

# New Jersey Supreme Court

ANTHONY SINDONI,

Plaintiff-Appellee,

vs.

STEPHANO LA ROSA,

Defendant-Appellant.

On Contract.

On Appeal from  
the Atlantic City  
District Court.

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## REASONS.

(Filed January 29, 1913.)

The appellant specifies the following reasons or determinations of the court in the above cause, on which he relies in the argument in the above cause:

1. Because the suit was based on a promise to answer for a debt, promise or default of a third person by the defendant below, and was not in writing, and because the court permitted the cause to go to the jury over the objection of defendant. 20

2. Because the court refused to nonsuit the plaintiff at the close of his case on motion of defendant below, upon the reason urged by the defendant that the case was within the Statute of Frauds, and no writing was shown to prove the liability of defendant.

3. Because the court refused to direct a nonsuit at the close of plaintiff's case for the reasons urged by the defendant below, as will appear in the printed testimony in the cause. 30

4. Because the court erroneously admitted evidence on behalf of the plaintiff below, and rejected testimony on behalf of the defendant below over the objection of defendant, as appears in the printed testimony.

5. Because the court refused to direct a verdict for the defendant at the close of the plaintiff's case, and for the reason urged on the motion for a direction.

5. Because the court refused to direct a verdict that if they believe the testimony of the plaintiff, they might find a verdict for him.

7. Because the court failed to direct the jury that the plaintiff could not recover unless the alleged agreement sued on was in writing, the cause coming within the Statute of Frauds, and requiring such promise to be in writing.

Dated January 18th, 1913.

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GARRISON & VOORHEES,  
Attorneys of Defendant-Appellant.

State of New Jersey, Atlantic Co., ss.:

Herbert R. Voorhees, on his oath says he served a copy of within reasons on Geo. A. Bourgeois, of the firm of Bourgeois & Coulomb, January 27, 1913.

HERBERT R. VOORHEES.

Sworn and subscribed this 29th day of January, 1913.

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L. D. CHAMPION,  
Attorney at Law of N. J.

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Atlantic City District Court.

ANTHONY M. SINDONI,

Plaintiff, )

vs.

30 STEPHANO LA ROSA

Defendant. )

NOTICE OF APPEAL.

(Filed January 16, 1913.)

To Bourgeois & Coulomb, Esqs.,  
Attorneys of Anthony Sindoni.

Sirs:—TAKE NOTICE that the Defendant, Stephano La Rosa, hereby appeals to the New Jersey

Supreme Court from the judgment of the Atlantic City District Court, rendered in the above stated action on the second day of January, 1913.

Dated January 3d, 1913.

GARRISON & VOORHEES,  
Attorneys of Defendant.

A properly executed appeal bond was approved by the Judge of the District Court and filed January 3d, 1913.

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Atlantic City District Court.

SUMMONS—ACTION AT LAW.

Atlantic County, Atlantic City, ss.:

The State of New Jersey, to any Constable of Atlantic County, Summon Stephano La Rosa to appear before the District Court of the City of Atlantic City, to be held at the Court Room, City Hall, third floor, North Entrance, in the said City, on Friday, the twenty-third day of August, nineteen hundred and twelve, at ten o'clock in the forenoon to answer unto Anthony M. Sindoni in an action at law for five hundred (real debt \$473.32) dollars. Hereof fail not. 20

WITNESS, Frank Smathers, Esq., Judge of said Court, at Atlantic City aforesaid, the seventeenth day of August, in the year of our Lord nineteen hundred and twelve. 30

GEORGE R. GREIR,  
BOURGEOIS & COULOMB,  
Attorneys.

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COMPLAINT.

The plaintiff, Anthony M. Sindoni, residing at number 109 South Mississippi Avenue, Atlantic

City, Atlantic County, New Jersey, says:

1. That on the third day of January, A. D. nineteen hundred and eleven, Sylvester Leeds agreed with the said plaintiff that if he, the said plaintiff, would sell and dispose of for the said Leeds, a certain tract of land situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

BEGINNING at a point in the Northeast corner of Indiana and Hummock Avenues, and extending (1) Eastwardly along the Northerly line of Hummock Avenue, two hundred feet to the Westerly line of Robinson Avenue; (2) Northwardly along the Westerly line of Robinson Avenue, one hundred thirty-three feet to the Southerly line of Logan Avenue; (3) Westwardly, along the Southerly line of Logan Avenue two hundred feet to the Easterly line of Indiana Avenue; (4) Southwardly, along the Easterly line of Indiana Avenue, one hundred and thirty-three feet to the place of beginning;

20 And also a certain tract of land situate in Atlantic City aforesaid, described as follows:

BEGINNING at a point in the Westerly line of a twenty feet wide alley, at a point distant one hundred feet South from the Southerly line of Lincoln Avenue and one hundred and forty-five feet West from the Westerly line of Indiana Avenue, measured at right angles thereto respectively, and extends thence (1) Westwardly, parallel with Lincoln Avenue, one hundred feet to the Easterly line of a fifteen feet wide alley; thence (2) Southwardly, along said 30 alley, parallel with Indiana Avenue one hundred feet; (3) Eastwardly, parallel with Lincoln Avenue, one hundred feet to the Westerly line of a twenty feet wide alley; (4) Northwardly, along the same, parallel with Indiana Avenue, one hundred feet to the place of beginning; that he, the said Leeds, would pay to the said plaintiff two per cent. commission on the sale price thereof.

2. Afterwards, to wit, on the . . . . . day of February, A. D. nineteen hundred and eleven, the plain-

tiff procured a purchaser for the said property, to wit, Stephano La Rosa, who agreed that he would pay therefor the sum of Twenty-Five Thousand Three Hundred Dollars (\$25,300).

3. That in accordance with the contract between the plaintiff and the said Leeds, plaintiff's commission at two per cent. would amount to Five Hundred and Six Dollars (\$506).

4. That upon entering into the agreement between the said Leeds and the said La Rosa for the purchase of said property, the said Leeds refused to sell the said property unless he could procure for the same the sum of Twenty-five Thousand Three Hundred, net, and would not sell the said property to the said La Rosa for the sum of Twenty-five Thousand Three Hundred Dollars if he was obliged to pay out of said sum the sum of Five Hundred and Six Dollars to the plaintiff as commissions thereon. 10

5. That after some negotiations between the said La Rosa and the said Leeds and the plaintiff, the said La Rosa directed the plaintiff to go to the said Leeds and tell the said Leeds that he would forego his rights to the commission on the sale of said property, if he, the said Leeds, would sell said property to the said La Rosa for the sum of Twenty-five Thousand Three Hundred Dollars, and the said La Rosa agreed to and with the said plaintiff that if the said plaintiff would go to the said Leeds and tell him that he would forego the said commissions, and if, the said plaintiff would forego the said commissions of Five Hundred and Six Dollars, he, the said defendant, La Rosa, would pay to this plaintiff the sum of Five Hundred and Six Dollars. 20 30

6. Said plaintiff further says that in consideration of the said promise he did forego his right to have of and from the said Sylvester Leeds said commissions of Five Hundred and Six Dollars, being two per cent. of such purchase price, and did go and tell the said Sylvester Leeds that if he, the said Sylvester Leeds, would sell and convey said property to the said La Rosa for the sum of Twenty-five Thousand

Three Hundred Dollars, he, the said plaintiff, would forego said commissions, and thereupon the said Sylvester Leeds did sell and convey the said property to the said La Rosa for the sum of Twenty-five Thousand Three Hundred Dollars, whereupon the said defendant, Stephano La Rosa, was indebted to this plaintiff in the sum of Five Hundred and Six Dollars.

7. This plaintiff further says that he, the said plaintiff, is indebted to the said defendant in the sum of Thirty-two Dollars and Sixty-eight Cents (\$32.68) for the price and value of certain meats and provisions sold and delivered by the said La Rosa to the said plaintiff, for which sum he, the said plaintiff, gives a credit to the said La Rosa for and on account of the amount due from the said La Rosa to this plaintiff by reason of said agreement.

8. Plaintiff further says that the amount due and owing from the said defendant, Stephano La Rosa to him, allowing said credit, is the sum of Four Hundred Seventy-three Dollars and Thirty-two Cents (\$473.32).

9. Plaintiff further says that the said defendant refuses to pay said sum of Four Hundred Seventy-three Dollars and Thirty-two Cents (\$473.32) or any part thereof, to his damage, Five Hundred Dollars (\$500.00), wherefore he demands against the said defendant, Stephano La Rosa, the sum of Five Hundred Dollars.

30 BOURGEOIS & COULOMB,  
Attorneys of Plaintiff.

The following is a bill of particulars of the statement whereon the annexed complaint is founded:  
Stephano La Rosa, Dr.

To Anthony M. Sindoni.  
Cash due on account of contract .....\$506 00  
Credit by meats and provisions sold by  
Stephano La Rosa to Anthony M. Sindoni. 32 68  

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Balance .....\$473 32

Judgment will be demanded for the above sum of Four Hundred Seventy-three Dollars and Thirty-two cents (\$473.32).

BOURGEOIS & COULOMB,  
Attorneys of Plaintiff.

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TESTIMONY.

Before Hon. Frank Smathers, Judge, and jury, at 10  
District Court Room, City Hall, Atlantic City, New  
Jersey, this sixth day of September, A. D. 1912.

Appearances—For Plaintiff, Bourgeois & Coulomb.  
For Defendant, Garrison & Voorhees.  
(A. K. Littlefield, stenographer, first duly sworn.)

ANTHONY M. SINDONI, Sworn.

Direct Examination, by Mr. Coulomb:

Q. Mr. Sindoni, you are the plaintiff in this case? 20

A. Yes, sir.

Q. And where do you live?

A. 109 South Mississippi Avenue.

Q. And what is your business?

A. Why my trade is barber, but I run a boarding  
house.

Q. And do you know Mr. Leeds, Mr. Sylvester  
Leeds?

A. Yes, sir.

Q. And did you have a business dealing with him 30  
sometime in January of 1911?

A. Yes, sir.

Q. And what did that business concern?

A. About houses, sold his houses.

Q. And was that property situate at the north-  
east corner of Indiana and Hummock Avenues in the  
city of Atlantic City?

A. Yes, sir.

Q. What was the nature of that business? What  
did he employ you to do?

A. Why one day I just met Mr. Leeds and I——

Q. Answer the question; I think we can get along quicker. What did he employ you to do with respect to that property?

A. Who?

Q. Mr. Leeds.

A. Mr. Leeds told me if I sold his property would give two per cent.

Q. And how much was the least Mr. Leeds would  
10 property?

A. At that time wants to get thirty thousand dollars.

Q. Did you make any effort to sell it?

A. Any offer?

Q. Make any effort to sell it for him?

A. I told him I sold it.

Q. And in relation to the sale of that property did you have any dealings with Stephano La Rosa?

A. Yes, sir.

20 Q. Did you go to him to see whether he would purchase the property?

A. Yes, sir.

Q. Did he manifest a willingness to purchase the property?

A. What?

Q. Did he agree to purchase the property?

A. Who agreed?

Q. Mr. La Rosa?

A. I took Mr. La Rosa to Mr. Leeds.

30 Q. And how much did Mr. La Rosa want to buy the property for?

A. Well, he give him different prices, you know. One time offered twenty-four thousand dollars, twenty-five thousand dollars, until I put him up to the price twenty-five thousand three hundred.

Q. And was that the highest price that Mr. La Rosa would give for the property?

A. Oh, Mr. La Rosa was going to give more if Mr. Leeds wouldn't sell it.

Q. And how much was the least Mr. Leeds would take for the property?

A. Mr. Leeds wouldn't take less than twenty-six thousand dollars.

Q. So Mr. Leeds wouldn't take less than twenty-six thousand dollars?

A. Yes, sir.

Q. What did he say that he would do if you sold it for less than twenty-six thousand dollars?

Mr. Garrison—I object.

(Question allowed.)

(Whereupon the defendant, by his counsel, 10  
prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

FRANK SMATHERS (Seal.)

Q. What did Mr. Leeds say with respect to the payment of commissions if he had to take less than twenty-six thousand dollars for the property?

A. If I take less than twenty-six thousand dollars would give no commission.

Q. Then did you make any proposition of that 20  
kind to Mr. La Rosa?

A. Yes, sir.

Q. What did you say to Mr. La Rosa?

A. Why Mr. La Rosa say to me, ask Mr. Leeds, "I am short in the money, ask Mr. Leeds would take without commission and I pay you the commission," and Mr. Leeds says—

Q. Who said "I pay?" Who said that?

A. Mr. La Rosa.

Q. Did he say that to you?

A. He say to me "I pay the commission." 30

Q. Then what did you do then upon that proposition being made to you?

A. Then I went to Mr. Leed's store on Atlantic Avenue.

Q. And who went with you?

A. Mr. La Rosa and I went up to Mr. Leed's store and Mr. Leeds I say "what you take, Mr. Leeds, lowest figure for your property?" He says "twenty-six thousand dollars." Then Mr. La Rosa ask "what

he take without the commission, because I ain't got much money now, and when I got the possession and collect the rent I pay that." Mr. Leeds says, "I allow you two per cent.; figure up what that amount to." And Mr. La Rosa told him, he says, "try you best to take cheap you can, that two per cent. off," and Mr. Leeds says "I will give you something beside."

10 Q. And what was finally the figure that Mr. Leeds agreed to take for the property?

A. Twenty-six thousand dollars.

Q. What was finally the price that he agreed to take?

A. Two per cent. off.

Q. How much was it?

A. Twenty-six thousand dollars; take two per cent. off.

Q. Can you tell how much money the property was finally sold?

20 A. How much was sold?

Q. Yes.

A. How much was sold? Twenty-five thousand three hundred.

Q. And did Mr. La Rosa pay that much for the property?

A. Paid that much for the property.

Q. And property was conveyed to him?

A. I brought him to close the bargain.

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CROSS EXAMINATION, by Mr. Garrison:

Q. Had you an agreement in writing from Mr. Leeds that he would pay you two per cent. commission?

A. No, sir.

Q. Didn't have any agreement in writing with Mr. Leeds at all?

A. No.

Q. Mr. Leeds didn't give you a writing that he would pay you the two per cent.?

A. No.

Q. Are you sure of that?

A. I am sure; yes, sir.

Q. Didn't have any agreement in writing from Mr. La Rosa, either, did you, that he would pay you two per cent.?

A. Listen, Mr. Garrison——

Mr. Coulomb—Answer the question, Mr. Sindoni.

A. No, didn't have no writing. 10

Q. How long ago has it been since this happened?

A. I don't put down the date in my book, but some time in the winter time; I don't remember the date.

Q. Now you know when it was, Mr. Sindoni. Now tell the jury just when it was.

A. I told the truth, you know, Mr. Garrison; I told the truth.

Q. You said it was in cold weather?

A. Yes.

Q. Was it the last cold weather we had? 20

A. Yes, cold weather was.

Q. You mean to tell the jury this transaction took place last winter?

A. No, sir.

Q. When did it take place?

A. Winter before last.

Q. Then you do remember when it took place, don't you?

A. I don't remember the date.

Q. What month did it take place in? 30

A. Really I don't remember.

Q. Don't remember what month?

A. No, don't remember what month because I have no particular date, because I was dealing with Mr. La Rosa honest.

Q. Where was his settlement made?

A. In the Marine Trust Bank building, Title Company.

Q. Did you say anything to Mr. Lord about you were to have a commission out of this sale?

A. Mr. Lord? I don't say nothing to Mr. Lord because was between me and Mr. La Rosa in Mr. Leed's store.

Q. You have answered you didn't say anything to Mr. Lord about it?

A. No, because in Mr. Leed's store——

Q. Never mind the because. Your attorney can get that if he wants it. Mr. Lord made the settlement, didn't he?

10 A. Yes, sir.

Q. And Mr. La Rosa paid twenty-five thousand three hundred dollars for the property?

A. Yes, sir.

Q. And you stated Mr. Leeds told La Rosa that he would take two per cent. off of twenty-six thousand dollars?

A. Yes, sir.

Q. And he could have it for the difference?

A. Yes, sir.

20 Q. How do you account for the fact that he didn't get it for that difference?

A. Because I will tell you I take to Mr. Repetto office after that and I make Mr. Leeds come down there and Mr. La Rosa say, "If you will take cheap you can, I will give you same money than Mr. Leeds allowed you."

Q. Then he promised you more commission outside of that?

30 A. No, he promised that two per cent., wasn't Mr. La Rosa's money, Mr. Leeds money allowed to Mr. La Rosa to give to me and Mr. La Rosa told him to give me something beside.

Q. Now this matter happened in January, 1911; is that right?

A. I don't know when it was because I have no particular time put down in my book.

Q. Did you keep a book account of any?

A. What is the use of keeping book account when he says give to me as soon as he got his rent?

Q. Now you received a letter from our office, didn't

you, to come and pay a bill that you owed Mr. La Rosa?

(Objected to. Objection withdrawn.)

Q. We wrote you a letter from Mr. La Rosa about a week before you started this suit that if you did not come in and pay the bill you owed La Rosa that we would sue you the following Saturday, didn't we? Isn't that true?

A. Yes, sir.

Q. And on that following Saturday you brought 10 this suit, didn't you?

A. No, sir.

Q. Why, certainly, answer; you don't have to look to him to get an answer.

A. (Witness nods head yes.)

Q. Now why didn't you bring this suit sooner than when gotten after the bill you owed La Rosa?

A. Because he postponed me every day.

Q. Then you saw him every day about it?

A. Mr. Garrison, ask Mr. La Rosa what I told him 20 about that money.

Q. Mr. La Rosa is going to be on the stand in a minute. What relation are you to Mr. La Rosa?

A. He married my cousin.

Q. Then you are relatives, are you?

A. Yes.

Q. Now have you told all the conversation that took place between you and La Rosa?

A. What?

Q. Have you told all the conversation that took place between you and La Rosa touching this com- 30 mission?

A. I don't understand the question.

(Question repeated.)

A. Have I told him? Not yet.

Q. Got more to tell yet?

A. Yes; I have got more to tell yet.

Q. Now La Rosa met you one time on the street, didn't he, and asked you to pay that meat bill?

A. Mr. La Rosa?

Q. Yes.

- A. He sent the bill over to the house.  
 Q. Sent the bill over to the house?  
 A. Yes, after I stopped the bill to him.  
 Q. Well, but that isn't the question I asked you, Mr. Sindoni. I asked you if Mr. La Rosa didn't stop you on the street—  
 A. Stop me on the street?  
 Q. —and ask you to pay him the meat bill?  
 A. Not stopping me on the street.  
 10 Q. And you say he did not?  
 A. Not in the street.  
 Q. Did he come over to the store and ask you to pay the meat bill?  
 A. Yes.  
 Q. Did he show you the bill?  
 A. Yes, he showed me the bill; sent me the bill.  
 Q. And what did you tell him when he showed you—did Mr. Leeds tell you that he would give you two per cent. commission if you sold his property?  
 A. Yes, sir.

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SYLVESTER LEEDS, Sworn.

DIRECT EXAMINATION, by Mr. Coulomb:

- Q. Mr. Leeds, were you the owner in January, 1911, of a property situate at the northeast corner of Indiana and Hummock Avenue in Atlantic City?  
 A. Yes.  
 30 Q. And did you have that property for sale?  
 A. I did.  
 Q. Did Mr. Sindoni have any agreement with you respecting the sale of it?  
 A. Verbally, yes.  
 Q. And what was the agreement?  
 A. Why I first asked thirty thousand dollars.  
 Q. Did you agree to pay him any commission?  
 A. No, I didn't; but I did then, yes.  
 Q. And how much commission did you agree to pay him if he sold it?

A. I understood it was to be two per cent.

Q. Were any offers made to you for the property through him?

A. What say?

Q. Were any offers made to you for the property through Mr. Sindoni?

A. Yes, several.

Q. Was an offer made by Mr. La Rosa, Stephano La Rosa?

A. I found that out afterwards, yes. 10

Q. How much did Mr. Stephano La Rosa offer to pay for the property?

A. Who, Mr. La Rose?

Q. Yes.

A. Well, made two or three offers; what one do you mean?

Q. What was the highest offer he made?

A. Twenty-five thousand, I think.

Q. Was it twenty-five thousand three hundred, do you know? 20

A. You are talking about the offer; he offered twenty-five thousand.

Q. What was the highest price he finally agreed to pay for it?

A. Twenty-five thousand three hundred, I think.

Q. Was there any conversation with you (withdrawn). What was the lowest price you would take for the property?

A. Twenty-six thousand.

Q. You finally sold it for twenty-five thousand three hundred, I understand? 30

A. I did.

Q. Was there any agreement made touching the payment of commissions?

A. I said I would pay no commission after it got below twenty-six thousand.

Q. After it got below twenty-six thousand?

A. Yes.

Q. Was Mr. Stephano La Rosa present when that statement was made?

A. I couldn't say.

Q. You don't know whether Mr. Sindoni and Mr. La Rosa were at your store?

A. No.

Q. Do you remember whether or not they were at your store together?

A. They were at Mr. Repetto's office; I don't know whether they were at the store; I don't remember that.

Q. Did you ever see them together?

10 A. At Mr. Repetto's office.

Q. Did Mr. La Rosa and Mr. Sindoni come to your place with reference to the purchase of this property?

A. They were at the store, I believe now?

Q. And did they have any conversation together there in your presence?

A. Yes.

Q. In what language was that conversation held?

A. Italian, I guess.

20 Q. It wasn't in English?

A. No, sir; it was not.

Q. And after that conversation was concluded, did Mr. Sindoni say anything to you respecting his fore-  
going of his commission?

A. I can't just recall that. I won't say positive. It was either there or at Repetto's office; I don't know which it was.

30 Q. What was said at either that place or Repetto's office with respect to Mr. Sindoni's foregoing his commissions?

A. I had told—

Mr. Garrison—Wait a minute, Mr. Leeds. I don't think, if your Honor please, conversations they had in which Mr. La Rosa, a man can't understand the English language, is relevant.

The Court—Well, it appears now as though this agent was agent for both of them.

Mr. Coulomb—I see the situation.

The Court—He was trying to get it for the defendant here very cheap and he was also

trying to sell it for Mr. Leeds and get the biggest price for it.

Mr. Garrison—That is his saying so. I can't see how that could be likely. I will withdraw the objection to save time.

(Question repeated.)

A. Who by, Sindoni? What do you mean, what was said?

Q. Yes.

A. I can't just recall. I will tell you, I don't know anything about the agreement between La Rose and Sindoni. I know nothing about their agreement; I just simply said I wouldn't give any commission after that time. 10

The Court—I think he has made it plain enough that he wouldn't pay any commission after he got less than twenty-six thousand dollars.

CROSS EXAMINATION, by Mr. Garrison:

Q. Mr. Siracusa came to your place with Mr. La Rosa, too, didn't he? 20

A. I believe he did.

Q. And La Rosa and his daughter came one time to your place to see about the property?

A. I don't remember.

Q. Don't remember that?

A. I don't remember that.

Q. But you do know that Anthony Siracusa came there to try to get the property for Mr. La Rosa?

A. Yes. 30

LOUIS A. REPETTO, sworn.

DIRECT EXAMINATION, by Mr. Coulomb:

Q. Mr. Repetto, do you know Mr. Sindoni and Mr. La Rosa, the parties to this suit?

A. I do.

Q. Were they ever in your office with respect to the purchase of property from Mr. Leeds?

A. They were.

Q. Do you know what price Mr. Leeds held this property at?

A. My recollection is about thirty thousand dollars.

Q. Do you know what was his figures, the lowest price he agreed to take for it; that is before there was any discussion about commissions?

A. Twenty-six thousand and some odd hundred, if I remember.

10 Q. Do you know what price Mr. La Rosa wanted to pay for the property?

A. He wanted, I think, about less than twenty-five thousand dollars, as I remember.

Q. Do you recall whether anything was said by Mr. Leeds with respect to the payment of commissions in the event it was not sold for twenty-six thousand dollars?

A. He said he would not pay any commission if he got less than twenty-six thousand dollars.

20 Q. And who was the agent that was trying to sell it for him?

A. Mr. Sindoni.

Q. The plaintiff?

A. Yes, it was I who got him to get La Rosa for Mr. Leeds.

Q. And was the property finally sold by Mr. Leeds to Mr. La Rosa?

A. It was.

30 Q. And what was the price paid?

A. Twenty-five thousand three hundred dollars.

Q. Was there any conversation held in your office wherein Mr. La Rosa agreed to pay the extra commissions if the property could be procured for less than twenty-six thousand dollars?

A. Well, Mr. Leeds and I were talking in English and Mr. La Rosa and Mr. Sindoni held a conversation in Italian and they were discussing the question of commissions and, of course, they speak a dialect in Italian and, you might say, almost a sub-dialect of the Italian language, and I have considerable diffi-

culty in recalling now the conversation except the impression that was made on me at the time.

(Objected to.)

Q. Now at the conclusion of that conversation while Mr. La Rosa was present, did Mr. Sindoni say anything to Mr. Leeds about the commissions?

A. He said he wouldn't ask for any commissions from Mr. Leeds.

CROSS EXAMINATION, by Mr. Garrison: 10

Q. Mr. Repetto, you remember my going to you and asking you if you ever heard any conversation touching commissions between Sindoni and La Rosa? You remember that?

A. I remember you meeting me in the hallway of the Bartlett Building some time ago after the suit was brought.

Q. And do you remember stating to me at that time that time had been so long ago that you had no recollection of any conversation that they had on 20 commissions?

A. No, I didn't say that. What I said is this: that I didn't recall the details; that I was taken sick a short time after that and didn't have anything to do with business for months afterwards. But I said, going out of the Marine Trust Company I remember La Rosa saying to Sindoni, "I will see you later," and I said to you, "I don't know what that meant." That is what I told you.

Q. Didn't you say to me that you had no recol- 30 lection of ever hearing them talk about commissions. The only recollections that you had was, you also in this conversation told me, that you had been sick since—the only recollection that you had when they were leaving the Marine Trust Company La Rosa said, "I will see you later?" Isn't that what you told me?

A. Yes.

Q. Certainly you did.

RE-DIRECT EXAMINATION, by Mr. Coulomb:

Q. Mr. Repetto, did you say that was the only recollection you had of this matter?

A. No, I said I didn't remember the details.

Q. But you did remember that after?

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PLAINTIFF RESTS.

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MOTION FOR NONSUIT.

Mr. Garrison—If your Honor please, I want to make a motion on the record just now. It seems to me, if your Honor please, there ought to be a nonsuit in this case. If this is anything at all it is clearly a promise to pay the debt of another. You see, Mr. Leeds had agreed with Mr. Sindoni that he would pay two per cent. commission. He said Mr. Leeds agreed to that. Later on he says that Mr. La Rosa promised to pay that commission. Now, it seems to me, that is within the statute of frauds, clearly a promise to pay the debt of another, under their pleadings, if you read their pleadings. Their pleadings follow that out.

The Court—I think, on the contrary, the evidence shows, and I think the pleadings would warrant the evidence, that it was the original obligation of the defendant instead of he promising to pay Mr. Leeds' debt. In other words, as I understand the evidence, they are trying to show that this man, LaRosa, the defendant, agreed himself primarily and personally to pay the commission.

Mr. Garrison—That is Leeds did?

The Court—No, he don't look to Leeds. In the first instance was Leeds' obligation, but later on he releases Leeds because Leeds won't sell for the amount that the defendant wants to pay, so finally the defendant says, "if you get it for a certain price,

then I will pay you the commission." In other words making it his own debt.

Mr. Coulomb—If your Honor please, there was no obligation on Mr. Leeds to pay this commission if it was sold below twenty-six thousand dollars.

(Motion overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

FRANK SMATHERS (Seal). 10

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### DEFENDANT'S TESTIMONY.

LOUIS DEGROSSA, first duly sworn as interpreter.

STEPHANO LA ROSA, sworn through interpreter.

DIRECT EXAMINATION, by Mr. Garrison: 20

Q. You know Mr. Sindoni?

A. Yes, sir.

Q. Some relation to you, isn't he?

A. Yes, sir.

Q. Did you purchase a property from Mr. Leeds?

A. Yes, sir.

Q. And when did you purchase that property?

A. I don't know precisely the date; it was about the twenty-second or more of February, but the contract begin on that month.

Q. That was 1911? 30

A. It is eighteen months this last February.

Q. Did you have an agreement with Mr. Sindoni that you would pay him a commission of two per cent. on whatever he got you the property for?

A. Never.

Q. Ask him when he first heard that Sindoni claimed that he owed him some commission for buying the property off of Mr. Leeds?

A. It was after that I asked him for the sixty dol-

lars that he owed me for meat that he had bought at my place in the neighborhood of about fifty-nine dollars and some odd cents. It was then when he spoke to me about it.

Q. Did he speak to you about it or did he bring a suit?

A. He spoke information of the percentage of anything and he brought a suit against me.

10 Q. Did you on one occasion send him a bill for his meats?

A. Different times I have sent the bills.

Q. After you had sent him a bill for meats did you ever meet him on the street and have a conversation with him about it?

A. More than once and once happened that he came from the West Side and we met together.

Q. Now what did he say to you about paying the meat bill?

20 A. He said that I don't owe you anything; if I do why sue me for it.

Q. Ask him if he remembers the same day that the papers were fixed in Mr. Repetto's office that they afterward went down to La Rosa's house——

A. You mean the attorney?

Q. No. I will ask a new question. Did you have a conversation with Mr. Sindoni at your own home when your wife and daughter and your son was present about this property?

A. I did.

30 Q. What was the conversation?

A. He wants to relate the beginning of the introduction of this sale of this property; is that what you want?

Q. No; I don't want to go back to that. Did you meet Mr. Sindoni in Mr. Leeds' office and while in the office did you promise to pay him a commission if he got you this property?

A. Never.

CROSS EXAMINATION, by Mr. Coulomb:

Q. You purchased this property for twenty-five thousand three hundred dollars, didn't you?

A. Yes, sir.

Q. Do you know how much Mr. Leeds wanted for the property in the beginning?

A. Twenty-seven thousand, but not thirty thousand.

Q. Did you ever hear Mr. Sindoni say to Mr. Leeds that he would not demand any commission for the 10 sale of the property to Mr. Leeds?

A. No, sir; I can't understand him.

Q. Can't understand the questions?

The Court—No, he said he couldn't understand the conference between these two men.

A. No, I can't understand the conversation.

Q. How long have you been in this country?

A. Nearly eleven years.

Q. And where have you lived during that time?

A. Atlantic City.

20

ERNEST A. LORD, sworn.

DIRECT EXAMINATION, by Mr. Garrison:

Q. Mr. Lord, you are the boss down at the South Jersey Title Company?

A. One of them.

Q. And did you make a settlement between Sylvester Leeds and Stephano La Rosa?

A. I did.

30

Q. And when was that? Let's get the right date.

A. I don't seem to have the date that settlement was made, but it was made as of February first, 1911.

Q. 1911?

A. Yes.

Q. Now you made that settlement yourself, I understand it?

A. I did.

Q. Anything said during that settlement between

Sindoni and La Rosa about a commission that you recollect?

A. I don't remember Mr. Sindoni being there.

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CROSS EXAMINATION, by Mr. Coulomb:

Q. Who was there, Mr. Lord?

10 A. Seems to me Mr. Repetto was there and Mr. La Rosa and Mr. Leeds, and I don't know whether James Henry Mason, Sr., was there or not.

Q. Have you got the statement?

A. Yes.

Q. Was there any commissions charged off on that statement?

A. In favor of no one.

Q. Was there any deduction made in the price paid to Mr. Leeds for commissions?

A. No, sir.

20 Q. What was the price paid for the property?

A. Twenty-five thousand three hundred.

---

MRS. CONCETTA LA ROSA, sworn through Louis Degrossa, Interpreter.

DIRECT EXAMINATION, By Mr. Garrison:

Q. Do you know Mr. Sindoni?

A. Yes.

30 Q. Do you remember when your husband bought the property from Mr. Leeds?

A. Yes.

Q. Right away after the sale was made, did Mr. Sindoni and your husband come home?

A. Yes.

Q. What did they say?

A. It was short after that they bought the property Mr. Sindoni and the husband came home and Mr. Sindoni says, "I am awfully glad and happy that your husband bought the property and I am so glad so that neither one or another got any com-

mission about it.”

Q. Did he claim at that time in your presence that he was to have a commission from your husband?

A. Not a thing.

---

NO CROSS EXAMINATION.

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STEPHANO LA ROSA, recalled. 10  
 DIRECT EXAMINATION, by Mr. Garrison:

Q. Who was to get the commission from Mr. Leeds on this sale?

A. Sindoni was to get the commission if would give him some.

A Juror—What business is this man in?

A. He is a butcher.

MISS JOSEPHINE LA ROSA, sworn. 20  
 DIRECT EXAMINATION, by Mr. Garrison:

Q. Do you know Mr. Sindoni?

A. Yes, sir.

Q. Were you present the day they came home after they had purchased this property?

A. Yes, sir.

Q. Did you hear them have a conversation?

A. Yes, sir.

Q. What did you hear? You can speak English?

A. Why, I heard Mr. Sindoni, after we bought this property, when they came home, Mr. Sindoni and my father came home and Mr. Sindoni said he was very happy, very glad my father bought the property and that he was very glad that my father had the property and that he didn't care that he didn't get nothing because he was relations, but he just want my father buy the property. 30

Q. Did he say your father had made a good bargain?

A. He said he made my father get a good bargain, yes, sir; made a nice chance.

CROSS EXAMINATION, by Mr. Coulomb:

Q. When did this conversation take place?

A. What do you mean? I can't understand.

Q. What time did this conversation take place?

A. What time this was said?

Q. Yes.

A. Well, it was after they got done; I can't re-  
10 member the time, of course.

Q. And how long ago was it?

A. Well, it was in February of sometime, it was in the winter of 1911 that they bought the property.

Q. Don't remember what month it was? How did you know they had just bought the property?

A. Because they came home and said it.

Q. Both came home together?

A. Yes, sir.

Q. Anybody else with them?

A. No, sir; them two was together then.  
20

By Mr. Garrison:

Q. Say, Miss La Rosa, who was present when that talk went on?

A. One of my brothers and one fellow was working for us then.

Q. Was there a young fellow working for you that heard it?

A. A butcher.  
30

Q. Is he here?

A. He is here.

FRANK LA ROSA, sworn.

DIRECT EXAMINATION, by Mr. Garrison:

Q. Now everything, you heard your sister testify on the stand, did you?

A. Yes, sir.

Q. Were you present when they came back?

A. Yes, sir.

Q. Now you tell the jury what you understood them to say?

A. I understood them to say after they bought this property, they came home, and Mr. Sindoni said he was very glad we bought this property, he didn't want nobody else to have, was a very cheap property, he didn't care, didn't get nothing on account he was relation to us. That is all.

Q. Did he say anything about that he didn't care if he didn't get any commission? 10

A. Yes, sir.

(Objected to as leading.)

The Court—He already said that.

CROSS EXAMINATION, by Mr. Coulomb:

Q. Was this conversation held in English or Italian?

A. Held in Italian.

Q. And you understood it, did you?

A. Yes, sir.

Q. Were you born in this country or in Italy? 20

A. Born in Italy.

Q. Born here, you say?

A. No, Italy.

Q. And when did this conversation take place?

A. Why, in February.

Q. Of what year?

A. I don't remember the date.

Q. But you remember it took place, do you?

A. Yes, sir.

Q. And who did you first tell about this conversation since this suit happened? 30

A. I don't understand what you mean.

Q. Who did you first tell you heard this conversation to?

A. I heard Mr. Sindoni said at my house?

Q. And who did you first tell about it?

A. Who did I tell?

Q. Yes.

A. Didn't tell anybody; I heard it said in my house.

Q. But you never told anybody that you heard it said?

A. No.

Q. Not to this minute?

A. No.

Q. Just came along without telling anybody that you heard this said?

A. No.

10 Mr. Garrison—Did you understand the last question he asked you?

Mr. Coulomb—He understood it and he answered it.

By Mr. Garrison:

Q. You know me, do you?

A. Yes, sir.

Q. Were you up in my office some time ago?

A. Yes, sir.

Q. Well, did you tell it to me?

20 A. Sure.

By Mr. Coulomb:

Q. Mr. La Rosa, why didn't you tell me now in answer to my question?

A. I didn't understand what you meant.

Q. Didn't understand. I asked you two or three times.

A. I didn't understand.

30

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DEFENDANT RESTS.

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PLAINTIFF'S REBUTTAL.

ANTHONY M. SINDONI, recalled.

DIRECT EXAMINATION, by Mr. Coulomb:

Q. Mr. Sindoni, did you ever say to Mr. La Rosa in his house that you were not to get any commissions and you were glad he got the property and

that you didn't want any commissions?

A. Never.

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NO CROSS EXAMINATION.

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BOTH SIDES REST.

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10

COURT'S CHARGE TO JURY.

Gentlemen of the Jury, the facts are so simple in this case I hardly believe it is necessary to have any legal enlightenment from the court. The only point for you to decide is the point of veracity. If you believe the plaintiff, then your verdict should be in his favor for the amount he claims. If, on the other hand, you believe the defendant and his witnesses, then your verdict should be in favor of the defendant, and then that is all there is to it. 20

Now the burden of proof is always upon the plaintiff, that is, he must, by a preponderance of evidence, satisfy your minds that he is entitled to your verdict. If the evidence is equally balanced and you do not know which way to go, then you should give the benefit to the defendant and say the plaintiff has not carried the burden of proof such as the law requires in civil cases. 30

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The jury returned into court with a verdict in favor of the plaintiff and against the defendant for four hundred seventy-three 32-100 dollars and costs.

A rule to show cause why a new trial should not be allowed defendant was allowed September 11th, 1912, finally argued January 2d, 1913, and dismissed.

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JUDGMENT.

This cause having been tried before the Atlantic City District Court and a jury, on the sixth day of September, nineteen hundred and twelve, and the  
 10 jury having rendered their verdict on that day in favor of the plaintiff and against the defendant and assessed his damages at the sum of four hundred seventy-three 32-100 dollars with costs to be taxed, and a Rule to Show Cause why said verdict should not be set aside having been allowed by the Judge of this court, and same having been argued on the thirty-first day of December past, and said Rule having been dismissed:

It is thereupon on this second day of January,  
 20 nineteen hundred and thirteen, ordered that judgment final in the above cause be and the same hereby is entered in favor of the plaintiff and against the defendant in the sum of four hundred seventy-three 32-100 dollars, damages and twenty-seven 67-100 dollars costs.

Entered on motion of

FRANK SMATHERS,  
 BOURGEOIS & COULOMB, Judge.  
 Attorneys for Plaintiff.

30

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ON APPEAL—ORDER.

(Filed January 16, 1913.)

I hereby certify that the foregoing record, consisting of notice, summons and declaration, stenographer's record and copy of Judgment constitutes the State of the Case in the above cause, and I hereby certify same as such this fifteenth day of January, nineteen hundred and thirteen.

FRANK SMATHERS,  
 Judge Atlantic City District Court.

# NEW JERSEY SUPREME COURT

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Anthony Sindoni,

Plaintiff-Appellee,

vs.

Stephano La Rosa,

Defendant-Appellant.

}  
} Notice of Appeal.  
}

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TO BOURGEOIS & COULOMB, ESQS.,  
Attorneys of Anthony Sindoni.

TAKE NOTICE, that the Defendant appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court affirming the judgment on appeal from the Atlantic City District Court, on the following grounds:

1. Because the said judgment affirms the judgment obtained in the Atlantic City District Court, thereby finding no merit in the reasons set forth on the appeal from said Atlantic City District Court.

2. Because the Court failed to find that the judgment of the Atlantic City District Court, appealed from, was based on a promise to answer for a debt, promise or default of a third person by the Defendant below, and was not in writing; and because the Court erroneously permitted the case to go to the jury over the objection of Defendant.

3. Because the Court refused to reverse the judgment below wherein the Court erroneously permitted the case to go to the jury when the same was within the "Statute of Frauds", and no writing was shown to prove the liability of Defendant.

4. Because the Court below refused to direct a verdict for the Defendant at the close of the Plaintiff's case, and

for the reason urged on the motion for a direction, and the Supreme Court refused to reverse for this reason.

5. Because the Supreme Court refused to reverse the judgment of the Atlantic City District Court for the reasons set out in the record as presented to the New Jersey Supreme Court.

Respectfully,

GARRISON & VOORHEES,

Attorneys of Defendant.

10 Dated July 14th, 1913.

NEW JERSEY SUPREME COURT

---

Anthony Sindoni,

Appellee,

vs.

Stephano La Rosa,

Appellant.

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Argued February 18, 1913; Decided June 8, 1913.

On Appeal from District Court.

Before Justices Garrison, Swayze and Minturn.

For the Appellant, Garrison & Voorhees.

For the Appellee, Bourgeois & Coulomb.

10

PER CURIAM:

The judgment of the District Court is affirmed. It was a fact case and properly submitted to the jury.

NEW JERSEY SUPREME COURT

---

Anthony Sindoni,  
Appellee,  
vs.  
Stephano La Rosa,  
Appellant.

On Appeal.  
On Affirmance.  
Judgment Record.  
Bourgeois & Coulomb,  
Attorneys.

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The defendant appellant appeals from the judgment of the City District Court of Atlantic City and files the following case and reasons for reversal.

10 The plaintiff, Anthony M. Sindoni, residing at number 109 South Mississippi Avenue, Atlantic City, Atlantic County, New Jersey, says:

1. That on the third day of January, A. D. nineteen hundred and eleven, Sylvester Leeds agreed with the said plaintiff that if he, the said plaintiff, would sell and dispose of for the said Leeds, a certain tract of land situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, described as follows:

20 Beginning at a point in the northeast corner of Indiana and Hummock Avenues, and extending (1) eastwardly along the northerly line of Hummock Avenue, two hundred feet to the westerly line of Robinson Avenue; (2) northwardly, along the westerly line of Robinson Avenue, one hundred thirty-three feet to the southerly line of Logan Avenue; (3) Westwardly, along the southerly line of Logan Avenue two hundred feet to the easterly line of Indiana Avenue; (4) southwardly, along the easterly line of Indiana Avenue, one hundred and thirty-three feet to the place of beginning:

30 And also a certain tract of land situate in Atlantic City aforesaid, described as follows:

Beginning at a point in the westerly line of a twenty feet wide alley, at a point distant one hundred feet south

from the southerly line of Lincoln Avenue and one hundred and forty-five feet west from the westerly line of Indiana Avenue, measured at right angles thereto respectively; and extends thence (1) westwardly, parallel with Lincoln Avenue, one hundred feet to the easterly line of a fifteen feet wide alley; thence (2) southwardly, along said alley, parallel with Indiana Avenue, one hundred feet; (3) eastwardly, parallel with Lincoln Avenue, one hundred feet to the westerly line of a twenty feet wide alley; (4) northwardly, along the same, parallel with Indiana Avenue, one hundred feet to the place of beginning; that he, the said Leeds, would pay to the said plaintiff two per cent. commission on the sale price thereof.

2. Afterwards, to wit, on the \_\_\_\_\_ day of February, A. D. nineteen hundred and eleven, the plaintiff procured a purchaser for the said property, to wit, Stephano La Rosa, who agreed that he would pay therefor the sum of twenty-five thousand three hundred dollars (\$25,300.) 20

3. That in accordance with the contract between the plaintiff and the said Leeds, plaintiff's commission at two per cent. would amount to five hundred and six dollars (\$506.)

4. That upon entering into the agreement between the said Leeds and the said La Rosa for the purchase of said property, the said Leeds refused to sell the said property unless he could procure for the same the sum of twenty-five thousand three hundred dollars, net, and would not sell the said property to the said La Rosa for the sum of 30 twenty-five thousand three hundred dollars if he was obliged to pay out of said sum the sum of five hundred and six dollars to the plaintiff as commission thereon.

5. That after some negotiations between the said La Rosa and the said Leeds and the plaintiff, the said La Rosa directed the plaintiff to go to the said Leeds and tell the said Leeds that he would forego his rights to the commission on the sale of said property, if he, the said Leeds, would sell said property to the said La Rosa for the sum of twenty-five thousand three hundred dollars, 40 and the said La Rosa agreed to and with the said plaintiff that if the said plaintiff would go to the said Leeds and tell him that he would forego the said commissions, and if, the said plaintiff would forego the said commissions of five hundred and six dollars, he, the said defend-

ant, La Rosa, would pay to this plaintiff the sum of five hundred and six dollars.

6. Said plaintiff further says that in consideration of said promise he did forego his right to have of and from the said Sylvester Leeds said commissions of five hundred and six dollars, being two per cent. of such purchase price, and did go and tell the said Sylvester Leeds that if he, the said Sylvester Leeds, would sell and convey said property to the said La Rosa for the sum of twenty-  
10 five thousand three hundred dollars, he, the said plaintiff, would forego said commissions, and thereupon the said Sylvester Leeds did sell and convey the said property to the said La Rosa for the sum of twenty-five thousand three hundred dollars, whereupon the said defendant, Stephano La Rosa, was indebted to this plaintiff in the sum of five hundred and six dollars.

7. This plaintiff further says that he, the said plaintiff, is indebted to the said defendant in the sum of thirty-two dollars and sixty-eight cents (\$32.68) for the price  
20 and value of certain meats and provisions sold and delivered by the said La Rosa to the said plaintiff, for which sum he, the said plaintiff, gives a credit to the said La Rosa for and on account of the amount due from the said La Rosa to this plaintiff by reason of said agreement.

8. Plaintiff further says that the amount due and owing from the said defendant, Stephano La Rosa to him, allowing said credit, is the sum of four hundred seventy-three dollars and thirty-two cents (\$473.32.)

9. Plaintiff further says that the said defendant re-  
30 fuses to pay said sum of four hundred seventy-three dollars and thirty-two cents (\$473.32) or any part thereof, to his damage, five hundred dollars (\$500.00,) wherefore he demands against the said defendant, Stephano La Rosa, the sum of five hundred dollars.

BOURGEOIS & COULOMB,  
Attorneys of Plaintiff.

The following is a bill of particulars of the statement whereon the annexed complaint is founded:

Stephano La Rosa, Dr.

To Anthony M. Sindoni,

Cash due on account of contract.....\$506.00

Credit by meats and provisions sold by Stephano

La Rosa to Anthony M. Sindoni ..... 32.68

Balance .....\$473.32

Judgment will be demanded for the above sum of four hundred seventy-three dollars and thirty-two cents 10  
(\$473.32.)

BOURGEOIS & COULOMB,

Attorneys of Plaintiff.

This cause having been tried before the Atlantic City District Court and a jury, on the sixth day of September, nineteen hundred and twelve, and the jury having rendered their verdict on that day in favor of the plaintiff and against the defendant and assessed his damages at the sum of four hundred seventy-three 32-100 dollars with costs to be taxed, and a Rule to Show Cause why said 20  
verdict should not be set aside having been allowed by the Judge of this Court, and same having been argued on the thirty-first day of December past and said Rule having been dismissed:

It is thereupon on this second day of January, nineteen hundred and thirteen ordered that judgment final in the above cause be and the same hereby is entered in favor of the plaintiff and against the defendant in the sum of four hundred seventy-three 32-100 dollars, damages and twenty-seven 67-100 dollars costs. 30

Entered on motion of Bourgeois & Coulomb, Attorneys of Plaintiff.

FRANK SMATHERS, Judge.

The appellant specifies the following reasons or determinations of the court, in the above cause, on which he relies in the argument in the above cause.

1. Because the suit was based on a promise to answer for a debt, promise or default of a third person by the defendant below, and was not in writing, and because the court permitted the cause to go to the jury over the ob- 40  
jection of the defendant.

2. Because the court refused to non-suit the plaintiff at the close of his case on motion of defendant below, upon the reason urged by the defendant that the case was within the Statute of Frauds, and no writing was shown to prove the liability of defendant.
3. Because the court refused to direct a non-suit at the close of plaintiff's case for the reasons urged by the defendant below, as will appear in the printed testimony in the cause.
- 10 4. Because the court erroneously admitted evidence on behalf of the plaintiff below, and rejected testimony on behalf of the defendant below over the objection of defendant, as appears in the printed testimony.
5. Because the court refused to direct a verdict for the defendant at the close of the plaintiff's case, and for the reason urged on the motion for a direction.
6. Because the court erroneously directed the jury that if they believe the testimony of the plaintiff, they might find a verdict for him.
- 20 7. Because the court failed to direct the jury that the plaintiff could not recover unless the alleged agreement sued on was in writing, the cause coming within the Statute of Frauds, and requiring such promise to be in writing.

GARRISON & VOORHEES,  
Attorneys of Defendant-Appellant.

Dated January 18th, 1913.

This cause was heard by our Supreme Court at the February Term, 1913, before Justices Garrison, Swayze  
30 and Minturn, who find that the judgment of the District Court should be affirmed.

Whereupon it is adjudged that the judgment above set forth be affirmed and that the plaintiff appellee recover of the defendant appellant the sum of \$500.99 damages and costs below, and his costs in the Supreme Court which are taxed at \$19.00, making in the whole the sum of \$519.99.

Judgment entered June 17, 1913.

WM. S. GUMMERE, C. J.

THE STATE OF NEW JERSEY

County of Atlantic, } ss.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this third day of September, A. D. nineteen hundred and thirteen.

(SEAL)

Clerk.

ENDORSED ::

“FILED October 14, 1913.

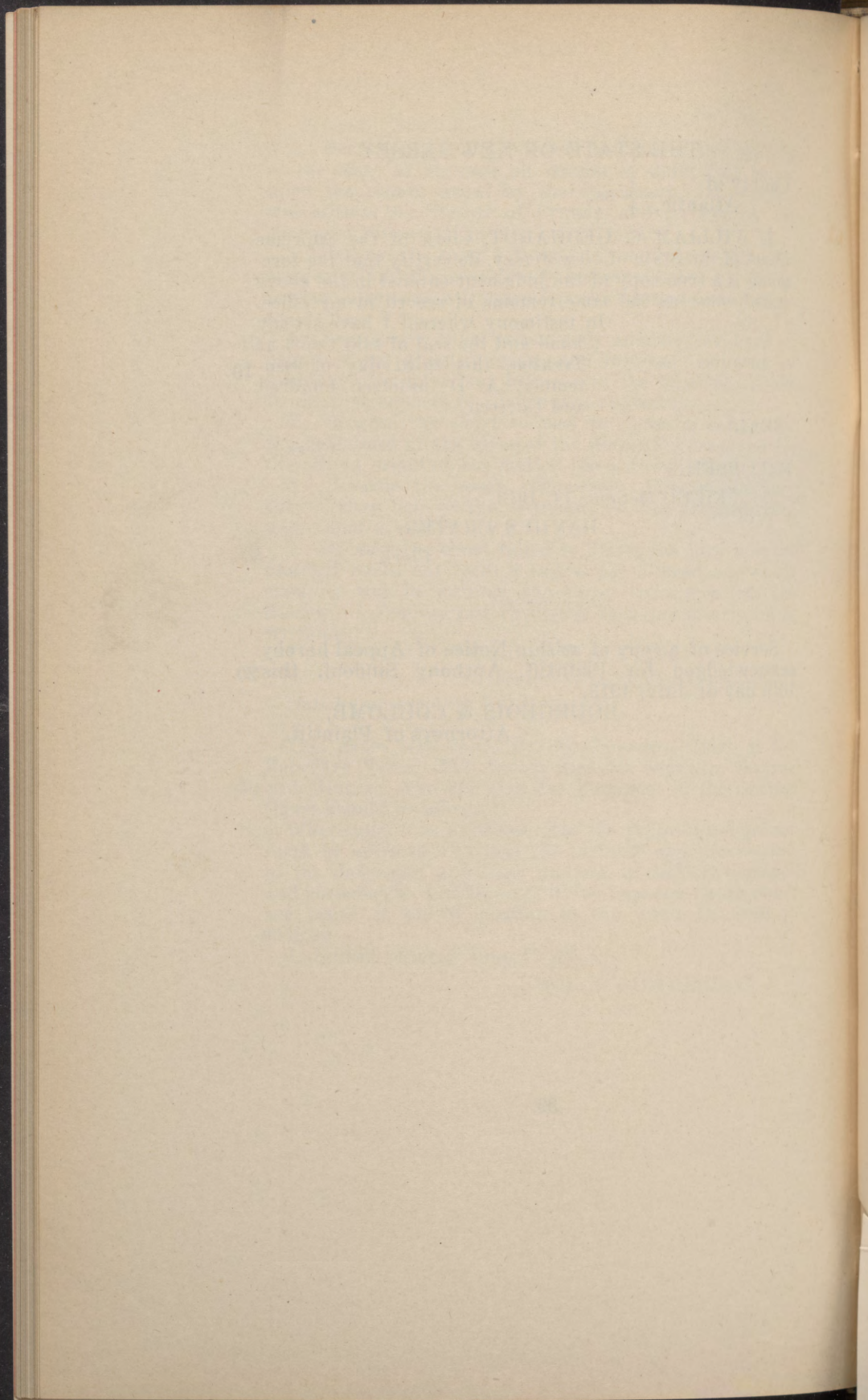
DAVID S. CRATER,

Clerk.”

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Service of a copy of within Notice of Appeal hereby acknowledged for Plaintiff, Anthony Sindoni, this 20 16th day of July, 1913.

BOURGEOIS & COULOMB,  
Attorneys of Plaintiff.



## New Jersey Court of Errors and Appeals.

ANTHONY SINDONI,  
Appellee,

vs.

STEPHANO LA ROSA,  
Appellant.

On Contract.  
On Appeal from  
Supreme Court.

**BRIEF FOR  
APPELLANT.**

This is an appeal from a judgment of the Supreme Court which affirmed a judgment in favor of the plaintiff below, entered upon a verdict obtained in his favor in the Atlantic City District Court.

The action was brought to recover commissions alleged to have been earned by the plaintiff in bringing about the sale of certain real estate from one Leeds to the defendant.

It appears from the evidence that Leeds employed the plaintiff to make a sale of some property belonging to Leeds, and that the plaintiff secured the defendant as a purchaser. The plaintiff introduced testimony tending to show that the vendor was unwilling to sell for less than twenty-six thousand dollars (\$26,000.), and that the purchaser thereupon orally promised the plaintiff to pay his commissions.

The principal question in the case is whether or not this promise was only to answer for the debt, default or miscarriage of another, and therefore unenforceable within *Section 5 of the Statute of Frauds, Comp. St., 2612*, because not evidenced by a writing signed by the defendant or his lawfully authorized agent.

The testimony adduced by the defendant tended to show that there never was any promise made by

him with respect to the payment of commissions, but on this appeal the plaintiff's case must be taken as settled by the verdict of the jury.

**The Court erred in directing the jury that if they believed the testimony of the plaintiff they might find a verdict for him.**

This is based on the Sixth reason for reversal of the Supreme Court (Case, p. 38) and the Fifth ground of appeal to this Court (Case, p. 32).

At the close of the case, the Court charged the jury as follows:

(Case, p. 29) "Gentlemen of the Jury, the facts are so simple in this case that I hardly believe it necessary to have any legal enlightenment from the Court. The only point for you to decide is the point of veracity. If you believe the plaintiff, then your verdict should be in his favor for the amount he claims. If, on the other hand, you believe the defendant and his witnesses, then your verdict should be in favor of the defendant, and that is all there is to it.

Now the burden of proof is always upon the plaintiff, that is, he must, by a preponderance of evidence, satisfy your minds that he is entitled to your verdict. If the evidence is equally balanced and you do not know which way to go, then you should give the benefit to the defendant and say the plaintiff has not carried the burden of proof such as the law requires in civil cases."

This charge left a clean-cut issue in the minds of the jury between the defendant's denial of making any promise, and the plaintiff's testimony that a promise was made. It authorized a verdict for the plaintiff simply on finding the truth to lie with his witnesses. It entirely disregarded the question of the Statute of Frauds.

The testimony of the plaintiff's witnesses was inconsistent, as will be hereafter shown; in particular

X We reserve however the benefit of the objection made to the erroneous admission of what the Leeds ~~was~~ said when La Rosa was not present. (p 926) This alone, we submit, requires a reversal.

that part of it showing a promise by the defendant was capable of two interpretations (1), that the defendant's promise was an original one, and (2) that the said promise was a collateral promise to answer for the primary debt of Leeds.

The plaintiff's counsel contended that the first inference should be put on this testimony. The Court agreed with him, drew that inference, and kept from the jury the power of drawing the other inference, which would have necessitated a verdict for the defendant because there was no evidence of a writing. This is evident from the argument on the motion for a nonsuit (Case, p. 20).

"Mr. Garrison—If your Honor please, I want to make a motion on the record just now. It seems to me, if your Honor please, there ought to be a nonsuit in this case. If this is anything at all it is clearly a promise to pay the debt of another. You see, Mr. Leeds had agreed with Mr. Sindoni that he would pay two per cent. commission. He said Mr. Leeds agreed to that. Later on he says that Mr. LaRosa promised to pay that commission. Now, it seems to me, that within the Statute of Frauds, clearly a promise to pay the debt of another, under their pleadings, if you read their pleadings. Their pleadings follow that out.

The Court—I think, on the contrary, the evidence shows, and I think the pleadings would warrant the evidence, that it was the original obligation of the defendant instead of he promising to pay Mr. Leeds' debt. In other words, as I understand the evidence, they are trying to show that this man, La Rosa, the defendant, agreed himself primarily and personally to pay the commission.

Mr. Garrison.—That is Leeds did?

The Court—No, he don't look to Leeds. In the first instance was Leeds obligation, but later on he releases Leeds because Leeds won't sell for the amount that the defendant wants to pay, so finally the defendant says, 'if you get it for a certain price, then I will pay you the commission.' In other words making it his own debt."

It is quite evident that the plaintiff was trying to show that the defendant agreed himself primarily and personally to pay the commission. Our contention is that it was improper for the Court to draw that inference from the evidence instead of leaving it for the jury to draw.

The most important part of the testimony of the plaintiff's witnesses with reference to the question of whether or not the alleged promise by the defendant was or was not within the statute, is that bearing on the question of whether or not Leeds was under any obligation to pay commissions. Here there was some inconsistency, for instance (Case, p. 9):

“ Q. What did Mr. Leeds say with respect to the payment of commissions if he had to take less than \$26,000. for the property?

“ A. If I take less than \$26,000., would give no commission.”

Compare that with the following on page 9 of the case, line 36:

“ A. Mr. LaRosa and I went up to Mr. Leeds' store and Mr. Leeds I say 'what you take, Mr. Leeds, lowest figure for your property?' He says '\$26,000.' Then Mr. LaRosa ask 'what he take without the commission, because I ain't got much money now, and when I got the possession and collect the rent I pay that.' Mr. Leeds says, 'I allow you two per cent.; figure up what that amount to.' And Mr. LaRosa told him, he says, 'try you best to take cheap you can, that two per cent. off,' and Mr. Leeds says, 'I will give you something beside.'

Q. And what was finally the figure that Mr. Leeds agreed to take for the property?

A. Twenty-six thousand dollars.

Q. What was finally the price that he agreed to take?

A. Two per cent. off.”

There are similar inconsistencies in the testimony of Mr. Leeds, for instance: Compare page 15, line 32:

“ Q. Was there any agreement made touching the payment of commissions?

A. I said I would pay no commission after it got below twenty-six thousand."

with Case, page 14, line 36:

"Q. Did you agree to pay him any commission?

A. No, I didn't; but I did then, yes.

Q. And how much commission did you agree to pay him if he sold it?

A. I understood it was to be two per cent."

The importance of this testimony will be seen when it is remembered that the defendant's contention, that the promise as proved was within the Statute of Frauds, cannot be correct unless there was a subsisting obligation on the part of Leeds to which the defendant's alleged undertaking was collateral.

*Hetfield v. Dow*, 3 Dutcher, 440.

See also *Hazeltine v. Wilson*, 26 Vr., 250.

The practical importance of the testimony in this case was especially great because the direct evidence of the promise alleged to have been made by the defendant, was unsatisfactory in the extreme. The principal witnesses had slight knowledge of English and spoke ungrammatically and inaccurately, and therefore their quotation of what the defendant said should have been considered by the jury with the correct rule as this collateral matter in mind.

It was of the utmost importance to the defendant that the jury should be specifically instructed on all these matters and that it should not be left broadly to the jury to decide on the case at large simply on a question of veracity.

In *Chesebrough v. Tirrill*, 32 Vr., 628, it was held by this Court that when the question in issue is whether the agreement upon which the suit is brought is an original agreement or a collateral undertaking to pay the debt of another, which must

be in writing under the Statute of Frauds, and the evidence is disputed as to the character of the promise or agreement, the question becomes one which must be submitted to the jury.

In the case at bar, not only did the Judge not direct the jury's attention to this phase of the case, not only did he not tell them that there was an issue of the Statute of Frauds in the case instead of leaving to them simply the issue of whether or not the promise was made, for that was the issue between the evidence of the plaintiff's witnesses and that of the defendant's, but he let them go to their deliberations bearing in mind his openly expressed opinion, made only a few moments before on the argument for a nonsuit, that the plaintiff's evidence proved that the promise was an original undertaking.

It is true, as the Supreme Court said in their opinion (Case, p. 33) that this was a "fact case," but it is earnestly urged that this "fact case" was not properly submitted to the jury.

WHEREFORE, it is respectfully but earnestly contended that the judgment should be set aside and a new trial granted.

Respectfully submitted,

MCCARTER & ENGLISH,  
Counsel with Appellant.

# New Jersey Court of Errors and Appeals.

No. 129 November Term.

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ANTHONY SINDONI,

Plaintiff-Appellee,

vs.

STEPHANO LAROSA,

Defendant-Appellant.

} ON CONTRACT.

} On Appeal from New

} Jersey Supreme Court.

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BRIEF OF BOURGEOIS & COULOMB,  
ATTORNEYS FOR PLAINTIFF-APPELLEE.

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The plaintiff sued for commissions which the defendant agreed to pay him provided he could induce the owner of certain property to sell it to the defendant for less than \$26,000. The plaintiff procured the property to be sold to the defendant for \$25,300. The jury awarded a verdict in favor of the plaintiff for \$473.32 besides costs, which verdict was sustained by the Supreme Court on the ground that it was a jury question.

The appeal in this case should be dismissed:—

1.

THE APPELLANT WAIVED HIS RIGHT TO APPEAL BY PROSECUTING THE RULE TO SHOW CAUSE (page 30, line 1).

Section 213F of the District Court Act, Comp. Stat. p. 2017, P. L. 1910, P. 497, provides that the "granting by a Judge of the District Court of a rule

to show cause why a new trial should not be granted shall, unless expressly stipulated in the rule, be a waiver of any grounds for appeal existing in favor of the party obtaining such rule."

2.

THE CONTRACT IN QUESTION IS NOT WITHIN THE PROHIBITION OF THE STATUTE OF FRAUDS.

10 The action was not upon a promise to pay the debt of another, but upon a direct promise to pay a certain sum for services rendered by the plaintiff in procuring the owner of property to sell it for less than the owner had intended to sell it for (pages 8, 9 and 10 of the state of the case).

20 The proof shows that Mr. Leeds was the owner, and would not pay any commission if the property was sold for less than twenty-six thousand dollars (page 9, line 18). The proof further shows that the property was sold for twenty-five thousand three hundred dollars (page 10, line 23). So that, upon these aspects of the case, there was no obligation whatsoever upon Mr. Leeds to pay any commission, either legally or morally, and there could be no such thing as a contract to pay the debt of another, when that debt did not in fact exist. (See *Dilts vs. Parke*, 4 N. J. L. 419).

30 Neither does the Statute of Frauds apply when there is a new consideration moving to the party promising upon some fresh and substantial ground of a personal concern to himself. (See *Joslin vs. New Jersey Co.*, 6 N. J. L. 141); nor does the Statute of Frauds apply to contracts to pay commissions for the purchase of property. *Fist vs. Jerolman*, 75 Atl. p. 751; *Conkling vs. Gruger*, 75 Atl. 436; *Brown vs. Winter*, 77 Atl. 1021.

3.

THE FOURTH REASON ASSIGNED BY APPELLANT (page 1, line 33) IS INSUFFICIENT

BECAUSE IT DOES NOT POINT OUT THE TESTIMONY COMPLAINED OF.

Rule 90 of the Supreme Court, adopted June 4, 1907, requires that "the appellant shall specify the determination or direction complained of." The testimony, however, was properly admitted. The question (page 9, line 6) was properly admissible for the purpose of showing what statement by the owner of the property influenced the course of action between the plaintiff and the defendant in this cause, and if in any wise objectionable, was cured by the testimony of Leeds himself (page 15, line 1). 10

4.

WITH RESPECT TO THE FIFTH REASON (page 2, line 1), THE COURT DIRECTED PROPERLY AS TO THE DUTY OF THE JURY, (page 29, line 20).

It is respectfully submitted that the appeal should be dismissed and the judgment affirmed.

BOURGEOIS & COULOMB,  
Attorneys of Plaintiff-Appellee. 20



