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1771

SUMMONS.

Filed March 4, 1929.

The State of New Jersey to Max
Landesman:

(SEAL) YOU ARE SUMMONED to answer the
annexed complaint of George D.
Truitt, in an action at law in the 10
Essex County Circuit Court. AND TAKE NOTICE
that unless you file your answer to said complaint
with the Clerk of the Essex County Circuit Court
at Newark within twenty days after service upon
you of this writ and the annexed complaint, the
plaintiff may proceed in the suit and judgment
may be entered against you.

WITNESS, WILLIAM A. SMITH, Judge of the
Essex County Circuit Court, at Newark, this 4th
day of March, nineteen hundred and twenty-nine. 20

JOHN H. SCOTT,
Clerk.

MICHAEL G. ALENICK,
Attorney.

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COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	GEORGE D. TRUITT, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>On Recognizance.</i>
	MAX LANDESMAN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Complaint.</i>

The plaintiff, George D. Truitt, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. On December 28, 1928, he instituted a suit in the Essex County Circuit Court against Louis Landesman by a *capias ad respondendum* which issued that day under the hand of Milton M. Unger, Esquire, a Supreme Court Commissioner, and leave is hereby asked to refer to the proceedings in said suit as if they were recited herein at length.

2. By virtue of said *capias* and order to hold to bail, Louis Landesman, the defendant in the suit instituted by George D. Truitt as aforesaid was taken into custody on January 12, 1929, by the Sheriff of Essex County and held to bail in the sum of \$603.60.

3. Thereupon, on January 12, 1929, the defendant, Max Landesman, entered into a recognizance of bail with Louis Landesman in which they both severally acknowledged themselves to owe unto the plaintiff herein the sum of \$1,207.20 which they agreed to pay in the event of a breach of the condition of the bond which they

Complaint.

then and there gave. Annexed hereto and made part hereof is a true copy of the recognizance of bail into which the defendant Max Landesman and Louis Landesman entered.

4. The said bond provided that it was given upon condition that if Louis Landesman, the defendant in the aforementioned suit, should be condemned in the action at the suit of George D. Truitt that he, the said Louis Landesman, would pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of Essex County for the same, or if he failed to pay the same that the said Max Landesman would pay the same or render Louis Landesman into the custody of the Sheriff of Essex County.

5. The said Louis Landesman on February 8, 1929, was condemned in the action at the suit of George D. Truitt aforementioned and having failed to file any answer to said suit, judgment was entered against the said Louis Landesman in the sum of \$610.86, besides costs of \$84.38.

6. The said Louis Landesman having been thus condemned in the action aforementioned has failed and neglected to pay the costs and condemnation of the Court and he has failed to render himself into the custody of the Sheriff of Essex County for the same.

7. The defendant, Max Landesman, has failed to pay the costs and condemnation of the Court in the aforementioned suit against Louis Landesman and he has failed to render Louis Landesman into the custody of the Sheriff of Essex County.

Complaint.

8. On February 18, 1929, the plaintiff caused a *capias ad satisfaciendum* to issue which after the expiration of four days and more was returned by the Sheriff of Essex County unsatisfied and non est inventus.

10 9. By reason of the foregoing the defendant Max Landesman is indebted to the plaintiff herein in the sum of \$610.86 damages with interest thereon from February 8, 1929, besides costs of \$84.38 and the costs of this suit.

WHEREFORE, plaintiff demands judgment in the sum of twelve hundred and seven dollars and twenty cents (\$1,207.20).

MICHAEL G. ALENICK,
Attorney of Plaintiff.

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RECOGNIZANCE OF BAIL.

ESSEX COUNTY CIRCUIT COURT.

GEORGE D. TRUITT, <div style="text-align: center;"><i>vs.</i></div> LOUIS LANDESMAN, 	<i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Recognizance of Bail.</i>	10
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Be it remembered that on the twelfth day of January, 1929, Louis Landesman and Max Landesman of the County of Essex personally appeared before me, Milton M. Unger, one of the Supreme Court Commissioners of the State of New Jersey and severally acknowledged themselves to owe unto George D. Truitt the sum of \$1,207.20 each to be levied upon their several goods and lands, upon condition that if the defendant, Louis Landesman, shall be condemned in this action at the suit of George D. Truitt, he shall pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of said County for the same, or if he fails to do so that the said Max Landesman will pay the costs and condemnation for him or render him into the custody of the Sheriff of the said County.

LOUIS LANDESMAN (L. S.)

MAX LANDESMAN (L. S.)

Affidavit of Merits.

Taken and acknowledged the day and year above written before me, Milton M. Unger, a Supreme Court Commissioner.

Notice to the within-named defendant:

10 In case the within summons and complaint are served upon you personally, then TAKE NOTICE that if you intend to make a defense to this action, you must file an affidavit of merits within ten (10) days from the date of service hereof upon you, and must file your answer within twenty (20) days from the date of such service, and in default of filing of such affidavit and answer, judgment will be entered against you.

MICHAEL G. ALENICK,
Attorney of Plaintiff.

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AFFIDAVITS OF MERITS.

Filed March 14, 1929.

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

30 MAX LANDESMAN, being duly sworn according to law upon his oath, deposes and says:

That he is the defendant herein and that he has a legal and meritorious defense to the action brought herein.

MAX LANDESMAN,

Sworn and Subscribed to before
me this 14th day of March,
1929.

40 HERMAN SHAPIRO,
An Attorney at Law of New Jersey.

NOTICE.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY CIRCUIT.

GEORGE D. TRUITT,

*Plaintiff,**vs.*

LOUIS LANDESMAN,

*Defendant.**Notice.*

10

To Michael Alenick, Esq., 24 Branford Place,
Newark, New Jersey:

KINDLY TAKE NOTICE that the surety herein,
Max Landesman, will formally surrender before
the Chief Justice of the Supreme Court, or such
Justice as may hold court at the Hall of Records
building, Newark, New Jersey, on Saturday, the
23rd day of March, nineteen hundred and twenty-
nine, at ten o'clock in the forenoon, or as soon
thereafter as counsel may be heard, Louis
Landesman, the defendant herein.

20

Dated March 18, 1929.

FAST & FAST,
Attorneys for Defendant.

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ANSWER.

Filed March 28, 1929.

The defendant, of the City of Newark, County of Essex and State of New Jersey, answering the complaint herein, says:

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1. The defendant admits paragraph one.
2. The defendant admits paragraph two.
3. The defendant admits paragraph three.
4. The defendant admits paragraph four.
5. The defendant admits paragraph five.
6. The defendant denies paragraph six.
7. The defendant denies paragraph seven.

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8. The defendant has no knowledge upon which to base an answer to the eighth paragraph of the complaint and leaves the plaintiff to the proof of the statements therein contained.

9. The defendant denies paragraph nine.

30

By way of separate and independent defense, the defendant sets up that the condition of the bond has been fulfilled, inasfar as the defendant herein Max Landesman, is concerned, in that upon the failure by Louis Landesman to pay the judgment in the proceedings instituted against Louis Landesman by G. D. Tile Company, Inc., said Louis Landesman was rendered in the custody of the Sheriff of the County of Essex and that there is nothing due from the defendant herein to the plaintiff.

FAST & FAST,
Attorneys for Defendant.

40

NOTICE OF MOTION.

Filed May 8, 1929.

Messrs. Fast & Fast, attorneys of defendant,

SIRS:

PLEASE TAKE NOTICE that on Saturday, April 13, 1929, at the Hall of Records, Newark, New Jersey, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, I will move before William A. Smith, Esquire, Judge of the Essex County Circuit Court or such other Judge as shall be sitting to hear motions for an order to strike out the answer filed by the defendant Max Landesman and for the entry of summary judgment against the said defendant on the ground that said answer is frivolous, sham, sets forth no legal defense, is insufficient in law, and will use in connection therewith affidavits, a true copy of which is hereto annexed and hereby made part hereof.

Yours respectfully,

MICHAEL G. ALENICK,
Attorney of Plaintiff.10
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Affidavit of Michael G. Alenick.

AFFIDAVIT.

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

MICHAEL G. ALENICK, being duly sworn according to law, on his oath deposes and says:

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1. I am the attorney of the plaintiff in the above-entitled cause and am actively in charge thereof.

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2. On December 28, 1928, on behalf of George D. Truitt, the plaintiff in the above-entitled action, I instituted a suit in the Essex County Circuit Court against Louis Landesman by a *capias ad respondendum* which issued that day under the hand of Milton M. Unger, Esquire, a Supreme Court Commissioner. By virtue of said *capias* and an order to hold to bail, Louis Landesman as aforesaid was taken into custody on January 12, 1929, by the Sheriff of Essex County and held to bail in the sum of \$603.60.

30

3. Thereupon on January 12, 1929, the defendant Max Landesman entered into a recognizance of bail with Louis Landesman in which they both severally acknowledged themselves to owe unto the plaintiff herein the sum of \$1,207.20 which they agreed to pay in the event of a breach of the condition of the bond which they then and there gave.

4. Annexed to the complaint filed in this cause is a true copy of the recognizance of bail and is hereby referred to as if it were recited herein at length.

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5. The said bond provided that it was given upon condition that if Louis Landesman, the defendant in the aforementioned suit, should be condemned in the action at the suit of George

Affidavit of Michael G. Alenick.

D. Truitt that he, the said Louis Landesman, should pay the cost and condemnation of the Court or render himself into the custody of the Sheriff of Essex County for the same, or if he failed to pay the same that the said Max Landesman would pay the same or render Louis Landesman into the custody of the Sheriff of Essex County. 10

6. The said Louis Landesman on February 8, 1929, was condemned in the action at the suit of George D. Truitt aforementioned and having failed to file any answer to said suit, judgment was entered against the said Louis Landesman in the sum of \$610.86, besides costs of \$84.38.

7. The said Louis Landesman having been thus condemned in the action aforementioned has failed and neglected to pay the costs and condemnation of the Court and he has failed in that cause to render himself into the custody of the Sheriff of Essex County for the same. 20

8. The defendant Max Landesman has failed to pay the costs and condemnation of the Court in the aforementioned suit against Louis Landesman and he has not made a surrender in that cause of the body of Louis Landesman to the Sheriff of Essex County as is required by law to the best knowledge, information and belief of deponent. 30

9. On February 18, 1929, a *capias ad satisfaciendum* issued which after the expiration of four and more days was returned by the Sheriff of Essex County *non est inventus* and unsatisfied.

10. By reason of the foregoing the defendant Max Landesman, the surety named in the recognizance of bail, is indebted to the plaintiff herein 40

Affidavit of Michael G. Alenick.

in the sum of \$610.86 damages with interest thereon from February 8, 1929, besides costs of suit of \$84.48 and the costs of this action.

10 11. I have made an examination of the records in the office of the Clerk of the Essex County Court of Quarter Sessions and have noted that the defendant Louis Landesman was held in \$1,000.00 bail on indictment No. 722 and \$1,000.00 bail on indictment No. 723 and that on each of those indictments he was sentenced to two years in prison, the periods to run consecutively and on that day, March 18, 1929, Max Landesman, the defendant in this case surrendered Louis Landesman in discharge of the bail filed in those criminal cases.

20 12. I have examined the records in the office of the Clerk of Essex County and those records fail to disclose any surrender having been made in the form required by law of the defendant Louis Landesman in either of the cases of George D. Truitt *v.* Louis Landesman or George D. Truitt *v.* Max Landesman.

30 13. Inquiry by me at the Sheriff's office has failed to disclose that any surrender was made in either this case or in the previous suit of George D. Truitt *v.* Louis Landesman of the body of Louis Landesman to the Sheriff of Essex County after the furnishing of the recognizance of bail on January 12, 1929.

14. I verily believe that the defendant Max Landesman has no just and legal defense to this cause.

MICHAEL G. ALENICK.

Affidavit of George D. Truitt.

Sworn and subscribed to before
me this 12th day of April,
A. D. 1929.

SAMUEL I. BENDIT,
Notary Public of New Jersey.

10

AFFIDAVIT.

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

GEORGE D. TRUITT, being duly sworn according
to law, on his oath deposes and says:

1. I am the plaintiff in the above-entitled
cause.

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2. At no time since the institution of suit
by me against Louis Landesman or my suit
against Max Landesman has there been served
upon me any notice by either of the said de-
fendants Louis Landesman or Max Landesman
of any surrender to the Sheriff of Essex County
in either of the aforementioned suits.

3. The only notice I ever heard of was one
that was served upon my attorney Michael G.
Alenick sometime about March 18, 1929, but I
do not know that any surrender has been made
of Louis Landesman to the Sheriff of Essex
County in conformity with the statute governing
the rendering of a defendant in discharge of bail.

30

GEO. D. TRUITT.

40

Order.

Sworn and subscribed to before
me this 12th day of April,
1929.

THEODORE R. HARE,

An Attorney at Law of New Jersey.

10 Due, legal and timely service of the within
notice is hereby acknowledged this 12th day of
April, 1929.

FAST & FAST,
Attorneys of Defendant.

Filed May 8, 1929.

ORDER.

20 Filed May 17, 1929.

Application having been made by Fast & Fast,
attorneys for Max Landesman, surety on bond
filed herein for an extension of time to enable
them to produce the body of Louis Landesman
in open court that he may be surrendered for-
mally and after hearing attorney for the plaintiff
and good and sufficient reasons appearing for
the application, it is on this 14th day of May,
30 1929,

ORDERED that the time be extended until the
twenty-fourth day of May, 1929, within which
time the said Max Landesman may formally sur-
render Louis Landesman in court in discharge of
bail on file in these proceedings.

WILLIAM A. SMITH,
Judge.

PETITION.

NEW JERSEY SUPREME COURT.

 GEORGE D. TRUITT,

Plaintiff,
vs.

LOUIS LANDESMAN,

Defendant.

*Action
at Law.*

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Petition.

*To The Honorable William S. Gummere, Chief
Justice of the New Jersey Supreme Court.*

The petition of Max Landesman respectfully
shows that,

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1. He is the person mentioned in the recogni-
zance of the bill filed in the suit of George D.
Truitt *vs.* Louis Landesman in the Essex County
Circuit Court, and which bond required that if
the defendant Louis Landesman shall be con-
demned in this action at the suit of George D.
Truitt, he shall pay the costs and condemnation
of the court or surrender himself unto the cus-
tody of the Sheriff of Essex County for the
same, or if he fails to do so, the said Max Lan- 30
desman will pay the costs and condemnation for
him or render him unto the custody of the Sher-
iff of said county.

2. That the Honorable William A. Smith,
Judge of the Circuit Court in and for the County
of Essex has granted your petitioner until the
24th day of May, 1929 to surrender Louis Lan-
desman the defendant in the suit of George D.
Truitt *vs.* Louis Landesman.

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Petition of Max Landesman.

3. The said Louis Landesman is now confined in the State Prison at Trenton on sentence from the Essex County Quarter Sessions.

10 4. That the attorney for the plaintiff George D. Truitt, has waived the actual production of the body of Louis Landesman before Honorable William A. Smith, Judge of the Circuit Court for the County of Essex.

5. Your petitioner sets forth that he did on the fourteenth day of March, 1929 appear before the Sheriff of the County of Essex, and did then and there say to the said Sheriff that he was surrendering Louis Landesman to him in pursuance of a bond filed in the suit of George D. Truitt vs. Louis Landesman.

20 6. That on the said fourteenth day of March, 1929 Louis Landesman was then and there incarcerated in the Essex County Jail.

Your petitioner therefore prays that your Honor will grant to him the writ of Habeas Corpus according to the statutes in such case made and provided that he may be enabled to produce the body of said Louis Landesman before the Honorable William A. Smith, Judge of the Circuit Court for the County of Essex to render him in
30 discharge of bail in so far as your Petitioner is concerned.

And your Petitioner will ever pray, etc.

MAX LANDESMAN,
Petitioner.

Petition of Max Landesman.

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

MAX LANDESMAN, being duly sworn upon his oath according to law, deposes and says:

The petition by me signed is in all things true.

MAX LANDESMAN, 10

Sworn and subscribed to before me this 9th day of May, 1929.

HERMAN L. SHAPIRO,
An Attorney at Law of New Jersey.

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PETITION.

ESSEX COUNTY CIRCUIT COURT.

10	GEORGE D. TRUITT, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> LOUIS LANDESMAN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law. Petition.</i>
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To the Honorable William A. Smith, Judge of the
Essex County Circuit Court:

The petition of Louis Landesman, the defendant herein, respectfully shows unto your Honor:

- 20 1. That he is the defendant in these proceedings.
2. That he is now confined in the State Prison on sentence of the Essex County Quarter Sessions; that he is desirous of rendering himself in discharge of bail in these proceedings, that he may be surrendered thereon.
3. Your Honor has extended the time for rendering of the defendant herein in discharge
- 30 of bail until the 25th of January, 1930.

Your petitioner therefore prays that an order in the nature of a writ of habeas corpus be made by your Honor requiring the Head Keeper of the State Prison at Trenton to produce the body of your petitioner before your Honor on the 25th day of January, 1930, to render him in discharge of bail.

Petition of Louis Landesman.

Your petitioner will ever pray, etc.

LOUIS LANDESMAN,
Petitioner.

By FAST & FAST,
His Attorney.

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

LOUIS A. FAST, being duly sworn on his oath according to law, deposes and says:

That he is a member of the firm of Fast & Fast, attorneys for the petitioner herein; that the contents contained in the petition are true, except as to those matters based on hearsay and information, and as to those matters, he believes the same to be true to the best of his knowledge and belief.

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LOUIS A. FAST.

Sworn and subscribed to before
me this 17th day of January,
1930.

JEROME RICHEIMER,
Notary Public of New Jersey.

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WRIT OF HABEAS CORPUS.
ESSEX COUNTY CIRCUIT COURT.

10	GEORGE D. TRUITT, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; margin: 5px 0;"><i>vs.</i></div> LOUIS LANDESMAN, <div style="text-align: right; margin-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Writ of Habeas Corpus.</i>
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To the Keeper of the State Prison of Trenton,
New Jersey:

We command you have the body of Louis Landesman by you imprisoned and detained, it is said by whatsoever the said Louis Landesman shall be called or charged, before William A. Smith, Esquire, one of the Judges of the Circuit Court of Essex County, at the Hall of Records, in the City of Newark, on Saturday, January 25, 1930, at ten o'clock in the forenoon to do and receive what shall then and there be considered concerning the said Louis Landesman, in the matter pending in the Essex County Circuit Court, in which George D. Truitt, is the plaintiff, and Louis Landesman, defendant, and have you then and there this writ.

WITNESS, the Honorable William A. Smith, Judge of the Circuit Court in and for the County of Essex, this seventeenth day of January, nineteen hundred and thirty.

JOHN H. SCOTT,
Clerk.

FAST & FAST,
Attorneys.

Writ of Habeas Corpus.

Let this order be entered upon the minutes of this court. The attorney for the plaintiff consented in open court that the defendant Louis Landesman need not be actually produced in open court and waived the production of his body in open court, but excepts to the Court's right to grant a writ in this matter.

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WILLIAM A. SMITH,
Judge.

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CERTIFICATE OF CIRCUIT COURT JUDGE.

Filed February 27, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	GEORGE D. TRUITT, <div style="text-align: center;"><i>Plaintiff,</i></div> <i>vs.</i> MAX LANDESMAN, <div style="text-align: center;"><i>Defendant.</i></div>	} <i>Action at Law. On Recognizance. Certificate by Circuit Court Judge as to the Objections Made to the Granting of a Writ of Habeas Corpus.</i>
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30 Objection having been made by Michael G. Alenick, attorney of the plaintiff herein, to the granting of a writ of habeas corpus which was this 18th day of January, 1930, allowed to the defendant, Max Landesman, and to which an exception was duly taken and granted, and the attorney for the plaintiff having requested that his objections be noted, it is hereby certified that objection was made by the attorney of the plaintiff, to the granting of a writ of habeas corpus and the following reasons were advanced:

1. The defendant, Louis Landesman, was not unlawfully detained but was convicted by a court of competent jurisdiction.

(a) The Habeas Corpus Act only provides for the issuance of such a writ where a person

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Certificate of Circuit Court Judge.

is unlawfully restrained of his liberty. 2 C. S. 2639 and 2640 Section I.

2. The Circuit Court did not have the authority to issue such a writ.

(a) The act provides for the issuance of such writs and specifically provides who may grant a writ. 2 C. S. 2640 Section II. 10

(b) At common law the only persons who had authority to issue said writs were the Chancellor, Supreme Court and Justice of the Supreme Court. In re Thompson, 85 Eq.

(c) The application for the writ was not timely made.

3. The proper procedure was not followed in that (1) the application was made to the Circuit Court instead of the Supreme Court, (2) the petition was insufficient and did not set forth enough facts to warrant the issuance of said writ, (3) the writ was not issued under the seal of the Supreme Court, 2 C. S. 2641-2642; (4) the application was made not in the case before the Court but in another case in which judgment had already been entered. 20

4. The application having been made to the Chief Justice prior to this application and involving the identical parties and subject matter and the Chief Justice having denied said application, the matter was res adjudicata and the defendant if dissatisfied should have appealed from said ruling. 2 C. S. 2651. 30

WILLIAM A. SMITH,
Circuit Court Judge.

Filed February 27, 1930.

Reply.

ORDER.

Filed June 3, 1930.

10 This matter coming on to be heard in the presence of Michael G. Alenick, attorney of plaintiff, and Louis A. Fast, for Fast & Fast, attorneys of defendant, on motion by the plaintiff to strike out the answer by the defendant herein, and the Court having heard the arguments of counsel and having considered the same and being of the opinion that the answer filed by the defendant should not be stricken out,

20 It is on this 2nd day of June, 1930, ORDERED that the motion to strike out the answer of the defendant, Max Landesman, be and the same is hereby denied; and the exception taken by the plaintiff to the Court's ruling is hereby noted.

WILLIAM A. SMITH,
Judge.

REPLY.

Filed May 22, 1930.

30 Plaintiff replying to the answer filed by the defendant says that:

1. He joins issue with said answer.
2. He denies the allegations contained in the separate and independent defenses.

MICHAEL G. ALENICK,
Attorney of Plaintiff.

ORDER.

Filed June 4, 1930.

A writ of habeas corpus having been issued by the above Court in the above-entitled cause on January 18, 1930, addressed to the Keeper of the State Prison of Trenton, New Jersey, commanding him to have the body of Louis Landesman before Honorable William A. Smith, one of the Judges of the Essex County Circuit Court at the Hall of Records in the City of Newark on January 25, 1930, and Michael G. Alenick, attorney for the plaintiff, who contested the Court's jurisdiction to issue the writ of habeas corpus and took exception to the Court's action in issuing the same, having consented in open court that if the writ of habeas corpus were allowed, he would waive the actual, physical production of Louis Landesman, and said physical production of Louis Landesman being thus waived and,

It further appearing that an order was made on May 21, 1929, and other orders were entered afterwards over the objections and exceptions taken by the attorney for the plaintiff, extending the time until January 25, 1930, within which the defendant, Max Landesman, might produce the body of Louis Landesman in discharge of the bail which was furnished by Max Landesman, and a hearing having been had before the Court on January 18, 1930, at which hearing the Court announced that it would grant an order discharging said bail and said order not having been actually entered,

It is, on this 2nd day of June, 1930, on motion of Fast & Fast, attorneys of defendant, ORDERED that the recognizance of bail furnished by Max Landesman in the suit wherein George D. Truitt

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Order.

was plaintiff and Louis Landesman was defendant and in which judgment was entered against Louis Landesman in the Essex County Circuit Court, be and the same is hereby discharged, and it is further

10 ORDERED, that this order take effect nunc pro tunc as of January 25, 1930.

WILLIAM A. SMITH,
Circuit Court Judge.

Filed June 4, 1930.

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VERDICT.

#49214

ESSEX COUNTY CIRCUIT COURT.

#7347	}	<i>Action</i>	10
GEORGE D. TRUITT,		<i>at Law.</i>	
<i>vs.</i>		<i>On</i>	
MAX LANDESMAN,		<i>Recognizance.</i>	
		<i>Verdict.</i>	
			20

This action was tried before Judge William A. Smith, without a jury, at the Essex County Circuit Court on June 2, 1930, upon a stipulation of facts and the pleadings that were filed in the cause, and the Court having considered the stipulation and the pleadings and papers filed in the cause entered a verdict in favor of the defendant Max Landesman and against the plaintiff George D. Truitt.

On motion of FAST & FAST,
Attorneys of Defendant.

Judgment entered October 6, 1930, as of June 2, 1930. 30

Proceedings of June 12, 1930.

TESTIMONY.

ESSEX CIRCUIT COURT.

Monday, June 12, 1930.

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GEORGE D. TRUITT,

vs.

MAX LANDESMAN.

*Action
at Law.*

Before Hon. William A. Smith, *J.*, without a jury.

For plaintiff appears Michael G. Alenick.

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For defendant appear Fast & Fast (by Louis A. Fast).

Mr. Fast: Exception was taken to your Honor's signing an order in habeas corpus. I think there ought to be an order formally surrendering and discharging the bail. The facts in the order are in the stipulation.

The Court: I did not sign the order because I wanted Mr. Alenick to be heard on it.

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Mr. Alenick: That's right. I object to the entry of this order on the ground that your Honor has not the jurisdiction to make an order of this kind at this time.

Mr. Fast: It would have to be *nunc pro tunc*.

The Court: Didn't I hold in open court that I would discharge the bail?

Mr. Alenick: It was tantamount to making such an order.

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The Court: And I decided that I would discharge bail, but no order was entered on it.

Proceedings of June 12, 1930.

However, it was within the time that I extended.

Mr. Alenick: I ask that my exception be noted if your Honor is disposed to sign such an order. I might say—

The Court: What was the date you last appeared? 10

Mr. Alenick: January 18, 1930. From a casual inspection of the form of order that has just been presented to me by Mr. Fast, it would appear that the order is lacking in a number of important recitals. I haven't had time to really study it.

The Court: I think you had better recite what took place and that on said day I announced that I would discharge the bail, and no order having been entered on that determination, this order should be entered as of that date. 20

Mr. Alenick: Now, if your Honor please, in order that the record of this case may be clear, may I say this about it: The suit of George D. Truitt, plaintiff, *v.* Max Landesman, is based on a recognizance of bail furnished by Max Landesman, wherein George D. Truitt was plaintiff and Louis Landesman, the son of the present defendant, was the defendant. In the first suit against Louis Landesman, which was instituted by the plaintiff on a *capias ad respondendum*, no answer was filed and judgment went against him; after the time provided by the statute had expired, after the issuance of a *capias ad satisfaciendum*, this suit was instituted on the recognizance of bail. An answer was filed by this defendant in which he set forth that he had complied with the condition of the bond, and to that answer a motion was addressed by the 30
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Proceedings of June 12, 1930.

plaintiff and it was moved that the answer be stricken out and that summary judgment be entered upon the grounds that are set forth in the notice of motion. On the return day of the motion to strike out the answer of the defendant Max Landesman your Honor reserved decision on that motion and at the same time an application was made by the attorneys for the defendant for a writ of habeas corpus and for an extension of time within which Max Landesman, the surety, could surrender Louis Landesman in order to recover a discharge of the bond that was furnished by Max Landesman. To that ruling of the Court an exception was duly taken. Your Honor, after extending the time over objection of the attorney of the plaintiff, issued a writ of habeas corpus, and at the time that your Honor issued the writ the application for the writ and its actual issuance was resisted on the ground that the Court had no jurisdiction to grant the writ, and citations were called to your Honor's attention at the time, of the Habeas Corpus Act. Furthermore, it was called to your Honor's attention that the matter was already res judicata in that application had been made to the Chief Justice for a writ of habeas corpus and that the Chief Justice had denied the application. Furthermore, the point was made that even if your Honor had the jurisdiction to grant the writ of habeas corpus, nevertheless, the time for its allowance having expired, the rights of the plaintiff in this case would be prejudiced by an extension of time when there was no special legal reason advanced for such action; and there were other points made at the time and your Honor was presented afterward with a form of certificate in which these various objections were

Proceedings of June 12, 1930.

set forth and constitute part of the record in this case. However, what stands out at this time is this: that a motion has been made to strike out the answer filed by the defendant Max Landesman and there is nothing on record up to this time to indicate what your Honor's ruling on that motion was, and I think that before I go on, to have the record clear, your Honor should state in view of the motion as it was made and in the face of the affidavits which were annexed to the notice of motion, whether that motion should not at this time, nunc pro tunc of the time it was made, prevail. 10

The Court: I thought I concluded on that motion that they were entitled to have an extension of time, and if they did have an extension of time and surrender him, they would have a good defense against the bail. 20

Mr. Alenick: Then am I to assume that your Honor denied the motion to strike out the answer?

The Court: I would have to give them an extension of time and give them an opportunity to surrender him. I suppose that put off the motion at that time. I suppose it is a motion that can be brought up again. The case is now down for trial? 30

Mr. Alenick: Yes, sir; we are disposing of it in this peremptory fashion for the reason that we have already stipulated the facts in the case and directly after your Honor's ruling on this motion to strike out the answer I was to offer as part of the record in the case and have marked as an exhibit in it this stipulation of facts.

(The same is received in evidence and marked Exhibit P. 1.) 40

Proceedings of June 12, 1930.

The Court: I don't think there is any necessity of passing on the motion to strike out now if you are down for trial because you are in a better position to have it disposed of at a trial than as a motion.

10 Mr. Fast: I think the facts are not disputed. In other words, we thought we would save a lot of time by giving your Honor the stipulation.

The Court: What is the fact at issue?

Mr. Fast: We will have to add the change in the order.

The Court: What is the proposition involved?

20 Mr. Alenick: Has your Honor the right or had your Honor the right to make an order extending the time within which Louis Landesman could be surrendered in charge of bail furnished by his father, Max Landesman.

The Court: I have already decided that. In other words, you are asking me now to say that I should not have done that.

Mr. Alenick: That is precisely it.

The Court: Why do that? Make your record and get someone else to do that because I will not take back the order that I made.

30 Mr. Alenick: The other legal questions that are raised by the stipulation of facts are those which your Honor has already passed upon in the previous proceedings and what I wanted to do was to get the record in such shape as to have the upper Court understand.

The Court: You have it. The case was called for trial and you have waived the jury. I don't think it is even necessary for me to write a memorandum.

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Proceedings of June 12, 1930.

Mr. Fast: The only thing I want to add to this stipulation is the fact that the time within which to produce Louis Landesman was extended by the Court until the 18th of January, 1930, and that date was also the return date of a writ of habeas corpus signed by Judge Smith that Louis Landesman be produced in court so that he may be rendered discharged of bail. 10

The Court: And that the Court in open court granted the motion.

Mr. Fast: Yes, and also that Mr. Alenick, as attorney for the plaintiff, George D. Truitt, waived the physical production of the body of Louis Landesman and stipulated that the same effect be given to that waiver as if Louis Landesman had actually been produced in open court.

Mr. Alenick: All over my objection. 20

Mr. Fast: Yes. And further that an order to discharge the bail and reciting the surrender on the 18th of January is to be signed nunc pro tunc.

Mr. Alenick: Is it necessary at this time to make a motion for a direction of a verdict?

The Court: On the stipulation of fact each side moves for a direction of a verdict and the Court grants the defendant's motion. 30

Mr. Alenick: To which an exception is taken by the attorney for the plaintiff.

Exception noted as ground of appeal.

*Exhibit P. 1.***EXHIBIT P. .1.****ESSEX COUNTY CIRCUIT COURT.**

10	GEORGE D. TRUITT, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> MAX LANDESMAN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law. On Recognizance. Stipulation.</i>
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It is hereby stipulated and agreed by and between Michael G. Alenick, attorney of the plaintiff, and Fast & Fast, attorneys of the defendant, as follows:

20 I. The above entitled case shall be tried before his Honor, William A. Smith, Judge of the Essex County Circuit County Circuit Court, without a jury.

II. The following facts are admitted as correct:

30 1. A suit based on fraud committed by Louis Landesman was instituted in this Court by a *capias ad respondendum* by George D. Truitt, plaintiff, against Louis Landesman, who is the son of Max Landesman, the above-named defendant, and no answer having been filed in said suit, such proceedings were had therein that a judgment was entered on February 8, 1929, in favor of the plaintiff, George D. Truitt and against the defendant in that suit, Louis Landesman, in the sum of \$610.86, besides costs of \$84.38.

40 2. At the time that Louis Landesman was arrested by the Sheriff of Essex County by

Exhibit P. 1.

virtue of said *capias ad respondendum*, the above-named defendant, Max Landesman, entered into a recognizance of bail, a true copy of which is hereto annexed and hereby made part hereof.

3. After the entry of the judgment against Louis Landesman, as aforementioned, a *capias ad satisfaciendum* was issued and after having been held by the Sheriff of Essex County for more than four days, was returned *non est inventus*. 10

4. Thereafter, on or about March 4th, 1929, the present suit was instituted on the recognizance so furnished by the above named defendant, Max Landesman.

5. On March 18th, 1929, the attorneys of Louis Landesman served upon the attorney of the plaintiff a notice which was entitled and read as follows: 20

NEW JERSEY SUPREME COURT.

ESSEX COUNTY CIRCUIT.

GEORGE D. TRUITT,

Plaintiff,

vs.

LOUIS LANDESMAN,

Defendant.

} *Notice.*

30

TO MICHAEL G. ALENICK, ESQ.,
24 Branford Place,
Newark, New Jersey.

KINDLY TAKE NOTICE that the surety herein, Max Landesman, will formally surrender 40

Exhibit P. 1.

before the Chief Justice of the Supreme Court, or such Justice as may hold Court at the Hall of Records Building, Newark, New Jersey, on Saturday, the 23rd day of March, Nineteen Hundred and Twenty-nine, at ten o'clock in the forenoon, or as soon thereafter as counsel may be
 10 heard, Louis Landesman, the defendant herein.

FAST & FAST
 Attorneys for Defendant

Dated: March 18th, 1929

6. The attorneys of both plaintiff and of Louis Landesman appeared at the time and place designated in the foregoing notice but no formal surrender was made by the surety Max Landesman of the principal Louis Landesman.
 20

7. The said defendant Max Landesman was served with the summons and complaint in this suit on March 5th, 1929 by the Sheriff of Essex County, but failed to file any answer or surrender Louis Landesman in accordance with the terms of the recognizance until some time after March 26th, 1929, when a rule was entered for judgment by the plaintiff, George D. Truitt, against Max Landesman for \$700.80 besides costs.

8. On March 27th, 1929, an answer was filed
 30 by the defendant Max Landesman and since judgment had already been entered against him, it was stipulated on April 10, 1929 between the attorneys for the respective parties hereto, as follows:

(a) That the answer submitted by the defendant with the correction that instead of the name G. D. Tile Company, Inc., the name George D. Truitt be substituted therefor, be filed as within time.
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Exhibit P. 1.

(b) That the judgment entered in this cause should not be disturbed until determination of the legal propriety of the answer and by a trial thereunder, if it should be decided that the answer is good in law.

(c) That the defendant waived all notices to which he might be entitled for the purpose of striking out the answer, and that the 13th day of April, 1929, at ten o'clock in the forenoon or as soon thereafter as counsel might be heard, was thereby fixed as the time for the argument on said motion, and that the motion be argued before Judge Mountain or such other Judge as might be sitting in the Circuit Court at Newark on said date.

9. A motion was made to strike out the answer which was filed by the defendant Max Landesman and it was argued before His Honor William A. Smith on April 20, 1929, The Court reserved decision on said motion, and in the meantime granted leave to the attorneys of the defendant to make application for a writ of habeas corpus for the surrender of Louis Landesman. To this ruling of the Court the attorney of the plaintiff entered an exception.

10. Application was made by the attorneys of the defendant on May 10th, 1929 to His Honor William S. Gummere, Chief Justice of the Supreme Court, for a writ of habeas corpus which application, however, was denied.

11. Louis Landesman, the defendant named in the first suit, on March 18th, 1929, was sentenced to State Prison to serve two consecutive terms of two years each on each of two criminal convictions.

Exhibit P. 1.

12. In these criminal cases of Louis Landesman to which the plaintiff was no party, the defendant here, Max Landesman, had furnished bail and on March 13th, 1929, he surrendered Louis Landesman to the Sheriff of Essex County to discharge the bail in the criminal cases.

10 13. On the 14th day of March, 1929, Max Landesman the defendant in these proceedings, attended at the office of the Sheriff of the County of Essex, with Louis A. Fast, one of his attorneys, and told Under-Sheriff Alfred C. Walker, who was in charge of the Sheriff's office at that time, that he desired to surrender Louis Landesman, in the suit of George D. Truitt vs. Louis Landesman, in which proceedings, he, the said Max Landesman, was the surety on the recognizance filed by Louis Landesman, as principal and 20 Max Landesman as surety. The said Under-Sheriff then stated that he required a court order for such surrender. No Court order was presented.

MICHAEL G. ALENICK
Attorney of Plaintiff

FAST & FAST
Attorneys of Defendant

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Exhibit P. 1.

ESSEX COUNTY CIRCUIT COURT.

GEORGE D. TRUITT, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> LOUIS LANDESMAN, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Recognizance of Bail.</i>	 10
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Be it remembered that on the 12th day of January, 1929, Louis Landesman and Max Landesman of the County of Essex personally appeared before me, Milton M. Unger, one of the Supreme Court Commissioners of the State of New Jersey and severally acknowledged themselves to owe unto George D. Truitt the sum of \$1207.20 each to be levied upon their several goods and lands, upon condition that if the defendant, Louis Landesman, shall be condemned in this action at the suit of George D. Truitt, he shall pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of said County for the same, or if he fails to do so that the said Max Landesman will pay the costs and condemnation for him or render him into the custody of the Sheriff of the said County.

Louis Landesman (L. S.)
Max Landesman (L. S.)

Taken and acknowledged the day
and year above written before
me

MILTON M. UNGER
A Supreme Court Commissioner

NOTICE OF APPEAL.

Filed September 4, 1930.

ESSEX COUNTY CIRCUIT COURT.

10	#7347 GEORGE D. TRUITT, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> MAX LANDESMAN, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law. Notice of Appeal.</i>
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To Fast & Fast, attorneys of defendant,

SIRS:

20 PLEASE TAKE NOTICE that George D. Truitt, the plaintiff in the above-entitled cause, appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

Respectfully yours,

MICHAEL G. ALENICK,
Attorney for and of Counsel with
Plaintiff, George D. Truitt.

30

Service of a copy of the within notice of appeal is hereby acknowledged this 3rd day of September, 1930.

FAST & FAST,
Attorneys for Defendant.

Filed September 4, 1930.

40

GROUNDS OF APPEAL.

Filed September 5, 1930.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

#7347 GEORGE D. TRUITT, <i>Plaintiff-Appellant,</i> <i>vs.</i> MAX LANDESMAN, <i>Defendant-Respondent.</i>	}	<i>Appeal from</i> 10 <i>Essex County</i> <i>Circuit Court.</i> <i>Sat Below:</i> <i>Judge</i> <i>William</i> <i>A. Smith.</i> <i>Grounds</i> <i>of Appeal.</i>
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Appellant, George D. Truitt, specifies the following grounds why the judgment rendered in the above-entitled cause should be reversed:

1. Because the learned trial Judge denied the motion of the plaintiff to strike out the answer filed by the defendant.

2. Because the learned trial Judge granted to the defendant an extension of time within which to surrender the body of Louis Landesman.

3. Because the learned trial Judge granted the application of the defendant for a writ of habeas corpus.

4. Because the learned trial Judge made an order discharging and releasing the bail.

5. Because the learned trial Judge granted the motion of the defendant for a direction of a verdict.

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Grounds of Appeal.

6. Because the verdict was contrary to law.

MICHAEL G. ALENICK,
Attorney for and of Counsel
with Plaintiff-Appellant.

10 Service of a copy of the within grounds of
appeal is hereby acknowledged this 3rd day of
September, 1930.

FAST & FAST,
Attorneys for Defendant-Respondent,
Max Landesman.

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New Jersey Court of Errors and Appeals

GEORGE D. TRUITT, <i>Plaintiff-Appellant,</i> <i>vs.</i> MAX LANDESMAN, <i>Defendant-Respondent.</i>	}	<i>Action at Law. On Appeal from Essex County Circuit Court.</i>
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Sat Below: Hon. William A. Smith.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

By this appeal, plaintiff-appellant seeks to reverse a judgment rendered in favor of the defendant-respondent.

The facts in this case have been stipulated (See Exhibit P. 1; Case 34). However, for the sake of clarity a brief resume may be helpful.

This suit is based upon a recognizance of bail which was furnished by the present defendant for his son, Louis Landesman, who had been apprehended by the Sheriff of Essex County on a *capias* in a suit wherein George D. Truitt was plaintiff and Louis Landesman was defendant. In the latter action, judgment went against Louis Landesman. A *capias ad satisfaciendum* issued and after the expiration of four and more days it was returned by the Sheriff of Essex County *non est inventus*. Thereafter this suit was commenced against Max Landesman on his recognizance of bail.

On March 18, 1929, defendant's attorneys served the attorney of the plaintiff with notice that on March 23, 1929 they would surrender

Louis Landesman formally before the Chief Justice. Although the attorneys for both parties appeared at the time and place designated in the notice, no surrender was made (Case 36, ll. 15-20). A surrender had been attempted to be made on March 14, 1929 to Under-Sheriff Walker, but this proved abortive because the sheriff required a court order and none was presented by the defendant (Case 38, ll. 22-25).

Then an answer was filed by this defendant in which he set forth that he had complied with the condition of the bond and to that answer a motion was made to strike it out and to have summary judgment entered. After argument thereon, decision on this motion was reserved by the learned trial judge and at the same time the attorneys for the defendant applied for an extension of time within which to surrender Louis Landesman in discharge of the bail furnished by his father, Max Landesman, the present defendant. The Court over objection made and exception taken by the plaintiff granted the defendant the extension of time requested and gave leave to his attorneys to apply for a writ of habeas corpus. Accordingly on May 10, 1929, application was made by the attorneys of the defendant to Chief Justice Gummere for a writ of habeas corpus. This application, however, was denied (Case 37, ll. 21-35).

Thereafter an application was made to Judge Smith of the Essex County Circuit Court for a writ of habeas corpus and over objection made by plaintiff, Judge Smith issued the writ and the objections made by the plaintiff were certified to by the trial court (Case 22 and 23).

Subsequently, the Court denied the application to strike out the answer (Case 24, ll. 1-20) and

rendered judgment in favor of the defendant and discharged the bail. In so doing, error was committed.

POINT I.

The lower Court discharged the bail and in doing so committed error because the defendant did not follow the procedure outlined by the statute for the discharge of a surety on a recognizance of bail.

Where a statute prescribes the manner in which a surrender, by bail, of their principal shall be made, the statutory procedure must be followed in order to exonerate the bail. This view of the law is borne out by the following authorities:

- 6 *Corpus Juris* 1042;
- State v. Casey*, 183 N. W. 971;
- Commonwealth v. Allen*, 162 S. W. 116;
- Cameron v. Burger*, 120 Pac. 10;
- United States v. Stevins*, 16 Fed. 101;
- Jupin v. Jupin*, 3 N. J. Misc. Rep. 163; 127 A. 588.

In the case of *Cameron v. Burger*, *supra*, the Court said:

“The statute itself provides the manner in which a defendant may be surrendered and bail exonerated, and that is the rule to be observed. It excludes all other methods reaching that result.”

In the case of *United States v. Stevens*, *supra*, it was held that where the statute required an indorsement of exoneration of bail to be made by certain officers, the sureties were charged with the duty of seeing that such indorsement was made, and that such indorsement was the essential and exclusive evidence of a valid discharge.

Section 77 of the Practice Act of 1903 provides:

“Subsequent to the return of the *capias ad respondendum* the defendant may on notice to the plaintiff render himself or be rendered in discharge of his bail either before or after judgment, to the court in which the action was brought or to a judge; provided such render be made within twenty days after the return day of the *scire facias* against the bail or of the process in an action on the recognizance of bail and not after, unless for good cause further time be granted by the court or a judge; * * *.”

Section 78 of the Practice Act of 1903 provides:

“The court or a judge before whom the render is made shall make an entry or minute of such render and commitment; and thereupon the defendant shall be committed to the custody of the sheriff or jailer of the county in which the *capias* was served; and on such render and commitment if done in open court, or on the same being certified to the clerk by the judge if not done in open court, the clerk shall enter an *exoneretur* on the recognizance of bail and thereupon the bail shall be discharged. At any time before judgment in the action, a defendant who has been rendered in discharge of bail or arrested on a warrant as aforesaid may be released on giving bail duly approved on notice to the plaintiff in the manner above described.”

The procedure thus outlined by the statute was not followed in the instant case in that (1) the surrender was made to the sheriff and not to the Court in which the action was brought or to a judge, (2) there was no notice given to the plaintiff of said surrender, (3) there was no minute made of the said surrender and (4) there was no *exoneretur* entered by the clerk (Exhibit P. 1, Case 38, ll. 10-24).

The policy of our State in this class of cases is set forth in the case of *Jupin v. Jupin, supra*, 3 N. J. Misc. Rep. 163. In that case the sureties surrendered the principal to the sheriff but did not give notice to the plaintiff, and in a suit on the recognizance judgment was rendered in favor of the plaintiff. On appeal, the Supreme Court affirmed the lower Court, saying:

“This was not in compliance with the statute in any respect. It was a surrender or render to the sheriff and not to the Court, it was done without notice to the plaintiff, no minute was made in the Court by the court, nor was there any commitment of the defendant to the custody of the sheriff as required by the statute. The act clearly implies that before a surrender shall be effective notice must be given of an intention to surrender to the plaintiff in the action, and that it must be made to the court itself and not to any other officer, certainly not to the sheriff of the county who has nothing to do with the case until the commitment is made to him by the court or a judge.”

The above-cited case presents exactly the same situation as the case now before the Court in that the surrender in the instant case was made to the sheriff and no notice was given to the plaintiff (Exhibit P. 1, Case 38, l. 10).

For this reason alone, the judgment should be reversed.

POINT II.

The lower Court erred in denying the motion of the plaintiff to strike out the answer filed by the defendant and for the entry of summary judgment.

The answer filed by the defendant set forth that the condition of the bond was fulfilled in

that the surety surrendered the principal in the custody of the Sheriff of Essex County (Case 8, l. 34). A motion was made to strike out the said answer on the ground that the same was frivolous, sham, set forth no legal defense and was insufficient in law, and the plaintiff annexed affidavits to this notice of motion (Case 9-13).

The only papers before the Court at the hearing of this motion were the summons and complaint, the answer of the defendant and the notice of motion with the affidavits of the plaintiff, annexed, which showed conclusively that no proper surrender had been made nor notice thereof given. There were no answering affidavits. On the papers before it, the Court, therefore, should have stricken out the defendant's answer and rendered summary judgment in favor of the plaintiff.

The statute requires that a surrender be made to the court in which suit is brought or to a judge. Section 77 of the Practice Act of 1903. The answer filed alleged that a surrender was made to the sheriff. This was held to be an improper surrender and one not in compliance with the statute. *Jupin v. Jupin*, 3 N. J. Misc. Rep. 163; 127 A. 588.

Manifestly, in declining to strike out the defendant's answer and entering judgment for the plaintiff, the learned trial court committed error.

POINT III.

The lower Court erred in granting the defendant an extension of time within which to surrender the body of the principal, Louis Landesman.

At the time that the lower court granted the defendant an extension of time within which to surrender the body of Louis Landesman, the defendant had already filed an answer setting forth that the condition of the bond had been fulfilled in that Louis Landesman had been surrendered to the sheriff (Case 8).

Under section 77 of the Practice Act of 1903, the judge is given the power, upon good cause shown, to grant an extension of time within which the surety may surrender the principal. This, of course, assumes that no previous surrender had been made. However, in the instant case, the defendant having alleged that a surrender had already been made, the Court exceeded its power in granting an extension. The judge is not given the right, under the statute, after an alleged surrender has been made, to inquire into the legality of said surrender and if he believes the same to be improper, to grant the defendant an extension of time within which to make a proper surrender.

What was done in the instant case was that a purported surrender was made to the sheriff. At the hearing of the motion to strike out the answer of the defendant which set up such surrender, the lower court reserved decision on said motion and granted the defendant an extension of time within which to surrender the principal, when in fact the answer of the defendant before the Court at that time, set up that a surrender had been made.

The Court by such action in effect determined that the surrender set forth in defendant's answer was improper and therefore the said Court should have stricken out the answer of the defendant and entered judgment in favor of the plaintiff.

POINT IV.

The lower Court committed error in granting the writ of habeas corpus.

This will be shown under the following headings:

1. The petitioner, Louis Landesman, was not unlawfully detained.

2. The Circuit Court had no jurisdiction to issue the writ.

3. The matter was *res adjudicata*.

The writ of habeas corpus will only issue where the petitioner is unlawfully detained of his liberty.

“Whenever a party is restrained of his liberty or is unlawfully detained or confined, he may make application for a writ of habeas corpus before the proper court or judge.”
Church on Habeas Corpus, 141.

Where a person is committed or detained by virtue of a final judgment of a court of competent jurisdiction, he is not entitled to a writ.

2 C. S. 2639 and 2640, Section 1, par. 2.

“That the following persons shall not be entitled to prosecute such writ: Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, unless such judgment or decree be founded upon contract; but no

order of commitment for any alleged contempt, or upon proceedings as for contempt, to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section; nor shall any attachment or other process issued upon any such order, be deemed an execution within the meaning of this section."

In re Barone, 97 N. J. L. 249;

Ex parte Markus, 7 Ad. Rep. 806;

Peltier v. Washington, 14 N. J. L. 312.

In the instant case Louis Landesman was convicted by a court of competent jurisdiction (Case 37, ll. 36-40). He was not unlawfully detained and therefore was not entitled to a writ of habeas corpus.

The Circuit Court has no jurisdiction to issue a writ. The Habeas Corpus Act specifically provides who may grant the said writ and does not give the Circuit Court such authority.

(2 C. S. 2640, Sec. II.

3. "Application for writ: That application for such writ shall be made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, as follows:

I. To the Supreme Court during its sitting; or,

II. During any term or vacation of the Supreme Court, to the chief justice, or to any one of the associate justices thereof, at chambers (Rev. 1877, p. 468).

3a. Chancellor declared to have and to have had power to issue writs of habeas corpus: Sec. 1. That the Chancellor of this state is hereby declared to have had the power to issue writs of habeas corpus under the seal of the Court of Chancery and to hear and determine the same, notwithstanding the provisions or any of them, of the act entitled 'An Act for Preventing the in-

jury of illegal confinement and better securing the liberty of the people' (Revision), approved March 27, 1874 and in the same manner as if the said act had never been passed and the act entitled 'An act for preventing the injury of illegal confinement and better securing the liberty of the people,' passed March 11, 1795 had never been repealed. (P. L. 1878, p. 350).

3b. Law judges of common pleas may grant writs of habeas corpus: Sec. 1. That the law or president judge of any court of common pleas in any county in this state shall have concurrent jurisdiction in his county with the justices of the Supreme Court to grant a writ of habeas corpus in all criminal cases where any person may be confined in prison or detained in custody, and to hear and determine the same in the same manner as though the application had been made before a justice of the Supreme Court (P. L. 1885, p. 286).

3c. Vice Chancellors may grant writs of habeas corpus.—Sec. 1. That the vice chancellors, or either of them, shall have the same jurisdiction, power and authority to grant all writs of habeas corpus, and to hear and determine the same, that the Chancellor of this state now has, and he or they shall proceed in the same manner." (P. L. 1889, p. 426.)

It is admitted that the application for the writ was first made to the Chief Justice and was denied. This made the matter *res adjudicata*. The defendant, if he felt aggrieved, should have appealed and not made another application to the Circuit Court. The Habeas Corpus Act specifically provides for an appeal where the application has been denied.

(2 C. S. 2651, Sec. 53) "In criminal cases, prisoner may appeal; in civil cases, either party.—That all proceedings commenced under this act before a justice of the su-

preme court may be removed, after final decision by such justice, by certiorari into the supreme court, that is to say, if the imprisonment is for an alleged crime, and the decision is against the right of the prisoner to a discharge, the prisoner may remove such proceeding; if on civil process either party may do so; in like manner the final decision of the supreme court thereon may be removed, by writ of error, into the court of errors and appeals; provided, however, that if a discharge has been awarded, such appeal shall not stay such discharge. (Rev. 1877, p. 475.)”

In granting the writ of habeas corpus, the trial court erred.

CONCLUSION.

Having shown that the case at bar falls squarely within the determination of the Supreme Court in the case of *Jupin v. Jupin, supra*, and having demonstrated that the defendant did not follow the procedure prescribed by the statute in endeavoring to exonerate himself from the bail which he furnished for his son, and that the trial court in denying the motion of the plaintiff to strike out the defendant's answer and for the entry of summary judgment against him, and in granting the defendant an extension of time within which to surrender the body of the principal, and in allowing the writ of habeas corpus committed manifest error, it is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

MICHAEL G. ALENICK,
Solicitor for and of Counsel
with Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

GEORGE D. TRUITT,
Plaintiff-Appellant,

vs.

MAX LANDESMAN,
Defendant-Respondent.

Action at Law.

BRIEF OF DEFENDANT-RESPONDENT.

Facts.

The facts are sufficiently set up in the stipulation as appears on page 34 of the State of Case. The defendant in this case furnished bail for his son, Louis Landesman, who had been apprehended on a suit instituted by a *capias*. Judgment was rendered in favor of the plaintiff in a suit in which the bail was furnished, and suit thereafter was instituted on the bail. As soon as the defendant was served with the summons in the said suit, he immediately offered to surrender his son in discharge of the bail. More than 20 days having elapsed since the entry of the judgment in the first suit instituted on the *capias*, the defendant sought and obtained an extension of time within which to produce his son. At the time he was sought to be produced, his son was in State Prison because of a criminal offense. The learned judge of the Circuit Court thereupon allowed a writ of habeas corpus requiring the son to be produced. Physical production of the

son was waived by the plaintiff. Judgment was entered at the trial in favor of the defendant and the bail discharged.

In setting out the law, we shall follow as much as is practical the points as set forth by the plaintiff-appellant.

POINT ' 1

No error was committed by the Court in discharging the bail. The Court had the right and power to extend the time within which the son, Louis Landesman, could be surrendered in discharge of the bail furnished by the defendant.

The objection of plaintiff to the extension of time granted by the Court cannot be sustained. The Act (Sect. 77 of the Practice Act, Comp. Stat., p. 4075), allows a surrender after twenty days, by grace, upon good cause shown. This the Court did. The appellant-plaintiff does not charge that good cause was not shown. To the contrary, under the circumstances stated, there was sufficient facts to show good cause. Further, an exercise of such discretionary power by the Court is not appealable. *Van Hoogenstyn v. D. L. & W. R. R. Co.*, 90 N. J. Law 189 (Errors and Appeals). In *Vail v. Diamond*, 100 N. J. Eq. 394, V. C. Backes held that the law court (Circuit) could allow a surrender of the principal in satisfaction of the bail. It was further held that the inclination of the law is to exonerate the bail upon the prompt rendition of the body of the defendant after notice, citing *Van Winkle v. Alling*, 17 N. J. Law 446. The Vice Chancellor held that the Court could extend the time, pointing out that the plaintiff in the action suffered no injury by the delay.

POINT II.

The Circuit Court was not obliged to enter summary judgment on the motion of the plaintiff to strike out the defendant's answer.

The Court neither granted nor denied the plaintiff's motion but reserved decision, and at the hearing granted leave to the defendant to apply for a writ of habeas corpus. State of Case, page 30, line 7.

It cannot be said as a strict proposition of law that if one party on a motion files an affidavit and the other does not, that then the motion must be decided in favor of the party filing the affidavit. It may be sufficient that the answer itself or an order of the Court shows good cause or reason for a denial of the motion. In this case, the reasons for the denial of the motion at the time it was heard were undoubtedly those facts which made up the merits of the case on which judgment was finally rendered in favor of the defendant.

POINT III.

There was no error in granting the extension of time to produce the principal's custody or surrender.

This point seems to be covered by Point I, and for the law in this point we respectfully refer the Court to Point I herein. The answer in this case was filed in good faith and undoubtedly the defendant was entitled to his day in court.

POINT IV.

No error was committed by the Court in granting the writ of habeas corpus.

At the time application for the writ of habeas corpus was made, Louis Landesman, the principal, was serving a sentence at State Prison. State of Case, page 37, line 36. The principal, being in legal custody, the writ was properly issued. Anonymous 2, N. J. Law 284, where the writ was allowed to enable bail to surrender his principal in custody on a ca. sa. in another suit. It was also held that the sheriff was the proper officer to whom he should be delivered and the writ was made returnable to the Circuit Court.

The Court had jurisdiction to grant the writ. Section 25 of the Habeas Corpus Act confers upon the court or justice to whom a writ of habeas corpus is returned, when it appears that the prisoner is in custody by virtue of civil process issued in any action founded on contract upon a judge of the Court out of which a *capias* has issued in an action *ex contractu*. *Selz v. Presburger*, 49 N. J. Law 396, at page 399. This clearly shows a circuit court judge has the power to issue the writ.

The matter was not *res adjudicata*. This was expressly so held in *Selz v. Presburger*, 49 N. J. Law 396, and the reasoning of that case was restated and the same law set down in *Van Hoogenstyn v. D. L. & W. R. R. Co.*, 90 N. J. Law 189, by the Court of Errors and Appeals. The order of the Chief Justice was squarely held to be not appealable. Further, no order appears to have been formally entered denying no application. The question of *res adjudicata* is also de-

cided against plaintiff's contention in *Vail v. Diamond*, 100 N. J. Eq. 394.

No prejudicial error appearing, the judgment should be affirmed with costs.

Respectfully submitted,

FAST & FAST,
Attorneys of Defendant-
Respondent.