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*Summons.*

**SUMMONS**

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

To any Constable of said County,  
or to the Sergeant-at-Arms of the  
(SEAL) East Orange District Court of the 10  
City of East Orange.

SUMMON Pietro De Luca to appear before the  
East Orange District Court of the City of East  
Orange, to be held at the City Hall, Main street  
(Second floor) in said City, on the 24th day of  
June, Nineteen Hundred and Twenty-Six, at  
Nine-thirty o'clock in the forenoon, to answer  
unto Albert Crane and Anthony Sicoransa in an  
action upon contract wherein the plaintiff de-  
mands from the defendant Five Hundred Dol- 20  
lars.

Hereof fail not.

WITNESS, WILLIAM V. RAFFERTY, Esq., Judge  
of said Court at East Orange, as aforesaid, the  
18th day of June in the year One Thousand  
Nine Hundred and Twenty-six.

Clerk.

I served the within summons June 18th, 1926, 30  
on the defendant P. De Luca by reading it to  
him and giving him a copy thereof.

M. EDWARD LEAHY,  
Sergeant-at-Arms.

State of Demand.

STATE OF DEMAND.

Filed June 18, 1926.

EAST ORANGE DISTRICT COURT OF THE CITY OF EAST ORANGE.

10	ALBERT CRANE and ANTHONY SICORANSA,	} Plaintiffs,	} On Contract. } State of Demand. } Defendant.
	<i>vs.</i>		
	PIETRO DE LUCA,		

20 The plaintiff demands of the defendant the sum of Five Hundred Dollars (\$500.00), the return of \$100.00 One Hundred Dollars paid as a deposit on premises known as 167 North 15th street, East Orange, New Jersey. Defendant agreed to return said deposit if he sold said property, on a certain date. Defendant did sell said property within a certain date and now refuses to return said deposit to plaintiffs.

30 Plaintiffs demand of the defendant the sum of One Hundred Dollars.

Judgment will be claimed in the sum of One Hundred Dollars and no cents (\$100.00) together with lawful interest and costs of suit.

MILTON GOLDBERG,  
Attorney for Plaintiff.

40

Transcript of Clerk's Docket.

TRANSCRIPT OF CLERK'S DOCKET.

Filed July 27, 1927.

DISTRICT COURT,  
EAST ORANGE, NEW JERSEY.

10	ALBERT CRANE and ANTHONY SICORANSA,	} Plaintiffs,	} On Contract. } Demand } \$500.00.
	<i>vs.</i>		
	PIETRO DE LUCA,		

PLAINTIFF'S COSTS.

Summons .....	2.10	20
Mileage .....		
Listing fee .....	1.50	
Witness fee .....		
Attorney's fee .....	5.00	
	8.60	
Total Cost		
Execution		
Statement		

Milton S. Goldberg, plaintiff's attorney. 30  
Wolber & Gilhooly, defendant's attorney.

A summons in the above-stated cause was issued on the eighteenth day of June, 1926, returnable on the twenty-fourth day of June, 1926, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

The plaintiff filed its state of demand June 18, 1926.

The summons was served and returned as follows: I served the within summons June 18, 1926, on the defendant by reading it to him and 40

*Transcript of Clerk's Docket.*

giving him a copy thereof. Mr. Edw. Leahy, Sergeant-at Arms.

July 8, 1926. The plaintiff and the defendant appearing the cause was tried and determined at this time. Anthony Sicaronsa for plaintiff.

10 Check P. 1. Pietro De Luca for defendant. Albert Crane for plaintiff. The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of One Hundred and 00/000 Dollars damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of One Hundred Dollars damages with costs. \$100.00.

20 July 15, 1926. Rule filed authorizing the clerk to accept amount of judgment and costs in the sum of One Hundred Nine Dollars.

July 15, 1926. Notice of Appeal filed.

July 15, 1926. Sum of One Hundred Nine Dollars received.

July 29, 1926. Order extending time to settle case on appeal filed.

30 I hereby certify that the above is a true copy of the case of Crane v. De Luca entered in Docket No. 84, Case No. 41859, in the East Orange District Court, East Orange, New Jersey. Given under my hand and the seal of said Court this twenty-fourth day of July, Nineteen Hundred Twenty-six.

DENNIS L. CONROY,  
(SEAL) Clerk East Orange District Court.

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed July 15, 1926.

EAST ORANGE DISTRICT COURT OF THE CITY OF EAST ORANGE.

ALBERT CRANE and ANTHONY SICORANSA,  <i>Plaintiffs,</i>  <i>vs.</i>  PIETRO DE LUCA,  <i>Defendant.</i>	}	<i>Notice of          Appeal.</i>	10
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To Albert Crane and Anthony Sicoransa or Milton Goldberg, attorney of the plaintiffs. 20

GENTLEMEN:

TAKE NOTICE that the defendant Pietro De Luca hereby appeals to the New Jersey Supreme Court from the judgment of the East Orange District Court rendered in the above stated action on the eighth day of July, Nineteen Hundred and Twenty-six.

WOLBER & GILHOOLY,  
Attorneys of Defendant. 30

Service of the within notice of appeal is hereby acknowledged this 13th day of July, A. D. 1926.

MILTON S. GOLDBERG,  
H. O'Keefe,  
Attorney of Plaintiffs.

Rule.

**RULE AUTHORIZING CLERK TO ACCEPT THE AMOUNT OF THE JUDGMENT AND COSTS.**

Filed July 15, 1926.

10 EAST ORANGE DISTRICT COURT OF THE CITY OF EAST ORANGE.

ALBERT CRANE and ANTHONY SICORANSA,	}	<i>Plaintiffs,</i>	} <i>On Contract.</i>
<i>vs.</i>		} <i>Rule.</i>	
PIETRO DE LUCA,			

20 WHEREAS, a judgment was rendered in this Court on Thursday, the eighth day of July, A. D. 1926, in a suit herein depending whereing Albert Crane and Anthony Sicoransa are plaintiffs and Pietro De Luca is defendant for the sum of \$100.00 damages and \$9.00 costs of suit, and the defendant Pietro De Luca is about to appeal from said judgment of this Court to the New Jersey Supreme Court, and the defendant being

30 desirous of paying the amount of said judgment into the hands of the Clerk of this Court, in accordance with Chapter No. 305 of the Pamphlet Laws of 1915.

Now, therefore, I do on this 15th day of July, A. D. 1926, hereby permit, allow and consent to the defendant Pietro De Luca paying the amount of said judgment, namely the sum of \$109.00 into the hands of the Clerk of this Court, and this rule shall be his authorization for so doing.

40 WILLIAM V. RAFFERTY,  
Judge of the East Orange District Court.

Order Extending Time.

**ORDER EXTENDING TIME TO SETTLE CASE ON APPEAL.**

Filed July 29, 1926.

EAST ORANGE DISTRICT COURT OF THE CITY OF EAST ORANGE.

ALBERT CRANE and ANTHONY SICORANSA,	}	<i>Plaintiffs-Appellees,</i>	} <i>On Contract.</i>
<i>vs.</i>		} <i>On Appeal.</i>	
PIETRO DE LUCA,			

20 It appearing that judgment was entered in the above entitled cause in favor of the plaintiffs and against the defendant Pietro De Luca, on the eighth day of July, 1926, for the sum of One Hundred Dollars (\$100.00) besides costs, and it further appearing that due notice of the appeal of this cause to the New Jersey Supreme Court was duly given, and it further appearing that the time within which to settle said case on appeal would expire on the second day of August, 1926, and that further time should be allowed

30 said defendant to settle and determine such case for appeal:

It is, therefore, on this 29th day of July, 1926, ORDERED, that the said defendant shall have until the sixteenth day of August, 1926, to settle and determine such case on appeal.

WILLIAM V. RAFFERTY,  
Judge.

40

*Clerk's Certificate.*

We hereby consent to the entry of the above order.

MILTON S. GOLDBERG,  
Attorney for Plaintiffs-Appellees.

WOLBER & GILHOOLY,  
Attorneys for Defendant-Appellant.

10

**CLERK'S CERTIFICATE.**

I, Dennis L. Conroy, Clerk of the East Orange District Court of the City of East Orange, in the County of Essex and State of New Jersey, do hereby certify the foregoing to be a true copy of the record and proceedings in the case of Albert Crane and Anthony Sicoransa v. Pietro De Luca, held in the East Orange District Court of the City of East Orange, in the County of Essex and the State of New Jersey, as taken from the East Orange District Court Docket No. 84, page No. 41859.

20

DENNIS L. CONROY,  
(SEAL) Clerk.

30

per M. EDWARD LEAHY,  
Sergeant-at-Arms,  
Acting Clerk.

Dated, August 6, 1926.

40

*State of Case Agreed Upon.*

**STATE OF CASE AGREED UPON.**

Filed August 7, 1926.

EAST ORANGE DISTRICT COURT OF THE  
CITY OF EAST ORANGE.

ALBERT CRANE and ANTHONY SICORANSA, Plaintiffs-Appellees,	}	<i>On Contract.</i>	10
PIETRO DE LUCA, Defendant-Appellant.		<i>On Appeal.</i>	
<i>vs.</i>		<i>State of Case Agreed Upon.</i>	

Milton Goldberg, attorney for plaintiffs-appellees.

20

Wolber & Gilhooly, attorneys for defendant-appellant.

The parties hereto by their respective attorneys submit the following as the state of the case for appeal, from the judgment entered in the East Orange District Court on the eighth day of July, 1926, in favor of the plaintiffs and against the defendant.

Plaintiffs entered into a contract with the defendant for the purchase of premises No. 165-167 North 15th street in the City of East Orange, County of Essex and State of New Jersey, and paid as a deposit thereon the sum of \$100.00.

30

The action by the plaintiffs was to recover the deposit so paid and they based their right to the recovery of the same upon an oral promise made by the defendant at the time they withdrew from their contract, defendant promising that

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*State of Case Agreed Upon.*

if he sold the property within two months he would return to them the said deposit of \$100.00.

At the opening of the case the defendant moved to strike out the plaintiff's state of demand upon the following grounds:

- 10 1. That the same did not set forth a cause of action.
2. It did not set forth any consideration to bind the defendant upon his oral promise to return the deposit.

The motion was denied and an exception to the Court's ruling prayed and granted.

The Trial Court found as follows:

On a date since forgotten the plaintiffs entered into a written contract with the defendant for the purchase of premises No. 165-167  
20 North 15th street in the City of East Orange. \$100.00 was paid as a deposit (check dated February 25, 1926, and signed by Anthony Sioransa for said amount was offered and received in evidence ("P. 1").

The purchase price was \$5,500.00. The title was to pass May 1, 1926. Some time before and during the month of March the plaintiffs visited the defendant and stated they did not wish to continue the above referred to contract because  
30 they were unable to obtain the mortgage necessary to finance same. During the conversation of the plaintiffs with the defendant the contracts of both parties were torn up, the defendant agreeing to return the deposit to them, if he sold the property within two months. The Court found that the defendant meant two months from the date of this conversation. The plaintiffs did not remember the date of the conversation or the date on which the defendant sold  
40 the premises in question. They testified that

*State of Case Agreed Upon.*

the defendant had sold the premises within two months after the date of said conversation.

At the close of the plaintiffs' case the defendant by his attorney, moved for a non-suit on the following grounds:

1. That the plaintiffs have not sustained the burden placed upon them and have failed  
10 to establish a cause of action.
2. That the plaintiffs have not shown any consideration for the alleged oral promise of the defendant to return the deposit.
3. That if however, the Court should find that the plaintiffs have shown a good and sufficient consideration to bind the defendant to his promise, the plaintiffs have failed to show that they are entitled to profit by  
20 the defendant's promise in that they have not shown that the property was sold within two months from the date of the conversation as required; in that they were unable to remember the date on which the property was sold and they have based their claim and rested their case solely upon the naked statement that the property was sold within two months.

The Court denied the motion of a non-suit and  
30 an exception to the Court's ruling prayed and granted.

The Trial Court found the following facts from the testimony of the defendant.

That the defendant was the owner of premises No. 165-167 North 15th street in the City of East Orange and had entered into the above referred to contract with the plaintiffs.

That on the occasion when advised of the plaintiffs' intention to withdraw from the con-  
40

*State of Case Agreed Upon.*

tract, that the defendant had objected to their doing so and had offered to obtain for them a \$3,000.00 mortgage upon the property in question or that he, himself, would give them a \$3,000.00 first mortgage or a \$2,000.00 second mortgage; further that he had not sold the premises to another vendee until the fifteenth day of June, 1926.

At the close of the case the defendant moved for a judgment for the defendant upon the grounds urged on the motion for a non-suit, and on the additional grounds;

That inasmuch as the plaintiffs did not fix the date of the conversation and the sale of the premises by the defendant to another vendee, and that the defendant had approximately fixed the date of the conversation and had fixed the date of subsequent sale by him, which testimony was uncontradicted; that therefore the plaintiffs had failed to establish a case entitling them to recover against the defendant.

The motion was denied and an exception to the Court's ruling prayed and granted.

The Court gave judgment for the plaintiffs and against the defendant for the sum of \$100.00, being the amount in question and costs of suit.

An exception to the Court's finding was prayed and granted.

MILTON S. GOLDBERG,  
Attorney for Plaintiffs-Appellees.

August 2, 1926.

WOLBER & GILHOOLY,  
Attorneys for Defendant-Appellant.

*Exhibit P. 1.*

**EXHIBIT P. 1.**

The East Orange Bank.

East Orange, N. J., February 25, 1926, No. 75  
Pay to the Order of Mr. Pietro De Luca \$100.00  
One hundred - - - - Dollars  
Anthony Sicoransa. 10

On Back

Part Payment on the stores  
Pietro De Luca

*Specification of Determinations.*

**SPECIFICATION OF DETERMINATIONS.**

Filed August 3, 1926.

NEW JERSEY SUPREME COURT.

10	ALBERT CRANE and ANTHONY SICORANSA, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> PIETRO DE LUCA, <i>Defendant-Appellant.</i>	} <i>On Contract.</i> } <i>On Appeal.</i> } <i>Specification</i> } <i>of</i> } <i>Determina-</i> } <i>tions.</i>
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20 The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law.

1. At the opening of the case, the defendant by his attorney moved to strike out the state of demand filed by the plaintiffs on the following grounds:

(a) That the same did not set forth a cause of action in that it did not set forth any consideration for the alleged promise of the defendant.

30 The Court denied the motion to strike out the state of demand. An exception was prayed for and allowed.

2. At the close of the plaintiffs' case the defendant by his attorney moved for a non-suit on the following grounds:

(a) The plaintiffs have not sustained the burden placed upon them and have failed to establish a cause of action.

40 (b) The plaintiffs have not shown any consideration to bind the defendant upon his oral promise to return the deposit.

*Specification of Determinations.*

(c) That if, however, the Court should find that the plaintiffs had shown a good and sufficient consideration to bind the defendant to his promise, the plaintiffs have failed to show that they are entitled to profit by the defendant's promise in that they have not shown that the property was sold within two months of the conversation as required. 10

The Court denied the motion to non-suit the plaintiffs. An exception was prayed and granted.

3. At the close of the case, the defendant by his attorney moved for judgment in favor of the defendant on the following grounds:

(a) That the plaintiffs had not sustained the burden placed upon them and had failed to establish a cause of action. 20

(b) The plaintiffs have not shown any consideration to bind the defendant upon his oral promise to return the deposit.

(c) That if, however, the Court should find that the plaintiffs have shown a good and sufficient consideration to bind the defendant to his promise, the plaintiffs have failed to show that they are entitled to profit by the defendant's promise in that they have not shown that the property was sold within two months from the date of the conversation as required; that they were unable to remember the date of the conversation; that they were unable to remember the date the property was sold and they based their claim and rested their case solely upon the naked statement that the property was sold within two months, which statement was met with the positive denial 30 40

*Specification of Determinations.*

of the defendant and evidence of the fact that the property was not sold within two months of the date of the above-referred-to conversation.

10 The Court denied the motion and gave judgment for the plaintiffs and against the defendant.

An exception was prayed and granted.

4. The Court erred in these determinations, wherefore defendant-appellant prays that the judgment may be reversed and set aside and for nothing holden.

Respectfully submitted,

20 WOLBER & GILHOOLY,  
Attorneys for Defendant-Appellant.

Dated July 23, 1926.

30

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*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed February 28, 1927.

**NEW JERSEY SUPREME COURT.**

No. 427, October Term, 1926.

ALBERT CRANE and ANTHONY SICORANSA,	} <i>Plaintiffs,</i>
<i>vs.</i>	
PIETRO DE LUCA,	} <i>Defendant.</i>

10

Submitted October 6, 1926. Decided  
, 1927.

20

On appeal from the East Orange District Court.

For the appellant, Wolber & Gilhooly.  
For the respondents, Milton S. Goldberg.

Before Justices Kalisch, Katzenbach and Lloyd.

*Per Curiam:*

30

This is an appeal from a judgment in favor of the plaintiffs rendered in the District Court of East Orange by the judge sitting without a jury. The action was to recover the sum of \$100 paid as a deposit upon the making of a written contract between the parties whereby the plaintiffs agreed to purchase and the defendant agreed to convey premises 155 and 157 North 15th street, in the City of East Orange, settlement to be made May 1, 1926. The contract

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*Opinion of Supreme Court.*

was not carried out, but in the agreed state of facts appears the following: "During the month of March the plaintiffs visited the defendant and stated that they did not wish to continue the contract because they were unable to obtain the mortgage necessary to finance the same. During the conversation with the defendant the contracts of both parties were torn up, the defendant agreeing to return the deposit to the plaintiffs if he sold the propetry within two months." It further appears that the defendant did sell the property within the two months following the date of this conversation.

At the close of the plaintiffs' case the defendant moved for a non-suit and assigned as grounds therefor that the plaintiffs had failed to establish a cause of action; that they had not shown any consideration for the oral promise to return the deposit; that the plaintiffs had failed to show that the property was sold within two months.

The motion for non-suit was denied and an exception prayed and allowed. A similar motion was made at the end of the entire case for a judgment in favor of the defendant, which was also denied.

The only real question in the case is whether the state of the case shows sufficient consideration for the defendant's promise to return the deposit. It seems to us that an adequate consideration is clearly exhibited as a result of the conversation above quoted. There is the expression of a desire on the part of the plaintiffs to rescind the contract and an implied request to the defendant to acquiesce therein; and, as we think, a like implied acquiescence of the defendant in this request evinced by the volun-

*Opinion of Supreme Court.*

tary tearing up of the contracts held by the parties and the defendant agreeing to return the deposit money. In this the plaintiffs relinquished their right to purchase and the defendant was relieved of the obligation to convey, and as a part of the entire transaction the defendant agreed to return the deposit if he could sell the property within two months which he did. In our view the state of the case presented an adequate cause of action which justified the judgment rendered in the court below.

It is, therefore, affirmed.

*Order of Affirmance of Judgment.*

**ORDER OF AFFIRMANCE OF JUDGMENT.**

Filed April 7, 1927.

NEW JERSEY SUPREME COURT.

October Term, 1926.

10

ALBERT CRANE and ANTHONY SICORANSA, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> PIETRO DE LUCA, <i>Defendant-Appellant.</i>	<i>On Appeal          from          East Orange          District Court          of the City of          East Orange.</i>
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20 This cause having been duly argued at the October term, 1926, of this Court by Wolber and Gilhooly of counsel for appellant and no one appearing for the appellee and the Court having considered the same and finding no error in the record or proceedings in the East Orange District Court for the City of East Orange.

30 It is thereupon on this 7th day of April, in the year of our Lord, one thousand nine hundred and twenty-seven, ordered and adjudged that the judgment of the East Orange District Court for the City of East Orange removed by the appeal of this cause be affirmed with costs and the record be remitted to the East Orange District Court of the City of East Orange to be proceeded with in accordance that this judgment and the practice of said Court.

On motion of

40 ANTHONY SICORANSA,  
 ALBERT CRANE,  
 Plaintiffs-Appellees.

*Notice of Appeal to Court of Errors and Appeals.*

**NOTICE OF APPEAL TO COURT OF ERRORS AND APPEALS.**

Filed April 7, 1927.

NEW JERSEY SUPREME COURT.

ALBERT CRANE and ANTHONY SICORANSA, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> PIETRO DE LUCA, <i>Defendant-Appellant.</i>	<i>On Contract.          On Appeal.          Notice of          Appeal.</i>	10
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To Milton Goldberg, Esq., 760 Broad street,  
 Newark, New Jersey. 20

To Messrs. Albert Crane and Anthony Sicoransa,  
 City of East Orange, New Jersey.

GENTLEMEN :

PLEASE TAKE NOTICE that Pietro De Luca, the above named defendant-appellant, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this action in the New Jersey Supreme Court.

30 WOLBER & GILHOOLY,  
 Attorneys for Defendant-Appellant.

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*Grounds of Appeal.*

**GROUNDS OF APPEAL.**

Filed ~~March 28~~ <sup>APRIL 25</sup> 1927.

**New Jersey Court of Errors and Appeals**

10	ALBERT CRANE and ANTHONY SICORANSA, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> PIETRO DE LUCA, <i>Defendant-Appellant.</i>	<i>On Contract.</i> <i>On Appeal.</i>  <i>Grounds</i> <i>of Appeal.</i>
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The defendant-appellant assigns the following ground for appeal in the above entitled cause:

20 The Supreme Court erred in that it gave judgment for the plaintiffs-appellees herein when it should have given judgment for the defendant-appellant.

WOLBER & GILHOOLY,  
Attorneys for and of Counsel  
with Defendant-Appellant.

30

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**New Jersey Court of Errors and Appeals**

ALBERT CRANE and ANTHONY SICORANSA, <i>Plaintiffs-Appellees,</i>  <i>vs.</i> PIETRO DE LUCA, <i>Defendant-Appellant.</i>	<i>On Appeal</i> <i>from New</i> <i>Jersey</i> <i>Supreme</i> <i>Court.</i>
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**BRIEF FOR DEFENDANT-APPELLANT.**

**Facts.**

This action was brought by the plaintiffs in the East Orange District Court of the City of East Orange to recover the sum of \$100, paid by them as a deposit on a contract for the sale of certain premises.

The State of Demand filed by the plaintiffs in said District Court is founded upon a naked oral promise on the part of the defendant to return to the plaintiffs said \$100 if he sold the premises in question on a certain date.

The evidence at the trial of the cause was to the effect that the plaintiffs had abandoned the contract of purchase because of financial inability and that the defendant, after said abandonment had orally promised to return to said plaintiffs the deposit of \$100 if he sold the premises in question within two months from the date of said abandonment.

The case was tried before the Hon. William V. Rafferty, District Court Judge, on July 8th, 1926, and resulted in a verdict in favor of the plaintiffs for \$100 and judgment for said amount was entered.

On appeal to the New Jersey Supreme Court the judgment of the Trial Court was affirmed.

#### POINT ONE.

The state of demand of the plaintiffs does not contain a legal cause of action and the Trial Court erred in refusing to grant the defendant's motion to strike it out.

Technical accuracy of pleading is not required in a suit in the District Court. It is sufficient if the State of Demand contains in itself a LEGAL CAUSE OF ACTION, apprises the defendant of the complaint against him and so states the case that it may afterwards appear what was decided.

*Patten v. Heustin* (Supreme Court 1875—*Elmer, J.*), 26 N. J. L. 293;

*O'Donnell v. Weiler* (Supreme Court 1905—*Fort, J.*), 72 N. J. L. 142;

*DeJianne v. Citizens' Protective Association of New Jersey* (Supreme Court 1908—*Trenchard, J.*), 79 N. J. L. 107;

*Kennell v. Gershonovitz* (Supreme Court 1913—*Voorhees, J.*), 84 N. J. L. 577.

This broad rule gives the pleader in the District Court great range and scope, but limits him, however, in one particular, namely, his demand must contain a LEGAL CAUSE OF ACTION.

The demand of the plaintiffs (State of Case, page 2) does not contain a LEGAL CAUSE OF ACTION because

"The expression 'cause of action' means the whole cause of action, that is all the facts which together constitute the plaintiffs' right to maintain the action."

*Allhausen v. Malgarijo*, L. R. 3 Q. B. 343;

*Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 88, 48 S. E. 643.

"Cause of action includes every fact necessary for the plaintiff to prove, to entitle him to succeed, and every fact that the defendant would have a right to traverse. The terms 'right of action' and 'cause of action' are equivalents. The term 'cause of action' comprehends the right to sue and implies that there is some person in existence who can assert and also one who can lawfully be sued and if one has no legal right to sue, he has no cause of action and not merely a bad cause of action."

*Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651;

*Parris v. Atlanta K. & N. Railway Co.*, 128 Georgia, 434, 57 S. E. 692.

"A cause of action is the existence of those facts which give a party a right to judicial interference in his behalf."

*Billing v. Gilmer* (U. S.), 60 Fed. 332, 8 C. C. A. 645.

"It is still more material that certainty and accuracy be observed in the more substantial parts of the declaration, which state THE CAUSE OF ACTION itself. Thus, in assumpsit the consideration of the contract and the contract itself must be fully stated—"

*Chitty on Pleading*, Volume 1, page 261.

The facts as set forth in plaintiffs' demand show only a promise on the part of the defendant to return the deposit. They do not show his promise to be supported by consideration.

In view of the above we come to the question of what is necessary to give the plaintiffs a LEGAL CAUSE OF ACTION.

A LEGAL CAUSE OF ACTION herein must be founded upon a consideration. Does the State of Demand set forth a consideration? It does not. It merely says that the defendant agreed to

return said deposit if he sold the property on a certain date. This is nothing but a gratuitous promise at best and

“An agreement or promise made without consideration does not amount to a contract and is unenforceable.”

*Morford v. Vunck* (Supreme Court 1813), 3 N. J. L. 1031;

*Clyne v. Helmes* (Supreme Court 1898, Depue, J.), 61 N. J. L. 358, 39 Atl. 767.

It is a “*nudum pactum ex non quo oritur actio.*”

*Kilborn v. Payne* (C. C. of A., 3 C. 1922—Davids, C. J.), 279 Fed. 864.

It was therefore, as has been stated, incumbent on the plaintiffs to show a consideration supporting said promise and the giving of this consideration being one of the facts necessary to their right of action it should have been pleaded. It was not pleaded.

Hence no legal cause of action was contained in the demand and the Court erred in refusing to strike it out.

The defendant to further his contention that the consideration for the promise should have been pleaded calls attention to the following:

The New Jersey Supreme Court (1809) in the case of *Bigelow v. Pine*, 3 N. J. L. 114 (523), holds that:

Although no consideration was expressed in the State of Demand in a court for the trial of small causes and after verdict it would be too strict to reverse the decision rendered for that cause and judgment was affirmed.

But the same court in 1810 in the case of *Shepherd v. Layton*, 3 N. J. L. 202 (618), modified this rule and held that:

“No consideration appearing for the terms on which the action was founded it was at best a naked promise \* \* \* from a naked promise no action arises. The consideration moving to the promise must appear and judgment was reversed.”

Volume 4 of the Encyclopedia of Pleading and Practice at page 928 says:

“In the absence of statutory enactments to the contrary, it is necessary in actions upon contracts to allege a consideration, except in the case of contracts under seal, bills of exchange and negotiable promissory notes, all of which by intendment of law import a consideration.”

The case before us does not come within the exceptions and the consideration should have been pleaded.

Volume 1 of *Chitty on Pleading* at page 293 holds:

“In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration as a bill of exchange or promissory note or expressly to state the particular consideration upon which it is founded.”

“The consideration is an essential part of a contract and in the absence of statutory relief from the rule a party declaring on a contract which at common law does not import a consideration must fully and truly state the consideration as well as the promise founded on it and must prove it as laid.” 13 C. J. 722.

For the foregoing reasons we respectfully contend the Court erred in refusing to grant the defendant's motion to strike out the plaintiffs' State of Demand (State of Case, p. 10).

## POINT TWO.

The plaintiffs in the presentation of their case did not prove a legal cause of action in that they failed to show a consideration supporting the defendant's promise.

The plaintiffs in the Trial Court neglected and totally failed to prove a consideration to support the defendant's promise. An examination of the state of case agreed upon (State of Case, pages 9-13) shows that nowhere therein, except in the defendant's motions and objections, is the so essential element of consideration mentioned or considered.

The New Jersey Supreme Court on Appeal held that an adequate consideration is clearly exhibited as a result of the conversation here quoted. "During the month of March the plaintiffs visited the defendant and stated that they did not wish to continue the contract because they were unable to obtain the mortgage necessary to finance the same. During the conversation with the defendant, the contracts of both parties were torn up; the defendant agreeing to return the deposit to the plaintiffs if he sold the property within two months." (State of Case, page 18).

Does this conversation constitute a consideration? We respectfully contend that it does not. What detriment was incurred thereby by the promisee or what benefit was thereby received by the promisor? In fact it was just the reverse. The detriment is experienced by the promisor and the benefit by the promisee. The defendant could have exercised his rights to specific performance, he could have insisted upon the plaintiffs performing the contract in question, but what did he do; he consented to and permitted

them to withdraw therefrom and then after he has so permitted them, he voluntarily states that he will return to them the deposit if he sells the premises, which are the subject of said contract, within two months. To hold this a valid consideration sufficient to bind the defendant is to hold that a man can enforce a gratuitous promise whenever the same is to his benefit.

If we examine the plaintiffs' State of Demand (State of Case, page 2) closely, what do we find? Do we find that they are bringing their action because in reliance upon the defendant's promise they tore up their contract? No, rather, we find that the action is brought because defendant agreed to return said deposit if he sold said property on a certain date.

The burden of proving a consideration sufficient to support the defendant's promise rested upon the plaintiffs because they were not entitled as a matter of right to a return of their deposit in the absence of fraud or mistake and there was neither fraud nor mistake.

*Steinbach v. Pettingill* (Supreme Court 1901—Garrison, J.) (67 N. J. L. 36, 50 Atl. 433).

This decision was followed in the case of *Thompson v. Killheffer* (Supreme Court 1923—Parker, J.), 98 N. J. L. 359, 119 Atl. 770, which case was reversed (Court of Errors and Appeals 1924, Kalisch, J.), 99 N. J. L. 439, 125 Atl. 11.

Justice Kalisch in delivering the opinion for the Court of Errors and Appeals cited with approval *Thompson v. Killheffer, supra*, but distinguished it from the conceded facts *sub judice*.

The defendant's promise was not a promise to perform a legal obligation, for no such obligation existed, and it was therefor only a voluntary

promise to do something the promisor was under no legal obligation to perform without proof that plaintiffs' situation was changed by reason of the promise. The plaintiffs' position was not changed by reason of the promise. By their own testimony they admitted their inability to perform the terms of their contract and the defendant in releasing them from said contract did so to their benefit rather than to their detriment. His promise to return the deposit was made after he had so released them and such a promise is without consideration unless it results in some act done, forbearance, detriment, loss or responsibility incurred by the promisee at the request expressed or implied of the promisor.

*Shadwell v. Shadwell*, 6 Eng. R. C. 9;

*McDonald v. Central R. R. Co. of N. J.*  
(Court of Errors and Appeals 1918—Bergen, J.), 91 N. J. L. 630, 103 Atl. 198.

Plaintiffs offered no proof in this case that they had suffered any loss, detriment, etcetra, because of the voluntary promise to return the deposit and they based their case and rested their claim solely upon the naked oral promise of the defendant without showing or attempting to show a consideration binding upon the said defendant in support thereof.

### POINT THREE.

**The plaintiffs in the presentation of their case totally failed and neglected to prove the fulfillment of the condition precedent and therefore should not have prevailed.**

The testimony in this cause discloses that the defendant made as a condition precedent to any liability he might have incurred by reason of his oral promise the fact that he sell the premises

in controversy within two months after the date of the conversation which occurred when the plaintiffs abandoned their contract. (State of Case, p. 10.)

Assume for the moment that the defendant's promise was founded upon a good and valid consideration. It was nevertheless conditional, that is, the performance was not due immediately, but only after the happening of an event within a certain specified time. In such a case as a rule the condition precedent must be exactly performed or fulfilled before the promise can be enforced (13 C. J. 631, 698).

Now, was the condition precedent herein performed or fulfilled? Were the premises sold within two months of the conversation which took place at the time the plaintiffs abandoned their contract? The burden of proving the fulfillment or performance of the condition rests upon the plaintiffs (13 C. J. 764, 957).

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist must prove that these facts do or do not exist."

Stevens' Digest of the Law of Evidence (page 237) quoted with approval in the cases of *Turner, et al., v. Wells* (Court of Errors and Appeals, 1900, Dixon, J.), 64 N. J. L. 269, 45 Atl. 641.

*Thomas Orr Trucking and Forwarding Co. v. Metropolitan Surety Co.* (Court of Errors and Appeals, 1909, Voorhees, J.), 77 N. J. L. 749, 73 Atl. 541.

Have they sustained the burden? We respectfully contend that they have not. At the trial the plaintiffs failed to remember the date of the conversation at which the promise was made and from which date the condition precedent was to

run, except to place it in the month of March, 1926. They also failed to remember the date of the sale of the premises to another vendee and they attempted to meet and satisfy the burden of proving the fulfillment of the condition by the naked statement that the premises were sold within two months of the date of the above referred to conversation.

The defendant, while unable to remember the date of the conversation, agrees with the plaintiffs and says it was during the month of March, 1926, but denies the premises were sold to another vendee within two months of the abandonment of the contract by the plaintiffs, and proved that the date of sale of said premises was June 15, 1926 (State of Case, page 12). The law is well settled in this State that the facts found by the District Court, or by the Judge sitting without a jury, will be presumed to rest on competent proof when nothing appears to the contrary and that the findings of fact by the Trial Court or Judge based on conflicting evidence will not be reversed on appeal.

*Gore v. Herring*, 72 Law 423;

*Smarak v. Segusse*, 91 Law 57;

*Steinmeyer v. Phenix Cheese Co.*, 91 N. J. L. 351.

Even though the above is the law in this State, it nevertheless does not permit the Judge to disregard affirmative evidence and find contrary thereto. The Judge in this case found contrary to the positive evidence placed before him and in the proof thereof let us examine the evidence.

Both plaintiffs state the conversation in question was during the month of March. The plaintiffs do not know when the premises were sold. The defendant proves the premises were sold on

June 15th, 1926. Even if we assume that the said conversation took place on the last day of the month of March, we will find that two months and fifteen days elapsed before the property was sold and that giving to the plaintiffs' story the best possible inference that can be drawn therefrom we nevertheless find that the condition precedent had expired by fifteen days and that by reason of said expiration the defendant was relieved from his promise, if he had ever been bound thereby.

The above we believe to be sufficiently contrary to the findings of the Court to hold that said Court erred in ruling the premises had been sold within two months.

For the foregoing reasons, we respectfully submit that there was error in the Supreme Court and that judgment affirming the judgment in favor of the plaintiffs should be reversed.

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