

NEW JERSEY Court of Errors and Appeals

WILLIAM I. PUSEY,
Plaintiff-Respondent,
vs.
CHARLES R. MOORE,
Defendant-Appellant.

} On Appeal from
} Supreme Court.

Appellant's Brief.

FACTS.

Respondent's action was begun in the District Court of Atlantic City, where he secured a judgment from which appellant appealed to the Supreme Court, which affirmed the judgment. The case is embraced in the agreed state of the case and the facts and inferences to justify the judgment must be found there. The original demand (*Exhibit A*) relied upon a *quantum meruit*, but that was abandoned at the trial and leave was granted to amend by filing a demand setting up an express contract between the appellant and respondent in which appellant was to pay respondent \$75 a month to manage appellant's hotel from the 28th day of July to the 28th day of September, 1914. See amended state of demand (*Exhibit B*). Both demands allege

the performance of services by respondent for appellant from July 28th to September 28th. There is no proof or suggestion in the case that respondent performed services for the appellant, and in this respect the proof and allegation do not meet. Nor does the proof show an express contract as alleged, and upon which respondent must stand in order to hold his judgment.

These two salient points were pressed before the Supreme Court and our conception is that they were wholly ignored.

LAW.

It is elementary that allegation and proof must harmonize. It is equally as elementary that plaintiff must recover upon the case as made in his pleadings, unless, of course, he obtains an amendment. These rules apply as well in the District Court as elsewhere. And they apply regardless of the amount involved. Litigants are well within their rights when they insist upon the application of legal rules, notwithstanding the Court may feel that the whole matter is trifling. Notwithstanding the opinion of the Supreme Court that there was evidence of an expressed contract, we submit such evidence is lacking. Minds must meet before there can be a contract. They never met in this case. The Supreme Court disposed of the point by saying: "We think there was such evidence. It is to be found in the testimony of the plaintiff that defendant said, 'I will give you \$75 a month or more if the business warrants it.'" But did the respondent accept this proposition? The fact that he sued on a *quantum meruit* is an indication that he did not. The agreed state of the case does not say that he accepted it, and since it does not show performance or that he did any work for the appellant, will this Court say there is a presumption that he did accept the proposition and did perform services thereunder? That is this case in a nutshell. Moreover, you

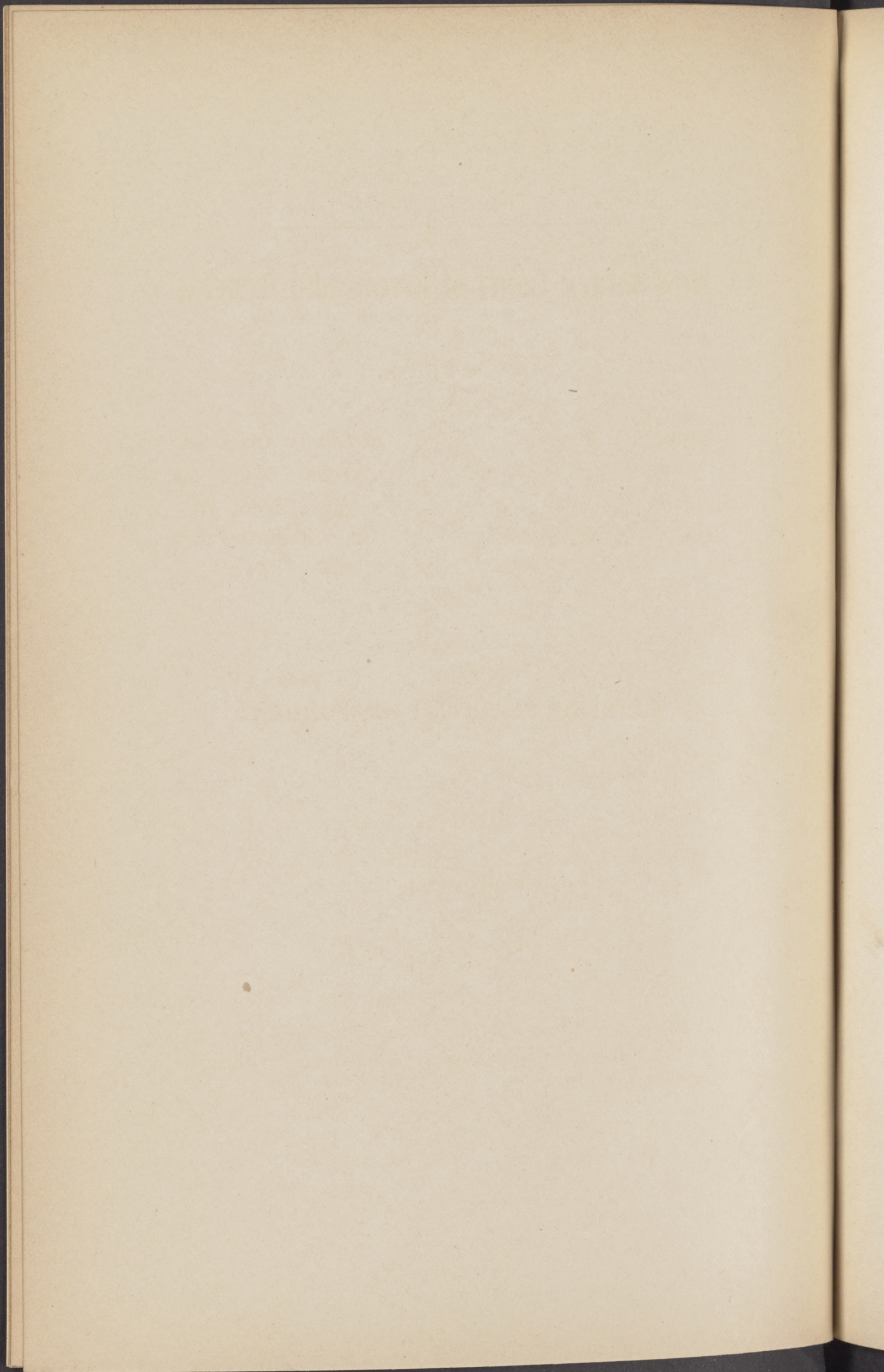
cannot spell an express contract out of the colloquy between the parties. At best the whole affair was purely tentative. Had there been proof of performance the respondent might have recovered on his demand based upon the *quantum meruit*, but having abandoned that, then he was required to show performance of an express contract. Or had there been proof of service there would have been justification for a finding that the respondent had accepted the supposed or alleged proposition of the appellant to pay \$75 a month. As the case stands the finding of an acceptance of the appellant's proposition or the making of an express contract must be extracted from pure ether.

SUMMARIZED.

1. There is no evidence that warranted the finding of an express contract.
2. There is no evidence that the respondent performed any services for the appellant.
3. The judgment should be reversed.

Respectfully submitted,

C. L. COLE,
Attorney for Appellant.



New Jersey Court of Errors and Appeals

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|---|---|--|
| William I. Pusey, <i>Plaintiff-Respondent,</i> | } | Appeal from Supreme Court on Appeal from District Court of Atlantic City. |
| vs. | | |
| Charles R. Moore, <i>Defendant-Appellant.</i> | | |

BRIEF OF PLAINTIFF-RESPONDENT.

IRVING P. PARSONS, for plaintiff-respondent.
C. L. COLE, for defendant-appellant.

Respondent respectfully shows that the decision of the Supreme Court should be affirmed for the following reasons:

First.

Appellant limited and put boundaries to the controversy in this case by and in his motion for direction for the defendant at the close of the trial before the District Court as fully appears by Section 5 of the State of the Case, as stated by the parties to wit:

“The Attorney for the defendant at the close of the case moved for a direction on the ground that the weight of the evidence was in favor of the defendant; that the proof did not warrant the finding of an express contract of hiring;—that the proof was vague, uncertain and indefinite and that there was no evidence to warrant a judgment on an express contract.”

And all this in the face of the evidence of the plaintiff as appears in Section 4 of the Agreed State of the Case, to wit:

“Pusey you stick by me, I will do better than that by you. I want some one here to run this place for me.” He also said “you stand by me and I will give you seventy-five dollars a month or more if the business warrants it.”

Then it is stated that “the defendant denied that there was any contract between him and the plaintiff except that he had promised to give plaintiff board and lodging so long as he remained with him.”

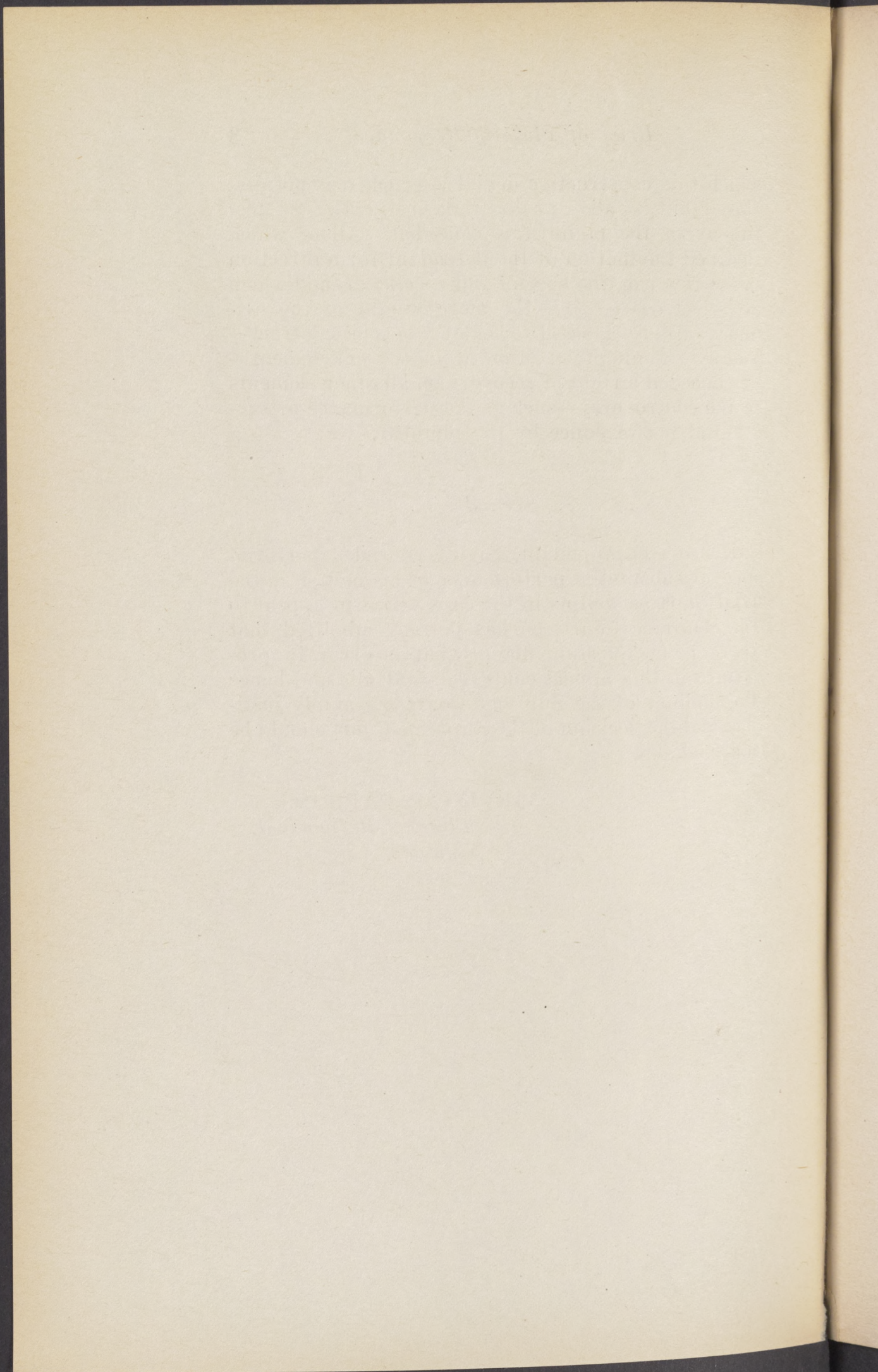
N. B. denied “that he made any other contract except to give board and lodging so long as he remained with him.” But the language in

which this constructive denial is couched is not disclosed, but it fully appears that one part of the testimony of the plaintiff is conceded. All of which justified the motion of the defendant for a direction in his favor on the special and specific ground which he selected—to wit:—the mere weight of the evidence on the technical terms of a special contract—and by confining his motion to this special element—he conceded a right of recovery on all other elements of the controversy—such as the performance or substantial performance by the plaintiff.

Second.

Hence—the appellant, having conceded performance or substantial performance of his motion in the trial court as well as in the case stated in appeal to the Supreme Court, he has thereby admitted that there is no question about what is error in procedure in this appeal controversy at all; and hence the findings of the Supreme Court are amply justified and the decision of the Supreme Court should be affirmed.

IRVING P. PARSONS,
For Plaintiff-Respondent.



New Jersey Supreme Court.

WILLIAM I. PUSEY,
Plaintiff-Appellee, } On Appeal from
vs. } District Court of
CHARLES R. MOORE, } Atlantic City.
Defendant-Appellant.

RECORD OF DISTRICT COURT.

(Filed May 25, 1915.)

IN THE DISTRICT COURT OF THE CITY OF ATLANTIC
CITY.

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

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William I. Pusey,
Plaintiff }
vs. } In an action at law
Charles R. Moore,
Defendant. }

Demand, \$500.00; real debt, \$152.28.

Greis & Parsons, attorneys of plaintiff.

Babcock & Champion, attorneys of defendant.

A summons was issued in the above-stated cause De-
cember 18, A. D. 1914, returnable December 24, A. D.
1914, at ten o'clock A. M., and was returned by the 20
Sergeant-at-Arms as follows:

I served the within summons December 18, 1914, on the defendant by reading it to him and giving him a copy.

D. S. BROWN,
Sergeant-at-Arms.

December 18, 1914, State of Demand filed.

December 24, 1914, the plaintiff appeared ready for trial. The defendant appearing, and it further appearing by the return endorsed thereon that the summons was duly served, the Court proceeded to hear and determine the cause.

William I. Pusey, Charles Agnew and Paul Rosecrans, sworn and testified on part of plaintiff.

Charles R. Moore and Claude Banks, sworn and testified on part of defendant.

Decision reserved.

February 24, 1915, decision rendered.

The evidence being closed and submitted to the Court, judgment was given by the Court in favor of the plaintiff and against the defendant for the sum of one hundred and fifty-two dollars and twenty-eight cents debt, and eleven dollars and twenty cents, cost of suit, to wit:

| | |
|--------------------------|--------|
| Summons, | \$2.10 |
| Entering judgment, | 1.50 |
| Attorney's fees, | 7.60 |

—————
\$11.20

\$1.00 March 5, 1915 Affidavits and Rule to Show Cause filed.

30 .30 March 11, 1915 Three subpoena.
March 12, 1915 Hearing on Rule: Herman Roberts, Jerry Smith and Christian B. Lewis, sworn and testified on part of plaintiff. Rule dismissed.

\$1.00 March 15, 1915 Notice of Appeal and Appeal Bond filed.

DISTRICT COURT OF THE CITY OF ATLANTIC CITY.

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| William I. Pusey, Plaintiff-Appellee, <i>vs.</i> Charles R. Moore, Defendant-Appellant. | } | Agreed State of the Case for Appeal. |
|---|---|---|

The parties hereto (and by their respective attorneys) submit the following as the state of the case for appeal:

1. The action was to recover for services performed by the plaintiff for the defendant, as set forth in the state of demand, a copy of which is hereto and marked *Ex. A.* 10

2. During the course of the trial plaintiff, in order to have his proof and allegation in harmony, moved to amend his demand by setting up an express contract; which motion was allowed, but the amended state of the case was not filed until after the rendition of judgment

3. A copy of the state of demand as filed is hereto and marked *Ex. B.*

4. The only testimony in support of the claim of an express contract was that of the plaintiff, whose testimony was as follows: 20

"Mr. Moore (meaning defendant) says to me 'Have you got connected yet?' I says, 'No, sir; not yet, but I have two or three offers.' He says, I might be able to use you myself; come on up.' I says, 'I will take room and board with you for awhile until I get a place.' He says, 'Come on up; I'm not doing anything, and I will fix you up next week.' I went right in with Mr. Moore. He turned around and went back to the hotel with me and gave me a room. The twenty-sixth, that was Sunday. The following day Mr. Moore and I sat around the hotel, and he was talking to me about the hotel business, and he said things wasn't going right in the hotel, and he wasn't doing any business, and that he had to have somebody to manage the place. I told Mr. Moore, I says, 30

'Mr. Moore, I have an offer now of \$75 a month and board,' and I says, 'I will pay you for my room and board.' Mr. Moore, he says, 'Pusey, you stick by me; I will do better than that for you; I want some man here to run this place for me.' He also said, 'You stick by me, and I will give you \$75 a month or more if the business warrant it.' "

The defendant denied that there was any contract between him and the plaintiff except that he had promised **10** to give plaintiff board and lodging so long as he remained with him.

5. The attorney for the defendant at the close of the case moved for a direction on the ground that the weight of the evidence was in favor of the defendant; that the proof did not warrant the finding of an express contract of hiring; that the proof was vague, uncertain and indefinite, and that there was no evidence to warrant a judgment on an express contract.

All of which motions were overruled and judgment rendered for the plaintiff on an express contract.

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IRVING P. PARSONS,
Att'y for Plaintiff-Appellee.
C. L. COLE,
Att'y for Defendant-Appellant.

EXHIBIT "A."

IN THE DISTRICT COURT OF THE CITY OF ATLANTIC
CITY.

William I. Pusey,
Plaintiff, }
 vs. } Action at Law.
Charles R. Moore, } State of Demand.
Defendant. }
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I. Plaintiff is a resident of the City of Philadelphia, County of Philadelphia and State of Pennsylvania.

2. From July 24, 1914, to September 24, 1914, plaintiff rendered services to defendant, at his request, as his manager for the Hotel Maryland, South New York Avenue, in the City of Atlantic City, County of Atlantic and State of New Jersey.

3. For said services, defendant undertook to pay plaintiff what the same were reasonably worth.

4. The same were reasonably worth the sum of one hundred and fifty (\$150.00) Dollars, which sum was due for the same on the day last mentioned.

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5. Defendant has not paid the same.

Plaintiff demands as damages the sum of one hundred and fifty dollars, with interest from September 24, 1914, to December 24, 1914, in the sum of two dollars and twenty-eight cents, making a total of one hundred and fifty-two dollars and twenty-eight cents besides costs of suit.

GRIES AND PARSONS,
Attorneys for plaintiff.

(Filed Dec. 18.)

EXHIBIT "B."

ATLANTIC CITY DISTRICT COURT.

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|--|---|----------------|
| William I. Pusey, Plaintiff, <i>vs.</i> Charles R. Moore, Defendant. | } | Action at Law. |
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COMPLAINT.

Plaintiff demands of the defendant the just sum of one hundred fifty dollars for wages due the plaintiff for acting as manager of defendant's hotel, known as Hotel Maryland, South New York Avenue, in the City of At-

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lantic City, County of Atlantic and State of New Jersey, from the twenty-eighth day of July, nineteen hundred and fourteen, to the twenty-eighth day of September, nineteen hundred and fourteen, at the wages of at least seventy-five dollars a month, which sum defendant promised to pay plaintiff and promised to pay more if the business warranted it.

Judgment will be claimed for the sum of one hundred fifty dollars together with lawful interests and costs.

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IRVING P. PARSONS,
Attorney for plaintiff.

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

I, William I. Risley, Clerk of the District Court of the City of Atlantic City and County of Atlantic, do certify that the foregoing is a true copy of the whole record, including the judgment record and agreed state of the case for appeal in the case wherein William I. Pusey is plaintiff and Charles R. Moore is defendant, as full, entire and complete as the same remains on file in said court in the case there stated.

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In testimony whereof I have hereunto set my hand and affixed the seal of the said court this
[L. s.] 25th day of March, in the year of our Lord one thousand nine hundred and fifteen.

WILLIAM I. RISLEY,
Clerk.

NEW JERSEY SUPREME COURT.

WILLIAM I. PUSEY,
Plaintiff-Appellee,)
vs.) On Appeal from
 CHARLES R. MOORE,) Atlantic City
Defendant-Appellant.) District Court.

SPECIFICATIONS IN ERROR.

(Filed March 18, 1915.)

The defendant-appellant specifies the following for cause of error: **10**

1. There was no evidence to warrant a verdict in favor of the plaintiff.
2. The state of demand as amended does not show a cause of action, it failing to show any consideration for the alleged agreement.
3. The alleged agreement was within the Statute of Frauds, being an agreement not to be performed within a year, and was required to be in writing.
4. The judgment could not be supported because the evidence does not prove the agreement set forth in the **20** amended declaration.
5. The alleged agreement displayed by the proof is vague, uncertain and indefinite.
6. The Court refused to nonsuit the plaintiff or direct a verdict for the defendant for the foregoing reasons.

C. L. COLE,
Att'y for Defendant-Appellant.

NEW JERSEY SUPREME COURT.

WILLIAM I. PUSEY,
Plaintiff-Appellee,
vs.
CHARLES R. MOORE,
Defendant-Appellant. }

NOTICE OF ARGUMENT.

(Filed March 27, 1915.)

To Irving P. Parsons, attorney for appellee.

10 Notice the argument of this case before the Supreme Court at Trenton, on the first Tuesday of June next, at the hour of ten-thirty, or as soon thereafter as the same may be reached.

C. L. COLE,
Attorney for Appellant.

Dated March 25, 1915.

Service acknowledged this 26th day of March, 1915.

IRVING P. PARSONS,
Att'y for Plaintiff-Appellee.

NEW JERSEY SUPREME COURT.
June Term, 1915.

WILLIAM I. PUSEY,
Plaintiff and Appellee, }
vs. }
CHARLES R. MOORE,
Defendant and Appellant. }

(Filed November 5, 1915.)

Submitted July 1, 1915; decided November 9, 1915.

On appeal from District Court.

Before Justices GARRISON, TRENCHARD and BLACK. 10

For the appellant, *C. L. Cole*.

For the appellee, *Irving P. Parsons*.

PER CURIAM: The only legal question raised is: Did the court err in refusing to direct a verdict for defendant? We think not. It was grounded upon these reasons: (1) that the weight of the evidence was in favor of the defendant; (2) that the proof did not warrant the finding of an express contract of hiring; (3) that the proof was vague, uncertain and indefinite; 20 and (4) that there was no evidence to warrant a judgment on an express contract.

Of these grounds the only one meriting remark is that the proof did not warrant the finding of an express contract. We think there was such evidence. It is to be found in the testimony of the plaintiff that defendant said "I will give you \$75 a month or more if the business warrants it."

The judgment will be affirmed, with costs.

NEW JERSEY SUPREME COURT.

WILLIAM I. PUSEY,
Plaintiff-Respondent, }
vs. }
 CHARLES R. MOORE,
Defendant-Appellant. }

NOTICE OF APPEAL.

(Filed December 15, 1915.)

10 To Irving P. Parsons, attorney of Plaintiff-Respondent:

Take notice that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court affirmed the judgment in favor of the plaintiff against the defendant, when it should have reversed it.

20 2. The Supreme Court ruled that there was no error in refusing to direct a verdict for the defendant, when it should have ruled that under the evidence there should have been a direction in favor of the defendant.

3. The Supreme Court ruled that there was evidence warranting the finding of an express contract of hiring when it should have ruled that there was no such evidence.

30 4. The Supreme Court ruled that there was evidence to warrant a judgment on express contract when it should have ruled there was no such evidence, because both the District Court and the Supreme Court ignored the fact that there was no evidence of performance on the part of the plaintiff even assuming that there was evidence of an express contract and the judgment was based upon the contract and not damages for a breach thereof.

5. The state of demand as amended and upon which the plaintiff recovered does not show any consideration for the alleged agreement. There was no evidence to warrant a judgment in favor of the plaintiff.

6. Both the alleged agreement and the proof to support it is too vague, uncertain and indefinite on which to ground a judgment.

C. L. COLE,
Attorney of Appellant.

Due and legal service acknowledged this 15th day 10
of November, 1915, by

IRVING P. PARSONS,
Atty. of Plaintiff-Respondent.

NEW JERSEY SUPREME COURT.

| | | |
|-------------------|---|------------------------|
| WILLIAM I. PUSEY | } | Judgment record. |
| <i>vs.</i> | | On appeal. Affirmance. |
| CHARLES R. MOORE. | | |

Irving P. Parsons, attorney.

Pursuant to the statute in such case made and provided the said defendant, Charles R. Moore, appeals to the Supreme Court from the judgment entered against him in favor of William I. Pusey, the transcript of judgment and state of the case agreed upon being in the words and figures following, to wit: 20

1. Plaintiff is a resident of the City of Philadelphia, County of Philadelphia and State of Pennsylvania.

2. From July 24, 1914, to September 24, 1914, plaintiff rendered services to defendant, at his request, as his manager for the Hotel Maryland, South New York Avenue, in the City of Atlantic City, County of Atlantic and State of New Jersey. 30

3. For said services defendant undertook to pay plaintiff what the same were reasonably worth.

4. The same were reasonably worth the sum of one hundred and fifty dollars (\$150.00), which sum was due for the same on the day last mentioned.

5. Defendant has not paid the same.

10 Plaintiff demands as damages the sum of one hundred and fifty dollars, with interest from September 24, 1914, to December 24, 1914, in the sum of two dollars and twenty-eight cents, making a total of one hundred and fifty two dollars and twenty-eight cents, besides costs of suit.

GRIES & PARSONS,
Attorneys for Plaintiff.

(Filed Dec. 18.)

20 Plaintiff demands of the defendant the just sum of one hundred fifty dollars for wages due the plaintiff for acting as manager of defendant's hotel, known as Hotel Maryland, South New York Avenue, in the City of Atlantic City, County of Atlantic, and State of New Jersey, from the twenty-eighth day of July, nineteen hundred and fourteen, to the twenty-eighth day of September, nineteen hundred and fourteen, at the wages of at least seventy-five dollars a month, which sum defendant promised to pay plaintiff and promised to pay more if the business warranted it.

Judgment will be claimed for the sum of one hundred fifty dollars, together with lawful interest and costs.

30 IRVING P. PARSONS, *Attorney for Plaintiff.*

The evidence being closed and submitted to the Court, judgment was given by the Court in favor of the plaintiff and against the defendant for the sum of one hundred and fifty-two dollars and twenty-eight cents, debt, and eleven dollars and twenty cents, cost of suit.

District Court of the City of Atlantic City.

| | | |
|---|---|---|
| William I. Pusey, Plaintiff-Appellee, <i>vs.</i> Charles R. Moore, Defendant-Appellant. | } | Agreed State of the Case for Appeal. |
|---|---|---|

The parties hereto (and by their respective attorneys) submit the following as the state of the case for appeal:

1. The action was to recover for services performed by the plaintiff for the defendant, as set forth in the state of demand, a copy of which is hereto and marked *Ex. A.* 10

2. During the course of the trial, plaintiff, in order to have his proof and allegation in harmony, moved to amend his demand by setting up an express contract; which motion was allowed, but the amended state of the case was not filed until after the rendition of judgment.

3. A copy of the state of demand as filed is hereto and marked *Ex. B.* 20

4. The only testimony in support of the claim of an express contract was that of the plaintiff, whose testimony was as follows:

“Mr. Moore (meaning defendant) says to me, ‘have you got connected yet?’ I says, ‘No, sir, not yet, but I have two or three offers.’ He says, ‘I might be able to use you myself, come on up.’ I says, ‘I will take room and board with you for a while until I get a place.’ He says, ‘Come on up, I’m not doing anything, and I will fix you up next week.’ I went right in with Mr. Moore. He turned around and went back to the hotel with me and gave me a room. The twenty-sixth, that was Sunday. The following day Mr. Moore and I sat around the hotel, and he was talking to me about the hotel business, and he said things wasn’t going right in the hotel, and he wasn’t doing any business, 30

and that he had to have somebody to manage the place. I told Mr. Moore, I says, 'Mr. Moore I have an offer now of \$75 a month and board,' and I says, 'I will pay you for my room and board.' Mr. Moore, he says, 'Pusey, you stick by me, I will do better than that for you, I want some man here to run this place for me.' He also said, 'You stick by me and I will give you \$75 a month or more if the business warrant it.' "

The defendant denied that there was any contract
 10 between him and the plaintiff except that he had promised to give plaintiff board and lodging so long as he remained with him.

5. The attorney for the defendant at the close of the case moved for a direction on the ground that the weight of the evidence was in favor of the defendant; that the proof did not warrant the finding of an express contract of hiring; that the proof was vague, uncertain and indefinite, and that there was no evidence to warrant a judgment on an express contract.

20 All of which motions were overruled and judgment rendered for the plaintiff on an express contract.

IRVING P. PARSONS,

Atty. for P'ff-Appellee.

C. L. COLE,

Atty. for Def't-Appellant.

The defendant-appellant specifies the following for cause of error :

1. There was no evidence to warrant a verdict in
 30 favor of the plaintiff.

2. The state of demand, as amended, does not show a cause of action, it failing to show any consideration for the alleged agreement.

3. The alleged agreement was within the Statute of Frauds, being an agreement not to be performed within a year and was required to be in writing.

4. The judgment could not be supported because the evidence does not prove the agreement set forth in the amended declaration.

5. The alleged agreement displayed by the proof is vague, uncertain and indefinite.

6. The Court refused to nonsuit the plaintiff or direct a verdict for the defendant for the foregoing reasons.

C. L. COLE,
Atty. for Defendant-Appellant.

This cause was heard before our Supreme Court at the June term, 1915, and judgment of affirmance was rendered in favor of the plaintiff November 16, 1915. 10

Whereupon it is adjudged that the plaintiff, William I. Pusey, do recover of the said defendant, Charles R. Moore, the sum of one hundred and sixty-three dollars and forty-eight cents, debt and costs below; and also the sum of ——— costs in Supreme Court, making in the whole the sum of ———.

\$163.48 debt and costs below.

——— Costs Sup. Ct.

Judgment entered November 16, 1915.

WM. S. GUMMERE, *C. J.* 20

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 notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand [SEAL.] and the seal of said Court at Trenton, this twenty-third day of November, A. D. nineteen hundred and fifteen. 30

WM. C. GEBHARDT,
Clerk.

