INDEX

NOTICE OF APPEAL.

Filed March 27, 1929.

Essex County Circuit Court

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff*, *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To Benjamin P. De Witt, attorney of defendants, or to whom it may concern:

SIR:

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

Dated: October 3, 1928.

Respectfully yours,

JOHN V. LADDEY,
Attorney of Plaintiff.

GROUNDS OF APPEAL.

Filed March 30, 1929.

New Jersey Court of Errors and Appeals

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff,*		*Action at Law.*
vs.		
NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*		*Grounds of Appeal.*

The following are the grounds of appeal which will be urged at the argument of the appeal in the above-entitled cause:

1. The Essex County Circuit Court granted the motion to strike out the complaint on the ground that it failed to state a cause of action because the complaint did not allege that a capias *ad satisfaciendum* was returned *non est inventus,* whereas the said Court should have denied the motion to strike out the complaint.

JOHN V. LADDEY,
Attorney for Plaintiff.

SUMMONS.

Essex County, *ss.*

The State of New Jersey, to National Surety Company, a corporation; Ludwig Held and Ludwig Hascher:

(seal)

You Are Summoned To Answer the annexed complaint upon recognizance of bail of Sophie Lully, administratrix *ad prosequendum* Anthony J. Lully, deceased, in an action at law in the Essex County Circuit Court: And Take Notice, that unless you file your answer to said complaint with the Clerk of said Court at Newark, within twenty days, after service upon you of this writ and the said annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Nelson Y. Dungan, Esquire, Judge of Essex County Circuit Court, at Newark, this 14th day of May, A. D. Nineteen Hundred and Twenty-eight.

JOHN H. SCOTT,
Clerk.

John V. Laddey,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Complaint.* *Upon Recognizance of Bail.*

Plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says:

FIRST COUNT.

1. On May 3, 1927, defendant, National Surety Company, a corporation, and defendant, Ludwig Held, entered into a recognizance of bail, under its seal, to the plaintiff, in the sum of $7,000., in an action then pending in the New Jersey Supreme Court wherein the plaintiff brought suit against William Le Baron, Ludwig Held and Ludwig Hascher, and whereby the said defendants, National Surety Company and Ludwig Held, acknowledged themselves to owe unto plaintiff the sum of $7,000. each, to be levied upon their several goods and lands, upon the condition that if the defendant, Ludwig Held, shall be condemned in the said action at the suit of the plaintiff, he shall pay the costs and condemnation of the Court or render himself

into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so that the National Surety Company will pay the costs or condemnation for him or render him into the custody of the Sheriff of said County, a copy of which recognizance of bail is attached hereto and made a part hereof.

2. The said defendant, Ludwig Held, named in the said recognizance, was condemned on April 26, 1928, in the said action in the New Jersey Supreme Court as aforesaid, in the sum of $21,500. damages and $98.31 costs.

3. The said defendant, Ludwig Held, has not paid the said costs, nor the said condemnation of the Court, nor rendered himself into the custody of the Sheriff of Middlesex County.

4. The said defendant, National Surety Company, has not paid the costs, nor condemnation of the Court for the said defendant, Ludwig Held, nor has the said defendant, National Surety Company, rendered Ludwig Held into the custody of the Sheriff of Middlesex County.

5. Nothing has been paid by either of said defendants on account of said recognizance of bail.

Plaintiff demands as damages $7,000.00.

SECOND COUNT.

1. On May 3, 1927, defendant, National Surety Company, a corporation, and defendant, Ludwig Hascher, entered into a recognizance of bail, under its seal, to the plaintiff, in the sum of $7,000., in an action then pending in the New Jersey Supreme Court wherein the plaintiff brought suit against William Le Baron, Ludwig Held and Ludwig Hascher, and whereby the said

defendants, National Surety Company and Ludwig Hascher, acknowledged themselves to owe unto plaintiff the sum of $7,000. each, to be levied upon their several goods and lands, upon the condition that if the defendant, Ludwig Hascher, shall be condemned in the said action at the suit of the plaintiff, he shall pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so that the National Surety Company will pay the costs or condemnation for him or render him into the custody of the Sheriff of said County, a copy of which recognizance of bail is attached hereto and made a part hereof.

2. The said defendant, Ludwig Hascher, named in the said recognizance, was condemned on April 26, 1928, in the said action in the New Jersey Supreme Court as aforesaid, in the sum of $21,500. damages and $98.31 costs.

3. The said defendant, Ludwig Hascher, has not paid the said costs, nor the said condemnation of the Court, nor rendered himself into the custody of the Sheriff of Middlesex County.

4. The said defendant, National Surety Company, has not paid the costs, nor condemnation of the Court for the said defendant, Ludwig Hascher, nor has the said defendant, National Surety Company, rendered Ludwig Hascher into the custody of the Sheriff of Middlesex County.

5. Nothing has been paid by either of said defendants on account of said recognizance of bail.

Plaintiff demands as damages $7,000.00.

JOHN V. LADDEY,
Attorney for Plaintiff.

RECOGNIZANCE OF BAIL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOPHIE LULLY, administratrix *ad prosequendum* to prosecute a suit for damages by reason of the death of Anthony J. Lully, deceased, *Plaintiff*, *vs.* WILLIAM LE BARON, LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Recognizance of Bail.*

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

BE IT REMEMBERED, that on the third day of May, 1927, Ludwig Held and National Surety Company, a corporation, 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 Sophie Lully, administratrix *ad prosequendum* Anthony Lully deceased the sum of Seven Thousand Dollars each to be levied upon their several goods and lands, upon condition that if the defendant Ludwig Held shall be condemned in this action at the suit of Sophie Lully, admx. as aforesaid he shall pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so that the said National Surety Company will pay the costs and condem-

nation for him or render him into the custody of the Sheriff of the said County.

LUDWIG HELD.
(SEAL)

NATIONAL SURETY COMPANY,

By GEO. A. KAYSER,
Atty.-in-fact.
(SEAL)

Taken and acknowledged the day and year above written before me a Supreme Court Commissioner of New Jersey.

MILTON M. UNGER,
A Supreme Court Commissioner
of New Jersey.

RECOGNIZANCE OF BAIL.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

SOPHIE LULLY, administratrix *ad prosequendum* to prosecute a suit for damages alleged to have occurred by reason of the death of Anthony J. Lully, deceased, *Plaintiff,* *vs.* WILLIAM LE BARON, LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Recognizance of Bail.*

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

BE IT REMEMBERED, that on the third day of May, 1927, Ludwig Hascher and National Surety Company, a corporation, 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 Sophie Lully, administratrix *ad prosequendum* Anthony Lully, deceased, the sum of Seven Thousand Dollars each to be levied upon their several goods and lands, upon condition that if the defendant Ludwig Hascher shall be condemned in this action at the suit of Sophie Lully, admx. as aforesaid he shall pay the costs and condemnation of the Court or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail

Recognizance of Bail.

to do so that the said National Surety Company will pay the costs and condemnation for him or render him into the custody of the Sheriff of the said County.

LUDWIG HASCHER.
(SEAL)

NATIONAL SURETY COMPANY,

By GEO. A. KAYSER,
Atty.-in-fact.
(SEAL)

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

MILTON M. UNGER,
A Supreme Court Commissioner
of New Jersey.

NOTICE.

Filed May 24, 1928.

ESSEX COUNTY CIRCUIT COURT.

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff*, *against* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Notice.*

To John V. Laddey, Esquire, attorney of plaintiff.

SIR:

PLEASE TAKE NOTICE that on the 26th day of May, 1928, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Hall of Records in Newark, New Jersey, before Honorable Newton H. Porter, Judge of the above-stated court, I shall move to strike out the alleged causes of action contained in the complaint filed in this action on the ground that the said alleged causes of action in said complaint do not disclose any causes of action in that:

1. The first alleged cause of action contained in the complaint fails to contain any allegation that a *capias ad satisfaciendum* was issued to the Sheriff and returned *non est inventus* or any compliance with the provisions of Section 79 of the New Jersey Practice Act.

Notice.

2. The second alleged cause of action contained in the complaint fails to contain any allegation that a *capias ad satisfaciendum* was issued to the Sheriff and returned *non inventus est* or any compliance with the provisions of Section 79 of the New Jersey Practice Act.

Dated: May 21, 1928.

BENJAMIN P. DE WITT,
Attorney of Defendants Ludwig Held, Ludwig Hascher and National Surety Company.

MEMORANDUM OF JUDGE.

ESSEX COUNTY CIRCUIT COURT.

SOPHIE LULLY, administratrix *ad prosequendum* of Anthony J. Lully, deceased, *Plaintiff,*	*Action at Law.*
vs.	
NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*On Motion to Strike out Complaint.*

Newark, N. J., June 26, 1928.

For plaintiff: John V. Laddey, Esq.

For defendants: Benjamin P. De Witt, Esq.

PORTER, *J.*

On motion to strike out the complaint. The action is brought to recover the amount due the plaintiff from the defendants under the terms and conditions of a recognizance of bail. The complaint sets forth the terms and conditions of said recognizance, and charges a breach of said conditions. Several reasons are urged on behalf of the defendants in support of the motion. The only question to be considered on this motion is whether or not the complaint sets forth a proper cause of action.

Section 79 of the Practice Act provides:

> "After a *capias ad satisfaciendum* shall have been returned *non est inventus,* the plaintiff may proceed against the bail upon their recognizance."

Memorandum of Judge.

Under this statute, it seems prerequisite that a compliance with its provisions must be had before an action on the recognizance will lie.

That being so, the complaint must contain an averment to that effect.

There is none such in this complaint. *Morgan* v. *Bowman,* 137 Atl. 655, is cited by the attorney for the plaintiff as authority to the contrary. I do not so read it.

The motion is granted.

(Signed) NEWTON H. PORTER,
Circuit Court Judge.

ORDER STRIKING OUT COMPLAINT.

Filed July 7, 1928.

ESSEX COUNTY CIRCUIT COURT.

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law upon Recognizance of Bail.* *Order Striking out Complaint.*

A motion having been regularly made by the defendants, National Surety Company, Ludwig Held and Ludwig Hascher to strike out the complaint in the above-entitled action upon the ground that it failed to state a cause of action.

Now on reading the complaint and upon all the proceedings herein, and after hearing Benjamin P. De Witt, Esquire, attorney for the defendants in favor of said motion, and John V. Laddey, Esquire, attorney for the plaintiff in opposition thereto, and it appearing that the complaint in the above-entitled action fails to state a cause of action

IT IS HEREBY ORDERED that the complaint in the above-entitled action be stricken out.

Dated: July 5, 1928.

Order Striking Out Complaint.

Let the above order be entered on the minutes.

NEWTON H. PORTER,
Circuit Court Judge.

Entered on motion of

BENJAMIN P. DE WITT,
Attorney for National
Surety Company, Ludwig
Held and Ludwig Hascher.

Notice.

Filed May 11, 1929.

ESSEX COUNTY CIRCUIT COURT.

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants.*	*Action at Law.* *Notice.*

To John V. Laddey, Esquire, attorney of plaintiff:

SIR:

PLEASE TAKE NOTICE, that on the 26th day of May, 1928, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the Hall of Records in Newark, New Jersey, before Honorable Nelson Y. Dungan, Judge of above-stated court, I shall move to strike out the plaintiff's complaint upon the ground that the said complaint does not disclose any cause of action. In addition to the grounds specified in the Notice of Motion in the above entitled action, dated May 21st, 1928, and served upon the attorney of the plaintiffs on May 22d, 1928, returnable at the same time and place as this Notice of Motion, the defendants will urge that:

1. The first alleged cause of action contained in the complaint failed to contain any allega-

tions that the recognizance of bail upon which the said alleged cause of action is based, is still in full force and effect.

2. The recognizance of bail upon which the first alleged cause of action was totally discharged by an Order dated April 30th, 1928, made by Honorable Worrall F. Mountain, Justice of the Circuit Court of the State of New Jersey, and New Jersey Supreme Court Commissioner sitting at a term of the New Jersey Supreme Court, and filed in the office of the clerk of the New Jersey Supreme Court on May 4th, 1928;

3. The second alleged cause of action contained in the complaint failed to contain any allegations that the recognizance of bail, upon which the said alleged cause of action is based, is still in full force and effect.

4. The recognizance of bail upon which the second alleged cause of action was totally discharged by an Order dated April 30th, 1928, made by Honorable Worrall F. Mountain, Justice of the Circuit Court of the State of New Jersey, and New Jersey Supreme Court Commissioner sitting at a term of the New Jersey Supreme Court, and filed in the office of the clerk of the New Jersey Supreme Court on May 4th, 1928.

Dated: May 23d, 1928.

BENJAMIN P. DE WITT,
For Defendants Ludwig Held and Ludwig Hascher.

BENJAMIN P. DE WITT,
For Defendant National Surety Co.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff-Appellant,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants-Appellees.*	*On Appeal from Essex County Circuit Court.*

BRIEF FOR PLAINTIFF-APPELLANT.

Statement of the Case.

This is an appeal from an order made by the Essex County Circuit Court, striking out the complaint in the above-entitled cause on the ground that the complaint failed to state a cause of action.

The suit is upon two recognizances of bail of $7,000 each, which the defendants, National Surety Company and Ludwig Held, and National Surety Company and Ludwig Hascher, respectively, entered into with the plaintiff on a *capias ad respondendum,* which issued against the defendants Held and Hascher, the condition in each of which recognizances being:

> "If the defendant should be condemned in the action, he shall pay the costs and condemnation of the court or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so, that the National Surety Co. will pay the costs and condemnation for him, or render him into the custody of the Sheriff of said County."

The complaint alleges that on May 3, 1927, defendant National Surety Co. and defendant Held, and defendant Hascher, respectively, each entered into a recognizance to the plaintiff in the sum of $7,000, in an action then pending in the New Jersey Supreme Court, wherein the plaintiff brought suit against defendants Held and Hascher and by which recognizances the said defendant National Surety Co. and defendants Held and Hascher, respectively, acknowledged themselves to owe unto the plaintiff the sum of $7,000 each, to be levied upon their several goods and lands, upon the condition that if the defendant should be condemned in the action, he shall pay the costs and condemnation of the court, or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so that the National Surety Co. will pay the costs and condemnation for him, or render him into the custody of the Sheriff of said County; that the defendants were condemned on April 26, 1928 in the said Supreme Court action in the sum of $21,500 and costs; that neither of the defendants Held or Hascher had paid the said condemnation or costs, nor rendered themselves into the custody of the Sheriff of Middlesex County; and that the defendant National Surety Co. had not paid the condemnation and costs, nor had rendered the defendants Held and Hascher, or either of them, into the custody of the Sheriff of Middlesex County, and that nothing had been paid by any of the defendants on account of said two recognizances.

The defendants gave notice of motion to strike out the complaint on the ground that "the cause of action contained in the complaint fails to contain any allegation that a *capias ad satisfaciendum* was issued to the Sheriff and returned *non*

est inventus, or any compliance with the provisions of Section 79 of the New Jersey Practice Act."

The Judge of the Essex County Circuit Court decided that the complaint was defective in that the complaint did not allege that a writ of *capias ad satisfaciendum* had been returned *non est inventus* and made an order striking out the complaint.

Ground of Appeal.

The Essex County Circuit Court granted the motion to strike out the complaint on the ground that it failed to state a cause of action because the complaint did not allege that a *capias ad satisfaciendum* was returned *non est inventus,* whereas the said Court should have denied the motion to strike out the complaint.

ARGUMENT.

I.

Answer should be filed.

A motion to strike out a complaint in effect admits, for the purpose of the motion, the truth of the allegations of the complaint.

The complaint sets out the recognizances, with full copies of the recognizances annexed thereto, providing for surrender to the Sheriff of Middlesex County, and that the defendants were condemned in the sum of $21,500.00, and that they did not surrender to the Sheriff of Middlesex County, and that the surety had not paid the condemnation and also that the surety had not rendered the defendants into the custody of the Sheriff of Middlesex County.

These facts are admitted by the motion to strike out the complaint.

Plaintiff contends that whatever matter can be set up against this claim, should be set up by way of an answer.

Defendants contend that Section 79 of the Practice Act, 3 C. S. 4075, enacted in 1799, providing that:

> "After a *capias ad satisfaciendum* shall have been returned *non est inventus* the plaintiff may proceed against the special bail upon his recognizance." P. L. 1903, p. 559; 1799, Sec. 80,

requires that the complaint allege that a *capias ad satisfaciendum* was returned *non est inventus.*

In the case of *Cochran* v. *Drake* (Supr. Ct. 1840), 18 L. 9, it was held that:

> "the want of a *capias ad satisfaciendum* against the principal cannot be taken advantage of by the bail on motion, it is matter of substance and must be pleaded."

This case was decided in 1840 and Section 79 of the Practice Act is on the Statute Books since 1799.

In Chitty on Pleading, Vol. 2, Precedents of Declarations on Recognizances of Bail, do not contain any allegation that a *capias ad satisfaciendum* had issued and returned *non est inventus.*

In the case of *Morgan* v. *Bowman,* 137 A. 655, 103 L. 542, it was held:

> "The statutory language contained in a recognizance of bail to the action, providing that if the defendant shall be condemned in the action, he shall pay the costs and condemnation, or render himself into custody, and, if he fail to do so, the bail shall pay

> the costs and condemnation for him, refers to the final judgment in such action, if in favor of the plaintiff."

This case practically holds that if there is a verdict for the plaintiff, and where defendants neither pay nor surrender, no *capias ad satisfaciendum* is required where a *capias ad respondendum* has issued and a recognizance was given thereunder, for the reason that the obligee to the recognizance may elect to avail himself of the benefits thereunder in preference to issuing a *capias ad satisfaciendum,* notwithstanding the judgment is greater than the amount recoverable under the recognizance.

The recognizance of bail given in the case at Bar, constitutes a contract under seal between the parties, whereby, the defendants obligated themselves to surrender to the Sheriff of Middlesex County. *Expressum facit cessare tacitum.* Defendants are obligated to comply with their contract.

Where a *capias ad satisfaciendum* has issued and is returned *non est inventus,* the liability of the bail is conclusively fixed, whereas in a suit on a recognizance where no *capias ad satisfaciendum* issued, there may be defenses interposed to the liability of bail for the recognizance given under a *capias ad respondendum,* where the liability of the bail is based upon a breach of one of the terms or provisions of that recognizance, in which latter case the defendants can, by statute, still be surrendered within a twenty-day period. Sec. 77 of the Practice Act, 3 C. S. 4075.

II.

Section 79 of the Practice Act is permissive only.

Section 79 only permits plaintiff to preclude any defense, by issuing a *capias ad satisfaciendum* and having same returned *non est inventus*, thereby conclusively fixing the bail's liability.

The fact that a *capias ad satisfaciendum* did not issue is favorable to defendants in that such a situation permits defendants to make a defense, which would otherwise be barred. The issuance of a *capias ad satisfaciendum* where a recognizance was given under a *capias ad respondendum* is only permissive and not obligatory.

The word "may" as used in this section is not mandatory.

The Statute, Section 79, being permissive, does not deprive one of the right to sue for breach of contract, even though subject to certain defenses as compared with no substantive defense, where a *capias ad satisfaciendum* issued and whereby the liability of the bail became fixed. A *capias ad satisfaciendum* is merely a privilege to conclusively fix the liability of the bail if the obligee of the bond chooses to do so.

It is, accordingly, contended that an obligee upon a recognizance of bail is not obliged to allege in his complaint that a *capias ad satisfaciendum* was returned *non est inventus*. The allegation, that no *capias ad satisfaciendum* issued, is purely a matter of defense, which must be raised by the answer.

III.

Bond sub judice is a special bond voluntarily given.

The form of bond given in this case creates a situation in which Section 79 of the Practice Act is not applicable.

Section 69 of the Practice Act, 3 C. S. 4072, provides that the recognizance given by a defendant shall be to the effect of a form of a bond, set up in that section, but it has been held that a variation from the statutory form does not void such a bond and the surety is estopped from objecting to its validity.

In the case at Bar, the bond is not in the statutory form, for the reason that it does not provide a surrender to the Sheriff of the County in which the venue was laid.

The bond given provides for a surrender to the Middlesex Sheriff. It is, therefore, a voluntary bond and under terms of such a bond, no notice to the bail, by way of a *capias ad satisfaciendum,* need be given.

The defendants obligated themselves to surrender to the Middlesex County Sheriff, notwithstanding the statutory form of bond requiring surrender to the Sheriff of the County in which the venue was laid. Plaintiff accepted this bond.

It is for the reason that the bond is a variation from the statutory bond that Section 79, providing for notice by way of a *capias ad satisfaciendum* to the bail, is not applicable to a bond like the one given in the case at Bar, which is a voluntary bond, specifically providing for the surrender to the Middlesex County Sheriff.

It is a special bond as in the case of *Emanuel* v. *McNeil,* 94 A. 616, 87 L. 499, in which Chan-

cellor Walker for the Court of Errors and Appeals held:

> "Practice Act, Sec. 69 (P. L. 1903, p. 555), provides that the recognizance which may be given by a defendant arrested on a *capias ad respondendum* shall be to the effect and not literally in the form therein set out; and Section 77 provides independently that, subsequent to the return of the *capias ad respondendum*, either before or after judgment, the defendant may render himself or be rendered in discharge of bail. HELD, that a recognizance given in the form set out in Section 69, with the exception of omitting the last alternative in the condition contained in the statutory form, viz., 'or render him (defendant) into the custody of the Sheriff,' does not make the recognizance void."
>
> "Our statute does not enact that a recognizance of bail given in a form varying from that set out shall be void; and we have no statute or rule which operates to nullify the recognizance sued on by the parties to this cause."
>
> "The record in this cause being silent as to any coercion or duress, and the bond sued on not being prohibited by statute, and not being contrary to public policy, but being founded upon a good and sufficient consideration and intended to subserve a lawful purpose, is, between the parties, good as a voluntary bond."
>
> "The surety on a bond of the character and given under the circumstances above mentioned is estopped from objecting to its validity."

The recognizance in the case at Bar shows on its face that it is not strictly a statutory recognizance, and although the departure from the statutory form does not make it invalid, it becomes thereby a voluntary bond and Section 79 with reference to a *capias ad satisfaciendum* does not apply.

Section 79 does not provide that a complaint must allege that a *capias ad satisfaciendum* has issued and returned *non est inventus,* but inferentially provides that the bail may show that no *capias ad satisfaciendum* issued and was returned *non est inventus.*

The purpose of the *capias ad satisfaciendum* is to give notice to bail that plaintiff intends to proceed against him. If this defense is made, plaintiff may show that bail had notice in some other way.

It is, therefore, obvious that defendants' defenses must be set up by way of an answer.

Conclusion.

It is, therefore, contended that the complaint shows on its face a sufficient, complete and valid cause of action and it is urged that the order striking out the complaint be reversed.

Respectfully submitted,

JOHN V. LADDEY,
Attorney for and of Counsel
with Plaintiff-Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff-Appellant,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants-Appellees.*	*On Appeal from Essex County Circuit Court.*

REPLY BRIEF OF PLAINTIFF-APPELLANT.

Argument Addressed to Defendants-Appellees' Supplemental State of Case.

The addition to the State of Case, by the appellees, of the second Notice of Motion which had not been filed in Court below, necessitates the filing of a reply brief by the appellant.

With reference to the first and third grounds set up in that Notice of Motion, both of which grounds are alike in tenor, reading:

> "The (first and second) alleged cause of action contained in the complaint failed to contain any allegations that the recognizance of bail upon which the said alleged cause of action is based, is still in full accord and effect,"

it should be pointed out that such an allegation would be bad pleading, because it would state a legal conclusion, whereas the complaint under attack, setting out the facts and conditions of the recognizances and that the conditions precedent thereto had eventuated, and that the conditions set up in that recognizance, to be complied

with by the obligors, had not been complied with, shows that the recognizance is in full force and effect.

With reference to the second and fourth grounds also alike in tenor, reading:

> "The recognizance of bail upon which the (first and second) alleged cause of action was totally discharged by an Order dated April 30th, 1928, made by Honorable Worrall F. Mountain, Justice of the Circuit Court of the State of New Jersey, and New Jersey Supreme Court Commissioner sitting at a term of the New Jersey Supreme Court, and filed in the office of the clerk of the New Jersey Supreme Court on May 4th, 1928,"

it should be pointed out the Order referred to states itself out of Court, because it shows an order made on April 30, 1928, in Supreme Court cause by one other than a Justice of the Supreme Court, whereas the defendants Held and Hascher were condemned on April 26, 1928, in said action in the New Jersey Supreme Court, as stated in the complaint under attack.

Furthermore, the defendants' insistence that the order of discharge made in another cause and, therefore, clearly outside of the record of this case, must be considered, is proof that an answer, in which this is set up, is necessary to create an issue.

Furthermore, the Order adjudging that the conditions of the two recognizances of bail heretofore given and filed herein on the 3rd day of May, 1927, have been completely fulfilled, contradicts the recognizance which is a matter of record.

The fact of the discharge is purely a matter of defense.

It is clear, therefore, that an answer should be filed.

Argument by Way of Reply to Defendants' Brief.

Defendants' brief attempts to spell out that a motion to strike out, is equivalent to a plea.

It is contended by the plaintiff-appellant that to plead means a plea setting up a fact and that the Court's holding in the case of *Cochran* v. *Drake,* 18 L. 9, that the want of a *capias ad satisfaciendum* should be pleaded, means that a plea synonymous with answer should be filed.

Stephen's on Pleading, at page 83, says:

> "If defendant does not demur, his only alternative method of defense is to oppose or answer the declaration by matter of fact. In so doing he is said to *plead* (by way of distinction from demurring) and the answer of fact so made is called the plea."

Tidd, Vol. 2, page 1182, says:

> "They may *plead* in discharge of their liability that there was no *capias ad satisfaciendum* sued out and returned against the principal."

Chitty's Archbold, Vol. 1, page 798, says:

> "If no *capias ad satisfaciendum* be actually sued out and returned and an action of debt, or *scire facias,* be brought against the bail, the bail may *plead* this matter; but the Court it seems will not quash the *scire facias* or stay the proceedings on motion."

Section 79 of the Practice Act does not make it compulsory that a *capias ad satisfaciendum* issue and be returned *non est inventus* before suit on a special bond voluntarily given, as in the case at bar, can be instituted, especially where such bond is in a lesser amount than the amount of the judgment obtained in the cause, for the reason that a judgment creditor may be taken to have lost his right to resort to other

process to be sued out against judgment debtor's lands and goods, when the said judgment debtor is once taken in execution upon a writ of *capias ad satisfaciendum.*

A judgment debtor should be permitted to preserve unprejudiced his right to proceed against the personalty and realty that the defendant may have concealed at the time of the judgment, or may acquire thereafter, and this should be particularly indicated where the judgment debtors are residents of California, as in the case at bar.

To hold that the provision that defendants render themselves into the custody of the Middlesex County Sheriff is meaningless, would be, as *C. J.* Gummere held in *Glynn* v. *Kelly*, 71 L. 10, 58 A. 178, to practically declare such bonds to be mere waste paper for the obligor could with impunity entirely disregard the condition of the bond unless and until suit would be brought upon it, and then defeat a recovery by contending that it was meaningless.

The complaint alleges that the defendants have not paid the judgment and have not been surrendered to the Sheriff of Middlesex County. This is a sufficient allegation of the forfeiture of the special bond, voluntarily given in this case.

An allegation that a *capias ad satisfaciendum* has been returned *non est inventus* is an inferential allegation of a forfeiture as a conclusion of law. It may be pleaded as a fact that no *capias ad satisfaciendum* has been returned *non est inventus* and that would merely raise the question of notice to the bail.

The two principal defendants cannot plead it, as they are not entitled to notice.

An allegation that the bond had become forfeited and that no surrender has been made, implies that the bail had notice. The bail should answer that they had no notice that the plaintiff intended to proceed, which must be set up by an answer.

It has been intimated that the plaintiff-appellant's contention is based on a mere technicality. The question of technicality is one of relativity.

The plaintiff-appellant's contention is not, relatively speaking, a technicality in view of all the circumstances of the case, which were as follows:

Defendants Held and Hascher were traveling in an automobile owned by Held and operated by Hascher from Connecticut to California. As they were traveling along the Lincoln Highway, in Middlesex County of this State, they drove so recklessly and so far on the left-hand side of the road as to be the third auto abreast of other vehicles and thereby to run into the motorcycle, which was traveling in the opposite direction on its right-hand side of the road, and being operated by the plaintiff's husband, thereby causing the death of the 28-year-old husband of the 27-year-old plaintiff, and father of two infant children, 2 and 5 years of age, respectively.

The reason for the violation of the conditions of the special bond voluntarily given in this case may be found in the surmise that the defendants Held and Hascher may have been under a desire to avoid everything that might cause attention being drawn to their offense in Middlesex County, where they were indictable for manslaughter.

Plaintiff-appellant's insistence upon her contention that the defendants have violated the conditions of their bond, would tend to result in an approximation of justice in the abstract through close and strict adherence to justice according to law, namely, the letter of the law.

It should, of course, always be borne in mind that we are not asking this appellate court for a money judgment, nor for the affirmance of a money judgment, but merely for a request that an answer be filed to the complaint herein.

Respectfully submitted,

JOHN V. LADDEY,
Attorney for and of Counsel
with Plaintiff-Appellant.

Receipt of 3 copies of Defts Brief is hereby acknowledged this 16th day of Dec 1929. [illegible] Atty for Pltff.

New Jersey Court of Errors and Appeals.

SOPHIE LULLY, administratrix *ad prosequendum* Anthony J. Lully, deceased, *Plaintiff-Appellant,* *vs.* NATIONAL SURETY COMPANY, a corporation; LUDWIG HELD and LUDWIG HASCHER, *Defendants-Appellees.*	*On Appeal from Essex County Circuit Court.*

BRIEF FOR DEFENDANTS-APPELLEES.

Statement of the Case.

This is an appeal from an order made by the Essex County Circuit Court striking out the complaint in the above entitled action on the ground that the complaint failed to state a cause of action. The action is based upon two recognizances of bail given under a *capias ad respondendum,* each of which contains the condition that:

> "If the defendant should be condemned in the action, he shall pay the costs and condemnation of the court or render himself into the custody of the Sheriff of Middlesex County for the same, or if he fail to do so, that the National Surety Co. will pay the costs and condemnation for him, or render him into the custody of the Sheriff of said County."

The defendants gave notice of motion to strike out the complaint on the ground that the complaint failed to state a cause of action in that it failed to allege compliance with the provisions of Section 79 of the New Jersey Practice Act and upon the further grounds (not mentioned in plaintiff-appellant's statement of the case) that the complaint failed to allege that the recognizances of bail were still in full force and effect and that the recognizances of bail were discharged by an order of the Supreme Court.

Judge Newton H. Porter of the Essex County Circuit Court held that a compliance with the provisions of Section 79 of the New Jersey Practice Act was prerequisite to the maintenance of an action against the bail upon the recognizances and that therefore an averment of such compliance should have been contained in the complaint. The Court in disposing of the motion upon this ground did not find it necessary to consider the further grounds urged by the defendants.

ARGUMENT.

I.

The complaint should contain an allegation that the provisions of Section 79 of the Practice Act have been complied with by plaintiff.

Section 79 of the New Jersey Practice Act, 3 C. S. 4075, provides:

> "79. **Plaintiff may proceed against bail.** After a *capias ad satisfaciendum* shall have been returned *non est inventus* the plaintiff may proceed against the special bail upon his recognizance."

The common law rule adopted by New Jersey courts prior to the enactment of Section 79 of the New Jersey Practice Act held that the liability of the bail was fixed only upon the return of *capias ad satisfaciendum non est inventus* and that until such return was regularly made the bail was not liable. *Armstrong* v. *Davis,* 1 L. 110.

Section 79 of the New Jersey Practice Act, which was originally enacted in 1799, is merely a statutory enactment of the pre-existing common law rule.

In *Cook* v. *Evans,* 16 L. 177, the Court, in considering the effect of the statutory provisions, held, at page 178:

> "This is manifest, where the defendant appears, and judgment passes against him, *for the security is not liable unless the defendant fails to surrender himself to the constable, upon execution * * *. There must therefore be a final judgment and execution thereon, against the defendant, before the security, in that case, can be liable."* (Italics mine.)

This statutory prerequisite to the maintenance of an action by a plaintiff against the special bail is a matter of substantive law and until the plaintiff has complied with the provisions of Section 79 she has no right of action against the bail for until a *capias ad satisfaciendum* is properly returned the liability of the bail is not fixed. That being so, the complaint must contain an allegation of compliance with the provisions of the said section to state a cause of action.

The plaintiff-appellant attempts to make three points:

1. That the recognizances of bail constituted a contract under seal between the parties.

2. That the plaintiff had the right to elect to avail herself of the benefits of the recognizances in preference to the issuance of a *capias* upon a *verdict* in her favor.

3. That the liability of the bail is fixed before any *capias* is issued and that the only effect of the return of the *capias ad satisfaciendum non est inventus* is to fix the liability of the bail conclusively.

1. The recognizances of bail, however, in themselves cannot constitute a contract between the parties for they fail to contain an essential provision—the time within which the defendants or their surety were to perform the conditions of the recognizances. In order to supply this missing provision it is necessary to refer to Section 79 of the New Jersey Practice Act which expressly fixes the time within which the conditions of the recognizances are to be performed by providing that the liability of the bail is fixed after a *capias ad satisfaciendum* has been issued and returned *non est inventus* and that at that time a right arises in the plaintiff to proceed against the special bail upon their recognizance. Until the provisions of this section have been complied with, the plaintiff has no right against the bail.

2. The plaintiff-appellant cites the case of *Morgan* v. *Bowman,* 137 A. 655, 103 L. 542, as establishing the plaintiff's right to elect to avail herself of the benefits of the recognizance in preference to the issuance of a *capias* upon a verdict in her favor.

An examination of this case discloses that the

plaintiff-appellant's contention is entirely unfounded. The verdict in this case was in favor of the *defendant,* not of the *plaintiff,* and no judgment was entered, and the question of whether the plaintiff upon a *verdict* in her favor could elect to avail herself of the benefits of these recognizances in preference to issuing a *capias ad satisfaciendum* could, therefore, not arise. The sole question involved in the *Morgan* case was whether a *verdict* of a jury in favor of a principal *in itself* discharged the recognizance and it was held by the Court that the verdict in itself did not discharge the recognizance since the verdict might be waived by the party in whose favor it was rendered and remained subject to the control of the Court until judgment was entered and since judgment might be rendered by the Court contrary to the verdict and in spite of it. The Court held that only a final judgment in favor of a principal would discharge bail from liability upon the recognizance.

If the plaintiff-appellant's contention is correct, it would mean that upon the entry of a judgment against a defendant, a plaintiff could commence an action against the bail without affording either the defendant or the bail an opportunity either to surrender or pay, the result of which would be that the bail, even though ready and willing to pay or surrender, would have to pay the costs of the action (Section 77 of the Practice Act, 3 C. S. 4075) and in addition thereto the fees of counsel which by reason of the action the bail would necessarily have to consult.

On the other hand, if as the defendants-appellees contend, a *capias* must first issue before an action can be begun, the bail would have three days, the period during which the *capias* must

remain with the Sheriff before return is made, in which the bail might either surrender or pay the judgment without any penalty.

3. The contention of the plaintiff-appellant that the liability of the bail is fixed before any *capias* is issued and that the only effect of the return of the *capias ad satisfaciendum non est inventus* is to fix the liability of the bail conclusively is equally without foundation. The implication which the plaintiff-appellant attempts to make is that the issuance and return of a *capias* precludes the special bail from raising certain defenses to an existing right of action including the defense of the surrender of the principal in accordance with the provisions of Section 77 of the Practice Act within twenty (20) days after the return day of the *scire facias* or of process in an action upon the recognizance. By the terms of Section 77 of the New Jersey Practice Act provision is made for the rendering of a principal by a bail in discharge of the recognizance at any time within twenty (20) days after the return day of the *scire facias* against the bail or of the process in an action on the recognizance of bail which must be preceded by the issuance of the *capias*. The proper return of a *capias ad satisfaciendum* fixes the bail only in so far that the bail will be liable unless the principal is surrendered within the time allowed by statute for his render to the sheriff or the bail otherwise discharged during that period.

This was likewise the rule at common law prior to the enactment of Section 77 of the Practice Act. At common law a principal might be rendered into the custody of the sheriff by the bail within the time allowed *ex gratia* by the practice

of the Court and his only liability was the payment of the costs of the action instituted by the plaintiff if the action was brought after the return of the *capias*. Both at common law and under the statute the want of a *capias* does not create defenses in a bail to an otherwise enforceable right of action, but the issuance of a *capias* is a condition precedent which must be performed before *any* right against the bail accrues in the plaintiff. Even after the accrual of this right provision is made for the discharge of the liability of the bail. *Armstrong* v. *Davis, supra; Cook* v. *Evans, supra.*

The plaintiff-appellant also cites the case of *Cochran* v. *Drake,* (Supr. Ct. 1840) 18 L. 9, as authority for the proposition that "the want of a *capias ad satisfaciendum* against the principal cannot be taken advantage of by the bail on motion."

The Court in this case considered a motion to set aside a summons on the grounds that in order to fix the liability of the bail, a *capias ad satisfaciendum* had to be lodged with the sheriff of the county in which the defendant was arrested or that the plaintiff discharged the bail by laying the venue of the action against the principal in a different county from the one in which the arrest was made under the *capias ad respondendum.* In disposing of this motion the Supreme Court stated on page 10:

> "If, however, the want of a ca. sa. to the Sheriff of Sussex was fatal to the plaintiff, it could not be taken advantage of by the bail, on motion. The want of a ca. sa. is not a mere irregularity; but is a matter of substance of which, the bail can only take advantage by pleading."

This case was decided in 1840. At that time, common law forms of motions and pleadings were employed in the Courts of New Jersey. Many remedies now available in the form of motion under statutes subsequently enacted could then only be availed of by a defendant by pleading in the form of a demurrer. General demurrers were not abolished until the Practice Act of 1912, at which time a motion to strike out the complaint was substituted for that form of remedy. Motions at common law were restricted to a few defects dealing with matters in abatement, as, for example, a motion to set aside the service of summons. Other defects could only be attacked by the pleadings of the defendant, either in the form of a demurrer or answer. The case of *Cochran* v. *Drake* (*supra*), therefore, merely holds that since the return of a *capias ad satisfaciendum non est inventus* is not a mere irregularity such as might be attacked by a common law motion but is a matter of substance affecting the plaintiff's right to maintain an action against the special bail, the proper form of remedy was not to bring a common law motion but to take advantage of the want of the *capias ad satisfaciendum* by pleading to the declaration either in the form of a general demurrer to the action therein contained or by answer. Since general demurrers were abolished by the Practice Act of 1912 it now appears that the proper remedy of a bail is to bring a motion to strike out the complaint based on the defect in substance.

II.

Section 79 of the Practice Act is not permissive.

As stated above, the return of a *capias ad satisfaciendum* does not *conclusively* fix the bail's liability so as to preclude any defense, but is a condition precedent to the accrual of *any* right in the plaintiff against the bail for until such return the liability of the bail is not fixed. *Armstrong* v. *Davis* (*supra*), *Cook* v. *Evans* (*supra*), *Cochran* v. *Drake* (*supra*). The want of such return does not create a defense in favor of the bail to an otherwise enforceable right in the plaintiff but precludes the possibility of the existence of any right.

This section was adopted by the Legislature in 1799 and at that time read as follows:

> "LXXX. And be it enacted, That after a *capias ad satisfaciendum* shall have been returned *non est inventus*, by the sheriff or officer, the plaintiff may proceed against the special bail upon their recognizance."

Any claim upon the part of the plaintiff-appellant of ambiguity in this language must be dismissed when this section is read in conjunction with the marginal note accompanying the section at the time of its enactment which read as follows: "*When* the plaintiff may proceed against the special bail." (Italics mine.) (*An Act for the Limitation of Actions, enacted February 7, 1799, Sec. 80.*) A clearer statement of a condition precedent to the right to maintain an action could not be made.

The use of the word "may" does not refer to the return of the *capias* but refers directly to the

maintenance of an action upon the recognizance against the bail. The section is permissive only in the sense that the plaintiff upon the accrual of a right of action against the bail after the performance of the condition precedent, is not obligated to sue the bail but may do so in her discretion.

While we appreciate, of course, that the analogous statute of New York State is in no sense controlling upon this Court, it is interesting to note that it specifically provides that an action cannot be brought against the bail until (1) an execution against the principal's property has been returned wholly or partly unsatisfied and (2) until an execution against the person of the principal has been returned to the effect that the principal cannot be found. *N. Y. Civil Practice Act, Section 871.*

Since compliance with the provisions of Section 79 is a prerequisite to the maintenance of an action upon the recognizance, the complaint must contain an allegation of such compliance.

III.

Assuming, though not conceding, that the bonds are special bonds voluntarily given, the plaintiff is not excused from compliance with the provisions of Section 79.

The plaintiff-appellant cites the case of *Emanuel* v. *McNeil,* 94 A. 616, 87 L. 499 as authority for the proposition that if the bonds are mere voluntary bonds, no notice to the bail by way of a *capias ad satisfaciendum* need be given.

In this case the bond given did not contain the last alternative in the condition contained in the statutory form, viz., "or render him (defendant) into the custody of the Sheriff." The bail attempted to attack the validity of the bond because of its failure to comply with the statute and Chancellor Walker held that since the bail had the right to surrender the principal in discharge of the bail's liability by virtue of the provisions of the dissociated Section 77 of the Practice Act, even though this provision was not contained in the recognizance, the bail was estopped from objecting to its validity, stating at page 617:

> "The statutory provisions of the Practice Act above mentioned are both under the heading 'VII. Bail'; and section 69 requiring the recognizance to be to the effect therein set out, is under the subdivision, '2. Bail. How Given'; while section 77 is under the subdivision '4. Render in Discharge'. It thus appears that sections 69 and 77 are dissociated one from the other, and are entirely independent provisions. Surely then, failure to insert in the recognizance of bail the alternative condition, which was omitted, cannot operate to nullify the provision contained in section 77, which enables a defendant to render himself, or his surety to render him in discharge of bail. Therefore the respondent was not deprived of his right to render his principal in discharge of bail, notwithstanding the omission of the condition to that effect in the bond, and consequently the recognizance was not in fact more burdensome than that set forth in the statute."

Thus even in the case of a voluntary bond provisions contained in dissociated sections of the Practice Act are operative for the protection of the bail. Section 79 is likewise a dissociated sec-

tion under subdivision "5. Proceedings Against" of the main heading "VII. Bail" and the plaintiff is not excused from compliance with the provisions thereof even if it be assumed that the recognizances of the defendants are voluntary bonds. It is significant that Chancellor Walker's statement of the case on page 616 of the report reveals the fact that a *capias* was duly issued and returned in this case before suit was commenced against the bail.

The decision of the Chancellor in *Emanuel* v. *McNeil* plainly imposes an obligation upon the plaintiff to comply with the terms of Section 79 as a prerequisite to an action against the bail even in the case of a voluntary bond.

IV.

The complaint fails to state a cause of action in that it fails to allege that the recognizances are still in full force and effect.

Special bail upon a recognizance given under a *capias ad respondendum* may be discharged of all liability in various ways in addition to the payment of the judgment entered against the principal or the render of the principal into the custody of the Sheriff. The death of the principal, insanity of the principal, bankruptcy of the principal, discharge of the principal under insolvent debtor proceedings, sentence of principal to transporation and certain acts and defaults of the plaintiff likewise effect a discharge of the bail and entitle the bail to the entry of an *exoneretur* discharging the recognizance. *Morgan* v. *Bowman*, 137 A. 655, 656.

A bare allegation that the judgment has not been paid or the principals rendered into the custody of the Sheriff is, therefore, not equivalent to an allegation that the recognizances are still in full force and effect and an allegation in those terms must be included in the complaint. The entry of an *exoneretur* upon the recognizance by the clerk who has custody of the recognizance is a summary remedy created by statute to protect the bail against unfounded actions and if plaintiffs were allowed to institute litigation against special bail upon recognizances discharged of record, the summary remedy of the bail would be of no effect. The complaint, therefore, must contain an allegation, similar to that required in all actions upon contract, to the effect that the recognizances are still in full force and effect.

Conclusion.

The complaint in the above-entitled action fails to state a cause of action in that it fails to allege (1) any compliance with the provision of Section 79 of the New Jersey Practice Act and (2) that the recognizances of bail are still in full force and effect and the order striking out the complaint should be affirmed.

Respectfully submitted,

BENJAMIN P. DEWITT,
Attorney for and of Counsel,
with the Defendants-Appellees.