INDEX

New Jersey Supreme Court

PASSAIC COUNTY.

MAY LOWE, (FORMERLY MAY WOOD), *Plaintiff and Appellant,* vs. CORNELIUS DOREMUS, Executor, etc., *Defendant and Respondent.*	*Notice of Appeal.*

To JOSEPH H. LECOUR, JR.,
Attorney of Defendant.

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:—

1st. The Court admitted in evidence the interrogatories propounded to the plaintiff by the defendant and the answers thereto which interrogatories and answers thereto as follows and marked "Exhibits D1 and D2.":—

FIRST INTERROGATORY: Where was the promissory note upon which this action is founded, made, and where was it delivered?

ANSWER: At Paterson, N. J. At Saddle River, Township, Bergen County, N. J.

SECOND INTERROGATORY: Who was present at the time of the delivery of said promissory note to the plaintiff?

ANSWER: No person.

THIRD INTERROGATORY: Was there any conversation had between, or statements made by, any of the persons present at the time of the delivery of said promissory note relating to said note?

ANSWER: No person present, so therefore no conversation.

FOURTH INTERROGATORY: If the answer to the foregoing interrogatory be "Yes," state what such conversation was, and what statements were made relating to said promissory note?

ANSWER: No conversation.

FIFTH INTERROGATORY: At the time and place of the delivery of said promissory note was anything said about the consideration for said promissory note, and if so, what was said concerning such consideration?

ANSWER: Decedent agreed to give plaintiff a promissory note payable thirty days after his death; for three thousand dollars, if plaintiff would stay and continue in his employ and not marry until his death.

SIXTH INTERROGATORY: What was the consideration for the making and delivery of said promissory note?

ANSWER: Continuing and staying in the employ of and not marrying until after the death of the maker, Henry Van Riper, and attending to, and caring for the wants of the said Henry Van Riper until his death.

SEVENTH INTERROGATORY: Give the date or dates on which, or between which, such consideration was given?

ANSWER: The continuing and staying in the employ of, and not marrying until after the death of said Henry Van Riper, and the attending to and caring for the wants of said Henry Van Riper from and before the date of said note until the death of said Henry Van Riper.

EIGHTH INTERROGATORY: At what place or places was each consideration given or paid?

ANSWER: At Bergen County.

NINTH INTERROGATORY: Who was present at the time such consideration was given or paid?

ANSWER: Henry Van Riper, deceased, and the members of his family, and many others, whose names the plaintiff may ascertain on or before the trial.

ISADORE V. KLENERT,
JAMES F. CARROLL,
Attorneys of Appellant.

Service of a copy of the within notice of appeal and reasons acknowledged this seventh day of February, Nineteen Hundred and Fourteen.

JOSEPH H. LECOUR, JR.,
Attorney of Respondent.

NEW JERSEY SUPREME COURT.

MAY LOWE, vs. CORNELIUS DOREMUS, Executor, Etc., of HENRY VAN RIPER, Deceased.	*On Contract. On Postea. Judgment for Defendant.*

JOSEPH H. LECOUR, JR.,
Attorney.

As yet of the twenty-fifth day of January, A. D., nineteen hundred and twelve.

Witness, WILLIAM S. GUMMERE, Esquire.
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

PASSAIC COUNTY, SS:

CORNELIUS DOREMUS, executor of the last will and testament of Henry Van Riper, deceased, the defendant in this suit, was summoned to answer unto May Lowe, (formerly May Wood) the plaintiff therein in an action upon contract, and thereupon the plaintiff by James F. Carroll, her attorney, complains; for that whereas, the said Henry Van Riper, in his life time, heretofore, to wit, on the twenty-eighth day of August, nineteen hundred and nine, at Paterson, in the County of Passaic, was indebted to the plaintiff in the sum of Five Thousand Dollars, for goods sold and delivered by the plaintiff to the said Henry Van Riper, in his life time, at his request, and in the like sum for work done and materials furnished by the plaintiff for the said Henry Van Riper, in his life time, at his request; and in the like sum for money lent by the plaintiff to the said

Henry Van Riper, in his life time, at his reqest; and in the like sum for money paid by the plaintiff for the use of the said Henry Van Riper, in his life time, at his request; and in the like sum for money received by the said Henry Van Riper, in his life time, for the use of the plaintiff; and in the like sum for interest for the forebearance by the plaintiff at the request of the said Henry Van Riper, in his life time of money due and owing from the said Henry Van Riper, in his life time, to the plaintiff; and in the like sum for money due from the said Henry Van Riper, in his life time, and the said defendant, his executor as aforesaid, since the death of the said Henry Van Riper, to the plaintiff on an account stated between them; and the said Henry Van Riper, in his life time, afterwards to wit, on the day and year last aforesaid, in the County aforesaid, faithfully promised the said plaintiff to pay her the said sums of money last mentioned on request; yet the said Henry Van Riper, in his life time, and the said defendant, his executor as aforesaid, since the death of the said Henry Van Riper, have not, nor have either of them as yet paid the several sums of money, or any part thereof, to the said plaintiff, but the said Henry Van Riper, in his life time, and the said defendant have hitherto wholly refused, and the said defendant still refuses so to do, to the damage of the said plaintiff Five Thousand Dollars, and therefore she brings her suit, etc.

GALLEY TWO—LAW 206...c,..ONcmfw

Notice is hereby given that this action is brought to recover the amount due on a note of which the following is a true copy:

Paterson, N. J., August 28th, 1909.

Thirty days after death, I promise, or authorize my executor or administrator to pay to the order of May Wood, the sum of Three Thousand ($3,000) Dollars at the First National Bank of Paterson.

HENRY VAN RIPER.

Value received.
Witness, JAMES F. CARROLL.

Endorsements—

MAY WOOD,
MAY LOWE.

Judgment will be claimed for Three Thousand Dollars, with interest thereon from August 28th, 1909. besides costs.

And the said defendant by Joseph H. Lecour, Jr., his attorney, comes and defends the wrong and injury, when etc., and says that the said Henry Van Riper, deceased, in his life time, did not undertake or promise in manner or form, as the said plaintiff hath above thereof complained against the said defendant, and of this he puts himself upon the country, etc.

And the said plaintiff, as to the plea of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Paterson, in and for the County of Passaic, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and fourteen, by whom etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the twentieth day of January, A. D. nineteen hundred and fourteen, before our said Supreme Court at Trenton come the said parties by their respective attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

This case was referred for trial to Charles C. Black, Esq., Judge of the Circuit Court by the Justice of the Supreme Court presiding in and for the Passaic Circuit Court, and was tried by the said Charles C. Black, Esq., Judge of the Circuit Court with a Jury at the Passaic Circuit on January 7th, 1914. The Jury rendered a general verdict in favor of the defendant and against the plaintiff.

Therefore it is considered that the said plaintiff, May Lowe, take nothing by her said writ, and that said defendant, Cornelius, Doremus, Executor, etc., of Henry Van Riper, deceased, do go thereof without pay, etc.

And it is further considered that the said defendant, Cornelius Doremus, Executor, etc., of Henry Van Riper, deceased, do recover against the said plaintiff, May Lowe, the sum of forty-three dollars and sixty cents, for his costs and charges by him about his defense in this behalf laid out and expended by the Court now here adjudged to the said defendant and with his assent according to the form of the statute in such case made and provided, and that the said defendant, Cornelius Doremus, Executor, etc., of Henry Van Riper, deceased, have execution thereof, etc.

Judgment signed this twentieth day of January, A. D. nineteen hundred and fourteen.

WILLIAM S. GUMMERE, *C. J.*

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and seal of said Court at Trenton, this ninth day of February, A. D. nineteen hundred and fourteen.

WILLIAM C. GEBHARDT, *Clerk.*

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

MAY LOWE (FORMERLY MAY WOOD), *Plaintiff,* vs. CORNELIUS DOREMUS, Executor, Etc. *Defendant.*	*Before Hon. Charles C. Black, J., and a Jury.*

Paterson, N. J., January 7th, 1914.

APPEARANCES:

JAMES F. CARROLL, ESQ.,
ISADORE KLENERT, ESQ.,
For the Plaintiff,

JOSEPH H. LECOUR, JR., ESQ., and
MICHAEL DUNN, ESQ.,
For the Defendant.

(A Jury being empanelled and found satisfactory, they were sworn.)

(Mr. Klenert opens for the Plaintiff.)

(Mr. Dunn opens for the Defendant).

IT IS ADMITTED that Henry Van Riper departed this life on the sixteenth day of July, 1911; and that Cornelius Doremus, the defendant was appointed Executor of his estate, under his will, and that a claim was filed by the Plaintiff against the estate for the amount due on the note sued on in this suit, and that the said claim was rejected and notice given to bring suit.

JAMES F. CARROLL, sworn as a witness on behalf of the Plaintiff, testifies as follows:
Direct Examination by Mr. Klenert.

Q. You are an attorney at law of the State of New Jersey? A. Yes, sir.

Q. Practicing the City of Paterson? A. Yes, sir.

Q. Did you know Henry Van Riper in his life time? A. Yes, sir.

Q. Did you see Mr. Van Riper sign this paper which I show you? A. Yes, sir.

Q. That is his signature attached to that paper? A. Yes, sir.

Q. Was it signed at the date of the note? A. It was signed August twenty-eighth, 1909, in my presence, and in my office in the Silk City Bank Building.

Q. And is that your name there opposite his as a witness? A. Yes, sir.

Mr. Klenert.—I offer the note in evidence, being the note sued upon in this case.

ADMITTED AND MARKED "Plaintiff's Exhibit P1" of this date.

Q. How long have you known Mr. Van Riper before the note, was signed? A. Oh, perhaps seven or eight years.

Q. Had you ever acted as counsel for him? A. I acted as counsel for him in different matters.

Mr. Dunn.—I object to this line of examination as immaterial and irrelevant.

Q. At the time that Mr. Van Riper signed this note did you have any conversation with him regarding it? A. Yes, sir.

Mr. Dunn.—I object to this line of examination as immaterial and irrelevant and move to strike out the answer.

The Court.—I will let that answer stand. Motion denied. Defendant excepts.

Q. What conversation did you have with him?

Mr. Dunn.—Objected to. The suit is brought on this note and the note is now proved and in evidence

and what conversation he may have had with the deceased is utterly immaterial.

The Court.—I will take the testimony.

Objection overruled. Defendant excepts.

A. When he came to my office on that day, and for a number of days previous to that, he was talking about this matter, he spoke to me about making out a promissory note payable to the lady who was at his house and who was Mrs. Wood at that time, on the date of the making out of the note, and he asked me to make out a promissory note, payable thirty days after his death, payable to May Wood, and he said he was giving that note because—

Mr. Dunn.—I object to it and insist that it is immaterial and incompetent.

The Court.—I will take the testimony.

Q. What did he say? A. He said he agreed to give her the note and she agreed to stay in his employ and take care of him and look after his wants until he died, and he said that he would notify her to come to me after his death for the note, which he did. That was the first time I knew her. He said that she was working in the house, and he agreed to have her stay there, she had agreed to stay and perform those services besides her work as housekeeper.

Q. Until his death? A. Until his death, yes, sir.

Q. Was that about the time the note was signed, you say? A. That was at the time the note was signed, and in that same conversation, and a dozen times previous to that, at different dates, he would call at my office probably three times a week all during that time.

Cross-Examination by Mr. Dunn:

Q. Was anything said by him as to whether she should remain unmarried during the time that he lived? A. No sir; I never heard a word from him in relation to marriage.

Q. When did you first hear that he had imposed that condition upon this plaintiff? A. The first I heard of that was when I read it in the suit after interrogatories had been served and answered by a young lawyer in my office.

Q. There were interrogatories served in this case by the defendant upon you as the attorney of the Plaintiff, were there not?

Mr. Klenert.—Objected to as not proper cross examination.

Objection overruled.

A. Yes, there were a number of interrogatories, three or four times, different interrogatories.

Q. I ask you whether or not you knew that one of the considerations of this note was that she should remain with him unmarried until his death, when you served the answers to the interrogatories propounded to the plaintiff? A. No sir, I did not draw up the interrogatories.

Q. No, the answers to the interrogatories? A. No sir. I left it to a clerk in my office.

Q. The paper was signed by you? A. Oh, yes, as I was the attorney of record. I left it to the chief clerk in the office.

Q. The answers were sworn to by her? A. Not before me.

Q. They were sworn to before Mr. Stein? A. Yes, sir; he is the gentleman who drew them up.

Q. Was that the first time that you knew that she was not to get married during the service? A. No, it was months afterwards, it was months after the suit had been started.

Q. She did not get married while he lived, did she, so far as you know? A. From what she advises me, no; she did not get married until quite some time after old Mr. Van Riper's death.

Q. August fifth, 1911, two or three weeks after his death? A. So she informs me.

DR. GEORGE B. FLOOD, sworn as a witness on behalf of the Plaintiff, testifies as follows:

Direct Examination by Mr. Klenert.

Q. You are a practicing physician in the City of Paterson? A. I am.

Q. Where is your place of business? A. No. 279 Broadway, this city.

Q. How long have you been practicing here in Paterson? A. Since 1903.

Q. Did you know Henry Van Riper? A. I did.

Q. Have you ever attended Mr. Van Riper in his lifetime? A. I attended him during April, May, June and July of 1911.

Q. And any time prior to that time? A. I have a recollection of having seen him prior to that, but I have no record of any treatment before that time.

Q. Do you remember around April and May in 1911 or at any time in 1911, having any conversation with Mr. Van Riper regarding May Lowe, in reference to a note he had given her? A. He told me that he had given her a note, or he had made an arrangement with her whereby she was to remain with him as long as he lived.

Q. What was that, I did not catch that? A. That she was to remain with him as long as he lived, she was to remain in his employ.

Q. And what was he to do, did he say? A. He told me that he had given her a note that was payable after his death.

Q. Do you remember just about the time that conversation took place? A. That was a short time before his death.

Q. He died some time in July, is that right? A. Yes, sir.

Q. And this conversation was a short time before that? A. Yes, sir.

Cross-Examination by Mr. Dunn:

Q. That is all he said, is it; I mean, in reference to the giving of the note? A. That she was to remain in his employ; yes, sir.

Q. You were not interested in what she was to do or anything about it, and this was to you just a casual remark? A. I knew nothing about it at all, only what he told me, simply that she was to remain there as long as he lived.

By Mr. Klenert:

Q. Did you ever call at his house while Mrs. Wood was there? A. I did, yes; before his death he was confined to his bed for a short time, in the house, and then he was taken to the Paterson General Hospital.

Q. Did you see Mrs. Wood there? A. I did.

Q. At any time that you called there? A. Yes, sir; I did.

Q. Did you see what she was doing there in reference to Mr. Van Riper? A. She was looking after Mr. Van Riper.

Q. Caring for him? A. Yes, sir.

By Mr. Dunn:

Q. Was his family also there looking after him? Mrs. Van Riper, was she not there? A. Well, Mrs. Van Riper was out of health at that time, I think.

By Mr. Klenert:

Q. She was what? A. She was out of health, in very poor health.

By Mr. Dunn:

Q. In that spell of sickness he remained at home four days before he was taken to the hospital? A. Well, I don't know just how long it was, but it was a short time.

Q. In the hospital? A. Yes, he was only down in bed a very short time before he died.

Q. So he was sick at home for four days and then was removed to the hospital? A. Well, he was sick at home for some time before he was sick in bed, he was sick in bed for about four days, and then for about the same length of time, as far as I can remember it, in the hospital after that.

By Mr. Klenert:

Q. Mr. Van Riper was an old man wasn't he? A. He was an old man, yes, sir.

Q. How old about? A. Between seventy and eighty years old.

Q. Was there any nurse there besides Mrs. Wood? A. Only for a day or two before he was taken to the hospital they had a practical nurse there, or a semi-professional nurse.

Q. In addition to Mrs. Wood being there? A. Yes, sir.

By Mr. Dunn:

Q. Mrs. Wood did not have anything to do with nursing Mr. Van Riper, so far as you saw? A. Just exactly the same as the other nurse would do, a semi

practical nurse, of course, is not the same as a practical nurse; they are supposed to attend as far as they can to the wants of the person.

Q. They had a professional nurse there, did they not? A. For a day or so before he went to the hospital; yes sir.

Q. And he was only sick four days? A. He was only sick in bed four days, but he was up and about and ailing and coming to my office for three months.

Q. It was not necessary then that he should have at home somebody to carry him on their hands? A. Not to carry him on their hands, exactly, but there would be a great many things that it would be necessary to do.

Q. You were not there to see who was doing those things, were you? You were not at the house during the times that he was visiting your office, to see what Mrs. Wood was doing for him or what she was not doing? A. I made calls at the house and he came to see me at the office. He was sick in bed during the last four days.

Q. You only called there four times, that was the last four days before he was taken to the hospital? A. No, that is not so.

Q. How many times did you call? A. Well, now, I have no record to tell you, but it was a bill of considerable size, about seventy or eighty dollars.

Q. I am talking about the calls at the house? A. And I was calling to see Mr. Van Riper at his house during April and May and June and July.

Q. I thought you said that he was calling at your office? A. I called on him there, to see him, and he came to see me at the office. The last four days he was confined to bed. He was a man of considerable will power and he wanted to keep on his feet as long as he could, and he came down to see me in my office when I had ordered him to remain in bed, and then I would go to see him at the house, that is exactly the way the thing was.

MAY LOWE, the Plaintiff, sworn as a witness on her own behalf, testifies as follows:
Direct Examination by Mr. Klenert:

Q. You are the plaintiff in this case? A. Yes, sir.

Q. I show you this note made the twentieth day of August, 1909, signed by Mr. Van Riper, payable to you thirty days after death for three thousand dollars, who owns this note? A. I own the note.

Q. You do? A. Yes, sir.

Q. Has it been paid by the estate of Mr. Van Riper? A. No, sir.

Q. Has any part of it been paid? A. No, sir.

No Cross Examination.

Plaintiff Rests.

Mr. Dunn.—I offer in evidence the Interrogatories propounded to the plaintiff, and the answers thereto. And I desire to read them to the jury.

Mr. Klenert.—If the Court Please, at this time I desire to make objection to the reading of the interrogatories in this case which counsel intends to read now, upon the ground that it is contrary to the law. The defendant has called upon the plaintiff for testimony, and the act strictly prohibits a person from testifying where the suit is brought in a representative capacity, unless the executor or administrator offers himself as a witness, in which case the other party may testify. Now here, the defendant is making the plaintiff a witness in the case, which is clearly in violation of the section of the law which provides that in a suit brought in a representative capacity neither party is competent to testify unless the executor or administrator offers himself as a witness, and in that case the other side has a right to testify to any transaction or statements made by the testa-

tor in his life time. The defendant now intends to offer in evidence here, evidence of the plaintiff as to statements and transactions had with the testator in his life time, which is clearly in violation of the Evidence Act, Fourth Section, page 2219, of the Revised Statutes of New Jersey.

The Court.—As I understand the situation, the plaintiff could not testify to any conversation with or transaction with the deceased, if she offered the evidence herself; but that does not preclude the executors from offering themselves or waiving the statute and then that lets the bar down for her to testify to any other transaction. Now, as I understand this is a demand that comes from the executors calling upon her to give certain testimony. If that is testimony which she could not give under the statute without their consent, they let down the bars and they let the testimony in, and they also open the door to any further testimony she may want to give after that, as I understand.

Mr. Klenert.—I do not understand it that way. The act says that it is not competent and that they cannot do it in this way. (Citing SHEPARD v. McLEAN, 18 Eq. 128; HARTMAN v. ALDEN, 34 L. 552.)

(Counsel argue the objection.)

The Court.—The statute here invoked was passed for the protection of estates, and while the strict wording of it would seem to exclude the testimony in its present shape, yet, it seems to me the sound construction of the statute is that the executors may waive the benefit of the statute if they so desire, and this testimony being offered by the executors, it will be admitted.

Objection overruled. Plaintiff excepts.

THE SAID INTERROGATORIES AND ANSWERS ARE ADMITTED IN EVIDENCE AND MARKED "Defendant's Exhibits D1 and Da" of this date.

(Counsel reads the Interrogatories and answers as follows:)

FIRST INTERROGATORY: Where was the promissory note upon which this action is founded, made, and where was it delivered?

ANSWER: At Paterson, N. J. At Saddle River Township, Bergen County, N. J.

SECOND INTERROGATORY: Who was present at the time of the delivery of said promissory note to the plaintiff?

ANSWER: No person.

THIRD INTERROGATORY: Was there any conversation had between, or statements made by, any of the persons present at the time of the delivery of said promissory note relating to said note?

ANSWER: No person present, so therefore no conversation.

FOURTH INTERROGATORY: If the answer to the foregoing interrogatory be "Yes," state what such conversation was, and what statements were made relating to said promissory note?

ANSWER: No conversation.

FIFTH INTERROGATORY: At the time and place of the delivery of said promissory note was anything said about the consideration for said promissory note, and if so, what was said concerning such consideration.

ANSWER: Decedent agreed to give plaintiff a promissory note payable thirty days after his death, for three thousand dollars, if plaintiff would stay and continue in his employ and not marry until his death.

SIXTH INTERROGATORY: What was the consideration for making and delivery of said promissory note?

ANSWER: Continuing and staying in the employ of and not marrying until after the death of the maker, Henry Van Riper, and attending to, and caring for the wants of said Henry Van Riper until his death.

SEVENTH INTERROGATORY: (Give the date or dates on which, or between which, such consideration was given?

ANSWER: The continuing and staying in the employ of, and not marrying until after the death of said Henry Van Riper and the attending to and caring for the wants of said Henry Van Riper from and before the date of said note until the death of said Henry Van Riper.

EIGHTH INTERROGATORY: At what place or places was such consideration given or paid?

Answer: At Bergen County.

NINTH INTERROGATORY: Who was present at the time such consideration was given or paid?

ANSWER: Henry Van Riper, deceased, and the members of his family, and many others, whose names the plaintiff may ascertain on or before the trial.

Signed, "James F. Carroll, attorney for Plaintiff," and dated April 24th, 1912.

STATE OF NEW JERSEY, } ss:
COUNTY OF PASSAIC, }

MAY LOWE, of full age, being duly sworn, on her oath, says that she is the plaintiff in the suit in which the foregoing answers and interrogatories are made and that the facts set out in the said answers and that the statements made therein are true to the best of her knowledge as she actually believes.

Sworn to and subscribed before me this twenty-third day of April, 1912.

BENJAMIN L. STEIN,
Attorney at Law,
New Jersey Notary Public.

Mr. Klenert.—We object to the offering of the interrogatories and answers in evidence and object to their being read and ask that they be stricken out and excluded on the grounds formerly stated.

Objections overruled; motion denied; Plaintiff excepts.

JOSEPH REED, sworn as a witness on behalf of the Defendant, testifies as follows:

Direct Examination by Mr. Dunn:

Q. Where do you reside? A. No. 104 Madison street.

Q. Do you know May Lowe, formerly May Wood? A. I do, yes, sir.

Q. Did you know her back in 1909 and before that? A. Yes, sir.

Q. In the year 1909 did you have any conversation with May Lowe in reference to a promissory note? A. Yes, sir.

Q. Whose note was it that you were talking to her about? A. That is the note that she received from Henry Van Riper.

Q. Did you know how much the note was for? A. For three thousand dollars.

Q. Did she show it to you? A. She did, yes, sir.

Q. Do you remember what month about it was that she showed it to you? A. I think it was a week or two weeks after she had received the note, one Sunday.

Q. What year was that, the same year the note was made? A. The same year the note was made, 1909.

Q. What did she say to you as to why the note was given to her? A. She called me forward, one Sunday morning, I was out there sitting in the yard and she called me forward to the house, she pulled the window down and she said, "See what I have got here; it is a note for three thousand dollars that I was speaking about, and Mr. Van Riper has given me this note if I will remain with him for the rest of his life and not marry."

Q. I show you this paper Plaintiff's Exhibit P1 and ask you if you can recognize that as being the note which she showed you? A. Yes, sir, I recognize that, yes, sir.

Cross Examination by Mr. Klenert.

Q. When did you have this conversation? A. This was about a week or two weeks after she had received the note.

Q. About when was that? A. I think September, 1909.

Q. Then she showed you the note, did she? A. Yes, sir.

Q. And she told you that Mr. Van Riper gave it to her? A. Yes, sir.

Q. Did she tell you what she was to do for that note? A. She said she was to remain with him for the rest of his life and not to marry Arthur Lowe.

ELEANOR M. VAN RIPER, sworn as a witness on behalf of the Defendants, testified as follows:

Direct Examination by Mr. Dunn.

Q. You are the widow of Henry Van Riper, are you not? A. Yes, sir.

Q. Do you remember when May Lowe came to work for you, what year it was? A. I hired her from the Intelligence Office.

Q. What year? A. I cannot remember; she was with me between six and seven years.

Q. About 1904, was it? A. Yes, sir.

Q. And she continued with you up until the time of Mr. Van Riper's death? A. Yes, sir, I hired her for general house work, I was always my own housekeeper, and I hired her simply for general house work.

Q. During the years 1907, 1908 and 1909, what were her wages per month? A. When she first came she came for ten dollars and the boy, and then I raised it to twelve, when she came back from Europe, the second time, the boy was so much larger, I raised it to fourteen and the boy.

Q. And board for herself and her boy? A. Yes. sir, for herself and the boy and fourteen dollars.

Q. And was she paid that fourteen dollars right along from that time when she came back from Europe right down to the time she left you? She was always paid, yes, sir, she was always paid, I always paid her.

Q. At the time she left you, or at the time Mr. Van Riper died, was there some little more accrued on that month that was settled or unsettled? A. Well, the time that I sent her away, when I found on looking up so much money lost, so many thousand dollars gone—

Q. Never mind that. A. Well, it is that time that I gave her this.—it was a receipt for the fourteen dollars and asked her to sign it and she would not, so then I said, 'All right, go to Judge Doremus," because I was dependent on my money all the time and I wanted to keep it separate.

Q. Judge Doremus was the executor? A. Yes, sir.

Q. And you don't know whether she was paid that last fourteen dollars or not? A. I don't know anything about it, it was only a few days, but I was going to pay her for the full month.

Q. During the time she had been working for you what was the work she was doing there?

Mr. Klenert.—Objected to as immaterial and irrelevant.

Objection overruled; Plaintiff excepts.

A. She was doing general house work, as I hired her for; Mr. Van Riper was never sick, she never took care of him at all.

Mr. Klenert.—We object to this evidence upon the ground that it is immaterial and irrelevant, this plaintiff it appears was hired as housekeeper and we do not claim under that capacity at all, we claim under the other capacity.

The Witness.—I never hired her as housekeeper at all.

Q. The question was whether during the years 1909, 1910 and 1911 up to the time of Mr. Van Riper's death with possibly two or three days' exception, she did any work any different from what she had been doing? A. No. sir, nothing at all, he was

not ill at all, he went down twice a week to be shaved to the last to Paterson.

Q. How long was he sick at home just before his death? A. He became ill first the first of April, but he was always around and I think for three or four days he was unable to be around.

Q. I mean, how long was he in bed? A. About four days.

Q. Did you have a trained nurse for him outside of that? A. Yes, the last day Dr. Flood said it was necessary or he must go to the hospital, so we did not want him to go to the hospital and we put in a trained nurse.

Q. Were you around the house at that time? A. I was there all the time, she was never upstairs at all, and the second day we had another trained nurse, the first one could not stay.

Cross Examination by Mr. Klenert.

Q. How long had Mrs. Lowe been in your employ? A. Between six and seven years, I don't know exactly.

Q. You were the one who engaged her? A. I was, yes, sir.

Q. And she remained with you continuously, did she, until your husband's death? A. Except the time she was to Europe.

Q. Until your husband's death? A. Yes, sir.

Q. She was with you up to the time of his death? A. Yes, all except the time she was in Europe.

Q. At the time of his death she was with you, she had not left your employ as yet? A. Oh, no.

Q. And it was you who after his death discharged her, is that right? A. Why, certainly, I hired her, why shouldn't I discharge her.

Q. Just answer yes or no, did you discharge her after his death? A. I certainly did.

Q. You, however, discharged her after receiving a claim from her attorney for this note, is that right? A. That is right, a few days before I knew it, a few days before this note, just then.

Q. That is when you discharged her? A. No, not when I first knew of it, no, sir.

Q. You got the claim, didn't you? A. I don't understand you.

Q. Did you receive a claim from Mrs. Lowe's attorney for this three thousand dollars? A. I was told of it.

Q. Did you receive a claim from the attorney of Mrs. Lowe for three thousand dollars? A. I don't understand you.

Q. Is that such a difficult question? A. I did not see the note, I was told about it a few days before I discharged her.

Q. By whom? A. Who I was told by?

Q. Yes? A. I really don't know.

Q. You discharged her? A. I did. Not for that alone.

Q. You discharged her? A. But for many others, many other things, too.

Q. You discharged her? A. I did.

Q. And after you had received notice of this claim for three thousand dollars, and at the time you discharged her, you wanted her to sign a paper, did you not? A. No, sir.

Q. Some paper? A. It was simply a receipt for the fourteen dollars wages, that was all.

Q. It was a release, wasn't it, that you wanted her to release the estate from all claim? A. No, not a release of anything, I don't know anything about a release.

Q. Who gave you the paper? A. I don't know, really, you confuse me, it was simply nothing at all.

DEFENDANT RESTS.

Mr. Klenert.—As a matter of information, I desire to call the plaintiff, in order to correct the part of the interrogatories which was read, as the answers were drawn by a young lawyer in the office of the counsel for the plaintiff and we desire to prove by the plaintiff herself that that part of the answers is incorrect, and as they have put in the evidence I think we have a right now to put her on the stand.

The Court.—I presume you have.

MAY LOWE, recalled as a witness on her own behalf in rebuttal, testifies as follows:

Direct Examination by Mr. Klenert.

Q. Do you remember getting this note from Mr. Van Riper? A. Yes, sir.

Q. What arrangement or agreement did you make with Mr. Van Riper?

Mr. Dunn.—Objected to.

The Court.—You may take up the interrogatories and let her explain or modify or change what the answers contain. That is what you proposed to do.

Q. Do you remember signing a paper at one time in the office of Mr. Carroll, or some office connected with Mr. Caroll, do you remember swearing to some paper? A. Yes, sir.

Q. In that paper you said the decedent, that is Mr. Van Riper, agreed to give you three thousand dollars, provided you would stay with him in his employ until his death, and not marry, is that correct?

Mr. Dunn.—We object to any explanation of the witness in reference to that for this reason: that these answers are in writing and the writing is before the Court and before the Jury, and it is put in solemn form under the statute, and the question now propounded cannot in any phase of it be said to give us any light upon what her answer was to that question. We therefore object to it as not being proper rebuttal and not being proper examination and also as contrary to the rule.

The Court.—She cannot interpret it, of course, but now she is called and she may explain or modify that answer if she has got any explanation or modification to make.

Objection overruled; Defendant excepts.

Q. What have you to say in regard to this answer which you signed for the lawyer in Mr. Carroll's office, that he would give you this three thousand dollars, that decedent agreed to give you the note for three

thousand dollars, payable thirty days after his death, if you would remain in his employ and not marry until his death? A. Well, I signed that statement.

Q. What was the agreement, was this the agreement, what you say here?

Mr. Dunn.—Object to.

Objection sustained.

The Court.—What explanation has she got if any to make in reference to that answer.

Q. What explanation have you got to make in regard to that if any? A. Well, Mr. Van Riper did not mention marriage to me.

Q. He did not mention marriage to you? A. No, sir.

Q. Was that incorrect then, the answer? A. It must have been incorrect. I signed the paper, but I was very busy at the time, I signed those papers, but I did not wait to read them, that is all, because I did not notice that.

The Court.—Is that all the explanation you have got to make.

The Witness.—Yes, sir.

Q. That is the explanation, is it? A. Yes, sir.

Q. Then in the sixth Answer again, the lawyer who drew up these interrogatories said, "Continuing and staying in the employ of and not marrying until after the death of the maker, Henry Van Riper, and attending to and caring for the wants of said Henry Van Riper until his death?" A. Well, he did not mention marriage to me.

Q. He did not? A. He did not. No, sir.

Q. And also in the seventh answer again the lawyer has said, "The continuing and staying in the employ of, and not marrying until after the death of said Henry Van Riper, and the attending to and caring for the wants of said Henry Van Riper from and before the date of said note until the death of said Henry Van Riper," explain that one? A. Well that about marriage is a mistake.

Cross Examination by Mr. Dunn.

Q. When did you discover that was a mistake? A. I discovered it on the trial.

Q. You said nothing about it at the other trial? A. No, but I discovered it and then I let it go.

Q. Do you recall of having made the same statement to Dr. Ellis, the son-in-law of Mr. Van Riper. and also to Mrs. Ellis? A. I have made no statement to Dr. Ellis, I have never spoken to him about it.

Q. That you had agreed to stay there? A. I have never spoken to Dr. Ellis about it.

Q. That you had agreed to stay there with Mr. Van Riper as long as he lived and not to get married while he lived? A. I have never spoken to Dr. Ellis nor Mr. Van Riper nor Mrs. Ellis on that question.

Q. Wasn't there anything said about that you were not to get married? A. No, not by anyone.

Q. But you did not get married? A. No, I did not, I was not asked to get married.

Q. Until two weeks after his death? A. I was not asked to get married.

Q. You got married two weeks after his death? A. Well, I may have done that.

Q. August fifth? A. Yes, I did, but that was not any of Mr. Van Riper's business.

Q. But you did not get married before that while you were working for him? A. No. I could not get married until the man asked me to get married.

Q. Did you tell a man by the name of Reed who was on the stand here, did you tell him at any time that you agreed to stay with Mr. Van Riper and not marry until after his death? A. I never mentioned it to Mr. Reed at all in any way.

PLAINTIFF RESTS.

DR. ROBERT ELLIS, sworn as a witness on behalf of the Defendant in Surrebuttal, testifies as follows:

Direct Examination by Mr. Dunn.

Q. You were a son-in-law of Henry Van Riper? A. Yes, sir.

Q. You were living up in the home in 1911 part of the time? A. I was up there during his illness, yes, sir.

Q. Did you at any time between 1909 and 1911 have any talk with Miss May Lowe concerning this note and concerning her staying there? A. Yes, sir.

Q. Did she say to you that she had this note and the consideration of it was that she was to remain in his service and remain unmarried? A. She positively did, but not in those words.

The Court.—What words did she use?

The Witness.—She stepped in the dining room in the presence of my wife and myself and made the statement. She said, "I am getting ready. I am going to leave you." I said, "Why, Mrs. Wood, don't do that in a hurry." We knew nothing about the note at that time. I said, "Don't be in a hurry to leave us, you don't need to hurry away." She said, "Yes, I must leave now, I have kept my agreement with Mr. Van Riper, I have stayed with him as long as he lived and not married. I am free now." That was the first I ever heard of it.

The Court.—Is that all she said?

The Witness.—That is the substance of what she said.

No Cross Examination.

IDA ELLIS, sworn as a witness on behalf of the Defendant in surrebuttal, testifies as follows:

Direct Examination by Mr. Dunn.

Q. You are the wife of Dr. Ellis? A. Yes, sir.

Q. And a daughter of Henry Van Riper? A. Yes sir.

Q. After the death of your father, or about the time of the death of your father, did you have any conversation with the plaintiff, May Lowe, in this case, in which she stated to you that she had agreed to remain with your father unmarried as long as he lived. A. Yes, sir.

Q. State what she said? A. She said,—well, I will have to say a few words to make it plain, I cannot express it and keep still about all that; she said

that she was going to leave, it was shortly after father's burial, about two or three days, I am not sure which, and I was much surprised, because we were complaining, mother was, about feeling badly, and I said, "Why, Mrs. Wood, why are you going to leave now?" And she said, "I have kept my agreement, I have stayed here as long as I have promised your father, I have kept my agreement, and now I am going to leave and be married to a man."

No Cross Examination.

TESTIMONY CLOSED.

Mr. Dunn.—I move for the direction of a verdict upon the ground that the Interrogatories and Answers in this case show that the consideration of this note was illegal and void and in restraint of marriage, and the evidence also shows that there was no additional consideration for this note, and the note itself shows that it was something not to be performed until after the death of the maker, practically being a testamentary gift and it is invalid as such for want of proper execution; and I base the motion for the direction of a verdict upon the ground stated in the opinion of the Court of Appeals that the plaintiff in her evidence justifies that direction.

Mr. Klenert.—It is a question for the Jury to say what was the true consideration of the note, whether to remain and take care of him until his death, or whether, in addition, she was also not to marry.

The Court.—I will let you discuss before the Jury what was the consideration of this note, and, under the ruling of the Court of Appeals if they find that the plaintiff was to remain unmarried, then their verdict must be for the defendant; if the Jury find that the consideration was simply the services, then they may find for the plaintiff. You

may discuss that question and that question only. I will deny the motion of the defense.

Motion denied; Defendant excepts.

Mr. Dunn sums up for the Defendant.
Mr. Klenert sums up for the Plaintiff.
The Court then charged the Jury as follows:

The Court.—Gentlemen of the Jury, the discussion of this case has extended over a wider field than the circumstances will justify. I am going to ask you to find in this case, and the only question that is submitted to you is, to say, whether or not, a part of the consideration of this note, was the fact that this Plaintiff was to serve the testator in his service and not marry until his death. If you find that to be the consideration of this note, then your verdict must be for the defendant, and that, not by reason of any technicality, as has been urged, not by reason of any Justice or Equity in the cause, but, because it is the law of the State, as declared by the Court of Errors and Appeals, and it is the duty of this Court to follow the rulings of that Court, and it is your duty to follow the law as given to you by this Court; and it is not for you, nor it is not for this Court, to question the wisdom of the highest Court set up and maintained by the people of the State. Now, that Court has declared the law to be, in reference to its application to this case, as follows:

"A promise by a man to an unmarried "woman that if she continue in his employ "and care for his wants until his death and "did not marry until after his death, his "executor would then pay a specified sum, "is void as an agreement in general restraint "of marriage."

And if that was the consideration of the note it was void when it was made, and it

is void now according to the decision of the Court of Appeals, and what I am submitting to you is the simple proposition to find whether it is true, as stated by this Plaintiff in her sworn statement in three separate places, under oath, and in writing, in which she said that the testator gave her the note, "If plaintiff would stay and continue in his employ, and not marry until his death." And again she stated, in a second place, "Continuing and staying in the employ and not marrying until after the death of the maker." And in a third place she stated in writing, "The continuing and staying in the employ of and not marrying until after the death of said Henry Van Riper." And I give you binding instructions, if you find that to be true, as stated by her, your verdict must be for the defendant. Because, under the decision of the Court of Appeals, if your finding were otherwise, it would be void, as an agreement in restraint of marriage.

You may find for the Plaintiff only in case you find that the consideration of the note was for services only; and if you find that to be the case you will need to know the amount for which you shall render a verdict. The note is for three thousand dollars, and it provides that it shall be paid within thirty days after the death of the testator, and it will, therefore draw interest from that time, which interest has been calculated and amounts to Four hundred and sixty 50/100 ($460.50) dollars; so that if you find under these instructions, and the only thing that is submitted to you, that the services alone were the consideration of this note, you may then find a verdict for the plaintiff in the sum of Three thousand four hundred and sixty 50/100 dollars ($3,460.50); but, if on the other hand, you find that the consideration of

the note was this plaintiff's services and not marrying, then your verdict must be for the defendant.

Do I make that clear to you, gentlemen? Is it clear to you all?

Now, do not go off into some bye path in your discussions of this case; that it is a mere technicality, and, therefore, you should disregard it; or, that it is a suit against an estate, and, therefore, nobody will be hurt; or, that these services were rendered and therefore in equity they should be paid. Lay all of those considerations out of your deliberations, and confine your deliberations and your verdict to the point, the only point that is submitted to you, that is to say, whether or not it is true that, as part of the consideration of this note, the plaintiff was to remain unmarried; and if you find that from the evidence, your verdict must be for the defendant, and, if you find that was not a part of the consideration under the explanation that is made, and that the consideration was simply services rendered, then you may render a verdict for the plaintiff in the sum of Three thousand four hundred and sixty 50/100 dollars ($3,460.50).

The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence of the truth of her claim.

Take the case, Gentlemen and find a verdict in accordance with the evidence and the law.

(The Jury then retire.)

Mr. Dunn.—The Defendant excepts to that part of the Charge in which the Court directed the Jury that they might find a verdict for the Plaintiff in case they did not find that a part of

the consideration of the note was that the Plaintiff should remain unmarried; upon the ground that the evidence did not show consideration to justify a verdict for the plaintiff, and also that the note was defective as to its form in that it is made payable after death.

ISADORE V. KLENERT,

JAMES F. CARROLL,

Attorneys of Plaintiff and Appellant.

New Jersey Court of Errors and Appeals

MAY LOWE (formerly May Wood), Appellant, against CORNELIUS DOREMUS, executor of the last Will and Testament of Henry Van Riper, deceased, Respondent.	On Appeal from New Jersey Supreme Court.

BRIEF OF MICHAEL DUNN AND JOSEPH H. LECOUR, JR., ATTORNEYS FOR AND OF COUNSEL WITH RESPONDENT.

Statement of Facts.

This action was brought by the plaintiff-appellant against the defendant-respondent, to recover the amount due on a certain promissory note made by Henry Van Riper in his lifetime, of which the following is a copy:

"Paterson, N. J., August 28th, 1909.

Thirty days after death, I promise, or authorize my executor or administrator to pay to the order of May Wood, the sum of

Three thousand ($3,000) Dollars at the First National Bank of Paterson.
Value received.

HENRY VAN RIPER.

Witness: JAMES F. CARROLL.
Endorsements. May Wood.
May Lowe."

At the first trial of the cause it was contended that no recovery could be had upon the note, First —Because it was given without consideration— Second, Because the evidence showed that it was a contract given in restraint of marriage, and was void as being contrary to public policy,—and Third, that no recovery could be had thereon because the note was payable after the death of the testator, and being devoid of valuable consideration, it was a mere gift and not enforcible against the estate.

The signature to the note was not contested at either trial. The defendant supported his contentions by the evidence of witnesses, and also by the sworn answers to interrogatories propounded to the plaintiff in which she admitted, "Answer to the Fifth Interrogatory: Decedent agreed to give plaintiff a promissory note, payable thirty days after his death, for Three thousand dollars, if plaintiff would stay and continue in his employ and not marry until after his death" (p. 19). In answer to the sixth and seventh interrogatories she also stated that the note made and delivered to her was for that consideration. Her statements as to consideration were corroborated by other witnesses. The correctness of these statements was not attempted to be contradicted by the plaintiff in that trial.

At the close of the first trial, the Trial Judge refused a motion to direct a verdict for the defendant, and erroneously directed a verdict for the plaintiff for the amount of the note and interest. This ruling was made upon the theory that an agreement not to marry did not vitiate the note.

This judgment was reviewed by the Court of Errors and Appeals, and reversed at the June Term, 1913. A *venire de novo* was awarded. In deciding the case the Court held:

> "A promise by a man to an unmarried woman that if she continued in his employ and cared for his wants until his death, and did not marry until after his death, his executor would then pay her a specified sum, is void as an agreement in general restraint of marriage."
>
> *Lowe* v. *Doremus,* 87 *Atl., p.* 459.

At the second trial, the record of which is now brought up for review, the respondent introduced practically the same evidence by witnesses as on the former trial, and the same interrogatories and answers thereto, made under oath by the apellant, were read and offered in evidence.

The plaintiff-appellant was called upon the stand and given an opportunity by the Court to explain, modify or change the answers made to the interrogatories which she had before signed and sworn to (pp. 26-27). She testified that Mr. Van Riper didn't mention about marriage to her, and that statement in her answers must have been incorrect. She admitted that she signed the paper, but said that she was very busy at the time and she did not notice that. She also admitted on cross-examination that she discovered that it was in her

answers on the first trial, but at that time she said nothing about it, and let it go. The truth of her answers was not in dispute at first trial.

A motion to direct a verdict in favor of the defendant-respondent was made and denied by the Court at the second trial, and the Court submitted the case to the jury. In his charge he said:

> "The only question that is submitted to you is to say whether or not a part of the consideration of this note was the fact that this plaintiff was to serve the testator in his service and not marry until his death (line 12). If you find that to be the consideration of this note, then your verdict must be for the defendant" (p. 31).

He further said (p. 32, l. 25):

> "You may find for the plaintiff only in case you find that the consideration of the note was for services only. * * * But if, on the other hand, you find that the consideration of the note was this plaintiff's services and not marrying, then your verdict must be for the defendant."

The jury returned a verdict for the defendant.

The only ground of appeal is predicated upon the ruling of the Court admitting to be read in evidence the interrogatories and answers thereto, which appear at pages 19-20. The objection made to the admission of the same, and the ruling of the Court will be found on pages 17 and 18.

I.

We contend that there is no error in the trial of this case and that the judgment should be affirmed.

We contend that the interrogatories and answers thereto as shown in Exhibits D-1 and D-2 (pp. 17-18) were properly admitted and read as evidence in this, the second trial of the cause.

These interrogatories were prepared and the answers to them were made in keeping with the provisions of Section 140 of the Practice Act.

The defendant sued was an executor. He was entitled to know what was the true consideration of the note on which suit was brought. The claim had been filed with him, and notice that the claim was disputed had been given by him, and afterwards this suit was instituted. To properly enable him to prepare his defense it was necessary that he should secure some information from the plaintiff as to the origin and history of the note and the consideration on which it was based. The answers were properly made; there was no objection raised to the propriety of giving the information called for; they were voluntarily prepared by the counsel for the plaintiff, sworn to by the plaintiff, and delivered to the attorney for the defendant, in keeping with the statute. They were admitted without objection and read as evidence before the jury on the former trial.

1. Under the statute it is provided that "The answers shall be evidence in the action, if offered by the party proposing the interrogatories." The offer of these interrogatories and answers in evidence was therefore proper.

2. In addition to being legal evidence under the statute, the answers having been voluntarily made and signed by the plaintiff and sworn to, the same had the force and effect of admissions made by the plaintiff against her interest, and the defendant was entitled to the benefit of the same in the trial of the cause.

The answer given under oath by appellant to the interrogatories were not compelled. If she objected to answering them she could have applied to the Court at the proper time to have the interrogatories struck out; this she did not do, but gave sworn answers to them. She cannot now repudiate those answers, because, forsooth, they contain evidence that will defeat her claim.

> "Where interrogatories are filed for the purpose of obtaining discovery, the party's answers have the force of judicial admissions in the suit in which they are made, although the answers are not made with the fomality required by the statute, or the interrogatories themselves put in evidence."
>
> *Nichols* v. *Allen,* 112 *Mass.,* 23.

And

> "statements made by a party to the record are admissible when offered against the party himself."
>
> 16 *Cyc.,* 977.

3. *The interrogatories and answers thereto were properly admitted as evidence at the second trial to show the admission in the testimony that was given by the plaintiff at the first trial.*

This contention is borne out by all the cases.

> "Statements made upon a previous trial by a party to an action, are admissible in evidence against him, not only to contradict his present testimony, but as evidence upon the issues."
>
> *McPhillips* v. *N. Y., N. H. & H. R. R. Co.*, 37 *N. Y. S. R.*, 263; 13 *N. Y. Supp.*, 917.

It was held in *Parker* v. *Chancellor* (15 *S. W.*, 157) that

> "Though the plaintiff's deposition taken by the defendant has been suppressed, the answers are admissible as admissions, on proof that they were given and subscribed by him."

It appears by the plaintiff's evidence (pp. 27-28) that she knew and understood at the first trial what was stated in the answers to these interrogatories, and she admits that she made no attempt to change or correct the statements as contained in her answers. She and her counsel permitted the case to be tried and determined on that testimony, that she was not to get married during the lifetime of Mr. Van Riper as a part of the consideration of the note. *Her conduct now is simply an afterthought due to the decision of this Court.*

II.

The objection to the admission of the interrogatories and answers as evidence is wholly without merit.

The ground on which this objection is based is stated on pages 17 and 18. It involves a reading

and construction of the third and fourth sections of the Evidence Act. The counsel for plaintiff seeks to exclude these interrogatories and answers and admissions upon the theory that they are incompetent under the Fourth Section of the Evidence Act (C. S., p. 2219).

The reasoning of the Court (p. 18) in overruling this objection is sound and is supported by authority and the very essence of the principles upon which justice is founded.

That provision of the Evidence Act was passed to protect estates, it was never intended to deprive an executor of the right to adduce a claimant upon a trial and obtain from such claimant evidence that would protect the estate from a false or unjust claim. The claimant, under the statute, could not testify in her own behalf as to actions or conversations and statements personally made to her by the deceased, but this did not prevent the executor from calling upon the claimant for information concerning the claim.

This statute making the answers to interrogatories evidence is not abridged by this Fourth Section of the Evidence Act. If the plaintiff in this case wanted to perpetrate a fraud upon this estate at the outset she should have refused to answer the interrogatories, or move to have them struck out.

The purpose of the rule of evidence governing an action brought by or against a party in a representative capacity is to put both on the same footing.

This principle is clearly enunciated in the case of *Wolverton* v. *Van Syckel*, 57 *N. J. L., page* 393, where the Court says:

> "The inhibition of the statutes where the representative party to a suit does not testify to a transaction or conversation with

> his decedent, is against testimony by the other party touching any transaction with or statement by this decedent. The design of that legislation is to produce equality between the parties to such suit."

As already stated, the answers made by appellant were voluntary. *The defendant-appellee had a right to waive the protection given him by the statute, and he elected to do so by offering appellant's answers as evidence.*

This proposition is supported by the case of *Walker* v. *Hill,* 22 *N. J. E., page* 518, where the Court held that

> "When the party with whom alone the objection lies, who is himself a competent witness, and by his own examination as a witness may remove the disqualification of the other, makes no motion to suppress the deposition of the latter, accompanied by an offer to withdraw his own deposition, but on the contrary, reads his own deposition, and relies upon it at the hearing, he will be held by such course to have elected to legalize the deposition taken on the other side, which would have been legal if taken in different order."

We therefore contend that the answers of appellant were properly admitted as evidence at the trial of the case at bar.

The objection to the competency of the plaintiff as a witness in this case comes too late, if it ever could be made. She is not here called upon to give testimony on her own behalf, she is called upon to give testimony on behalf of the executor. She is, therefore, competent. But even if the Court

should think her incompetent, and that she had a right to refuse to answer the interrogatories, the time to make that objection was before the interrogatories were answered and sworn to, and before the case was tried before the Court and jury the first time. Her testimony affected nobody but the parties to the suit, and none but the parties to the suit are interested in the exercise of power given to exclude testimony.

In *Rowland* v. *Rowland*, 40 *N. J. E.*, 280, at 283, Justice REED, speaking for the Court of Errors, says:

> "That parties may be witnesses is now the settled policy of the State. The exception engrafted upon the general incompetency of all parties, that where one is dead and is represented in the suit, then the living party shall not be permitted to testify, is only a regulation to secure mutuality in the action itself. The admission of such testimony affects no one but the parties, and none but the parties are interested in the exercise of the power given to exclude this testimony.
>
> It stands upon the same footing of any other testimony, which might have been the subject of objection, and which the parties have admitted without objection. Now, the rule is well settled that a party or his counsel cannot sit by and accept the chance of a witness making evidence in his favor, and then, after ascertaining its force, raise, for the first time, an objection to its competency."

See also

Berryman v. *Graham*, 21 *N. J. E.*, 370.

In *Boone* v. *Ridgeway Executors*, 29 *N. J. E., p.* 543, at page 545, the rule above stated is upheld. The Court there says that a party may waive the incompetency of a witness. If he wishes to prevent the witness from giving testimony, he must make the objection when the witness is called.

The executor in the case at bar had a perfect right to call upon the plaintiff for information as to the consideration of the note, and as to whether it was still due and upaid.

Suppose that in answer to an interrogatory propounded, plaintiff admitted that the note had been partially paid, although the suit was for the full face of the note, would it be contended that such an admission in writing, under oath, could not be offered in evidence by the executor to defeat the claim for the full amount due upon the note?

The Evidence Act was not passed, and cannot be construed as intending to defeat justice. It put a power into the hands of the executor to prevent fraud, but it permitted the executor to allow evidence, that he might object to, to enable him to waive his right, this was done to enable him to protect his estate.

A reading of the evidence of the plaintiff-appellant in this case in explanation of the answers made to the interrogatories (pp. 26-28) will show quite clearly that this change in the testimony is an *afterthought*. It was undoubtedly suggested for the first time, after counsel had read the opinion of the Court of Errors and Appeals in the former case.

I feel confident that the plaintiff told the truth in her answers to the interrogatories, but the de-

cision of the Court of Errors led her and her counsel to believe that she should change her positon, and take the chances of the jury believing her story. But there was other testimony in the case as to the true consideration, and as to her admissions contained in these answers which corroborated her answers as given on the first trial, and contradicted point blank her attempted denial and explanation made on this trial.

This question of fact was left to the jury.

> "The conduct of a party inconsistent with his previous contention may tend to show that the latter is an afterthought (16 Cyc., 977)."

Holding that the answers to the interrogatories were properly admitted, the verdict could not be other than for defendant in connection with the other admissions of witnesses; applying the law as stated by the Court in the appeal of the same case upon the first trial thereof, to wit:

> "The contract sued on was in general restraint of marriage, and consequently void."
>
> "The Trial Judge was influenced by the argument that the consideration of the note was severable into three distinct undertakings, the performance of any of which would constitute a good consideration. This is clearly not so. The consideration was the services of an unmarried woman who was to continue as such during the term of her employment."

By plaintiff's own testimony in her sworn answers, this was the consideration of the note.

It will be seen from the case (p. 26) that she was

permitted to give testimony in explanation of her answers. It was for the jury to say whether she was telling the truth or not when she swore to the answers.

Moreover, three reputable witnesses, Dr. Ellis (p. 29), Mrs. Ida Ellis (p. 30) and Joseph Reed (p. 31, line 40) testified that she had stated to them, at different times, that she had agreed in consideration of the note not to marry while Mr. Van Riper lived.

III.

The verdict of the jury is supported by the evidence and the correctness of their conclusion as to facts will not be reviewed by this Court on error.

In this case it was left to the jury to decide. There was evidence upon which they could decide in favor of the defendant. Their finding on this point is not reviewable on this appeal, but is binding upon this Court.

CONCLUSION.

We therefore submit that the judgment should be affirmed, and this appeal dismissed with costs.

Respectfully submitted,

MICHAEL DUNN,
JOSEPH LECOUR, JR.,
Of Counsel for Respondent.

New Jersey Court of Errors and Appeals

MAY LOWE, (FORMERLY MAY WOOD), *Plaintiff and Appellant,* *vs.* CORNELIUS DOREMUS, EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF HENRY VAN RIPER, DECEASED, *Defendant and Respondent.*	*On Appeal from New Jersey Supreme Court.*

This action was brought to recover the sum due on a promissory note made by Henry Van Riper, during his life-time, of which the following is a copy:

Paterson, N. J., August 28th, 1909.

Thirty days after death, I promise or authorize my executor or administrator to pay to the order of May Wood, the sum of Three Thousand Dollars ($3,000), at the First National Bank of Paterson.

Value received. HENRY VAN RIPER.

Witness: JAMES F. CARROLL.

ENDORSEMENTS: MAY WOOD.
MAY LOWE.

The above Henry Van Riper, maker of the promissory note in question departed this life on July sixteenth, nineteen hundred and eleven, leaving a last will and testament which was duly probated in the Surrogate's office of Bergen County, in which the defendant Cornelius Doremus is named as executor, who duly qualified.

At the trial below the court allowed and permitted the defendant, who is sued in a representative capacity, over the objection of the plaintiff, to put in evidence answers of the plaintiff to interrogatories of the defendant, which answers relate to transactions with and statements by the deceased, and the plaintiff. The interrogatories and answers being as follows:

First Interrogatory: Where was the promissory note upon which this action is founded, made, and where was it delivered?

Answer: At Paterson, N. J. At Saddle River Township, Bergen County, N. J.

Second Interrogatory: Who was present at the time of the delivery of said promissory note to the plaintiff?

Answer: No person.

Third Interrogatory: Was there any conversation had between, or statements made by, any of the persons present at the time of the delivery of said promissory note relating to said note?

Answer: No person present, so therefore no conversation.

Fourth Interrogatory: If the answer to the foregoing interrogatory be "Yes," state what such conversation was, and what statements were made relating to said promissory note?

Answer: No conversation.

Fifth Interrogatory: At the time and place of the delivery of said promissory note was anything said about the consideration for said promissory note, and if so, what was said concerning such consideration?

Answer: Decedent agreed to give plaintiff a promissory note payable thirty days after his death, for three thousand dollars, if plaintiff would stay and continue in his employ and not marry until his death.

Sixth Interrogatory: What was the consideration for the making and delivery of said promissory note?

Answer: Continuing and staying in the employ of and not marrying until after the death of the maker, Henry Van Riper, and attending to, and caring for the wants of said Henry Van Riper until his death.

Seventh Interrogatory: Give the date or dates on which, or between which, such consideration was given?

Answer: The continuing and staying in the employ of, and not marrying until after the death of said Henry Van Riper, and the attending to and caring for the wants of said Henry Van Riper from and before the date of said note until the death of said Henry Van Riper.

Eighth Interrogatory: At what place or places was such consideration given or paid?

Answer: At Bergen County.

Ninth Interrogatory: Who was present at the time such consideration was given or paid?

Answer: Henry Van Riper, deceased, and the members of his family, and many others, whose names the plaintiff may ascertain on or before the trial.

At the trial below, the defendant who was being sued in a representative capacity, did not offer himself as a witness on his own behalf, and did not testify to any statement with or transaction by his testator; under our Evidence Act, he was entitled to do so, but did not avail himself of the opportunity.

The plaintiff contends that the trial court erred when it allowed and permitted the defendant to put the above interrogatories and answers in evidence over the objection of the plaintiff. It is the contention of the plaintiff that the defendant being sued in a representative capacity could not under our statute do so, unless he, himself first was sworn as a witness on his own behalf and testified to one or more transaction with or statement by his testator with the plaintiff. The trial

court below in allowing and permitting these interrogatories and answers in evidence under such circumstances, directly violated Sections 3 and 4 of our Evidence Act (Compiled Statutes of New Jersey, Vol. 2, page 2,218).

Section 3 reads as follows:

"No person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credit; *provided, no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness.*"

As is plainly seen by this section, no person shall be disqualified as a witness, *provided no party shall be sworn in any case when the opposite party is prohibited by any legal disability* from being sworn as a witness; now, in this case, the plaintiff was disqualified as a witness owing to the legal disability of her testifying, unless the defendant offered himself as a witness on his own behalf and testified to one or more transaction with or statement by his testator with the plaintiff.

Section 4 of the Evidence Act places this legal disability upon the plaintiff in this case:

It grants to the defendant the right to remove this disability from the plaintiff by the defendant doing a certain act, and that act is to offer himself as a witness on his own behalf and testify to any transaction or statement by his testator, and then by so doing lifts the legal disability off the plaintiff, as provided by the third section, and when such disability is removed, then the plaintiff could, under the fourth section of the Evidence Act, testify to any and all statements by and transactions with the testator.

"In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party

thereto may sue or be sued in a representative capacity; provided this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to the issue."

Sec. 4. Compiled Statutes of N. J., Vol. 2, p. 2,218.

The object of these sections is that both parties to the suit, would, in going into court be on an equal basis; the one is silenced by law and the other silenced by death. It is the intention of the law to prohibit the living party from testifying to any statements or transactions with the deceased person, where the deceased person could not be represented in person. In this case the plaintiff was the person who was silenced by law by reason of the third and fourth sections of our Evidence Act, and the defendant was silenced by the death of his testator, and in order for the admission of the above interrogatories and answers in the case on behalf of the defendant, the defendant must lift the legal disability attached to the plaintiff by reason of the third and fourth sections of the Evidence Act, and offer himself as a witness on his own behalf and testify to some transaction with or statement by his testator, according to the strict wording of the fourth section of the Evidence Act.

In the case of Lodge, Administrator vs. Hulings, Executor, 64 E., 761 (Affirming 63 E., 159) the court held:

"By the true construction of Sections 3 and 4 of the Evidence Act, as revised in 1900, a party to a suit is

a competent witness, notwithstanding that either, or both, of the parties appear on the record in a representative capacity, but, when that is the case, a party offering himself as a witness will not be permitted to testify concerning any transaction with, or statement by, the decedent of his adversary, unless his adversary first offers himself as a witness and testifies to a transaction with, or statement by, such decedent."

The complainant is not a competent witness where any of the defendants are sued in a representative capacity.

Force vs. Dutcher, 18 E., 401.

Sweet vs. Parker, 22 E., 453.

Montgomery vs. Simpson, 31 E., 1.

Petty vs. Petty, 31 E., 8.

Under the fourth section of the Evidence Act aforesaid, the wording is very plain and exact; it distinctly states that *no testimony* can be given by any party to the action as to any transaction with or statement by the testator, unless the representative offers himself as a witness on his own behalf and testifies to some transaction with or statement by the testator. Now, unless the representative performs this obligation, the plaintiff could not testify to any such statements or transactions above set forth.

In the cases of Yetman vs. Dey, 33 L., 32 and Handlong vs. Barnes, 30 L., 69, it was held, that any testimony given by a witness who is disqualified by law, will not be rendered competent by the subsequent offer and admission of such disqualified witness.

It is well settled in this state, not only by statute, but by the decisions of our courts, that in cases, such as this one, that the plaintiff is incompetent as a witness as to any transactions with or statements by the testator, unless the defendant representative, first offers himself as a witness on his own behalf and testifies

to some transaction with or statement by his testator, and unless the representative does so, the plaintiff is silenced from testifying by virtue of the third and fourth sections of our Evidence Act. (Compiled Statutes of N. J., Vol. 2, p. 2,218.)

See

Matthews vs. Hoagland, 48 Eq., 456.

Tichenor vs. Tichenor, 43 Eq., 163.

Montgomery vs. Simpson, 31 Eq., 314.

Sweet vs. Parker, 22 Eq., 455.

Shepherd vs. McClain, 18 Eq., 128.

Lanning vs. Lanning, 17 Eq., 228.

Haines vs. Watts, 26 At. Rep., 572.

ISADORE V. KLENERT,
JAMES F. CARROLL,
Attorneys of Appellant.