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Notice of Appeal from Judgment of the Supreme Court.

New Jersey Supreme Court.

10 VINCENT J. DESALVIO,
Defendant-in-error,
vs.
LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Estate of Angelo Bar-
bato,
Plaintiff-in-error,

On Certiorari.
Notice of Ap-
peal from
Judgment of
the Supreme
Court.

20 To: MEYER Q. KESSEL, Attorney of Vincent J.
DeSalvio, Defendant-in-error, or to whom
it may concern:

Sir:

Please Take Notice that the Defendant- Prose-
cutor below, Plaintiff-in-error, Lucy Barbato Raf-
fone appeals to the Court of Errors and Appeals
in the Last Resort in all causes in New Jersey,
from the whole of the judgment entered in the
above stated cause on the following ground:

30 1. Because the Supreme Court erred in affirm-
ing the judgment of the Second Judicial District
Court of the County of Essex.

Dated: December 17th, 1928.

CHARLES C. GIFFONIELLO,
Attorney for and of Counsel with Appellant.

Sat below:

Justices Minturn, Black and Campbell.

40

Affidavit of Lucy Barbato Raffone.

neither the plaintiff nor the defendant appeared for trial. The docket of the District Court, a certified copy of which is hereto attached, shows that the jury demanded for was not called at any time to try the issue and that the case was marked "No Appearance" again on April 11th, 1928, contrary to the defendant's right in the matter; and by order of the Judge of said Court said case was marked as follows: "may be restored to list if jury is waived"; which order was an arbitrary and illegal action on the part of the said Judge.

That on April 25th, 1928, without a jury and without the knowledge of the defendant, nor any notice given to deponent as defendant, or to her Attorney, plaintiff appeared, and upon the suggestion of the Court, and as Attorney *Pro Se*, upon his testimony alone, recovered a judgment against deponent individually only, in the sum of \$500.00 damages and costs of suit; to which the deponent was prevented from entering her appearance and defenses in said cause, which defense consisted of a denial by the defendant of any money owed to plaintiff by her or by her deceased husband, alleged to have been loaned five years previous, and that plaintiff had no right in law to demand payment for any transaction between himself and the deceased; and also a denial that defendant individually, at any time owed plaintiff any money, or paid back to plaintiff any money on account of any alleged claim or debt.

That the judgment was entered by the Judge without notice to the defendant, and without a jury and that this deponent at no time waived her right to trial by jury, and by such action the Judge

Affidavit of Lucy Barbato Raffone.

arbitrarily and illegally and without jurisdiction tried the issue of facts without notice to the deponent and without a jury.

That upon learning of the illegal entry of the judgment, a Rule to Show Cause was obtained and argued, said Judge reserved decision and stated from the bench that one of the conditions for the reopening of the judgment, if he should so decide, would be that the defendant waive the jury; decision was reserved and said Judge denied to the deponent the right to reopen said judgment and again affirming the judgment which was formerly entered, contrary to law and in defiance of the constitutional rights of deponent. 10

Deponent states that the said Judge was without jurisdiction to try the cause of action; that he usurped the province of the jury, that he denied deponent to have her defenses heard; that said judgment was entered illegally in favor of the plaintiff against the deponent without a jury, and denied to deponent her constitutional right of trial by jury. 20

Deponent further says that she has a just, true and legal defense to the merits of the case. That the action is based upon an alleged loan by plaintiff to Angelo Barbato and deponent on April 15th, 1920. Angelo Barbato died August 6th, 1920 in Newark, New Jersey, without leaving a Will. Deponent remarried on July 6th, 1925, to one Philip Raffone. That deponent was appointed Administratrix of the Estate of Angelo Barbato on April 21, 1923, and that the said plaintiff has never made any claim or demand from the deponent, nor has filed or presented any claim with deponent as Administratrix or other wise, or to the Surrogate 30 40

Affidavit of Lucy Barbato Raffone.

of the County of Essex at any time. Deponent further says that she personally and individually had never any transaction at any time with plaintiff, but that any transaction, if any, was made with her deceased husband. That she has never paid to plaintiff the sum of \$50.00 or any other sum on June 22nd, 1925, or at any other time; nor did she borrow from plaintiff the sum of \$50.00 or any other sum on June 22nd, 1925, or at any other time.

That the said claim of plaintiff is false, and unfounded on fact and law, and that the trial Judge refused to allow deponent to interpose said defenses, because he, the said Judge, was prejudiced in favor of plaintiff and against defendant and denied deponent her constitutional right of trial by jury.

That deponent verily believes that if said Judge would not have denied her the right of trial by jury, that said defenses would have been presented and that the judgment would have been in favor of defendant and against the plaintiff, as of right it should have been.

That execution on said judgment has been issued out of said Court and is still pending.

Deponent therefore prays that a Writ of Certiorari may be allowed her to review the proceedings and actions of the Judge of the said District Court to the end that the same may be set aside and for nothing holden.

LUCY BARBATO RAFFONE.

Subscribed and sworn to before me

this 7th day of July A. D., 1928. }

Louis Stryesky,

Atty at Law

of New Jersey.

Transcript of Docket Page.

Suit #18,944

DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

ON CONTRACT

10

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, 122
Warren St., Nrk, Individual-
ly and Administratrix of Es-
tate of Angelo Barbato,
Defendant.

20

MEYER Q. KESSEL, Plaintiff's Attorney.
CHARLES C. GIFFONIELLO, Deft's Attorney.

PLAINTIFF'S COSTS.

Summons	\$2.10	
Mileage	.24	
Listing	1.50	30
Att'y Fee	25.00	
	<hr/>	
Total Costs	\$28.84	
State of Judg.	.50	
Execution	\$1.59	

DEFENDANT'S COSTS.

Venire	5.75	
Order	1.00	
Transcript	1.25	40

Transcript of Docket Page.

July 15, 1927. A summons was issued returnable July 26, 1927.

The demand was: \$450.00

The summons was returned as follows:

10 "The said defendant not being found I served the within summons July 15th, 1927 by leaving a copy thereof at her residence with a member of her family above the age of fourteen years by informing her of its contents.

"Charles J. Schroeder
Sergeant-at-Arms"

July 18th, 1927. A State of Demand was filed.

20 July 26th, 1927 Case listed and called. Defendant did not appear. No appearance noted.

Nov. 16, 1927 A demand for Jury was filed by defendant. DMD

Mar. 8, 1928 A stipulation to try case on Mar 14 1928 was filed. DMD

Apr. 9, 1928 A venire was issued returnable April 11, 1928—DMD

This was adjourned to 1928—Mar 14—27—
Apr 10—11

30 April 11, 1928 Case listed and called. Defendant did not appear. No appearance entered. May be restored to the list if Jury is waived.

April 25, 1928 The plaintiff appeared and the defendant not appearing and no reason being assigned for her absence the cause was tried, and determined at this time.

The following witnesses were sworn on behalf of the plaintiff.

Vincent J. DeSalvio

40

Transcript of Docket Page.

- April 25, 1928. Whereupon it is on this day, by this Court considered and adjudged that Vincent J. DeSalvio the plaintiff, recover against Lucy Barbato Raffone, ind. only the defendant the sum of Five Hundred Dollars and no cents damages and the costs of suit. DMD
- May 24th, 1928. A substitution of plaintiff's Atty in favor of J. Victor D'Aloia was filed. DMD 10
- May 24th, 1928. A substitution of Vincent J. DeSalvio, as Atty Pro Se was filed. DMD
- May 25th, 1928. A Rule to Show Cause ret June 1st, 1928 was filed. DMD
- June 8th, 1928. A substitution of Plaintiff's attorney in favor of Meyer Q. Kessel was filed. DMD
- June 15th, 1928. In Re:—Rule to Show Cause why Judgment should not be reopened. Decision was reserved. 20
- June 20th, 1928. Decision was announced and judgment entered as follows: The motion was denied The Rule dismissed.
- June 22, 1928. A Statement of Judgment was issued.
- June 27th, 1928. Execution issued and returned as follows:
- July 2, 1928. A Transcript of the Docket Page was issued. 30

*Transcript of Docket Page.*DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

State of New Jersey, }
County of Essex, } ss.:

10 I, J. Edward DeLancy, Clerk of the District Court of the Second Judicial District of the County of Essex do hereby certify that the foregoing transcript of the Docket page #18944 is a true copy of the record of the proceedings in the matter wherein Vincent J. DeSalvio, was plaintiff and Lucy Barbato Raffone individually and Administratrix of Estate of Angelo Barbato was the defendant and that the judgment above set forth stands open and unpaid of record.

20 In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Irvington, New Jersey, this Fifth day of July, A. D., Nineteen hundred and Twenty-eight.

J. E. DE LANCY,
Clerk. DMD

(Seal)

30

40

Answering Affidavit of Vincent J. De Salvio.

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">VINCENT J. DE SALVIO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Defendant.</p>	}	<p>On Certiorari. 10</p> <p>Answering Affidavit.</p>
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State of New Jersey, }
County of Essex, } ss. :

Vincint J. De Salvio, of full age, being duly sworn upon his oath, deposes and says: 20

1. He is the plaintiff in the above cause.

2. That on July 15th, 1927, a summons and state of demand was issued out of the District Court of the Second Judicial District of the County of Essex against Lucy Barbato Raffone, individually and as administratrix of the Estate of Angelo Barbato, which summons and state of demand demanded the sum of \$500., on two counts. The first count alleges that on April 15th, 1920 the plaintiff loaned to the defendant the sum of \$500., which was reduced by a payment of \$50. on June 22, 1925, on which date the defendant requested the plaintiff to renew the said loan upon the express promise to pay the sum then due and owing, namely \$450. The second count alleges that on June 22, 1925, the plaintiff loaned to the defendant the sum of \$50., which the defendant agreed to repay, but has since refused to do so. 30 40

Answering Affidavit of Vincent J. De Salvo.

3. On July 26th, 1927, the first return date, the defendant did not put in an appearance, nor did her attorney of record, Charles C. Giffoniello and therefore the case was marked "No Appearance".

10 4. About the end of October, 1927, he, Vincent J. De Salvo went to the District Court in Irvington, where he learned from the clerk that his case against Lucy Barbato Raffone had been marked "No Appearance" and that if he so desired he could enter judgment. At this time no demand for a jury had yet been filed.

5. After learning this information he had his attorney, J. Victor D'Aloia, communicate with Mr. Giffoniello and relate the status of the case to him.

20 6. On November 16th, 1927, after the above mentioned conversation between the respective attorneys, a demand for a jury was filed by the defendant, although a "No Appearance" was on the record.

7. On March 8th, 1928, a stipulation was filed to try the case on March 14th, 1928. On March 14th, 1928, the case was adjourned until March 27th, 1928, and from then to April 11th, 1928.

30 8. That on April 11th, 1928, the plaintiff appeared with his attorney, J. Victor D'Aloia ready to proceed with his case, but the defendant did not appear, and consequently the jury was dismissed and a second "No Appearance" entered.

9. That on April 25th, 1928, two (2) weeks after the "No Appearance" had been entered, he, the plaintiff, appeared, proved his case against the defendant and judgment was entered against the defendant, Lucy Barbato Raffone, individually in the sum of \$500. together with costs.

40 10. On May 25th, 1928, a rule to show cause

Answering Affidavit of Vincent J. De Salvio.

was filed, to re-open the judgment, and on June 15th, 1928 the said rule was argued and decision was reserved until June 20th, 1928, when Judge Felix Forlenza denied the motion of the defendant's attorney and dismissed the rule.

The issue in question was marked "No Appearance" on April 11th, 1928, so that the attorney for the defendant might have an opportunity to put this case on the list again if he so chose on terms and this in no wise was contrary whatsoever to the defendant's right in the matter, and the plaintiff waited two (2) weeks, to April 25th, 1928, before entering final judgment against the defendant. 10

The words "May be restored to the list if jury is waived" was not an illegal action on the part of the District Court Judge, since C. S. 1959 Section 17, wherein the Judge has power to order a new trial upon such terms as he sees fit. The Court was also of the opinion that this matter had been on the calendar repeatedly for almost a year and that the purpose of the demand for a jury was only to further delay the trial of the issue at hand and to clog the wheels of justice, pointing out that from the time the first "No Appearance" was entered in July 26th, 1927 to the time the demand for a jury was filed in November 16th, 1927, four (4) months had elapsed and the plaintiff could have entered judgment if he had desired, but instead had re-opened the case and adjourned the matter, and the trial was set down by stipulation for March 14th, 1928. 20 30

In rendering the decision on the rule to show cause why the judgment should not be re-opened, the Judge pointed out that the case had been on 40

Answering Affidavit of Vincent J. De Salvo.

the calendar repeatedly as aforesaid, and that at the request of the defendant the case had been adjourned and that the matter was set down peremptorily for April 11th, 1928, and that on this date the defendant again failed to appear, whereas the plaintiff and his attorney were present.

10 The defendant had notice that this case was called for trial on April 11th, 1928, actually and constructively since the matter was marked for trial on March 14th, 1928, by stipulation, and it was less than a month after this, that the case was set down for trial by jury.

20 It is the custom of the clerk of the District Court to mail to the respective attorneys copies of the jury list together with the probable date of their cases being reached. It is the duty of the attorney on each side to keep in contact with and to follow the steps of their respective cases. There is no duty whatsoever on the part of the plaintiff or the Court to give notice otherwise to either side with the respects to any issue.

30 The plaintiff made visits to the Court, so that the steps of his case would be at hand and the defendant could have used the same means, if, she or her attorney, had not been delinquent in paying attention to the matter at bar.

That the plaintiff has a just and meritorious cause of action and has witnesses to prove his case against the defendant, on a just and lawful debt due and owing from the defendant to the plaintiff.

40 In addition he has a letter from the defendant admitting the debt, dated October 16th, 1925. Said letter alleges an inability on her part to pay same with a promise to make a small payment toward

Answering Affidavit of Vincent J. De Salvio.

the debt due and owing from her to the plaintiff at a subsequent date.

A "No Appearance" having been entered on the return day, July 26th, 1927, the filing of a demand for a jury by the defendant on November 16th, 1927 was without avail and to no legal effect being contrary to the statute in such case made and provided and she was not before the Court legally insofar as her demand for a jury was concerned, and therefore she was never deprived of her right of trial by jury since she had lost her right at that time. 10

VINCENT J. DE SALVIO.

Sworn to and subscribed before me }
this 26th day of July, 1928. }

Michael A. Santa Maria,
Notary Public of N. J. 20

30

40

Rule to Show Cause.

Filed July 18, 1928.

NEW JERSEY SUPREME COURT.

100	VINCENT J. DE SALVIO, Plaintiff-Respondent, vs. LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Defendant-Prosecutor.	}	On Certiorari. Rule to Show Cause.
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20 This matter being opened to the Court on motion of Charles C. Giffoniello, Attorney of the Prosecutor, and sufficient cause appearing from the Affidavit read and filed, it is hereby

30 ORDERED on this 17th day of July, 1928, that the Respondent-plaintiff, Vincent J. De Salvio, show cause on the 28th day of July, 1928, at ten o'clock in the forenoon or as soon thereafter as Counsel can be heard, before the Supreme Court of the State of New Jersey, to be held at The Court House in the City of Newark why a Writ of Certiorari should not issue, directed to the Honorable Felix Forlenza, Judge of the District Court of the Second Judicial District of the County of Essex, and Vincent J. De Salvio, to review the proceedings had in said cause, wherein Vincent J. De Salvio, was plaintiff, and Lucy Barbato Raffone, was defendant, and all things attached concerning the same as fully and entirely as they remain in said

40 Court.

Rule to Show Cause.

It is Further Ordered that in the meantime and until the further order of this Court, any further proceedings had in said Court or execution issued thereon be and are hereby stayed until the further order of this Court.

And it is Further Ordered that a copy of this rule and the affidavits which need not be certified upon which it is based be served upon the respondent or his attorney within three days from the date hereof.

10

FRANK S. KATZENBACH, JR.,
J. S. C.

Writ of Certiorari.

Filed August 17, 1928.

20

New Jersey, ss: State of New Jersey, to Honorable FELIX FORLENZA, Judge of the District Court of the Second Judicial District of the County of Essex.

(Seal)

Greeting:

We being willing, for certain reasons, to be certified concerning the entry of a certain Judgment, order and proceeding given and made in the said District Court of the Second Judicial District of the County of Essex, in a certain action brought by Vincent J. De Salvio, Plaintiff, vs. Lucy Barbato Raffone, Individually and as Administratrix of Estate of Angelo Barbato, defendant, we command you that you send under your seal to our New Jersey Supreme Court, at Trenton, on the seventeenth day of August next, the judgment, or-

30

40

Rule to Show Cause.

10 der together with a record of the docket in said cause and proceedings aforesaid, and all things attached concerning the same as fully and entirely as they remain in said Court before you, together with this Writ, that we may further cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

Witness, Hon. WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court at Newark, this 2nd day of Aug. 1928.

FRED L. BLOODGOOD,
Clerk.

CHAS. C. GIFFONIELLO.
Attorney for Prosecutor.

20 I allow the within writ; let it be sealed.
WILLIAM S. GUMMERE,
Chief Justice of Supreme Court.

Filed Aug. 3, 1928.

J. Edward DeLancy, Clerk, District Court of the Second Judicial District of the County of Essex.

30 Filed Aug. 17, 1928.
Fred L. Bloodgood, Clerk.

Bond.

Know All Men by These Presents, That We, Lucy Barbato, and Frank Del Bianco, of the City of Newark, County of Essex and State of New Jersey, are held and firmly bound unto Vincent J. DeSalvio, for the sum of Twelve Hundred Dollars lawful money of the United States, for the payment of which we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. 10

Sealed with our seals, and dated the 30th day of June, A. D. 1928.

The condition of this obligation is such, that whereas a judgment has been rendered in the District Court of the Second Judicial District of the County of Essex in favor of Vincent J. De Salvio, against Lucy Barbato Raffone, has applied to William S. Gummere, Chief Justice of the Supreme Court for a Writ of Certiorari to review said judgment because said Court was without jurisdiction of the premises; 20

Now Therefore, if the said Lucy Barbato Raffone, shall prosecute said Writ of Certiorari in the Supreme Court and shall pay the sum recovered in the District Court of the Second Judicial District of the County of Essex with interest and costs, if the judgment shall be affirmed, and shall in all things stand to and abide the judgment of the said Supreme Court, respecting the judgment, order or proceeding given or made by the said Court below, then this obligation to be void, otherwise to remain in full force and virtue. 30

LUCY BARBATO RAFFONE (Seal)

FRANK DEL BIANCO (Seal)

Signed, sealed and delivered in
the presence of

F. MASUCCI. 40

Bond.

State of New Jersey, }
 County of Essex, } ss.:

- 10 Frank Del Bianco, being duly sworn according to law, upon his oath says, that he is Surety in the within Bond named, that he is worth the sum of Twelve Hundred Dollars over and above all his just debts and liabilities and has property to the extent of Twelve Hundred Dollars within the limits of the County of Essex, subject to execution.

FRANK DEL BIANCO.

Sworn and subscribed to before }
 me this 3rd day of July }

F. Masucci,
 M. C. C. of N. J.

- 20 I approve the within bond as to form and sufficiency. Let it be filed.

WILLIAM S. GUMMERE,
 Chief Justice of Supreme Court.

Summons on Contract (Combined Form)

Filed July 18, 1927.

- 30 NOTE: If a special form of state of demand is used, attach it here. Prepare one copy for each defendant and one for the court. On the face of summons be careful to name all parties to the suit. Use a typewriter.

State of Demand.DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

<p style="text-align: center;">VINCENT J. DE SALVIO, Plaintiff, vs. LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Defendant.</p>	}	<p>10</p> <p>On Contract. State of Demand.</p>
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The plaintiff demands of the defendant the sum of Five Hundred (\$500.00) for that: 20

FIRST COUNT:

1. On or about the 15th day of April, 1920 the plaintiff did loan to the defendants the sum of five hundred dollars, which sum of money the defendants did agree to pay to the plaintiff within a reasonable time. 30

2. At the time, said debt was incurred the defendant Lucy Barbato Raffone, was the wife of Angelo Barbato, and subsequently she was married to one Philip Raffone.

3. On or about the 22nd day of June, 1925, the defendant, Lucy Barbato Raffone, did pay on account of said sum the amount of \$50.00.

4. At the aforesaid time, the defendant, Lucy 40

State of Demand.

Barbato Raffone requested the plaintiff to renew said loan upon the express promise of said defendant to pay the sum then due and owing.

10 5. There is now due and owing on said debt the sum of \$450.00 which the plaintiff has often demanded of the defendant, Lucy Barbato Raffone, which sum the said defendant has refused to pay.

Judgment will be claimed in the sum of Four Hundred Fifty Dollars and cents (\$450.00) together with lawful interest and costs of suit on the First Count.

Attorney for Plaintiff.

20 The plaintiff demand of the defendant the sum of Five Hundred Dollars (\$500.00)

Continued.

SECOND COUNT:

30 1. On or about the 22nd day of June, 1925, the plaintiff did loan to the defendant, the sum of \$50.00 which sum of money the defendant did agree to repay the plaintiff within a reasonable time.

2. Plaintiff has demanded payment of said sum of money which defendant has refused to pay.

Judgment will be claimed in the sum of Fifty Dollars and cents (\$50.00) together with lawful interest and costs of suit, on the Second Count.

40

HARRY E. STERN,
Attorney for Plaintiff.

State of Demand.

State of New Jersey, }
 County of Essex, } ss.:

To any Constable of said County or to the
 Sergeant-at-Arms of the District Court of the Sec-
 ond Judicial District of the County of Essex:

(District Court summons on contract)

10

SUMMON

Lucy Barbato Raffone, Individually and Ad-
 ministratrix of the Estate of Angelo Barbato, to
 appear before the District Court of the Second
 Judicial District of the County of Essex to be held
 at 1092 Clinton Avenue (second floor) in the Town
 of Irvington, on the 26th day of July, Nineteen
 hundred and twenty-seven at Ten o'clock in the
 forenoon, to answer unto

20

VINCENT J. DE SALVIO,

in an action upon contract wherein the plaintiff de-
 mands from the defendant Five Hundred dollars.
 Hereof fail not.

Witness FELIX FORLENZA, Esq., Judge of said
 Court at Irvington, as aforesaid the 15th day of
 July in the year One Thousand Nine Hundred and
 Twenty-seven.

30

(Seal)

J. EDWARD DE LANCY,
 Clerk.

40

State of Demand.

The said defendant not being found, I served the within summons July 15, 1927 by leaving a copy thereof at her residence with a member of her family above the age of fourteen years, informing her of its contents.

10

C. J. SCHROEDER,
Sergeant-at-Arms,
Constable.

To the Defendant:

Take Notice that the plaintiff demand that the defendant shall file 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.

20

Plaintiff's Attorney.

Endorsed.

(July 15, 1927)

Defendant's Address
122 Warren St., Nrk.
#18944

30

40

Summons.DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

VINCENT J. DE SALVIO, <div style="text-align: right;">Plaintiff,</div> vs.	}	10
LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, <div style="text-align: right;">Defendant.</div>	}	On Contract. Summons.

Demand	\$450.	
Summons	2.10	20
Listing Fee	1.50	
Mileage	.24	
Attorney's Fee 5%	22.50	

Returnable July 26, 1927.

J. Victor D'Aloia, 738 Broad St., Newark.
Atty. for Plaintiff.Harry E. Stern, 128 Market St., Newark, N. J. 30
Filed July 18, 1927

J. Edward DeLancy, Clerk.

Notice of Trial.

IRVINGTON DISTRICT COURT.

10	<p style="text-align: center;">VINCENT J. DE SALVIO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Defendant.</p>	}	<p>Action On Contract. Notice of Trial.</p>
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Sir:

20 Please Take Notice that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justices thereof, as shall then be holding said Court on the 25th day of October A. D. 1927 at the Court House in the Town of Irvington, in and for the County of Essex at ten o'clock in the afternoon or as soon thereafter as the said Court can attend to the same.

Dated October 21st, A. D. 1927.

30 HARRY E. STERN,
Attorney of Plaintiff.

To
Charles C. Giffoniello, Esq.,
Attorney of Defendant,
31 Clinton St., Newark, N. J.

Demand for Jury.

Filed Nov. 16, 1927.

**SECOND JUDICIAL DISTRICT COURT
OF THE COUNTY OF ESSEX.**

<p style="text-align: center;">VINCENT J. DE SALVIO, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LUCY BARBATO RAFFONE, Ind., and Admin. of Estate of An- gelo Barbato, Defendant.</p>	}	<p>10</p> <p>Demand for Jury.</p>
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To:

J. Edward DeLancy, Esq., 20
 Clerk of Second Judicial District Court
 Irvington, New Jersey.

Please Take Notice that the defendant herein de-
 mands a jury for the trial of the Judgment in the
 above-entitled cause.

CHARLES C. GIFFONIELLO,
 Attorney for Defendant.

30

Stipulation.

Filed March 8, 1928.

SECOND JUDICIAL DISTRICT COURT

OF THE COUNTY OF ESSEX.

10

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Ind.,
and Admin. of Estate of An-
gelo Barbato,

Defendant.

On Contract.

Stipulation.

20

It is hereby stipulated and agreed by and be-
tween Harry E. Stern, Attorney for Plaintiff, and
Charles C. Giffoniello, Attorney for defendant,
that the above-entitled cause, which has been here-
tofore marked "No Appearance" by mistake be
and is hereby placed on the calendar for trial for
March 14th, 1928.

Dated: Newark, N. J., March 3rd, 1928.

30

HARRY E. STERN,
Attorney for Plaintiff.

CHAS. C. GIFFONIELLO,
Attorney for Defendant.

40

Substitution.

Filed May 24, 1928.

DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Estate of Angelo Bar-
bato,

Defendant.

10

On Contract.
Substitution.

20

I hereby consent to the substitution of J. Victor
D'Aloia, as attorney of record of the plaintiff in
the above entitled matter.

Dated: March , 1928.

HARRY E. STERN.

30

40

Substitution.

Filed May 24, 1928.

**DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT**

OF THE COUNTY OF ESSEX.

10

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Estate of Angelo Bar-
bato,

Defendant.

On Contract.
Substitution.

20

I hereby consent to the substitution of Vincent
J. De Salvio, as attorney per se, in the above stated
cause.

Dated: May 15th, 1928.

J. VICTOR D'ALOIA,
Attorney.

30

40

District Court Venire.

ESSEX COUNTY

To CHARLES J. SCHROEDER
 (L.S.) Sergeant-at-Arms, Second Judicial
 District Court of the County of Essex.

(District Court Venire)

You are hereby Commanded that cause to come 10
 before the Judicial District Court of the County
 of Essex, holden at 1092 Clinton Avenue (second
 floor) Irvington, in said County on Wednesday
 the Eleventh day of April 1928 at 10 o'clock in the
 forenoon fifteen good and lawful men being citi-
 zens 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 Vincent J. DeSal-
 vio, Plaintiff and Lucy Barbato Raffone, Individ- 20
 ually and Administratrix of Estate of Angelo Bar-
 bato, Defendant nor interested in the suit, to make
 a jury for the trial of the action between the par-
 ties 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 FELIX FORLENZA, Judge of said Court, 30
 at Irvington, aforesaid the 9th day of April, in the
 year one Thousand Nine Hundred and twenty-
 eight.

D. M. D. Clerk.

Rule to Show Cause.

Filed May 25, 1928.

DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT
OF THE COUNTY OF ESSEX.

10

VINCENT J. DE SALVIO,
Plaintiff,
vs.

LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Estate of Angelo Bar-
bato,
Defendant.

} On Contract.
} Rule to
} Show Cause.

20

This matter being opened to the Court by Charles C. Giffoniello, attorney for the defendant upon an application for a rule to show cause why a new trial should not be granted in the above entitled cause and sufficient reason appearing:

30

It is, on this 22nd day of May, nineteen hundred and twenty-eight, ordered, that the plaintiff, Vincent J. De Salvio show cause before this Court, at the District Court of the Second Judicial District of the County of Essex on the 1st day of June, nineteen hundred and twenty-eight at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, why a new trial should not be granted in the above entitled cause, or a judgment rendered in favor of the defendant instead of the plaintiff.

40

And it is further ordered, that a copy of this order and of the affidavit on which same is granted,

Rule to Show Cause.

be served upon the attorney for said plaintiff within three days from the date hereof.

And it is further ordered, that in the meantime, and until the further order of this court, all proceedings in said cause and on the execution issued on the judgment be and the same are hereby stayed.

10

And it is further ordered, that the granting of the within rule to show cause shall not be a waiver of any grounds for appeal existing in favor of the defendant.

FELIX FORLENZA,
Judge.

Affidavit of Charles C. Giffoniello.

20

State of New Jersey, }
County of Essex, }ss.:

Charles C. Giffoniello, being duly sworn according to law upon his oath deposes and says:

1. I am a practicing Counsellor-at-Law of the State of New Jersey with offices at #31 Clinton Street, Newark, New Jersey.

2. I am the attorney of record and represent Lucy Barbato Raffone, Individually and Administratrix of Estate of Angelo Barbato in the above entitled cause.

30

3. I am convinced that the defendant has a just and meritorious defense to the action of the case.

4. Summons in this case was issued on July 15th, 1927, demanding the sum of \$450.00 and made returnable on July 26th, 1927. Subsequent-

40

Affidavit of Charles C. Giffoniello.

ly a demand for jury was made. The matter was adjourned from time to time and it was set down on the call for April 10th, 1928, but no disposition was made of the case at that time and I was awaiting further instructions from the Clerk of the District Court as to the position of the case on the jury calendar.

10

5. On April 22nd, 1928, I was married and went away on a trip and did not return to the office until May 14th, 1928. In looking over my matters and checking up on my cases I determined to find out the status of the above entitled cause, and on May 22nd, 1928, I learned for the first time that during my absence on April 25th, 1928, a judgment had been entered by the plaintiff against the defendant for \$500.00 and costs.

20

6. The defendant contends that the said sum of \$500.00 is not due and owing from her either individually or as Administratrix of the late Angelo Barbato nor any other sum, and further that the alleged loan was made to the said Angelo Barbato deceased in the year 1920, which said claim is barred by the Statute of Limitations and was never revived.

30

CHARLES C. GIFFONIELLO.

Sworn and subscribed to before me {
 this 22nd day of May, 1928. }

Pietro Stenziele,
 Notary Public of New Jersey.

40

Affidavit of Louis G. Zellner.

Filed May 25, 1928.

DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Estate of Angelo Bar-
bato,

Defendant.

10

On Contract.
Affidavit.

20

State of New Jersey, }
County of Essex, } ss.:

Louis G. Zellner, being duly sworn according to law upon his oath deposes and says:

1. I am a Clerk in the office of Charles C. Giffoniello, Essex Building, Newark, N. J. a practicing Counsellor-at-Law of this State.

2. On May 23rd, 1928, I was requested by Mr. Giffoniello to serve a copy of the Rule to Show Cause signed by the Honorable FELIX FORLENZA, Judge, which this affidavit is hereto annexed.

30

3. That I called at the residence of the plaintiff, Vincent J. DeSalvio, at #219 Mt. Prospect Avenue, Newark, New Jersey, and served him with a copy of the said Rule by delivering the same to him personally and explaining to him the con-

40

Affidavit of Louis G. Zellner.

tents. The said De Salvio accepted service thereon.

LOUIS G. ZELLNER.

Sworn and subscribed to before me
this 24th day of May, 1928.

Pietro Stenziele,

Notary Public of New Jersey.

10

Substitution.

Filed June 8, 1928.

DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

20

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Indi-
vidually, and as Administra-
trix of Angelo Barbato,
Defendant.

On Contract.
Affidavit.

30

I hereby consent to the substitution of Meyer Q. Kessel, as attorney of record for the plaintiff in the above entitled cause.

Dated: June 6th, 1928.

J. VICTOR D'ALOIA,
Attorney.

40

Jul 15 1927

Jul 25 1927
#18944

VINCENT J. DE SALVIO,

vs.

LUCY BARBATO RAFFONE, Individually, and as Administratrix of Estate of Angelo Barbato,

10

Pro Se (Wm. D'Aloia)

Mic 2374

Charles E. Gifforinello Ma 3428

Mar 14 1928

Mar 27 1928

20

Apr 10 1928

Apr 11 1928

Rule

June 1 1928

June 1 1928

Jun 6 1928

Jun 8 1928 Entered

Reverse side:

March 14, 1928

April 14, 1928

30

Apr 11 1928 Entered

4/25/28 Pltff. Vincent J. DeSalvio

Jun 1 1928

(J for P 500.00) Entered.

Jun 8 1928

40

Jul 15 1928

Jul 26 1928

#18944

VINCENT J. DE SALVIO,

vs.

10 LUCY BARBATO RAFFONE, Individually, and as Administratrix of Estate of Angelo Barbato,

#18944

Meyer Q. Kissel

Charles E. Gifforinello

Dummy Jacket inside.

June 15, 1928

20 Reverse side:

Jun 15 1928

Came in on Rule why judg. should not be reopened.

Reserve

Decision was reserved.

30

40

Judgment Docket.

Suit #18,944

**DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT**

OF THE COUNTY OF ESSEX.

ON CONTRACT

10

VINCENT J. DE SALVIO,
Plaintiff,

vs.

LUCY BARBATO RAFFONE, Ind.,
and Administratrix of the
Estate of Angelo Barbato,
122 Warren St. Nrk.

20

MEYER J. KESSEL, Plaintiff's Attorney.
CHARLES C. GIFFONIELLO, Deft's Attorney.

PLAINTIFF'S COSTS.

Summons	\$2.10	
Mileage	.24	
Listing	1.50	
Attorney's Fee	25.00	30
<hr/>		
Total Costs	\$28.84	
Transcript	1.50	
State of J.	.50	
Execution	1.59	

40

Judgment Docket.

DEFENDANT'S COSTS.

	Order	1.00
	Venire	5.75
	Transcript	1.25
	\$500.00	
	28.84	
10	—————	
	\$528.84	

July 15, 1927. A summons was issued returnable:
July 26, 1927.

The demand was: \$450.00

The summons was returned as follows:

20 The said defendant not being found I served the within summons July 15th, 1927 by leaving a copy thereof at her residence with a member of her family above the age of fourteen years, informing her of its contents.

“Charles J. Schroeder
Sergeant-at-Arms”

30 July 18th, -927 A State of Demand was filed.
July 26th, 1927 Case listed and called. Defendant did not appear. No appearance entered.
Nov. 16, 1927 A demand for Jury was filed by defendant. DMD
Mar. 8, 1928 A stipulation to try case on Mar 14 1928 was filed. DMD
Apr. 9, 1928 A venire was issued returnable April 11, 1928—DMD
This was adjourned to 1928—Mar 14—27—
40 Apr 10—11

Judgment Docket.

- April 11, 1928 Case listed and called. Defendant did not appear. No appearance entered. May be restored to the list if Jury is waived.
- April 25, 1928 The plaintiff appeared and the defendant not appearing and no reason being assigned for her absence the cause was tried, and determined at this time. 10
- The following witnesses were sworn on behalf of the plaintiff.
- Vincent J. DeSalvio
- April 25, 1928. Whereupon it is on this day, by this Court considered and adjudged that Vincent J. DeSalvio the plaintiff, recover against Lucy Barbato Raffone, ind. only the defendant the sum of Five Hundred Dollars and no cents damages and the costs of suit. DMD 20
- May 24th, 1928. A substitution of plaintiff's Atty in favor of J. Victor D'Aloia was filed. DMD
- May 24th, 1928. A substitution of Vincent J. DeSalvio, as Attorney Pro Se was filed. DMD
- May 25th, 1928. A Rule to Show Cause returnable June 1st, 1928 was filed. DMD
- June 8th, 1928. A substitution of Plaintiff's attorney in favor of Meyer J. Kessel was filed. DMD
- June 15th, 1928. In Re:—Rule to Show Cause why Judgment should not be reopened. 30
- Decision was reserved.
- June 20th, 1928. Decision was announced and judgment entered as follows: The motion was denied. The Rule dismissed.
- June 22, 1928. A Statement of Judgment was issued. PBF.
- June 27th, 1928. Execution issued and returned as follows: 40

Judgment Docket.

July 2, 1928. A Transcript of the Docket Page was issued. PBF

July 18, 1928. Rule to Show Cause. On Certiorari, was filed by Chas C. Giffoniello, Esq., returnable at Essex Court House July 28, 1928 before Supreme Court—all proceedings stayed.

10

I have returned this execution July 21, 1928 unsatisfied; I have made diligent search and inquiry and could not find any goods and chattels of the defendant whereof to levy, to make the debt and costs or any part thereof.

Aug. 3, 1928. A Bond on Certiorari was filed DMD

20

Aug. 3, 1928. A Writ of Certiorari tested in the name of Hon. William S. Gummere, Chief Justice of the New Jersey Supreme Court was received, shown to Hon. Felix Forlenza, Judge of this District Court and filed.

J. EDWARD DELANCY, Clerk.

Aug. 3, 1928. A Transcript of the docket page was issued PBF.

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*Judgment Docket.*DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT

OF THE COUNTY OF ESSEX.

State of New Jersey, }
County of Essex, } ss. :

10

I, J. Edward DeLancy, Clerk of the District Court of the Second Judicial District of the County of Essex, do hereby certify that the foregoing transcript of the Docket page #18944 is a true copy of the record of the proceedings in the matter wherein Vincent J. De Salvo—was plaintiff and Lucy Barbato Raffone Ind. and Administratrix of Estate of Angelo Barbato—was the defendant and that the judgment above set forth stands open and unpaid of record.

20

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Irvington, New Jersey, this third day of August, A. D. Nineteen hundred and twenty-eight.

(Seal)

J. EDWARD DELANCY, Clerk.
By: N. M. HOOCHER, Acting Clerk.

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Reasons.

NEW JERSEY SUPREME COURT.

10	VINCENT J. DE SALVIO, Plaintiff-Respondent, vs. LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Defendant-Prosecutor.	}	On Certiorari. Reasons.
----	---	---	--------------------------------

20 The said Prosecutor, by her Attorney, comes and prays that the action of the trial judge of the District Court of the Second Judicial District of the County of Essex, New Jersey, may be set aside, reversed, and for nothing holden for the following reasons:

1. That the defendant, in accordance with the practice and of the statute, demanded a trial by jury in the form and in accordance to law.

30 2. That the action of the trial judge in having the cause tried without a jury and without the knowledge of the defendant and without notice to her or to her Attorney and permitting the plaintiff as an Attorney *Pro se* to proceed in the cause and recover a judgment in his favor and against the defendant, deprived the defendant of her right to defend herself in said cause, and was tantamount on the part of the Court to permit the plaintiff to obtain a judgment in a cause without
40 notice to the defendant.

Reasons.

3. A venire was issued for a jury trial to be held on April 11th, 1928, but a jury was never called on said day in accordance with said venire nor at any other time. That no other venire was ever issued.

4. That the action of the trial judge of the District Court in ordering that the case be marked "No Appearance" and ordering that the case "may be restored to list if jury is waived" was arbitrary and illegal. 10

5. That the said trial judge was without jurisdiction to enter a judgment in favor of the plaintiff and against the defendant.

6. The trial judge had no jurisdiction to hear and determine the law and the facts without a jury and without a notice to the defendant. 20

7. Because of the action of the said trial judge the defendant was denied and deprived of her constitutional and statutory right of trial by jury.

8. Because of the action of the trial judge in hearing and determining the cause without notice to her prevented the defendant from presenting her true and legal defense to the action. 30

9. Said judgment was entered by said trial judge without notice to the defendant and without a jury was arbitrary and illegal and without juris-

Reasons.

diction, because the defendant at no time waived her right by jury, but was contesting the same to the full knowledge of the trial judge.

10 That the said action on the part of the said trial judge as aforesaid is in divers other respects arbitrary, illegal, unjust, unconstitutional and oppressive and should be set aside and for nothing holden.

CHAS. C. GIFFONIELLO,
Attorney of Prosecutor.

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Opinion.

Filed Nov. 30, 1928.

NEW JERSEY SUPREME COURT.

No. 256. October Term, 1928.

<p style="text-align: center;">VINCENT J. DESALVIO, Plaintiff-Respondent,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix, Defendant-Prosecutrix.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">On Certiorari.</p>
---	---	---

Submitted October Term, 1928: Decided Novem-
ber 30th, 1928. 20

Before Justices MINTURN, BLACK and CAMPBELL.
For the Prosecutrix: MR. CHARLES C. GIFFONEL-
LO.

For the Respondent: MR. MEYER Q. KESSEL.

Per Curiam:

A certiorari was allowed in this case to review a judgment in the District Court of the Second Judicial District of Essex County, N. J. The following are the pertinent facts on which the judgment is sought to be set aside: 30

The action was brought by summons in the Second Judicial District Court of Essex County, on July 11th, 1927. A state of demand was properly filed and on July 26th, 1927, when, the case appeared on the list for trial, there was a "No appearance" noted in the record.

It was subsequently restored to the list for November 16th, 1927; the defendant filed a demand for a jury. The case was adjourned from time to 40

Opinion.

time, but was definitely set down for trial on April 11th, 1928, and, in accordance with the defendant's demand for a jury, a venire was issued on April 9th, 1928, returnable on the trial date, April 11th, 1928.

10 The jury demanded by the defendant was summoned and the case was on the trial list on April 11th, 1928, *but the defendant failed to appear; neither did her attorney appear.* This appears in the docket record of the District Court, and is admitted by the defendant.

20 In the absence of the defendant and her attorney on April 11th, 1928, the plaintiff entered a second "No appearance" and on April 25th, 1928, entered judgment. Between April 11th, 1928, and April 25th, 1928, no attempt was made by the defendant or her attorney to find out what, if anything, had occurred on April 11th, 1928. As stated above, it appears by the record, that the jury demanded by the defendant was summoned and the case set down for trial before the jury on April 11th, 1928. When the defendant and her attorney failed to appear, on the trial day, the defendant lost any right to a trial by jury.

30 On May 25th, 1928, a rule to show cause returnable June 1st, 1928, was allowed and filed by the trial Court. On June 15th, 1928, the rule to show cause why the judgment should not be reopened was heard. On June 20th, 1928, the rule was dismissed by the trial judge, almost a year after the case was instituted.

40 In this situation we think the trial judge was justified in hearing and deciding the case. The defendant seems to think the trial Court was bound to wait indefinitely for the defendant to appear or at least wait upon the convenience of the defendant.

The certiorari is dismissed with costs.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

VINCENT J. DE SALVIO,
Defendant-in-Error,

—vs—

LUCY BARBATO RAFFONE,
Individually, and as Adminis-
tratrix of Estate of Angelo
Barbato,
Plaintiff-in-Error.

ON CERTIORARI

BRIEF FOR THE DEFENDANT-IN-ERROR.

This is an action brought by summons in the Irvington District Court, on July 15th, 1927. A state of demand was properly filed and on July 26th, 1927, when the case appeared on the list for trial, there was a "No Appearance" noted in the record. (Case page 6, L. 19).

It was subsequently restored to the list ~~and~~ on November 16th, 1927 and the defendant filed a demand for a jury. The case was adjourned from time to time, but was definitely set down for trial on April 11th, 1928 and, in accordance with the defendant's demand for a jury, a venire was issued on April 9th, 1928, returnable on the trial date, April 11th, 1928.

The jury demanded by the defendant was summoned and the case was on the trial list on April 11th, 1928, **but the defendant failed to appear; neither did her attorney appear.** This appears in the docket record of the Irvington District Court and is admitted by the defendant. (Case page 6, L. 29).

In the absence of the defendant and her attorney on April 11th, 1928, the plaintiff entered a second

"No Appearance" and on April 25th, 1928, entered judgment.

Between April 11th, 1928 and April 25th, 1928, no attempt was made by the defendant or her attorney to find out what, if anything, had occurred on April 11th, 1928.

None of the cases, cited in behalf of the prosecutor is applicable to the case at bar, for here it appears, by the record, that the jury demanded by the defendant was summoned and the case set down for trial before that jury on April 11th, 1928. When the defendant and her attorney failed to appear, on that trial day, the defendant lost any right to a trial by jury. This situation does not appear in any of the cases relied upon by the prosecutor.

In the case of Clayton vs. Clark, 55 N. J. L. 539, the Judge refused to issue a venire and it does not apply to this case.

In the case of Raphael vs. Lane & Clifford, 56 N. J. L. 108, **the defendant was present in court and objected** to the judge trying the case without a jury and had not waived trial by jury. This situation is not the same as in the case at bar.

In the case of Crossley vs. Connolly Co., 90 N. J. L. 238, the court **under the objection of the defendant** proceeded to hear the **case without a jury**. That situation does not apply to the case at bar.

In the case of Stuppiello vs. Waldron, 140 Atl. 436, the situation was also different, because there the defendant was **present and did object to the trial proceeding upon the ground** that he had filed a proper demand for a jury.

So in all these cases the defendant did nothing

to waive the right to a jury, but on the other hand was present either in person or by attorney to strenuously object to the course taken by the Court. Not so in the case sub judice.

Therefore, it is respectfully contended, by the undersigned, that on April 11th, 1928, when this case was set down for trial and on which day especially a jury had been summoned by a venire issued on April 9th, 1928, in accordance with the defendant's demand, her failure and the failure of her attorney to appear constituted a waiver of the jury previously demanded.

The decision of the Supreme Court should be affirmed.

Respectfully submitted,

J. VICTOR D'ALOIA,
Of Counsel for
Plaintiff-Responded.

New Jersey Court of Errors and Appeals

VINCENT J. DESALVIO, Defendant-in-error,	}	On Certiorari.
vs.		
LUCY BARBATO RAFFONE, Indi- vidually, and as Administra- trix of Estate of Angelo Bar- bato, Plaintiff-in-error,		

BRIEF FOR THE DEFENDANT-PROSECUTOR.

This is an action to obtain a Writ of Certiorari by Lucy Barbato Raffone, to review the proceedings in the Second Judicial District Court of the County of Essex.

A Writ of Certiorari was obtained and the Supreme Court affirmed the judgment of the Court below.

A judgment was entered by the Court in the sum of \$500. and costs in favor of Vincent J. De Salvio, against Lucy Barbato Raffone. A demand for jury was properly filed and a day set for trial. Upon the day set April 11th, 1928, defendant did not answer or appear and by order of the Court the case was marked "No Appearance, may be restored to list if jury is waived." (State of Case, page 6, line 29).

That subsequently on April 25th, 1928, the Court without a jury and without notice to the defendant entered judgment in favor of the plaintiff and against the defendant for \$500.00 and costs of suit. (State of Case, page 7, line 1).

It is contended that the trial court erred in rendering judgment without a jury, when a jury was properly called. In 24 Cyc. 168 (F) and cases cited, the rule is defined as follows:

“When a case is triable by jury as a matter of right, it is reversible error for the Court to try it without a jury, where demand for jury trial has been properly made.”

Defendant in accordance with the practice of the Statute of the State of New Jersey, demanded a trial by jury. Trial by jury is a substantial right and may be evoked and demanded at any time. The United States Constitution, Seventh Amendment, is as follows:

“In suits at common law, where the value in controversy shall exceed twenty-five dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Article I, Paragraph 7 of the New Jersey Constitution, is as follows:

“The right of a trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men.”

In accordance with the Practice of the Statute of the State of New Jersey, defendant Prosecutor duly filed her demand for jury. (State of Case, page 6, line 21).

Chapter 149 of the District Court Act of New Jersey provides:

“Either party may demand a trial by jury, and if a jury is demanded, a venire shall be issued to summon a jury of six persons who shall be summoned without regard to sex, and no more, if debt, demand or matter in dispute does not exceed the sum of Fifty dollars, or a jury of twelve persons who shall be summoned without regard to sex, if the debt, demand or matter in dispute exceed the sum of fifty dollars, being citizens of this State above the age of twenty-one years and under the age of sixty-five years, and in nowise akin to the plaintiff or defendant, nor interested in the suit, to be and appear before the said court at such time and place as shall be expressed in the venire to make a jury for the trial of the action between the parties mentioned therein; and the constable or serjeant-at-arms shall, at the return of the said venire, return annexed thereto, a panel containing the names of the jurors, whom he shall have summoned by virtue thereof; and if on the return of the venire, it shall appear that one or more of the jurors are disqualified to serve, or do not appear, than it shall be lawful for the constable or serjeant-at-arms who served the same, by order of the court, immediately to summon others who shall serve in their stead; unless a demand for trial by jury shall be made, and notice thereof given to the clerk of the court at least two days, exclusive of Sundays and legal holidays, before the time fixed for the trial, and unless the party demanding the same shall at the time of the making such demand pay the cost of the venire, the demand for trial by jury shall be deemed to be waived; but the judge of any such court may, in his discretion, grant a venire at the expense of the plaintiff, to be taxed in the costs of the suit, notwithstanding the failure of a demand as hereinbefore specified.”

(As amended P. L. 1903, p. 505, P. L. 1905, p. 494, P. L. 1913, page 618, and P. L. 1921, p. 69)

In the leading case of Clayton v. Clark, 55 N. J. L. 539, where the defendant demanded a jury, the Court held:

“With respect to the expenses of these statutory courts it will be observed that the plaintiff and defendant stand in totally different attitudes. The plaintiff chooses the tribunal in which he will bring his suit. When the amount of his claim is above \$200.00 he has from which to select the Supreme Court, the Circuit Court and the Court of Common Pleas, in all of which a common law trial by jury is provided at public expense. If, with these courts open to him, the plaintiff elects to take the defendant before a statutory tribunal where either party may demand a jury, it is doubtful if he can be heard to complain of any reasonable regulation rendered necessary by the legislative frame of the tribunal selected. With the defendant it is totally different. The legislature has made the right to a jury absolute if demanded at the proper time. The defendant has had no voice in choosing the forum, hence has submitted himself to no implied conditions arising from its construction. He is there *in invitum*, with the right to question the constitutionality of the procedure in all its steps, and to ignore utterly all innovations upon his common law rights for which express legislative authority does not exist. No custom, however reasonable, and no rule of court, however adopted, can deprive him of a constitutional privilege that is unconditionally incorporated in the legislative act to which the tribunal owes its existence. When, therefore, the demand of the defendant for a venire is met by a counter demand for in-

demnity, the plaintiff must either furnish the indemnity or have his action dismissed. With this the defendant has nothing whatsoever to do—under the statute his demand for a jury, if made at the proper time, deprives the court of jurisdiction to try the cause otherwise than by a jury. The issue must either be tried in this manner or not at all. This result rests in statutory interpretation so plain that it has not been deemed necessary to inquire whether it is within the power of the legislature to annex a condition of prepayment to a trial by jury in a tribunal from which it had taken away all provision for retrial upon appeal. For the same reason no reference is made to the practice said to exist in justices' courts, by which such costs are demanded. Such practice could have no pertinence in a constitutional sense save as it existed prior to 1844, when the constitution was adopted; and it is extremely doubtful if at that period such a practice obtained in the court for the trial of small causes as a recognized custom. No reference to such a course is to be found in the reported cases or in the histories of the small cause court. On the contrary, in the edition of Pennington edited by Harrison, and published in 1943, the year before the adoption of the constitution, the author inveighs bitterly against the provision of the act that required the defendant to pay the costs of the jury when the case went against him—characterizing it as “peculiarly hard on the defendant.” Pen. Tr. 33. It is not likely, if there was at that time an established practice by which the defendant was subjected to the vastly greater hardship of advancing the jury fees before trial, it would have been overlooked by the zealous author of that treatise. * * * In the case before us, when the defendant demanded a jury it became the duty of the Judge either to issue the venire or dismiss the case; he had no

authority to require of the defendant any condition not prescribed by the statute, nor any jurisdiction "to inquire into the merits of the cause" himself. * * * * The record shows that after the refusal of the judge to issue the venire the defendant moved that the case be dismissed. The judgment for the plaintiff subsequently rendered was a nullity, and upon a direct attack, must be set aside."

In the case of Raphael v. Lane & Clifford, 56 N. J. L. 108, the Court held:

"An action was brought in the First District Court of Newark to recover a claim of over \$200.00 under the supplement to the District Court Act of March 27th, 1882. (Rev. Sup. p. 261). When the case was called for trial the defendant objected to the Judge trying the case without a jury, upon the ground that the defendant had not waived a trial by jury. The judge proceeded to try the case without a jury, and gave judgment for the plaintiffs.

Held: "That this proceeding was in violation of Article 1 paragraph 7 of the Constitution, which declares that "the right of trial by jury shall remain inviolate;" that the defendant is not bound by the judgment, which should be reversed, and the record remitted to the District Court to be proceeded in according to law".

This principle of law was definitely established by the Court of Errors and Appeals in the leading case of Crossley v. Connolly Co., 90 N. J. L. 238.

"Where the defendant, in a District Court, demanded a trial by jury, and during the progress of the trial, the court, upon the motion of the plaintiff, dismissed the jury, and adjourned the case, and upon the next day

fixed for the trial under the objection of the defendant proceeded to hear the case without a jury, and gave judgment for the plaintiff. *Held*, that the proceeding was irregular, and that the defendant under the circumstances, could not be deprived of his right to a trial by jury.

The substantial inquiry presented by these facts is whether the trial court deprived the defendant of his statutory right of a trial by jury. The question resolves itself essentially into one of procedure, and since the District Court is a court of statutory origin, the relative rights of the parties must be deduced from the express provisions and the spirit of the statute.

Causes ordinarily are tried before the District Court without a jury, except in one contingency, when the court by the express provisions of the statute is deprived of that power."

Section 149 of The District Court Act provides (Comp. Stat. p. 1999)

"Either party may demand a trial by jury—unless a demand for trial by jury shall be made—and unless the party demanding the same shall at the time of making such demand pay the cost of the venire, the demand for a trial by jury shall be deemed to be waived."

This section of the Act received due consideration in the cases of *Clayton v. Clark*, 55 N. J. L. 539 and *Raphael v. Lane*, 56 N. J. L. 108. On page 240 the Court continues:

"It will suffice, for the determination of the case *subjudice*, to declare that we concur in this construction of the provision of the act under consideration. The inquiry results whether, in such a situation, no legislative provision having been made for the

return of the same jury, or the payment of the cost of a subsequent venire, the District Court may order an adjournment of a jury trial and impose upon the defendant, *ex-necessitate*, the cost of another venire, for the trial of the case upon the adjourned day.

Whereas, in this case, it is manifest that the plaintiff's demand was brought about by no dereliction or default upon the part of the defendant, the rights of the latter to the form of trial conceded to him by the statute, and which he has elected to adopt in conformity with the statutory procedure, should in nowise be jeopardized by the action of the court. Neither the plaintiff's unwillingness to proceed, nor the trial court's recognition of his right to an adjournment, should be so determined as to deprive the defendant of a right secured to him by law.

The practical equitable procedure in such an exigency would dictate that the postponement requested be granted upon terms which would impose upon the party demanding it the costs incident to the issuing of another venire, so that upon the adjourned day the parties may be restored to the *status quo ante*."

The judgment of the Supreme Court will be reversed, and the record will be remitted to the District Court for a Venire DeNovo.

In the recent case of Stuppiello v. Waldron, 140 Atl. 436, decided by the Supreme Court on February 8th, 1928, where the suit was brought by the plaintiff to recover a balance due for work, and the question presented involved one of practice. Two days after the return day of the summons a demand for a jury trial was entered by the defendant. The demand was filed by the Clerk of the District Court, and the fees required by law were paid. Upon the return day of the summons, the case was marked "No appearance on behalf of the

plaintiff." After the demand for a jury was filed, a stipulation was filed by the attorneys. The case was set down for trial on June 29th, 1926, and was thereafter adjourned from time to time, and finally was set down for trial on June 14th, 1927. On the day set for trial, the attorney for defendant requested the court to adjourn the case until July 14th, 1927, which was the day set for jury trials. This the court refused. When the case was called for trial, the attorney for the defendant objected to the trial proceeding upon the ground that he had filed a proper demand for a jury in accordance with the statute, and that therefore the court had no jurisdiction to try the case without a jury. The court overruled this objection, and ordered the plaintiff to proceed. The defendant refused to enter any defense or to cross-examine any witness, and judgment was entered for the plaintiff in the amount sued for. The Court held:

"The question presented there obviously is one of procedure under the District Court Act.

The question essentially, therefore, is whether the demand was made two days before the time fixed for trial, as provided for in the statute. It is manifest in this case that the defendant had done everything which the statute required him to do for the purpose of obtaining a jury trial. The intervening acts of the parties and of the court from that time to the day set for trial did not deprive him of the right of a jury trial which he had demanded at the time required by the statute. He did nothing under the circumstances to waive this right, and it was the duty of the trial court under the circumstances to afford him that right whenever the case was set down for trial, unless he had done something to waive the right. It is obvious in the situation present-

ed by the record that he had done nothing to waive his right but throughout had insisted upon his right to trial by jury."

We think, after an examination of the cases bearing upon the subject in this court, such as *Rosner v. Cohn*, 81 N. J. L. 343, 79, A. 1956; *Consolidated Gas Co. v. Blanda*, 89 N. J. L. 104, 97 A. 769; *Clayton v. Clark*, 55 N. J. L. 539, 26 A. 795; *Crossley v. Connolly*, 90 N. J. L. 238, 100 A. 228; *Raphael v. Lane*, 56 N. J. L. 108, 28 A. 421, that it was the clear intent of the Legislature to afford to the defendant, upon a proper demand and payment of the fees, as required by the statute, the right to a jury trial, and that this right could not be affected, except by the laches or waiver of the defendant himself, and that once that right attached it was the duty of the court to proceed with the case before a jury.

It is therefore respectfully submitted that the lower court committed reversible error in entering judgment in favor of plaintiff and against defendant as hereinabove set forth in denial of prosecutor's constitutional and statutory right of a trial by jury.

It is therefore further respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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