INDEX

EXHIBITS

Plaintiff's:

New Jersey
Court of Errors and Appeals

MONMOUTH COUNTY CIRCUIT COURT

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CALVIN ROGERS,
Plaintiff,
vs.
GEORGIANNA PALMER, Administratrix, etc.,
Defendant.
} Action at Law.

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NOTICE OF APPEAL.

To Calvin Rogers, Plaintiff, and to Wilson & Smock, Attorneys for the Plaintiff:

PLEASE TAKE NOTICE, that the defendant, Georgianna Palmer, hereby appeals from the whole of the judgment rendered in the above entitled cause, to the New Jersey Court of Errors and Appeals. 30

Dated June 21st, 1928.

Yours truly,

QUINN, PARSONS & DOREMUS,
Attorneys for the Defendant.

Endorsed:

Service of copy of within Notice is hereby acknowledged the 23rd day of June, 1928. 40

WILSON and SMOCK,
Attys. of Plaintiff.

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

CALVIN ROGERS, Pltff-Respondent, vs. GEORGIANNA PALMER, Administratrix, etc., Def't-Appellant.	On Appeal.

To Wilson & Smock, Attorneys for Plaintiff-Respondent:

PLEASE TAKE NOTICE that the Defendant-Appellant writes down the following grounds of appeal:

1. Because the trial court admitted testimony with reference to the notes, though there was no proof of an endorsement.

2. Because the trial court admitted said notes though there was no evidence of endorsement, though the suit endeavored to hold the endorser.

3. Because the trial court admitted over objection and exception, evidence relating to payment of the note, though there was no endorsement.

4. Because the trial court refused upon motion to order that the plaintiff elect upon which count he was proceeding.

5. Because the trial court denied a motion for nonsuit.

6. Because the trial court refused a direction of a verdict in favor of the defendant.

7. Because the trial court erroneously entered judgment against the defendant.

Respectfully yours,

QUINN, PARSONS & DOREMUS,
Attorneys of Def't-Appellant.

Endorsed:

Service of copy of within Grounds of Appeal acknowledged June 23rd, 1928.

WILSON and SMOCK,
Attys. of Plaintiff.

SUMMONS.

The State of New Jersey to Georgianna Palmer, and Georgianna Palmer, Admrx. etc., of Elwood F. Palmer, deceased.
(L. S.)

You are Summoned to answer the annexed complaint of Calvin Rogers, in an action at law in the Monmouth County Circuit Court, And take notice that unless you file your answer to said complaint with the Clerk of the Monmouth County Circuit Court at Freehold within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness Rulif V. Lawrence Judge of the said Court at Freehold, this twenty-ninth day of October, Nineteen Hundred and twenty-six.

WILSON and SMOCK,
Attorneys.
Joseph McDermott,
Clerk.

(See notice endorsed upon annexed complaint.)

COMPLAINT.

MONMOUTH COUNTY CIRCUIT COURT

Monmouth County

Calvin Rogers, Plaintiff, vs. Georgianna Palmer, Defendant, And in the alternative Georgianna Palmer, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

Plaintiff residing at Belmar, in the County of Monmouth and State of New Jersey says that:

First Count:

1. He sues for the amount of three certain promissory notes aggregating the sum of $2,400 and made by the defendant Georgianna Palmer and endorsed by Elwood F. Palmer, to the plaintiff, a copy of which notes are hereto annexed.

Plaintiff still owns said notes. No part of the same have been paid.

Second Count:

1. He sues for the amount of three certain promissory notes aggregating the sum of $2,400

endorsed by Elwood F. Palmer in his lifetime and payable to the plaintiff, a copy of which notes are hereto annexed.

2. The said Elwood F. Palmer died intestate on or about January 15th, 1926.

3. Thereafter Georgianna Palmer was duly appointed administratrix of his estate and qualified as such and assumed the burdens of her administration and is still acting as such administratrix.

4. Plaintiff avers that the notes given and the proceeds realized therefrom were received by the said Elwood F. Palmer in his lifetime, and that said notes were his primary obligation, and that although his name now appears on each note, in each instance as the endorser, he is in effect the maker of said notes.

Judgment will be claimed upon either the first or second counts for $2,400 with interest and costs of suit.

WILSON and SMOCK,
Attorneys for Plaintiff.

Copy of the notes mentioned in the above complaint.

The following is a copy of the notes mentioned in the above complaint.

$1200.00 Belmar, N. J. Sept. 1, 1925.

Six months after date I promise to pay to the order of Elwood F. Palmer,
Twelve Hundred 00/100 Dollars
at the First National Bank of Belmar, N. J.

This note is given by me for the benefit of my personal estate, and the proceeds thereof are for my personal use.
Value Received. GEORGIANNA PALMER.

$700.00 Belmar, N. J. Oct. 8, 1925.

Six months after date I promise to pay to the order of Elwood F. Palmer,
Seven Hundred Dollars
at the First National Bank of Belmar, N. J.

This note is given by me for the benefit of my personal estate, and the proceeds thereof are for my personal use.
Value Received GEORGIANNA PALMER.

$500.00 Belmar, N. J. Sept. 26, 1925.

Six months after date I promise to pay to the order of Elwood F. Palmer,
Five Hundred Dollars
at the First National Bank of Belmar, N. J.

This note is given by me for the benefit of my personal estate, and the proceeds thereof are for my personal use.
Value Received. GEORGIANNA PALMER.

WILSON and SMOCK,
Pltff's Attys.

Complaint

Notice to the within-named Defendants:

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. 1912, p. 394, Rule 56.)

WILSON and SMOCK,
Plaintiff's Attorneys.

Endorsed:

SUMMONS AND COMPLAINT
Wilson & Smock,
Plaintiff's Attorneys,
P. O. Address
Broad & Mechanic Sts.,
Red Bank, N. J.

ANSWER OF THE DEFENDANT GEORGIANNA PALMER.

MONMOUTH COUNTY CIRCUIT COURT

CALVIN ROGERS, Plaintiff, vs. GEORGIANNA PALMER, Defendant, And in the alternative GEORGIANNA PALMER, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

The defendant, Georgianna Palmer, residing at 507 Eleventh Avenue, Belmar, New Jersey, says:

ANSWER TO FIRST COUNT:

1. She denies the truth of the matters contained in the first count of the complaint except so far as admitted in the following statement. Defendant admits the making of the promissory notes set forth in the first count in said complaint and says that said notes were delivered to Elwood F. Palmer.

2. This defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff still owns said notes and as to whether or not said notes have been paid in whole or in

part, and therefore leaves the plaintiff to his proof.

First Defense to First Count:

This defendant is a married woman and she is not liable to pay the debt or answer the default or liability of any other person, and she expressly pleads the statute in such case made and provided. (Comp. Statutes, page 3226, paragraph 5.)

Second Defense to First Count:

The said notes were never protested and no notice of protest was ever sent to or received by the defendant and she expressly pleads the Negotiable Instruments Act (Compiled Statutes page 3745, paragraph 89), as a bar to the plaintiff's suit herein.

Answer to Second Count:

1. The defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph one of the second count in plaintiff's complaint. She therefore leaves the plaintiff to his proof.

2. She admits paragraph two of the second count.

3. She admits paragraph three of the second count.

4. She has no knowledge or information sufficient to form a belief as to the matters and things

alleged in paragraph four of the second count and therefore leaves the plaintiff to his proof.

Defendant denies that she is indebted to the plaintiff on either of said counts in the sum of twenty-four hundred dollars with interest or any other sum.

STOKES, McDERMOTT & HARTSHORNE,
Attorneys for Georgianna Palmer.

ANSWER OF THE DEFENDANT GEORGIANNA PALMER, ADMRX.

MONMOUTH COUNTY CIRCUIT COURT

Calvin Rogers, Plaintiff, vs. Georgianna Palmer, Defendant, And in the alternative Georgianna Palmer, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

The defendant, Georgianna Palmer, administratrix of the goods, chattels, rights and credits

of Elwood F. Palmer, deceased, residing at 507 Eleventh Avenue, Belmar, New Jersey, says:

Answer to First Count:

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1. She has no knowledge or information sufficient to form a belief as to the matters and things alleged in paragraph one of the first count or in the second unnumbered paragraph of said count, and therefore leaves the plaintiff to his proof.

Answer to Second Count:

1. Defendant has no knowledge or information
20 sufficient to form a belief as to the matters and things set forth in paragraph one of the second count and therefore leaves the plaintiff to his proof.

2. She admits paragraph two of the second count.

3. She admits paragraph three of the second count.

4. She has no knowledge or information suffic-
30 ient to form a belief as to paragraph four of the second count and therefore leaves the plaintiff to his proof.

The defendant denies that she is indebted to the plaintiff on either of said counts in the sum of twenty-four hundred dollars with interest or any other sum.

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First Defense to First and Second Counts:

The notes mentioned in the plaintiff's complaint were never protested and this defendant never received a notice of protest of any of said 10
notes, and she expressly pleads the Negotiable Instruments Act of the State of New Jersey, (Compiled Statutes page 3746, paragraph 98), as a bar to the plaintiff's action.

Objections of Law.

The defendant reserves the right at any time before or on the day of trial to move the court for a dismissal of the plaintiff's complaint herein on 20
the ground that it does not set up a cause of action against this defendant because it does not set up affirmatively that plaintiff filed a verified claim with the defendant as administratrix and whether or not the action is commenced within three months from the notice that claim was disputed as required by law.

STOKES, McDERMOTT & HARTSHORNE,
Attorneys for Georgianna Palmer, Admrx. 30

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REPLY TO ANSWER OF GEORGIANNA PALMER.

MONMOUTH COUNTY CIRCUIT COURT

CALVIN ROGERS, Plaintiff, vs. GEORGIANNA PALMER, Defendant, And in the alternative GEORGIANNA PALMER, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

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Plaintiff replying to the answers of the defendants, says that:

1. He denies the first defense to the first count.

2. He denies the second defense to the first count.

WILSON and SMOCK,
Attorneys of Plaintiff.

REPLY TO ANSWER OF GEORGIANNA PALMER, ADMRX.

MONMOUTH COUNTY CIRCUIT COURT

CALVIN ROGERS, Plaintiff, vs. GEORGIANNA PALMER, Defendant, And in the alternative GEORGIANNA PALMER, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

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Plaintiff replying to the answers of the defendants, says that:

1. He denies the first defense to the first and second counts.

WILSON and SMOCK,
Attorneys of Plaintiff.

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SUBSTITUTION OF ATTORNEYS.

MONMOUTH COUNTY CIRCUIT COURT

CALVIN ROGERS, Plaintiff, vs. GEORGIANNA PALMER, Defendant, And in the alternative GEORGIANNA PALMER, Admrx., of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, Defendant.	Action at Law.

It appearing to the Court that Stokes, McDermott & Hartshorne, attorneys of Defendant, Georgianna Palmer, and in the alternative Georgianna Palmer, administratrix of the goods, chattels, rights and credits of Elwood F. Palmer, deceased, in the above entitled cause, consent hereto:

It is on this 2nd day of February, A. D. 1927 ORDERED that Messrs. Quinn, Parsons & Doremus be and they hereby are substituted as attorneys of said defendant in the place and stead of the said Stokes, McDermott & Hartshorne.

We hereby consent to the entry of the above order.

STOKES, McDERMOTT & HARTSHORNE,
Attorneys of Defendant.

JUDGMENT.

MONMOUTH CIRCUIT COURT

December Term 1927

18262-25-112

CALVIN ROGERS, Plaintiff, vs. GEORGIANNA PALMER and in the alternative GEORGIANNA PALMER, Admrx., of the goods, chattels, rights, credits of Elwood F. Palmer, deceased, Defendants.	Action at Law Judgment by a Verdict Judgment entered April 12, 1928 Damages $2698.19 Costs 92.31 $2790.50

Wilson & Smock, attys.

Judgment in the above entitled action was entered on the twelfth day of April, A. D., One thousand nine hundred and twenty-eight in favor of the Plaintiff Calvin Rogers and against the defendants Georgianna Palmer admrx., of goods, chattels, rights and credits of Elwood F. Palmer deceased, Action at Law; Judgment by a Verdict for the sum of twenty-six hundred and ninety-eight dollars and nineteen cents damages and ninety-two dollars and thirty-one cents costs of suit.

Judgment entered and signed April 12, 1928.

TESTIMONY.

MONMOUTH COUNTY CIRCUIT COURT

CALVIN ROGERS, Plaintiff, v. GEORGIANNA PALMER, *et als.*, Defendants.	Action at Law.

Freehold, N. J., April 4, 1928.

Mr. Brinley: We would like to dispense with a jury, inasmuch as we believe there is a question of law only.

The Court: Has the jury been sworn?

Mr. Brinley: No, sir.

The Court: But you want to stipulate to try it before the court without a jury?

Mr. Brinley: Yes, sir.

Mr. Quinn: There are no questions of fact, all of law.

Mr. Brinley: If your Honor please, in the second count, that is based upon a suit against the administrator, and in it I have failed to allege, as I am obliged to, that a claim was filed and disputed. And I called that to the attention of Mr. Quinn's office some six months ago, and he has agreed that I may add a proper paragraph to that effect, making this paragraph 3a of the second count:

"The plaintiff presented to the defendant Georgianna Palmer, administratrix, a sworn

claim against the deceased, Elwood F. Palmer, for the amount due upon the same notes which are the subject matter of this suit, which said claim was disputed by the said defendant on August 10, 1926, and an action to recover thereon was instituted on October 29, 1926, within a period of three months from the date of disputing the claim."

The Court: Now do you want to amend the complaint further?

Mr. Brinley: Just with the two things. I notice here in the first paragraph there has been an omission. I say: "He sues for the amount of three certain promissory notes, aggregating some $2,400, and made by the defendant Georgianna Palmer and endorsed by Elwood F. Palmer." I say "payable to the plaintiff" and it should be "delivered to the plaintiff." And the same thing in the second count, where I say "payable," it should be not "payable to the plaintiff" but "delivered to the plaintiff," the first paragraph of the second count.

Mr. Quinn: We enter a general denial.

The Court: To both?

Mr. Quinn: Yes.

The Court: Now what is it all about, Mr. Quinn?

Mr. Quinn: I am the defendant, if the court please.

Mr. Brinley: If your Honor please, this controversy is over three notes made in the fall of 1925, aggregating $2,400. They were all made by Georgianna Palmer, payable to the order of Elwood F. Palmer, who was her husband. Three

notes were made in the months of September and October, aggregating $2,400, made by Georgianna Palmer, who was then a married woman, payable to the order of Elwood F. Palmer, her husband, and endorsed by Elwood F. Palmer in turn, delivered for a valuable consideration, namely, the amount of the note in each instance, to the plaintiff Calvin Rogers.

On January 15, 1926, Elwood F. Palmer died. This action is brought in the alternative, the defendant in the first count being Georgianna Palmer in her own individual capacity, and in the alternative Georgianna Palmer, administratrix of the estate of Elwood F. Palmer, she having been in the meantime appointed administratrix. And again in the second count, a claim was filed against the estate of Elwood F. Palmer, disputed in due course, and a suit brought within the time limited by law.

Mr. Quinn: The defense, if the court please—the maker and payee are husband and wife—the defenses are that the plaintiff is not a holder in due course, that the notes were not properly negotiated, that the wife received no benefit by reason of the giving of these notes, that the endorsee at no time was ever given notice of protest, and generally that the present owner is not a holder for value.

The Court: Do I understand that the claim is that they were not the notes of Georgianna Palmer?

Mr. Quinn: In legal effect, yes; she being a married woman, although they are made by her as maker she received no benefit from them.

The Court: Whose notes were they?

Mr. Quinn: They are made by Georgianna Palmer, made payable to her husband and endorsed by her.

The Court: Which is the principal under the evidence?

Mr. Quinn: That is for the plaintiff to prove. I also ask at this time that the plaintiff elect upon which count they intend to rely. We can't be held on both. We are ether maker or endorser.

Mr. Brinley: If your Honor please, we are not obliged to determine now.

The Court: No, the court won't make you determine now. The motion is denied at this time. You may repeat it later.

Exception noted for defendant as ground of appeal.

CALVIN ROGERS, sworn for plaintiff.

Direct-examination by Mr. Brinley:

Q. Mr. Rogers, are you the plaintiff in this case? A. Yes, sir.

Q. You live where? A. In Belmar.

Q. Where in Belmar? A. 1015 F. Street

Q. Right in the Borough of Belmar? A. Yes, sir.

Q. Do you hold three notes given to you in the fall of 1925, upon which notes Georgianna Palmer is maker? A. Yes, sir.

Mr. Quinn: May I see the notes, Mr. Brinley?

(Notes submitted to Mr. Quinn.)

Mr. Quinn: I object, if the Court please, to any testimony with reference to these notes, upon the ground that no endorsement appears on either the face of the note or the back, under the Negotiable Instruments Law, Section 31, which provides that "The endorsement must be written upon the instrument itself or upon a paper attached thereto; the signature of the endorser, without additional words, is a sufficient endorsement." There is no endorsement to the transferee.

Mr. Brinley: No endorsement to Calvin Rogers?

The Court: What do you mean, Mr. Quinn?

Mr. Quinn: The notes are not endorsed or transferred to the transferee, the person who claims to hold them.

The Court: Oh, objection overruled. There is a general endorsement.

Mr. Quinn: Then I object under Section 49 of the Negotiable Instruments Law, which holds that "Where the holder of an instrument payable to his order transfers it for value with endorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the endorsement of the transferer; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made." There

is no endorsement to the transferee upon that.

The Court: Oh, yes; there is.

Mr. Quinn: No, there is not.

The Court: There is no special endorsement but there is a general endorsement.

Mr. Quinn: There is only the endorsement of the payee of the note, but there is no endorsement to the transferee.

The Court: I don't understand the law that there has to be a special endorsement. Objection overruled.

(Objection noted for defendant as ground of appeal.)

Mr. Quinn: I object to any testimony with reference to the endorsement because the plaintiff does not allege that these notes were ever protested for non-payment, and I move to strike out all the testimony with reference to the endorsement on the notes.

Mr. Brinley: There is no allegation that they were protested and no claim that they were protested; no necessity that they should be protested.

The Court: As far as their admissibility in evidence is concerned, the Court will permit them to be marked. Have they been marked?

Mr. Brinley: No, I am just trying to identify them.

Mr. Quinn: Will your Honor rule at this time or later on the question of endorsement?

The Court: I will rule later.

Q. I show you a note dated September 1, 1925, in the amount of $1,200, made by Georgianna Palmer to Elwood F. Palmer, and ask you if that is one of the notes which you hold. A. Yes, sir.

Q. Do you know the signature of Georgianna Palmer? A. Yes, sir.

Q. Is that her signature? A. Yes, sir.

Q. Do you know the handwriting of Elwood F. Palmer? A. Yes, sir.

Q. Is that his handwriting in all except his signature? A. Yes, sir.

Q. Is that signature on the back, Elwood F. Palmer, his handwriting? A. Yes, sir.

Mr. Brinley: I offer it in evidence.

Mr. Quinn: That is objected to for the reason that no proper endorsement or legal endorsement is upon this paper; for the further reason that this is an attempt to hold the endorser. The plaintiff does not allege that the note was ever protested, and the endorser cannot be held unless he had received notice of protest.

The Court: Objection overruled.

Exception noted for defendant as ground of appeal.

(Paper marked Exhibit P-1.)

Q. Has any part of that note been paid, Mr. Rogers? A. No, sir.

Q. Either principal or interest? A. No, sir.

Q. All due you? A. Yes, sir.

Q. I show you a note for $500, dated September 26, 1925, made by Georgianna Palmer to Elwood F. Palmer, and ask you if that is one of the

notes which you hold upon which you are bringing suit. A. Yes, sir.

Q. Is that the signature of Georgianna Palmer? A. Yes, sir.

Q. Is the writing on that note that of Elwood F. Palmer? A. Yes, sir.

Q. Is the endorsement on the back the handwriting of Elwood F. Palmer? A. Yes, sir.

Q. Has any part of this note been paid, Mr. Rogers? A. No, sir.

Mr. Quinn: The same objection.

The Court: The same ruling.

Exception noted for defendant as ground of appeal.

Mr. Brinley: I offer the note in evidence.

(Note marked Exhibit P-2.)

Q. I show you a note for $700, dated October 8, 1925, made by Georgianna Palmer, payable to Elwood F. Palmer and endorsed by him, and ask you if that is one of the notes upon which you are bringing suit. A. Yes, sir.

Q. Is that the signature of Elwood F. Palmer? A. Yes, sir.

Q. You recognize it? A. Yes, sir.

Q. Is the writing on that note, except for the signature, the writing of Elwood F. Palmer? A. Yes, sir.

Q. Is the endorsement on the back the handwriting of Elwood F. Palmer? A. Yes, sir.

Q. Has any part of this note for $700 been paid to you, either principal or interest? A. No, sir.

Mr. Brinley: I offer the note in evidence.

(Note marked Exhibit P-3.)

Mr. Brinley: Now, again the alternative, in which suit is brought against the administrators of Elwood F. Palmer, I wish to offer in evidence the formal dispute filed by the administrators.

10 Mr. Quinn: No objection.

Q. I show you that and ask you if that is the formal dispute of claim received by you? A. Yes, sir.

(Paper marked Exhibit P-4.)

Mr. Brinley: I would also like to offer in evidence the letters of administration. Shall I get the records, Mr. Quinn, from the

20 office?

Mr. Quinn: No, that is admitted.

Mr. Brinley: I find here the original letters are recorded in Book G of Letters of Administration, page 152, in the Surrogate's Office, on February 9, 1926.

The Court: Is that undisputed, Mr. Quinn?

Mr. Quinn: Yes, that is admitted.

30 Mr. Brinley: Now, in connection with the second count, if your Honor please, the complaint avers—I am reading from it—"that the notes given and the proceeds realized therefrom were received by the said Elwood F. Palmer in his lifetime and that said notes were his primary obligation, and that although his name now appears on each note in each instance as an endorser he is in effect the maker of said

40 notes."

Q. Now, Mr. Rogers, directing your attention to that allegation, to whom was the $1,200 given in the first note? A. To me.

Q. Mr. Rogers, I am showing you a note for $1,200 made by Elwood Palmer and now held by you. What was the consideration which you gave 10 for that note?

Mr. Quinn: I object, if the Court please, under Section 4 of the Evidence Act, with reference to any transaction with the deceased. I believe that is about what the answer will result in.

The Court: What you are offering to do, Mr. Brinley, is under the special provision 20 with regard to liability under the Negotiable Instruments Act, to show that the parties to the instruments were liable in a different capacity from what appears upon them?

Mr. Brinley: Yes.

The Court: And you are asking to fix liability different from that appearing on the note by means of extrinsic evidence of negotiations had with the decedent, aren't 30 you?

Mr. Brinley: I presume in every instance, yes.

The Court: I think that that is inadmissible. I am inclined to think that that is inadmissible.

Mr. Brinley: From this witness, you mean?

The Court: From this witness. I sus- 40 tain the objection.

Q. Mr. Rogers, I show you a check dated September 26, 1925, made to the order of Elwood F. Palmer for $500, and ask you if that is the check which you gave for the note.

Mr. Quinn: Objected to under Section 4 of the Evidence Act. It is a transaction with the deceased.

(Question repeated.)

Mr. Quinn: I will withdraw the objection.

Q. Is that the check which you gave for the note which you now hold? A. Yes.

Mr. Quinn: That is to Elwood F. Palmer, the husband?

Mr. Brinley: Yes, made to Elwood F. Palmer. I offer this in evidence.

(Check marked Exhibit P-5.)

Q. I show you a check dated October 8, 1925, made by Calvin Rogers to the order of Elwood F. Palmer for $700, and ask you if that is the check which you gave as consideration for the $700 note. A. Yes, sir.

Mr. Brinley: I would like to offer this in evidence; both checks, for your Honor's benefit, being endorsed by Elwood F. Palmer.

CROSS-EXAMINATION by Mr. Quinn:

Q. Mr. Rogers, you knew that Elwood F. Palmer and Georgianna Palmer were husband and wife? A. Yes, sir.

Q. Before the notes were delivered to you you looked upon the face of the notes and saw the name of Elwood F. Palmer as payee and Georgianna Palmer as maker of the note? A. Yes, sir.

Q. And also on the back of the note Elwood F. Palmer as endorser? A. Yes, sir.

Q. And you knew that they were husband and wife? A. Yes, sir.

Q. You had full knowledge that it was a transaction between husband and wife? A. Yes, sir.

Q. Elwood Palmer died on what date? A. The 15th of January.

Q. And these notes were never protested; is that so? A. No, sir.

Q. The answer is no? A. No, sir.

Q. Did you ever give notice of protest to the administratrix of the estate?

The Court: There is no testimony of protest, is there?

Mr. Quinn: No, but I want to save time. If I get it out of him I would not have to offer proof of it.

Mr. Brinley: Well, if we don't prove it.

A. No, sir.

Q. As a matter of fact no notice of protest was ever given to the administratrix or Mr. Rogers? A. No, the surrogate told us to—

Q. Not what they told you. There was no notice ever given by you to the administratrix? A. No, sir.

SARAH ROGERS, sworn for plaintiff.

Direct-examination by Mr. Brinley:

Q. Mrs. Rogers, you are the wife of the plaintiff in this suit, Calvin Rogers? A. Yes, sir.

10 Q. You were the sister of Elwood F. Palmer, were you not? A. Yes, sir.

Q. I show you Exhibit P-1, which is a note for $1,200, dated September 1, 1925, made by Georgianna Palmer to Elwood F. Palmer, endorsed by him, and ask you whether you know what the consideration of that note was. A. Yes, sir; my brother and I owed a property at West Belmar and he gave me this note for $1,200. My brother

20 and I owned a property at West Belmar and I sold my interest to him—

Q. To your brother, and that is Mr.— A. Elwood Palmer, and he gave me this note of $1,200 and $175 in a check. So he gave Mr. Rogers and I this note to secure the deed that I gave to him, and I have the deed showing—

The Court: What is the exhibit?

The Witness: $1,200.

30 Q. Have you the deed for that property? A. Yes, you have, with you.

Q. I show you a deed dated September 1, 1925, from Sarah F. Rogers and Calvin Rogers, her husband, to Elwood F. Rogers, and ask you if that is the deed which you gave in consideration of the $1,200 note received by your husband. A. Yes, sir.

40 Mr. Brinley: I would like to offer this in evidence.

Mr. Quinn: No objection.

(Deed marked Exhibit P-7.)

Q. I show you a note marked Exhibit P-2, for $500, made by Georgianna Palmer to the order of Elwood F. Palmer, endorsed by him, and ask you whether you know what the consideration of that note is. A. Yes, sir. My brother bought some property at Spring Lake, and he came and 10 asked Mr. Rogers would he let him have some money to pay down on the deposit of the house at Spring Lake, on Tuttle Avenue; and I loaned him every cent at that time I had and Mr. Rogers had for to pay for the property.

Q. I show you a note for $700, dated October 8, 1925, made by Georgianna Palmer to Elwood F. Palmer, Exhibit P-3, and ask you if you know what the consideration for that is. A. Yes, sir; 20 when he took the title of this property, he took the deed, he came and asked my husband and I if we would let him have all the money that we had to spare for him to take and pay for the property; and we let him have everything we had so he could get the deed, and the next day he got the deed for it.

Q. I show you a deed from George Kirkbride and wife to Elwood F. Palmer and ask you if that is the deed which your brother received, part 30 of the consideration of which he paid for by these two notes of $500 and $700 respectively. A. Yes, sir.

Mr. Brinley: I would like to offer this in evidence.

Mr. Quinn: No objection.

(Deed marked Exhibit D-8.)

40

CROSS-EXAMINATION by Mr. Quinn:

Q. So that Mrs. Palmer received nothing out of these transactions? A. Yes, she did. Now since my brother—

Q. I mean at the time of the negotiation. A. The property has been sold and she has had her share of the lot allotted to her.

Q. That is after he died. I am not speaking of that. At the time of the negotiation of these notes she received nothing? It was for the accommodation of Mr. Palmer, was it not? A. It was for the accommodation of her and him both.

Q. She received nothing? A. She has received since his death.

Q. Just confine yourself prior to the time of the death. That is in settlement of the estate. But at the time the notes were signed and made she received nothing; it was for Mr. Palmer, was it not? A. It was for both of them. Both of them was to make the agreement and both of them signed—

Q. But the money went to the husband, did it not? It went into his bank account; she never received anything? A. It went into the property.

Q. All of it? A. It was sold and she got the benefit of it since his death.

Q. I am not asking you that. Just confine yourself to when it was given. Your brother is living now; at that time Mrs. Palmer received nothing; it all went to Mr. Palmer; isn't that so? A. I don't know what you would call it.

Q. Well, the money was paid to the husband; the wife didn't receive any of it? You say your brother came to you and your husband and said he wanted money is that so? A. Yes.

Q. And the money was given to him; is that right? A. Yes.

Q. No money was given to Mrs. Palmer; you know that if your own knowledge she received nothing? A. No, she has received it since.

Q. Well, let's assume that; but at the time these notes were given she got nothing out of the transaction; isn't that so? When he went to your husband he was manipulating in real estate? A. Yes.

Q. You know that of your own knowledge, that the only benefit received was that which the husband got? The wife got nothing but merely acted as accommodation maker; isn't that so? A. Yes, sir.

The Court: Do you rest now, Mr. Brinley?

Mr. Brinley: Yes, I rest now.

Mr. Quinn: I ask that the plaintiff elect at this time upon which count he relies.

Mr. Brinley: If this were a suit brought against joint defendants I believe I would be obliged to elect; but this being a suit brought in the alternative, if there were a jury, the facts to be submitted to the jury under the guidance of the Court, under specific directions to the jury as to what to hold if they held certain facts to be true and what to hold in the event other facts were proven to be true to them, for that reason I believe I am not obliged to elect upon which count I propose to rely; the purpose of the statute being to permit those facts to be presented to the jury in two ca-

pacities and let them determine which of the sets of facts they believe to be correct, if either.

The Court: Then you refuse to elect?

Mr. Brinley: I do.

Mr. Quinn: If the Court please, while the suit is entitled in the alternative in the body of the complaint, there is no alternative relief asked for. There are two separate and distinct counts, each one a distinct cause of action, without reference to either one or the other or binding either one.

The Court: I don't think that is so.

Mr. Quinn: Now, we are either liable as maker or the endorser is liable as maker. We cannot be liable as both. Now, before we present our defense I think we are entitled to know upon what theory he proceeds.

The Court: There is nothing before me.

Mr. Quinn: There are two counts before you.

The Court: There is no motion pending before me.

Mr. Quinn: Then I ask, if the Court please, that your Honor rule whether or not the plaintiff shall elect.

The Court: I deny your motion.

Mr. Quinn: Your Honor will allow me an exception?

The Court: Yes.

(Objection noted for defendants as ground of appeal.)

Mr. Quinn: Now, I ask for a nonsuit, if the Court please, upon the ground that it appears by the evidence that the original notes were made between husband and wife; and assuming, for the purpose of argument, that there were proper negotiations of transfer to the present holder, he could only receive the same title that existed between the husband and wife. There can be no doubt the husband and wife could not sue each other in this Court upon that note; and he gets no further rights than his transferer. Therefore, he being subject to it, assume for the sake of argument, he cannot bring a suit in this Court between husband and wife. And upon the further ground that there is no proof that any notice of protest was ever given to the endorser, in the evidence it appears—

The Court: Who is the endorser?

Mr. Quinn: Elwood F.

The Court: That is rather inconsistent with your first statement, isn't it?

Mr. Quinn: No, if the Court please.

The Court: Repeat that first reason.

(First part of motion repeated by stenographer.)

Mr. Quinn: Therefore they could not assign their action so that he could do what the original party could not do.

Upon the further ground that no notice of protest was given to the endorser. It appears that prior to the time that these

notes became due the endorser died. Under Section 98 of the Negotiable Instruments Act it provides: "When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found; if there be no personal representative, notice may be sent to the last residence or last place of business of the deceased." It plainly appears here that no notice of protest was given, and therefore the endorser should be released.

The Court: Do you wish to be heard?

Mr. Brinley: I do not wish to be heard on the first count unless your Honor would like to hear me speak upon it.

The Court: Go ahead.

Mr. Brinley: On the first count?

The Court: Yes.

Mr. Brinley: Mr. Rogers is an innocent third person and a holder in due course. He paid a valuable consideration for the notes at the time they were negotiated, and the fact that the intermediary happened to be the husband it seems to me is entirely immaterial in this controversy.

The Court: Now, go on with the second.

Mr. Brinley: As to the second, we concede that there was no protest, and we concede that we cannot hold the estate of Elwood F. Palmer as an endorser. The only chance on which we can recover is to show that the maker was an accommodation

maker for the benefit of Elwood F. Palmer and that his estate received the benefit of it, namely, of these properties which were transferred to him.

Mr. Brinley: No, sir; I am not. That is all I wish to say.

The Court: How about the third reason?

Mr. Brinley: I do not believe I got it.

(Third reason repeated by stenographer.)

The Court: I will deny the motion.

(Objection noted for defendants as ground of appeal.)

DEFENDANT'S TESTIMONY

GEORGIANNA PALMER, sworn for defendant.

Direct-examination by Mr. Quinn:

Q. Mrs. Palmer, you are a married woman? A. Yes.

Q. And your husband's name? A. Elwood F. Palmer.

Q. When were you married? A. 1902.

Q. When did he die? A. January 15, 1926.

Q. Did you ever receive any benefit, Mrs. Palmer, by reason of the negotiation of these notes or the making of them?

Mr. Brinley: Objected to upon the ground that that is purely a question of law, whether she ever received any benefit. In some cases to which I can probably refer

your Honor I think that undoubtedly is so. Whether she received any benefit, when she received it, by what theory she received it, are matters of law that I believe this witness cannot be asked anyhow, to bind herself by merely saying that she did not receive any benefit.

The Court: Oh, well, I will let her say. Objection overruled.

Q. What is your answer, Mrs. Palmer? A. I never did.

Q. Did you ever receive any money by reason of these notes? A. No.

Q. Did you ever have any bank account in your name? A. No.

Q. Either directly or indirectly by reason of these notes? A. No.

Q. Do you know where the money went with respect to these notes? A. Yes.

Q. Where? A. Just as they stated, for real estate.

Q. For real estate? A. Yes.

Q. Given to your husband? A. Yes.

Q. Did you ever receive notice of protest of any of these notes? A. No.

Q. Either individually or as administrator of your husband's estate? A. No, not any.

CROSS-EXAMINATION by Mr. Brinley:

Q. Mrs. Palmer, I show you a deed from Sarah F. Rogers and her husband to Elwood F. Palmer, Exhibit P-7, and ask you if that property was owned by Mr. Palmer at that time of his death at West Belmar. A. Partly.

Q. Partly? A. Yes.

Q. I show you a deed from George Kirkbride and wife to Elwood F. Palmer, dated October 9, 1925, marked Exhibit P-8, and ask you if he owned that property at the time of his death. A. Yes.

Mr. Quinn: May I ask again, for the purpose of the record, that the plaintiff be compelled to elect upon which count he relies, so that the record may show it in a denial, that request being made?

The Court: Are you finishing your case?

Mr. Quinn: Yes, sir.

The Court: Have you rested?

Mr. Quinn: Yes, sir.

Mr. Brinley: I respectfully decline to make election at this time, believing, under the theory which I explained at the time the motion was made formerly, that it is for the jury, or in this instance the Court, to determine which theory shall prevail.

The Court: Of course there is some presumption arising from the order, the manner of the names upon the negotiable instrument; but the question arises whether that presumption has been overcome. And I admit there is a question of fact as well as law there.

Mr. Quinn: If the Court please, I do not think there is any question but what the proof, both the proof that we have offered and the proof of the plaintiff, is that the defendant Georgianna Palmer did not receive any benefit by reason of these notes. I think that is plain both from the case we present and the case that they present. For

the purpose of the record, under those conditions, I think I am entitled now at this time to a direction as to Georgianna Palmer, because they practically admit that to be so.

The Court: Is that all you are asking for?

10 Mr. Quinn: Yes, sir.

The Court: I will handle that with the other matter. I won't make a direction at this time.

Mr. Quinn: Then I ask for the direction of a verdict as to Elwood F. Palmer upon the ground that no notice of protest has been given in accordance with Section 98 of the Negotiable Instruments Act.

The Court: Mr. Quinn, I have been thinking. I 20 think it would seem that if he is principal and the note is really his he would not require any notice of protest, would he?

Mr. Quinn: If the Court please, that is the very object of my making my motion at this time, or my request that the plaintiff elect. There is no question that they cannot hold these defendants upon both of these counts.

The Court: No question about that whatsoever.

Mr. Quinn: Whatever your Honor decides with 30 respect to one count may result in other motions being made as to the other. I am in a position that I cannot properly make my objection.

The Court: The court will tell you that it finds that there is no cause of action against Georgianna Palmer.

Mr. Brinley: I would like to be heard on that.

The Court: All right; go on. You can be heard on it.

40 Mr. Brinley: Not to make an election, if your

Honor please, at this time, but in order to forestall, if I may, any conclusion of your Honor. It appears in the proof that Georgianna Palmer was a married woman and that the note was made by her; that the money passed in two instances into 10 her husband's possession, Elwood F. Palmer, and that he used that money in those two instances to buy a piece of property which he owned at the time of his death. It is immaterial whether he owned it or not. As to the other transaction, the note was for $1,200 and represented a half interest in property which Elwood F. Palmer bought in his own name. Now, that being so, she had then an inchoate right of dower in both of those 20 properties, which the Courts have held amounted to a consideration passing to her. And in this instance we have something better, because in both instances we have her owning the property at the time of his death. He died intestate. And naturally, under the laws of this state there was an actual dower interest there which she undoubtedly received. Now, there is a real consideration. (Cites authorities.)

Mr. Quinn: Now, I renew my motion for the 30 direction of a verdict as to Georgianna Palmer as administratrix of Elwood E. Palmer, upon the ground that there has been no notice of protest as required by Section 98 of the Negotiable Instruments Act; upon the further ground that the plaintiff is not a holder in due course for value; upon the further ground that the notes in question have not been properly transferred to the plaintiff.

The Court: Why not? In what manner have 40 they not?

Mr. Quinn: I am relying on Section 49 that I had previously read.

The Court: You mean a general endorsement, being endorsed over to the plaintiff not sufficient?

Mr. Quinn: Yes, under Section 49.

10 The Court: What is Section 49?

Mr. Quinn: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer; but for the purpose of determining whether the transferee is a holder in due course, the negoti-
20 ation takes effect as of the time when the indorsement is actually made."

Mr. Brinley: Your Honor already ruled against that before.

Mr. Quinn: Upon the further ground that there is no testimony in the case to indicate that Elwood F. Palmer was the maker of these notes except as might appear by reason of his endorsement. There is no testimony in the case to show that he was the person intended to be originally liable
30 for the payment of these moneys. I would like to submit a brief, your Honor, upon that question. I am now assuming that the other count is practically stricken out as against her as administratrix of her husband Elwood F. Palmer.

Mr. Brinley: If your Honor please, is there any need for the brief? I had not undertaken to burden myself.

The Court: What is the brief to be, on what
40 point?

Mr. Quinn: Your Honor has already granted a nonsuit as to Georgianna F. Palmer individually.

The Court: Yes.

Mr. Quinn: I move for the direction of a verdict so against her as administratrix, because under the statute, the Negotiable Instruments Law, it 10 had not been complied with, that the endorser had not received notice of protest. Now, the testimony which they have adduced for the purpose of insinuating that he was the person originally liable upon this note does not to my mind bring any facts before your Honor upon which you could find that he was the maker of the note, and that your Honor would have to find that they are not entitled to notice of protest; that your Honor 20 would have to find that he was the maker of the note and not the endorser; because if he is endorser he was relieved by reason of no notice of protest having been given.

The Court: Now, you say there is no testimony as to that?

Mr. Quinn: No, sir.

The Court: Where do you find the testimony as to it, Mr. Brinley? Where do you find any testimony that Elwood F. Palmer intended to bind 30 himself as being originally liable on that note?

Mr. Brinley: In accepting the benefit of a check which is made payable to his order. He gets the money in two instances. In the other he gets a piece of property which makes him the real beneficiary of the transaction. I think that under the Negotiable Instruments Law that is all that is necessary to prove in order to bind him.

The Court: What section is that of the Negoti- 40 able Instruments Law?

Mr. Brinley: No section, except that it says that the person primarily liable shall be bound. There are several sections of that. I will refer you to one. Of course first of all it is not necessary to protest a note in any event. The question is not protest but presentation for payment.

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

"Notice of dishonor is not required to be given the drawer where the instrument was made or accepted for his accommodation."

The Court I think that is the law, but Mr. Quinn wants to raise the point, and what he wants to argue more at length, I presume, is that there is no evidence that Elwood Palmer ever bound himself, intended to bind himself as a primary debtor on this note.

Mr. Quinn: That is the question.

Mr. Brinley: I submit, if your Honor please, that if he received the benefit of it and it was for his accommodation, as it is proved by this case, where he received the actual benefit, that that is all that is required under the statute. You do not have to go further and attempt to produce some conversation in which he said he was willing to be bound as a result. If that be true it would be almost impossible ever to hold.

The Court: Mr. Quinn, I do not think there is any need of serving a brief.

Mr. Quinn: There are some cases I would like to submit.

The Court: How soon?

Mr. Quinn: Two days.

The Court: How about it, Mr. Brinley? I suppose you would want to see it?

Mr. Brinley: I would like to look at it, at least.

Mr. Quinn: I will send you a copy.

Mr. Brinley: I will try to have it in your Honor's hands immediately after I receive it.

The Court: I will continue this matter until Tuesday morning, April 10th, at 10 A. M. I want all the briefs there are to be in by that time, or before that if possible.

Freehold, N. J., April 12, 1928.

(Hearing of the cause resumed at 10:00 A. M.)

The Court: The Court finds that the plaintiff Calvin Rogers is entitled to recover of the defendant Georgianna Palmer, administratrix of the goods and chattels, rights and credits of Elwood F. Palmer, deceased, for the amounts of the promissory notes set up in the complaint, with interest from their due dates respectively: on the note for $1,200 with interest from March 1, 1926; on the note of $700, with interest from April 8, 1926; and the note of $500 with interest from March 26, 1926; amounting in all to the sum of $2,698.19. Judgment is accordingly given in favor of the plaintiff and against the defendant Georgianna Palmer, administratrix of the goods and chattels, rights and credits of Elwood F. Palmer, deceased, in the sum of $2,698.19, and the plaintiff shall have his costs.

New Jersey Court of Errors and Appeals.

CALVIN ROGERS, *Plaintiff,* *vs.* GEORGIANNA PALMER, Administratrix, etc., *Defendant.*	*Action at Law. On Appeal from Monmouth County Circuit Court.*

This is on appeal from a judgment rendered by the Monmouth County Circuit Court on the twelfth day of April, 1928.

This suit was originally instituted by Calvin Rogers against Georgianna Palmer individually and in the alternative as administratrix of the goods, chattels, rights and credits of Elwood F. Palmer, deceased. The subjects of controversy were three certain promissory notes of which the defendant Georgianna Palmer was the maker and of which the deceased Elwood F. Palmer was endorser. The court in its decision found that the plaintiff was entitled to judgment against the administratrix of the deceased endorser.

The facts briefly are as follows: Elwood F. Palmer and Georgianna Palmer were husband and wife. The notes in question were executed by Georgianna Palmer and endorsed by Elwood F. Palmer. Elwood F. Palmer has since subsequently died. The notes have never been protested. These facts, it appears, are not in dispute.

TESTIMONY.

Counsel stipulated at the beginning of the trial that a jury was to be dispensed with and that the court should act as both judge and jury.

The first witness called for the plaintiff was Calvin Rogers. He testified that he was the holder of the three notes in controversy. (P. 21, line 35.) The first was a note dated September 1, 1925, in the sum of twelve hundred dollars of which the wife was the maker and the husband the endorser and payee. The second was a note for five hundred dollars dated September 26th, 1925, of which the wife, Georgianna Palmer, was the maker and the husband payee and endorser. The next was a note for seven hundred dollars dated October 8, 1925, of which the wife, Georgianna Palmer, was maker and the husband, Elwood F. Palmer, endorser. The witness testified that the signatures were those of the parties sought to be charged, and that no part of the same had been paid. (P. 24, line 1 to 20; p. 24, line 37, to p. 25, line 12 and p. 25, line 23 to 38.) There was also entered in evidence a formal dispute of claim presented by the witness. (P. 26, line 13.) The witness further testified that the note for twelve hundred dollars had been delivered to him in exchange for certain checks, one in the sum of five hundred dollars and the other in the sum of seven hundred dollars. These checks were payable to the order of Elwood F. Palmer. (P. 28, line 3.)

On cross examination the witness stated that he had knowledge that Georgianna Palmer and Elwood F. Palmer were husband and wife. (P. 28, line 37.) He further had knowledge that this was a transaction between husband and wife. (P. 29, line 15.) He admitted that the notes had never been protested (p. 29, line 18), and that no notice of protest had been given to the administratrix of the estate.

Sarah Rogers was then called as a witness. She testified that the consideration for the twelve hundred dollar note was the sale of certain property to her brother in which she had an interest. (P. 30, line 12.) She stated that the consideration for the five hundred dollar note was a loan of money made by her husband to the deceased, representing the deposit on a house at Spring Lake which the deceased was about to purchase.

She testified that the note for seven hundred dollars was given in exchange for part of the purchase price of the same piece of property and that both the five hundred dollar and the seven hundred dollar loans were evidenced by the notes in controversy. (P. 31, line 10 to line 30.)

On cross examination she admitted that Georgianna Palmer had received no benefit from the transaction at the time of the giving of the notes. (P. 10, line 10 to line 40, and p. 33, line 10 to line 20.)

A motion was then made for a non suit and at the time of making the motion it was admitted by counsel for the plaintiff that the estate of Elwood F. Palmer could not be held as endorser. The court, however, denied the motion for a non suit as to both Georgianna Palmer individually and also as administratrix of the estate of Elwood F. Palmer, deceased.

Georgianna Palmer was then called as a witness for the defendant. She testified that at the time of the trasaction in question she was a married woman. (P. 37, line 30.) She stated that she received no consideration by reason of the giving of the notes, nor did she receive any money or any advantage. (P. 38, line 10 to line 20.) She stated that she had no bank account in her own name and received nothing directly or indirectly from the notes in question. She stated that the consideration for the notes was real estate given to her husband. (P. 38, line 25.) She stated that no notice of protest was ever given on the notes in question to her individually or as administratrix of her husband's estate.

On cross examination she stated that her husband,

Elwood F. Palmer, was part owner of the property covered by the deed for which the note was consideration at the time of his death. (P. 38, line 40.) She stated that the property which was conveyed by deed and for which the last two notes were given, belonged to her husband at the time of his death.

The court found that there was no cause of action against the defendant, Georgianna Palmer. The court, however, rendered judgment against the defendant Georgianna Palmer as administratrix; and from this judgment the defendant appeals.

Inasmuch as the grounds of appeal which the defendant urges all have reference to one point of law in which it is contended that the trial court committed error, the argument of defendant will be confined under one head to this single point.

ARGUMENT.

The Trial Court Erred in Entering Judgment Against the Defendant Administratrix in the Absence of Proof That Notice of Dishonor Had Been Given to the Endorser of the Instruments, Elwood F. Palmer.

At the close of the plaintiff's case, a motion for a non suit was made on the part of the defendant. Counsel for the plaintiff at that time admitted that there was no notice of protest and conceded that it was impossible for the plaintiff to hold the estate of Elwood F. Palmer as endorser. The only other position in which the deceased Elwood F. Palmer could be placed than that of endorser, was the position of maker and it was obviously an impossibility for the trial court to disregard the evident position of the signatures upon the notes and place the deceased in a position where it was not the intention of the parties that he should be placed, namely, as the maker of the note. It can not be said with any degree of force that such power was vested in the trial court, but on the contrary while the trial court could find that the wife, Georgianna Palmer, was

accommodation maker or accommodation endorser and as such not liable as a married woman, not having received consideration or benefit to her own estate, nevertheless the court was without power to charge a person as a maker whom the parties had elected to charge as endorser.

The only question remaining, therefore, and the question which it is contended the court erroneously resolved against the defendant, was the question of notice of dishonor being given to the endorser.

This matter is covered by our negotiable instruments law in no uncertain terms. 3 *com. stat. p.* 3745, *sec.* 89. Under section 89 we find the following:

> "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

The evidence was conclusive that no such notice of dishonor was ever given to the party whom the note charged with liability in this case. On the contrary, it was admitted by both the plaintiff and his wife that no such notice was ever given nor was any attempt ever made to give such notice. For this reason, therefore, defendant contends that the estate of Elwood F. Palmer was discharged from all liability on said note by reason of this provision.

Section 98 *of the same act at p.* 3746 proceeds as follows:

> "When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found; if there be no personal representative, notice may be sent to the last residence or last place of business of the deceased."

In the instant case, a personal representative had

been appointed in the person of the wife of the deceased. It was therefore obligatory upon the plaintiff, before the estate of the endorser could be charged, to give notice of dishonor in accordance with the statute to the administratrix of the estate of the deceased. This he has failed to do and for this reason, therefore, defendant contends that the endorser was discharged.

In the case of *Second National Bank of Hoboken v. Smith,* a somewhat similar question came before the court. In that case the note was presented for payment and protested. The endorser was dead, having left a Will appointing an executor. The assistant cashier of the bank informed the holder of the note of the death of the endorser and gave him the name of the executor. A notice was then mailed to the endorser in care of the executor, naming him at his address. The court held that that was a sufficient compliance with the statute and that sufficient notice had been proved to entitle the endorser to be held.

In the case of *Smalley v. Wright,* 40 *N. J. L.,* 471, the court dealt with a similar situation, and held:

> "The endorser's death occurred before maturity of the notes, and notice of dishonor was served, or attempted to be served, upon the administrators, and not upon the defendants, as heirs."

The court quotes with approval the following citation from Parsons on bills and notes:

> "We think the true rule, although it may not reconcile all the authorities, and, indeed, must be open to some exceptions, should be this: every person who, by and immediately upon the dishonor of the note of bill, and only upon such dishonor becomes liable to an action, either on the paper or on the consideration for which the paper was given, is entitled to immediate notice."

The court further goes on to say:

> "To support a recovery, then, proof that notice was actually received in *legal time* was necessary. Such proof the plaintiff attempted to make, but in this I think he failed."

The court also dealt with a similar situation in the case of *Dodson v. Taylor, reported in* 56 *N. J. L. at p.* 11. In that case the endorser also had died previous to the time of maturity of the notes. The court held in dealing with the present situation:

> "When the endorser is dead and there are no personal representatives, or none can be discovered by reasonable diligence, then notice of dishonor should be addressed to the endorser at his last place of abode."

At *page* 19 the court goes on to say further:

> "But when there are personal representatives and they are known or discoverable by due diligence, then notice must be given to them."

In the instant case, the first note should have matured March 1, 1926; the second, or seven hundred dollar note should have matured April 8, 1926; and the third, or five hundred dollar note should have matured March 26, 1926. The evidence disclosed the fact that the endorser, Elwood F. Palmer, died on January 15, 1926, and that subsequently, on February 9, 1926, Georgianna Palmer was appointed administratrix. It follows, therefore, that a personal representative had been appointed at the time the notes matured and that there was due to her as such personal representative, notice of dishonor of the notes upon which the deceased was endorser.

At the close of the case no evidence had been adduced or attempted to be adduced, which would indicate that notice of such protest was ever given. On the contrary, the attorney for the plaintiff admitted that no such notice had ever been given and that none was attempted to be given.

CONCLUSION.

Therefore, for the reason that

1. The statute by its very language discharged the endorser, Elwood F. Palmer, deceased, in the event that notice of dishonor were not given him, and that

2. At the close of the plaintiff's case and at the close of all the testimony there was no evidence whatever before the court that any such notice of dishonor had ever been given or attempted to be given in behalf of the plaintiff to the deceased endorser or his personal representative.

It is respectfully submitted that the trial court erred in entering judgment in favor of the plaintiff and against the defendant as administratrix of the estate of Elwood F. Palmer, deceased.

Respectfully submitted,

QUINN, PARSONS & DOREMUS,
Attorneys of and Counsel With Defendant-Appellant, Georgianna Palmer, Administratrix, Etc.

New Jersey Court of Errors and Appeals.

CALVIN ROGERS, *Plaintiff,* vs. GEORGIANNA PALMER, Administratrix, etc., *Defendant.*	*Action at Law. On Appeal from Monmouth County Circuit Court.*

PRELIMINARY STATEMENT.

The opening statement of facts as it appears in the brief for the defendant-appellant is substantially correct. The statement of the testimony in the defendant's brief, as far as it goes, is correct. The printed record is not as full as it might be, some of the exhibits being omitted. But it is sufficiently full to deal intelligently with the problem involved, namely, "may Calvin Rogers, the plaintiff below, recover the amount due upon three promissory notes aggregating $2,400, all made by Georgianna Palmer, payable to the order of Elwood F. Palmer, who was her husband, endorsed 'Elwood F. Palmer,' and delivered by him in that form for full consideration to the plaintiff."

FACTS.

It is conceded at the outset that the defendant against whom the judgment was entered, namely, Georgianna Palmer, administratrix of the goods,

chattels, rights and credits of Elwood F. Palmer, deceased, did not receive notice of dishonor, or notice of protest of the three notes, which are the subject of this controversy.

The difficulty is that the defendant in her brief has entirely ignored the theory upon which the plaintiff made his recovery, namely, that Elwood F. Palmer, was the real party in interest, that he benefited and he alone from the proceeds of the notes, and that Georgianna Palmer, the maker of the notes, was an accommodation maker merely. That Georgianna Palmer received no benefit from the notes is most strongly set forth in her own testimony on pages 37 and 38, and she in direct examination reiterates the testimony of Sarah Rogers (a witness produced by the plaintiff) that the proceeds from the several notes were used in all three instances for the purchase of real estate by her husband. (See page 38 middle, and cross-examination same witness, page 38 bottom, and page 39 top.)

Sarah Rogers, a witness produced by the plaintiff, (see page 30) testifies that the $1,200 note (Exhibit P-1) represented the purchase price paid by Elwood F. Palmer, of an undivided one-half interest of her and her husband, Calvin Robgers, in property at Belmar, in which property Elwood F. Palmer already owned the remaining undivided interest. Sarah Rogers testifies (page 31) that the proceeds of the $500 note (Exhibit P-2) represented the first installment paid by Elwood F. Palmer upon the purchase price of a property at Spring Lake, and the proceeds of the $700 note (Exhibit P-3) represented payment of that amount upon the purchase price at the time Elwood F. Palmer took title. These facts clearly make Elwood F. Palmer the person for whose benefit the several notes were made, and the only person.

DISCUSSION.

The question is "Does the fact that Elwood F. Palmer placed his name upon the back of each of said notes, presumably as an endorser, prevent a recovery against his estate, (he having died in the meantime), even though his estate received no notice of dishonor, when the facts are disclosed that he was the sole beneficiary of the transaction?"

The theory of the plaintiff is that he was the real maker of the notes; that for some reason, or perhaps no reason, except lack of knowledge of the significance of the position of the signatures in negotiable instruments, the notes were all made by Georgianna Palmer to the order of her husband, Elwood F. Palmer, and endorsed by him, and delivered by him with no other endorsement except his name written across the back of each note, for a valuable consideration to the plaintiff.

The plaintiff under the Negotiable Instruments Act is very clearly a holder in due course, and entitled to the benefit of such a holder as defined by Section 57 of the Negotiable Instruments Act (Compiled statutes, volume 3, page 3741). That act holds (section 70, page 3743) "that presentment for payment is not necessary in order to charge the person primarily liable on the instrument." That act also provides (section 80, page 3744) that "presentment for payment is not required in order to charge an endorser where the instrument was made or accepted for his accommodation." Section one hundred and fifteen (page 3748) of the same act provides "that notice of dishonor is not required to be given to the endorser (3) where the instrument was made or accepted for his accommodation."

The conclusiveness of the testimony on the point just stressed is clear and convincing, and the plaintiff contends that the judgment of the Circuit Court in holding Georgianna Palmer, administratrix, liable for the debt is sound and in keeping with the

purpose and intent of the Negotiable Instruments Act.

The sections of the Negotiable Instruments Act above quoted, which the plaintiff claims are applicable to the case at bar, and permit a recovery by him, are meaningless unless in addition to the facts proven by the plaintiff in this case, it is necessary for him to produce testimony of some actual statement made at the time of the negotiation by the endorser, that although he has signed as endorser, he in fact is the maker, and expects to be held in that capacity.

We do not believe that the Negotiable Instruments Act contemplates such testimony in order to make the sections above quoted applicable. The purpose of the Negotiable Instruments law is to make this type of instrument more certain and more likely to result in a recovery and in justice among the parties. Such a strained construction as we have just spoken of would not lead to certainty and fair dealing among the parties to the instrument, but would result in almost every instance as it would result in the case at bar, in the perpetration of a fraud.

Calvin Rogers who paid cash in two instances in the amount of the note, or deeded property in the third instance, would receive nothing in return, and Elwood F. Palmer, who received the cash, or the property would not be obliged to reimburse Calvin Rogers for this benefit, which he had received.

We have endeavored to find a case or cases which would be illuminating upon this exact point, but have failed.

The case of *Eheret vs. Basso*, 4 *Miscellaneous, page* 69, deals with facts which are somewhat similar to the case at bar, and although it does not treat of the particular point which is now before the Court, it does determine the general principle herein striven for.

The conclusion of the plaintiff is that the true relations of the parties were shown by parol evi-

dence at the trial, and that when it was proven that the maker was an accommodation maker only, that the endorser received the sole benefit from the negotiation of the note, that there is no necessity for notice of dishonor to be given to the endorser and that the plaintiff may look to the endorser for satisfaction as if his name had appeared on the face of the note as maker.

Respectfully submitted,

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Attorneys for and of Counsel
With the Plaintiff.