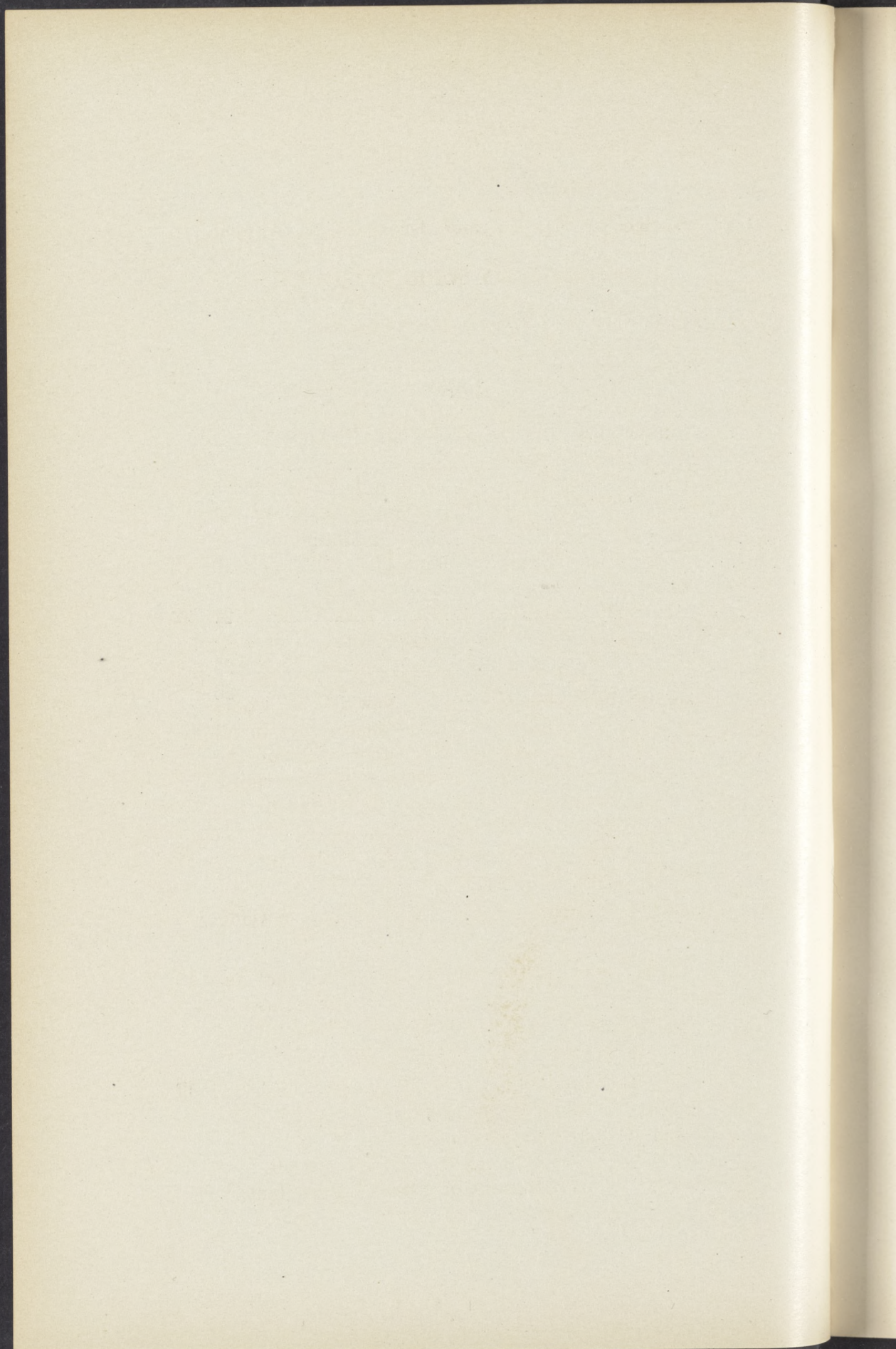


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Notice of Appeal and Grounds of Appeal.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

SAMUEL EDELMAN, Plaintiff-Appellant, vs. JAMES M. DUNN, Defendant-Appellee.	}	Action-at- Law.	10
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To:

Burnett, Murray & Trelease, Esqs.,
Attorneys of Defendant-Appellee: 20

Take Notice that the plaintiff-appellant, Samuel Edelman, appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in the above cause, striking out the complaint in this cause and made by the Hon. William B. Mackay, Judge of the Circuit Court, sitting as Supreme Court Commissioner, on the following grounds, to wit: 30

1. The Court erred in striking out the Complaint.

2. The Court erred in holding that the Assistant Prosecutor of the Pleas of Passaic County, was a judicial or quasi judicial officer, and as such immune from liability.

3. The Court erred in holding there was no liability against the Assistant Prosecutor who acted beyond his jurisdiction. 40

MINTURN & WEINBERGER,
Attorneys of Plaintiff-Appellant.

Complaint

\$15,000.00, and his counsel, at ten o'clock in the forenoon of said date.

10 5. The said defendant, James M. Dunn, agreed to fix the bail in the sum of Seventy-five hundred dollars (\$7500.00), at 10:15 o'clock in the forenoon of said date.

20 6. That thereafter the said plaintiff, through his counsel, offered as bail on the same charge for and in behalf of the said plaintiff, the same property as bail which had been theretofore approved by the Court in November, 1929, in the sum of \$15,000.00. That the said defendant willfully and maliciously and without legal cause or justification, refused to accept said bail, falsely pretending and falsely and fraudulently claiming that he wished to investigate the said bail before he would accept it in the sum of \$7500.00, the said plaintiff in the meantime, at the special instance and request of, and at the direction of the said defendant, being incarcerated and placed in the custody of the Sheriff, and there unlawfully detained and imprisoned.

30 7. Immediately thereafter, the said plaintiff, through his counsel, made application to Honorable Joseph A. Delaney, one of the Judges of the Court of Quarter Sessions of the County of Passaic, for the purpose of compelling and directing the acceptance of the bail theretofore approved in the sum of \$15,000.00, and reduced to \$7500.00. That the said Joseph A. Delaney, Judge as aforesaid, directed that the said defendant forthwith attend to the acceptance of
40 said bail. The same occurred at about 12:30 P. M.

Complaint

8. That the said defendant well knowing that the said bail offered by the parties offering to furnish the bond, was sufficient surety under the statute and well knowing that the said property had been approved and accepted theretofore for bail in the sum of \$15,000.00, having caused and procured the unlawful arrest of the said plaintiff, and intending to continue the arrest so unlawfully procured, and the illegal deprivation of the plaintiff's liberty, surreptitiously left the Court House immediately after having caused and procured the arrest and illegal detention of said plaintiff, and failed to return to the Court House until 2:30 P. M. or 2:45 P. M., the said plaintiff, in the meantime having been illegally incarcerated and illegally detained.

9. That the said James M. Dunn, the defendant herein, was in possession of an order signed by Hon. Joseph A. Delaney, authorizing the acceptance of bail, and was in such possession at ten o'clock in the forenoon of said 9th day of January, 1930, when the sureties offered to qualify in accordance with law, and furnish bail in the amount required, to wit: The sum of \$7500.00. That despite such fact, the said James M. Dunn, the defendant herein, fraudulently withheld the said order from counsel of the plaintiff, and the plaintiff, until ten minutes to four, and failed to deliver the same until ten minutes to four on various false and fraudulent pretences and misrepresentations advanced as excuses for the withholding thereof, none of which were legal justification or excuse, however, sufficient in law.

Complaint

10 10. That in the meantime the said Samuel Edelman, at the special instance and request of the said defendant herein, who illegally procured the arrest of and the illegal detention of the said plaintiff, was arrested and deprived of his liberty, against his will.

11. That the said plaintiff was greatly humiliated and was forced to expend considerable moneys as a result of the said defendant's causing and procuring the arrest of said plaintiff unlawfully, and because of his being illegally deprived of his liberty.

20 Wherefore, plaintiff demands damages in the sum of Twenty-five thousand dollars (\$25,000) together with costs of suit.

MINTURN & WEINBERGER,
Attorneys of Plaintiff.

30

40

Notice of Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

<p style="text-align: center;">SAMUEL EDELMAN, Plaintiff, vs. JAMES M. DUNN, Defendant.</p>	}	Action at Law	10
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Sirs:

Please Take Notice that we shall apply to his Honor, Charles C. Black, Justice of the Supreme Court, at the Court House, in the City of Paterson on the 1st day of February 1930, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order to strike out the complaint filed by you in the above-stated case, on the following grounds: 20

1. That the complaint fails to set forth any cause of action against this defendant.

2. That no act or refusal to act is alleged in the complaint against the defendant which gave rise to any cause of action against him by the plaintiff. 30

3. That the several allegations in the complaint relative to the arrest and detention and imprisonment of plaintiff are inconsistent with each other and show on their face as a matter of law that defendant was neither the cause thereof nor legally responsible therefor. 40

Notice of Motion to Strike Out Complaint

4. That the action sounds in tort but no tort or torts committed by or chargeable to this defendant are set forth in the complaint.

10 5. That the several allegations in the complaint are so inconsistent with and repugnant to each other that defendant cannot safely plead thereto.

6. That there are no issuable allegations of fact properly pleaded in the complaint to which defendant should answer or plead.

20 7. That the complaint, so far as it purports to require answer or plea by defendant, improperly sets up merely conclusions of law and generalizations to which defendant cannot fairly and properly answer or plead.

30 8. That the "wishes," "claims," "pretenses," and "representations" alleged in the complaint as made by or attributable to defendant are not shown by the complaint except by highly improper innuendo and adjectival conclusions to be either untrue or improper or illegal or tortious or in any wise not consonant with the law or with the facts.

40 9. That the complaint discloses no cause of action because it shows on its face that defendant at all times therein mentioned was an Assistant Prosecutor of the pleas of the County of Passaic, and that the alleged acts and omissions of the defendant complained of were done in the course of and as a part of his official duties as such Assistant Prosecutor.

10. That the complaint is multifarious and

Notice of Motion to Strike Out Complaint

duplicitous because it attempts to set forth several distinct and separate causes of action in one count.

11. That the complaint is obscure, uncertain, irregular, and defective and improperly so framed as to embarrass, hinder, delay, prejudice, and render impossible a fair trial. 10

12. That the complaint as a whole and each and every part thereof is frivolous, and so far as concerns the allegations against defendant, utterly sham and wholly false in fact. This ground of the said motion will be supported by the affidavit hereto annexed and made part hereof. We shall appreciate the professional courtesy of your answering affidavits at least one day before the date of said motion. 20

You are further notified that if the complaint shall be struck out on the last mentioned ground, application will be made for an order directing that such striking out is with prejudice to the institution of another proceeding at law based on the same cause or causes of action as were set forth in such complaint and directing that such action of said court is finally and conclusively dispositive of said alleged cause or causes of action. 30

To:

Minturn & Weinberger, Esqs.,
Attorneys of Plaintiff,
Military Park Building,
Newark, N. J.

Dated, January 27, 1930.

BURNETT, MURRAY & TRELEASE,
Attorneys for Defendant. 40

D. FREDERICK BURNETT
Of Counsel with Defendant.

**Affidavit of James M. Dunn on Motion to Strike
Out Complaint.**

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	<p style="text-align: center;">SAMUEL EDELMAN, Plaintiff, vs. JAMES M. DUNN, Defendant.</p>	}	<p>Action At Law</p>
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State of New Jersey,
County of Essex, ss:

20

James M. Dunn, of full age, being duly sworn, according to law, on his oath, deposes and says: I am the above-named defendant, and now am, and at all times hereinafter mentioned was, the duly appointed, qualified, and acting First Assistant Prosecutor of the Pleas of the County of Passaic, New Jersey.

30

On January 9, 1930, I was in attendance as such Assistant Prosecutor before the Quarter Sessions Court of said Passaic County and charged with the duty of attending to the arraignments of all persons appearing that day to plead to indictments against them. Among such persons was the above-named plaintiff, who appeared that day in court under the custody of the Sheriff of the said County of Passaic, having been produced to the Sheriff by his bondsmen in compliance with the bail given December 2, 1929, erroneously stated in the complaint as November, 1929, which bail had been

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Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

given at the time of his arrest on a charge of arson to await the action of the Grand Jury of Passaic County. After giving said bail he was indicted by said Grand Jury for arson, and his appearance in court on January 9, 1930, was to plead to said indictment charging him with arson. He pleaded not guilty. At the time of making said plea, he was under arrest.

10

Up to the time of said plea, I had had nothing whatever to do with the indictment of plaintiff nor his release on bail as aforesaid, nor with the approval of such bail by the Prosecutor's office, and I neither knew nor had heard anything about this case or the facts aforesaid.

20

It is a long established rule of the Prosecutor's office of said Passaic County, approved and continued in force by the present Prosecutor of said county, that when real estate is offered as security for bail of five thousand dollars or over that before it is approved, an investigation and verification of the title and of the liens and encumbrances thereon, together with an appraisal of the fair market value of the property, must be made by the representatives of the Prosecutor. Depending upon the result of such investigation and appraisal, bail is approved or disapproved by the Prosecutor.

30

It has long been the practice for the Judges of said Passaic Quarter Sessions Court to provide said Prosecutor with orders in blank, signed by the Judges, in the following form:

40

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

QUARTER
PASSAIC SPECIAL SESSIONS

10 THE STATE } Sur.....
vs. }
..... } for.....

The Clerk of this Court or the Sheriff of the County of Passaic is hereby authorized to take bail in the above stated case, in the sum of
.....
Sureties to Qualify in the usual manner.

.....
Judge

20 Dated 19 .

30 At the times hereinafter mentioned, the Prosecutor was in possession of a number of these blank forms signed by Judge Delaney of the said Court of Quarter Sessions. These forms are used by direction of the said Judge only in his absence and only after approval of the offered bail by the Prosecutor or one of his Assistants, which approval is to be first endorsed on said order and countersigned by the Prosecutor or Assistants.

40 When plaintiff appeared as aforesaid to plead, he was accompanied by his counsel, Harry H. Weinberger. When he pleaded not guilty, Weinberger said that he would offer as bail the same bondsmen and real estate security under which plaintiff had been released to await the action of the Grand Jury as aforesaid. I thereupon inquired the circumstances of this case and the state of the record and thereby learned that in-

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

advertently the bail previously given by the defendant as aforesaid had not been first investigated and approved by the Prosecutor or his Assistants pursuant to the rule aforesaid. I then informed Weinberger that the bail was too high, and that I would recommend reduction to seventy-five hundred dollars, but that the security offered must first be investigated and appraised before I would approve it. 10

Weinberger at first, refused for his client, the plaintiff aforesaid, to fill out any application for bail, and stated that he was going to apply to the court direct, and I told him that he was at perfect liberty to do so. 20

Mr. Weinberger then applied to Judge Delaney to have the offered security accepted immediately as bail, and stated to that Judge that the offered real estate had been accepted before, and that there was no reason why it should not be accepted then. I told Judge Delaney that it had not been previously investigated, and that I could not and would not approve it until I was satisfied by an investigation that it was sufficient and proper, and I called Judge Delaney's attention to the fact that he himself had power to accept it or reject it. Judge Delaney then stated that "the Prosecutor's office" should have investigated it "since it was first accepted," to which I replied that its acceptance without investigation had been a mistake on the part of the Prosecutor's Assistant who had accepted it, and that no one else in the office had learned of this mistake until this 30 40

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

10 day, whereupon Judge Delaney ruled that he would leave the matter of bail to the Prosecutor's office, and that that office should attend to it as soon as possible, and thereupon left the court room for the day. This ruling was promptly and reasonably complied with as follows:

20 I again asked Weinberger in the presence of said plaintiff to make out the written application for bail and have it signed by the bondsmen. He and the plaintiff then went into another room and talked and at or about 12:50 P. M. Weinberger handed to me the application duly filled out, and thereupon I immediately caused the usual search to be made for judgments and other liens in the New Jersey Supreme Court and in the United States District Court for the District of New Jersey. I at once delivered the application to Harry Boyle, one of the detectives of the Prosecutor's office, to appraise the property.

30 I then left the Court House for lunch at about 1:15 P. M., and returned at 2:00 P. M. I then personally went to the Register's and Clerk's offices of Passaic County and made a search of the title of the security offered as bail.

40 I completed the title search and returned to my office in the Court House about 2:30 P. M., and about 3:00 P. M. received a report from said Boyle that he had inspected the property, and appraised it as worth \$40,000, and reported that he had ascertained its assessed value was \$17,100. Boyle then made an en-

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

dorsement on the application for bail to that effect.

About 3:15 P. M., I received a report of the result of the examination of the said New Jersey Supreme Court and the United States District Court records. This report stated that in the New Jersey Supreme Court there was a judgment against a Jacob E. Weiss, two others against a Jacob Weiss, and that in the United States District Court there was a bankruptcy proceeding of record against a Jacob Weiss. This information I caused to be immediately communicated to Mr. Weinberger, and I asked him to have the proposed bondsman, one Jonas Weiss, whose signature on the present application for bail was almost illegible, and who had apparently signed or caused to be signed the original bail as both Jacob and Jonas although in different handwritings, execute an affidavit to the effect that he was not the Jacob Weiss who had been bankrupt, nor the person against whom the judgments of record as aforesaid had been entered. Weinberger thereupon wrote out in his own handwriting such affidavit and caused the bondsman, Jonas Weiss, to sign and swear to it and then delivered it to me.

Thereupon I at once filled out one of the above-mentioned blank orders signed by Judge Delaney and endorsed my approval of the security offered, and delivered such order to Weinberger as counsel to the plaintiff. I also immediately notified the Sheriff that the bail had been approved and to produce the plaintiff at

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

once. He was thereupon brought to the County Clerk's office at about 4:10 P. M., and released on bail at about 4:15 P. M., January 9, 1930.

10 It was my duty, the premises considered, as such Assistant Prosecutor to make the investigation of the security offered for bail which I made, completed and acted upon as quickly as humanly possible, and without unnecessary delay. I was not actuated by any malice or ill will whatsoever. I did not know the plaintiff and had never heard of him until said January ninth. My entire conduct throughout was only that which was required of me in the proper
20 performance of my duty as said Assistant Prosecutor. I would have been remiss in my duty had I done otherwise. I was not actuated by any malice, ill will, or prejudice toward the plaintiff, Samuel Edelman, or his counsel, or any one else, and in fact, neither had nor have any malice or ill will or prejudice towards either of them, and I did no differently in this case than
30 I would have done in any other case presenting the same or similar facts. Each of my acts was done in good faith, and strictly and only in pursuance of my duty.

I did not cause or have anything whatsoever to do with the arrest of Samuel Edelman. He was arrested because he had been indicted and not because of any act of mine, and held merely in default of bail.

40 I made neither false nor fraudulent representations or statements. I advanced no false pretext or excuses whatsoever to plaintiff or his

Affidavit of James M. Dunn on Notice of Motion to Strike Out Complaint.

counsel. Everything I said would be required to be done, was, in fact, done. Nothing was required that was unnecessary. Except for the blank orders signed by Judge Delaney as aforesaid, and which I was authorized to use only after approving the security as aforesaid, I never had, and did not withhold from plaintiff or Weinberger, any order from Judge Delaney regarding bail or the acceptance of bail in this case. There never was any specific order for bail in this case. 10

I have read the complaint filed in the above-entitled cause, and say that every allegation therein which is inconsistent with the facts as stated in this affidavit is untrue in fact and I verily believe and therefore charge that the matters set forth therein present no cause of action in law, and that the entire complaint is sham and frivolous, and without foundation in law or in fact, and should be stricken out. 20

JAMES M. DUNN.

Subscribed and sworn to before me this

27th day of January, 1930. 30

Grant V. Dusenberry,

Notary Public of N. J.

(Seal.)

Affidavit of Samuel Edelman

4. An application had been made out and filled out for the Fifteen thousand dollars (\$15,000.00) bail which was in the possession of Mr. Dunn, and that he knew all about the property and the facts of the property at about 10:15 o'clock in the morning, or prior thereto, when Mr. Weinberger told Mr. Dunn that the same sureties were to give bail, and that asking to have the second application filled out at about 12:50 P. M. was merely a pretence or excuse for further delay with regard to an uncalled for investigation.

10

5. I charge that Mr. Dunn left the Court House for the purpose of keeping me in jail, and I deny the fact he got back at 2 P. M. I deny the truthfulness of the statement made by Mr. Dunn with regard to the searches.

20

6. I deny that defendant's conduct throughout this entire proceeding was required of him in the performance of his duty, and deny that it was the duty of Mr. Dunn to make the investigation which he claims.

7. I deny that Mr. Dunn had nothing to do with my being illegally detained for hours after my sureties had offered to go bail for me, but on the contrary charge that my detention was due absolutely and solely to his acts and conduct, which I am prepared to prove before a Court and Jury. I further charge that there was no default in bail by me, and charge further that the very bail which was offered at 10:15 in the morning, was the same bail that

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Affidavit of Samuel Edelman

10 defendant approved at 4:10 in the afternoon,
and respectfully submit that everything which
resulted in my being detained, was due to the
conduct of, and the illegal and improper refusal
of the said defendant to accept the said bail
when offered, there being no legal or just ex-
cuse.

8. I have several witnesses to substantiate
the allegations of my complaint, and am pre-
pared to do so at the trial of said cause.

SAM EDELMAN.

Sworn to and subscribed before me this
31st day of January, 1930.

20

Fannie ~~Landioff~~, **NIMAROFF**
Notary Public of N. J.

30

40

Memo

10 ance of bail. Further, that Dunn knew before investigating that the bail was sufficient because he had accepted the same bondsman and the same real estate security when Edelman was first arrested, and prior to his indictment and arraignment on January 9th, 1930.

The theory of the plaintiff's complaint is that defendant had power to fix and accept bail. This does not appear to be so.

20 Under the criminal procedure act the judge of the quarter sessions fixes the bail in an arson case (Section 24, 2 Comp. Stat. 1910, p. 1828). The sheriff or county clerk may admit to bail upon the order in writing of the judge (see
30 Section 20), and I am of the opinion that these last named officials are the proper persons to examine or investigate the bail. There appears to be no warrant in law for the judge to delegate the power to investigate bail (which plaintiff alleges in his affidavit the judge did), nor any authority for the assistant prosecutor to take upon himself the performance of this task. Plaintiff's affidavit is to the effect that there is a long established rule of the prosecutor's office to investigate bail. He attaches a blank form, signed in blank by the judge. This blank form clearly sets forth: "The clerk of this court or the sheriff of the County of Passaic is hereby authorized to take bail in the above-stated case."

40 Why then, should assistant prosecutors walk around with blank forms signed by the judge, and take bail when they see fit, having no authority in the premises so to do. It can and may open the door for favoritism. It is repre-

Memo

hensible in the extreme. If the present law is not satisfactory then let the legislature act, but until they have done so, let us have the criminal procedure followed legally. Nothing is more sacred than liberty. Every person charged with crime is presumed innocent until proven guilty. I have digressed from my opinion on this motion because defendant's affidavit presents an unusual and improper method of dealing with the subject of bail and I feel it my duty to call it to the attention of counsel. 10

The complaint appears to me to be frivolous. On its face it set forth no cause of action, although true.

National Surety Co. vs. Mulligan, 146 Atl. Rep. 372. 20

Furthermore, our courts having held regarding a judicial officer and quasi-judicial officer, that "for a mere error in judgment in the execution of his office no action can be maintained. It is a principle which lies at the very foundation of a free, vigorous and independent administration of justice." 30

Little vs. Moore, 4 N. J. L. 84.

In Taylor vs. Doremus, 16 N. J. L. 473, Chief Justice Hornblower said, *inter alia*, "An action will not lie against a judge for an error in judgment however prejudicial to the rights of the party such error may be, is a proposition so plain, so consonant to reason, and so essential to the very courts of justice, that it needs neither authority nor argument to support it." 40

Memo

Taylor vs. Doremus, 16 N. J. L. 473.
 See Grove vs. Van Duyn, 44 N. J. L. 654.

10 While I have heretofore stated that the assistant prosecutor had no power to accept or fix bail and that it was improper to have blank applications, nevertheless, there was another duty which the assistant prosecutor had to perform. He was acting in a judicial or quasi judicial capacity. I believe he was a quasi judicial officer. Although there may have been an error in judgment on his part he had an official duty to perform, connected with plaintiff's arraignment.

20 See Hamn vs. Lloyd, 50 N. J. L. 1.
 See Griffith vs. Slinkard, 44 N. E. 1001 (Ind.).

It follows that the complaint in this case should be struck out. I will so recommend.

30

40

**Order Granting Motion to Strike Out Com-
plaint.**

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

SAMUEL EDELMAN,	}	10
Plaintiff,		

vs.

JAMES M. DUNN,	}	10
Defendant.		

A motion having been made herein before Hon. William B. Mackay, Circuit Judge sitting as Supreme Court Commissioner, by the defendant James M. Dunn, to strike out the complaint upon the ground that there was no liability against the defendant, and the Court having heard the argument of Harry H. Weinberger, Esq., of the firm of Minturn & Weinberger, Esqs., appearing for the plaintiff, and D. Frederick Burnett, Esq., of the firm of Burnett, Murray & Trelease, Esqs., appearing for the defendant,

It is, on this 29th day of April, 1930, Ordered that the motion be granted.

W. B. MACKAY,
Circuit Judge Sitting as
Supreme Court Commissioner.

Consent is hereby given to the entry of the foregoing order.

BURNETT, MURRAY & TRELEASE,
Attorneys for Defendant.

Rule for Judgment.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

SAMUEL EDELMAN,

Plaintiff,

vs.

JAMES M. DUNN,

Defendant.

} Action-at-
Law.

20

It appearing by the affidavit filed in this cause that the allegations in the plaintiff's complaint do not set forth a cause of action, and no liability exists thereunder as against the said defendant;

It is on this 3rd day of May, 1930, Ordered that the complaint be stricken out and that final judgment be entered for the defendant and against the plaintiff.

W. B. MACKAY,
Circuit Court Judge acting as
Supreme Court Commissioner.

30

40

**NEW JERSEY COURT OF ERRORS AND
APPEALS**

SAMUEL EDELMAN,
Plaintiff-Appellant,

vs.

JAMES M. DUNN,
Defendant-Appellee.

} On Appeal
} From Su-
} preme Court.

**BRIEF ON BEHALF OF PLAINTIFF-APPEL-
LANT.**

Facts.

This is an appeal from a final judgment of the Supreme Court of New Jersey, Passaic County Circuit thereof, rendered by Circuit Court Judge William B. Mackay, sitting as Supreme Court Commissioner, striking out a complaint. The complaint was sued out in the Supreme Court of New Jersey, Passaic County, by Samuel Edelman against James M. Dunn, first Assistant Prosecutor of the Pleas of Passaic County. The complaint alleged false imprisonment because of defendant's refusal to accept the tender of proper bail and until said bail was accepted, the plaintiff was illegally imprisoned.

The defendant, through his attorneys, made a motion to strike out said complaint, alleging, among other grounds, that the complaint set forth no cause of action against the defendant; that no cause of action was set forth because

the defendant was an Assistant Prosecutor of the Pleas of the County of Passaic, and that all acts and omissions of the defendant complained of, were done in the course of and as part of his official duties as such Assistant Prosecutor. Said motion was referred by Supreme Court Justice Black to Circuit Court Judge William B. Mackay, sitting as Supreme Court Commissioner, who struck out said complaint on the ground that there was no liability against said defendant, and final judgment was entered accordingly. From this final judgment the plaintiff appeals.

A brief reiteration of the important facts of the complaint will be clarifying in settling the legal questions involved. The plaintiff, Samuel Edelman, in November, 1929, was arrested on a certain charge made against him and was held under bail in the sum of fifteen thousand dollars (\$15,000), which was properly furnished and accepted by the Prosecutor's office of Passaic County. Subsequently the Grand Jury returned an indictment against said Edelman and he was summoned by the Prosecutor's office for appearance and the fixing of new bail. The Assistant Prosecutor agreed to reduce the bail to seventy-five hundred dollars (\$7500), just half of what it originally was. The plaintiff offered the same bail as was previously approved and accepted. Yet the Assistant Prosecutor refused to accept it without first investigating the bail. Immediately thereafter said plaintiff, through his counsel, made application to Honorable Joseph A. Delaney, one of the Judges of the Court of Quarter Sessions of the County of Passaic, for the pur-

pose of compelling and directing the acceptance of the bail theretofore approved in the sum of fifteen thousand dollars (\$15,000), and reduced to seventy-five hundred dollars (\$7500). The Honorable Judge so directed. Yet in spite of this order, said Assistant Prosecutor, by unlawful, unwarranted and illegal means and methods, kept the plaintiff incarcerated, until a number of hours later, at which time the plaintiff was released upon the Assistant Prosecutor's order that the bail offered was satisfactory and acceptable. The other facts are set forth in the complaint appearing on pages 3-6 in the State of Case.

POINT I.

The Court erred in striking out the complaint.

The defendant's motion to strike out the complaint was the equivalent of a demurrer and therefore admitted all the material averments of the complaint. The complaint set forth all the material and necessary allegations constituting a *prima facie* case of false imprisonment. The motion to strike out the complaint was, in effect, an admission of the truth of all the allegations set forth, yet denied liability on the ground that the defendant, being an Assistant Prosecutor at the time, was immune to such a suit. The Supreme Court Commissioner, it seems from a reading of his memorandum filed in the case, agreed with the defendant's contention. (See p. 23 of State of Case, lines 16-19.) From a reading of this opinion, it would

seem that the Commissioner was of the opinion that the Assistant Prosecutor was a judicial or quasi judicial officer, and therefore was immune from liability in the case at bar. The Commissioner did not go one step beyond that proposition; he did not go into the merits of the question presented by the appellant, to the effect that the said Assistant Prosecutor clearly acted beyond his capacity as such Prosecutor and by so doing made himself amenable to a suit of the character brought against him. Appellant therefore contends that the Supreme Court Commissioner did not decide the real merits of the case on the motion to strike out, and erred in granting said motion.

POINT II.

Appellant's main contention is that, assuming that the defendant was a judicial or quasi judicial officer, still he acted clearly beyond his jurisdiction and became liable to the appellant.

Appellant is not willing to agree with the Commissioner that the office of Assistant Prosecutor is a judicial or quasi judicial office. The Commissioner cited the cases of *Hann v. Lloyd*, 50 Law 1; *Little v. Moore*, 4 Law 84; and *Taylor v. Doremus*, 16 Law 473, as his authority. The first two cases hold that Justices of the Peace are judicial officers and for any acts or omissions done in matters within their jurisdiction, they are not liable. Counsel for appellant agrees with the soundness of this proposition but contends that those cases have no relationship to the case at bar.

In the case of *Hann v. Lloyd, supra*, the defendant was Prosecutor of the Pleas and not Assistant Prosecutor, as in the case at bar. The appellant contends that if such an immunity is bestowed upon the Prosecutor's office, that it extends only to the Prosecutor himself and not to the Assistant Prosecutor and to those below. In that case, Chief Justice Beasley held that with respect to what he (Prosecutor) did, he was invested with an immunity. The Chief Justice did not say, in so many words, that the office of Prosecutor was a judicial or quasi judicial one. Appellant is not aware of any decisions in the state holding that the office of Assistant Prosecutor is judicial or quasi judicial. The case of *Hann v. Lloyd* is no authority for the proposition that an Assistant Prosecutor is invested with an immunity as counsel for appellee contend.

Assuming that the Assistant Prosecutor is a judicial or quasi judicial officer, still the appellant contends that he is not immune to the suit in the case at bar, because he clearly acted beyond his jurisdiction. This is appellant's chief contention.

Counsel for appellant have vainly searched for any authority given to the Assistant Prosecutor or even the Prosecutor, to fix and examine or investigate bail. Such a power vested in the Prosecutor's office is unheard of. Under the criminal procedure act, the judge of the Quarter Sessions fixes the bail in an arson case (Section 24, 2 Comp. Stat. 1910, p. 1828). The Sheriff or County Clerk may admit to bail upon the order in writing of the Judge (Sec-

tion 20, 2 Comp. Stat. 1910, p. 1827). The procedure under these statutes is the only proper, legal and authorized means to be strictly followed in fixing, examining and investigating bail. The statutes are specific on this point, and by virtue of these statutes the Assistant Prosecutor is totally excluded from taking any part in examining and investigating bail. The Commissioner expressed his opinion conforming in toto with the above view. At page 22 of State of Case, he says in his memo:

“* * * and I am of the opinion that these last named officials (Sheriff or County Clerk) are the proper persons to examine or investigate the bail.”

This honorable Court will undoubtedly agree that such is the correct procedure in a case of this character as to the examination and investigation of bail. However, and here lies the crux of the whole case, the Assistant Prosecutor did voluntarily and without an iota of authority, take upon himself this duty. This is not denied; as a matter of fact it is expressly admitted by the appellee in his affidavit. (See p. 11, lines 20-35 of the State of Case.)

How does the Assistant Prosecutor justify his illegal and unlawful transgression? Not by any legal and lawful justification, but by a custom which he says prevails in the Prosecutor's office of Passaic County. The reading of the appellee's affidavit (pp. 10-17 State of Case), is the strongest and most conclusive evidence of this “judicial” abuse. The affidavit and its admissions leave no room for argument that he acted beyond the scope of his authority and “judicial” powers.

At page 11, line 20, to page 12, line 31 of State of Case the appellee in affidavit form sets out a time honored custom by virtue of which he seeks to evade responsibility for his unwarranted actions. He says it is a long established rule of the Prosecutor's office of said Passaic County, approved and continued in force by the present Prosecutor of said county to investigate the bail offered and accordingly to reject or approve its acceptance. The appellant is not concerned with any such customs of the Prosecutor's office which do not base their origin in some statute or legal authority. Especially so where such custom is directly opposed to the specific directions of the statutes. Nor is the appellant concerned with any local practices of the Judges which are likewise unwarranted and contrary to statutory dictates. The Assistant Prosecutor says he had in his possession a blank form, signed by the Judge, delegating to the said Assistant Prosecutor the power to investigate bail. It is interesting to note that on this blank form appears the direction that:

"the clerk of this Court or the Sheriff of the County of Passaic is hereby authorized to take bail in the above stated case."

Even by this blank form there appears no such authority as the appellee assumed, and what is more, it was express notice to the Prosecutor who held such blank form in his possession, that the power was in the Sheriff or Clerk and not in the Prosecutor or Assistant Prosecutor. It seems that the Assistant Prosecutor, by his own statements as they appear in his affidavits, condemns his own conduct as being illegal and unwarranted. The Commissioner in his opinion expressed this view (p. 22 of State of Case, ll. 37 to p. 23, l. 16):

“Why then, should Assistant Prosecutors walk around with blank forms signed by the judge, and take bail when they see fit, having no authority in the premises so to do. It can and may open the door for favoritism. It is reprehensible in the extreme. If the present law is not satisfactory then let the legislature act, but until they have done so, let us have the criminal procedure followed legally. Nothing is more sacred than liberty. Every person charged with crime is presumed innocent until proven guilty. I have digressed from my opinion on the motion because defendant's affidavit presents an unusual and improper method of dealing with the subject of bail and I feel it my duty to call it to the attention of counsel.”

This excerpt from the Commissioner's opinion sums up well the true situation with reference to the appellee's action beyond his authority. Counsel for the appellant wholly agree with the learned Commissioner on this phase of this case. Such a practice is not only reprehensible in the extreme but extremely vicious in its effect and is to be greatly condemned and put to an end.

It is the contention of counsel for the appellant that they have amply proved the fact that the Assistant Prosecutor acted beyond his authority. In this it seems they are fully and properly substantiated by the Commissioner's opinion. This conclusion is reached not by force of any argument but merely by a clear presentation of the facts, especially the affidavit of the Assistant Prosecutor.

The law of the United States and of New Jersey with reference to the personal liability

of judges and other judicial officers depends, for the most part, on the question of jurisdiction. On the existence or non-existence of jurisdiction depends immunity from, or liability for, acts done by a person while acting in a judicial capacity. If he acts wholly without jurisdiction, and counsel for appellant claim the Assistant Prosecutor did so act, his judicial office can afford him no protection whatsoever. As to this principle, there is no conflict among the authorities.

At page 1351 A. L. R., Vol. 13, under "False Imprisonment," we find the following:

"It is well settled that a judicial officer may be held liable for false imprisonment, for causing the arrest of a person in a proceeding in which he is acting wholly without jurisdiction."

Numerous cases are cited thereunder supporting this rule.

In New Jersey, the rule seems also to be well established. In the case of *Shaefer v. Smith*, 92 L. 267, the Supreme Court, in an opinion delivered by Justice Swayze, held that a Magistrate who without a sworn complaint issues a warrant and causes the arrest of a citizen and binds him over to keep the peace, may be held for false imprisonment. In that case it was essential that the Magistrate have a sworn complaint before "swearing the peace." The lack of such a complaint indicated a clear absence of jurisdiction and the Magistrate, although a judicial officer, subjected himself to a civil suit for false imprisonment. His judicial office could serve him no immunity where he acted without jurisdiction.

In the case of *Valentine v. Englewood*, 76 Law 509, at page 517, Justice Swayze again said:

“The exemption of officers from liability extends only to matters in which they have jurisdiction under the statutes.” * * *

“Jurisdiction under the statutes” is very important. In the case at bar, counsel for the appellant have clearly indicated the Assistant Prosecutor’s lack of jurisdiction under the statute. The statute specifically provided who shall examine or investigate the bail and the Prosecutor was not one of those invested with such power.

In the case of *Mangold v. Thorpe*, 33 N. J. L. 134, at page 137, Chief Justice Beasley, speaking for the Supreme Court, said:

“For my part, I regard it as a matter of public interest, that the rule should be perfectly settled which gives entire immunity from private prosecutions, in respect of every act of a judicial nature within the scope of his jurisdiction.”

This case dealt with the immunity afforded a justice of the peace who acted within his jurisdiction.

In the case of *Grove v. Van Duyn*, 44 N. J. L. 654, a Magistrate was held not liable to an action in consequence of a decision made by him in a matter which was colorably within his jurisdiction. Chief Justice Beasley, speaking for the Court of Errors and Appeals said, at page 657:

“It is said everywhere in the text books and decisions that the officer, in order to entitle himself to claim the immunity that belongs to official conduct, must restrict

his action within the bounds of his jurisdiction, and jurisdiction has been defined to be 'the authority of the law to act officially in the particular matter in hand.' Cooley on Torts 417."

At page 660:

"From these legal conditions of the subject my inference is, that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put at least colorably under his jurisdiction. * * * But when no facts are present or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."

Chief Justice Beasley refers back to the above case in the case of *Booth v. Kurrus*, 55 N. J. L. 370, where speaking for the Supreme Court he said at page 372:

"It is obvious that the principle on which it can alone be rested is, that the justice is liable to a suit in every case in

which he mistakes the law with regard to his duty either in granting or refusing a warrant when a criminal complaint is before him.”

In this case the Magistrate was held not liable, since the Court decided that he acted within his jurisdiction.

The case of *Smith v. Hebler* (N. J. 92 Atl. 364), reiterates the same proposition already set out. To the same effect *Loftus v. Frag*, 43 N. J. L. 667, and *Hann v. Lloyd*, 50 N. J. L. 1. In the last case the Supreme Court, through Chief Justice Beasley, held that the Sheriff and constables, in executing the writ of a court of general jurisdiction, having cognizance over the class of cases to which it appertains, are entitled to immunity for every act done necessarily in putting it into effect. In all the above cases, the Court found the defendants not liable because of the fact that being judicial officers, and acting within their authority, they were immune. None of the cases dealt with an Assistant Prosecutor. The case of *Hann v. Lloyd*, *supra*, dealt with a Prosecutor but in our earlier discussion of this case, we have endeavored to show its non-applicability to the case at bar.

The case of *Taylor v. Doremus*, 16 N. J. L. 473, sums up well the doctrine of liability of a judicial officer as such. At page 476, Chief Justice Hornblower, speaking for the Supreme Court, said:

“But on the other hand, if he had not, and could not have jurisdiction of the cause, that is the subject-matter; or where he has jurisdiction of the subject-matter, but proceeds without having obtained

jurisdiction over the party, by having him in court, by process or otherwise, actually or constructively, his acts though strictly of a judicial character, are *coram non jūdice* and void, and he and all persons concerned in executing his judgment or award would be trespassers. So, too, where a ministerial duty or authority is annexed to a judicial office, if the officer executes that ministerial duty wrongfully, whether by mistake or fraud, he is answerable to the injured party in a suit at law."

The same doctrine seems also to be well settled outside the State of New Jersey.

In the case of *Wall v. Trumbull*, 16 Mich. 228, Cooley, J., in discussing the rule relating to the liability of officers exercising judicial powers for errors in judgment, where they do not exceed their jurisdiction observed,

"A ministerial officer has a line of conduct marked out for him, and has nothing to do but to follow it; and he must be held liable for any failure to do so which results in the injury of another. * * * It is accordingly a rule of very great antiquity that no action will lie against a judicial officer for any act done by him in the exercise of his judicial functions, provided the act, though done mistakenly, were within the scope of his jurisdiction."

The same principle of law was set out in *Robertson v. Hale*, 68 N. H. 538, 44 Atl. 695.

In *Lund v. Hennessey*, 67 Ill. App. 233, the Court in dealing with this doctrine followed the general rule, but it is important to note that in so doing it seems to have listed the judicial persons who are privileged to invoke the rule for their protection:

“No judicial person whether a chancellor, or sitting in a court of equity, a judge of the common law court of record, a justice of the peace, or other inferior magistrate, member of a court martial, or juror who is a part of the court, is, for any judicial act within his jurisdiction, however erroneous or mistaken, answerable in a civil suit to the party aggrieved.”

There is no indication in this statement that such immunity was intended for any person connected with the Prosecutor's office.

In the leading case of *Bradley v. Fisher*, 13 Wall 335, 352, 20 L. ed. 646, 651:

“Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.”

These same principles are supported in the following cases:

Calhoun v. Little, 106 Ga. 336, 32 S. E. 86.

Pooler v. Reed, 75 Me. 488.

Hand v. Phila., 8 Pa. Co. Ct. 214.

Fowle v. Alexandria, 3 Pet. 398, 7 L. ed. 719.

Thayer v. Boston, 19 Peck. 516.

Forsyth v. Canniff, 20 Ont. Rep. 478.

Stanbury v. Exeter Corp. (1905), 2 K. B. 838.

In 19 Cye., 331:

“A complainant may, however, become responsible in damages for an arrest when he directs or procures, is a conspicuous actor in, or in a legal sense causes a detention unauthorized by law.”

In 25 Corpus Juris, Sec. 101:

“It is stated in a number of decisions that there is a clear distinction between absence of all jurisdiction as to the subject-matter and excess of jurisdiction. If a judicial officer acts in the clear absence of all jurisdiction and authority he incurs liability even though his decision is made in good faith, that he had such jurisdiction, and his honesty of purpose is not a defense to the action.”

All the foregoing authorities well establish the principle that where a public officer other than a judicial one does an act directly invasive of the private rights of others, by acting in a matter in which he is unauthorized and lacks the necessary jurisdictional qualities to give him that right, such officer is personally liable without proof of malice and intent to injure. The case at bar presents just such a situation. The Assistant Prosecutor took upon himself the power to act in this case in clear absence of any such power to act and contrary to the statute specifically providing who shall act in such a case. Such Assistant Prosecutor possessed not even the color of authority to act in the case at bar in examining and investigating the bail of the appellant, the final result of which was to depend upon the Assistant Prosecutor's whim and caprice. The bona fides and absence of malice or ill will on the part of the Prosecutor plays no part in this action of false imprisonment. The question merely is, did he exceed his authority as an officer of the Court, assuming he is one? Counsel for appellant are of the opinion that even assuming that the Assistant Prosecutor of the Pleas is a judicial officer, still he clearly

transcended the limits of his authority and is therefore subject to appellant's civil suit for damages in false imprisonment.

Still assuming that the Assistant Prosecutor was an officer, yet his conduct as to the bail situation was clearly an invasion of the appellant's personal rights and privileges.

In 25 Corpus Juris 495:

“A failure to discharge on tender of proper bail renders the officer whose duty it is to do so liable.”

In the case at bar the bail tendered was proper bail, it having been a short time previous accepted by the Prosecutor's office. Not only that but the bail had been reduced from \$15,000 to \$7,500.

Further, page 495:

“A party, having given him proper bail, has the absolute right to be at large, and the officer who rearrests him in disregard of his rights is liable.”

In the case of *Grohmann v. Kirschmann*, 168 Pa. 189, 32 Atl. 32, it was held that in trespass under the practice act of May 25, 1887 (P. L. 271), for false imprisonment, based on the illegality of the original arrest, it was proper to charge that, if the defendant caused the lodging of the information against and the original arrest of the plaintiff, knowing there was no ground for the proceeding, or having no reasonable cause to believe it warranted, and if he refused to accept bail from plaintiff, or in either case, he was liable.

At page 34 it was said:

“It is clearly agreed to be an offence by the common law as well as by statute, and punishable by indictment as well as by action, to deny or delay or obstruct bail where it ought to be granted. ‘Bac. Abr. 596 I. To refuse bail when the party ought to be bailed (the party offering the same), is a misdemeanor, punishable not only at the suit of the party but also by indictment. (1 McKinney, Jus. [4th ed.] 258, citing 2 Hawk. P. C. [8th ed. 141]); is a misdemeanor at common law, as an offense against the liberty of the subject and an action lies at the suit of the party wrongfully imprisoned’ (*id.* citing 1 Chit. Cr. Law, p. 103). So also, to refuse bail, or unduly delay granting it, where a right to it exists, is an offense against the liberty of the subject, both at common law and by Statute, punishable by civil action or by both. Rap. Cr. Prac. par. 41, citing a number of authorities. * * * It is laid down generally that if, after execution of civil or criminal process, the person served is subjected to unwarrantable treatment, he has a remedy by action against the officer and against others who may unite with him in doing the wrong. *Wood v. Graves*, 144 Mass. 365-367, 11 N. E. 567.”

In 19 Cyc., 325, note 46, we find the following in reference to the acceptance of bail, assuming the officer has authority to do so.

“Refusal to accept bail—liability for unlawfully prolonged detention may attach because of attendant circumstances, like refusal to accept any reasonable bail. *Manning v. Mitchell*, 73 Ga. 660, *Gibbs v. Randlett*, 58 N. H. 407, without reference to malice. *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506.”

In the case of *Manning v. Mitchell*, *supra*, plaintiff brought an action of false imprisonment against the Sheriff and policeman for false imprisonment for refusal to accept proper bail. The Court held the imprisonment illegal and said:

“* * * the plaintiff in error had the clear right to go before the jury, under the facts, and let them say what damages he sustained by reason of this unwarranted conduct on the part of the defendants. But to deny the plaintiffs a hearing, and direct the jury to find for all the defendants, is certainly erroneous.”

This case falls directly to the benefit of the appellant because assuming that the Assistant Prosecutor had the power to accept bail, still where he abuses that authority he may be held liable.

In the case of *Gibbs v. Randlett*, 58 N. H. 407, it was held that one knowing the sufficiency of the bail offered by the defendant to the officer making the arrest is liable, in case, for the damage done by his ordering and causing the officer to refuse the bail and hold the defendant in custody:

“The Sheriff by refusing to take sufficient bail, legally offered by the plaintiff, did an unlawful act to his injury, and he was entitled to his action on the case against the Sheriff therefor.”

Further:

“The defendant claims he is not liable unless he acted maliciously and without probable cause. This is not an action for malicious prosecution. It is for doing an illegal act by the defendant that injured the plaintiff. Although it was done in the execution of legal process, yet, it

was an act in abuse of that process. It was an imprisonment by the plaintiff under that process when the right to do so had ceased. It was an act equally illegal whether the original action was malicious or in good faith with or without probable cause, and the end of it can have no legal or logical connection, with the plaintiff's right to recover in this suit.

“* * * Generally in an action for abuse of legal process it is not necessary to aver or prove that it was sued out maliciously or without probable cause.”

Cooley in his book on Torts, 3rd edition, page 302, under False Imprisonment deals with the very point involved and applicable to the facts in the case at bar:

“A writ may be absolutely void because it does not emanate from the court or officer purporting to issue it. This may happen because it is forged, or because some unauthorized person has assumed to fill out and issue process in the name of a magistrate. It has been decided in New York and also in Illinois, that if a Justice of the Peace, who by law, has authority to issue writs in person, shall deliver blanks to an officer, with leave to fill them up at his discretion, and then issue them, such permission would be void, and writs issued in pursuance of its nullities” (cases cited).

In the case at bar the Assistant Prosecutor was in possession of blanks signed by the judge authorizing the taking of bail. He had neither the right to this blank nor the right to fill it in according to his own judgment, and any act performed by him thereunder was null and void and an invasion of the appellant's constitutional rights.

In conclusion counsel for the appellant wish to repeat their contentions upon which they rest

this appeal. First, the appellant has endeavored to show that the Assistant Prosecutor is not a judicial officer. No state statute confers upon him that rank. Further there are no decisions in the State of New Jersey directly or indirectly deciding that an Assistant Prosecutor is such. Secondly, and here lies the appellant's chief contention, if the Assistant Prosecutor is deemed to be a judicial officer and as such entitled to invoke the privilege of such immunity, still he clearly crossed and abused his office by acting in a situation where he clearly had no right. This is proven by the appellee's own affidavit which is the most convincing admission on the point. Assuming further that the Assistant Prosecutor did have the power to examine and investigate bail, in that procedure, too, he abused the power by refusing to accept properly tendered bail. He violated every legal rule and method of procedure in the case at bar. By so doing, he caused the appellant to be deprived of his guaranteed constitutional rights and privileges. The least ~~he~~ ^{the appellant} could be afforded is the right to bring a civil suit for false imprisonment. And counsel for appellant urge that the Supreme Court Commissioner, although expressing the true nature of the facts and highly condemning the Assistant Prosecutor's practice as such, failed to go into the question of the appellee's abuse of authority by virtue of which he became liable to the suit brought. Counsel for appellant feel that the merits of this point alone would warrant a reversal. In final conclusion counsel for appellant say that the Supreme Court Commissioner erred in striking out the appellant's complaint and, for the reasons urged, the judgment should be reversed.

Respectfully submitted,

MINTURN & WEINBERGER,
Attorneys and of Counsel with Appellant.

