

dant that he had never been sued; that before the defendant returned the next day to bring the promissory note in question and to carry out the transaction, plaintiff had discovered that the defendant had been frequently sued and when the defendant offered his note the following day, the plaintiff refused it and continued the action.

The defendant alleged that he had never stated to the plaintiff that he had never been sued; but finally, that he said he had never been sued, meaning in connection with premiums of insurance.

The judgment found in favor of the plaintiff, holding that the defendant's evidence was unsatisfactory. I think this judgment is clearly right. In the first place, the burden of proof to establish that delay was given upon the defendant. The plaintiff admits that it gave the delay but conditionally only, viz: that it gave it in consequence of the representation of the defendant about his not having been sued. This admission cannot be divided. Certainly the defendant had not overturned the plaintiff's evidence with regard to the matter. Besides, there is no suggestion that any consideration was given by the defendant to the plaintiff for the promise in question. That is one of the essential elements of a contract that is must have a consideration. Even supposing that the plaintiff had granted an additional delay without any consideration whatever, I cannot see that the plaintiff was obliged to carry out that promise. It was what is known in roman law as a "nudum pactum" and not binding upon the party.

I am of opinion that the judgment is right and must be confirmed.

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