# INDEX

## SUMMONS.

THE STATE OF NEW JERSEY, TO LINA H. BOGGIANO, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN BOGGIANO, DECEASED:

(L. S.)

You are summoned to answer the annexed complaint of Emilia Valente, administratrix of the Estate of Joseph C. Valente, deceased, in an action at law in the Supreme Court. And take notice that unless you file an answer to said complaint with the clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 14th day of June, 1927.

EDWARD J. KELLEHER,
*Clerk.*

ALEX. F. REID, JR.,
*Attorney of Plaintiff.*

COMPLAINT.

(Filed June 17, 1927.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

TRANSCRIPT OF PLEADINGS FOR TRIAL.

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EMILIA VALENTE, Adm. of the Estate of JOSEPH C. VALENTE, deceased,
*Plaintiff*,
v.
LINA H. BOGGIANO, Indiv., and Adm. of the Estate of JOHN BOGGIANO, deceased,
*Defendant*.

Alex. F. Reid, Jr., Attorney for Plaintiff.
Lionel P. Kristeller, Attorney for Defendant.
Complaint.

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Summons issued June 4, 1927.

Plaintiff, Emilia Valente, residing in the City, County and State of New York, and administratrix of the Estate of Joseph C. Valente, deceased, late of the town of Peekskill, New York, shows that:

1. She sues for the amount of a promissory note for three thousand dollars ($3,000), made by the

defendant, Lina H. Boggiano, and by John Boggiano, the defendant's intestate and late husband, to plaintiff's intestate, a copy of which is hereto annexed, designated "Schedule A."

2. Plaintiff still owns said note. It has not been paid.

Wherefore, plaintiff demands as damages, three thousand dollars ($3,000), with interest at the rate of four per cent (4%) from April 1, 1913, to July 22, 1916, together with interest to date at the rate of six per cent (6%) on the total sum due July 22, 1916; also costs of suit to be taxed.

ALEX. F. REID, JR.,
*Attorney of Plaintiff.*

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SCHEDULE "A."

$3,000 Int. @ 4% NEW YORK April 1st, 1913
One Year AFTER DATE I PROMISE TO PAY
TO THE ORDER OF Joseph Valente
Three Thousand plus Interest @ 4%...DOLLARS
AT 37 Broadway, N. Y. C.
VALUE RECEIVED. John Boggiano
NO..... DUE..... Lina H. Boggiano

REVERSE SIDE OF NOTE

June 24th, 1914
This note is renewed for One Year from this date.
John Boggiano
Lina Boggiano

July 22nd, 1915
This note is renewed for One Year from this date.
John Boggiano
Lina H. Boggiano.

## ANSWER.

(Filed June 21, 1927.)

The defendant, Lina H. Boggiano, individually, and as administratrix of the Estate of John Boggiano, deceased, answering the complaint herein, says:

1. She denies each and every allegation contained in the complaint filed herein.

### First Separate Defense.

1. That on or about the first day of April, 1913, John Boggiano made and executed a promissory note to the order of Joseph Valente, in the amount of three thousand dollars ($3,000.00), payable in one year from date, with interest at four per cent.

2. That at the time that John Boggiano made and executed the aforesaid note, Lina H. Boggiano, a married woman, the wife of the said John Boggiano, signed the said note as an accommodation endorser.

3. That before the commencement of this suit, the full sum of money due on the said promissory note, together with all the interest due, was paid to the holder of the note, in accordance with its tenor, and the payment thereof is a full satisfaction and discharge of any and all liability of all the parties to the said note.

SECOND SEPARATE DEFENSE.

1. The allegations contained in paragraphs 1 and 2 of the first separate defense are herein repeated and re-affirmed, as if the same were expressly set forth in detail and at length.

2. That at the time the said defendant herein signed the promissory note referred to in paragraphs 1 and 2 of the first separate defense, she was a married woman and could not become an accommodation endorser, guarantor or surety, nor could she be liable on any promise to pay the debt or answer for the default or liability of any person, because of the provisions of the Act of the Legislature entitled, "An Act to amend the law relating to the property of married women" (C. S. 1910, p. 3226), and the various supplements and Acts amendatory thereof.

THIRD SEPARATE DEFENSE.

1. The allegations contained in paragraphs 1 and 2 of the first separate defense are herein repeated and re-affirmed, as if the same were expressly set forth in detail and at length.

2. That the said defendant did not at any time within six years next before the commencement of this suit undertake or promise in manner and form as the said plaintiff hath above thereof complained of against her and cannot be held liable in this action because of the provisions of an Act of the Legislature entitled, "An Act for the Limitation of

Actions" (C. S. 1910, Vol. 3, p. 3162), and the various supplements and Acts amendatory thereof.

FOURTH SEPARATE DEFENSE.

1. This defendant, further answering the complaint herein, says that she has fully administered all and singular the goods and chattels which were of the said John Boggiano, deceased, at the time of his death, and which have ever come to the hands of the said defendant, as administratrix as aforesaid, to be administered, and that the said defendant has not, at the time of the commencement of this suit, or at any time since, had any goods or chattels which were of the said John Boggiano, deceased, at the time of his death, in her hands to be administered.

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NOTICE.

Please take notice, that the defendant reserves the right to strike out, at or before the trial herein, the complaint filed by the plaintiff, on the ground that it does not set forth facts sufficient to constitute a cause of action.

LIONEL P. KRISTELLER,
*Attorney of Defendant.*

Dated: June 21, 1927.

## REPLY.

(Filed June 23, 1927.)

The plaintiff, Emilia Valente, administratrix of the Estate of Joseph C. Valente, deceased, replying to the defendant's answer herein, says:

1. She joins issue with defendant on each and every paragraph of the answer to said complaint.

### As to the First Separate Defense.

1. So much of paragraph 1 as alleges that "on the first day of April, 1913, John Boggiano made and executed a promissory note to the order of Joseph Valente, in the amount of three thousand dollars ($3,000), payable in one year from date, with interest at four per cent (4%)," is admitted; but defendant has not alleged therein, as was the fact, that the defendant, Lina H. Boggiano, also was one of the makers of the said note.

2. Paragraphs 2 and 3 are denied.

### As to the Second Separate Defense.

1. So much of the allegations contained in paragraphs 1 and 2 of the reply to the first separate defense as relate to paragraphs 1 and 2 of the said first separate defense, are herein repeated and reaffirmed as if the same were expressly set forth in

detail and at length, as and for the reply to paragraph 1 of the second separate defense.

2. So much of paragraph 2 of the second separate defense as alleges that "she was a married woman * * * at the time said defendant herein signed the promissory note * * *" is admitted; the balance of said paragraph is denied; as a further reply to paragraph 2 of the said second separate defense, plaintiff denies that said defendant signed said note, the subject-matter of the suit, as either an accommodation endorser, guarantor or surety, and further denies that she was making herself liable on any promise to pay the debt or answer for the default or liability of any person under the provisions of an Act entitled, "An Act to amend the law relating to the property of married women" (C. S. 1910, p. 3226), and the various supplements and Acts amendatory thereof, as therein alleged.

As to the Third Separate Defense.

1. So much of the allegations contained in paragraphs 1 and 2 of the reply to the first separate defense as relate to paragraphs 1 and 2 of the first separate defense are herein repeated and reaffirmed, as if the same were expressly set forth in detail and at length, as and for the reply to paragraph 1 of the third separate defense.

2. Paragraph 2 is denied and plaintiff further denies that the Act of Legislature entitled, "An Act for the Limitation of Actions" (C. S. 1910, Vol. 3, p. 3162), and the various supplements and Acts

amendatory thereof, constitute a bar to the present suit, because of the following circumstances:

a) Joseph Valente, late of the County of Westchester, State of New York, died on March 5, 1914, intestate, leaving him surviving, his widow, Emilia Valente, the plaintiff herein and the administratrix of his estate, and John Valente, Joseph Valente, Adeline Valente and Raymond Valente, four children, as his next of kin and heirs-at-law; all of said children, at the time of their father's death, being minors, with the exception of Adeline Valente, who, at the time of her father's death, was 23 years of age.

b) The said Joseph Valente died seized and possessed of a promissory note executed in the State of New York, dated April 1, 1913, payable to the order of himself, in the sum of three thousand dollars ($3,000), bearing interest at the rate of four per cent (4%) and due one year from date at #37 Broadway, New York City, the makers of said note being John Boggiano and Lina H. Boggiano, the latter being the defendant in the above-entitled suit and the former being now deceased.

c) The said Joseph Valente died before the debt represented by the note, referred to in the complaint filed in this cause, matured, he having died on March 5, 1914, and the maturity date of the note being April 1, 1914.

d) No letters of administration upon the estate of the said Joseph Valente, deceased, were applied for until January 16, 1924 (when, upon proper application, letters of administration upon the estate

of the said Joseph Valente, deceased, were duly granted by the Surrogate of the County of Westchester, State of New York, to Emilia Valente, the plaintiff herein, who then and there entered upon the duties of administering her said husband's estate, as per the exemplified copy of her letters of administration now on file in the office of the Register of the Prerogative Court, in accordance with the statute in such case made and provided), owing to the fact that decedent left practically no estate save the note referred to in the complaint filed herein and the subject-matter of the within suit, and because of the fact that many times during the period from March 5, 1914, the date of the death of her husband, and March 14, 1924, the date that a suit was instituted in the Supreme Court of the State of New Jersey for the County of Essex against Lina H. Boggiano, the defendant, on said promissory note, plaintiff made demands upon the defendant, Lina H. Boggiano, both individually and as administratrix of her late husband's estate, for the amount then due on such indebtedness, and received, in answer to such demands, evasive promises of payment, none of which, however, were in writing, but resulting in plaintiff's never taking any active steps looking toward recovery of the aforesaid debt, both on her own behalf and that of her children, until the date before specified, March 14, 1924, when, upon advice of counsel, she instituted suit for recovery upon said note in the Supreme Court of the State of New Jersey, as before noted.

e) Inasmuch as the debt arose subsequent to the date of the death of Joseph Valente, plaintiff's intestate, the time elapsing between his death, on March 5, 1914, and January 16, 1924, the date that letters of administration were duly granted upon

his estate to his widow, Emilia Valente, the plaintiff herein, is not to be computed as part of the period which would bar the present suit under the Act of Legislature entitled, "An Act for the Limitation of Actions" (C. S. 1910, Vol. 3, p. 3162).

AS TO THE FOURTH SEPARATE DEFENSE.

1. Paragraph 1 is denied.

2. Plaintiff, in replying further to the fourth separate defense, states that, even admitting the truth of the allegations contained in paragraph 1 of the said fourth separate defense, the same does not constitute a good and legal defense as to this action, defendant having failed to legally and judicially wind up in proper manner, in the Orphans' Court of the County of Essex, the estate of her late husband, John Boggiano; having failed to take any active steps in the administration thereof beyond the filing of an administration bond in the sum of $1500, on March 22, 1922; never having prepared any inventory, nor obtained any order to limit creditors, nor was any decree for distribution made or entered therein, nor did she take any steps to have any guardian appointed to receive the portion of the estate of her intestate, John Boggiano, deceased, her late husband, lawfully belonging to his minor children, Caesar Boggiano, Adele Boggiano and John Boggiano, Jr., nor were any steps taken by her to procure releases and refunding bonds from the distributors of the estate of the said John Boggiano, deceased.

ALEX. F. REID, JR.,
*Attorney of Plaintiff.*

Dated: June 23rd, 1927.

## REJOINDER.

(Filed July 6, 1927.)

The defendant, answering the reply filed by the plaintiff herein, says:

1. The defendant repeats and reaffirms each and every allegation contained in the answer heretofore filed.

As to the reply to the third and fourth separate defenses, the defendant says:

1. That the plaintiff, ever since the death of the plaintiff's intestate, on March 5th, 1914, was aware of the existence of the promissory note referred to in the complaint filed herein, and frequently made, on behalf of herself and the children of herself and Joseph C. Valente, deceased, demand to the defendant herein, of payment of said alleged claim.

2. That, notwithstanding the fact that the plaintiff knew and understood the nature of the said alleged claim, the plaintiff failed and neglected to apply for administration of the Estate of Joseph C. Valente, deceased, and the plaintiff, therefore, is guilty of laches, and is hereby estopped from maintaining the within action.

LIONEL P. KRISTELLER,
*Attorney of Defendant.*

Dated: July 6, 1927.

## CERTIFICATION.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

In testimony whereof, I have set my hand and the seal of said Court, at Trenton, this twenty-second day of July, A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,
*Clerk.*

(Seal)

## TESTIMONY.

### NEW JERSEY SUPREME COURT.

Essex Circuit.

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John Valente, administrator of the Estate of Joseph C. Valente, Deceased,
*Plaintiff,*
v.
Lina H. Boggiano, individually, and as administratrix of the Estate of John Boggiano, deceased,
*Defendant.*

Action at Law.

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Wednesday, June 4, 1930.

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Before Hon. Nelson Y. Dungan, Jr., and a jury.

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For plaintiff appears Alex F. Reid, Jr.
For defendant appears Lionel P. Kristeller.

(A jury is called and sworn.)

(Mr. Reid opens for plaintiff.)

Mr. Kristeller: I think on counsel's opening I am entitled to a non-suit, assuming that he proves everything he says. He says that the note was due in 1914. The note is outlawed by some eight years —1916 plus six years is 1922, and it is now 1930.

(Argument.)

The Court: It appears, by the opening in this case, that this suit was brought upon a promissory note dated April 1, 1913, for $3,000, payable one year after date. It further appears that on March 5, 1914, before the maturity of the note, the payee died. It further appears that no letters of administration were taken out upon this estate, the estate of the payee of the note, until January 16, 1924, and that this suit was not commenced until June 4, 1927, more than thirteen years after the maturity of the note.

It is insisted that the Statute of Limitations does not begin to run from the maturity of the note, but from the date of the appointment of the administrator of the estate of the payee, which would be January 16, 1924. I do not so understand the Statute of Limitations, but I do understand that such actions upon a promissory note must be commenced and sued within six years next after the cause of action shall accrue, and not after.

The cause of action in this case, in my judgment, accrued on the 1st day of April, 1914, and not at the appointment of the administrator of the estate

of the payee, which was January 16, 1924. Therefore, this note upon which this suit is brought is barred by that statute. The only qualification that I find in the statute, in which death affects the running of the statute, is the ninth section, which provides: "That if any person, against whom there is or shall be any such cause of action as is specified in the first, fifth, sixth or seventh sections of this Act, shall have died or shall hereafter die before the expiration of the times of limitation therein mentioned, the space or term of six months next succeeding the death of such person shall not be computed as part of the limited period within which such action or actions is or are required to be brought by the said sections."

I find no provision of the Limitation of Actions Act which makes even that extension in the case of the death of the person to whom the note is made payable.

The result of these views is to grant the nonsuit requested, and that will be the order of the Court; and an exception to that ruling may be noted as ground of appeal; and if you desire to review this decision I will do everything I can to facilitate it, if upon further examination of the decisions you still think you are right about it.

Mr. Reid: In case an examination does disclose that my contention be correct, would there be any way of having this put upon the commercial calendar again, so as it can be reached again?

The Court: This is final, as far as I am concerned, but I think perhaps you might want to review it, because you seem to be quite certain about your views, and I will be glad to facilitate it to

enable you to state more fully the facts upon the record upon which the motion for a non-suit was based. The opening was not taken down, but I endeavored, in my decision of the matter, to state all the facts.

Mr. Reid: I think you have covered them.

The Court: And if it be consented on both sides that those facts represent the claim of the plaintiff, then you have facts enough now upon the record to review my decision.

## ORDER.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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| JOHN VALENTE, administrator *de bonis non* of the Estate of JOSEPH VALENTE, deceased, *Plaintiff*, v. LINA H. BOGGIANO, individually, and as administratrix of the Estate of JOHN BOGGIANO, deceased, *Defendant*. | Action at Law. Order. |

This matter being opened to the Court by Lionel P. Kristeller, Esquire, attorney of the defendants in the above-entitled cause, and it appearing that on the sixth day of June, 1930, a judgment of nonsuit was entered in the above-entitled cause in favor of the defendants and against the plaintiffs, and that by an error the postea in this cause was entitled as follows:

EMILIA VALENTE, Adm. of the Estate of JOSEPH C. VALENTE, deceased,
*Plaintiff,*
v.
LINA H. BOGGIANO, individually, and Adm. of the Estate of JOHN BOGGIANO, deceased,
*Defendant.*

and that there was heretofore filed in this cause an order substituting the present plaintiff in the place and stead of Emilia Valente, administratrix, etc.

Now, therefore, upon the annexed consents, it is, on this day of June, nineteen hundred and thirty, ordered, that the postea in the above-entitled matter heretofore filed in this court on June 6, 1930, and the judgment thereupon entered, be amended so that the judgment entered herein be against John Valente, administrator *de bonis non* of the Estate of Joseph Valente, deceased, instead of against the original plaintiff in this cause.

Rule actually entered on this day of

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

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We hereby consent to the foregoing order.

ALEX. F. REID, JR.,
*Attorney of Plaintiff.*
LIONEL P. KRISTELLER,
*Attorney of Defendant.*

## NOTICE AND GROUNDS OF APPEAL.

### NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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|---|---|
| JOHN VALENTE, administrator *de bonis non* of the Estate of JOSEPH C. VALENTE, deceased, *Plaintiff*, v. LINA H. BOGGIANO, individually, and as administratrix of the Estate of JOHN BOGGIANO, deceased, *Defendant*. | Action at Law. Notice and Grounds of Appeal. |

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*To Lionel P. Kristeller, Esq., Attorney of Defendant:*

Take notice that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment of non-suit entered in this case, upon the following grounds:

1. Because the trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant, when thereunto moved by counsel for

the defendant, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

2. Because the trial Court ruled that the Statute of Limitations (an Act for the Limitation of Actions, Rev. 1877, p. 594, and amendments thereto and supplements thereof) was a bar to the action under the circumstances set forth in the case, as shown by the pleadings and the opening of counsel to the jury.

3. Because the trial Court ruled that, where a debt accrued subsequent to the death of an intestate, and no letters of administration were taken out upon his estate until ten (10) years thereafter, that these circumstances did not operate in favor of the estate of the decedent by barring the running or operation of the Statute of Limitations between the date of decedent's death and the appointment of an administratrix of his estate, and that the interval of time elapsing between the death of the intestate and the appointment of his administratrix, ten (10) years later, was to be counted as part of the six (6) year period of time within which actions, founded upon contract, must be brought under the terms of said Statute of Limitations (known as An Act for the Limitation of Actions, Rev. 1877, p. 594, and amendments thereto and supplements thereof) or be thereafter forever barred.

4. Because the trial Court ruled that the death of a creditor, intestate, prior to the accrual of a cause of action, founded upon contract, in his favor, and upon whose estate no administration was taken out until ten (10) years thereafter, could not extend

or lengthen the six (6) year period limited for the bringing of suit on causes of action founded upon contract, and that the Statute of Limitations must be held to have commenced to run at the time of decedent's death rather than from the time administration was had upon his estate.

5. Because the trial Court ruled that the estate of Joseph Valente could not recover against the defendant on a promissory note in his favor, dated April 1st, 1913, due April 1st, 1914, where the payee, the said Joseph Valente, died March 5, 1914, before the note was due, and where no letters of administration were taken out upon his estate till ten (10) years after his death, and where, also, the suit was admittedly brought within six (6) years after the granting of letters of administration upon his estate, to wit, on June 4th, 1927.

ALEX. F. REID, JR.

Atty. of Pltf.

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[ENDORSED]

Due, sufficient and timely service of a copy of the within Notice and Grounds of Appeal is acknowledged this day of June, 1930.

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Attorney of Defendant.

MINUTES.

ESSEX CIRCUIT COURT.

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No. 1711.

JOHN VALENTE, administrator of the Estate of JOSEPH C. VALENTE, deceased,

v.

LINA H. BOGGIANO, individually, and as administrator of the Estate of JOHN BOGGIANO, deceased.

Action at Law.
Supreme Court Case Referred to Circuit Court for Trial.

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Wednesday, June 4, 1930.

The Court order on the trial of this cause, and that the sheriff return a panel, whereupon the following persons were returned and sworn as jurors:

1. Frank L. Delhagen
2. Randolph F. Debevoise
3. George F. Benjamin
4. Herbert C. Davidson
5. Henry Hillman
6. Charles B. Dutcher
7. Frank W. Cronover
8. Frank L. Drew
9. Merton R. Davies

10. John L. Allison
11. Harry Corson
12. John L. Workman

| Plaintiff's Attorney | Defendant's Attorney, |
|---|---|
| Alex. F. Reid, Jr. | Lionel P. Kristeller, |

At this stage of the proceedings, on motion of attorney for defendant, the Court granted a nonsuit, in favor of the defendant, whereupon, by order of the Court, the jury was discharged from further service in the above cause of action.

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## COUNTY CLERK'S CERTIFICATE OF MINUTES OF ESSEX COUNTY CIRCUIT COURT.

I, John Scott, Clerk of the County of Essex, and also Clerk of its Essex County Circuit Court, hereby certify that the foregoing is a true excerpt of the minutes of the Essex County Circuit Court, as taken from and compared with the original record on file in this office.

In witness whereof, I have hereunto set my hand and official seal of office this 18th day of August, 1930.

John H. Scott,
*Clerk.*

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COURT OF ERRORS AND APPEALS OF NEW JERSEY

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|---|---|
| John Valente, Administrator, de Bonis Non of the Estate of Joseph C. Valente, Deceased, Plaintiff(Appellant) | Action-at-Law |
| vs | On Appeal from Supreme Court |
| Lina H. Boggiano, individually, and as Administratrix of the Estate of John Boggiano, Deceased. Defendant(Respondent) | |

BRIEF OF PLAINTIFF, APPELLANT

On appeal from a judgment of non-suit entered in the April, 1930, term of the New Jersey Supreme Court, Essex County Circuit, before Hon. Nelson Y. Dungan and a jury.

Statement of Facts.

The facts are fully set forth in the State of the Case at page 15.

The five(5) grounds of appeal relied upon by the Plaintiff, Appellant, really turn upon one point which is:-

Does the Statute of Limitations(An Act for the Limitations of Actions, Rev. 1877, p. 594, and amendments thereto and supplements thereof), act as a bar to an action brought upon a debt(promissory note)where the debt accrued subsequent to the death of plaintiff's intestate(the note being due April 1,1914, and the plaintiff's intestate, the payee of the note, having died March 5, 1914), and where suit is brought within (6) years after the issuing of letters of administration upon the estate of the plaintiff's said intestate?

POINT ONE

In support of the proposition that pleading the Statute in defense is no bar to recovery, see:-

Schwarz vs Public Service Transport Co. 149 Atl. 814. (decided in the Circuit Court of Hudson Co. March 4,1930) where the Court(Judge Ackerson) held that an action, instituted by an administratrix ad prosequendum of the estate of an infant under the Death Act, must be brought within 2 years from said infant's death rather than within 2 years from the appointment of the general administratrix for his estate.

In deciding the question the Court stated as follows:-

"There seems to be authority in this state and elsewhere for the proposition that in all cases 'where the cause of action did not exist during the life of the party and came into existence subsequent to the party's death, the statute does not begin to run until the appointment of a representative'....." Citing Stevenson vs Markley 72 N. J. E., 686, at page 695.
DeKay vs Darrah 14, N.J.L., 288 at page 296.
Further that, ".....The reason alleged for this rule is that no cause of action can originate in behalf of a personal representative until he comes into existence as such." The Court then goes on to distinguish the instant case, holding that, at the time of the injury received, the cause of action immediately accrued in his favor, and hence, even though a minor he could have immediately prosecuted his suit and hence, after his death the personal representatives are not given any greater time to bring their suit than those of any adult would be given. In other words, the Court says, when once the running of the statute has started, it runs over all disabilities.

In the present case, sub judise, however, the situation is different. The statute never started to run during the lifetime of the decedent and so could not be held to commence till after his personal representative was appointed.

x x x x x x x x x x x

Stevenson vs Markley 72 N. J. E. 686(affirmed by Court of Errors and Appeals, Dec. 2,1907, reported in 73 E. p 731.)

In this case a suit was brought for an accounting by the husband of a deceased ward against the Executors of a deceased guardian.

Mary Markley, the ward, came of age on January 13, 1883. She married Richard G. Stevenson on March 26,1886, and died December 25,1885. There was no accounting between her and her guardian. Her mother, the guardian, died on February 26,1905. Richard G. Stevenson, the husband of the deceased ward, was appointed administrator on March 1,1906, and then immediately brought his suit.

V. C. Garrison, in delivering the Court's opinion, held that while the Statute of Limitations did not begin to run as between the guardian and ward, in their respective life times, owing to the continuing nature of the trust involved, yet that it might ordinarily be held to run at the ward's death. However,

he very clearly states, in disallowing the plea, that where a cause of action "did not exist during the life of the party and came into existence subsequent to the party's death, the Statute does not begin to run until the appointment of a representative. The time between the death of the party and the qualification of personal representative is not counted.

Citing DeKay vs Darrah 14 L (2 Gr.) 288 et al

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DeKay vs Adm. of Darrah 14, N.J.L., 288 (N.J.Sup) Suit vs Administrators of a deceased indorser of a promissory note by one of the holders in due course thereof. Defense, Statute of Limitations.

The note was dated July 12,1824, defendant's decedent died May 8,1830, after plaintiff became the holder of the note, and suit was brought within 6 months after Darrah's death.

Chief Justice Hornblower, in holding that the Statute of Limitations was an effectual defense, even though the time limited for bringing the action was reduced by the inhibition placed upon creditors prohibiting suit to be brought against an estate within 6 months after the death of a decedent, as provided by the Act of June 1820 Rev. Laws 766 (being an Act concerning insolvent estates), stated that, when once the Statute of Limitations has commenced to run, that it continues to run over all subsequent disabilities and intermediate acts and events.

He was careful, however, to distinguish the case before the Court from that class of cases where the cause of action only accrued after a decedents death. In referring to the case of Cary vs Stephenson 2 Salk (also referred to with approval in the case of Stevenson vs Markley, supra) he says:- "The cause of action was never in the intestate; the defendants received the money belonging to the intestate's estate after his death, and before administration, and the court held, that the administrator's title commenced when he obtained letters of administration, and that he had 6 years from that time, to bring his action."

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Extrs of Burnet vs Adm. of Bryan 6 N.J.L., p. 377 (N.J.Sup.Ct.)

This was an action commenced by the Executors of a physician against the Administrators of a deceased patient, for a debt in the nature of a book account, arising out of medical treatment of the deceased patient during the period of the latter's last illness.

Among other things, the defendants interposed the Statute of Limitations as a defense to the suit.

The patient died in 1777, but no letters of administration were taken out on his estate until 1794. Within one year thereafter, this suit was commenced.

Chief Justice Kinsey, in delivering the opinion of the Court, disposed of the Defendant's contention that the Statute of Limitations was a complete defense to the suit, in these words:- "We are of opinion, on the authority of the case, cited from 2 Vernon, recognized and confirmed as it has been(the case referred to being Joliffe vs Pitt, 2 Vern.695) that the whole period from the death of the intestate till the time when the letters of administration were taken out, is fully accounted for. During this interval, the statute of limitations, did not run, because there was no person against whom the plaintiffs were bound to bring their action."

Respectfully submitted,

ALEX F. REID, Jr.
Attorney and Counsel for Plaintiff, Appellant.

Bernard Mindes,
On the Brief.

91 OCT.T.1930

COURT OF ERRORS AND APPEALS
OF NEW JERSEY.

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John Valente, Adm.
de Bonis Non of the
Est. of Joseph C.
Valente, Dec'd.,

Plaintiff, Appellant

vs.

Lina H. Boggiano, ind.
and as Adm. of the Est.
of John Boggiano, Dec'd.

Defendant, Respon-
dent.

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Actio-at-Law
On Appeal from Supreme Ct.
Brief of Plaintiff, Appell-
ant.

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Alex. F. Reid Jr.,
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# New Jersey Court of Errors and Appeals

*Between,*

JOHN VALENTI, Adm. etc.,
*Plaintiff-Appellant,*

*and*

LINA H. BOGGIANO, individually etc.,
*Defendant-Respondent.*

## BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

(Italics ours except where otherwise noted.)

### Statement.

This appeal is taken by the plaintiff from a judgment of non-suit entered upon the plaintiff's opening at the trial of this cause in the New Jersey Supreme Court, Essex Circuit, on June 4, 1930, because it clearly appeared from the plaintiff's opening remarks, that there was no cause of action against the defendant, more than thirteen years having elapsed from the due date of a promissory note upon which recovery was sought.

### Facts.

This suit was commenced June 14, 1927 by EMILIA VALENTI (the widow of JOSEPH C. VALENTI, deceased), as administratrix of the Estate of JOSEPH C. VALENTI, deceased, upon a promissory note for $3,000.00 made by JOHN BOGGIANO and LINA H. BOGGIANO, his wife, dated April 1, 1913, and payable "to the order of JOSEPH VALENTI,"

one year after date. A copy of the note is annexed to the complaint (S. C. 3). The complaint consists of a simple count on a promissory note. The answer contained four separate defenses:

The first was payment.

The second pleaded "An Act to amend the law relating to the property of married women" (C. S. 1910, p. 3223) and the several acts supplemental thereto and amendatory thereof, and that the said note having been made by the defendant as an accommodation maker and without benefit to her separate estate, he was not liable thereon.

The third was that recovery upon said note against the defendant individually, and as administratrix of the Estate of JOHN BOGGIANO, was barred under the "Limitation of Actions Act" C. S. 1910, p. 3162).

The fourth defense was that the respondent as administratrix had completely administered the Estate of JOHN BOGGIANO, deceased.

The appellant filed a reply to the answer and to each of the defenses therein set forth. As to the first, second and fourth separate defenses the reply contained formal denials. As to the third separate defense, the appellant sought to avoid the force of the statute of limitations by setting up certain circumstances, which are hereinafter more fully discussed.

The following chronology will materially facilitate the presentation of the argument, and assist the court in comprehending events in the order of their sequence:

1914
March 5, JOHN VALENTI died.
April 1, Note became due.
June 24, The note is endorsed as follows:
"This note is renewed from one year from this date."
Signed "John Boggiano,
Lina Boggiano."

1915
July 22, The note was endorsed as follows:
"This note is renewed for one year from this date."
Signed "John Boggiano,
Lina H. Boggiano."

1921
December 28, JOHN BOGGIANO died.

1924
January 16, Administration granted upon Estate of JOSEPH C. VALENTI by the Surrogate of the County of Westchester and State of New York.
March 14, Suit instituted in the New Jersey Supreme Court to recover upon the note set forth in the complaint.

1925
January 20, Non-suit entered in the above suit in this Court.

1927
June 14, The suit, in which the present appeal is pending instituted in the New Jersey Supreme Court, 13 years after said note became due and payable.
July 16, EMILIA VALENTI died.

1928
October 5, Plaintiff appointed substituted administrator of the Estate of JOSEPH VALENTI.

The circumstances, which the appellant relies upon as preventing the running of the statute of limitations, are as follows:

That Joseph Valenti, the appellant's intestate, died March 5, 1914, leaving him surviving his widow, the former plaintiff in this suit, and four children. That all, with the exception of one, were minors at the time of their father's death. That the intestate was seized and possessed of the promissory note in question. That the intestate "died before the debt represented by the note matured * * *, and that no letters of administration were applied for upon said estate until January 16, 1924, when Emilia Valenti was appointed administratrix.

The reason for this delay is set out in the appellant's reply (S. C. 10):

> "Owing to the fact that decedent left practically no estate save the note referred to in the complaint filed herein and the subject matter of the within suit, and because of the fact that many times during the period from March 5, 1914, the date of the death of her husband, and March 14, 1924, the date that a suit was instituted in the Supreme Court of the State of New Jersey for the County of Essex against Lina H. Boggiano, the defendant, on said promissory note, plaintiff made demands upon the defendant, Lina H. Boggiano, both individually and as administratrix of her late husband's estate, for the amount then due on such indebtedness and received, in answer to such demands, evasive promises of payment, none of which, however, were in writing, but resulting in plaintiff's never taking any active steps looking toward recovery of the aforesaid debt, both on her own behalf and that of her children, until the date before specified, March 14, 1924, when, upon advice of counsel, she instituted suit for recovery upon said note

in the Supreme Court of the State of New Jersey, as before noted."

The pleadings, particularly the foregoing excerpt from the reply clearly establish that the note in the suit was in the possession of the widow of the intestate, from the time of his death until the date when suit was commenced; that the original date of maturity was extended, and that for the entire period between the death of plaintiff's intestate and the commencement of the present suit, the intestate's widow had knowledge of the alleged obligation now sued upon, and that payment thereof was sought on June 24, 1914 and July 22, 1915 and that on March 14, 1924 a suit was started to enforce said note and that a demand for payment was made "many times during the period from March 5, 1914, the date of the death of her husband, to the date of the commencement of this suit," June 14, 1927.

## ARGUMENT.

The entire question presented by this appeal narrows down to a determination of the time when the Statute of Limitations begins to run in those infrequent cases where, (1) the person in whom a right has become vested dies (2) before a breach has made a cause of action thereon.

Appellant contends that the Statute does not begin to run until an administrator is appointed. The respondent maintains that it runs from the time of the breach.

## POINT I.

**Appellant's action is barred by the express terms of the Statute of Limitations. There can be no implied exception to said Statute.**

The Statute of Limitations is one of repose. Any construction tending to defeat this purpose is to be avoided. It is only by the force of some express exception to this Statute that one can extricate himself from the effect thereof, and to do so must bring himself strictly within the terms of the exception. This, the appellant did not, and cannot do. The Statute (C. S. 1910 p. 3162) provides in Section 1:

> "That all actions * * * of debt, founded upon any lending or contract without speciality * * * shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after."

The only exceptions to the Statute are those found under sections 4, 8, and 9. By Section 4, the running of the Statute is suspended when at the time the cause of action accrues, the plaintiff is an infant, or a lunatic. Section 8 suspends the running of the Statute during the absence of the defendant from the State; or where, he was not resident therein when the cause of action arose. Section 9 provides that where the defendant dies before the Statute has run, the six months following his death are not to be counted.

Applying the test to our case, we find that the appellant does not come within either Section 8 or 9, because neither of them *provide for the disability of the person entitled to bring the action.* They provide for the disability of the *other party,* that is, the person *against* whom a cause of action lies. Nor does the appellant come

within Section 4, because, while it provides for the disability of the proper party (the person entitled to a cause of action), it does not provide for the disability caused by death; it provides only for disability caused by infancy, or insanity. There being no exception in the Statute covering the appellant's case, it falls under the general rule of Section 1, which unqualifiedly bars his action.

In the case of *Freeholders of Somerset* v. *Veghte,* 44 N. J. L., 509, Magie, *J.*, said (p. 513):

> "The statute of limitations contains various express exceptions from the operation of its provisions. Some of them relate to the character, condition or residence of the persons affected. Some relate to the nature of the cause of action. If such exceptions had not been expressly made, there is high authority for the proposition that a court of equity could not create them, however meritorious the case might be. *Demarest* v. *Wynkoop,* 3 Johns, Ch. 129; 143; and cases there collected.
>
> There can be no pretence that the replication presents a case within any of the express exceptions of the statute. *Can there be an implied exception covering the case here presented?*
>
> *To admit this would be in opposition to a cardinal maxim which forbids a resort to implication where the intent has been expressed.*
>
> WHETHER COURTS OF EQUITY MAY ENGRAFT AN EXCEPTION BY IMPLICATION, UPON THIS STATUTE, OR NOT, IT HAS BEEN WELL SETTLED THAT COURTS OF LAW CANNOT. IN MCIVER V. RAGAN, 2 WHEAT., 25, CHIEF JUSTICE MARSHALL, IN REGARD TO WHAT WAS CLAIMED TO BE AN INEQUITABLE RESULT, PRODUCED BY A STATUTE OF LIMITATIONS, DECLARED: 'IF THIS DIFFICULTY BE PRODUCED BY THE LEGISLATIVE POWER, THE SAME POWER MIGHT PROVIDE A REMEDY, BUT COURTS CANNOT, ON

THAT ACCOUNT, INSERT IN THE STATUTE OF LIMITATIONS AN EXCEPTION WHICH THE STATUTE DOES NOT CONTAIN'."

We submit that the foregoing is dispositive of the appellant's case; and were it not for the fact that some confusion might result from the rule frequently laid down by text writers that "a cause of action does not accrue until there is a person capable of suing or of being sued," respondent would rest here.

## POINT II.

**The construction placed upon the Statute of Limitations by the text writers and the courts of other jurisdictions is not binding on our courts.**

This rule is found in *Blackstone* (Shars. Ed. Vol. 2, p. 306, footnote), in *Williston on Contracts* (1924 Ed. Vol. 3, Sec. 2005), in *Wood on the Limitation of Actions* (3rd. Ed. p. 284, sec. 117), and is stated in 17 R. C. L., p. 751, as follows:

> "Though there is nothing in the statute expressing the necessity of there being, at the time of the accrual of the cause of action, some person or persons capable of suing or being sued upon the claim to be affected by the statute, in order that it may then begin to run, nevertheless the courts have established this is a prerequisite. It needs no express terms or implication in the statute to establish its necessity in this respect. The existence of a person or persons to sue or be sued is involved in the accrual of the cause of action which the statute prescribes as the time of its commencement, for unless there be such a person, a cause of action cannot accrue, and the statute will not commence to run."

The rule is based on an exception implied from the language of section 1 of the Statute.

Obviously such an implication runs counter to the principle of the *Veghte* case, *supra,* that no exceptions can be created by implication or judicial construction.

To better clarify the principle involved, we will examine further into the origin and soundness of this rule and the credit it is entitled to by the New Jersey courts.

The Statute of Limitations, 21 Jac. 1, c. 16, was first adopted in England, in 1623. It provided that:

> "All actions * * * of debt * * * which shall be sued or brought * * * shall be commenced and sued within * * * six years next after the cause of such actions or suit, and not after * * *" (Chitty's Statutes, 6th Ed. Vol. 7, p. 619).

In 1821, the Court of King's Bench held in the case of *Murray* v. *The East India Company,* 5 Barn. & Ald., 204, at p. 214, that:

> "We are, however, of opinion, that the time of limitation in the present case did not begin to run until the grant of the administration. The words of the statute, 21 Jac. 1, c. 16, s. 3, are, that actions upon the case, etc., shall be brought within six years, next after the cause of such actions, and not after. *Now, independently of authority, we think that it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing.*"

This case has been followed by the Courts of Pennsylvania, as well as in several of the other states. The Pennsylvania Statute (Pa. Statutes 1920, sec. 13857), reads:

> "* * * within six years next after the cause of such actions or suit, and not after."

It should be noted that the foregoing language is identical with that of the Statute of 21 Jac. 1.

In the Pennsylvania case of *Riner* v. *Riner,* 31 Atl. 347, the Supreme Court there held (citing the case of *Murray* v. *The East India Company, supra*), that:

> "A cause of action does not exist unless there be a person in existence capable of suing or of being sued."

However, an exhaustive search of the decisions of our State fails to disclose any case adopting or following this view. There are cases which at first blush, seem to be on the question; but upon analysis, show that they are not; either because (1) they do not involve the person in whom a right had become vested who dies, or (2) that death did not occur in those cases before a breach had created a cause of action.

Of the four cases comprising appellant's brief two are inapplicable for both reasons and two are inapplicable because of the second reason.

In both *Burnet* v. *Bryan,* 6 N. J. L. 377 and *Dekay* v. *Darrah,* 14 N. J. L. 288, the question involved was the effect of the death of a person *against whom* a cause of action existed upon the running of the statute. Furthermore, the cause of action in those cases *accrued during the lifetime* of both parties. These cases are entirely dissimilar from the case at bar and have no bearing on the issue here presented. The latter case is further unlike this case in that there was no question as to the delay in taking out administration. In the Dekay case the period limited under the statute of limitations expired during the six months immediately following the decedent's death. Under "an act concerning the estates of persons who die insolvent, passed in June, 1820, Rev. Laws 766," no suit could be brought during the six-month period. It was held nevertheless that the action was barred since

the statute of limitations made no exception of the disability existing during that period. A subsequent amendment to the statute of limitations (now sect. 9) has provided for this contingency. It is also pertinent to note that the Dekay case weakens, if it does not wholly overrule, the Burnet case. Speaking of the Burnet case, Chief Justice Hornblower said (p. 296):

> "The court, in that case, bottom their opinion on the authority of Joliffe *v.* Pitt, 2 Vern. 694." * * * (the court then gives the facts of the Joliffe case and points out that running of the statute was suspended by the *express* terms of the statute) "But it is said in the case, 'that laches could not be attributed to Joliffe for not suing while there was no executor.' And this is the point relied on. * * * the remark was a just one; but it is a very different thing from saying that if the statute has commenced running, it will stop when the creditor or debtor dies, and be infinitely suspended until probate, or letters of administration are taken out. No such decision is, I believe, to be found in the English books; and yet, it is upon the authority of this case, that the court, in Burnet *v.* Bryan, decided, that the statute ceases to run until there is some person whom the creditor is bound to sue. It is true, the court speaks of that case, as having been recognized and confirmed, but they refer to no authorities."

On the next page the Chief Justice said:

> *"Upon the whole, I should not feel myself strongly bound by that decision, even if it were directly in point, which I think, is not the case."*

With reference to the case of *Schwarz* v. *Public Service*, 8 M. 182; 149 Atl. 814, counsel for appellant very aptly remarks, "In the present case, *sub judice*, however, the situation is dif-

ferent." We consider this a sufficient answer to the case. *Whatever the case says about the time from which the statute of limitations begins to run when the person in whom a right has become vested dies before a breach has made a cause of action thereon is pure dicta.* The case is distinguishable on the second point, "the death did not occur *before* a breach, had created a cause of action."

Furthermore, a Circuit Court case, however ably written is not binding on this court.

In the case of *Stevenson* v. *Markley,* 72 N. J. Eq. 686, the cause of action existed during the lifetime of the ward even though the statute of limitations did not attach to it and *consequently what is said about cases in which the cause of action* ARISES AFTER DEATH *is dicta.* The Vice-Chancellor seems to make a distinction between the period prior to the ward's death and after. A careful reading of the case, however, will show that the reason advanced for excluding the first period from the running of the statute is also the reason for excluding the second. The reason is succinctly stated by the Court as follows:

> *"I think it best to assimilate this trust with all other like trusts, and to hold that so long as the guardian has the property of the ward that is, so long as he has not accounted for it—he should be held as a trustee with a direct, subsisting, continuing trust, unaffected by statutes of limitations or principles in analogy thereto."*

A RIGHT TO AN ACCOUNTING BETWEEN GUARDIAN AND WARD DOES NOT "ACCRUE" IN THE SENSE THAT OTHER CAUSES OF ACTION ACCRUE. NO BREACH OF DUTY IS A PREREQUISITE TO AN ACTION FOR AN ACCOUNTING. SUCH A RIGHT ARISES AS SOON AS THE GUARDIAN SECURES PROPERTY OF THE WARD AND CON-

TINUES UNTIL AN ACCOUNT IS ACTUALLY RENDERED. THE RIGHT IS AN EQUITABLE ONE AND, AS THE COURT SAID,

> *"But, where the court of law did not originally have jurisdiction, the fact that it subsequently acquired it, and the action in it was barred by the statute, does not result in finding that the suit in the court of equity is likewise barred."*

In view of the distinctions and differences between the cases relied upon by appellant and the case at bar, we conclude that New Jersey has never adopted the rule of the East India Co. case *supra,* and now contend further that it should not adopt this rule.

Certainly it should not be adopted in the instant case, for the reasons (1) that this Court is not bound to adopt the rule; and (2) that to do so would be to devitalize the Statute of Limitations and to defeat the repose and security it was intended to afford and would be unsound.

The second reason will be discussed at length under Point III. The first will now be considered under the subdivisions "A," "B," and "C."

(A) THE CONSTRUCTION OF THE STATUTE OF LIMITATIONS IN THE EAST INDIA COMPANY CASE, *supra,* DID NOT TAKE PLACE *until after* A SIMILAR STATUTE HAD BEEN ADOPTED IN NEW JERSEY, AND IS, THEREFORE, NOT BINDING ON OUR COURTS, NOR IS IT OF ANY SIGNIFICANCE, EXCEPT HISTORICALLY.

Our Statute of Limitations presumably was patterned after the Statute of 21 Jac. 1 (*Dekay* v. *Darrah,* 14 L. 288, at p. 293, *Board of Chosen Freeholders* v. *Veghte, supra*). It might appear, therefore, that *Murray* v. *The East India Co., supra,* is dispositive of the instant case; and while it may be the rule that a statute taken from an-

other state or country carries with it, the judicial construction placed thereon by the highest courts thereof, this rule is inapplicable to the case at bar. At the time that New Jersey adopted the Statute of 21 Jac. 1, the construction urged by appellant had not yet been placed upon the Statute by the English Courts. While *Murray* v. *East India Co., supra,* cites a number of prior cases, it seems to be the first one laying down the rule. It is evident that the Court did not feel bound by the cases cited, since it said that it decided the case, "independently of authority." The rule, then, was not established in England until 1821. New Jersey at that time had had a Statute of Limitations on its statute books for at least twenty-two years. The 1820 Revision of the Laws of New Jersey p. 410 states that our Statute of Limitations was passed the seventh of February, 1799.

In 25 R. C. L., at p. 1072, it is stated that:

> "Where English statutes, such, for instance, as * * * the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes at the time they were admitted to operate in this country, indeed, to the time of our separation from the British Empire, if they were enacted prior thereto, is construed as forming an integral part of those statutes. *Subsequent English decisions, however, though entitled to great respect, are not of absolute authority.*"

And at p. 1075:

> "It is well settled that the rule now under consideration has no application where the construction of a statute in the originating state does not take place until after the statute has ben adoped in another state."

(B) THERE BEING NO AMBIGUITY IN THE LANGUAGE OF THE STATUTE, THERE IS NO NECESSITY FOR INTERPRETATION OR CONSTRUCTION.

Webster defines "accrue" as follows:

> "To come into existence as an enforceable claim; to vest as a right."

In Black's Dictionary, we find a similar definition:

> "The term is also used of independent or original demands, and then means to arise, to happen, to come into force or existence;"

To accrue means to come into being as an enforceable claim. The respondent submits that a cause of action springs into being as an enforceable claim, whether there be a person then in existence who may sue or be sued, or not. The claim itself is not thereby altered nor rendered unenforceable, *i. e., incapable* of enforcement; for it may be enforced by taking the necessary preliminary steps, *i. e.,* applying for and securing the appointment of an administrator. An analogous case is presented by the Death Act which requires the institution of suit within two years of the death. Such action must be brought by an administrator *ad prosequendum. It cannot be said that during the period between the death and the appointment of the administrator ad prosequendum that the claim is incapable of enforcement merely because the person entitled to sue has not perfected that right.* The cause "accrues" upon and at the death of the decedent. Likewise the cause of action in the case at bar "accrued" when the due date of the note passed, without payment being made.

In *Warren* v. *Clemenger* 120 Ill. App. 435 at page 439 the court said,

> "A cause of action accrues upon a promissory note at the time it becomes due and payable and is unpaid."

In Bouvier's Law Dictionary, we find the following;

> "Accrue—to rise, to happen, to come to pass; as the statute of limitations does not commence running until the cause of action has *accrued*, * * *. A cause of action *accrues* when suit may be commenced for a breach of contract; * * *"

A cause of action for a breach of contract may not be commenced before the occurrence of the breach. In *Larason* v. *Lambert,* 12 N. J. Law 248 Chief Justice Ewing said:

> "The period allowed by the statute within which a legal demand is to be made is to be reckoned from the time when the plaintiff may, according to the terms and nature of the contract, make such demand by the institution of an action. Thus if a promissory note is made payable on the first day of January next, until after that day no cause of action accrues, the payee cannot maintain a suit, and the statute until then is dormant."

Immediately thereafter, he may. The fact that the person entitled to sue is dead, does not prevent the commencement of the suit following the breach, for, the right to sue inures to his personal representative.

*Accrual of a cause of action means the right to institute and maintain an action for its enforcement.*

> "By the accrual of the cause of action is to be understood the right to institute and maintain a suit." *Larason* v. *Lambert, (supra).*

*The right exists whether there is anyone to take advantage of it or not. The appointment of an administrator to take advantage of such a right is merely an incident in the enforcement thereof. It does not create the right or cause it to accrue.*

It is our contention that the term "accrued" has a definite settled meaning, that it is free from ambiguity, and that consequently there is no need for construing its meaning in this case by resorting to the *East India* case or any other supposed authority. Certainly, if the court concludes that the term "accrued" is unambiguous the rest follows for it is well settled that,

> "The rule that the adoption of a foreign statute carries with it the prior construction in the originating state has been held to be applicable only where the terms of the statute are of doubtful import, so as to require construction" 25 R. C. L., 1073.

> "The adoption of a statute of another jurisdiction generally adopts also the construction that has been given to it, though this rule will not be followed where the language of the statute is plain and free from ambiguity so that there is no room for interpretation, or where such construction would not be in harmony with the spirit and policy of the legislation and decisions of the borrowing state" 17 R. C. L., 686.

This rule has been forcibly expressed in connection with the Statute of Limitations by the Supreme Court of Delaware in *Lewis* v. *Pawnee Bill's Wild West Co.*, 66 Atl. 471. The court, quoting with approval from the case of *Chancey* v. *Dyke*, 119 Fed. 16, said:

> "'*Construction and interpertation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. When its language is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction.*'"

Justice Kalisch, in discussing a construction sought to be placed upon the method of com-

puting the assessment under the inheritance tax act in *Torrance* v. *Edwards,* 89 N. J. L. 507, said:

> "While we recognize the force of the rule laid down * * * that where the Legislature enacts a provision taken from a statute of another state, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction, we do not think that this rule is applicable with full force here, since it is clear that to adopt the construction of the New York courts requires a twisting of the natural sense of the language of our act from its plain import."

In the case of *Trenton Savings Fund Soc.* v. *Wythman,* 7 A. R. 493, Chancellor Walker said:

> "But where an act is plain and unambiguous in its terms, the rule is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent."

The Chancellor cited the case of *In re: City of Passaic,* 94 N. J. L. 384, in which the same rule is expressed.

(C) THE RULE LAID DOWN IN THE EAST INDIA CASE, *supra,* HAS NOT BEEN UNIVERSALLY FOLLOWED.

In 25 R. C. L. at 1074, it is said:

> "Although a statute of one state is adopted in another state, the courts of the latter state are not bound by the construction placed upon the statute in the former state, if such statute is not peculiar to that state alone and other states have adopted it, and their courts have placed a different construction upon it."

This is the situation here. The Statute of Limitations is not peculiar to England alone. A similar statute is in force in all of the United States; and in California the courts have held

that the period of limitation runs, notwithstanding the fact that at the time the cause of action accrued, the person entitled to sue was dead, and no letters of administration were taken out on his estate. *Cortelyou* v. *Imperial Land Co.*, 134 Pac. 981.

## POINT III.

**The construction placed upon the statute by some of the other jurisdictions is unsound and unreasonable, and should not be followed by our courts.**

In the face of positive statutory enactment, plain and unambiguous, the courts of New Jersey are not bound by or concerned with the determinations of other jurisdictions. And with due respect to the tribunals of sister states, it is not inappropriate to quote from 7 R. C. L., at page 1011, that:

> "In a case of first impression in a state, the decisions in other states have only persuasive authority, and the consideration to which the *reasoning* therein is entitled. As has been aptly said, *'they are to be weighed, not counted.'* "

The Supreme Court of California in reaching the result urged by respondent, said in the case of *Cortelyou* v. *Imperial Land Co.*, 134 Pac. 981 (p. 984):

> "*'If the cause of action does not accrue until after the death of the party who would have been entitled to sue, the persons interested in his estate—his creditors, heirs and devisees—have the full time allowed by the statute in which to move in the matter to obtain a grant of administration and commence the action,' and that as the statute made no exception postponing the running of the statute until the grant of letters in such*

*case, the courts could not inject such exception into the statute by interpretation * * * The plaintiff had ample time within which to begin the action * * * No great diligence has been shown.''*

We submit that this reasoning is sound, reasonable and just.

The jurisdictions accepting the theory advanced by appellant do so on the basis that a cause of action does not exist unless there be a person in existence capable of suing (or being sued).

The Supreme Court of Pennsylvania, in *Riner* v. *Riner,* 31 Atl. 347, although adhering to the appellant's view, makes the terse and significant observations:

> ''We make this decision with the greatest reluctance, and *only by the sheer force of our prior rulings.* But it is intolerable that there shall be a right of action continuing for an indefinite time simply because those who are entitled to take out administration, neglect or refuse to do so and it is to be hoped that the legislature will grant relief by extending the statute of limitations to such cases, and providing that it shall commence to run from the death of the decedent. This will give six years in which to take out letters before the claim will be barred, and that length of time is surely enough.''

The Supreme Court of Ohio was similarly inclined in the case of *Hoiles* v. *Riddle,* 78 N. E. 219, where it was said (p. 222):

> ''Our conclusion is reached only because we are of opinion that the court is without authority to supplement the statute, and not because we think the statute wise in this respect. Indeed, we are inclined to agree with the court in *Riner* v. *Riner, supra,* that the present condition of the statute leaves a way open by which estates may be imposed upon, and that an amendment providing that,

> in a case like the present, the statute shall commence to run from the death of the decedent, or within a fixed time thereafter, would be in the interest of justice. But this is for the General Assembly, and not for the courts."

In other words, both the Pennsylvania and Ohio Courts admit that their conclusions are unsound, unreasonable and unjust, but reach them only because they are bound by existing statutes in their respective states. Both cases cite *Murray* v. *The East India Co., supra,* from which the doctrine originally emanated. Both courts apparently felt that they were bound to follow English precedent. Our courts, however, for the reasons hereinbefore indicated, are not bound by the doctrine laid down in the *East India Co.* case.

It is respectfully submitted that it is merely a fiction that a cause of action does not accrue until there is a person in existence capable of suing. A cause of action is concrete. It arises upon the breach of a duty. Its coming into existence cannot be postponed thereafter. To hold otherwise is not only the perpetration of a fiction, but is an unsound doctrine in that it fails to consider the existence of the person for whose benefit the action will lie, as well as his failure to protect his interests by taking the necessary steps to bring into existence a person legally capable of bringing suit. Such a holding gives to the derelict next of kin a greater right against the defendant than the decedent would himself have if he were alive. Such a holding makes the length of the defendant's liability depend upon an event which has no logical connection with it. *If the payee of a note is living when it matures, the maker is liable for six years; if the payee is dead the maker's liability is extended indefinitely,*

*and if no administrator is ever appointed, the liability is never terminated.* IT IS THE PERPETRATION OF A LIABILITY CAPABLE OF ENFORCEMENT TO THE END OF TIME, and a potential plague to generations unborn. The repugnancy of such a doctrine is apparent from the mere statement of it: certainly it is inconsonant with the spirit and purpose of the Statute of Limitations which:

> "* * * *is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses.*" (17 R. C. L., p. 664.) See also, Dekay *v.* Darrah, 14 N. J. L. 288.

How ~~persistent~~ pertinent this reasoning is to the case at bar! The note sued upon became due April 1, 1914. The complaint was not filed until June 17, 1927, more than 13 years thereafter. This is more than twice the statutory period for bringing suit upon such an instrument. *At the time of filing the complaint not only the payee of the note, but one of the two makers of the note was dead; and by the time the case reached trial, the payee's administratrix had died.*

## CONCLUSION.

**We respectfully submit that by the express terms of the Statute of Limitations, the appellant's action is barred; that no exception can be raised by implication; and that such exception as has been implied by the Courts of England and followed by other States is not binding on this Court because such exception was not created prior to our adoption of the Statute. Our Statute being clear and unambiguous, it is not subject to construction, and any contrary construction not having been universally accepted, should be rejected and not followed by the Courts of New Jersey, and the judgment of the Supreme Court should be affirmed with costs.**

October, 1930, Term.

Respectfully submitted,

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