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Summons.

SUMMONS.

Filed December 28, 1933.

The State of New Jersey to Edward Lukowiak, Anna Lukowiak,
(SEAL) Joseph M. Lukowiak and Helen Lukowiak, his wife: 10

You are summoned to answer the annexed complaint of Jerome T. Field and Helen Grace Kearney, administrators of the estate of Edwin J. Field, deceased, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in this suit, and judgment may be entered against you. 20

(And see notice endorsed thereon.)

WITNESS, THOMAS J. BROGAN, Chief Justice of the Supreme Court, at Trenton, this 28th day of December, 1933.

FRED L. BLOODGOOD,
Clerk.

ALBERT F. BENDER, 30
Attorney.

Summons.

Notice to Within Named Defendants:

10 In case the within Summons and Complaint are served upon you personally, then take notice that if you intend to make a defense to said action, you must file an Affidavit of Merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing thereof judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of the rule under which this notice is given (P. L. 1913, p. 394, Rule 56).

ALBERT F. BENDER,
Attorney for Plaintiffs.

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30

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Complaint.

COMPLAINT.

Filed December 28, 1933.

New Jersey Supreme Court

UNION COUNTY.

10

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

Plaintiffs,

vs.

EDWARD LUKOWIAK, *et al.*,

Defendants.

*Action
at Law.*

Complaint.

20

Plaintiffs, Jerome T. Field of the Town of Westfield, County of Union and State of New Jersey, and Helen Grace Kearney of the City of Paterson, County of Passaic and State of New Jersey, administrators of the estate of Edwin J. Field, deceased, say that:

FIRST COUNT.

30

1. On August 15th, 1931, defendants, Edward Lukowiak, Joseph N. Lukowiak, Anna Lukowiak and Helen Lukowiak, made a certain demand note for the sum of Sixteen Hundred Dollars (\$1,600.00), to Edwin J. Field, a copy of which is hereto annexed, made a part hereof and marked Exhibit "A."

2. On December 8th, 1931, Edwin J. Field, departed this life and on January 20th, 1932,

40

Complaint.

Jerome T. Field and Helen Grace Kearney, were appointed administrators of his estate.

3. Plaintiffs now hold said note which has not been paid.

10 Plaintiffs demand as damages on the First Count the sum of Sixteen Hundred Dollars (\$1,600.00), as well as interest from August 15th, 1931, and costs of suit.

SECOND COUNT.

1. On divers dates Edwin J. Field advanced to Edward Lukowiak, the sum of Four Thousand, Six Hundred Dollars (\$4,600.00), as a loan. The aforesaid sum was advanced on the dates more fully set out in Schedule "B," hereto
20 annexed and made a part hereof.

2. On December 8th, 1931, Edwin J. Field, departed this life and on January 20th, 1932, Jerome T. Field and Helen Grace Kearney, were appointed administrators of his estate.

3. No part of said sum of Four Thousand, Six Hundred Dollars (\$4,600.00) has been paid and is justly due and owing from the defendant to the plaintiffs.

30 Plaintiffs demand as damages on the Second Count the sum of Four Thousand, Six Hundred Dollars (\$4,600.00) as well as interest and costs of suit.

THIRD COUNT.

1. On October 14th, 1931, Edwin J. Field advanced the sum of Six Hundred Dollars (\$600.00), to Joseph Lukowiak and Helen Lukowiak, his wife, as a loan.
40

Complaint.

2. On December 8th, 1931, Edwin J. Field departed this life and on January 20th, 1932, Jerome T. Field and Helen Grace Kearney were appointed administrators of his estate.

3. No part of said sum of Six Hundred Dollars (\$600.00) has been paid and is justly due and owing from the defendants to the plaintiffs. 10

Plaintiffs demand as damages on the Third Count the sum of Six Hundred Dollars (\$600.00), as well as interest and costs of suit.

ALBERT F. BENDER,
Attorney for Plaintiffs.

EXHIBIT "A." 20

\$1600.00 August 15th, 1931
Edward Lukowiak Jos M. Lukowiak
Anna Lukowiak Helen Lukowiak On Demand
after date promise to pay to the order of
E. J. Field
"Sixteen Hundred Dollars" at 5%" Dollars
Payable at To E J Field, personally
Value received. Sixteen Hundred Dollars
No. 1 Due On Demand 30

Complaint.

EXHIBIT "B."

	July 15th, 1927.....	\$100.00
	Aug. 6th, 1927.....	50.00
	July 7th, 1928.....	100.00
	Aug. 15th, 1928.....	400.00
10	Dec. 24th, 1928.....	100.00
	Mch. 22nd, 1929.....	125.00
	July 6th, 1929.....	50.00
	Sept. 12th, 1929.....	50.00
	Dec. 5th, 1929.....	100.00
	Dec. 20th, 1929.....	100.00
	Mch. 6th, 1930.....	50.00
	Mch. 18th, 1930.....	50.00
	July 11th, 1930.....	50.00
	Nov. 22nd, 1930.....	75.00
20	July 6th, 1931.....	1000.00
	Oct. 14th, 1931.....	600.00
	Aug. 15th, 1931.....	1600.00
		<hr/>
		\$4600.00

30

40

Affidavit of Merits.

AFFIDAVIT OF MERITS.

Filed March 26, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

Plaintiffs,

vs.

EDWARD LUKOWIAK, *et als.,*

Defendants.

*Action
at Law.*

*Affidavit of
Merits.*

10

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

EDWARD LUKOWIAK, ANNA LUKOWIAK, JOSEPH
M. LUKOWIAK and HELEN LUKOWIAK, being duly
sworn according to law, on their respective oaths
depose and say:

That they are the defendants in the above
stated cause, and they believe that they have a
just and legal defense to the said action on the
merits of the case. 30

JOS. M. LUKOWIAK,
HELEN LUKOWIAK,
EDWARD LUKOWIAK,
ANNA LUKOWIAK.

40

Affidavit of Merits.

Sworn and subscribed to before me,
this 22nd day of March, 1934.

JOSEPH S. WEBER,
A Notary Public of New Jersey.
Comm. expires Mar. 2, 1938.

10

Due and legal service of a copy of within
Affidavit of Merits is hereby acknowledged as of
within time.

ALBERT F. BENDER,
Attorney for Plaintiffs.

20

30

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Answer.

ANSWER.

Filed March 26, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

Plaintiffs,

vs.

EDWARD LUKOWIAK, *et al.*,

Defendants.

*Action
at Law.*

Answer.

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20

The defendants, by way of answer to the complaint filed in the above entitled cause, say that:

1. The defendants deny that they are obligated to the plaintiffs' intestate in the sum of Sixteen Hundred (\$1,600.00) Dollars as set out in paragraphs one, two and three of the first count.

2. The defendant, Edward Lukowiak, denies that he is obligated to plaintiffs' intestate in the amount of Four Thousand Six Hundred (\$4,600.00) Dollars, as set out in paragraphs one, two and three of the second count.

3. The defendants, Joseph Lukowiak and Helen Lukowiak, deny that they are obligated to plaintiffs' intestate in the amount of Six Hundred (\$600.00) Dollars as set out in paragraphs one, two and three of the third count.

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Answer.

FIRST SEPARATE DEFENSE TO THE
FIRST COUNT.

10 1. The defendants herein allege that the sum of Sixteen Hundred (\$1,600.00) Dollars, referred to in the first count of the complaint filed, was a gift to the defendants, Joseph Lukowiak and Helen Lukowiak.

FIRST SEPARATE DEFENSE TO THE
SECOND COUNT.

1. The defendants allege that the sum of Sixteen Hundred (\$1,600.00) Dollars, was advanced by plaintiffs' intestate, as a gift to Joseph Lukowiak and Helen Lukowiak.

20 SECOND SEPARATE DEFENSE TO THE
SECOND COUNT.

1. The defendants allege that the sum of Three Thousand (\$3,000.00) Dollars alleged to have been advanced to Edward Lukowiak, was not advanced as a loan.

THIRD SEPARATE DEFENSE TO THE
SECOND COUNT.

30 1. The advances as set out in Schedule "B" (referred to in paragraph one of the second count) and annexed to the complaint, consisted in most part, of checks cashed by the defendant, Edward Lukowiak, and the cash immediately turned over to plaintiffs' intestate, at his express instance and request.

Answer.

FIRST SEPARATE DEFENSE TO THE
THIRD COUNT.

1. The defendants, Joseph Lukowiak and Helen Lukowiak, allege that the sum of Six Hundred (\$600.00) Dollars referred to in the third count of the complaint filed herein, was a gift made to them by plaintiffs' intestate during his lifetime. 10

LEO S. CARNEY,
Attorney for Defendants.

Due and Legal Service of a copy of within answer is hereby acknowledged as within time.

ALBERT F. BENDER,
Attorney for Plaintiffs. 20

30

40

Reply.

REPLY.

Filed March 14, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

<p>JEROME T. FIELD and HELEN GRACE KEARNEY, administra- tors of the estate of Edwin J. Field, deceased,</p>	<p><i>Plaintiffs,</i></p>
<p><i>vs.</i></p>	

*Action
at Law.
Reply.*

<p>EDWARD LUKOWIAK, <i>et al.</i>, <i>Defendants.</i></p>

20

Plaintiffs deny every allegation contained in the answer.

ALBERT F. BENDER,
Attorney for Plaintiffs.

30

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*Postea.***POSTEA.**

Filed July 3, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

*Plaintiffs,**vs.*EDWARD LUKOWIAK, *et al.*,
Defendants.

*Action
at Law.
Postea.*

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20

This case was tried before Judge Adam O. Robbins, Common Pleas Judge sitting as a Circuit Court Judge under an order of the Chief Justice, who directed a verdict for the plaintiffs in the sum of Sixteen Hundred Dollars (\$1,600.) with interest in the sum of Two Hundred and Twenty-six Dollars and sixty-seven cents (\$226.67) and costs.

Dated: June 18th, 1934.

30

(Signed) A. O. ROBBINS,
Judge.

40

Notice of Appeal.

NOTICE OF APPEAL.

Filed August 30, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

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JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

Plaintiffs,

vs.

EDWARD LUKOWIAK, *et als.,*

Defendants.

*Action
at Law.*

*Notice of
Appeal.*

20

To Albert F. Bender, attorney of plaintiffs, or
to whom it may concern:

PLEASE TAKE NOTICE, that the defendants in
the above entitled cause, appeal to the Court of
Errors and Appeals in the last resort in all
causes in New Jersey from the whole of the
judgment entered in this cause.

Dated: July 27th, 1934.

30

Respectfully yours,

LEO S. CARNEY,
Attorney of Defendants.

Due and legal service of a copy of within notice
is hereby acknowledged this 31st day of July,
1934.

ALBERT F. BENDER,
Attorney for Plaintiffs.

40

*Grounds of Appeal.***GROUNDS OF APPEAL.**

Filed October 1, 1934.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin J.
Field, deceased,

*Plaintiffs,**vs.*

EDWARD LUKOWIAK, *et als.*,
Defendants.

*Action
at Law.**Grounds
of Appeal.*

10

20

The appellants state the following grounds of appeal:—

1. (a) The refusal of the trial court to grant a motion of non suit in favor of the defendants on the ground that the plaintiffs failed to prove notice of dishonor and protest and presentment as against the defendants who appeared as endorsers.

(b) The failure of the trial court to pass upon the question of the capacity of the defendants whose names appeared upon the note.

2. The refusal of the trial court to permit the defendants to testify whether or not they owed any money to the decedent at the time of his death.

3. The refusal of the trial court to permit the defendants to testify if they were indebted to the decedent in any sum.

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Grounds of Appeal.

4. The refusal of the court to permit the defendants to testify if there was any money due to the decedent from them at the time of the death of decedent.

10 5. The refusal of the court to permit the defendants to testify to verbal transactions with the decedent, where the representative had already opened the door.

6. The refusal of the court to direct a verdict in favor of the defendants on the ground that no presentment or demand or notice of dishonor had been proved.

7. The failure of the court to deny plaintiffs' motion for a directed verdict, the issues presented being for the jury and not for the court.

20 8. The failure of the court to figure the interest from the date of demand, instead date of the note.

9. The failure of the court to grant a non-suit on the ground that no demand was proved to have been made upon the defendants within a reasonable time.

30 10. The failure of the court to direct a verdict in favor of the defendants on the ground that no demand was proved to have been made upon the defendants within a reasonable time.

LEO S. CARNEY,
Attorney of Defendants-Appellants.

Service of a copy of within grounds of appeal and consent of filing of same within time hereby acknowledged this 28th day of September, 1934.

40 ALBERT F. BENDER,
Attorney of Plaintiffs-Respondents.

TESTIMONY.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT,

May Term, 1934.

JEROME T. FIELD and HELEN GRACE KEARNEY, administra- tors of the estate of Edwin J. Field, deceased, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> EDWARD LUKOWIAK, <i>et al.,</i> <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law.</i>
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Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. Adam O. Robbins, Judge, and a jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the 18th day of June, 1934.

Appearances:

Albert F. Bender, Esq., counsel for the plaintiffs.

Leo S. Carney, Esq., counsel for the defendants. 30

(A jury was duly impaneled and sworn.)

(Mr. Bender made an opening statement to the jury on behalf of the plaintiffs, and Mr. Carney made an opening statement to the jury on behalf of the defendants.)

Mr. Bender: I offer in evidence a certificate of the surrogate of the County of Essex, appoint- 40

Edward Lukowiak, for Plaintiffs, Direct.

ing the plaintiffs as administrators of the estate of Father Field.

Mr. Carney: I have not any objection to that.

(The paper referred to was received in evidence and marked Exhibit P. 1.)

10 Mr. Bender: Are the signatures on the note admitted?

(There was no response.)

EDWARD LUKOWIAK, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bender.

20 Q Mr. Lukowiak, you are one of the defendants in this case? A I am.

Q I show you a paper and ask you if the words Edward Lukowiak there are your signature? A They are.

Q I show you a name on the back of the paper, Edward Lukowiak, is that your signature? A Yes, it is.

Mr. Bender: I ask that the paper be marked for identification.

30 (The paper referred to was received and marked Exhibit P. 2 for identification.)

Edward Lukowiak, recalled, Direct.

JOSEPH M. LUKOWIAK, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Bender.

Q You are one of the defendants to this suit? A Yes, sir. 10

Q I show you a paper marked P. 2, and ask you if the words Joseph M. Lukowiak are your signature? A Yes, sir.

Q And I show you the name Joseph M. Lukowiak on the back of that paper, and ask you if that is your signature? A Yes, sir.

Mr. Bender: That is all.

Mr. Carney: I raise no objection to that. 20

Mr. Bender: I now offer the note in evidence. Before I offer that, will you stipulate on the record that counsel for the defendants admits the genuineness of the four signatures on the face of the note and on the back of the note?

Mr. Carney: Will you designate on the note that the signatures of the defendant on the face of it appears in the upper left-hand corner? 30

EDWARD LUKOWIAK, recalled.

Direct examination by Mr. Bender.

Q Will you look at those checks, Mr. Lukowiak? Maybe we can save some more time. A Yes. 40

Edward Lukowiak, recalled, Direct.

Mr. Bender: I ask to have marked for identification a series of twenty checks, the counsel for the defendant admits that the endorsement on each of these checks is the endorsement of Edward Lukowiak, one of the defendants.

10 Mr. Carney: And that the endorsement of Father Fields precedes the endorsement of Edward Lukowiak on each one of the checks.

Mr. Bender: Not on each one.

Mr. Carney: Well, on all of them except one dated March 22, 1929, in the sum of \$125, and on one dated July 7, 1928, in the sum of \$100.

By Mr. Bender.

20 Q Mr. Lukowiak, I show you a check bearing date December 4, 1925, payable to cash, for \$50, signed E. J. Field, endorsed E. J. Field, and then by yourself, Edward Lukowiak, and ask you what that represents?

Mr. Bender: I will withdraw the question.

30 Q I ask you if you cashed that check? A I did cash the check. I returned the money to Father Fields.

Q You are sure of that? A Positive.

Q I show you check dated November 14, 1925, for \$100 to cash, endorsed by E. J. Fields and Edward Lukowiak, and ask you if you received the proceeds of that check? A I turned the money over to Father Fields, the same check.

40 Q You mean you cashed the check and turned the proceeds over to him? A I cashed the check and turned the proceeds over to him.

Edward Lukowiak, recalled, Direct.

Q Now, I will show you a series of checks and ask you to look through them and tell us if that same statement that you just made in answer to the previous question applies to these checks? A My answer is that every penny went to Father Fields, that these checks were cashed, every one of them, and the proceeds went to Father Fields. 10

Q I call your attention to check dated July 7, 1928, for \$100, made payable to Ed. Lukowiak, and endorsed by you? A Yes, I remember that check well. I went to the bank for Father Fields. He gave me that check, and he was taking a trip to Maryland, that is where he made his retreats to his college, and I turned that money in to Father Fields.

Q Was there any reason why his name was not put on this check, or why it was not made payable to cash, as the other checks were? A I don't know of any reason whatever. He gave me the check, and I turned every penny of that over, all of those checks there, every penny of it. 20

Mr. Bender: I offer this batch of checks in evidence.

(The checks referred to were received in evidence and marked Exhibit P. 3.) 30

Mr. Carney: No questions.

Mr. Bender: We rest.

Motion for Non-suit.

MOTION FOR NON-SUIT.

10 Mr. Carney: Your Honor, as to these checks, I respectfully move for a non-suit at this time on the ground that the testimony of this witness who has been called by the plaintiff is that of this money was turned over to Father Fields.

Mr. Bender: I am afraid we have no answer to that. Our reason for it was merely to clear the administrators in ignoring these checks which were found among his effects. We have offered them, and we have had the prayer in open court, and we have nothing further with reference to those checks.

20 The Court: If there is nothing further to offer with regard to the checks, of course, a non-suit should be granted so far as they are concerned, and you will be confined to the note which is in evidence.

30 Mr. Carney: Now, as to the note, I likewise move for a non-suit on the ground that it is ambiguous as to in what capacity the defendant signed. Now, the Negotiable Instruments Act points out that where a signature is so placed on an instrument that it is not clear in what capacity the person making same intended to sign, he is deemed to be endorser. That is Section seventeen, sub-section six. And with the further fact that no demand whatever has been attempted by the plaintiffs for the payment of this note, Section seventy-one provides that where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand—

40

Motion for Non-suit.

and this note, sir, is payable on demand—presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. This note, I call your Honor's attention to the fact it is dated 1931. And I move, sir, for a non-suit on the additional ground that there is no testimony or no evidence here to show that there is anything at all due upon this note. The mere fact that the note is offered in evidence is no evidence that there is a subsisting obligation; it is simply some evidence of a debt that was originally created. Whether or not there is anything due on this note has not been made known to the Court or to the jury. Upon those grounds, sir, I move for a non-suit.

Mr. Bender: The note is a demand note and is due immediately. The statute of limitations runs against it from the day of its date. The mere presentment in court of a note which, on its face, is a promissory note, without any proof whatsoever of the amount that is due upon it, is sufficient; it is not necessary to prove that the note has not been paid. In the case of the Trustees System Company of Newark versus Lisena, 150 Atlantic 373, the Court says, "When the plaintiff in a suit on a promissory note proves the note and offers the same in evidence, he establishes a prima facie case entitling him to go to the jury. The note speaks for itself, and gives inherent evidence of validity.

Motion for Non-suit.

10 “When a defendant has put in a plea denying the truth of the plaintiff’s complaint, but wholly abstains from supporting his plea by evidence, virtually resting his case on the evidence of the plaintiff, then, under authority of *Polhemus versus Prudential Realty Corporation, et al.*, 74 N. J. Law 570, 67 A. 303, 304, ‘the prima facie evidence of the plaintiff not merely entitles him to go to the jury, but, in the absence of all discrediting circumstances, becomes decisive of the issue. In such case, a direction of a verdict is not erroneous.’”

20 In the opinion written by Judge Wells in 1930 in the Court of Errors and Appeals, “The note, bearing the signature of the defendant and in the hands of the plaintiff, raised a presumption of law that it was unpaid, and, in the absence of contradictory proof even without the testimony of the manager, as to what the records showed, and the credits thereon, established a prima facie case and warranted a direction of verdict in favor of the plaintiff for the amount of the note.

30 “Chancellor Walker, delivering the opinion for this court, in the case of *McCormack versus Williams*, 88 N. J. Law 170, 95 A. 978, 979, said: ‘Our negotiable instruments act provides, in section 24, that every negotiable instrument shall be deemed prima facie to have been issued for a valuable consideration, and that every person whose signature appears thereon is deemed to have become a party thereto for value. Therefore, when the plaintiff proved the notes in suit, offered them, and rested, he estab-

40

Motion for Non-suit.

lished a prima facie case, and that entitled him to go to the jury. The notes spoke for themselves. They gave inherent evidence of validity.' ”

There are a number of other cases.

The Court: I think that is the law.

10

Mr. Carney: Your Honor, may I be heard further on this demand? I think Section 70 covers that entirely. Section 70 cites the necessity of presentment for payment. Now, it is not clear here in what capacity these parties signed the note, because, if I may bring your Honor's attention to it, they signed the note in the upper left-hand corner.

The Court: Well, that is a question for the jury. I think that is entirely a jury question as to the position of the signatures.

20

Mr. Carney: I, of course, would like to just refer to Section 70, the necessity of presentment for payment: “Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.”

30

Now, under Section 17, sub-section 6, we then find that “where a signature is so placed upon an instrument that it is not clear”—it is not a jury question; it is a question for consideration by the Court “—in what capacity the person making the same

40

Motion for Non-suit.

intended to sign, he is to be deemed an indorser," and in this case there is no question about it, and they are deemed then to be indorsers, and the other provisions I have referred to your Honor apply.

10 The Court: The motion for a non-suit is denied.

Mr. Carney: May I have an exception?

The Court: Yes, exception allowed.

Mr. Bender: I would like permission of your honor, Mr. Carney has no objection to it, I was going to just supply, so that there would be no possible question about this matter, and no use tangling up the record, supply the evidence of the demand for payment of the note made by me upon Mr. Lukowiak.

20 Mr. Carney: Do you want to stipulate on the record the time and the place?

Mr. Bender: All right. It is stipulated by and between the parties hereto that the attorney for the plaintiffs, Albert F. Bender, directed a letter on July 13, 1932, to Mr. Edward Lukowiak at 155 William street, Belleville, New Jersey, requesting payment of his indebtedness to the estate, amounting to \$3,700; that in reply to that letter Mr. Lukowiak came to my office, and I went over the items making up the \$3,700 demand, which included the note in question and all of the checks which have been offered in evidence, and demanded payment from Mr. Lukowiak at that time.

30 Mr. Carney: Your Honor, I again renew my motion on the same grounds as presented before.

40 The Court: Motion denied.

Edward Lukowiak, for Defendants, Direct.

DEFENDANTS' CASE.

EDWARD LUKOWIAK, one of the defendants,
being duly sworn according to law, on his oath,
saith:

Direct examination by Mr. Carney.

10

Q Mr. Lukowiak, you have admitted having signed this note that I offered here in evidence in the sum of \$1,600? A I did.

Q When did Father Fields die? A I just can't remember the date, I can't tell.

Q Can you remember the month that he died?
A Why, I just—

The Court: Do not the letters of administration show?

20

Mr. Carney: Yes. He died December, 1932, didn't he?

A That is right.

Q Now, at the time of his death did you owe him any money at all? A I never—

Mr. Bender: I object.

The Court: It would be confined to the note.

30

Q Did you owe him any money on this note at the time of his death?

Mr. Bender: I object. Under the fourth section of the evidence act, any transactions, any dealings whatsoever with the deceased cannot be testified to by a party to the action. A paper is in evidence showing an indebtedness. He now attempts to state that he is

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Edward Lukowiak, for Defendants, Direct.

not indebted, which he cannot do, because the answer must necessarily be a transaction with the decedent, otherwise it is a conclusion of law, and I object to it on that ground, his statement that he is not indebted would be a conclusion of law, and the question calls for a conclusion of law.

10

Mr. Carney: If your Honor please, it is not testifying to any transaction at all with the decedent, it is testifying to no transaction at all. If the witness were not permitted to say whether or not he was indebted or owed the decedent any sum at all, we would simply have to have this note offered in evidence against us and admit that we are liable, because by section four we cannot testify to anything. Section four refers to verbal statements and transactions had or made with the decedent. We are not attempting to open that door, we appreciate fully the consequences of opening that door. But certainly we should not be concluded by any construction placed upon that note, whether or not this witness can state to the Court and jury whether or not he was indebted or owed any money at the time of the death of the decedent.

20

30

Mr. Bender: The question calls for a conclusion of law by the witness.

Mr. Carney: Furthermore, if there was any suggestion that this were a transaction with the decedent, we have not made it, the plaintiffs in this case have made it by bringing in the note in question. If there was even a doubt in your Honor's mind that we could not proceed along these lines, you would have to resolve that doubt against

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Edward Lukowiak, for Defendants, Direct.

these plaintiffs, because they have opened the door by offering the note in evidence, and the checks as well.

Mr. Bender: The personal representatives have not offered themselves as witnesses. The note has been proven by the defendant. Now, the note, the indebtedness being established, he cannot state a conclusion of law that there is no indebtedness, the indebtedness is there. He, ordinarily, would have to give evidence which would prove payment, but the law does not permit him to do that, because the mouth of the decedent Father Field being sealed by death, this man's mouth must be sealed by law. 10

The Court: I think you are within that rule, Mr. Carney. 20

Mr. Carney: I would like you to hear me further, your Honor. Let us assume we are clearly within the rule, the personal representatives have called this man as a witness, who is a party to the cause, even though they have not opened the door to this transaction, if there is any doubt about it, they have presented this note. I made a motion based upon the evidence that there was no evidence of a presently existing indebtedness, the note itself is not evidence of an existing indebtedness, it is evidence that an obligation was created at that time, and they did not offer any proof at all as to whether or not there was any money due and owing upon it, and we are trying to simply show that there is nothing due. 30

The Court: That, of necessity, must show a transaction with the decedent. 40

Edward Lukowiak, for Defendants, Direct.

Mr. Carney: Isn't this note, your Honor, a transaction with the decedent, which they have offered in evidence, upon which they rely?

10 The Court: Why, certainly, and it has the admitted signatures of these defendants to it, and he simply went far enough to offer the note and prove the signatures, and that makes a prima facie case against these defendants.

20 Mr. Carney: But, your Honor, then they have already opened the door by asking this witness to testify even as to the checks. They opened the door with that and asked him what he did with the money. They opened the door; we did not. And certainly we should not have the door open on the one hand against us and closed on the other hand. I certainly think it is not testifying then to any transaction with the decedent to show that there is no money owing. Take a situation of this kind, either you or I may be sued by these personal representatives, and simply because they sued us we could not come in and say we did not owe any money. Section four does not go so far as
30 to say that you cannot testify to no transactions with the decedent, it only goes so far as to say that you cannot testify to any transactions with the decedent. We want to show now, not by any transactions with the decedent, but with this witness himself that there was no money due and owing at the time. That is not the transaction, that is the lack of any transaction, and I most seriously and urgently press that point.

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Edward Lukowiak, for Defendants, Direct.

The Court: I think you are precluded there, Mr. Carney. You may have an exception to the ruling.

Mr. Carney: I ask that the exception be noted.

Mr. Carney: I propose to ask the further question: 10

Q At the time of Father Field's death were you indebted to him in any sum at all?

Mr. Bender: I object on the same ground.

The Court: Objection sustained.

Mr. Carney: I press the same grounds and ask an exception be noted.

Q Was there any money due from you to Father Field at the time of his death? 20

Mr. Bender: I object to the question on the same grounds.

Mr. Carney: I press the same grounds and ask that the same exception be noted.

The Court: Yes.

Q Didn't you, on direct examination, Mr. Lukowiak, testify that the checks that you cashed were cashed for Father Field and turned over to him? 30

Mr. Bender: I object. There is nothing in the case at the present time with reference to those checks.

Mr. Carney: Your Honor, those checks are there, and that same door is there, the opening of the door. 40

Motion for Direction of a Verdict.

The Court: They are entirely out of the case now, nothing to consider about the checks at all.

Q Did you receive any money from Father Field at the time you signed this note?

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Mr. Bender: I object on the same ground as before.

The Court: Objection sustained.

Mr. Carney: That is all, Mr. Lukowiak.

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Mr. Carney: It is stipulated for the record that the same questions asked of Mr. Edward Lukowiak would likewise be asked of the defendants Joseph Lukowiak, Helen Lukowiak and Anna Lukowiak, and the same rulings and the same exceptions.

Mr. Carney: The defendant rests.

Mr. Bender: Plaintiffs rest likewise.

MOTION FOR DIRECTION OF VERDICT.

Mr. Carney: At this time, if your Honor please, I would like to move for a direction of
30 verdict on two grounds: First, that no demand has ever been made on these defendants within a reasonable time for the payment of this sum; secondly, that there is no evidence at all outside of the note that there was existing at the time of the death of the decedent any sum whatever, and I direct your Honor's attention to the note, which is dated 1931, and the fact that they signed it in the upper left-hand corner, and the sections of the act which make him appear to be an en-
40 dorser, and that no notice of demand, made

Motion for Direction of a Verdict.

within a reasonable time, was given to these defendants.

The Court: The motion is denied.

Mr. Bender: I now move for a directed verdict for the full amount of the note with interest at five per cent. from the day of its date.

Mr. Carney: Now, your Honor, I object to the motion on the ground that it raises a question of fact for the jury to pass upon as to whether or not there is any indebtedness or was any indebtedness existing at the time of the death of the decedent. The only thing we have here before us is the note. The note, while it may be evidence of an indebtedness, it is no evidence of an existing indebtedness, particularly where it is a demand note and a demand has to be made within a reasonable time, and no proof whatever of the question as to whether or not there is anything due and owing at the time, and I think that should be a question for the jury to pass upon, rather than the Court.

Mr. Bender: I see nothing whatsoever for the jury to pass upon. It is clear that we have made out our prima facie case. There is no conflicting testimony whatsoever before the jury. The note is there, and the Court in these various cases, and your Honor has already held that that is prima facie evidence of an indebtedness. Here a prima facie case is admitted without any defense. There is no need of it going to a jury.

The Court: Gentlemen of the jury: A note has been offered in evidence here signed by the four defendants in this cause. There is no dispute as to the signatures. Unfortunately, their mouths are closed so far as giving testimony

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Motion for Direction of a Verdict.

relative to transactions with the decedent is concerned. But there is no dispute as to their having signed the note, and the note being in the possession of the representatives of the decedent. You are directed to return a verdict in favor of the plaintiffs in the sum of \$1,600 with
10 interest from August 15, 1931, to date, at five per cent.

Mr. Carney: I respectfully ask an exception to your Honor's ruling.

The Court: You may have an exception.

The Court: You will figure the interest, Mr. Bender, and present it to the jury so that they may confirm your figures on it.

Mr. Carney: If your Honor please, may I
20 just suggest that the interest be from the time of the demand and not the date of the note? The note says nothing about interest, and I feel that the interest should be from the date of the demand and not the date of the note.

Mr. Bender: Interest accrues on a demand note from the day of its date. The statute of limitations runs against it from the day of its date.

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Exhibit P-1.

Exhibit P-1.

Essex County Surrogate's Court.

I, ANDREW J. WHINERY, Surrogate of the County of Essex, in the State of New Jersey, Do HEREBY CERTIFY, that on the 20th day of January 1932, letters of administration of the estate of Edwin J. Field late of the County of Essex, deceased, was duly granted to Helen Grace Kearney and Jerome T. Field who have duly qualified as such administrators, and are authorized to take upon themselves the administration of the said estate. 10

I FURTHER CERTIFY that the said letters of administration remain in full force and effect.

WITNESS MY HAND AND SEAL OF OFFICE, the 28th day of September, in the year of our Lord, one thousand nine hundred and thirty-four. 20

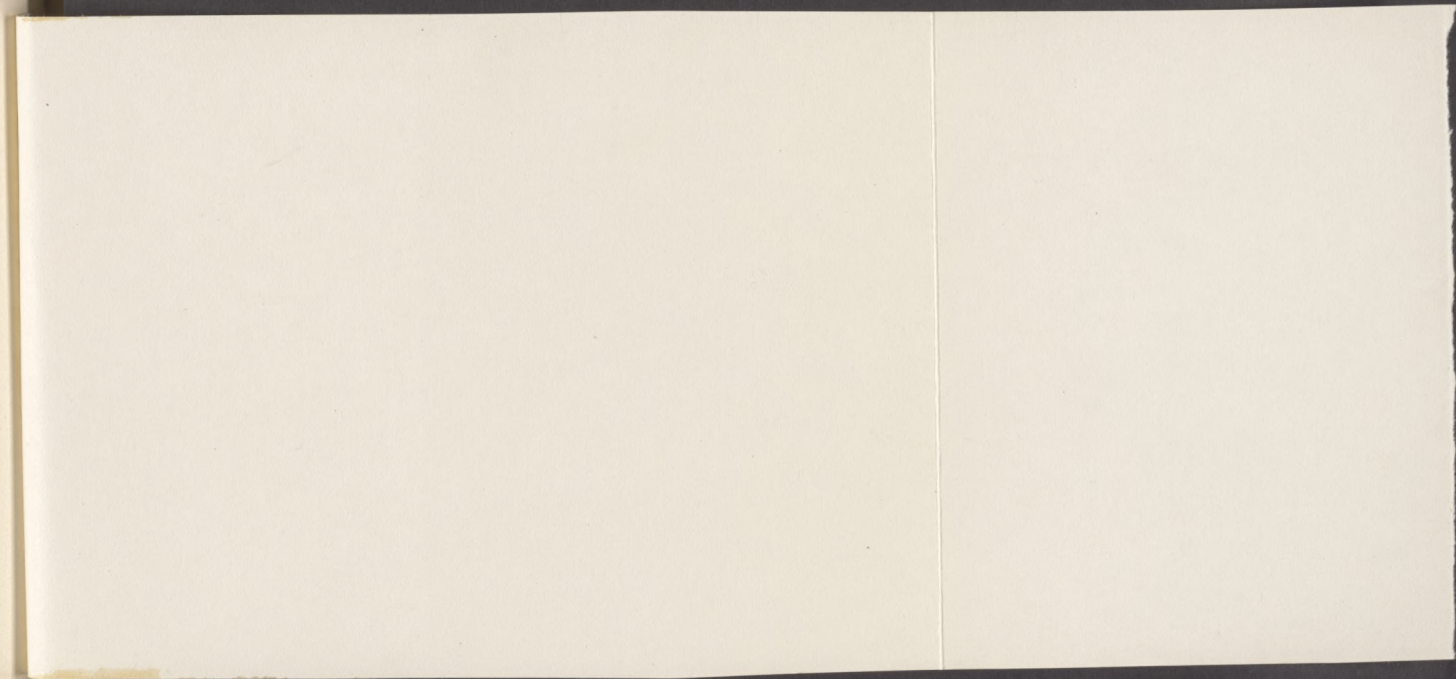
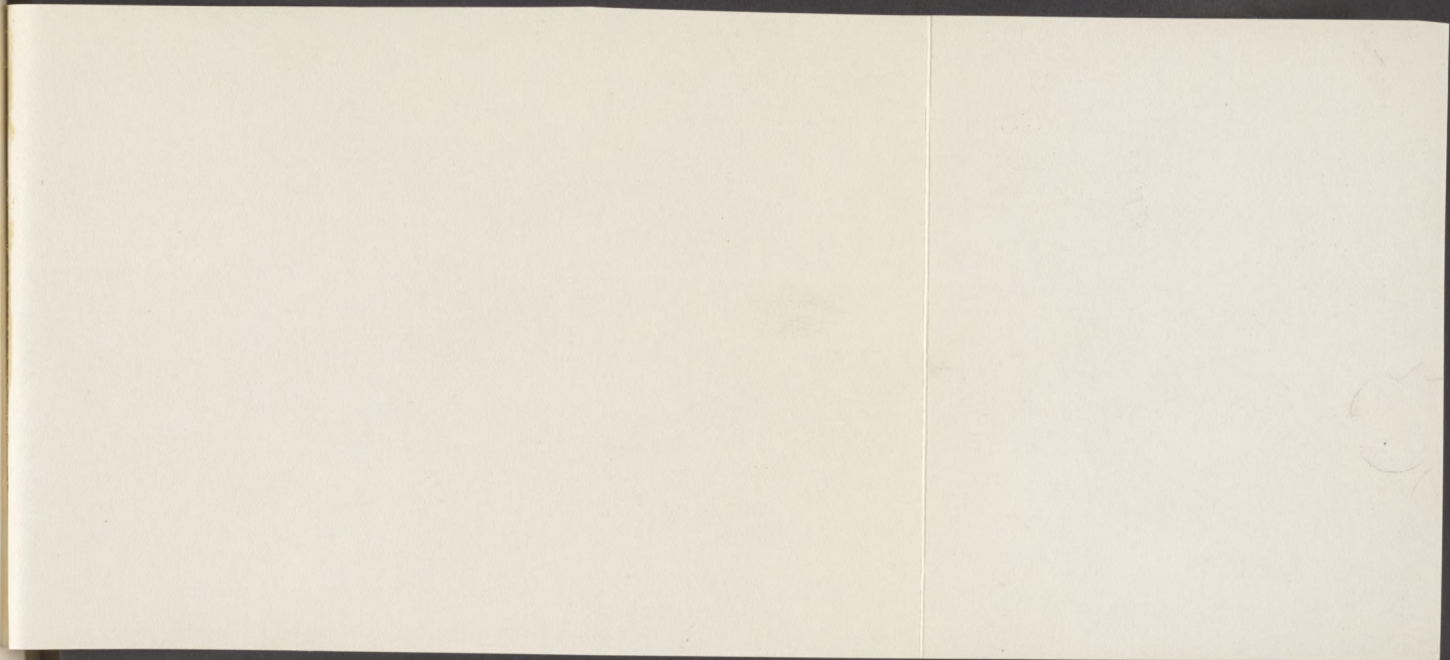
ANDREW J. WHINERY,
(SEAL) Surrogate.

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Exhibit P-2.

Exhibit P-2.



\$ 1600.00

August 18th 1931

Edward Lukowski, Jos. M. Lukowski
Anna Lukowski Helen Lukowski On Demand after date promise to pay to

the order of E. J. Field

"Sixteen Hundred Dollars" at 5%

Dollars

Payable at To E J Field, personally.

Value received. Sixteen Hundred Dollars

No. 1 Due On Demand

Edward Lukowski
Anna Lukowski
Jos. M. Lukowski
Helen Lukowski

P.
6/18/31
B.S.

Exhibit P-3.

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
7/15/27

FEDERAL TRUST COMPANY 55-14

Broad Street

Newark, N. J. July 15 1927

Pay to the Order of "Cash".....\$100.00

Insured -One- Hundred Dollars Insured. Dollars

No.....

E. J. Field

Endorsed:

E. J. Field

Edward Lukowiak

Pay to the order

of any bank, banker or trust company

All Prior Endorsements Guaranteed

55-371 Jul 15 1927 55-371

FIRST NATIONAL BANK

Belleville, N. J.

2

Circular
Bank Stamp
on face of
check, dated
8/6/27

FEDERAL TRUST COMPANY 55-14

Broad Street

Newark, N. J. Aug. 6th 1927

Pay to the Order of "Cash".....\$50.00

- * - Fifty Dollars Insured.....Dollars

No.....

E. J. Field

Endorsed:

E. J. Field

Edward Lukowiak

Pay to the order

of any bank, banker or trust company

All Prior Endorsements Guaranteed

55-371 Aug 6 1927 55-371

FIRST NATIONAL BANK

Belleville, N. J.

3

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
8/7/28

FEDERAL TRUST COMPANY 55-14
Broad Street
Newark, N. J. July 7th 1928
Pay to the Order of Ed. Lukowiak.....\$100.00
Insured -One- Hundred Dollars Insured.Dollars
No..... E. J. Field

Endorsed:

Edward Lukowiak

Pay to the order
of any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 July 7 1928 55-371

FIRST NATIONAL BANK
Belleville, N. J.

2

Square
Bank Stamp
on face of
check, dated
8/15/28

FEDERAL TRUST COMPANY 55-14
Broad Street
Newark, N. J. Aug 15 1928
Pay to the Order of E. J. Field.....\$400.00
Insured -Four Hundred Dollars Insured.Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak
c/o St. Peter's

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
12/24/28

FEDERAL TRUST COMPANY 55-14
Broad Street
Newark, N. J. Dec. 24 1928
Pay to the Order of "Cash".....\$100.00
Insured -One- Hundred Dollars Insured.Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order
of any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Dec 24 1928 55-371

FIRST NATIONAL BANK
Belleville, N. J.

Circular
Bank Stamp
on face of
check, dated
4/22/29

FEDERAL TRUST COMPANY 55-14
Broad Street
Newark, N. J. Mar. 22nd 1929
Pay to the Order of "Cash".....\$125.00
Insured -One- Hundred Twenty-five Dollars
InsuredDollars
No..... E. J. Field

Endorsed:

Edward Lukowiak

Pay to the order
of any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Mar 22 1929 55-371

FIRST NATIONAL BANK
Belleville, N. J.

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
7/6/29

FEDERAL TRUST COMPANY 55-14

Newark, N. J. July 6th 1929

Pay to the Order of "Cash".....\$50.00
The Sum of **\$50 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Jul. 6 1928 55-371

FIRST NATIONAL BANK
Belleville, N. J.

-2-

Circular
Bank Stamp
on face of
check, dated
9/12/29

FEDERAL TRUST COMPANY 55-14

Newark, N. J. Sept 12 1929

Pay to the Order of "Cash".....\$50.00
The Sum of \$\$\$\$50 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Sept 12 1929 55-371

FIRST NATIONAL BANK
Belleville, N. J.

-2-

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
12/5/29

FEDERAL TRUST COMPANY 55-14
Newark, N. J. Dec. 5th. 1929
Pay to the Order of "Cash".....\$100.00
The Sum of **\$100 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Dec 5 1929 55-371
FIRST NATIONAL BANK
Belleville, N. J.

-2-

Circular
Bank Stamp
on face of
check, dated
12/20/29

FEDERAL TRUST COMPANY 55-14
Newark, N. J. Dec. 20th 1929
Pay to the Order of E. J. Field.....\$100.00
The Sum of **\$100 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
Dec 20 1929

THE PEOPLES NATIONAL BANK
& TRUST COMPANY
55-525 of Belleville, N. J 55-525
Fred L. Wagner, Cashier

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
4/5/30

FEDERAL TRUST COMPANY 55-14
Newark, N. J. March 6th 192 30
Pay to the Order of "Cash".....\$50.00
The Sum of **\$50 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Mar 5 1930 55-371

FIRST NATIONAL BANK
Belleville, N. J.

-2-

64627

Circular
Bank Stamp
on face of
check, dated
4/19/30

FEDERAL TRUST COMPANY 55-14
Newark, N. J. March 18th 192 30
Pay to the Order of "Cash".....\$50.00
The Sum of ***\$50 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Mar 19 1930 55-371

FIRST NATIONAL BANK
Belleville, N. J.

-2-

Exhibit P-3.

Circular
Bank Stamp
on face of
check, dated
7/11/30

FEDERAL TRUST COMPANY 55-14
Newark, N. J. July 11th 1920 30
Pay to the Order of E J Field.....\$50.00
The Sum of \$*\$\$50 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

E. J. Field
Edward Lukowiak

Pay to the order of
any bank, banker or trust company
All Prior Endorsements Guaranteed
55-371 Jul 11 1930 55-371
FIRST NATIONAL BANK
Belleville, N. J.

-2-

Square
Bank Stamp
on face of
Check, dated
7/6/31

Newark, N. J. July 6th 1931
FEDERAL TRUST COMPANY 55-14
Pay to the Order of Ed Lukowiak.....\$1000.00
The Sum of *\$1000 and 00 Cts.....Dollars
No..... E. J. Field

Endorsed:

Ed Lukowiak

Circular Stamp
Thrift Department
FEDERAL TRUST Co. Newark, N. J.
Jul 6 1931
J. B.

Exhibit P-3.

Newark, N. J. Oct. 14th 1931

FEDERAL TRUST COMPANY 55-14

Pay to the Order of

Joseph Lukowiak & Wife.....\$600.00

The Sum of 00 \$600 and 00 Cts.....Dollars

10 No..... E. J. Field

Endorsed:

Joseph Lukowiak

Helen Lukowiak

Pay to the order of

any bank, banker or trust company

All Prior Endorsements Guaranteed

55-371 Nov 2 1931 55-371

FIRST NATIONAL BANK

Belleville, N. J.

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N

J

New Jersey Court of Errors and Appeals

JEROME T. FIELD and HELEN
GRACE KEARNEY, administra-
tors of the estate of Edwin
J. Field, deceased,

Plaintiffs-Respondents,

vs.

EDWARD LUKOWIAK, *et als.*,
Defendants-Appellants.

*Action
at Law.*

On Appeal.

BRIEF FOR DEFENDANTS-APPELLANTS.

Facts.

This action was brought by Jerome T. Field and Helen Grace Kearney, the personal representatives of the deceased, Edwin J. Field, who was the payee of a demand note in the sum of Sixteen Hundred (\$1,600.00) Dollars, to recover the amount thereof from all of the defendants, as well as the sum of Forty-six Hundred (\$4,600.00) Dollars alleged to have been advanced by plaintiffs' intestate during his lifetime, to the defendant, Edward Lukowiak, and the sum of Six Hundred (\$600.00) Dollars alleged to have been advanced by the plaintiffs' intestate to Joseph and Helen Lukowiak.

The note is dated August 15th, 1931 and was payable on demand. It was signed by all of the defendants in the upper left-hand corner, and upon the back thereof, appeared the signatures of all of the defendants.

The defendants, at the trial of the cause, offered to show that they were not indebted to plaintiffs' intestate at the time of his death;

and further offered to show that they did not owe any money to the deceased, at the time of his death. The trial court refused to permit the defendants to introduce any such testimony, notwithstanding that the personal representatives had called one of the defendants, Edward Lukowiak, to testify to practically all of the transactions surrounding the alleged advances of Forty-six Hundred (\$4,600.00) Dollars and Six Hundred (\$600.00) Dollars.

The defendants further showed that the note signed by them, was signed in the upper left-hand corner and that by reason of this, they were deemed to be endorsers and as such, entitled to notice of dishonor, presentment and protest within a reasonable time.

Motions for non-suit and directed verdict, on the above ground, were denied by the trial court, resulting in a verdict being directed by the court in favor of the plaintiffs and against all of the defendants, on the said note, in the amount of Sixteen Hundred (\$1,600.00) Dollars, together with interest amounting to Two Hundred Twenty-Six Dollars and Sixty-seven Cents (\$226.67).

The court, at the conclusion of plaintiffs' case granted a non-suit on the counts setting out the demands of Forty-six Hundred (\$4,600.00) Dollars and Six Hundred (\$600.00) Dollars, respectively; it appearing from the testimony of one of the defendants, Edward Lukowiak, who was called as a witness by the representative parties, that there was nothing due and owing on these items to the deceased at the time of his death.

From the refusal of the trial court to receive the evidence as above, and the refusal of the trial court to grant the respective motions for

non-suit and directed verdict in favor of all of the defendants, this appeal is taken.

POINT ONE.

(a) The trial court erred in refusing to grant defendants' motion for non-suit on the ground that the plaintiffs failed to prove notice of dishonor, protest and presentment as against the defendants who were endorsers on the note.

An examination of the note in question (Exhibit "P. 2" for plaintiffs), discloses clearly that the defendants signed the note in the upper left-hand corner and likewise endorsed the said note on the back thereof, and that no signature whatever, of anyone, appears in the space usually signed by the maker or makers.

It is obvious from this, that there is an ambiguity or uncertainty as to the capacity in which these defendants affixed their names to the note. Significance is lent to this assertion, by the fact that they likewise signed the note as endorsers.

In view of this, no difficulty is experienced in the application of the rule laid down in Section No. 17 of the Uniform Negotiable Instruments Act, 3 Comp. Stat., page 3727, with respect to the construction of instruments where the language thereof is ambiguous or where there are omissions in the instrument. The applicable portion of that section, is as follows:

"Where the signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is deemed to be an endorser"

The framers of the act, to further cover other doubtful situations that might arise in situations of this, or similar character, provided, in Sec-

tion No. 63 of the Act, 3 Comp. Stat., page 3742, that a person is deemed to be an endorser, when

“A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an endorser unless he clearly indicates by proper words, his intention to be bound in some other capacity.”

In this posture of the case, it cannot otherwise be urged but that the defendants were endorsers, and as such, were discharged from the obligation unless notice of dishonor and presentment for payment is established. The applicable section of the Act, Section No. 70, 3 Comp. Stat., page 3743, is as follows:

“* * * presentment for payment is necessary in order to charge drawers and endorsers”

and, Section No. 89 of the Act, which provides:

“Except as hereinotherwise provided, when the negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or endorser to whom such notice is not given, is discharged.”

In the case at bar, the only evidence of demand for payment, was the stipulation by Mr. Bender, attorney for the plaintiffs (S. C. p. 26), to the effect that on July 13th, 1932, he directed a letter to Edward Lukowiak at an address in Belleville, requesting payment of an amount, including the note in question, and demanding payment from him at that time; this, fully eleven months after the issuance of the note. This letter was directed to only one of the endorsers, *i. e.*, Edward Lukowiak. An examination of the whole of the testimony in this case, discloses that no similar demand was made upon any of the other

defendants; and Section No. 89 of the Act (*supra*), would effect a complete discharge of the defendants, Anna Lukowiak, Joseph Lukowiak and Helen Lukowiak.

So that with respect to the defendant, Edward Lukowiak, we find that there was no evidence whatever in the case, that the note in question was ever presented, or that notice of dishonor was ever given to him, except as hereinbefore stated. Assuming, but not conceding, the sufficiency of the demand made in July, 1932, how can the plaintiffs supply the essential requisite of the right to recover, without establishing a compliance with Section No. 70 of the Act, as above, to the effect that presentment is necessary in order to charge an endorser? It is submitted that no evidence whatever, of a presentment, appeared in the plaintiffs' case, nor is any excuse for the failure to present the note, made to appear in the evidence. In fact, plaintiffs' case is entirely devoid of any such proof.

One of the essentials to a proper presentment, is the necessity of exhibiting to the person from whom payment is demanded, the note itself. Section No. 74 of the Act, provides:

“The instrument must be exhibited to the person from whom payment is demanded
* * * .”

and under Section No. 70 of the Act, presentment is an absolute necessity in order to charge an endorser.

(b) POINT ONE.

In the case at bar, the attention of the court was directed to the position of the signatures of the defendants, on the note in question (S. C. p. 22, l. 28), and again at (S. C. p. 25, l. 14); and the court pointed out:

“I think that is entirely a jury question as to the position of the signatures.”

However, the court subsequently failed to determine whether or not the defendants were ENDORSERS and refused to pass upon this question.

It is therefore respectfully submitted, that the trial court erred in refusing to grant a motion of non-suit in favor of the defendants.

POINT TWO.

The court erred in refusing to permit the defendants to testify whether or not they owed the decedent any money; or whether or not they were indebted to the decedent at the time of his death; or that there was any money due to the decedent from them at the time; and the refusal of the trial court to permit defendants to testify to transactions with the decedent where the representative had already opened the door.

At the trial of this cause, the defendant Edward Lukowiak, in testifying for the defendants, was asked the following questions:

(S. C. p. 27, l. 26.)

Q Now, at the time of his death, did you owe him any money at all?

(S. C. p. 31, l. 12.)

Q At the time of Father Field's death were you indebted to him in any sum at all?

(S. C. p. 31, l. 21.)

Q Was there any money due from you to Father Field at the time of his death?

(S. C. p. 31, l. 29.)

Q Didn't you, on direct examination, Mr. Lukowiak, testify that the checks that you cashed were cashed for Father Field and turned over to him?

and all of the foregoing questions were objected to; the objections were sustained and exceptions were noted.

The applicable section of the statute upon which the objection is predicated, is the Evidence Act, 2 Comp. Stat., page 2218, par. 4, which is as follows:

“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 made by such testator or intestate, which are pertinent to the issue.”

An examination of the statute discloses that the underlying purpose of the prohibition contained therein, was designed for the purpose and object of guarding against temptation to give false testimony in regard to a transaction on the part of the surviving party, and further to put the two parties to a suit upon terms of equality in regard to the opportunity of giving testi-

mony. If one party to the original transaction is precluded from testifying by death, insanity or disability, the other party is not entitled to the undue advantage of giving his own uncontradicted and unexplained account of the transaction. The sources of the original information on the part of the representative of the deceased or incompetent person, are so inadequate as compared with those of the surviving party, that the law presumes the representative to be truly unable to testify as to the details of the transaction and hence excludes the adverse party.

There is nothing in the Evidence Act which prevents a person who is being sued in a representative capacity, from waiving the rule of evidence provided for in Section No. 4 (*supra*) of the Act; and when a party to an action sued in a representative capacity, calls upon the opposite party suing in his own right, to testify to conversations and transactions with the decedent, he cannot object to such testimony as being in contravention of such section. (See *Messenger v. Paterson Savings Institution*, 91 N. J. Eq., p. 654; *Lowe v. Doremus*, 86 N. J. Law, p. 325.)

In the case of *Lowe v. Doremus* (*supra*), our Court of Errors and Appeals, in passing upon a somewhat analagous situation, where the personal representative of the deceased called upon the opposite party to testify to conversations and transactions had with the decedent, Mr. Justice Kalisch, speaking for the court, at page 326, said:

“The statute was clearly intended for the protection of parties suing or being sued in a representative capacity. The statute was wholly inapplicable to the situation which presented itself to the court. The defendant was being sued in a representative capacity. He called the plaintiff who was suing in her

own proper person, as a witness to testify to conversations and transactions of the decedent, by the interrogatories submitted to her. This he had a perfect legal right to do."

In the case of *Messenger v. Paterson Savings Institution*, (*supra*), Mr. Justice Kalisch, again speaking for the Court of Errors and Appeals, pointed out (at p. 657):

"There is nothing in the Evidence Act which prevents a person who is being sued in a representative capacity, from waiving the rule of evidence made for his protection."

And, by parity of reasoning, there is nothing in the Evidence Act which prevents a person who is suing in a representative capacity, from likewise waiving the rules of evidence made for his protection.

And where one calls the opposite party, as in the case at bar (S. C. p. 20) and elicits testimony from him as to the detail of the transactions involving the issuing of a number of checks and cashing them for the deceased, it cannot be successfully urged that he did not waive the protection made for his benefit. The only suggestion made in the case to preclude the testimony of the defendants where the personal representatives had opened the door by calling the adverse party, was, that a non-suit had been entered as to the checks and that they were no longer in the case. But this is wholly and totally beside the question; for the waiver is made to depend upon whether or not the personal representatives had opened the door by calling their adversary, and having once opened the door, they waived the protection afforded not only as to the particular transaction, but as to any and all transactions.

In passing upon this latter question, our Court of Errors and Appeals, in the case of *Christopher v. Wilkins*, 64 N. J. Eq., page 354 (at p. 361), Mr. Justice Pitney, speaking, pointed out:

“Testimony by the representative party concerning any transaction with or statement by the deceased, although the deceased and the representative party thus testifying may have been the only parties to the transaction mentioned and although the statement by the deceased may have been heard only by the representative party, is sufficient to qualify the non-representative party to testify concerning all transactions with and statements by the person deceased which are pertinent to the issue.”

The same doctrine was followed in the case of *McCartin v. Traphagen*, 45 N. J. Eq., page 265; and was more recently followed, by our Court of Errors and Appeals, in the case of *Kapalczynski v. Sitniski*, 91 N. J. Eq., page 524.

The examination conducted on behalf of the personal representatives (S. C. p. 20) of the defendant, Edward Lukowiak, is as follows:

Examination by Mr. Bender, attorney for plaintiffs:

Q I ask you if you cashed that check? A I did cash the check. I returned the money to Father Fields.

Q You are sure of that? A Positive.

Q I show you check dated November 14, 1925 for \$100 to cash, endorsed by E. J. Fields and Edward Lukowiak, and ask you if you received the proceeds of that check? A I turned the money over to Father Fields, the same check.

Q You mean you cashed the check and turned the proceeds over to him? A I cashed the check and turned the proceeds over to him.

Q Now, I will show you a series of checks and ask you to look through them and tell

us if that same statement that you just made in answer to the previous question applies to these checks? A My answer is that every penny went to Father Fields, that these checks were cashed, every one of them, and the proceeds went to Father Fields.

Q I call your attention to check dated July 7, 1928 for \$100, made payable to Ed. Lukowiak and endorsed by you? A Yes, I remember that check well. I went to the bank for Father Fields. He gave me that check, and he was taking a trip to Maryland, that is where he made his retreats to his college, and I turned that money in to Father Fields.

Q Was there any reason why his name was not put on this check, or why it was not made payable to cash, as the other checks were? A I don't know of any reason whatever. He gave me the check, and I turned every penny of that over, all of those checks there, every penny of it.

It is therefore respectfully submitted that the trial court erred in its refusal to admit the offered testimony.

POINT THREE.

The trial court erred in refusing to direct a verdict in favor of the defendants who appeared as endorsers on the note, on the ground that no presentment, or demand, or notice of dishonor, had been proved.

Under this point, the same grounds are here urged for a reversal of the trial court's action in refusing to direct a verdict in favor of the defendants on the ground that no presentment or demand, or notice of dishonor of the note, had been proved, as are urged under Point one of this brief, for similar reasons.

POINT FOUR.

The trial court erred in failing to grant a nonsuit, or direct a verdict in favor of the defendants, on the ground that no demand was proved to have been made upon the defendants within a reasonable time.

On this question, the Uniform Negotiable Instrument Act, 3 Comp. Stat., page 3744, Section No. 71, provides:

“Where the instrument is not payable on demand, presentment must be made on the day it falls due; where it is payable on demand, presentment must be made within a reasonable time after it is issued; except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after negotiation thereof.”

and likewise, the Act, 3 Comp. Stat., page 3757, Section No. 193, in declaring what constitutes “reasonable time” points out:

“In determining what is reasonable time ‘or unreasonable time,’ regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.”

As a general rule, what is a reasonable time in which to present a demand note for payment, is a question of fact, depending upon the circumstances of the case, and is for the jury to decide.

In the case of *Belmar First National Bank v. Osborne*, 104 N. J. Law, page 112, our Court of Errors and Appeals, in considering the two sections above referred to, held that:

“Whether, under the circumstances in that case, the note had been presented in a reasonable time or unreasonable time, was

a question for the determination of the jury, under the guidance of the court.”

And furthermore, if any demand was made at all, it was made only of the defendant, Edward Lukowiak. However, *presentment was not shown to have been made, in any event, at any time.*

It is therefore respectfully submitted, that the trial court erred in refusing to grant a non-suit, or a directed verdict in favor of the defendants on this ground.

CONCLUSION.

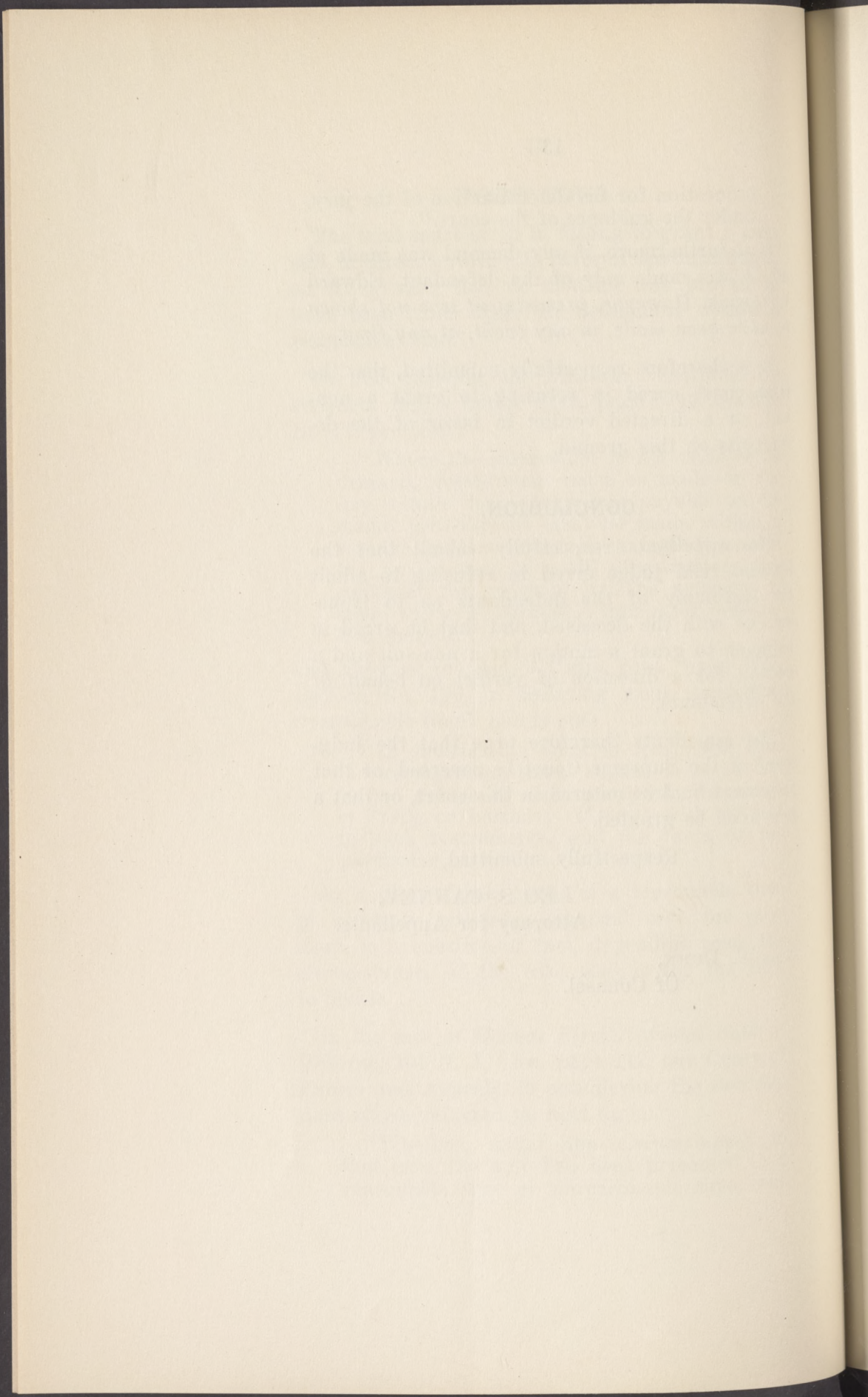
The appellants respectfully submit that the learned trial judge erred in refusing to admit the testimony of the defendants as to transactions with the deceased, and that he erred in refusing to grant a motion for a non-suit and a motion for a direction of verdict on behalf of the defendants.

The appellants therefore urge that the judgment of the Supreme Court be reversed, or that judgment final be entered in this court, or that a new trial be granted.

Respectfully submitted,

LEO S. CARNEY,
Attorney for Appellants.

SARA V. DUNN,
Of Counsel.



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October 18, 1934.

DUE AND LEGAL SERVICE OF THREE COPIES OF
THE WITHIN BRIEF, IS HEREBY ACKNOWLEDGED.

Albert F. Denehy
Attorney for Plaintiff-Respondents

New Jersey Court of Errors and Appeals

JEROME T. FIELD and HELEN
GRACE KEARNEY, Administra-
tors of the Estate of Edwin
J. Field, deceased,

Plaintiffs-Respondents,

vs.

EDWARD LUKOWIAK, *et als.*,
Defendants-Appellants.

*Action
at Law.*

On Appeal.

BRIEF FOR PLAINTIFFS-RESPONDENTS.

Facts.

The facts as set out in the brief of defendants-appellants are substantially correct except that the appellants therein state a conclusion of law by asserting that "they (defendants) were deemed to be endorsers and as such entitled to notice of dishonor, etc.," with which conclusion respondents do not agree.

The suit comprised three separate and distinct causes of action, set forth in three separate counts. The First Count is against the defendants Edward Lukowiak and Anna Lukowiak, his wife, and Joseph Lukowiak and Helen Lukowiak, his wife, upon a promissory note for \$1,600.00; the Second is against Edward Lukowiak alone, upon various checks of the decedent totaling \$4,600.00, alleged to represent loans to said Edward Lukowiak by the decedent; and the Third is against Joseph Lukowiak and Helen Lukowiak, his wife, upon a check for \$600.00 of the decedent, alleged to represent a loan by the decedent to said Joseph Lukowiak and Helen Lukowiak,

his wife. (See pages 19, 20 and 21 of State of Case.)

At the trial of the cause the attorney for the plaintiffs examined the defendant, Edward Lukowiak, only as to the checks upon which the Second and Third Counts are founded, and, as a result of his testimony, consented to the entry of a non-suit as to the Second and Third Counts. (See page 22 of State of Case, lines 1 to 24.)

The Court then directed a verdict in favor of the plaintiffs on the First Count and this appeal is from that judgment.

ANSWER TO POINT ONE.

(a) The trial court did not err in refusing to grant defendant's motion for non-suit, etc., because defendants were **PRIMARILY** liable as **MAKERS** of the note, and, as such, were not entitled to notice of dishonor, protest and presentment.

“Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. * * *” (Section 70—U. N. I. L.—3 Comp. Stat. page 3743.)

“The person ‘primarily’ liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same.” (Section 192—U. N. I. L.—3 Comp. Stat. page 3757.)

“Where the signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is deemed to be an endorser.” (Section 17—U. N. I. L.—3 Comp. Stat. page 3727.)

“A person placing his signature upon an instrument otherwise than as maker, draw-

er, or acceptor, is deemed to be an endorser, unless he clearly indicates by proper words, his intention to be bound in some other capacity." (Section 63—U. N. I. L.—3 Comp. Stat. page 3742.)

The four foregoing provisions of the Negotiable Instruments' Act must be read in conjunction with Section 1 of the Act (3 Comp. Stat. page 3734), viz.:

"An instrument to be negotiable must conform to the following requirements—

1. *It must be in writing and signed by the maker or drawer.*
2. *Must contain an unconditional promise or order to pay a sum certain in money.*
3. *Must be payable on demand, or at a fixed or determinable future time.*
4. *Must be payable to order or to bearer."*

Examining the note in question (Exhibit P. 2) we find—

1. An instrument in writing.
2. Signed with the admitted signatures of all of the defendants.
3. Containing an unconditional promise to pay a sum certain in money.
4. Payable on demand.
5. Payable to order of E. J. Field, personally.

We further find the admitted signatures of all the defendants placed at the beginning of the promise to pay and not at the end, which causes the defendants to reach the conclusion "that there is an ambiguity or uncertainty as to the capacity in which the defendants affixed their names to the note."

It is respectfully urged in answer to this contention that someone *must* be primarily liable on an instrument before someone can become secondarily liable. Four admitted signatures appear on the face of the note, purporting to promise the payment of a certain sum on demand. No other signatures appear on the face of the note. Who then is primarily liable to pay the note? Certainly there cannot be more than one correct answer, namely, the four defendants who have clearly expressed their obligation in writing and otherwise in accordance with every proviso of the Negotiable Instruments Law. Where is the uncertainty or ambiguity? Nothing in the law prescribes the place where the signatures of the makers should be placed, and, therefore, at the beginning or the end of the promise is sufficient.

Of course if two of the defendants had signed at the end of the promise to pay and two at the beginning, a situation would have been created where it became uncertain as to whether some of the signers intended to be makers or endorsers. But how can this uncertainty arise unless you first have a maker or makers of the note? How can it be argued that the note has no maker and at the same time that the signers are endorsers? No uncertainty can possibly exist without other signatures which conflict with the admitted ones, leaving an open question as to who are the makers and who the endorsers. Without this conflict, and there is no such conflict, the proviso with reference to uncertainty and ambiguity is not applicable to this case.

Defendants further contend that "significance is lent to the assertion by the fact that they (defendants) likewise signed the note as endorsers." It seems impossible to believe that the defendants

intended to endorse the note twice and that no one should appear as maker.

The defendants, in support of their contention, cite Sections No. 17 and 63 of the U. N. I. L. which refer to cases where it is not clear in what capacity a person signed the instrument. Neither of the above sections control in this case. The intention of the defendants is apparent on the face of the note. It is obvious that they intended to be **PRIMARILY** liable. The terms of the note are couched in the third person rather than in the first person, but the intent to be primarily liable is clear.

The defendants also quote Section 89 of the Act which provides for notice of dishonor to endorsers and drawers. It is the contention of the plaintiffs that the defendants are **PRIMARILY** liable as **MAKERS** and that it is not necessary to make a presentment for payment in order to charge them with liability. Section 70 of the U. N. I. L. (Comp. Stat. page 2143) reads as follows:

“Presentment for payment is *not necessary* in order to charge the person primarily liable on the instrument.”

(b) The court did not err in refusing to grant the defendant's motion for a non-suit because it did determine that the defendants were **MAKERS** and **PRIMARILY** liable by refusing the defendants' motions for a non-suit and directing a verdict in favor of plaintiffs.

ANSWER TO POINT TWO.

The court did not err in refusing to permit the defendants to testify because such testimony would have been contrary to Section 4 of an Act entitled, “An Act Concerning Evidence”

and the various revisions thereof and supplements thereto" (2 Comp. Stat. page 2218). The plaintiffs did not "open the door" nor waive any of their rights so as to permit the defendants to testify.

Each of the questions to the defendants objected to by the plaintiffs was directed to a transaction with decedent, the answer to which the plaintiffs would have found it impossible to rebut. The situation was the same as that in which the plaintiffs would have found themselves if the defendants had attempted to testify that the decedent was indebted to them. The defendants contend that the plaintiffs waived the benefits of this rule of evidence but this the plaintiffs deny. The court's attention is directed to the fact that *neither of the plaintiffs offered themselves as witnesses* and the only testimony elicited as a result of plaintiffs' questions to the defendant, Edward Lukowiak, concerned the checks upon which the Second and Third Counts are based. The plaintiffs consented to a non-suit as to the Second and Third Counts.

The defendants cite *Lowe v. Doremus*, 86 New Jersey Law, page 325, and *Messenger v. Paterson Savings Institution*, 91 New Jersey Equity, page 654. In both these cases the court merely held that the representative of a decedent could call the other party to the action to testify about a transaction with the decedent if he so desired, and that he could waive the assistance offered to him by Section 4 of the Evidence Act. However, the principle laid down in these two cases does not broaden the rule in such a case to then permit the non-representative party to testify as to transactions with the decedent. In neither of

the above cases did the representative party testify, nor did the non-representative party testify to any transaction other than those for which the representative party offered him.

Section 4 of the Evidence Act (page 2218) states that the defendant cannot testify "unless the representative party 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." The evidence elicited in attempting to support the Second and Third Counts (to which the plaintiffs consented to a non-suit) would not be any more pertinent to the issue in the First Count than the testimony in some other suit. It is a well established rule of law that the various counts in a complaint are separate, distinct and independent causes of action.

The defendants also cite *Christopher v. Wilkins*, 64 New Jersey Equity, page 354. In this case the court did permit the non-representative party to testify *because the representative party had testified* and held that the representative party had opened the door to all transactions with the deceased which were pertinent to the issue. The testimony of Edward Lukowiak as to the checks covered by the Second and Third Counts is most certainly not pertinent to the cause of action on the note. The defendants also cite *Kapalczynski v. Sitniski*, 91 New Jersey Equity, page 524, and *McCartin v. Traphagen*, 45 New Jersey Equity, page 265. In each of these cases the court found that the testimony offered by the representative party himself was

pertinent to the issue, there being but a single issue in each case. In the instant case the plaintiffs did not take the stand, and the questions put to Edward Lukowiak and his answers as to the checks covered by the Second and Third Counts were not pertinent to the issue in the First Count.

It is respectfully submitted that the trial court did not err in its refusal to admit the offered testimony.

ANSWER TO POINT THREE.

If, upon the motion for non-suit by the defendant, the court did not grant the same as to all of the defendants *as endorsers*, such action on his part was in nowise prejudicial to any or all of the defendants, and does not constitute such error as would entitle the defendants to have the ultimate decision of the court reversed. The sole contention of the plaintiffs throughout the case was that the defendants were the MAKERS of the note and were PRIMARILY liable thereon.

ANSWER TO POINT FOUR.

The trial court did not err in failing to grant a non-suit or directing a verdict in favor of the plaintiffs, on the ground that no demand was proved to have been made upon the defendants within a reasonable time, because in an action upon a demand note no demand need be made upon the person who is PRIMARILY liable upon the note. All of the defendants are PRIMARILY liable as makers. Sec. 70—U. N. I. L. —(3 Comp. Stat. 3743).

CONCLUSION.

The respondents urge that the appeal herein be dismissed and that the judgment of the Supreme Court be, in all respects, affirmed.

Respectfully submitted,

ALBERT F. BENDER,
Attorney for Respondents.

ALBERT F. BENDER,
Of Counsel.

COMMISSION

The respondents urge that the award herein should be set aside on the ground that the award was made in violation of the provisions of the Act. It is respectfully submitted that the award is not voidable.

ALBERT P. BRIDGES

Attorney for Respondents

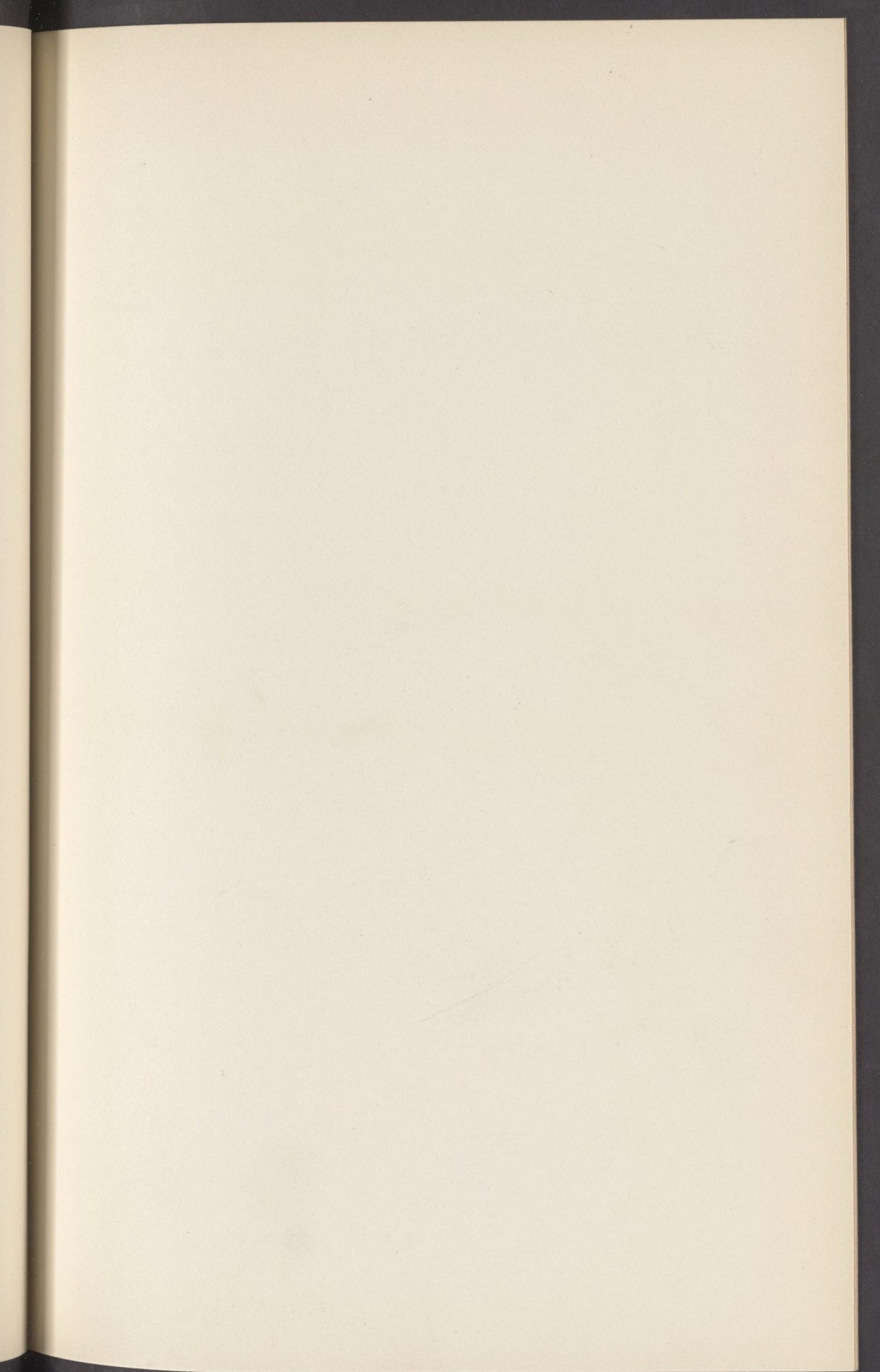
Of Counsel

STATEMENT OF WORKS

The undersigned, the Respondent, has performed the following work for the Commission: [Faint text describing the work performed]

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The undersigned, the Respondent, has performed the following work for the Commission: [Faint text describing the work performed]



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