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Summons.

(Filed Decmebr 28th, 1925.)

THE STATE OF NEW JERSEY to MICHAEL F. COYNE, Executor of the Estate of Philip Coyne, dec'd. 10

YOU ARE HEREBY SUMMONED to answer the complaint of Lila E. O'Connor, in an action at law in the New Jersey Supreme Court, Hudson County. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the New Jersey 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. 20

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this Twenty-fourth day of December, One Thousand Nine Hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

QUINN, PARSONS & DOREMUS, 30
Attorney.

Complaint.

Filed December 28th, 1925.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

LILA E. O'CONNOR,

10

Plaintiff,

vs.

MICHAEL F. COYNE, Executor of
the Estate of Philip H. Coyne,
dec'd,*Defendant.*Law.
Action at

20

Plaintiff, Lila E. O'Connor, of the City of Long Branch, in the County of Monmouth, and State of New Jersey, says that:

1. The plaintiff during the life of said Philip H. Coyne, acted as general housekeeper for him nursed him, cooked for him, cleaned the house, performed the duties of lay nurse for him, and generally cared for him from February 13, 1918 until May 16, 1923.

30

2. Said services were rendered upon the express promise of defendant's testator that he would repay her for her services.

3. Philip H. Coyne died leaving a Last Will and Testament which was duly admitted to probate by the Surrogate of Monmouth County, wherein and whereby he appointed the defendant, Michael F. Coyne, his executor, and wherein and whereby he did not, but on the contrary

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Complaint.

absolutely failed, to reimburse the plaintiff for her services as he had agreed to do.

4. Plaintiff presented a verified claim to said executor, which claim has been disputed by said executor.

SECOND COUNT.

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1. Plaintiff repeats paragraph one of the First Count.

2. Said services were rendered by the plaintiff upon the implied promise and agreement of defendant's testator, to pay the reasonable value of such services and reimburse the plaintiff for her services.

3. Plaintiff repeats paragraph three of the First Count.

20

4. Plaintiff presented a verified claim to said First Count.

5. The reasonable value of said services was \$9,425.

Plaintiff demands the sum of \$10,000. with lawful interest and costs of this suit, as damages.

QUINN, PARSONS & DOREMUS,
Attorneys of Plaintiff.

30

40

Answer and Counterclaim.

(Filed Jan. 21, 1926.)
 NEW JERSEY SUPREME COURT,
 MONMOUTH COUNTY.

10)	LILA E. O'CONNOR,	}	Action at Law.
		<i>Plaintiff,</i>		
		vs.		
		MICHAEL F. COYNE, Executor of the Estate of Philip H. Coyne, dec'd,	}	
		<i>Defendant.</i>		

20 The defendant for an answer to the Complaint filed herein says that:

ANSWER TO FIRST COUNT.

1. He denies paragraphs "1" and "2" of the First Count.

30 2. He admits that part of paragraph "3" which alleges that Philip H. Coyne died leaving a last will and testament, which was duly admitted to probate by the Surrogate of Monmouth County, wherein and whereby he appointed the defendant Michael F. Coyne, his executor. The rest of the said paragraph is denied.

3. He admits paragraph "4".

ANSWER TO SECOND COUNT.

1. He repeats answer to paragraph "1" of the First Count.

40 2. He denies paragraph "2" of the Second Count.

Answer and Counterclaim.

3. He repeats answer to paragraph "3" of the First Count.

4. He denies paragraph "4" of the Second Count.

5. He denies paragraph "5" of the Second Count.

SEPARATE DEFENSES. 10

The defendant for a Separate Defense to the Complaint filed herein says that:

1. His testator did not at any time during his lifetime promise the plaintiff either expressly or impliedly to pay her any money for any services rendered or to be rendered to him.

2. He denies that the plaintiff performed any services for his testator herein.

3. He denies that he is in anywise indebted to the plaintiff for services rendered to his testator. 20

4. If any services were performed at the home of defendant's testator they were performed voluntary and gratuitously.

5. That the suit herein is an attempt to circumvent the Statute of Wills by endeavoring to read into the Last Will and Testament of the testator Philip Coyne, deceased, a bequest to Lila E. O'Connor in the sum demanded in the Complaint, namely, \$10,000.00. 30

6. The decedent's home where the services set forth in the Complaint are alleged to have been performed for the testator was a "Wayside Inn" or "quasi eleemosynary institution" for defendant's relations; plaintiff and her husband living in the said abode of the testator during the alleged period of plaintiff's employment; two widowed aunts and the plaintiff's sister-in-law having been buried from the testator's home, so that if the plaintiff performed any household 40

Answer and Counterclaim.

services at the testator's home, the same were performed for the benefit of the plaintiff and her husband and her other relations and not for defendant's testator.

BY WAY OF COUNTER-CLAIM THIS DEFENDANT
 10 SAYS THAT:

1. That the plaintiff and her husband lived at the home of the testator from February 13th, 1918 to May 16th, 1925 and received their bed and board from defendant's testator during that time.

2. Such bed and board as aforesaid was furnished by the testator upon an implied promise and agreement by the plaintiff to pay the testator the reasonable value for such bed and
 20 board of herself and her husband.

3. The plaintiff failed to pay testator in his lifetime and has failed to pay the defendant herein, the executor of the testator's estate, any money for such bed and board as aforesaid, as she had agreed to do.

4. The reasonable charge for such bed and board during the period set forth in the First paragraph of the Complaint, namely, seven years
 30 and three months is \$25.00 per week, making a total of such bed and board of \$ 9,425.00.

Defendant demands by way of counter-claim the sum of \$10,000.00 with lawful interest and costs of suit as damages.

ROBERT H. DOHERTY,
 Attorney of Defendant.

Reply.

(Filed Jan. 25, 1926.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p style="text-align: center;">LILA E. O'CONNOR, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">MICHAEL F. COYNE, Executor of the Estate of Philip H. Coyne, dec'd, <i>Defendant.</i></p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">Action at Law.</p> <p style="text-align: right;">20</p>
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Plaintiff by way of reply to the Answer filed herein, says that she denies the new matter raised in said Answer, and joins issue on the same, and by way of answer to the Counter-Claim, plaintiff denies paragraph one, two and three and four of the Counter-Claim.

FIRST SEPARATE DEFENSE.

Plaintiff will move to strike out the Counter-Claim at the trial, by reason of the fact that the demands set forth in the Counter-claim are improperly made against the wife.

SECOND SEPARATE DEFENSE.

The charges made in said Counter-claim were never contracted either impliedly or expressly by the plaintiff.

THIRD SEPARATE DEFENSE.

40

Reuly—Postea.

The living expenses and groceries were paid for by the husband of the plaintiff.

FOURTH SEPARATE DEFENSE.

There is nothing due and owing by the plaintiff to the defendant.

10

QUINN, PARSONS & DOREMUS,
Attorneys for Plaintiff.

Postea.

(Filed July 20, 1926.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

20

LILA E. O'CONNOR,

Plaintiff,

vs.

MICHAEL F. COYNE, Executor of
the Estate of Philip H. Coyne,
dec'd,

Defendant.

Action at
Law.

30

This case was tried before Honorable Frank B. Jess with a jury at the Monmouth Circuit Court on July 16th, 1926.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Nine Thousand Four Hundred and twenty-five dollars (\$9425.00).

FRANK B. JESS,
Judge.

40

Dated July 19, 1926.

Notice of Appeal.

(Served Aug. 20, 1926.)

NEW JERSEY SUPREME COURT.

<p style="text-align: center;">LILA E. O'CONNOR, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">MICHAEL F. COYNE, Executor of the Estate of Philip H. Coyne, dec'd, <i>Defendant.</i></p>	}	<p style="text-align: center;">Action at Law.</p>	<p>10</p>
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To, 20

Quinn, Parsons & Doremus,
Attorneys for Plaintiff,
Red Bank, N. J.

Sirs:

TAKE NOTICE, that the defendant, MICHAEL F. COYNE, Executor of the Estate of Philip Coyne, deceased, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause. 30

Dated, August 19th, 1926.

Yours truly,

ROBERT H. DOHERTY,
Attorney of Defendant.

Grounds of Appeal.

(Served Sept. 10. 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

 LILA E. O'CONNOR,

Plaintiff-Appellee,

vs.

 MICHAEL F. COYNE, Executor of
 the Estate of Philip H. Coyne,
 dec'd,

Defendant-Appellant.

 Action at
 Law.

20 The Defendant-Appellant writes down the following grounds upon which he intends to rely on the argument of the appeal in the above entitled matter.

First: Because the Court refused to non-suit the plaintiff on motion of the defendant, although a non-suit should have been granted upon the following grounds.

30 (a) There was no proof that any payment was to be made to plaintiff for services alleged to have been rendered the deceased Philip Coyne.

(b) There was no proof that the deceased had made either an express or an implied contract to pay the plaintiff for the services alleged to have been rendered for him.

40 (c) The proof showed that the plaintiff relied solely upon the generosity of the decedent to remember her in his will.

Grounds of Appeal.

(d) The plaintiff was related to the decedent and was a member of decedent's household during the period of the alleged service, and the presumption arises that the services rendered were voluntary.

(e) There was no proof of what portion of the services rendered by the plaintiff in the Coyne household were rendered for decedent and the jury had no method of determining the extent of such services. 10

(f) There was no proof that the relation of debtor and creditor existed between the plaintiff and decedent for services rendered.

(g) The proof showed that the claim was a stale one. 20

Second: Because the Court refused to direct a verdict for the defendant when requested so to do upon the same ground as set forth in the motion for non-suit, and further because it then appeared that the decedent had sufficient monies on hand at all times to pay any indebtedness for services rendered.

Third: Because the Court erred in charging the jury as follow: 30

"The court would not permit the plaintiff in this case to testify herself as to any transactions had or statements made by the testator Coyne, but she produced witnesses who gave testimony which tends to support the claim made by the plaintiff both as to the services rendered and as to the promise of the recipient Mr. Coyne to pay for them."

Fourth: Because the Court erred in charging the jury as follows: 40

Grounds of Appeal.

"If you believe the testimony for the plaintiff, there being no evidence in contradiction, you must find that there was a mutual expectation that the plaintiff was to be paid for her services and that such compensation was to be paid by a provision in Mr. Coyne's will."

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Fifth: Because the Court erred in charging the jury as follows:

"Now the plaintiff seeks to recover the sum of \$9,425.00 as a reasonable value for services that she rendered. My understanding is that that amount figures out, according to the length of services at the rate of \$25.00 a week; so that would seem to be the value which she places upon the services which she performed."

20

Sixth: Because the Court erred in charging the jury as follows:

"Gentlemen, in the final analysis, it is not for the Court to say, but it is for the jury to say what in your judgment as experienced men, such services as you find were rendered by the plaintiff to the decedent were reasonably worth, having regard to all the circumstances as disclosed by the evidence."

30

Seventh: Because the Court refused defendant's requests to charge as follows:

"4. If you find that the plaintiff from the evidence in this case lived in the same household with Philip Coyne, as a member of the same household, and that she was related to him as a niece by marriage, then a presumption arises in favor of the defendant, that the services rendered in the household to a member occupying the same household were voluntary and gratuitous, unless the plaintiff can show by the greater weight

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Grounds of Appeal.

of the evidence that there was an agreement, either express or implied, by Philip Coyne to pay her for services rendered to him."

"5. The mere fact that the plaintiff has called six witnesses to testify in her behalf to establish the different elements of her case, does not of necessity meet the requirement of the burden of proof. You have a right to consider and inquire into the interest, bias and conduct of each witness, and as to whether anyone or all of the witnesses told the truth." 10

"6. You also have the right to discard the testimony of any one or all of the witnesses if in your best judgment, from the evidence in the case, you do not consider their testimony worthy of belief."

"7. If after a careful consideration of all the evidence and surrounding circumstances of this case, you find that the scale of evidence is evenly balanced, you must find your verdict for the defendant." 20

"9. Whether services are rendered upon an express or implied promise that compensation will be made therefor, or are performed gratuitously with a hope of recovering a legacy from a person for whom the services are rendered, is a question to be submitted to a jury when the testimony leaves the matter in dispute, the burden being on the plaintiff to establish the fact that the services were not rendered gratuitously, but upon a distinct understanding that he should be compensated; and if you find that this plaintiff relied upon Philip Coyne's generosity to take care of her in the will, she cannot recover in this suit." 30

Respectfully yours,

ROBERT H. DOHERTY,
Attorney and of Counsel with 40
Defendant Appellant.

Testimony.NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10	LILA E. O'CONNOR,	}	Action at Law.
	<i>Plaintiff,</i>		
	vs.		
	MICHAEL E. COYNE,		
	Exp., &c,		
	<i>Defendant.</i>		

Freehold, N. J., June 15, 1926.

20 MR. DOHERTY: Before Mr. Quinn opens I would like to amend my answer so that all that part of the plaintiff's claim arising out of her alleged cause of action which antedates six years prior to the commencement of this suit be barred by the statute of limitations; in other words, I plead the statute of limitations to all that part of this claim alleged in the first and second counts which antedates six years prior to the commencement of this action.

30 THE COURT: Any objection to the amendment?

MR. QUINN: I have no objection to the amendment. I do not desire to argue it at this time

RECESS TO 1:30. P. M.

Lester O'Connor—Direct.

Trial of the cause resumed at 1:30. P. M.

LESTER O'CONNOR, sworn for plaintiff.

DIRECT EXAMINATION BY MR. QUINN:

Q. You are the husband of Lila E. O'Connor, the plaintiff in this suit? A. Yes, sir. 10

Q. And where do you live, Mr. O'Conner? A. 605 Broadway.

Q. Did you know Mr. Philip H. Coyne? A. I did.

Q. And how long did you know him? A.

Q. Do you recall the date of his death? A. February 16th.

Q. Do you recall when he died? Do you recall that date? A. February 16th. 20

Q. When? A. 1925.

Q. Do you recall the date of his death? A. Yes.

MR. QUINN: Is the date of his death conceded?

MR. DOHERTY: Yes, May 16, 1925.

Q. You say you have known him for fourteen years? A. Yes.

Q. Do you know where his home was in Long Branch? A. At 505 Springdale Avenue. 30

Q. Before you went to live at his home where did you live? A. Over my place of business at 605 Broadway.

BY THE COURT:

Q. Where? A. Long Branch.

BY MR. QUINN:

Q. And how long had you lived at this 605 Broadway? A. Seven years. 40

Q. Did you know the wife of Philip H. Coyne? A. I did.

Fourteen years.

Lester O'Connor—Direct.

Q. And do you recall when she died, without giving the date? Do you recall when she died?

A. Yes, I do.

Q. And after her death who else lived in the house with Mr. Philip H. Coyne? A. An aunt of my wife's.

10 Q. How old a lady was she? A. She was a woman of about sixty-five.

Q. Were there any other persons there at that time? A. No other persons.

Q. Did you hear any conversation of Mr. Philip Coyne, the deceased, with your wife after the death of his wife? A. I did.

Q. And about how many days was that after his wife died? A. About four days.

20 Q. Will you state what that conversation was? A. Why, Mr. Coyne asked us if we would come over there and live; and I told him it was positively impossible; the place of business was right over the store and very handy. So he told me if Lila would come over—he was old and needed help—that if she would come over and take care of him he would remember her in his will.

30 Q. Any other language as to how he would remember her? A. He would remember her in his will.

Q. Well, did he specify any amount or how did he express himself? A. And that if she would take care—

(Objected to as leading.)

MR. QUINN: It might be leading.

40

Lester O'Connor—Direct.

Q. Did he express himself in any other words or the substance of the language as to how he would take care of her? A. By will, remember her in his will, make out a will in her favor.

Q. And you say that was about four days after? A. About four days after.

Q. And where did that conversation take place? A. At the table. 10

Q. Well, where? A. In the dining room.

Q. Well, whose house was it? Was it in the place where he lived? A. In the place where he lived.

Q. You say you told him that was impossible? A. Yes, sir.

Q. Did you finally agree to permit your wife to go there? A. My wife, because she talked to me and kind of persuaded me to go over there. 20

Q. And did your wife go? A. She went over there.

Q. And when? A. Well, we stayed there right from that time on.

Q. Until the time of his death? A. Until the time of his death.

Q. Now what did your wife do in the household of Philip H. Coyne? A. Done the cooking, prepare meals, took care of the house. 30

MR. QUINN: I am asking him to lay a foundation.

Mr. Doherty: I object at this time unless it appears that the decedent was not in the house when these services were performed; otherwise it is putting the cart before the horse. I don't care what services were performed; the question is here whether there was an express or implied contract to pay for the services; and the 40

Lester O'Connor—Direct.

rule of law is that they cannot testify, either this witness or this woman, as to any services that were performed, because their interests are the same; they are **identical**.

10 THE COURT: Whose interests are the same?

MR. DOHERTY: Husband and wife. He is saying, "We promised to do this and we promised to do that," although he is not a party to the suit.

THE COURT: He is asked, as I understand, what his wife was performing; that is what he is telling.

MR. DOHERTY: Oh, I misunderstood.

20 Q. Who was it who performed the services there in behalf of Mr. Coyne? A. My wife.

Q. You didn't perform any services? A. No, sir.

Q. And now state to us and tell us what services she performed to him. A. She took care of the washing, done the housework, cooked the meals, prepared special foods for him. He didn't have any teeth. The man had stomach trouble most of the time.

30 Q. Did he have any upper or lower teeth? A. He didn't have any upper or lower teeth.

Q. What kind of food did she have to prepare for him? A. Soft foods, cereals, custards, soups and so forth.

Q. You said washing; your wife, you say, did the washing? A. Yes.

Q. Who took care of the furnace in the winter time? A. Why, my wife; but stoves; they were not furnaces.

40 Q. Was any care given by your wife to him during any of the time during the period she

Lester O'Connor—Direct.

was there? A. Many times she had to get up in the middle of the night and take care of him.

Q. And what was the nature of the work that she performed at that time? A. Well, she would have to go down and boil hot water and make cake soda and give him things to kind of take the gases off his stomach. 10

Q. How frequently would you say that had to be done? A. Quite frequently.

Q. Well, how many times during a week approximately? A. Well, perhaps once a week, twice a week; sometimes he would go a couple weeks and he wouldn't have it.

Q. How old was Mr. Coyne when he died? A. Eighty-four or five.

Q. And other services you can recall that she performed for him? A. Made his baths. 20

Q. Was that every day? A. Prepared his baths for him.

Q. How frequently were baths taken? A. Twice a week.

Q. Were they special baths or what kind, if you know? A. Well, no, they were not special baths; just prepare them so he could take a bath, so as to have the water the right temperature. 30

Q. How long would you say the old gentleman suffered from the intestinal trouble? A. He suffered all the time while we were there.

Q. And did you ever see that during the day as well as during the night? A. Oh, yes.

Q. Anything else that you can recall that she had to do for him? A. No.

Q. Would your wife go away from the home at any period during the year for a vacation or otherwise? A. Why, about one week we used to go away in the fall of the year, but during that time her mother or a girl would have to take care of him. 40

Lester O'Connor—Direct Cross.

Q. Your wife's mother? A. Yes.

Q. Or a girl, did you say? A. Or a girl.

Q. Was that girl left there by someone? A. A girl that we had working for us.

Q. Did you pay for anything in the house?

A. I paid for everything in the house.

10 Q. Did you pay for your own food? A. Paid for my own food.

Q. Pay for your wife's food? A. Paid for my wife's food and paid for Mr. Coyne's food.

Q. And you say his food only consisted of cereals and soft foods and things of that kind?

A. Cereals and soft foods.

Q. Do you know whether Mr. Coyne owned the house or had a life estate? A. Mr. Coyne had a life estate.

20 Q. Now after his death did you remove from this place? A. Just as soon as I could.

Q. Then where did you go? A. Back over the store.

Q. Back to your own home? A. Yes.

Q. I believe you said there were no services whatever performed by you to Mr. Coyne? A. No.

30 Q. There was no promise made of any character or sort to you? A. No, there was not.

Q. Was your wife related to him in any way? A. By marriage.

Q. Only by marriage? A. By marriage.

CROSS EXAMINATION BY MR. DOHERTY:

Q. What relation is your wife, was your wife to the deceased Mr. Coyne? A. She was a niece to—

40 Q. To Mrs. Coyne? A. To Mrs. Coyne.

Q. And before your wife came to live with the Coynes over on Springdale avenue where did she live? A. She lived over the store with me.

Lester O'Connor—Cross.

Q. She lived over the store with you? A. Yes.

Q. How long were you married to the plaintiff in this case when you went to live with the Coyne? A. About seven years.

Q. You had been married seven years? A. Yes.

Q. Do you know where your wife lived before this time, before you married her and she lived with you at the address on Broadway? A. Before I married her? **10**

Q. Yes. A. She lived with her mother.

Q. Where? A. On High Street.

Q. Did she ever live in the Coyne home? A. Not to my knowledge.

Q. Not to your knowledge? A. Never during the time that I knew her. **20**

Q. How long did you say you had known Mr. Coyne? A. Fourteen years.

Q. Did you ever visit Philip Coyne's home before you married your wife? A. No.

Q. So that you don't know where your wife lived of your own knowledge before you married her? A. Oh, yes, I do. She lived on High Street with her mother.

Q. Did you call on her there before her marriage? A. Yes, I lived across the street from her. **30**

Q. And how long had she lived there? A. All her life, to my knowledge.

Q. When your wife went to live with you at the store after you were married did your wife do any work for you in the store? A. Occasionally.

Q. When did she do that work? A. In the afternoon she would come there for awhile and in the evenings she would perhaps come there for a while. **40**

Lester O'Connor—Cross.

Q. And how long were you married before you moved into the Coyne house? A. Seven years.

Q. And did your wife do any work around the store after the seven years? A. After the seven years?

10 Q. Yes. A. Once in a while she would come up and help out a little bit.

Q. And how often did she do that? A. Why, not very often.

Q. Well, about how often? This jury wants to know. A. Well, sometimes two or three times week.

Q. What time of day would she come over to the store? A. Well, sometimes at seven or eight o'clock at night, nine o'clock at night.

20 Q. And sometimes during the day? A. Sometimes in the afternoon.

Q. Sometimes in the morning? A. No.

Q. Never in the morning? A. No, never in the morning.

Q. How long a time would she stay in the store when she came over? A. How long a time?

Q. Yes. A. A couple of hours.

30 Q. And during that time she would work at the store, wouldn't she, wait on customers? A. She would.

Q. And that was in the afternoon and sometimes in the evening.

Q. So that she was away from the household of Philip Coyne for this vacation that you spoke of? A. Yes.

Q. And occasionally in the afternoon she went to visit some friends, didn't she? A. Occasionally in the afternoon?

40 Q. Yes. A. Seldom.

Q. Well, she did go out? Didn't she have her day off? Did she ever take any time off from

Lester O'Connor—Cross.

him? A. She couldn't leave Mr. Coyne.

Q. Couldn't leave him? A. No, sir.

Q. She did, however, come over to your store, didn't she? A. She did.

Q. She was able therefore to leave Mr. Coyne, wasn't she? A. If she came to the store the young girl was up at the store— 10

Q. I am not asking that question; but she did leave Mr. Coyne on occasion? A. Yes.

Q. And you say during those occasions she would come over to your store and stay for hours at a time and wait on customers; is that right? A. Yes, sir.

Q. And that was during the entire time that your wife was over at Mr. Coyne's in the seven years up to the time he died she did that, didn't she? A. Yes, sir. 20

Q. Who was working in your store with you? A. Who was working?

Q. Yes. Sometimes two or three girls.

Q. Two or three girls? A. Yes.

Q. And you also needed the help of your wife in connection? A. Beg pardon?

Q. And you needed the help of your wife over at the store; that is the reason she went over there? A. If she came up on occasions she would help out. 30

Q. When did you build that store? A. When?

Q. On Broadway. A. Two years ago.

Q. And what was there before the store? A. I had a store right adjoining it.

Q. And where did you live then? A. Right over the store.

Q. Then when you say you lived over the store you mean you lived over the store next to it and not this particular place where you were living before you got married; is that right? A. Right 40

Lester O'Connor—Cross.

Q. Now do you remember when Mrs. Coyne died, that is, Philip Coyne's wife? Do you remember the date? A. I do.

Q. Do you remember what date it was? A. 1918.

Q. What month of the year? A. February.

10 Q. And where was it that you overheard Mr. Coyne say what you have testified to on your direct examination? A. At the table.

Q. Whose table? A. The table at Mr. Coyne's house.

Q. The table at Mr. Coyne's house; and who was present? A. The wife, I and himself.

Q. Just the three of you? A. Yes.

Q. Nobody else was present that day? A. 20 That is all.

Q. And what time of day was it, do you remember? A. It was noontime.

Q. At noontime? A. Yes, sir.

Q. And was Mrs. Coyne buried as yet? A. Yes, she was buried.

Q. How many days had she been buried, do you recall? A. Four or five days.

Q. It was four or five days after she was buried? A. After she was buried.

30 Q. And how many days did they keep Mrs. Coyne after she died? A. After she died?

Q. Yes; did they bury her the same day? A. About three days.

Q. They kept her three days; and then it was about three days after that, or was it three days after she died? I want to try to fix the date. A. About three days after she was buried.

Q. About three days after she was buried? A.

40 Yes.

Q. So that that was about six or seven days after she died? A. Yes.

Lester O'Connor—Cross.

Q. And that was all that was said by Mr. Coyne that you have testified to on your direct examination? A. Yes.

Q. Nothing more; you are positive about that, are you? A. Yes.

Q. Now this aunt that lived in the Coyne house at that time, what was her name? A. Jemima Randell. 10

Q. How long did she live there with Mr. Coyne and you and your wife? A. About nine months after his wife died.

Q. About nine months after his wife died? A. Yes.

Q. During the time that you lived in the Coyne house on Springdale Avenue did you have a room of your own? A. My wife and I had a room there. 20

Q. You had a room of your own? A. Yes.

Q. And your wife had access to all the rooms there? A. Yes.

Q. And you lived in with Mr. Coyne as one of the family, didn't you? A. No, sir.

Q. You didn't? A. I did not.

Q. Well, why do you say that? You came there and ate your meals, you had your breakfast there, didn't you? A. Yes. 30

Q. And your wife had her breakfast there every morning? A. Yes.

Q. And you came home to lunch? A. Yes.

Q. And your wife was there at lunch every day? A. Yes.

Q. And you had your supper there? A. Yes.

Q. You came home there to supper? A. Yes.

Q. And every time you came in Philip Coyne was at the table other than occasions that he couldn't come to the table? A. Yes. 40

Lester O'Connor—Cross.

Q. Now how often was it during the period that you were at the Coyne house that Mr. Coyne, the elderly gentleman, was unable to come to the table? A. Quite often.

Q. Well, how often? A. Well, he would have spells that he couldn't come to the table for
10 three or four days.

Q. And then after the three or four days he would be perfectly all right; he could walk around, couldn't he? A. He could.

Q. And he did get out in the yard and tinker around the shop, didn't he? A. Yes.

Q. And he was working at a patent, wasn't he? A. Yes.

Q. And that was right up to the time he died, wasn't it, practically? A. Yes.
20

Q. And for his age he was a rather active old gentleman, wasn't he, always busy at something? A. Well, he sat around leisurely. I wouldn't say he was very busy. At times he tinkers around.

Q. You didn't have to carry him around, did you? He could walk? A. I didn't have to carry him around, no, sir.

Q. He could walk? A. He could walk.

Q. Come to the table without assistance? A. Yes, sir.
30

Q. Could he read the paper? A. He could read the paper.

Q. And that was right up to the time of his last illness, wasn't it? A. Yes, sir.

Q. And how long did this last illness continue before he died? How long was he sick? A. Why, about a week and a half.

Q. And up to that time he was up and around the house and taking his meals at the table and generally about the house? A. Yes, sir.
40

Lester O'Connor—Cross.

Q. Did any member of your family live with you at any time in the Coyne house? A. No, sir.

Q. None of your relatives? Wasn't one of your relatives buried there? A. Yes, my father came down and spent Decoration Day and was stricken with heart trouble and buried from there. 10

Q. And your relatives visited you quite frequently at this house? A. No, sir; my relatives are all in New York.

Q. They never came down to see you? A. No, sir.

Q. Didn't you consider this place your home? A. No, sir.

Q. During the seven years you were there? 20
A. No, sir.

Q. Where was your home? A. I had to sleep there, but not that I wanted to. It was the last place in the world that I wanted to sleep in the neighborhood.

Q. What was the matter that you didn't want to sleep there nights? Your wife was there? A. My wife was there.

Q. And she was perfectly contented to stay there, wasn't she? A. Yes. 30

Q. Did she ever complain to you about getting out of there? A. She had to stay there and take care of her uncle.

Q. I didn't ask you that. A. She never complained.

Q. She never complained to you that it was a hardship for having to stay there and you never complained to her? A. Indeed I have. She spoke about the hardship. It was a hardship on her. 40

Lester O'Connor—Cross.

Q. It was? A. Yes.

Q. How do you know? A. She said so.

Q. What did she say to you that conveyed to your mind that it was a hardship for her to stay at the Coyne house? A. Why, she naturally was tired out at times.

10 Q. When was the first time that she complained to you about living at the Coyne house, she didn't want to stay there but wanted to go away, if she did say so? A. When was the first time?

Q. Yes, when was the first time? A. She never said she wanted to go away.

Q. When then did she first complain to you about staying at the Coyne house on Springdale Avenue? A. Well, this last three or four years.

20 Q. This last three or four years? A. Yes.

Q. And how many times did she complain to you? A. Well, any time we were talking casually together.

Q. About how many times? A. Well, I couldn't say just how many times, but whenever we were talking together. Of course it was a hardship.

30 Q. Well, that is your idea, but I want to know what she said to you that conveyed to your mind that it was a hardship, if she said anything. You can't remember the occasions, only the first one? A. Well, she was tired out.

Q. She was tired out? A. Yes; sometimes I would come home, she was tired out taking care of a big house.

Q. All right; she was tired out. Is that what conveyed to your mind the fact that she was dissatisfied? A. Yes.

40 Q. She didn't say anything to you about it, though, did she? A. No.

Q. What? A. Enlighten me. What was it?

(Question repeated.)

Lester O'Connor—Cross.

A. She did, that she was tired out.

Q. That is all she said to you, that she was tired out? A. Yes.

Q. And it is a natural thing for a woman to be tired out working around the house, isn't it?

A. A natural thing if you work during the day, sure. 10

Q. And sometimes you are tired out whether you work or not, aren't you? A. But if she had stayed up with me she would not have had to work as hard as that, in a small apartment.

Q. That is your idea? A. Yes.

Q. She worked at the store occasionally, didn't she? A. Yes, she did occasionally.

Q. She did occasionally what? A. Work at the store. 20

Q. Yet she was very tired? A. Yes, sir.

Q. And during the period of the seven years that she worked on the Coyne estate, notwithstanding the fact that it was hard, that she was tired and that she didn't consider that her home or you didn't consider it your home, you brought her over to your store to work occasionally, didn't you? A. I didn't bring her over there.

Q. Well, she went over there and worked, didn't she? A. She went over occasionally and worked. 30

Q. And you were there and you knew about that? A. To help out.

Q. Now isn't it a fact that Mr. Coyne was out mowing his lawn the day that he was stricken? A. He was working around the garden; I don't know just what he was doing.

Q. But he was always tinkering around the garden? A. I think I heard him say that he was mowing the lawn. I was away the doctor advised him not to do such work. 40

Lester O'Connor—Cross.

Q. Now were you present when your wife was preparing a bath for him? A. I have been, yes.

Q. On how many occasions were you present, would you say, when you saw your wife preparing a bath for Mr. Coyne? A. Oh, numerous occasions.

10 Q. Numerous occasions? A. Yes.

Q. And what time of day did he take his bath? A. In the afternoon.

Q. In the afternoon? A. Yes.

Q. About what time? Regular routine? A. Right after lunch.

Q. Right after lunch? A. Yes.

Q. That was his custom, was it? A. Sometimes it was four o'clock.

20 Q. Sometimes it was four o'clock; and were you always at home at four o'clock? A. I had no regular meal hours.

Q. What time did you usually get home to lunch? A. Whenever I could get convenient, or that somebody got away; felt that I could get away from the sales.

Q. And that varied all day long? I suppose you had your lunch as late as five o'clock in the afternoon? A. Yes, I have had my supper as late as half past eight or nine.

30 Q. How often did that happen during the seven years, that you had your lunch as late as four o'clock in the afternoon? A. On numerous occasions.

Q. Was that the rule or the exception? A. That was the rule.

Q. It was the rule that you got home to lunch around four o'clock? A. Yes.

40 Q. Was that the time Mr. Coyne had his lunch? A. No, Mr. Coyne would have his lunch and have it all over.

Lester O'Connor—Cross.

Q. Well, you say that he always took his bath right after his lunch. How do you know? A. I didn't say he took it after his lunch. In the afternoon he took his bath.

Q. After his lunch? A. Sometimes after his lunch, sometimes a little later. Sometimes he had his bath while I was eating my lunch. 10

Q. Let me see if I can bring that out. Did you know when Mr. Coyne took his bath or are you only guessing at it? A. I am not guessing at it.

Q. When did he take it? A. In the afternoon.

Q. After his lunch? A. After his lunch or a little later.

Q. After his lunch might mean any time from twelve o'clock up to six o'clock in the afternoon. What time of day, according to the best of your recollection, during the time that you were at the house did he take his bath? A. Between one and four o'clock. 20

Q. Is that as definite as you can make it? A. That is as definite as I can make it.

Q. But whenever he took it before four o'clock you were not there? A. Sometimes I was not there. 30

Q. How soon after Mr. Coyne died did you leave the Coyne house? A. How soon after?

Q. Yes, A. One week, one or two weeks.

Q. And that was the day that the will was read, wasn't it? A. No.

Q. About that time, wasn't it? A. About that time, **yes.**

Q. And the reason that you left was because you were disappointed that your wife had not been left something in the will, wasn't it? A. No, **sir.** 40

Lester O'Connor—Cross Re-Direct.

MR. QUINN: Objected to as incompetent. They had no control of that home. Counsel has stated that that home belonged to the estate, not of this man but his wife.

(Objection sustained.)

10 Q. You knew that Mr. Coyne had a life estate, didn't you, in the premises? A. Yes, sir.

Q. And you knew that he had left a will, didn't you? A. Yes, sir.

Q. And you knew that he had some money in addition to a life estate, didn't you? You knew he had some money in bank, didn't you? A. Yes, sir.

Q. He told you that, didn't he? A. No, he never told me.

20 Q. Never told you that? A. No, sir.

Q. And wasn't it a fact that you left the house, the Coyne house, at about the time that Philip Coyne's will was read? That is the fact, isn't it? A. About a week or so after he died.

Q. You didn't stay there any longer, did you? A. No.

Q. Now who was Lila Tompkins O'Connor? Is that your wife? A. My wife.

30 RE-DIRECT EXAMINATION BY MR. QUINN:

Q. Just an omitted question. Did Mr. Coyne have an accident before his death, some years before? A. He had an accident shortly before we went over there.

Q. Do you know what the injuries were? A. He had two broken ribs and a broken wrist.

40 RE-CROSS EXAMINATION BY MR. DOHERTY:

Q. And how long was it before he recovered from that? A. How long?

Lester O'Connor—Re-Direct.

Q. Yes. A. He was still suffering from the broken wrist when we went over there.

Q. Now what did he do differently with that broken wrist during the time that you were over there at the Coyne house than you saw him do before you went over there? In what way did he suffer? A. Well, he couldn't use his wrist. He was always kind of meddling with it. **10**

Q. Did you see the contrivance that he was working on in his barn or shop out in back of the house on Springdale Avenue? A. Did I see it?

Q. Yes; he was working on an invention, wasn't he? A. He was making a model.

Q. He was making a model for an elevator, wasn't he? A. For an elevator and dumb waiter. **20**

Q. And that was a rather delicate piece of mechanism as you understand mechanism, wasn't it? A. Well, I wouldn't say that it was delicate.

Q. Well, you don't think that you could do it, do you?

(Objected to.)

Q. With the finesse that he did it? A. I think I could. I didn't know what his idea was. **30**

Q. To use the vernacular, you don't think any tramp of a carpenter could put that together, do you? A. Well, I don't know.

Q. It required a little skill, didn't it? A. There was nothing really—

Q. And he had to use a hammer and a saw and tools and do it quite delicately at that, didn't he? A. No, you wouldn't for a model.

Q. You wouldn't? A. No.

Q. What do you think he used to build that model? A. I couldn't say. **40**

L. O'Connor, Re-Direct—A. J. Cavalier, Direct.

Q. You don't think that he wished it and that it suddenly appeared there before him? A. I couldn't tell you.

10 Q. You don't want this jury to understand that he didn't build that model we are talking about, do you? Did you ever see him working on it? A. No, I didn't. I never seen him working on it.

Q. You never saw him working on it? A. Never saw him working on it.

Q. But you were around there? You were there for breakfast? A. Yes.

Q. You were there for lunch? A. I was there for lunch.

Q. And you were there for supper? A. Yes.

20 Q. And sometimes you came home at one o'clock in the afternoon, sometimes it was four and sometimes any time in the day? A. Yes.

Q. And yet you never saw Mr. Coyne out in the so-called woodshop working on this model? A. No, sir; I didn't.

ADDIE J. CAVALIER, sworn for Plaintiff.

DIRECT EXAMINATION BY QUINN:

30 Q. You live where, Mrs. Cavalier? A. Brighton Avenue, Long Branch.

Q. How long have you lived there? A. Three years in this one particular place.

Q. Do you know Mrs. O'Connor? A. Yes, I have known her for many years.

Q. A friend of hers a good many years? A. Yes.

Q. Did you know Mr. Coyne? A. Very well.

40 Q. Do you recall about the time that Mrs. O'Connor went over to the Coyne house? A. No, it was just after that that I became acquainted with her.

Addie J. Cavalier—Direct.

Q. Then you recall about the time she left her home and went over there? A. Yes.

Q. And do you recall where her home was before she moved over in that place? A. Yes.

Q. Where was her home at that time? A. On Broadway.

Q. Did you call at the Coyne home to see Mrs. O'Connor? A. Very often. 10

Q. Were your calls frequent? A. Yes, several times a week, perhaps every evening.

Q. Would you see her there? A. Yes.

Q. Do you know what she was doing there? A. Well, she took care of the house and took care of Mr. Coyne, cooked for him, bathed him, took care of his laundry and done all the details connected with the household. 20

Q. You were there the night the old gentleman died? A. I was.

Q. He died in your arms? A. My arms.

Q. You were holding him at that time? A. Yes.

Q. And do you know whether he had any teeth or not? A. He had no teeth.

Q. Upper or lower? A. Upper or lower; hadn't a tooth in his head.

Q. Do you know what kind of food was specially prepared for him by Mrs. O'Connor? A. All liquid and soft foods. 30

Q. Were you ever there at night when he was taken ill? A. Yes.

Q. State the nature of that. A. Well, he had violent cramps and vomiting and Mrs. O'Connor would have to get up and go down and heat water, have hot water and bring him hot water and bicarbonate of soda, and he also had medicines the doctors had given him to use on such occasions. 40

Addie J. Cavalier—Direct.

Q. Where would he vomit on those occasions?

A. Well, she would take a basin in his room.

Q. Any time did the vomiting occur before she would get there? A. Yes, you could hear him retching, you know, as he became ill, when he began to vomit, and then she would run in a hurry.

10

Q. You knew Mr. Coyne quite well during this period of years you were there? A. Quite well.

Q. Did you ever hear him refer to Mrs. Connor with respect to payment for services? A. Three years ago on New Years I was there to New Years dinner. We were all there, in fact, the family, my husband and myself; and we were talking of my case which I had, trouble with my will; and he said, "Well youngster—" he always called Mrs. O'Connor youngster. He says, "Youngster, you will never have to worry," he said, "for I am going to see that you are well taken care of, well repaid for all you have done in my will."

20

Q. Did you ever hear him say that more than once? A. Yes.

Q. On any other occasion? A. Yes, before he was dying, two days before; he said, "I must get strong; I must get strong enough to make that new will."

30

Q. Did you ever see any of the other relatives of this old gentleman there to take care of him?

A. Never.

Q. And do you know from the period of time that you knew Mrs. O'Connor whether she was there continuously at the house with the exception of some intermediate period that she may not have been there? A. It was rarely ever that we didn't see her there. If we had occasion to go out we took Mr. Coyne with us, such as bath-

40

Addie J. Cavalier—Direct, Cross.

ing and that; we took Mr. Coyne with us and he stayed there until we came out.

Q. Did you take him other places? A. Took him with us wherever we went. If we took one for a drive we took Mr. Coyne with us.

Q. Were you ever there while she was preparing these special foods for him? A. Yes, many times. **10**

Q. How many times would you say that you were there in the evenings when he was taken ill? A. When he was taken ill?

Q. If you can recall. A. His last illness?

Q. No, when he was taken ill; I mean about having this vomiting. A. At least half a dozen times.

Q. Do you know whether or not he had stomach trouble? A. I know he had stomach trouble. **20**

Q. Did you ever talk with him about it, or he with you? A. Yes, I spoke to the doctor about it.

Q. You spoke to his doctor about it? A. I spoke to his doctor about it.

Q. Were you there on any occasion that the doctor was there? A. No, the doctor had been to see Mr. Coyne and he came to see my mother and he told me the condition that Mr. Coyne was in. I had inquired for him. **30**

MR. DOHERTY: That is hearsay.

MR. QUINN: Yes, I suppose that can be stricken out.

CROSS EXAMINATION BY MR. GALLAGHER:

Q. Mrs. Cavalier, did I understand you to say you were a close friend of the plaintiff in this case? A. Yes, very close friend. **40**

Q. You are no relative? A. No.

Addie J. Cavalier—Cross.

Q. And you say you lived three years preceding the death of Philip Coyne where? A. On Brighton Avenue, Long Branch; West End proper.

Q. How far is that from the home of the decedent? A. I should imagine ten minutes' walk

10 Q. And you went to that house many times during the week? A. Many times.

Q. Now isn't it true, Mrs. Cavalier, that the old fellow was a pretty active old chap, that he pottered around the house, that he did his bit, as they say since the war, and that were it not for that fact that Mrs. O'Connor could never have gone to the store to help out her husband? A.

20 I have never seen Mr. Coyne perform any other duty with the exception of putting a shovel of coal on the fire in all my eight years visits.

Q. How many times did he do that? A. Well, not on more than three occasions that I can remember.

Q. And you have heard the husband here testify that he worked around the garden most all during his years, did you not? A. Well, ten days before he died he had been in the yard.

30 Q. And you also heard the husband admit that she had been at the store quite often and helped, and then on your direct examination you want us to believe that she didn't leave there at all unless she took Mr. Coyne? A. The times she left the house she had a young girl who remained with Mr. Coyne. He was always with company.

40 Q. Now this alleged conversation that took place three years ago last New Years, what was the condition of every one during that time? Was everyone happy and jovial as people usu-

Addie J. Cavalier—Cross.

ally are? A. No, we were all in our good sound sense. It was just a dinner in the middle of the day.

Q. There were no stimulants at that time? A. No stimulants whatsoever.

Q. Now this conversation as I understood you to say three days before the death of Mr. Coyne, what was Mr. Coyne's condition then? A. His mental condition was very good. 10

Q. His condition was mentally good? A. Yes.

Q. Now can you remember the exact words that he used there that he said previous to his death? A. Yes, he said "I must get stronger so I can make that new will. I want to see you taken care of." 20

Q. You understood from that that he was going to draw a will himself then, did you? A. I did.

Q. Isn't it true that his condition was such that he could call in a scrivener and draw his will that day if he wanted to? A. I couldn't say. He was a very peculiar man.

Q. You testified he was very bright. Then I am asking you isn't it true that if he saw fit he could have called in a scrivener that day and made a will? A. I imagine he could, yes. 30

Q. Now as to the words that he used three years ago, are you able to recall those words exactly? A. The expression he used was, "Youngster," he says, "this will never happen to you." He says, "I am going to see that you are well taken care of in my will."

Q. On your direct examination you testified that "You will be repaid." A. Well, possibly. 40

Q. Now how do you reconcile that with what you have just testified to? A. Well, they mean the same thing.

Addie J. Cavalier—Cross.

Q. They do? Well, now, for the benefit of the court and jury will you tell just what he said? A. "Youngster, you will be well—" "Youngster, you will be well repaid and well taken care of in my will."

10 Q. Is that true? A. Well, you have me confused now.

Q. Both of the propositions are incorporated in your answer now; is that the way I understand it? A. "Well repaid" is the expression.

Q. "Well repaid"? A. "Well repaid."

Q. And he didn't say anything about being taken care of in the will then? A. "Well repaid by my will."

20 Q. Oh, "Well repaid by my will"? A. "By my will."

Q. Now then, will you describe to the jury as carefully as you can, being a housewife yourself, this special food? Tell the jury about this special food. A. Custards, cereals, boiled cereals, well cooked, and any soft food; any soups, even soups, very often, I suppose.

30 Q. Of course being a lay person and only a mere man, may I inquire if that is not about the easiest possible food to prepare? A. No, I don't think so. The cereals required two hours to cook.

Q. So you didn't have to cook any fancy roasts and such as those and so forth? A. It was already cooked; it was there.

Q. He didn't eat it though? A. No, he didn't eat it.

40 Q. They were prepared for the persons in the household? A. Yes, and had he been a well man he could have eaten it.

Q. But weren't they living as one household usually lives, as an uncle and niece lives with

Addie J. Cavalier—Cross.

her husband? A. I don't understand.

Q. Weren't they living in this house as an ordinary household lives, with an uncle, his niece and her husband?

MR. QUINN: Objected to as too indefinite and one the witness can't understand. 10
(Objection sustained.)

MR. GALLAGHER: We will withdraw that question.

Q. Will you describe to the jury the manner in which Philip Coyne and Mrs. O'Connor and her husband lived there? A. Well, I don't understand what you mean, they lived.

Q. Did they have separate quarters or was Mr. Coyne treated strictly as a boarder? You know how they lived. You can tell how they lived. A. He lived among the family. They were all sociable and agreeable. 20

Q. Did I understand you to say on your direct examination that you came to that house every evening? A. Very often.

Q. Well, now there is quite a distinct difference between every evening and very often. A. Well, by that I mean I came over perhaps two or three years every evening that I drove around there. 30

Q. Every evening? A. Every evening.

Q. Are you a married woman? A. I am a married woman.

Q. Have you any family? A. No.

Q. Nobody but yourself and husband? A. No.

Q. Did you also call in the afternoon? A. No.

Q. Never called in the afternoon? A. Yes, at times I called, but not as often as in the evening. 40

Addie J. Cavalier—Cross.

Q. Did you and Mrs. O'Connor go out together frequently? A. No, we didn't go out very often.

Q. Now you have testified of your own knowledge that Mrs. O'Connor prepared this food, did the laundry and so forth, and you just testified now you came there only in the evening. A. **10** Well, I came there every evening and sometimes two or three times a week in the afternoon.

Q. Was the laundry prepared in the evening? A. No, during the day.

Q. Then you want to correct yourself, that you were there only in the evening? A. Yes, I was also there two or three times during the week during the day.

Q. Mrs. Cavalier, did Mr. Coyne in your presence ever make known any other of his personal or intimate affairs other than this proposition to take care of Mrs. O'Connor? Did he ever tell anything else to you or in your presence? A. **20** Yes, many little family details and affairs.

Q. Would you mind telling us what they were? A. Well, pertaining to his wife and different.

Q. Just tell the jury about pertaining to his wife what he said on those occasions. A. Oh, **30** I couldn't just recall.

Q. You are not clear on any of this; is that true? A. Just family conversation.

Q. But you are not clear on what was said? A. Oh, I couldn't remember anything distinctly.

Q. But you are very clear what was said three years ago New Years, just preceding his death?

A. Yes, because we were speaking on that subject; we were talking of my affairs. **40**

Q. Isn't it true that being as friendly as you are with Mrs. O'Connor that you have discussed

Addie J. Cavalier—Cross.

this case many times and this proceeding itself also? A. I didn't hear.

Q. Isn't it true that owing to your friendly, intimate relations with Mrs. O'Connor that you have discussed that lawsuit many times preceding this lawsuit? A. No.

Q. Never did? A. No.

10

Q. So that there was no discussion whatsoever on your part as to what you were to testify to today? A. No, I have seen very little of Mrs. O'Connor in the past—

Q. Was there no conversation? A. No.

Q. None whatever? A. No.

Q. Never did? A. No.

Q. So that there was no discussion whatsoever on your part as to what you were to testify to today? A. No, I have seen very little of Mrs. O'Connor in the past—

20

Q. Was there no conversation ? A. No.

Q. None whatever? A. No.

Q. So you want this jury to understand that you have never talked to anyone about what you were going to testify here today? A. No.

RE-DIRECT EXAMINATION BY MR. QUINN:

Q. You came to my office, didn't you, Mrs. Cavalier, at my request and went over this case with me, the attorney in the case? A. Yes.

30

Q. How long have you been a married woman?
A. Two years. .

BY MR. GALLAGHER:

Q. Then you did talk to Mr. Quinn about this case? A. Yes. I misunderstood.

Q. How many times? A. Once.

40

Mrs. Mamie Smith—Direct.

MRS. MAMIE SMITH, sworn for plaintiff.

DIRECT EXAMINATION BY MR. QUINN:

Q. You live at Long Branch, Mrs. Smith? A. Yes.

10 Q. And did you know Mr. Philip Coyne? A. Yes.

Q. Did you live across the street from Mr. Coyne's house? A. Yes.

Q. And up until what time did you live there? A. Well, I lived there for thirty years, I guess. Seven years ago we moved away.

Q. Were you there at any period of time when Mrs. O'Connor was there? A. Oh, yes.

20 Q. And about how long were you there during the period that she was there, if you can recall?

A. Well, I guess I must have lived there twenty-five years—twenty-four years.

Q. No, you don't understand the question. Do you recall Mrs. O'Connor? A. Yes.

Q. Living at the Coyne home? A. Yes.

Q. Were you living there at that time? A. Oh, yes; the Coyne house in Springdale.

30 Q. Now you have since moved away from there haven't you? A. Yes.

Q. And about how long were you living there at the time that Mrs. Coyne was there? A. Oh, I have lived there, I guess, about twenty-five years.

Q. No, you still don't understand. While Mrs. O'Connor was there how long were you living at that place? A. Oh, yes; I understand you. I guess about three years—two years; yes, about that.

40 Q. Do you recall seeing Mrs. O'Connor there? A. Yes, I was there when she came.

Mrs. Mamie Smith—Direct.

Q. At home? A. Yes.

Q. Did you ever call at the place? A. Yes.

Q. Did you ever have any conversation with Mr. Coyne? A. Yes.

Q. Any conversation with respect to who was taking care of him? A. We had on one occasion.

Q. Will you tell us what that was? A. Well, I was speaking about how kind it was of Mrs. O'Connor to break up her home and come to live with Mr. Coyne. 10

Q. Speak a little louder.

MR. DOHERTY: I object to what she said.

I have no objection to what he said, but not binding on us what she said.

THE COURT: Just what he said. 20

Q. What did he say as a result of that conversation? A. He said he would see that Mrs. Connor was well taken care of.

Q. Do you know of any duties that she performed there, Mrs. Smith? A. Well, she took full charge of the house, the same as any woman would do, the cooking, and prepared the meals for Mr. Coyne.

Q. The housework? A. The housework. 30

Q. Was she there also at night time? A. Also at night time.

Q. Do you recall any accident Mr. Coyne had? A. Yes, he did.

Q. What was that accident? A. He was in an automobile accident. He broke his two ribs and his wrist.

Q. He broke two ribs and his wrist? A. Yes.

Q. What did he call Mrs. O'Connor? Do you know what he called her? A. He always called her child. 40

Mrs. Mamie Smith—Direct.

Q. Child? A. Child, or young one, I forget which it was. Young one, I guess it was; some little pet name he had for her.

10 Q. Did he say anything about anyone else taking care of him? A. No, Mr. Coyne was a very old man. Nobody could touch Mr. Coyne. I knew Mr. Coyne for thirty years but when he died they came for me and I couldn't touch him. But I had lived right neighbor there thirty years except a few years. Nobody could wait on him but Lila.

Q. He wouldn't permit anybody else? A. Nobody. That man couldn't have a trained nurse touch him.

20 MR. DOHERTY: I object and ask to strike it out.

THE COURT: Yes, strike it out.

Q. Do you ever recall any specific instance where he said anything about Lila with respect to that? A. Not just exactly, as I know of, but I know for a fact, of course, no one couldn't touch him, no one couldn't wait on that man. I couldn't myself.

30 Q. Do you know whether he had any stomach trouble? A. Oh, yes; he did.

Q. Were you ever over there any time that he had spells? A. Yes.

Q. Describe those to the court and jury. A. They were just like, you know, like stomach trouble, indigestion; and prepared peppermint and just as they said, those little things for him.

40 Q. What would she have to do? A. Give him those little things, the peppermint, hot water and cake soda.

Mrs. Mamie Smith—Direct, Cross.

Q. During the night he would be sick? A. I was never there when he was sick. I know he would be sick during the night.

Q. How do you know that? A. Lila would always tell me.

Q. You can't say that. Did he have any teeth? A. Not a tooth in his head. 10

Q. Were you there when he died? A. Yes, they come for me, and I had to go home, and I was home just a little while when he died.

Q. During the three years you were there and saw Mrs. O'Connor taking care of his house and taking care of him and preparing his food and taking care of him during his illness, did you ever see any of his other relatives there? A. Mr. Coyne's? 20

Q. Taking care of him. Did you know during the period you lived there anybody take care of him except Mrs. O'Connor? A. Nobody.

CROSS EXAMINATION BY MR. STOKES:

Q. When did you say you moved away from there? A. Moved away from there seven years ago, six years ago.

Q. Then you didn't know much about Mr. O'Connor during the last six years of his life? 30

A. I used to visit them quite often. I was neighbors and only moved about fifteen minutes walk away.

Q. Well, how often did you visit the O'Connor home? A. Oh, probably a couple times a week, a couple times during the week.

Q. Did you visit Mr. Coyne or Mrs. O'Connor? A. Both of them. They were both there.

Q. Who was your friend that you went to see? 40

A. I knew them both.

Mrs. Mamie Smith—Cross.

Q. You didn't go to see Mr. Coyne, did you?

A. I certainly did.

Q. You said he was a very queer man? A. A queer man for anybody taking care of.

Q. Or any body talking to him, wasn't he? A. No, I was his neighbor, the best neighbor I had.

10 Q. But you moved away seven years ago? A. That is all right. I used to go down there.

Q. How frequently did you go to Mr. Coyne's house? A. A couple times a week.

Q. Every week in the year? A. Probably I didn't go every week. I didn't make no special practice of going.

Q. Sometimes you might not go once a month?

A. No, sir, oftener than that.

20 Q. Oftener than that? A. Yes.

Q. What time did you go? A. I didn't put it down, the day of course.

Q. What time of day did you generally go? A. In the afternoon.

Q. In the afternoon? A. Yes.

Q. Did you find Mrs. O'Connor down to her husband's store or find her at the Coyne house?

A. When I would go down she wouldn't be there. She left later in the day.

30 Q. What time did she leave to go to the store? A. Around four o'clock.

Q. You would go down to talk and she would leave the home? A. No, I never thought so.

Q. How did you know she was going to the store? A. I knew that she would go out every once in a while.

40 Q. And quite frequently she would leave about four o'clock and go up to the store? A. No particular time.

Mrs. Mamie Smith—Cross.

Q. I mean sometimes late in the afternoon.

A. Late in the afternoon, yes.

Q. Now evenings, did she go out in the evenings too? A. Sometimes.

Q. Who would be there with Mr. Coyne? A. The girl.

Q. You mean the housemaid? A. Yes. 10

Q. A servant in the house, you mean? A. Yes.

Q. Not related to anybody, simply a servant?

A. The girl.

Q. He would be left in charge of this servant who was working for Mr. and Mrs. O'Connor; is that right? A. Yes.

Q. Sure about that? A. Yes.

Q. Nobody else there would be in the house but the old gentleman eight-four years old and this servant girl? A. No. 20

Q. And she would be there frequently with him alone with the old gentleman? A. Yes; he was never left alone.

Q. How old a girl was that girl? A. Well, I guess she was about sixteen.

Q. Sixteen years old? A. Yes. No, she wasn't as old as that, maybe not. 30

MR. STOKES: If your Honor please, I think this lady should be told not to give any demonstrations by shaking her head or any other thing.

(After argument.)

A. She may not have been sixteen years old.

Q. You saw her do it and then you changed your story about being sixteen?

THE COURT: You will caution her to refrain from any demonstration. 40

Mrs. Mamie Smith—Cross.

Q. You say this girl was a young girl? A. Yes, she was a young girl.

Q. Mr. Coyne for his age was a very supple man, a very active man for a man of his age, was he not? A. Well, he was pretty active. He had the stomach trouble.

10 Q. He was a man that could take his own bath if the water was put in the tub, a man that could dress himself and undress himself? A. Yes.

Q. And a man that was up about the property? Did he have a garden on his property? A. Well, I couldn't say if he had of late years, that I don't know, if he had a garden or not.

20 Q. I am speaking of late years, when you visited there frequently. A. I don't know. He didn't have a garden when I was there because it wasn't time enough for a garden at that time.

Q. You were there, if I understood you, practically every week in the year; isn't that true? A. Well, I was there, but it wasn't garden time then.

Q. Now then, for some months of the year at least you were not there at all; isn't that true? A. No.

30 Q. How is that? A. No, I was there most every week.

Q. Did he have a garden or didn't he have a garden? A. Well, that last month I was there was the month Mr. Coyne died, It was May, wasn't it? A. There was no garden then.

Q. When did he die? A. Around the first of June is when he died.

40 Q. Well, that would be the correct time, wouldn't it, if he had one? A. Well, I don't think he had a garden at that time.

Mrs. Mamie Smith—Cross.

Q. Don't think he had? A. No.

Q. What about the year before? A. Yes, I think they had a garden the year before.

Q. How about the year before? A. I just don't remember that one. I didn't think I had to keep in mind whenever Mr. Coyne had a garden.

10

Q. You say on one occasion you heard Mr. O'Connor say something? A. No, Mr. Coyne.

Q. Mr. Coyne I mean. Now when was that occasion? A. It was shortly after Mrs. O'Connor came in to take charge of that place.

Q. Well, that is about seven years ago, you mean? A. Yes, just before I moved.

Q. Before you moved? A. Before I moved.

Q. And what was that occasion? A. I was just over making a call.

20

Q. Who else was present? A. Just Mr. Coyne and myself.

Q. Just you two? A. Yes.

Q. Mrs. O'Connor and Mr. O'Connor were not home? A. Mrs. O'Connor was home but she wasn't in the room.

Q. She wasn't in the room? A. No.

Q. Just you and Mr. Coyne had this conversation? A. Yes, sir.

30

Q. And what brought up the subject? A. I was talking about Lila coming to live with Mr. Coyne.

Q. Well, she was living with him at that time? A. Yes, she had just come there.

Q. How long before had she come there? A. Oh, just a few weeks. It was right after Mrs. Coyne had died.

Q. And what did Mr. Coyne say to you? Not what you said to him but what did he say to you? A. Well, I had said at first, I said it was

40

Mrs. Mamie Smith—Cross.

kind of Mrs. O'Connor to come and keep house for him; and he said he would see that she was well taken care of.

Q. That is all he said? A. That is all he said referring to that, yes.

Q. At that time was he able to make a will?
10 A. At that time he was able to make a will, yes.

Q. Active? A. Yes.

Q. What time of day was this conversation?
 A. Well, it was in the afternoon; I really couldn't tell you what time. It was in the afternoon.

Q. You say Mr. Coyne was ill on many occasions? A. Yes.

Q. And yet you also testified that you were never there in the night time, if I understood you; you were always in the afternoon before four o'clock? A. Yes.
20

Q. Then how do you know what his condition was in the evening? A. Well, I know he was sick; all the neighbors knew he was sick.

Q. But how did you personally know that Mr. Coyne was sick at night time if you never was there? A. Well, if one of your neighbors was sick in the neighborhood wouldn't you know it?
30

Q. Then it is only what somebody told you?
 A. Well, the doctor wouldn't go there and people know it if he wasn't sick.

Q. How many times did you see the doctor at Mr. Coyne's house while you lived there? A. Well, I couldn't tell you how many times. I often saw him but couldn't say how many times.

Q. What doctor did you see visit there? A. It was Dr. Strahan.
40

Q. Do you know whether he called to see Mr. Coyne or Mrs. O'Connor? A. He called to see Mr. Coyne.

Mrs. Mamie Smith—Cross.

- Q. How do you know that? Were you there?
 A. Because I had heard he was sick.
- Q. Oh, you had heard he was sick? A. Why, certainly.
- Q. Do you know what he was sick with? A. Stomach trouble.
- Q. How do you know that? A. Because I know he was subject to it. 10
- Q. Well, how frequently did he have stomach trouble? A. Well, he had had stomach trouble for years and he had had attacks—
- Q. Well, what I mean, a man has stomach trouble, it don't say he is sick. A. Well, he had a bad attack.
- Q. He had a bad attack every once in a while?
 A. Yes. 20
- Q. How frequently did he have any attacks?
 A. I couldn't just say; probably about every two or three weeks, something like that.
- Q. How long would the attack last? A. Two or three days.
- Q. Two or three days, then he would be all right again for two or three weeks more? A. Yes.
- Q. That is the only conversation you ever had with him anything about what he was going to do, Mrs. O'Connor would be taken care of?
 A. Yes. 30
- Q. All he ever said to you? A. Yes.
- Q. Never said anything later about it? A. No.
- Q. And yet you went there after that time, which was a few weeks after Mr. O'Connor had moved in his house, and yet he never said another word to you about it for all those seven long years you called there after that? A. No, he never talked about that. He was always praising Mrs. O'Connor. 40

Sophie Schultz—Direct.

SOPHIE SCHULZ, sworn for plaintiff.

DIRECT EXAMINATION BY MR. QUINN:

Q. Did you know Mr. Coyne? A. I did.

Q. And how long did you know him before his death? A. Oh, I guess about thirty-four
10 years.

Q. Did you ever call at his home? A. I did.

Q. Did you see Mrs. O'Connor there? A. Well, yes. I always seen her once in a while when Mrs. Coyne was alive. I often went there to visit when Mrs. Coyne was alive.

Q. Well, I mean now when Mrs. O'Connor was there. Did you call there when Mrs. O'Connor was there? A. Yes, I did.

20 Q. And what would she be doing while you were there? A. I always went there in the morning. I always saw her doing her work.

Q. Housework? A. Housework, yes; always either washing or ironing or washing dishes or cooking, doing something.

Q. Would you see Mr. Coyne there on some occasions? A. Once in a while.

Q. Do you know whether Mr. Coyne had any teeth or not? A. I couldn't tell you.

30 Q. You don't know anything about that? A. No.

Q. You just called there occasionally, did you? A. Yes.

Q. And on each of those occasions would you see Mrs. O'Connor working? A. Yes.

Q. Did you ever see any other person there, any other relatives of Mr. Coyne, who took care of him? A. No, never.

40 Q. And from the knowledge which you have do you know of any other person except Mrs.

Sophie Schultz—Direct, Cross.

O'Connor that did take care of Mr. Coyne? A. That is all I know. I lived on Springdale thirty-five years and I knew Mrs. O'Connor when she was a little child.

Q. Then do you recall where she lived before she came down to the Coyne place? A. Yes, she lived on High Street. 10

CROSS EXAMINATION BY MR. DOHERTY:

Q. Didn't Mrs. O'Connor before she was married, when she lived over on High Street— A. Oh, yes, yes.

Q. Didn't she spend much time over with her uncle Philip Coyne in your neighborhood? A. She came there quite often. Sure, Mrs. O'Connor, she has always gone with her uncle. 20

Q. Did she ever live there? A. No.

Q. Sure of that? A. No, I couldn't recall that, because she had a home on High Street.

Q. Did you ever call over to see her in High Street? A. Yes, Miss Tompkins. Her name used to be Tompkins.

Q. Mrs. Schulz, how frequently did you visit the Coyne home? A. Not very often. I used to run over there in the morning and when Mrs. Coyne was alive we used to go to church together. 30

Q. Now that is only ancient history, about Mrs. Coyne. Now at the time that Mrs. O'Connor came there to live, after Mrs. Coyne died, how frequently did you go to visit them? A. Once in a while in the morning, never in the evening.

Q. Never in the evening? A. No, never in the afternoon or evening; always went over there in the morning. 40

Q. What time in the morning? A. About between ten and eleven.

Sophie Schultz—Cross.

Q. How long would you stay when you went over there? A. Not over ten minutes.

Q. Not over ten minutes? A. No.

Q. Did you go over there every day? A. No.

Q. About how often did you go over there? A. A couple times a week.

10 Q. Twice or three times a week? A. Yes, run over; used to run over, go through the yard.

Q. And sometimes wouldn't go to the house at all? A. Yes, went in the kitchen, nowhere else only the kitchen.

Q. And there were some weeks that you didn't go over at all, weren't there? A. Sometimes.

20 Q. And there was sometimes a long period would go by that you wouldn't go over, maybe a month or two? A. Well, you know, according; when I heard they were all right then I didn't bother.

Q. When you heard that who was all right? A. When I heard they all was all right. Sometimes Mr. Coyne took sick and sometimes Mrs. O'Connor, she is a very frail small body, and I would go over to see her, because she is a frail body, and I often go see them.

30 Q. How did you know that Mr. Coyne was taken sick? Did you see him? A. No, I never went upstairs.

Q. It was what somebody told you, wasn't it? A. They told me that Mr. Coyne was very sick.

MR. DOHERTY: I ask that that testimony be stricken out. She doesn't know of her own knowledge.

MR. QUINN: It is consented to.

40 Q. So on these occasions you came over and went into the kitchen? A. Yes.

Sophie Schultz—Cross.

Q. That is as far as you got? A. That is all.

Q. You never saw Mr. Coyne; he would be out around the garden? A. When he was upstairs I never saw him.

Q. And he was either upstairs most of the time or out in the garden when the weather permitted, wasn't he, other than the occasions when he was laid up with his stomach trouble a couple of days? A. Yes. 10

Q. And he was a rather active old gentleman, wasn't he? A. Some time ago he was.

Q. Isn't it a fact that he was mowing his lawn the day that he was stricken down with illness? A. I couldn't tell you.

Q. Don't you know that you saw him around his little garden there and his house on Springdale Avenue shortly before his last illness? A. I don't live on Springdale Avenue exactly, I am in the back. But when I am in the kitchen I can't see anything. It was all in front. 20

Q. You live quite close to the Coyne house? A. Yes, I live on Waverly Place. I used to run over to Mrs. Young's house and used to go over to Mrs. Coyne's.

Q. Can you see Mr. Coyne's house from your house? A. I did. 30

Q. Can you see the garden? A. When I sit on the front stoop, which I very seldom do, I have got so much to do. You always find me in the kitchen.

Q. You always stay indoors; you never are out in the kitchen to see what other people are doing? A. No.

Q. So all you knew about what was going on all the time was when you went in the kitchen on these ten minute visits; sometimes you didn't 40

Sophie Schultz—Cross.

go there for some time; the only time you would go there was when you heard that this woman had a lot to do and when Mr. Coyne was sick; is that right? A. Yes.

Q. What did you see her do when you came over in the morning on these ten minute visits?

10 A. I seen her washing, seen her ironing and cooking or sweeping; she always done something.

Q. Now you don't know what clothes she was ironing, do you? A. No.

Q. You don't know whose clothese she was ironing? A. No.

Q. You don't know whether she was ironing her husband's clothes, do you? A. No.

20 Q. You don't know whether she was taking in washing, do you? A. No.

Q. You don't know of your own knowledge whose clothes they were, do you? A. Well, she is too frail to take in washing.

MR. DOHERTY: I ask that that be stricken out as not responsive.

THE COURT: All right. It may be.

30 Q. You don't know, Mrs. Schulz, of your own knowledge, where those clothes came from? A. No.

Q. The only thing you know is that she was working on some clothes? A. Yes.

Q. And you don't know who she was cooking for; you don't know who ate the food she was cooking in the morning, do you? A. Well, I don't know.

Eleanor Blair—Direct.

ELEANOR BLAIR, sworn for plaintiff.

DIRECT EXAMINATION BY MR. QUINN:

Q. Mrs. Blair, you are what is commonly known as a lay nurse? A. Yes, sir.

Q. And how long have you been engaged in that business? A. About forty years. **10**

Q. About how long have you been a lay nurse? A. About forty years.

Q. And what kind of services does that include? A. Well, washing, giving medicine and watching the patient, bathing.

Q. Housework? A. If the patient is ill you don't have no time.

Q. But ordinarily does it or does it not include housework? A. Yes. **20**

Q. It would include housework? A. Unless it is an old person.

Q. And have you had cases in and around Long Branch during the period that you have been engaged in that business? A. Yes, twelve years.

Q. For the last twelve years at Long Branch? A. Yes, sir.

Q. Have you taken care of old gentlemen and old ladies? A. Yes.

Q. And what is the reasonable value in that locality for such work weekly? A. At the present time? **30**

Q. At the present time. A. Thirty-five dollars a week at the present time.

Q. What was it two or three years ago or four years ago? A. Twenty-five.

Q. And how long has twenty-five been the value of those services? That is, about how long, in other words, have you been getting thirty-five? A. About three and a half years. **40**

Eleanor Blair—Direct, Cross.

Q. And before that period you were getting twenty-five for how many years? A. Ten or twelve years.

10 Q. You have heard the services testified to as to what Mrs. O'Connor did around the old Mr. Coyne. In your opinion are those prices a moderate or customary charge for those services? A. Well, for taking care of an old person they are very moderate.

Q. Is it a reasonable charge? A. Very.

CROSS EXAMINATION BY MR. DOHERTY:

Q. What care does an old person require? A. Man or woman?

20 Q. Man. A. Well, some of them require a great deal more than others.

Q. Well, assuming that the old man is able to get about his garden and he is able to work on a model and do a bit of work around, mow his lown, read his newspaper and go about the house, and he is a rather active old gentleman, as some of the witnesses put it; he is not as apt to need as much attention as an old gentleman who would not be able to go through all those functions? A. Sometimes you know they are very contrary.

30

Q. No, I am not asking you that now. Leave out every other element about their disposition. Assuming that this old gentleman was able to. A. Well, I don't know.

Q. Well, I am telling you what sort of an old gentleman he was. He was eighty-four years old when he died. He was able to be about the house, read his newspaper, get up in the morning, dress himself, clothe himself, able to come to the table and eat his meals, did not have to be carried about. He wouldn't need as much

40

Eleanor Blair—Cross.

attention as a man who was bedridden, would he? A. Certainly not.

Q. And you would take care of a case where a man was bedridden, had to be taken and carried about, for twenty-five dollars a week, wouldn't you? A. No, sir.

Q. How much would you charge? A. Well, the pay of a practical nurse depends on what kind of a case you have. **10**

Q. Would you name me some of the twelve cases that you have had where the gentleman was an old gentleman, able to get around and about, or some cases where you nursed old gentlemen or young gentlemen where they were cripples and had to be wheeled about and coddled? A. I never had a crippled case. **20**

Q. What kind of cases have you handled? A. Cases of scarlet fever and cancer.

Q. What services do you have to perform for a cancerous patient? What do you do? A. A great many things I wouldn't like to tell, but I will tell you some of them.

Q. I mean aside and apart from that that you had to go through formulas and washing certain parts of his body. I mean to include work around the house. A. Washing with water and bathing with alcohol. **30**

Q. How often? A. Five to eight times a night.

Q. Five to eight times a night? A. That is that last case I had.

Q. How often would you wash him during the day? A. Sometimes three times, sometimes more, just according to how bad he was.

Q. Well, you know how bad this patient was. **40**
We are taking just this particular patient of

Eleanor Blair—Cross.

yours, I don't care who he is or what his name is; but you wash him so many times during the night and wash him so many times during the day. What else do you do for him? A. Give him his medicine every hour or two hours, hypodermic.

10 Q. Was he in bed sometimes? A. Most of the time; sometimes; not the entire time.

Q. But most of the time he was in bed? A. Yes.

Q. Did you have to prepare his food for him? A. Most of it.

Q. What kind of food did he eat? Liquid food, wasn't it, mostly? A. No, sometimes I could fix him a real fair meal.

20 Q. Steak? A. Oh, no.

Q. Tell this jury what you mean by a real fair meal. A. Well, peas or beans, fruits and buttered toast and bread.

Q. And that required quite some preparation, didn't it? You couldn't get that together in five minutes? A. No, sir.

Q. And what else did you do for this patient if anything? A. Well,

Q. Did you bathe him? A. Oh, certainly.

30 Q. But I mean these were baths that he got in his bed? A. Cold applications on his head.

Q. And you were in constant attention upon this patient, weren't you, almost in constant touch with him at his bedside and took him to the chair? A. From one at night till one in the day some days.

Q. From one at night till one the next afternoon? A. Sometimes. Sometimes I would get away at nine.

40 Q. And during that time you attended to all his wants and was in constant attendance? A. Yes.

Eleanor Blair—Cross.

Q. Now when did you treat this patient, how many years ago? A. About a month ago.

Q. How much did you get for that? A. Thirty-five dollars.

Q. And is that the same patient that you would have gotten twenty-five dollars from five or six years ago? A. Yes. 10

Q. The same thing? A. Yes.

Q. What other patients did you have, men? A. Scarlet fever.

Q. How many patients did you have say five or six years ago of old gentlemen that you had to treat and be in constant attendance at his bedside? A. Very few gentlemen, but mostly old women.

Q. And the woemn always require more attention, don't they? A. Well, mostly. 20

Q. And how much more attention does a woman require than a man? A. That is according to the patient.

Q. Well, now, you know; you have given it—let me finish my question—you have given it as your opinion that a woman requires more attention than a man. Now would you kindly tell this court and jury what you have in your mind when you say that? How much more work do you have to do on those cases and why do you have to do more work? A. Well, they are more petty. A man is more patient. If you wait on him a little bit he is satisfied and contented, but a woman— 30

Q. A woman requires more attention, almost constantly, doesn't she? A. Yes.

Q. And in these particular cases that you have treated where you have mostly treated women and those four or five years ago, you have charged twenty-five dollars, didn't you? A. Yes. 40

Louis Moore—Direct.

MR. QUINN: I offer in evidence, if the court please, a copy of the will of Philip Coyne as recorded and shown in the surrogate's office of Monmouth County in Book 90, page 388.

10 THE COURT: Admitted.

MR. QUINN: It is conceded that a verified statement of the claim of the plaintiff was duly presented to the executors of the estate and refused.

LOUIS MOORE, sworn for Plaintiff.

DIRECT EXAMINATION BY MR QUINN:

20 Q. You are also a lay nurse, Miss Moore? A. Yes.

Q. Of Long Branch? A. Yes.

Q. How long have you been engaged as such? A. About five years.

Q. About five years? A. Yes.

Q. And what does that service consist of? A. Well, anything pertaining to nursing.

Q. General housekeeping and nursing? A. 30 Well, not as a rule; I don't take house cases if I can get out of it.

Q. Sometimes you have to do it? A. Sometimes I do but I work as a rule in the hospital.

Q. And when you take those does that include general housekeeping? A. That is according to the patient. If the patient is ill or housework is not included I don't.

Q. And if the patient is ill and someone has 40 to do the housework who does it then, the nurse? A. Well, I help. I never take full charge of it.

Q. What else does that include? A. Anything pertaining to every patient.

Louis Moore—Direct.

Q. Well, day and night? A. Well, that is according to the patient. If they are very, very sick, it is only twelve hours; but if they are so you can get a little sleep then it is twenty-four hours.

Q. Do you take any vacations during that period? A. We generally get an hour. 10

Q. An hour off every day? A. Yes.

Q. Any time off during the night? A. Well, if we want it, but if the patient is sick you can't have it. But if it is so that we can we are supposed to get two hours in the afternoon and an hour in the evening before bedtime.

Q. And what is the reasonable charge and value for the kind of— 20

MR. DOHERTY: It has not appeared yet that this woman is qualified as an expert as a lay nurse. She says she was engaged as a lay nurse for five years. That is her conclusion. She must have worked at it. There is no foundation laid to show how many patients she has treated during that time. She pretends to know a lot about it. I don't think he has qualified her. 30

Q. How many patients have you had during that time, approximately? A. I couldn't tell you offhand, but I can give you a few for two years back and give you an idea.

Q. Give me the names of a few for two years back.

THE COURT: Does she have to give the names or the number?

MR. QUINN: Do you want the names? 40

MR. DOHERTY: It doesn't matter.

Louis Moore—Direct.

Q. For a few years back how many cases have you had approximately? A. Since 1924 I have a record.

Q. How many cases have you had? A. About twenty-five.

10 Q. Twenty-five cases for the past two years; and about how many have you had before that time? Just approximate it. A. Well, I couldn't very well tell that. I haven't got a record. They were confinements. That was before I took hospital duties.

Q. Did you take care of old gentlemen at that time? A. Yes, lots of them.

Q. Elderly ladies? A. Yes.

20 Q. Now what in your opinion is a reasonable charge— A. Well, I have never got less than thirty-five a week.

Q. You had better wait till I ask the question. I had not finished. What in your opinion is the reasonable charge and fair value for such work in the vicinity of Long Branch at this time? A. I don't know. I understood they all got five dollars a day.

Q. No, at this time what is a reasonable charge? A. Well, Hazzard's was, I mean.

30 Q. That is thirty-five dollars a week? A. Yes.

Q. Three years ago what would you say it was? A. Well, I don't know what they got. I got the same as I do now.

Q. Well, would you say it was— A. I know they did get twenty-five dollars. Mother got twenty-five.

Q. Your mother? A. Yes.

Q. You say you got thirty-five? A. Yes.

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Louis Moore—Cross.

CROSS EXAMINATION BY MR. GALLAGHER:

Q. Miss Moore, since 1924 you testified you have a record of twenty-five cases? A. About twenty-five.

Q. You said something about them being hospital cases, did you? A. Yes. 10

Q. They are all hospital cases? A. Not all.

Q. About how many? A. Well, I should judge say fifteen of them.

Q. Fifteen of them would be hospital? A. Yes.

Q. And you said something about confinement. How many of them would be confinement cases? A. I haven't had but two confinements in the last two years. 20

Q. So the dates of confinement cases preceded 1924? A. Yes.

Q. Now in answer to Mr. Quinn's question you said that in your estimation a fair price for the service rendered by yourself was what you have sworn to; is that true? A. What did you say, please?

Q. Did you testify that a fair price for the services rendered by you during that time, or a person in like condition to you during that period, was thirty-five dollars, for the period of twenty-five? A. Yes. 30

Q. Is that true? A. Yes.

MR. GALLAGHER: You don't mean to, I take it, Mr. Quinn, did you qualify her on the hypothetical basis that appeared on the evidence?

MR. QUINN: No.

MR. GALLAGHER: Then she is not qualified to testify in this suit. I move to strike 40

Louis Moore—Cross.

it out unless she is qualified.

MR. QUINN: If the court please, I think the objection comes too late. She had answered the question.

THE COURT: The objection is too late.

10 Q. You heard Mr. Coyne's condition described?
A. Yes, sir.

Q. Taking all of his condition into consideration do you believe that he required the services of a lay nurse for the past three years? A. Well, not absolutely for the care of him, I don't.

Q. And for the time preceding the three years before his death do you think he required a lay nurse?

20 MR. QUINN: Objected to. It doesn't appear that she knew what his condition was three years prior to that.

THE COURT: Her answer, of course, must be confined to any evidence that has been developed here today that she has heard.

MR. GALLAGHER: Assuming that she heard the evidence that the man was up and about, barring short intervals due to stomach trouble.

30 MR. QUINN: Then I object to the question on the ground that all the facts should be included in the question. The question is asked whether or not she believes a lay nurse's services were necessary for his care. It makes no mention of the taking care of the house and cooking and so forth. It is just confined to the taking care of the old gentleman. I think all the facts should be
40 included to get her opinion.

Louis Moore—Cross.

THE COURT: Yes, just embrace in your question all the facts that the evidence has brought out as to this man's condition.

Q. Assume that Mr. Coyne was a man able to be up and about, barring the time that he was laid up due to stomach trouble and that ordinary household duties were furnished; that he was able to be up and about; do you consider your price given a fair price as applied to him? 10

MR. QUINN. Objected to, as applied to him; as applied to her, taking care of the house, also the cooking and whatever other service was done.

THE COURT: All the duties that she performed in taking care of the intestate. 20

Q. All the duties that she performed in connection with Mr. Coyne. A. I certainly think it was worth twenty-five. I wouldn't do it for that.

MR. GALLAGHER: That answer is not responsive. I ask to have it stricken out.

(Answer repeated.)

MR. GALLAGHER: We object to that part. She said "I wouldn't do it for that." 30

THE COURT: That may be stricken out.

Q. Isn't it true that in these hospital cases you testified about a great deal more care is required than one in the condition Mr. Coyne was in? A. No, I don't think so.

Q. You don't think so? A. Because we have things to work with. 40

Q. Could you give us any idea of what some of your hospital cases were? A. I have had cancer cases, I have had Bright's disease and heart trouble.

Lila O'Connor—Direct.

Q. Will you describe to the jury the treatment of the cancer cases? A. Mostly hypodermics.

Q. No bathing? A. Oh, yes; naturally; all bathing.

10 Q. How many baths? A. Well, it is according to how sick the patient is. Sometimes the bed is changed from five to six times a day and sometimes twice a day. Sometimes you won't have to change it at all.

Q. In other words, they require constant attention, don't they? A. Constant attention.

LILA O'CONNOR, sworn for plainiff.

DIRECT EXAMINATION BY MR. QUINN:

20 Q. Mrs. O'Connor, will you listen carefully to the question and not answer more than you are asked, because the law confines and restricts the testimony that you can give in this case. How old are you? A. Thirty-five.

Q. How old were you when you moved from your Broadway home in Long Branch? A. Twenty-eight.

30 Q. This question may appear strange, but listen to it. Were you in the Coyne home at any times when Mr. Coyne was not in the home with you? A. Yes, many times.

Q. And when he was outside of the house tell us what services you performed. A. Well, I always prepared the food, washing and ironing, mending his clothes, I always would lay his clothes out and fix his bath for him.

40 MR. DOHERTY: I object to what she had to do for him.

MR. QUINN: Strike that last out.

Lila O'Connor—Direct.

Q. Confine yourself now to periods when he was out of the house, not in the home there.

THE COURT: Didn't her answer confine it to that? I understood it so.

MR. QUINN: I think all but the last part.

(Testimony repeated. 10

Q. Would that be while he was out of the house? A. Laying his clothes out would be.

MR. DOHERTY: And I am going to object to it. The line of cases seem to indicate that this witness can testify to what happened when he was away, that it must be a personal transaction. But as I see it the very purpose of that statute was to prevent a woman in her position from testifying as to any transactions where the mouth of this man has been sealed in death and where he is not in a position to come in and contradict it. The mere fact that she says she does something for him when he is not physically present she says she was preparing a bath for him; and I think the very purpose of this statute is frustrated if this witness is going to be permitted, notwithstanding the fact that she says that he was not there, that these are personal transactions between her and this decedent; and I don't think that is the spirit of the statute or the spirit embodied in the decisions, to permit this witness to testify to any transactions between herself and Mr. Coyne; because it is putting the defendant in this case in a position where we can't come in to deny them. And as I understand it, the very purpose of that statute was to close the mouth of this 20
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Motions for Non-Suit.

witness when our decedent is dead and his lips are sealed in death, to come in and deny that she ever made a bath for him. If he were here we could put him on the stand, if he were removed a few feet down in the garden to come back for his bath which was there.

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MR. QUINN: I will withdraw the question and also the witness, rather than run into that technical condition.

MR. DOHERTY: I will call that objection A, and if there is any further testimony—

THE COURT: Mr. Quinn says he withdraws the question.

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PLAINTIFF RESTS.

MR. DOHERTY: Your Honor, I want to make a motion for nonsuit and I don't think the jury ought to hear it.

THE COURT: I hear those motions at side bar always.

(The court and counsel retire to chambers.)

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MOTION FOR NON-SUIT.

MR. DOHERTY: I submit to the court that the defendant moves for a nonsuit on the ground that the plaintiff has thus far, from the evidence, failed to make out a case. The plaintiff sets forth a cause of action founded upon the first and second counts, an implied and an express contract whereby the decedent promised to pay this woman for nursing and caring for him and generally performing the services of a lay nurse and demanding in the neighborhood of \$10,-

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Motions for Non-Suit.

000. And on the express contract we say that from the evidence adduced by the plaintiff thus far there is nothing that the defendant gave vent to in the form of expression that would warrant this plaintiff in understanding that she was to be paid for her services as far as he is concerned. She may have gotten that impression but I do not think that the decedent ever intended, from the form of expression that he used, taking the most favorable interpretation that could be taken from the words as used by three different witnesses, namely: "I will see that you are taken care of in a will;" or "Youngster, I will see that you are repaid in the will." But that is merely an intention evidenced by a testator that he intends to make a will or if a will has been made to reform or by a codicil annexed to his will whereby he is going to make provision for somebody in the will, and that she so understood it, that a will was to be made. Now when she finds out that a will has not been made and she is left out in the cold, so to speak, she says it was a contract, an express contract that was given vent to at that time whereby the testator agreed to pay her something and that she in turn was to receive a remuneration. I say that this is an attempt to circumvent the statute of wills. The law has been very, very careful to lay down certain formulas that must be gone through in the matter of the testator remembering the natural objects of his bounty. Of course she was not a natural object of his bounty. But I want to touch on that later on.

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Motions for Non-Suit.

10 But in any event I make the point first of all that there was no express contract. There was no meeting of minds that he was to pay her anything, and the mere fact that he did not take care of her in the will does not work out the contract. It was either his intention to take care of her in a will or it was not. Now if it was she cannot afterwards come in and say it was a contract. And I say that in this particular case the plaintiff has failed from the language used to make out an express contract.

20 An implied contract, for the same reason, a fortiori, if it does not spell out an express contract it is harder to work out an implied contract, because although all the incidents may tend to work it towards the goal that the plaintiff wants to seek in this suit, namely, the working out of an implied contract or quantum meruit, the cases in this state seem to indicate that where a woman in the position of Mrs. O'Connor goes into a household of a decedent, where this Philip Coyne is her uncle by marriage, the cases seem to indicate that the services rendered by her during a term of years is gratuitous.

30 (Continues argument and cites authorities.)

40 We also ask that this case be dismissed at this time on a point of law, because here we have a stale claim, for the reason that it is an equitable doctrine, of course, that we are trying to advance in this lawsuit. Here is a case in Pennsylvania. (Cites authorities.)

Defendant's Proffer of Proof.

(Mr. Quinn replies.)

(The court and counsel return to the court room.)

THE COURT: After considering the argument of counsel on a motion to nonsuit made in behalf of the defendant and consulting the cases which were submitted by counsel, I have reached the conclusion that the motion should be denied.

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(Objection noted for defendant as ground of appeal.)

DEFENDANT'S EVIDENCE.

MR. GALLAGHER: I want to offer in evidence Deed Book 782 at page 36, showing the transfer of a certain lot in Long Branch, Lot No. 20, situate on Springdale Avenue, as described therein, from Philip Coyne, et ux, to Jemima Randille, on the 29th day of August in the year of our Lord 1906; and in the same liber at page 39 a transfer of the same property from Jemima Randille to Lydia Lavinia Coyne. As I am going to follow this with an exemplified copy of the will of Jemima Coyne, I think it is proper to say that this Jemima Randille is a sister of Lydia Lavinia Coyne, the deceased wife of the defendant's intestate in this lawsuit; for the following purpose, supporting it by an exemplified record of the will of Lavinia Coyne; in which she gave the deceased intestate a life estate with the power to use, and failing in use with a remainder over of a onefourth interest to this plaintiff; for

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Defendant's Proffer of Proof.

10 the purpose of showing that this plaintiff was indirectly the recipient of a bounty from this decedent; and for the additional purpose of showing by the affidavit of the testatrix at the time that the real estate of his life estate was valued at \$4,750 and the personal property to be valued at \$1,200; and further supporting it by the inventory of the estate of Philip Coyne in the amount of \$6,435.12, as corrected by Mr. Quinn and myself today to \$11,935.12; for the purpose of showing that he was a man of means, had considerable means at his disposal not only through his personal estate but through his power to use the life estate, that it would be inequitable to let this plaintiff stand by and, if we may say so, encourage him to save his life estate on the theory of acquiring his personal estate, because it would be of her interest to preserve the life estate, she being the remainderman.

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MR. QUINN: I have no objection, if the court please; as a matter of fact I stipulate and agree that the present condition of the estate of Philip Coyne is \$11,935 and some odd cents. I object to the offer of the other on the ground that it is immaterial, irrelevant and incompetent, as having no bearing on the present issue; there being no claim that there was ever any payment made to the plaintiff. It is not based upon the claim of payment. Is there any claim that any payment has ever been made to the plaintiff?

MR. GALLAGHER: No, we offer it on the basis that the record speaks for itself. It

Defendant's Proffer of Proof.

is for the jury to say what a reasonable man would do, in the last analysis, and further, a reasonable man in funds, not only his own funds but funds of a deceased wife's life estate.

THE COURT: Do I understand from this offer that any part of the estate of the decedent came to the plaintiff? 10

MR. GALLAGHER: Will come to the plaintiff. The original estate of the plaintiff included this land, which it is plain to be seen was simply a wash transfer on that day certain, that he could have used it all during his lifetime.

MR. QUINN: I do not quite get the object. Is this something that the wife or sister of Philip Coyne gave to the plaintiff? 20

MR. GALLAGHER: No, Philip Coyne owned this right in this life estate originally and by a wash transaction transferred it to his wife, who through her will passed it on, through a life estate in the decedent, to this remainderman.

MR. QUINN: That is, the wife of the defendant?

MR. GALLAGHER: The wife of the defendant. 30

MR. QUINN: That is, transferred from the wife of the defendant to her niece, the plaintiff?

MR. GALLAGHER: Through the life estate in this will; and this decedent could have used the whole of that life estate.

MR. QUINN: If the court please, if the wife of the deceased or the defendant saw fit during her lifetime to make a gift to this plaintiff, her niece by marriage, I do not think it has any bearing on this case. 40

Defendant's Proffer of Proof.

10 MR. GALLAGHER: Mr. Quinn, you don't exemplified record of the will of the decedent's wife all this particular property that she acquired by a wash sale from the decedent went to the life estate of the husband with remainder over, and this plaintiff is one of the remaindermen.

MR. QUINN: That is, the wife of the defendant Philip Coyne made that transfer?

MR. COYNE: No, made a will. He made a transfer to her.

THE COURT: As I understand it, Philip Coyne conveyed this property to Randille?

MR. GALLAGHER: Yes, on the same day.

20 THE COURT: Then Randille conveyed it back to Mrs. Coyne?

MR. GALLAGHER: Mrs. Coyne—plainly a wash sale.

THE COURT: Your view is that it is simply for the purpose of enabling Mrs. Coyne to do something with it?

MR. GALLAGHER: Yes.

THE COURT: And that she then made a will leaving this property for life to her husband?

30 MR. GALLAGHER: With a power to use.

THE COURT: With a power to use it all?

MR. GALLAGHER: Correct.

MR. GALLAGHER: And at his death to go to this plaintiff?

MR. GALLAGHER: If there is a remainder left, a one-fourth interest, I think it is, two shares.

40 THE COURT: Well, that is just a little bit complicated, gentlemen.

MR. DOHERTY: The purpose of it, as I see it, and so the reason why she didn't sue in understand the point I made: that by the

Defendant's Proffer of Proof.

the decedent's lifetime, was because she would have got it out of that life estate and there would have been so much less coming to her. In other words, she has both ends.

THE COURT: Her idea is to get the life estate and also to get compensation from his estate? 10

MR. GALLAGHER: That is correct, and we believe that is for the jury to say.

MR. QUINN: Then, if the court please, as I understand it that claim was made because under the will of the wife of Philip Coyne he gives a life estate—or she gives the life estate—

MR. GALLAGHER: Life estate to Philip Coyne with the power to use, and then to the contingent remainderman. 20

(Further argument at side bar.)

THE COURT: The objection made by Mr. Quinn for the plaintiff to the offer on behalf of the defense to submit in evidence a deed made from the intestate to one Randille and to Mrs. Coyne, the wife of the intestate, and also an offer to submit in evidence the will made by Mrs. Coyne for the purpose, as stated by counsel, is sustained, that is, the objection to the admission of the evidence is sustained on the ground that it is immaterial and irrelevant to the issues in this cause. Counsel, however, do stipulate— 30

MR. QUINN: It is stipulated and agreed that the present value of the estate of Philip Coyne is \$11,935, the inventory.

MR. DOHERTY: We pray an exception to the ruling of the court. 40

Motion for Direction.

(Objection noted for defendant as ground of appeal.)

MR. DOHERTY: Of course that is all we have to offer.

Adjourned till July 16, 1926, at 9:45 A. M.

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Freehold, N. J., July 16, 1926.

Trial of the cause resumed at 9:45 A. M.

MOTION FOR DIRECTION.

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MR. DOHERTY: I would like to again renew my motion for direction of a verdict for the defendant on all of the evidence as it is now presented to the court and jury, for the reasons heretofore stated on the motion for nonsuit and for the additional reason that it now appears from the evidence introduced by the defendant that the defendant had ample means, having in his possession personal estate in the neighborhood of \$11,000; for the further reason that the evidence in the case as it now stands shows that this plaintiff, if she did perform any services for this decedent, performed the same with the expectation that she was not to be paid for the same, or, in other words, that there was no

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action in debt existing at any time during the lifetime of the decedent and this plaintiff, but that plaintiff always relied upon the fact that out of his generosity the decedent would take care of her in his will.

MR. QUINN: There was a typographical error in the first paragraph of the first count. I move to amend to correct the date from May 16, 1923, to May 16, 1925.

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THE COURT: The motion for direction of a verdict is denied.

(Objection noted for defendant as ground of appeal.)

Charge.

Gentlemen of the jury: The plaintiff in this case is Lila E. O'Connor, the defendant is Michael F. Coyne, executor of the estate of Philip H. Coyne, deceased. The suit is brought by Mrs. O'Connor against the estate of Coyne to recover for services which the plaintiff claims to have rendered to Mr. Coyne in his lifetime.

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Ordinarily where services are rendered and voluntarily accepted the law will imply a promise upon the part of the recipient to pay for them, save in those cases where the services are rendered by a member of the family in one household. The plaintiff in this case, however, does not rely upon this rule of law in seeking to recover for services which she says she rendered to Mr. Coyne. She relies upon a claim that for the services she rendered the decedent, Mr. Coyne, made an express promise to pay by a legacy.

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The law would not permit the plaintiff in this case to testify herself as to any transactions with or statements by the testator Coyne, but she produced witnesses who gave testimony which tends to support the claim made by the plaintiff both as to the services rendered and as to the promise of the recipient, Mr. Coyne, to pay for them. The plaintiff's husband testified that he and his wife, the plaintiff in this case, left their own home and took up their residence with Mr. Coyne at his request that they do so, and he further testified that Mr. Coyne promised that if Mrs. O'Connor would care for him he

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Charge.

would remember her in his will. Another witness testified for the plaintiff that she heard Mr. Coyne say to Mrs. O'Connor, the plaintiff, that she would be well repaid in his will for all that she had done for him, or words to that effect. A third witness says that Mr. Coyne said to her that Mrs. O'Connor would be well taken care of. Gentlemen, you have the testimony, the statements of these witnesses on their direct examination and you have before you any modifications of those statements which were made under cross-examination, and it is for you to find what the facts were from the testimony.

Now if the services said to have been rendered by the plaintiff were performed in the mere expectation of a legacy and not upon any understanding or contract that they would be thus compensated for or otherwise paid for, the plaintiff could not, when disappointed in that expectation, as she was, recover for the value of those services. There would not in that case be either an express or an implied contract enforceable in this court. The burden is upon the plaintiff to show that the services were not rendered gratuitously but upon a distinct understanding that they should be compensated. If you believe the testimony for the plaintiff, there being no evidence in contradiction, you must find that there was a mutual expectation that the plaintiff was to be paid for her services and that such compensation was to be paid by a provision in Mr. Coyne's will. If it was their understanding that the plaintiff should be paid for what she did, the intended will was but the method of paying an admitted obligation to compensate for services rendered, and the decedent

Charge.

having failed to pay by making any provisions for the plaintiff in his will, the plaintiff would then be entitled to recover as a creditor for the value of her services, provided, as I say, you find from the evidence that there was that promise upon the part of Mr. Coyne and a mutual expectation that the services were to be paid for in that way. 10

There is nothing in the evidence to show the amount of money that the decedent had in mind as a compensation which according to the plaintiff's case he intended to pay her for her services. In the absence of any express contract to pay a fixed or definite sum the law would imply a promise to pay what the services were reasonably worth. The plaintiff claims that she acted as general housekeeper for the decedent Coyne; she cleaned the house, did the washing, prepared his food, cared for him as a lay nurse would in his periods of indisposition, which seem, according to the evidence, to have been somewhat frequent but not prolonged, and that she generally performed the ordinary domestic duties of the home during a period extending from February 13, 1918, until May 16, 1925, which I understand, according to the testimony, was the date of Mr. Coyne's death. 20 30

Now the plaintiff seeks to recover the sum of \$9,425 as a reasonable value of the services that she rendered. My understanding is that that amount figures out, according to the length of services, at the rate of twenty-five dollars a week; so that would seem to be the value which she places upon the services which she performed.

It does not necessarily follow that if your verdict is for the plaintiff it should be for the full amount of the claim. If you find that the 40

Charge.

claim is in your judgment, based upon the evidence, excessive then it should be reduced. Now you have heard the evidence as to the nature and extent of the service rendered by the plaintiff to Mr. Coyne. It appears that the plaintiff did not devote herself exclusively to the care of the decedent. Her husband was a member of the household and necessarily some of her time must have been occupied in the performance of service of which he, her husband, was the recipient. Besides, it appears that the plaintiff gave some small portion of her time to the assistance of her husband in his business. But generally the claim of the plaintiff is that she acted as a housekeeper and when his condition required it as a nurse for Mr. Coyne; and it is for those services that she seeks to recover compensation in this suit.

Gentlemen, in the final analysis it is not for the court to say but it is for the jury to say what in your judgment as experienced men such services as you find were rendered by the plaintiff to the decedent were reasonably worth, having regard to all the circumstances as disclosed by the evidence. In a case of this kind it is the function of the jury not to be generous but to be just.

On behalf of the defendant I charge you that:

1. The burden of proof is upon the plaintiff throughout the whole case to establish her case by a fair preponderance of the evidence and this burden goes to every element which makes up the plaintiff's case, including the establishment that she performed all of her labors alleged in the complaint, such as cooking, washing and constant attendance at the Coyne home, for the exclusive benefit of the deceased Philip Coyne.

Charge.

2. The burden of proof is likewise upon the plaintiff, throughout the whole case, to establish from all the evidence and surrounding circumstances of the case that the deceased Philip Coyne agreed either expressly or impliedly to pay the plaintiff for services rendered.

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3. The burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence the reasonable value of the services rendered to Philip Coyne, if you find she rendered any such service to the deceased Philip Coyne.

Requests Nos. 4, 5, 6 and 7 are refused except as they may have been covered in the charge.

Request No. 8 is charged as follows:

8. The fact that a motion for nonsuit was made at the conclusion of plaintiff's case, and a similar motion for direction of verdict made at the conclusion of defendant's case, which motion was ruled upon by the court adversely to the defendant, is no indication to this jury as to how the case is to be decided by you. You men are the sole judges of the disputed questions of fact in this case.

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In charging that last request I call your attention to the fact that the defendant has offered no evidence to dispute the testimony offered on behalf of the plaintiff but relies upon the inferences which he asks you to draw from the plaintiff's evidence.

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As to the counterclaim filed by the defendant, gentlemen, I instruct you to disregard it for the reason there is no evidence in support of it.

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DEFENDANT'S EXCEPTIONS.

MR. DOHERTY: I except to that part of the court's charge in which he said there was nothing before the jury to consider on the question of the counterclaim; the contention being that Lester O'Connor testified that he and his wife lived at the home of the decedent during the time during which the services alleged in the complaint were supposed to have been performed.

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2. I also except to his Honor's refusal to charge requests Nos. 4, 5, 6, 7 and 9 as requested.

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3. I also except to that part of his Honor's charge wherein he says, "If you believe the witnesses for the plaintiff, there being no testimony on the part of the defendant, you must find that there was a mutual expectation that the services were to be paid for."

(The requests to charge on the part of the defendant which were refused by the court were as follows:)

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4. If you find that the plaintiff from the evidence in this case lived in the same household with Philip Coyne, as a member of the same household, and that she was related to him as a niece by marriage, then a presumption arises in favor of the defendant, that the services rendered in the household to a member occupying the same household were voluntary and gratuitous, unless the plaintiff can show by the greater weight of the evidence that there was an agreement, either express or implied, by Philip Coyne to pay her for services rendered to him.

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5. The mere fact that the plaintiff has called six witnesses to testify in her behalf to establish

Defendant's Exceptions.

the different elements of her case, does not of necessity meet the requirement of the burden of proof. You have a right to consider and inquire into the interest, bias and conduct of each witness, and as to whether any one or all of the witnesses told the truth.

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6. You also have the right to discard the testimony, from the evidence in the case, you do not consider their testimony worthy of belief.

7. If after a careful consideration of all the evidence and surrounding circumstances of this case, you find that the scale of evidence is evenly balanced, you must find your verdict for the defendant.

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9. Whether services are rendered upon an express or implied promise that compensation will be made therefor, or are performed gratuitously with a hope of recovering a legacy from a person for whom the services are rendered, is a question to be submitted to a jury when the testimony leaves the matter in dispute, the burden being on the plaintiff to establish the fact that the services were not rendered gratuitously, but upon a distinct understanding that he should be compensated; and if you find that this plaintiff relied upon Philip Coyne's generosity to take care of her in the will, she cannot recover in this suit.

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New Jersey Court of Errors and Appeals

LILA O'CONNOR,
Plaintiff-Respondent,

vs.

MICHAEL F. COYNE, Executor of
the Estate of Philip Coyne, de-
ceased,
Defendant-Appellant.

Action at Law.
On appeal from
Supreme Court,
Monmouth
Circuit.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

The above entitled action was tried in the Supreme Court, Monmouth Circuit, before the Hon. Frank B. Jess, to whom the same had been referred, and a jury. It resulted in a verdict of Nine Thousand Four Hundred and Twenty-five (\$9,425.00) Dollars for the plaintiff. Judgment was entered accordingly. It now comes before this court on appeal.

Facts.

The plaintiff, Lila O'Connor, is the niece by marriage of the defendant's testator Philip Coyne, both of whom were residents of Long Branch, N. J. When Philip Coyne's wife died on February 13th, 1918, she left her husband, Philip Coyne, a life estate in the lands and premises at #505 Springdale Avenue, Long Branch, N. J.

About this time Lester O'Connor and Lila O'Connor, his wife, the plaintiff herein, came to live with Philip Coyne at #505 Springdale Avenue and lived there until the date of the death of Philip Coyne on May 16th, 1925. During this period of approximately seven years, Lester O'Connor lived with his wife, the plaintiff herein, at #505 Springdale Avenue, taking all his meals there and Lester O'Connor, husband, and Lila O'Connor, wife, and Philip Coyne, who was about eighty-four years old at the time of his death lived as one family.

After the death of Philip Coyne, plaintiff instituted this suit against her uncle's estate for (\$10,000.00) Ten Thousand Dollars, basing her claim upon an express contract, as well also as upon an implied contract, that her uncle had requested her to act as general housekeeper, nurse him, cook for him, clean house and perform the duties of a lay nurse and that he would repay her for her services (pp. 2 and 3).

The plaintiff at the trial abandoned the theory of an implied contract and based her right to recover upon an express contract with Philip Coyne, that he had agreed to pay her for her services.

Evidence.

Lester O'Connor, husband of the plaintiff, testified that after the death of Philip Coyne's wife in February 1918, that "Mr. Coyne asked us if we would come over there and live and that he told Mr. Coyne that it was positively impossible, and that his place of business was right over his store and very handy; that Mr. Coyne told him that if Lila would come over—he was old and needed help—that if she would come over and take care

of him, he would remember her in his will" (p. 16, ll. 20-29); that he finally agreed to permit his wife to go there, because she talked to him and kind of persuaded him to go over there (p. 17, ll. 16-23), and they stayed there until Philip Coyne's death; that during the time she was at the Coyne home, she cooked, prepared meals, took care of the house (p. 17, ll. 28-30), and did the washing, housework, cooked special kinds of foods, because Philip Coyne had no teeth (p. 18, ll. 25-29); that the plaintiff also prepared baths for Philip Coyne about twice a week (p. 19, l. 25), and about once or twice a week his wife would go down to boil hot water and make cake soda for the deceased (p. 19, ll. 7 to 18); that during the time the plaintiff was in the Coyne home, she spent a couple of hours (p. 22, l. 27), two or three times a week (p. 22, ll. 14 and 15), for a period of seven years in helping her husband in his store; that he and his wife had a room in the Coyne home and had access to all the rooms in the house (p. 25, ll. 20-25), and that he and his wife had all their meals there (p. 25, l. 30) and that on all these occasions Philip Coyne was at the table other than the occasions when he couldn't come to table (p. 25, ll. 38-40); that Philip Coyne used to go out in the yard and tinker around the shop, and that the old gentleman was working on a patent, and that all of this continued up to the time of his death (p. 26, ll. 14-20); that the old gentleman could also read his newspaper (p. 26, ll. 33 and 34) and this was right up to the time of his last illness (p. 26, l. 35), which lasted about a week and a half (p. 26, l. 39), and that Mr. Coyne was working around the garden the day he was stricken (p. 29, ll. 34-42); that Mr. Coyne had a life estate in the premises where they were all living (p. 32, ll. 10-12).

Addie J. Cavalier, who has known the plaintiff for many years and who was a friend of the plaintiff a good many years (p. 34, ll. 30 to 38) testified that she called at the Coyne home several times a week perhaps every evening (p. 35, ll. 10-13), and that she knew that the plaintiff took care of the house, and took care of Mr. Coyne, cooked for him, bathed him, took care of his laundry and done all the details connected with the household (p. 35, ll. 15-20); that three years ago, New Year's, she heard Philip Coyne say "Well youngster," he always called Mrs. O'Connor youngster, he says "youngster, you will never have to worry," he said, "for I am going to see that you are well taken care of, well repaid for all you have done in my will;" (p. 36, ll. 22-27), and that he said on another occasion two days before he died, "I must get strong, I must get strong enough to make that new will" (p. 36, ll. 29-32); that ten days before he died he was out in the yard (p. 38, l. 28).

On cross-examination as to the exact words the deceased used two days before he died, she testified as follows, "I must get stronger so I can make the new will. I want to see you taken care of." She further testified that the deceased's mental condition was very good at that time (p. 39, ll. 9-14), and that he could have brought in a scrivener that day to make a will, (p. 39, ll. 28 to 32).

On cross-examination she testified further, that the expression the deceased used three years ago New Year's, was "'Youngster,' he says, 'This will never happen to you,' he says, 'I am going to see that you are well taken care of in my will'" (p. 39, ll. 34-38). She then testified that both expressions mean the same thing (p. 39, ll. 42 to 43).

Upon being pressed further as to what was said by the deceased on this point she further testified, "Youngster you will be well—Youngster

you will be well repaid and well taken care of in my will" (p. 40, ll. 7 and 8), and finally that nothing was said about "well taken care of," but that "well repaid" was the expression (p. 40, l. 15) and then again "well repaid by my will" (p. 40, ll. 17-18).

The witness further testified that she had never discussed the law suit with anyone (p. 43, ll. 5-28) but on cross-examination admitted that she talked to her attorney (p. 43, l. 32).

Mrs. Mamie Smith testified that she had a conversation with Philip Coyne and that on that occasion he said "He would see that Mrs. Connor was well taken care of." She also testified at length as to the services alleged to have been performed by Mrs. O'Connor but admitted that the only time that she was at the house was around four o'clock in the afternoon (p. 52, ll. 19-24) and then only a couple of times a week (p. 47, ll. 35-37).

Sophie Schultz did not give any testimony regarding the alleged promise of Mr. Coyne, her testimony dealing with the services alleged to have been performed by Mrs. O'Connor and she says she did not go over to the Coyne house very often and then only in the morning (p. 55, ll. 27-30) for about ten minutes (p. 56, l. 7).

Eleanor Blair, a lay nurse testified that she had been engaged in that business for forty years, and that including washing, giving medicine and watching the patient, bathing, (p. 59, ll. 5-25), and that a reasonable charge for such services was Twenty-five (\$25.00) dollars per week. On cross-examination she says that she handled scarlet fever and cancer cases and had to perform services that she wouldn't like to tell (p. 61, ll. 20-25), as well as washing with water and bathing with alcohol five to eight times a night (p. 61, ll. 30-33)

and sometimes three or more times during the day (p. 61, l. 38) and was in constant attendance upon the patient, from one at night until one in the day, some days (p. 62, ll. 32-38) and this is the sort of patient, the witness would receive Twenty-five (\$25.00) dollars per week from five or six years ago (p. 63, l. 10). She only charged Twenty-five (\$25.00) dollars four or five years ago to women patients (p. 63, ll. 39-43) and women require more attention than men (p. 63, l. 21).

Louise Moore, a lay nurse, testified she had been a lay nurse about Long Branch for five years and that she got Thirty-five (\$35.00) dollars, but that her mother got Twenty-five (\$25.00) dollars two or three years ago (p. 66, ll. 35 to 40); that she heard Mr. Coyne's condition described and that he did not require the services of a lay nurse for the past three years (p. 68, ll. 10 to 18); that fifteen out of her twenty-five cases were hospital cases (p. 67, ll. 5-13) and that treatment of these cases was mostly hypodermics (p. 70, ll. 5-6) and changing the bed five or six times a day, and that the patient required constant attention (p. 70, l. 15). On behalf of the defendant, it was stipulated, that Philip Coyne at the time of his death had Eleven Thousand Nine Hundred and Thirty-five (\$11,935) Dollars in cash as appears by the inventory (p. 79, ll. 36-39).

Statement.

The appellant does not urge grounds One and Two on the appeal, that the Court should have

non-suited or should have directed a verdict, and concedes that the question as to whether or not there was a mutual understanding between Philip Coyne and the plaintiff as to whether the services were to be paid for, under proper instructions, from the Court, was a question for the jury.

Schmetzer vs. Broegler, 105 Atl. Rep. 450;

Mulrooney vs. O'Keefe, 121 Atl. Rep. 721.

Grounds Three, Five and Six on the appeal are not urged for the reason that no exception was taken to the Court's charge on these points at the trial.

POINT I.

The Court erred in charging the jury as follows:

“If you believe the testimony for the plaintiff, there being no evidence in contradiction, you must find that there was a mutual expectation that the plaintiff was to be paid for her services and that such compensation was to be paid by a provision in Mr. Coyne's will.”

The appellant contends that the issue involved in the instant case was of momentous importance to the defendant, and that the testimony for the plaintiff in a case of this character, where the decedent's mouth has been closed in death should be taken with a great deal of caution and circumspection.

The Court adverted to the fact in this portion of the charge, that there was no evidence in con-

tradiction, but it must be borne in mind and the Court should have instructed the jury, that this was a case where it was practically impossible for the defendant to call upon any witnesses and that, therefore, the plaintiff's testimony ought to be taken with a great deal of caution, because the plaintiffs who testified, might well perjure themselves without being open to the penalties of perjury, because they could rest secure in the conviction that the grave would not open and the deceased come to confront them with his testimony.

The testimony of the husband of the plaintiff, if believed, might mean that he refused absolutely the proposition of the decedent, to have his wife go over to live with the decedent, after the decedent said he would remember her in his will (p. 17, l. 16). He says that he finally let his wife, the plaintiff go over, but having refused point blank the offer of the decedent, it does not appear from the evidence that the wife subsequently went over to the Coyne home relying upon any such promise. There is no evidence that the husband conveyed the information to his wife. It was, therefore, part of the plaintiff's case to prove the intention of the deceased, even admitting that all of the evidence for the plaintiff was true as stated by the Court. The Court took it upon itself to find as a matter of fact, that there was such an intention between the parties, because he told them in effect, that if they believed the testimony for the plaintiff they must find that there was this mutual understanding between them to pay for the services. We urge very strenuously that there is nothing in the evidence to show that if the jury believed the testimony for the plaintiff that they must find that there was a mutual expectation that the plaintiff

was to be paid for her services and that such compensation was to be paid by a provision in Mr. Coyne's will. Again, for aught that the evidence shows, it was for the jury to say, whether the plaintiff had not gone over to the Coyne home because she would have a big house in which she and her husband could live, because it appeared that her uncle had a life estate in the Springdale Avenue property (p. 32, ll. 10-12), and the jury from all of the evidence in the case had a right to infer that she may have gone over for numberless reasons other than the one reason which the Court instructed the jury upon, that they must find that she went over because she expected to be paid by a legacy.

We object further, to the language of the Court in this portion of the charge, for the reason that the jury was told that there was no evidence in contradiction to the testimony for the plaintiff. As adverted to before, it was a most difficult task for the defendant to locate any witnesses who could contradict the character of testimony that was introduced for the plaintiff. The testimony of Addie J. Cavalier, for the plaintiff, was replete with contradictions as to what the decedent had said on the question of the alleged promise. On direct examination she gave one version of what was said and on cross-examination another, and in fact gave four different versions as to what was said by the decedent. The point is further urged that the jury were misled into believing that if they believed any evidence of the plaintiff's witnesses, that they must of necessity bring in a verdict for the plaintiff. We maintain that the Court in this portion of the charge clearly usurped the province of the jury. They might well believe the testimony for the plaintiff and

decide as a question of fact that the plaintiff had gone to the home of the decedent and performed all of the alleged services relying upon the generosity of the decedent to take care of her in his will and if the jury had come to this conclusion the plaintiff could not recover. *Stone v. Todd*, 49 N. J. L. 274.

The only witness called by the plaintiff, who made any direct mention that the deceased had used the word "payment" for services, is the witness Addie J. Cavalier who made the contradictory statements as to just what was said by the testator, and which has just been pointed out to this Court. It may be contended that the Court modified this statement in other portions of his charge, but the only modification of the language used by the Court under this exception was when he charged (p. 83, ll. 6 to 11), "The plaintiff would be entitled to recover as a creditor for the value of her services, provided, as I say, you find from the evidence that there was that promise upon the part of Mr. Coyne, and a mutual expectation that the services were to be paid for in that way." We maintain that this statement did not take away from the jury the impression created in their minds, that they had to find for the plaintiff if they believed the testimony for the plaintiff. In this case, the appellant feels that the jury were misled to his injury by the language of the Court, after a full consideration of the whole charge and from all of the surrounding circumstances in the case.

Levy v. Public Service, 121 Atl. Rep. 741;
Brown v. Spence, 79 N. J. L. 452;
Crosby v. Wells, 73 N. J. L. 811.

Although there was no evidence in contradiction adduced at the trial upon direct proof by any

witness called on behalf of the defendant (although there were contradictory statements made by one of the plaintiff's witnesses on the question of alleged promise), there was a presumption of gratuitous service to be thrown in the scale of evidence on behalf of the defendant, if the jury believed that the plaintiff lived in the Coyne home as one of the members of that household, and the jury were not so informed in the charge by the Court. This question of presumption is discussed in Point II immediately following upon a request and refusal to charge.

POINT II.

The Court erred in refusing to charge the jury as follows:

“If you find that the plaintiff from the evidence in this case lived in the same household with Philip Coyne, as a member of the same household, and that she was related to him as a niece by marriage, then a presumption arises in favor of the defendant, that the services rendered in the household to a member occupying the same household were voluntary and gratuitous, unless the plaintiff can show by the greater weight of the evidence that there was an agreement either express or implied, by Philip Coyne to pay her for services rendered to him.”

The Court specifically charged the jury after stating the rule of law (p. 81, l. 10), that they need not consider that rule of law regarding those cases where the services were rendered by a member of the family, as the plaintiff relied upon an express contract. This however, does not alter the rule that the plaintiff had to overcome the presumption that these services were gratuitous, if

they found that she acted as one of the members of the family. It is true that the plaintiff did not rely upon this rule adverted to by the Court but the defendant did, and in fact that is about the only safeguard that the defendant had to rely upon.

That Mr. Coyne and the O'Connors lived as one family is conceded (p. 41, ll. 15-23). This presumption remained with the defendant throughout the whole case. The Court did not comment upon this phase of the case in the only language used by the Court on this point (p. 82, l. 27) that "The burden is upon the plaintiff to show that the services were not rendered gratuitously but upon a distinct understanding that they should be compensated." The Court failed to state to the jury that there was a presumption in favor of the gratuitous services if they found this family relation and the request to charge as to this presumption should have been given, especially in view of the fact that this was the only armor with which the defendant had to protect himself. We contend to refuse to give this instruction was damaging to the defendant and was error.

In *West vs. Prest*, 89 N. J. L. 209, it was held by this court, "That where services are rendered by members of a family living as one household, there will be no implication of a promise upon the part of the recipient to pay for the services rendered from the mere rendition and acceptance of the services; that in order to recover for said services the plaintiff must affirmatively show an express contract or that the circumstances were such as exhibit a reasonable and proper expectation that there would be compensation; and in *Disbrow vs. Durante*, 54 N. J. L. 343, this Court held, "That this rule of law applied to persons between whom there was no tie of blood, but who

lived together as one family. See *Heinz vs. Jacoby*, 76 N. J. L. 189, where it was held that in such cases a presumption arises that the services or board as the case may be, are gratuitous.

POINT III.

The Court erred in refusing to charge as follows:

“The mere fact that the plaintiff has called six witnesses to testify in her behalf to establish the different elements of her case, does not of necessity meet the requirement of the burden of proof. You have a right to consider and inquire into the interest, bias and conduct of each witness, and as to whether anyone or all of the witnesses told the truth.”

This request is based upon the familiar maxim, “*Testes ponderantur non numerantur*,” and should have been charged in view of the fact that nothing was said upon the question of burden of proof except as requested by the Defendant. Nothing was said by the Court to the jury on the question of credibility of witnesses, or as to how the jury should weigh the testimony of the witnesses. The Court in its charge did advert to the burden of the plaintiff at (p. 82, ll. 28-31) but no mention was made of the burden of proof of the plaintiff in the charge at (p. 7, ll. 7 to 10) where the jury was instructed that the plaintiff would be entitled to recover as a creditor if you find *from the evidence* that there was that promise of Mr. Coyne. * * * From this language, the jury were told, that if they found any evidence on this point, that there was such a promise, they must find that the plaintiff had made out her case. The request to charge clearly applied to the case *sub*

judice. The plaintiff's husband was unquestionably an interested party. The other witnesses, other than the expert lay nurses, were friends of the plaintiff and had been for years and the jury had a right to consider into the interest, bias and the conduct of each witness and as to whether or not any one or all of the witnesses told the truth.

The defendant further points out that the jury had before them the testimony of Lester O'Connor, that the deceased had promised to remember the plaintiff in his will and the four different versions as to what was said by the deceased on the question as to whether a promise had been made to remember the plaintiff in the will, appears in the testimony of Addie J. Cavalier. These were the only two witnesses who testified as to this alleged promise by testator to *remember*, to *re-pay* or to *take care* of the plaintiff in testator's will. The only other witness who testified as to any promise was Mrs. Mamie Smith, that "He would see that Mrs. O'Connor was well taken care of (p. 45, ll. 21-23). Nothing was said by this witness that the method of taking care of the plaintiff was *by will*. According to the evidence, if the testimony of this witness was to be believed, the Statute of Limitations was a bar to those services alleged to have been performed more than six years prior to the commencement of the suit. The Court did not charge the jury on this point. We maintain that the jury were not told that they might consider the interest, bias and conduct of these two witnesses referred to on the question of the alleged promise made by the testator that the will was to be the method of taking care of the plaintiff. The first witness, the husband of the plaintiff was assuredly an interested witness and the second, an old friend who had known the plaintiff for years, and from whose contradictory state-

ments, the jury might well say that the plaintiff had failed to make out her case.

There are several other elements in the instant case that go to the credibility of the witnesses.

First, the husband says that the promise to remember the plaintiff in the testator's will was made about the time when they first went over to live with Philip Coyne and although they lived in the said family for about seven years, up to the time of the decedent's death, he never heard the testator speak again on this subject.

The same is true of the testimony of Mamie Smith who testified that what she heard the testator say was shortly after Mrs. O'Connor came in to take care of that place (p. 51, l. 15), (which was about seven years before the testator died,) and never again heard the testator speak on this subject although she went to the house nearly every week in the year, a couple of times a week (p. 48, ll. 13-16).

Mrs. Cavalier testified that she heard the testator speak about the alleged promise to re-pay the plaintiff by his will only once about three years ago New Years, and once referred to the proposed will about two days before he died, although she came to the house every evening for two or three years (p. 4, ll. 28-31). There is the further element in the case that the old gentleman had Eleven Thousand Nine Hundred and Thirty-five (\$11,935.00) dollars at the time of his death (p. 79, ll. 37-39) and Lester O'Connor knew he had some money (p. 32, ll. 14-17).

We maintain therefore, that the decedent always had enough money on hand to pay for his help, if there was any such understanding that the plaintiff was to be paid for her services and the jury in view of the incredible story that the testator during all the time that he was at the

Coyne house only spoke upon two occasions about the alleged will, had a right to consider the credibility of the witnesses on this point.

This court in the case of *O'Connor vs. Clawans*, 133 Atl. Rep. 417 through Justice Minturn said, "No valid exception can be supported as to that procedure, since the Court properly called the attention of the jury to the fact that their verdict should not be determined by the number of witnesses, but entirely by the weight of the evidence, which comprehended the credit to be given to the testimony in view of the intelligence and interests of the witnesses, rather than by the number testifying to a given fact. That direction manifestly was in accord with the settled rule of evidence, and was unexceptionable." *Marzulli vs. Metropolitan Ins. Co.*, 81 N. J. Law, 166, 78 A. 1051.

We maintain therefore, that failure to charge under the facts in the instant case, the request to charge herein, was prejudicial error and was tantamount to an instruction by the Court, that as the plaintiff had called six witnesses on her side and the defendant had not called any witnesses, that this was sufficient to sustain the burden of proof.

POINT IV.

The Court erred in refusing to charge the jury as follows:

"You also have the right to discard the testimony of any one or all of the witnesses if in your best judgment, from the evidence in the case, you do not consider their testimony worthy of belief."

This is not a request to instruct the jury to disregard all the testimony of the plaintiff, if the

jury were satisfied that a witness or witnesses told an untruth, and we are aware that this court has held that the maxim *Falsus in uno, falsus in omnibus*, only applies where there has been a wilful attempt by a witness to falsify.

We contend that this was but another way of requesting the Court to charge the jury, that they had a right to discard the testimony of a witness, if they found that a witness was unworthy of belief, because of bias, prejudice or interest. We maintain that the requested charge should have been given.

POINT V.

The Court erred in refusing to charge the jury as follows:

“If after a careful consideration of all the evidence and surrounding circumstances of this case, you find that the scale of evidence is evenly balanced, you must find your verdict for the defendant.”

For all the reasons urged in Points III and IV on the question of credibility of witnesses and burden of proof, we contend that the Court should have charged as requested. The Court misled the jury into believing that from the evidence before them, the jury could not possibly come to the conclusion that the scale of evidence was evenly balanced, because there were several witnesses who testified for the plaintiff on the question of the testator's alleged promise, and several on the value of the alleged services. The Court told the jury “If you believe the testimony for the plaintiff, there being no evidence in contradiction, you must find that there was a mutual expectation

that the plaintiff was to be paid for her services * * * ” (p. 12, ll. 4-10) and further in charging defendant's request #8 (p. 85, ll. 20-25), reminded the jury that “the defendant had offered no evidence to dispute the testimony offered on behalf of the plaintiff but relies upon the inferences which he asks you to draw from the plaintiff's evidence.”

In answer to this, we say that the defendant relied upon the presumption that the services were gratuitous and likewise upon the meager credibility that ought to be given to the plaintiff's witnesses on the question of the alleged promise for the reasons heretofore stated. The jury were misled into believing that the scale of evidence could not possibly be evenly balanced. We maintain that if after relying upon the inferences in request #8 (p. 85, ll. 30-35), the scale of evidence was evenly balanced, that the Court did not charge the jury as to what their verdict should be.

In *Fuller vs. State Cafeteria*, 130 Atl. Rep. p. 4, this question was raised for the failure of the Court to cover the contingency that, if the evidence was in equilibrium on both sides, there should be a verdict for the defendant, and it was held not to be error, because no request was made and because the jury was told that the plaintiff had to prove his case by the greater weight of the evidence. In the instant case however, there was a request to charge and a refusal and an exception taken thereto. The only instruction upon the obligation of the plaintiff is in the language of the Court at (p. 82, l. 28), “The burden is upon the plaintiff to show that the services were not rendered gratuitously but upon a distinct understanding that they should be compensated.” Nothing was said about the weight of the evidence, or how to be determined, or that the plain-

tiff had to sustain her case by the greater weight of the evidence. It is true that defendant requested charges on the burden of proof in requests 1, 2 and 3 and that they were so charged; but defendant contends that he should have been afforded every safeguard from any misunderstanding, in view of the character of the case and the element of proof offered on behalf of the plaintiff.

We maintain that to refuse to charge as requested was error.

Respectfully submitted,

ROBERT H. DOHERTY,
Attorney for and of Counsel
with the Defendant-Appellant.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

1950-1951

PHYSICS 101

LECTURE NOTES

BY

ROBERT R. WATSON

PHYSICS DEPARTMENT

UNIVERSITY OF CHICAGO

CHICAGO, ILLINOIS

1951

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