INDEX

10

20

30

40

FIRST DISTRICT COURT

NEWARK, N. J.

Alexander T. Schenck,
Plaintiff's Attorney

RICHARD D. DONNELLY,
Plaintiff,

—*vs*—

PARAMOUNT ORGANIZATION
A Corporation,
Defendant.

45 Branford Place

Plaintiff's Costs

Summons	
Nov. 14	$ 2.10
Mileage	.08
Listing Fee	
Nov. 24	1.50
Witness Fee	
Attorney's Fee	11.98
Total Cost	15.66
Execution	1.51
Venire Dec. 11	11.75
Appeal Bond	
Dec. 31	1.00

A State of demand was filed and a summons in the above stated cause was issued on the Thirteenth day of November 1930, returnable on the Twenty-Fifth day of November 1930, wherein the plaintiff demands of defendant the sum of Five Hundred ($500.00) Dollars.

The Summons was served and returned as follows:

I Served the within summons Nov. 17, 1930, on Miss Rams she being the Secretary of said Paramount Organization, Inc. by reading it to her and giving her a copy thereof. Jacob Schoenbrun, Constable.

Nov. 25/30 This cause was adjourned to Dec. 9, 11.

Dec. 4/30 The defendant filed a demand for jury.

Dec. 8/30 Venire issued and made returnable Dec. 11.

Dec. 11/30 The Plaintiff and the Defendant appearing, the cause was tried and determined at this time.

The following men were sworn as jurors.

1. John W. Hubler
2. J. Muller
3. J. F. Cox
4. A. Lawitz
5. John Kelleghan
6. T. G. Wilson
7. Fred Weber
8. O. A. Rogers
9. Wm. Kent
10. Herman Meyerhoffer
11. Wm. Gerber
12. Frank Gardner.

After opening by Counsel the Court directed a verdict in favor of the Plaintiff, Thereupon the jury rendered its verdict in favor of the Plaintiff and against the Defendant in the sum of Two Hundred, Thirty-Nine and 69/100 dollars ($239.69) damages with costs, whereupon judgment is rendered in favor of the Plaintiff and against the Defendant in the sum of Two Hundred, Thirty-Nine and 69/100 dollars damages with costs.

Dec. 12/30 Execution was issued and returned as follows.

Dec. 20/30 Notice of Appeal Filed (Two)

Dec. 31/30 Appeal Bond Filed.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK

RICHARD D. DONNELLY, *Plaintiff,* —*vs*— PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant.*	ON CONTRACT NOTICE OF APPEAL No. 144655

To: RICHARD D. DONNELLY, or ALEXANDER T. SCHENCK, Attorney of RICHARD D. DONNELLY:

SIR:

TAKE NOTICE that the defendant Paramount Organization Inc. a corporation of N. J., hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark, rendered in the above stated action on Thursday, the 11th day of December, 1930.

Dated: December 19, 1930.

Samuel S. Ferster (Signed)
Attorney for Defendant.

Service of a copy of the within notice is hereby acknowledged this 20th day of December, 1930.

Alexander T. Schenck,
Attorney of Plaintiff.

FILED
Dec. 23, 1930
Louis Hecht, Clerk.

DISTRICT COURT VENIRE

ESSEX COUNTY, ss.
The State of New Jersey

To Frank McNellen & Martin B. Rose, Sergeant-at-Arms, First District Court.

(SEAL)

You are hereby commanded that you cause to come before the First District Court of the City of Newark, holden at the City Hall, in said City and County on Thursday the 11th day of December 1930 at 10:30 o'clock in the forenoon twelve good and lawful men being citizens of this State above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are in no wise akin to Richard D. Donnelly, Plaintiff and Paramount Organization Defendant nor interested in the suit, to make a jury for the trial of the action between the parties aforesaid, because as well the said plaintiff as the said defendant have put themselves on that Jury. And have you there the names of those jurors, and this writ.

Witness, CECIL H. MacMAHON, Esq., Judge of said Court at Newark, aforesaid, the 8th day of December, in the year One Thousand Nine Hundred and Thirty.

(Signed) Louis Hecht, Clerk.

No. 144655

FIRST DISTRICT COURT, NEWARK, N. J.

VENIRE

Richard D. Donnelly, vs. Paramount Organization
Returnable December 11 1930 at 10:30 A. M.

By virtue of within writ, I have duly summoned the following named lawful Jurors to appear at this time:

1	John H. Hubley	7	Fred Weber
2	J. Mueller	8	O. A. Rogers
3	J. F. Cox	9	Wm. Kent
4	A. Lowitz	10	Herman Mayhoffer
5	John Kellehan	11	Wm. Gerber
6	T. G. Wilson	12	Frank Gardner

M. B. Rose, Sergeant-at-Arms

Dec. 11, 1930.

FIRST DISTRICT COURT OF THE
CITY OF NEWARK.

RICHARD D. DONNELLY, *Plaintiff,* —*vs*— PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant.*	ON CONTRACT DEMAND FOR JURY

Defendant demands a trial by jury in the above entitled cause.

Samuel S. Ferster (Signed)
Attorney for Defendant.

FILED
Dec. 4, 1930.

Louis Hecht,
Clerk.

PARAMOUNT ORGANIZATION

Newark, New Jersey.

APPLICATION

PARAMOUNT ORGANIZATION Date 9/17/30

Please record my order for following:

MAKE OF CAR: Packard (Brand New)

MODEL: 1931 8-26 5 Pas. Sedan with Disc. wheels

COLOR OF PAINT: will advise 9/18/30

TYPE OF UPHOLSTERY: Standard equipment

Standard Price Delivered with Standard Equipment $2266.50

Deposit herewith to apply against purchase: (Amount of deposit must equal the discount 238.50

It is my understanding that I am to receive a discount of 238.50

of factory list price: Balance and Buick Trade-in 1711.50

I want delivery made on or about: October 6, 1930

Check which } I intend to pay cash upon delivery as follows: $1950 less $238.50 and will give you a 27-40 Model Buick #1732607

This application, with deposit, is made with the understanding that you will send me your usual signed purchase order and that if any feature of such purchase contract be objectionable to me or not according to my understanding, you will upon my written request cancel this application and promptly return to me the above mentioned deposit. I also have the privilege of accepting the

above car by merely paying the price less discount of

My application was recommended by self,

Signature of Applicant:

Paramount Organization Inc.

Address:

Maurice I. Bears, Pres.
45 Branford Place,
Newark, N. J.
Phone No. Market 2-4042

$238.50 or the net price of
$2266.50 (without any trade-in
of my Buick #1732607

Richard D. Donnelly
Elks Club, Newark, N. J.

FIRST DISTRICT COURT

Of the City of Newark

RICHARD D. DONNELLY, *Plaintiff,* —*vs*— PARAMOUNT ORGANIZATION A Corporation, *Defendant.*	ON CONTRACT STATE OF DEMAND

The plaintiff demands of the defendant the sum of Five Hundred Dollars ($500.00) for that:

FIRST COUNT

On or about September 17, 1930 the plaintiff gave to the defendant his written application, a copy of which is attached hereto and made a part hereof, for the delivery on or about October 6, 1930 of one Packard 5 Passenger Sedan—1931—8-26, at the price and upon the terms set out in said application, that the plaintiff paid to the defendant $238.50 in cash at that time, that in accordance with the terms of said application the defendant was to forward to the plaintiff its usual purchase order and that if any feature of such purchase contract be objectionable to the plaintiff, or not according to his understanding, the defendant would upon written request cancel said application and return the deposit, of $238.50, that the defendant never forwarded said purchase order or contract to the plaintiff for his acceptance, that on October 3, 1930 the defendant informed the plaintiff it would be unable to deliver and agreed to return to the plaintiff said deposit of

$238.50, that the defendant has refused to return said deposit of $238.50 to the plaintiff although often requested so to do.

SECOND COUNT.

The plaintiff sues for the sum of $238.50 moneys had and received by the defendant to and for the use of the plaintiff being a deposit of $238.50 made by the plaintiff on account of a certain Packard automobile which the defendant failed and neglected to deliver to the plaintiff.

Judgment will be claimed on the first and second counts in the sum of Five Hundred Dollars ($500.00) together with lawful interest and costs of suit.

(Signed) Alexander T. Schenck,
Plaintiff's Attorney.

DISTRICT COURT SUMMONS ON CONTRACT

ESSEX COUNTY
The State of New Jersey ss.

To any Constable of said County, or the Sergeant-at-Arms of the First District Court of the City of Newark.

SUMMON

(SEAL)

Paramount Organization, a corporation to appear before the First District Court of the City of Newark to be held at the City Hall Annex, Third Floor, Rear of City Hall, between Green and Franklin Streets, in said City, on the twenty-fifth day of November, Nineteen Hundred and Thirty, at Ten o'clock in the forenoon, to answer unto Richard D. Donnelly, in an action upon Contract wherein the Plaintiff demands from the Defendant Five hundred dollars. Hereof fail not.

Witness, CECIL H. MacMAHON, Esq. Judge of said Court at Newark, as aforesaid, the Thirteenth day of November, in the year One Thousand Nine Hundred and Thirty.

(Signed) Louis Hecht,
Clerk.

Address of Defendant
45 Branford Place,
Newark, New Jersey

First District Court
of Newark, N. J.

144655

SUMMONS ON CONTRACT

RICHARD D. DONNELLY, *Plaintiff,*	Demand $500.00
	Summons 2.10
—*vs*—	Mileage ..... .08
PARAMOUNT ORGANIZATION, A Corporation, *Defendant.*	Listing Fee 1.50
	Attorney's Fee (5%)

Returnable November 25, 1930

Alexander T. Schenck,
763 Broad St.,
Newark, N. J.
Attorney for Plaintiff.

SUMMONS AND STATE OF DEMAND

To the Defendant:

TAKE NOTICE, that the plaintiff demands that the defendant shall file and serve written specifications of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

(Signed) Alexander T. Schenck,
Plaintiff's Attorney.

I, Louis Hecht, Clerk of the First District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the foregoing is a true copy of the record and proceedings in the case of Richard D. Donnelly vs. Paramount Organization, held in the First District Court of the City of Newark, in the County of Essex and State of New Jersey, as taken from the First District Court Docket #300, page 144655.

(SEAL)

Louis Hecht,
Clerk.

Dated January 2nd, 1931.

FIRST DISTRICT COURT OF THE CITY OF NEWARK, in the County of Essex and State of New Jersey.

I, Cecil H. MacMahon, Judge of the First District Court of the City of Newark, in the County of Essex, and State of New Jersey, do hereby certify that the aforesaid Court is a Court of record, that Louis Hecht whose name is subscribed to the proceeding transcript, is the Clerk of the First District Court of the City of Newark, County of Essex, and State of New Jersey, and that full faith and credit are due his official acts.

Witness my hand at Newark, N. J. this second day of January, A. D. Nineteen hundred and thirty-one.

(SEAL)

Cecil H. MacMahon,
Judge.

FIRST DISTRICT COURT of the City of Newark, in the County of Essex and State of New Jersey.

I, Louis Hecht, Clerk of the First District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the aforesaid Court is a Court of record, that Honorable Cecil H. MacMahon, whose name is subscribed to the preceding certificate is the Judge of the First District Court of the City of Newark, in the Couny of Essex and State of New Jersey and that the signature of said Judge is genuine.

In testimony whereof I have set my hand and affixed the seal of said Court, this Second day of January, A. D. Nineteen hundred and Thirty-One.

(SEAL)

Louis Hecht,
Clerk.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

RICHARD D. DONNELLY, *Plaintiff-Respondent,* —*vs*— PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	ON CONTRACT STATE OF THE CASE.

This case came on for trial before me, CECIL H. MacMAHON, Judge of the First District Court of the City of Newark, on December 11th, 1930, before a jury.

The action is on contract in two counts, the first count to recover the amount paid as deposit, pursuant to a contract of purchase of an automobile, dated September 17th, 1930, a copy of said contract being annexed to the state of demand and a copy also being annexed hereto; the second count, to recover the sum of $238.50 for monies had and received pursuant to the said contract. A demand for filing and serving specifications of defenses was endorsed upon and served with the complaint. No specifications of defenses has yet been filed.

The jury was called and duly sworn. The attorney for the plaintiff in his opening address to the jury recited in substance that the defendant having failed to send the signed purchase order called for in the contract, the plaintiff had demanded the return of his deposit, which the defendant had refused to return.

The attorney of the defendant addressed the jury stating that the defendant admitted the con-

tract as set forth in the state of demand, mentioned in the opening of the plaintiff's attorney and the receipt of the deposit; further, that it was the intention of the defendant to offer evidence that on October 3rd, 1930, the plaintiff called the defendant on the telephone and requested that his order for the automobile be cancelled to which the defndant replied that it would cancel the order providing the plaintiff would purchase something else from defendant with the monies paid as a deposit; also that the defendant would introduce in evidence a letter written by the defendant confirming such telephone conversation, which letter crossed the letter written by the plaintiff and received by defendant in which plaintiff demanded the return of the deposit. The attorney for the defendant also stated to the jury that although the defendant offered to cancel the order for the automobile upon the conditions outlined in the letter written by the defendant, the plaintiff in fact did not comply with the conditions sought to be imposed by the defendant and the defendant would rely upon the original contract with the plaintiff.

The defendant's attorney having concluded his opening, the court on its own motion, directed the jury to bring in a verdict for the plaintiff for the amount of the deposit, because the order specifically provided for the cancellation of the contract by the plaintiff at his option, the sending of a signed purchase order by the defendant, and the return of his deposit upon written demand; that the defendant had failed to send a signed purchase order and had refused to return the deposit after receiving written notice of cancellation, and had sought to make the plaintiff apply the money deposited under the contract to the purchase from the defendant of something not cotemplated by the contract. The attorney for the defendant

attempted to interrupt the court during the delivery of the instructions to the jury, but was not permitted to speak until the jury had returned its verdict in accordance with the court's instructions; whereupon the defendant's attorney was allowed to take such exceptions as he desired and defendant's attorney did take exception to the court's ruling and action in directing a verdict; defendant's attorney also objected to the court's statement that no signed purchase order had been sent and then said that signed purchase order had been sent.

On December 22nd, 1930, the court received a letter from defendant's attorney, stating that he had filed a notice of appeal in this matter and submitted to the attorney of the plaintiff a proposed state of the case on appeal, to which plaintiff's attorney refused to agree and suggested that the court be requested to make a state of the case on appeal; no bond had then been filed in this matter, nor was any bond presented to the court until December 31st, 1930, when the bond was approved and filed.

Since December 31st, 1930, no effort has been made to agree upon the state of the case on appeal, so far as this court knows, nor has any request been made since an appeal was perfected to prepare such state of the case on appeal. An order was presented on January 2nd, 1931, extending the time for agreeing upon the state of the case on appeal to January 14th, 1931. The clerk of this court informs the court that between the date of filing notice of appeal, December 20th, 1930, and December 31st, 1930, when the appeal bond was filed, the attorney for the defendant spoke to the Clerk of the Court and asked whether the court had prepared a state of the case on appeal and was informed that no such state of the case had been prepared, probably because no bond had been

filed, whereupon defendant's attorney said he did not want to file a bond until he knew what the state of the case on appeal would contain.

All of which is respectfully submitted this 13th day of January, 1931.

CECIL H. MacMAHON,
Judge of the First District
Court of the City of Newark.

PARAMOUNT ORGANIZATION
Newark, New Jersey

APPLICATION

PARAMOUNT ORGANIZATION Date 9/17/30

Please record my order for following:

MAKE OF CAR: Packard (Brand New)

MODEL: 1931, 8-26, 5 Pas. Sedan with Disc. wheels

COLOR OF PAINT: Will advise 9/18/30

TYPE OF UPHOLSTERY: Standard Equipment

Standard Price Delivered with Standard Equipment $2266.50

Deposit herewith to apply against purchase: (Amount of deposit must equal the discount) 238.50

It is my understanding that I am to receive a discount of 238.50

of factory list price: Balance and Buick Trade-in 1711.50

I want delivery made on or about: October 6th 1930

Check which { I intend to pay cash upon delivery as follows: $1950 less $238.50 and will give you a 27-40 Model Buick #1732607

This application, with deposit, is made with the understanding that you will send me your usual signed purchase order and that if any feature of such purchase contract be objectionable to me or not according to my understanding, you will upon my written request cancel this application and promptly return to me the above mentioned de-

posit. I also have the privilege of accepting the above car by merely paying the price less discount of

My application was recommended by self.

Signature of Applicant:

Paramount Organization Inc.

Address:

Maurice I. Bears, Pres.
45 Branford Place,
Newark, N. J.
Phone No. Market 2-4042

$238.50 or the net price of
$2266.50 (without any trade-in
of my Buick #1732607
Richard D. Donnelly
Elks Club, Newark, N. J.

NEW JERSEY SUPREME COURT.

RICHARD D. DONNELLY, *Plaintiff-Respondent,* —*vs*— PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	Action at Law On Appeal From District Court Specification of Determinations.

The following is a specification of the determinations of the District Court with respect to which the appellant is dissatisfied in point of law.

1.—The District Court has erred because the judgment was entered without any evidence at all to support it.

2.—The District Court erred on the further ground that the counsel should have been given an opportunity to explain and qualify his statements and to correct any omissions or errors before the court acted on the opening statement.

3.—The District Court erred in entering judgment on the further ground that the defendant had a right to a trial by jury on the issues made by the pleadings and the verdict should have rested upon the evidence or want of evidence and not upon the opening statement of counsel.

4.—The District Court erred on the further ground that when the Court had expressed its intention of directing a verdict on the opening statement of counsel and counsel for the defendant attempted to interrupt the Court and remove a misapprehension of facts by further statement and was not permitted to make such statement, but was permitted to do so after the charge of the

Court, such statement should have been received and same considered as if made before the charge.

5.—The District Court erred on the further ground that in disposing of the case on the opening of counsel, nothing should have been taken against the party making the statement without full consideration, for the statement of counsel to the jury was not a detailed statement of all of the evidence but just an ordinary summary of what was intended to be proved and the inference to be drawn from same should have been as comprehensive as the statement would justify.

SAMUEL S. FERSTER,
Attorney for Appellant.

NEW JERSEY SUPREME COURT.

RICHARD D. DONNELLY, *Plaintiff-Respondent,* *vs.* PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	Action at Law Notice of Appeal to New Jersey Supreme Court.

To: ALEXANDER T. SCHENCK, Attorney for Plaintiff-Respondent.
#763 Broad Street
Newark, New Jersey.

SIR:

Please take notice that the Paramount Organization, Inc., a corporation, the defendant-appellant, appeals from the whole of the judgment entered in the above entitled cause from the New Jersey Supreme Court to the Court of Errors and Appeals, in the last resort in all causes, upon the ground that the Supreme Court erred in affirming the judgment of the First District Court of the City of Newark, instead of reversing the said judgment of the First District Court of the City of Newark.

Dated: July 13, 1931.

Respectfully,

Attorney for Defendant-Appellant.

Sat below

Justices Lloyd, Campbell and Bodine.

NEW JERSEY SUPREME COURT.

RICHARD D. DONNELLY, *Plaintiff-Respondent,* *vs.* PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	On Appeal Order of Affirmance.

This cause having been duly argued before our Supreme Court at the May Term, 1931, by Alexander T. Schenck of counsel for the plaintiff-respondent, and Samuel S. Ferster, of counsel for the defendant-appellant, and the court having considered the same, and being of the opinion that the judgment for the plaintiff, entered in the First District Court of the City of Newark, should be affirmed.

It is thereupon ORDERED AND ADJUDGED that the judgment of the First District Court of the City of Newark, from which an appeal was taken in this cause, be and the same is hereby affirmed with costs to the plaintiff-respondent, and that the record and proceedings be remitted to the court below to be proceeded with according to law and the practice of said court.

Entered July 10, 1931.

On Motion of:

ALEXANDER T. SCHENCK,
Attorney for Plaintiff-Respondent.

Cozzolino Ptg. Co., 265 Halsey St., Newark

NEW JERSEY SUPREME COURT.

No. 437, May Term, 1931.

RICHARD D. DONNELLY, *Plaintiff-Respondent,* *vs.* PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	Argued May 5, 1931 Decided 1931 On appeal from District Court.

For defendant-appellant, Samuel S. Ferster.

For plaintiff-respondent, Alexander T. Schenck.

Before Justices Lloyd, Campbell and Bodine:

PER CURIAM: The appeal in this case brings up a judgment of $239.69 entered in the First District Court of Newark in favor of the plaintiff. The error assigned was the direction of a verdict in favor of the plaintiff after the opening of counsel for both parties. "The trial judge, in the exercise of sound discretion, may in a proper case direct the verdict. And it is the duty of the court to do so when the facts warrant it, although statutes require issues of fact to be submitted to the jury. Such action does not deprive the party against whom the verdict is directed of his constitutional right to a jury trial, nor is this power in any way affected by the fact that statutes expressly confer on the parties the right to demur to the evidence." 38 Cys, 1563.

The action was brought to recover the deposit money paid upon an application to purchase a Packard automobile. The application contained the following clause: "This application, with deposit, is made with the understanding that you will send me your usual signed purchase order

and that if any feature of such purchase contract be objectionable to me or not according to my understanding, you will upon my written request cancel this application and promptly return to me the above mentioned deposit.

The defendant's attorney stated in his opening that he relied upon the written contract containing the above provision. He admitted that no purchase order was sent forward, and that the plaintiff had requested in writing a cancellation. He sought to go to the jury on the theory that he could show by parol that the defendant had offered to cancel the application if plaintiff would purchase other goods with the deposit money. This it is to be noted was quite apart from the right of the parties to stand upon the written contract.

The action of the trial judge was proper. The provisions of the written instrument were clear and definite. The defendant had admitted every material fact upon proof of which the plaintiff would be entitled to a verdict. The mere circumstance that the defendant sought to alter the terms of the contract could, in no sense, change the legal results. The learned trial judge merely found that there was no offer to prove any fact or circumstance which might bar plaintiff's recovery. Baldwin v. Shannon, 43 N. J. L. 596, 602. The suggestion by defendant's counsel that he would prove an offer to make a new and distinct contract certainly was of no avail in a court of law.

The judgment will be affirmed with costs.

New Jersey Court of Errors and Appeals

RICHARD D. DONNELLY, *Plaintiff-Respondent,* *vs.* PARAMOUNT ORGANIZATION, INC., a corporation, *Defendant-Appellant.*	Action at Law On Appeal from Supreme Court. Brief for Defendant-Appellant.

POINT ONE

CONTENTION

DEFENDANT-APPELLANT CONTENDS THAT THE DISTRICT COURT ERRED IN ENTERING JUDGMENT WITHOUT EVIDENCE IN SUPPORT THEREOF.

AUTHORITIES

The defendant-appellant contends that the District Court erred in entering judgment in the lower court without the testimony of witnesses or any evidence in support of the plaintiff-respondent's case, and in directing a verdict at the conclusion of the opening statement of counsel on both sides. It is admitted that it has occasionally been the practice of the courts to enter or to direct a verdict upon the opening of counsel. It is contended, however, that such practice is to be greatly limited, to be rarely used and sparingly exercised.

In 26 RULING CASE LAW, at page 1030, the general theory is summed up as follows:

"The opening statement of counsel is not intended to take the place of a declaration, complaint, or other pleading, either as a statement of legal cause of action or a legal defense, but is intended to advise the jury concerning the questions

of fact involved, so as to prepare their minds for the evidence to be heard. How full it shall be made, within reasonable limits, is left to the discretion of the attorney; but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated. A party is entitled to introduce evidence and prove a cause of action, or to defend against evidence tending to sustain a cause of action, if no statement at all is made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. Whether a verditc may be directed on the opening statement presents a different question."

In the same volume, at page 1071, the law is further expounded as follows:

"In most jurisdictions it is the rule that where counsel, in his opening statement to the jury, fails to state a cause of action, it is within the power of the trial court to render judgment on such statement for the defendant. The trial court, however, should not exercise this power unless it clearly appears from the plaintiff's own statement that he cannot recover. This is a conclusion that trial courts rarely reach, and a rule that should not be applied except in cases where the statement clearly shows that no cause of action exists. Of course, in all such proceedings, nothing should be taken, without full consideration against the party making the statement or admission. He should be allowed to explain or qualify in so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate so to declare and give such direction as will dispose of the action. In some jurisdictions, however, the power to direct a verdict on the opening statement is denied, and some

courts, while conceding the right to direct a verdict where the opening statement shows that to permit a recovery would be against public policy, deny the right to direct a verdict for failure to state facts sufficient to constitute a cause of action."

In this state the Courts have indicated the same attitude, as will be observed from excerpts quoted from the authorities hereinafter cited in support of the points hereinafter argued.

POINT TWO

CONTENTION

DEFENDANT - APPELLANT CONTENDS THAT THE DISTRICT COURT ERRED ON THE FURTHER GROUND THAT THE COUNSEL SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO EXPLAIN AND QUALIFY HIS STATEMENTS AND TO CORRECT ANY OMMISSIONS OR ERRORS BEFORE THE COURT ACTED ON THE OPENING STATEMENT.

AUTHORITIES

In KELLY v BERGEN COUNTY GAS CO., 67 Atl., 21, 74 N. J. LAW, 604, Court of Errors and Appeals of New Jersey, Chancellor Magie said:

"A motion for a nonsuit upon the opening of counsel is not frequently resorted to. In dealing with it, it is obvious that the rule which is applied to a motion for a nonsuit at the close of plaintiff's evidence is the one which should be applied. In both cases, the question presented is whether the facts stated or proved, and reasonable inferences which may be drawn therefrom, disclose that the plaintiff is not entitled to submit his case to the

jury, because a verdict in his favor could not be maintained. In practice, a motion for a nonsuit, made upon the opening of counsel, is, perhaps, more liberally treated than an application for a nonsuit at the close of the plaintiff's case. In the former case, if objection be made to a statement too meager to sustain the plaintiff's case, counsel will, doubtless, be permitted to enlarge his statement. But in the haste required by the pressure of business at the present day, counsel, in general, restrict themselves to a mere outline of the case they design to present.

The opening appearing in the bill of exceptions is somewhat meager, and if objected to on that ground, counsel would, no doubt, have been permitted to make this statement more complete.

But I think it does present a case for the jury if the facts stated therein were proved."

In OSCANYAN v ARMS COMPANY, 103 United States Reports, 261, it was said by Mr. Justice Field, as follows:

"In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case. If, on the trial of a homicide, to take an illustration suggested by counsel, it should appear from the opening statement that the ac-

cused had been pardoned for the offense charged, it would be a waste of time to listen to the evidence of his original criminalty; for if established he would still be entitled to his discharge by force of the pardon. So in a civil action, if it should appear from the opening statement that it is brought to obtain compensation for acts which the law denounces as corrupt and immoral, or declares to be criminal, such as attempts to bribe a public officer, or to evade the revenue law, or to embezzle the public funds, the court would not hesitate to close the case without delay. Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action."

In UNITED STATES v DIETRICH, 126 Federal Reporter, 676, the court said:

"Where, by the opening statement for the prosecution in criminal trial, and *after full opportunity for the correction of any ambiguity, error, or omission in the statement,* a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its motion or that of counsel, close the case by directing a verdict for the accused."

POINT THREE

CONTENTION

DEFENDANT-APPELLANT CONTENDS THAT THE DISTRICT COURT ERRED IN ENTERING JUDGMENT ON THE FURTHER GROUND THAT THE DEFENDANT HAD A RIGHT TO A TRIAL BY JURY ON THE ISSUES MADE BY THE PLEADINGS AND THE VERICT SHOULD HAVE RESTED UPON THE EVIDENCE OR WANT OF EVIDENCE AND NOT UPON THE OPENING STATEMENT OF COUNSEL.

AUTHORITIES

In Pietsch v Piesch, et al, 245 Ill., 454, 92 N. E., 325, after reciting the facts in this case, the court said:

"When the jury had been sworn to try the issues and render a verdict according to the evidence, it was the privilege of the attorney for each party, if he saw fit to do so, to make an opening statement of what he expected to prove. Such a statement is not intended to take the place of a declaration, complaint, or other pleadings, either as a statement of a legal cause of action or a legal defense, but is intended to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard. How full it shall be made, within reasonable limits, is left to the discretion of the attorney, but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated. 1 Thompson on Trials, 267. A party is entitled to introduce evidence and prove a cause of action or to defend against evidence tending to sustain a cause of action, if no statement at all is

made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. The opening statement may be wrong as to some facts, and there is no requirement that it shall give all the facts of the case, which may turn out to be different from the statement. The argument that a court may direct a verdict, not upon the evidence or the want of evidence but upon the statement of attorney, rests mainly upon the power of an attorney to make admissions binding upon his client and to waive his rights. There is no dispute about the authority of an attorney to admit facts on the trial and waive the necessity of introducing evidence as to such facts, but the authorities cited, relate to such admissions in the trial of the case. That the opening statement to the jury cannot be treated as an admission of facts binding upon the client was decided in Lusk v Throop, 189 Ill. 127, 59 N. E. 529, where the refusal of an instruction that any statement made by the attorney for the plaintiffs in his opening statement, about what evidence would show, was as binding upon the plaintiffs as if the plaintiffs themselves had made such statement, and as such should be considered by the jury in making their verdict,was endorsed by this court. If the jury could not treat statements of an attorney, in his opening statement, as to what the evidence would show as admissions of fact binding on the client and consider the same in making up their verdict, the same rule must necessarily be applied to the court, and it follows that there was no admission hereof the cause of action or that there was no defense to it. Even if it could be said that the attorney admitted that the legal title to the lot was in the plaintiff and the title could not be tried in forcible detainer, there was no attempt to try the question of title. The title was not involved and could not be tried or deter-

mined, but it did not necessarily follow that the plaintiff was entitled to the possession of the property. The law in England as, that a court cannot take such action as was taken in this cause upon an opening statement. In Fletcher v London & Northwestern Railway Co., 65 L. T. Rep. 605, the judge non-suited the plaintiff on the ground that the opening statement did not show any cause of action, and it was held that the judge at the trial had no right to nonsuit a plaintiff upon his counsel's opening statement without the consent of his counsel. It was pointed out that a suitor might lose his case because his counsel had omitted or misstated something in the opening, and the course adopted in that case was condemned as most dangerous to the rights of litigants. The law is the same in Wisconsin. Fisher v Fisher, 5 Wis. 472; Haley v Western Transit Co., 76 Wis., 344, 45 N. W., 16. The same argument was made to the Wisconsin court that is made here————that it would be convenient and conduce to the speedy administration of the law and justice to permit the court to decide the case upon an opening statement——but while that was conceded by the court, the practice was considered too dangerous to the rights of clients to be sanctioned. It is undoubtely true that the method adopted in this case would be expeditious, and if there were no omissions or defects in the statement, and it was certain that the evidence would turn out in accordance with it, the court might be enabled to do justice; but it would be a still more expeditious method and equally conduce to the ends of justice for the court to call up the attorneys and examine them and decide the case on what they say before calling a jury, whereby much time, labor, and expense would be saved. But if parties have a right to a trial by jury of the issues made by the pleadings, the verdict must rest upon evidence or want of evidence and not upon opening statements."

POINT FOUR

CONTENTION

DEFENDANT-APPELLANT CONTENDS THAT THE DISTRICT COURT ERRED ON THE FURTHER GROUND THAT WHEN THE COURT HAD EXPRESSED ITS INTENTION OF DIRECTING A VERDICT ON THE OPENING STATEMENT OF COUNSEL AND COUNSEL FOR DEFENDANT ATTEMPTED TO INTERRUPT THE COURT AND REMOVE A MISAPPREHENSION OF FACTS BY FURTHER STATEMENT AND WAS NOT PERMITTED TO MAKE SUCH STATEMENT, BUT WAS PERMITTED TO DO SO AFTER THE CHARGE OF THE COURT, SUCH STATEMENT SHOULD HAVE BEEN RECEIVED AND SAME CONSIDERED AS IF MADE BEFORE THE CHARGE.

AUTHORITIES

It is regretted that so long an excerpt from the case about to be referred to is necessary, but the situation in the said case is so identical with that at bar, and the decision therein so completely in line with the contentions of the defendant-appellant, that the tolerance of this court is sought.

In BARTO v DETROIT IRON & STEEL CO., 118 N. W. 738, the court held:

"A verdict was directed for the defendant on the opening statement of plaintiff's counsel, for the reason that it conclusively appeared from such statement that the negligence for which plaintiff claimed the right to recovery was the negligence of one Sawyer, who was a fellow servant of the plaintiff in defendant's employ.

The defendant is engaged in the manufacture of pig iron. After the pigs are formed, they are carred by a travelling crane operated by electric power to certain breaking apparatus, where the pigs are broken apart, fall into a chute, and are conveyed thereby into a freight car placed underneath the chute for that purpose. The travelling crane and the breaking appartus were operated by Sawyer. Plaintiff's intestate began work for defendant on the night of February 14, 1905, and was killed the next night by a pig falling upon him while he was clearing the rails beneath the chute so that cars could be placed beneath it. After the trial judge had indicated his intention to direct a verdict, plaintiff's counsel called the operator, Sawyer, who had been sworn, to the witness stand, and made the following statement: "Plaintiff is prepared to prove his case and has placed upon the stand a witness to prove it. He offers the witness for the purpose of sustaining the facts alleged in his declaration." In the course of the court's instruction to the jury, the following occurred: "Court: It appears that the arrangement is such that these pigs are not supposed to be dropped unless there is a car there, and it is the duty of the operator to conduct it in such a way by not placing them in the breakers or near the chute so that they will drop upon the floor, not to break them until such a time as a car is there. Mr. Dohany: In deference to my client it is my duty - - - - Court: Take your exception. Don't interrupt me. Mr. Dohany. I must. I must. My duty places me in a position that I must in behalf of my - - - - - Court: You may make your statement to the stenographer after I get through with my charge to the jury. * * * * Mr. Dohaney: Before a verdict is directed I want to make an amendment to your honor's statement of fact. Court: And, furthermore, gentlemen of

the jury - - - - Now, Mr. Dohany, you stop. I consider that the principle laid down in this case of 131 Mich. 594 (92 N. W. 110) applies to this case in connection with the situation that I have outlined and also independent of it. Before I direct a verdict, I desire to say that the case reported in 131 Mich. I think applies. Mr. Dohany: Before your honor directs a verdict, I desire to correct - - - - Court: Take the verdict, Mr. Clerk Mr. Dohany: It is my duty to the court and my honor as an attorney, it is my duty to my client - - - - Court: If you speak further, I will fine you; that is the end of it." At the conclusion of the instructions, plaintiff's counsel made the following statement upon the record: "Your honor's conclusion that the premises were so situated that the operator of the bridge might know that there was a car underneath or not underneath is entirely wrong. As a matter of fact, from the position that he occupied, the operator could not possibly know whether or not a freight car was underneath the chute ready to receive the pigs as they fell below. We are prepared to show, also, that he had no notice whatever that the freight car had been removed. We are also prepared to prove that pigs were often broken up and sent down through the chute when no freight car was underneath the chute. Because of the snortage of freight case, it would stop the operation of the whole plant if that rule were followed. We were also prepared to prove that the operator of the bridge on the night in question was entirely free from negligence, and also that the deceased was entirely free from negligence."

Under the ruling of the court that the plaintiff's counsel should make his statement to the stenographer after the charge was finished, we think such statement should receive the same consideration as though made before the conclusion of

the charge. Since the plaintiff's counsel offered to prove by the witness Sawyer, who operated the crane and breaking apparatus, the facts alleged in his declaration, such material facts must be taken as established. The statements of the plaintiff's counsel before and after the direction of the verdict and the allegations of the declaration, considered together, would warrant a finding: * * * *.

We are of the opinion that the court should have received the testimony of the witness Sawyer, and that it was error, under the circumstances, to direct a verdict.

POINT FIVE

DEFENDANT - APPELLANT CONTENDS THAT THE DISTRICT COURT ERRED ON THE FURTHER GROUND THAT IN DISPOSING OF THE CASE ON THE OPENING OF COUNSEL, NOTHING SHOULD HAVE BEEN TAKEN AGAINST THE PARTY MAKING THE STATEMENT WITHOUT FULL CONSIDERATION, FOR THE STATMENT OF COUNSEL TO THE JURY WAS NOT A DETAILED STATEMENT OF ALL OF THE EVIDENCE BUT JUST AN ORDINARY SUMMARY OF WHAT WAS INTENDED TO BE PROVED AND THE INFERENCE TO BE DRAWN FROM SAME SHOULD HAVE BEEN AS COMPREHENSIVE AS THE STATEMENT WOULD JUSTIFY.

AUTHORITIES

In support of this contention the opinion of the Court in CARR et al v DELAWARE, L. & W. R. Co., 78 N. J. Law, 692, 75 Atl. 928, is respectfully referred to. In that case the court said:

"At the close of this opening the trial court overruled the defense proffered and directed a verdict for the plaintiffs. To this the defendant took an exception, which is the basis of the assignment of error upon which the defendant relies for reversal of the judgment.

In directing a verdict against a defendant upon the opening of counsel, the trial court must give the statement of facts made by counsel the same force and effect as it if was duly testified to by withnesses; for the rule upon which such a proceeding is based is that, if all the facts be assumed to be true and were duly proven, they would constitute no defense, and the trial court should be satisfied, conceding all the inferences which the jury might justifiably draw from the facts stated, that the evidence tendered is insufficient to warrant a verdict for the defendant. Pleasants v. Fant, 89 U. S. 116, 22 L. Ed. 780-783; Oscanyan v W. R. Arms Co., 103 U. S. 261, 26 L. Ed. 539. We think that the inference which a jury would be warranted in drawing from the facts stated in the opening of defendant's counsel is that the defendant had established a special yard at Clymer Street, Brooklyn, with trackage room for only 45 cars, and that this trackage was apportioned among at least 12 persons, who were entitled to use the tracks apportioned to them, respectfully, for market purposes, * * * * * *. These were justifiable inferences, which the plaintiffs might have met and destroyed with rebuttal testimony; but for the purpose of this case the facts from which they may be drawn stand without contradiction.

In disposing of a case on the opening of counsel, nothing should be taken against the party making the statement without full consideration; for it is not a detailed statement of all the evidence, but ordinarily a summary of what is intended to be proven, and the inferences to be drawn should be

as comprhensive as the statement will justify. The defense proposed was that a special condition had been created by the defendant, not for the general public, but for a small number of market men, under which they had the unusual privilege of retailing their shipments directly from the car to their customers, and it differs from the ordinary terminal or station, where all persons may receive freight. The accommodations at the place were limited, and the plaintiffs, knowing this, and that the use of the tracks was apportioned among at least 12 dealers, including the plaintiffs, consigned to this special point more cars than they could unload according to the custom or method followed by them, in time to save depreciation; and it is not an unfair inference that the same depreciation would have happened if there had been ample room, and all of the cars had been floated to Brooklyn as fast as they were delivered at Hoboken.

In our opinion, the defense was improperly overruled; for if the special conditions, which the inferences warrant, existed, a jury might properly find that plaintiffs had knowledge of it, and consigned their produce to Clymer Street, instead of Hoboken, the rail terminal of the defendant, upon an implied agreement that the cars were to be floated from Hoboken to Brooklyn only as rapidly as the plaintiffs could sell their contents and release the proportion of trackage in the market space assigned to them, which agreement was fulfilled by the defendant on its part.

It is respectfully submitted that this Court should reverse the finding of the lower Court and remand the said cause for a re-trial.

Respectfully submitted,

SAMUEL S. FERSTER,
Attorney for Defendant-Appellant.

New Jersey Court of Errors and Appeals

RICHARD V. DONNELLY,
Plaintiff-Respondent,

vs.

PARAMOUNT ORGANIZATION, INC.,
a corporation,
Defendant-Appellant.

Brief of Plaintiff-Respondent.

BRIEF OF PLAINTIFF-RESPONDENT.

Abstract of the Case.

This is an appeal from a judgment of the Supreme Court affirming a decision of the First District Court of the City of Newark. The action is on contract for the recovery of a deposit paid by the plaintiff on account of the purchase price of an automobile.

At the trial the jury was sworn and the attorney of the plaintiff opened, stating that at the time the deposit was paid a written "application" was signed by the parties which was actually an offer or a request to do business, as it provided that the defendant was to send the plaintiff a "purchase order" or "purchase contract", and that if any feature of this new contract was objectionable, the plaintiff could have his deposit back; that no "purchase contract" was sent by the defendant to the plaintiff, that the defendant was, on his own admission, unable to deliver the automobile, and that the plaintiff, in writing, demanded the return of the deposit.

The attorney of the defendant, on his opening, admitted the execution by the parties of the writ-

ten "application" or "contract", a copy of which was attached to the state of demand, the receipt of the deposit by the defendant, and that the plaintiff in a written letter had demanded the return of the deposit. He spoke at length about telephone conversation and letters between the parties in reference to cancellation of that contract and the request of the defendant that the deposit be used for the purchase by the plaintiff of insurance, which was not done, and said that the defendant relied upon the original contract attached to the state of demand.

When the defendant's attorney had completed his opening, the Judge proceeded to charge the jury and instructed them to bring in a verdict for the plaintiff for the reasons given at page 16, line 25, of the State of the Case. The attorney for the defendant tried to stop the Judge but was not permitted to do so. After the jury had returned its verdict, he stated that the defendant had sent the plaintiff the "purchase order" or "purchase contract" mentioned in the original agreement or application.

The original agreement or "application", a copy of which was attached to the state of demand, contains this provision:

> "This application, with deposit, is made with the understanding that you will send me your usual signed purchase order and that if any feature of such purchase contract be objectionable to me or not according to my understanding, you will upon my written request cancel this application and promptly return to me the above mentioned deposit."

The opinion of the Supreme Court is printed at page 25 of the State of the Case.

ARGUMENT.

I. The plaintiff is entitled to the return of the deposit because the defendant failed to comply with the terms of the original contract.

The original contract was really an offer or request to do business. It provided that the defendant should send the plaintiff a purchase contract embodying their understanding which the plaintiff could cancel if any feature was objectionable (State of Case, page 19, line 30). In his opening, the defendant's attorney stated that he relied on the original contract (State of Case, page 16, line 22), and did not deny the prior statement of the plaintiff's attorney that no new purchase contract had been sent by the defendant. He admitted that the defendant had not delivered the automobile and had not complied with the original contract, and the plaintiff was, therefore, entitled to have his deposit returned. After the Judge had begun to charge the jury, he stated that a new purchase contract had been sent, but this was inconsistent with his previous statement that he relied on the original contract and not in explanation or amplification of what he had previously said. It would have made the new contract the basis of the case.

The present case is much like the case of *Hutton* vs. *Stewart,* 90 Kan. 602, 135 Pac. 681. In that case, a judgment was directed in favor of the plaintiff upon the opening statement and the pleadings of the plaintiff, and upon the opening statement of the defendant, where the defendant had filed no answer, not being required to do so, and the opening statement showed that the whole controversy turned on the construction of a written agreement for the payment of real estate com-

missions, the problem being whether under a proper construction of this agreement, the defense, which the defendant alleged, was a valid defense to the action. The case was affirmed on appeal.

II. The plaintiff is entitled to the return of the deposit because the original agreement, a copy of which is attached to the state of demand, was cancelled and the return of the deposit demanded pursuant to the terms of that agreement.

The original agreement provided for its cancellation and the return of the deposit to the plaintiff upon written request by the plaintiff in case the new purchase contract was objectionable (State of Case, page 19, line 30). Let us assume, for the sake of argument, that a new purchase contract was sent by the defendant to the plaintiff. The defendant's attorney in his opening admitted that the defendant had received a letter from the plaintiff demanding the return of the deposit (State of Case, page 16, line 15). The defendant's attorney also said that he relied on the original agreement (State of Case, page 16, line 22). On the admissions of the defendant's attorney in his opening, it is obvious that the original agreement was cancelled and the plaintiff entitled to the return of his deposit. After the Judge had directed a verdict for the plaintiff, the defendant's attorney made no objection to that part of the Judge's charge based on the cancellation of the contract and the demand that the deposit be returned.

III. The action of the Judge of the District Court in directing a verdict was not a violation of the defendant's right to a trial by jury as contended by the defendant.

This has been expressly held in *Board of Health* vs. *Vandruens,* 77 N. J. L., 443, at page 445.

IV. The direction by the District Court Judge of a verdict for the plaintiff on the opening of the defendant's attorney is in accordance with the New Jersey authorities:

Crosby vs. *Wells,* 73 N. J. L., 790;
Baldwin vs. *Shannon,* 43 N. J. L., 596;
Loper vs. *Somers,* 71 N. J. L., 657;
Board of Health vs. *Vandruens,* 77 N. J. L., 443;
State Board of Medical Examiners vs. *Giedroye,* 91 N. J. L. 61;
Polhemus vs. *Prudential Realty Corp.,* 74 N. J. L., 570.

It is submitted that judgment of the Supreme Court affirming the decision of the District Court should be affirmed.

Respectfully submitted,

Alexander T. Schenck,
Attorney and Counsel for
Plaintiff-Respondent.

INDEX