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Plaintiff's Notice of Appeal.

Filed.

New Jersey Supreme Court.

BERGEN COUNTY.

HACKENSACK TRUST COMPANY, administrator of estate of Florence K. Dartnell, deceased, *Plaintiff,* *vs.* THE ERIE RAILROAD COMPANY, a corporation of the State of New Jersey, and EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To RAYMOND P. WORTENDYKE, Esq., attorney of defendant, Eva Van Den Berg, administratrix of the estate of Wynand Van Den Berg, deceased.

TAKE NOTICE that the plaintiff appeals to the Court of Errors & Appeals from so much of the judgment entered in this cause as adjudges that there is no cause of action in the plaintiff against the defendant Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, on the following grounds:

1. The court granted a motion for a direction to the jury to find a verdict for the defendant,

Plaintiff's Notice of Appeal.

Eva Van Den Berg, as requested by the attorney for the said defendant.

2. That the court directed a verdict in favor of the defendant Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, and pursuant to such direction the jury brought in a verdict in favor of the said Eva Van Den Berg, administratrix, etc.

3. The court charged the jury

"The suit was brought against the railroad company and the administratrix of the driver of this car. The Orphans' Court of this county having made its decree barring the creditors of Mr. Van Den Berg's estate from any action against the administratrix of that estate, and the plaintiff in this case having failed to present its claim to the administratrix before the making of the Orphans' Court decree, there can be no recovery in this suit against this administratrix, and you will find a verdict in favor of the administratrix of the Van Den Berg estate."

4. The jury brought in a verdict in favor of the defendant Eva Van Den Berg, as administratrix, as directed by the court, upon which a judgment was entered in the Supreme Court in favor of the defendant Eva Van Den Berg, as aforesaid.

FREDERICK S. TAGGART,
Attorney of Appellant.

Service of the within notice acknowledged this 10th day of April, 1918.

R. P. WORTENDYKE,
Attorney of Defendant,
Eva Van Den Berg, Administratrix, etc.

Grounds of Appeal.

Filed.

New Jersey Court of Errors and Appeals

HACKENSACK TRUST COMPANY, administrator of estate of Florence K. Dartnell, deceased, *Plaintiff and Appellant,* *vs.* EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased, *Defendant and Respondent.*	*Action at Law.* *Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. The court granted a motion for a direction to the jury to find a verdict for the defendant Eva Van Den Berg, as requested by the attorney for the said defendant.

2. That the court directed a verdict in favor of the defendant, Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, and pursuant to such direction the jury brought in a verdict in favor of the said Eva Van Den Berg, administratrix, etc.

3. The court charged the jury

"The suit was brought against the railroad company and the administratrix of the driver of this car. The Orphans' Court of this county having made its decree barring

the creditors of Mr. Van Den Berg's estate from any action against the administratrix of that estate, and the plaintiff in this case having failed to present its claim to the administratrix before the making of the Orphans' Court decree, there can be no recovery in this suit against this administratrix, and you will find a verdict in favor of the administratrix of the Van Den Berg estate."

4. The jury brought in a verdict in favor of the defendant Eva Van Den Berg, as administratrix, as directed by the court, upon which a judgment was entered in the Supreme Court in favor of the defendant Eva Van Den Berg, as aforesaid.

FREDERICK S. TAGGART,
Attorney of Appellant.

I conceive that there is good ground for appeal in the above-stated cause.

FREDERICK S. TAGGART,
Attorney of Appellant.

Notice of Appeal of Defendant Eva Van Den Berg.

Filed.

SUPREME COURT OF NEW JERSEY

BERGEN COUNTY.

HACKENSACK TRUST COMPANY, administrator of estate of Florence K. Dartnell, deceased, *Plaintiff,* *vs.* THE ERIE RAILROAD COMPANY, a corporation of the State of New Jersey, and EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased, *Defendants.*	*Action at Law.* *In Tort.* *Notice of Appeal.*

To FREDERICK S. TAGGART, Esq., attorney of plaintiff, Hackensack Trust Company, administrator of estate of Florence K. Dartnell, deceased.

TAKE NOTICE that the defendant, Eva Van Den Berg, administratrix of Wynand Van Den Berg, deceased, appeals from so much of the judgment entered in this cause as adjudges that the cause of action particularly set out in the pleadings in said cause, survived against Eva Van Den Berg, administratrix of Wynand Van Den Berg, deceased, after the decease of the said Wynand Van Den Berg, and because the

said court denied the motion to dismiss the said action against the said Eva Van Den Berg, administratrix of Wynand Van Den Berg, deceased, upon the ground that the said action did not survive as against her.

R. P. WORTENDYKE,
Attorney of said Defendant.

Dated, April 16th, 1918.

I conceive that there is good cause for appeal in the above stated cause.

R. P. WORTENDYKE,
Attorney and of Counsel with said Defendant.

Complaint.

The Erie Railroad Company, a corporation and Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, the defendants in the cause, were summoned to answer unto the Hackensack Trust Co., administrator of the estate of Florence K. Dartnell, deceased, the plaintiff, therein in an action at law upon the following complaint.

Complaint.

Filed January 28th, 1916.

The plaintiff, a corporation of the State of New Jersey, having its principal office in the City of Hackensack, in the County of Bergen and State of New Jersey, says that, as administrator of all and singular the goods, chattels and credits of Florence K. Dartnell, deceased;

1. The said Florence K. Dartnell died on or about the first day of January, nineteen hundred and fifteen, intestate. On the nineteenth day of February, nineteen hundred and fifteen the Surrogate of the County of Bergen granted letters of administration upon the estate of the deceased to the plaintiff and the same were accepted by it and it qualified as such administrator.

2. That the said Florence K. Dartnell was, on the said first day of January, nineteen hundred and fifteen, and theretofore, a resident of the Borough of Tenafly, in the County of Bergen and State of New Jersey.

FIRST COUNT.

1. That the defendant, the Erie Railroad Company, is a corporation of this State, and, at the time within stated, maintained and op-

erated a steam railroad upon tracks laid through the Borough of Tenafly, in this State.

2. That the said Erie Railroad Company crossed a public street or highway, known as Jay street, at grade, upon the same level with the said public highway, in the Borough of Tenafly aforesaid, and that the said defendant, the Erie Railroad Company, ran and operated an engine and train of cars on said railroad and across the said public road or highway.

3. That it was the duty of the defendant, the Erie Railroad Company, to use reasonable care in the maintenance, management and operation of the said railroad and its property at or near the said Jay street, and the crossing aforesaid, and to give a warning, signal or notice of the approach of the trains or locomotives of the said defendant, the Erie Railroad Company, to all persons crossing the said railroad at the said Jay street, by blowing a whistle or ringing a bell, or by some other sufficient means to warn plaintiff's intestate and other persons of the approach of the said trains, so that said plaintiff's intestate and other persons crossing would not be injured by the trains of the defendant.

4. That on January first, nineteen hundred and fifteen, the defendant, the Erie Railroad Company, by its servants operated a train of cars and permitted or caused the same to pass along the said railroad over the said crossing at Jay street; that the said defendant, the Erie Railroad Company, disregarding its duty, negligently, carelessly and inefficiently failed to give a signal of the approach of the said train by ringing a bell or blowing a whistle or by giving sufficient warning of the said approach

in any other manner, and negligently, carelessly and inefficiently managed, maintained and operated the said train, and failed to guard the said crossing at Jay street as aforesaid, with the proper and necessary signals or warnings.

5. That because of such negligence, carelessness and inefficiency on the part of the defendant, the Erie Railroad Company, the said train so operated by the said defendant, collided with an automobile or motor vehicle belonging to and driven by one Wynand Van Den Berg, in which the plaintiff's intestate was then being lawfully driven by the said Wynand Van Den Berg, over the said crossing at Jay street and across the said railroad, whereby, without any negligence on the part of the plaintiff's intestate, and not knowing of the approach of the said train for want of warning and notification thereof, the said automobile or motor vehicle was struck and the said plaintiff's intestate was killed.

6. That the said decedent, Florence K. Dartnell, left her surviving a brother and sister, her next of kin, and that they sustained great pecuniary loss, damage and injury from and by reason of the death of the said Florence K. Dartnell, to wit, the sum of fifty thousand ($50,000) Dollars.

7. Whereby and by force of the statute in such case made and provided, an action has accrued to the plaintiff as administrator of the goods and chattels, rights and credits of the said Florence K. Dartnell, to demand and have of and from said defendants for the exclusive benefit of the next of kin, damages as aforesaid.

8. That this action is commenced within twenty-four calendar months after the death of the decedent, Florence K. Dartnell.

9. And the said plaintiff brings herein to court its letters of administration on the goods and chattels, rights and credits of the said Florence K. Dartnell, deceased, granted to it on the ninth day of February, nineteen hundred and fifteen, by the Surrogate of the County of Bergen, which is the County in this State wherein the said Florence K. Dartnell resided at the time of her death.

SECOND COUNT.

1. That the said defendant's intestate, Wynand Van Den Berg, was on the said first day of January, nineteen hundred and fifteen the ower of a certain garage and of certain taxicabs and motor vehicles and engaged in the business of transporting passengers for hire as a common carrier; that on the said first day of January, nineteen hundred and fifteen, the plaintiff's intestate was seated in a certain automobile or motor vehicle owned and driven by the said Wynand Van Den Berg, and riding in and along certain public highways in the Borough of Tenafly.

2. That the Erie Railroad Company, a corporation of this State, was operating a steam railroad upon tracks through the said Borough of Tenafly, which said tracks cross a street or highway known as Jay street, in the said borough, at grade.

3. That the said Wynand Van Den Berg, while engaged in transporting and carrying the plaintiff's intestate, so negligently drove and operated the said automobile or motor vehicle that he caused the same to collide with a train operated by the said Erie Railroad Company upon its tracks at the intersection of the said

Complaint.

Jay street with the tracks of the said company.

4. That because of the negligent and careless acts and conduct of the said Wynand Van Den Berg, the said automobile or motor vehicle owned and driven by him, collided with the said train, whereby the said Florence K. Dartnell, the plaintiff's intestate, was killed.

5. That as a result of the said accident, the said Wynand Van Den Berg was injured by the said collision and later died.

6. That thereafter and on the twelfth day of January, nineteen hundred and fifteen, the Surrogate of Bergen County issued letters of administration on the estate of the said Wynand Van Den Berg to Eva C. Van Den Berg, one of the defendants herein, and thereafter she qualified and took upon herself the administration of the estate and is now acting as such administrator.

7. That the decedent, Florence K. Dartnell, left her surviving a brother and sister, her next of kin, and that they sustained great pecuniary loss, damage and injury from and by reason of the death of the said Florence K. Dartnell, to wit, the sum of fifty thousand ($50,000) dollars.

8. Whereby and by force of the statute in such case made and provided, an action has accrued to the plaintiff as administrator of the goods and chattels, rights and credits of the said Florence K. Dartnell, to demand and have of and from said defendants for the exclusive benefit of the next of kin, damages as aforesaid.

9. That this action is commenced within twenty-four calendar months after the death of the decedent, Florence K. Dartnell.

10. And the said plaintiff brings herein to court its letters of administration on the goods and chattels, rights and credits of the said Florence K. Dartnell, deceased, granted to it on the ninth day of February, nineteen hundred and fifteen, by the Surrogate of the County of Bergen, which is the County in this State wherein the said Florence K. Dartnell resided at the time of her death.

THIRD COUNT.

1. That the defendant's intestate, the said Wynand Van Den Berg, was on the first day of January, nineteen hundred and fifteen, the owner and proprietor of and had in his possession a certain automobile or motor vehicle for the carriage and conveyance of passengers for hire and reward, and that thereupon the plaintiff's intestate, the said Florence K. Dartnell, became and was a passenger or occupant in said automobile or motor vehicle, owned and driven by the said Van Den Berg, for a certain compensation reward.

2. That it thereupon became and was the duty of the said Wynand Van Den Berg to use due and proper care in carrying the said plaintiff's intestate, the said Florence K. Dartnell, from her home in the Borough of Tenafly aforesaid to Tenafly Hall in the said borough.

3. That the said Wynand Van Den Berg failed to use due and proper care in conveying and carrying the said plaintiff's intestate, the said Florence K. Dartnell, and wholly neglected so to do.

4. That the Erie Railroad Company, a corporation of this State, was operating a steam

railroad upon tracks through the said Borough of Tenafly, which said tracks cross a public street or highway known as Jay street, in the said borough, at grade.

5. That the said Wynand Van Den Berg, while engaged in conveying and carrying the plaintiff's intestate, the said Florence K. Dartnell, so negligently and carelessly drove and operated the said automobile or motor vehicle, that he caused same to collide with a train operated by the defendant, the Erie Railroad Company, along and upon its tracks at the intersection of the said Jay street with the tracks of the said company.

6. That because of the negligent and careless acts and conduct of the said Wynand Van Den Berg, the said automobile or motor vehicle in which the plaintiff's intestate was being carried, collided with the said train, whereby the said Florence K. Dartnell, the plaintiff's intestate, was killed.

7. That as a result of the said accident, the said Wynand Van Den Berg was injured by the said collision and later died.

8. That thereafter and on the twelfth day of January, nineteen hundred and fifteen, the Surrogate of Bergen County issued letters of administration on the estate of the said Wynand Van Den Berg to Eva C. Van Den Berg, one of the defendants herein, and thereafter she qualified and took upon herself the administration of the estate and is now acting as such administrator.

9. That the said decedent, Florence K. Dartnell, left her surviving a brother and sister, her next of kin, and that they sustained great

pecuniary loss, damage and injury from and by reason of the death of the said Florence K. Dartnell, to wit, the sum of fifty thousand ($50,000) dollars.

10. Whereby and by force of the statute in such case made and provided, an action has accrued to the plaintiff as administrator of the goods and chattels, rights and credits of the said Florence K. Dartnell, to demand and to have of and from the said defendants for the exclusive benefit of the next of kin, damages as aforesaid.

11. That this action is commenced within twenty-four calendar months after the death of the decedent, Florence K. Dartnell.

12. And the said plaintiff brings herein to court its letters of administration on the goods and chattels, rights and credits of the said Florence K. Dartnell, deceased, granted to it on the ninth day of February, nineteen hundred and fifteen, by the Surrogate of the County of Bergen, which is the County in this State wherein the said Florence K. Dartnell resided at the time of her death.

FOURTH COUNT.

1. That the defendant's intestate, Wynand Van Den Berg, was on the first day of January, nineteen hundred and fifteen, the owner and proprietor of and had in his possession a certain automobile or motor vehicle.

2. That on the day aforesaid the said Wynand Van Den Berg invited the plaintiff's intestate, the said Florence K. Dartnell, to ride in the said automobile or motor vehicle and that the plaintiff's intestate thereupon accepted

the said invitation and entered the said automobile or motor vehicle so owned and driven by the said Wynand Van Den Berg.

3. That the Erie Railroad Company, one of the defendants herein, was on the day aforesaid, operating a steam railroad upon tracks through the said Borough of Tenafly and across a public street or highway known as Jay street, in the said borough, at grade.

4. That the said Wynand Van Den Berg, while engaged in driving the said plaintiff's intestate, the said Florence K. Dartnell, on and along certain highways in the Borough of Tenafly and on and along the said Jay street, where the said street crosses the tracks of the Erie Railroad Company, so negligently and carelessly operated and drove the said automobile or motor vehicle that he caused the same to collide with a train operated by the defendant, the Erie Railroad Company, at the intersection of the said Jay street with the tracks of the said company.

5. That because of the negligent and careless acts and conduct of the said Wynand Van Den Berg, the said automobile or motor vehicle owned and driven by him, collided with the said train, whereby the said Florence K. Dartnell, the plaintiff's intestate, was killed.

6. That as a result of the said accident, the said Wynand Van Den Berg was injured by the said collision and later died.

7. That thereafter and on the twelfth day of January, nineteen hundred and fifteen, the Surrogate of Bergen County issued letters of administration on the estate of the said Wynand Van Den Berg to Eva C. Van Den Berg, one

of the defendants herein; thereafter she qualified and took upon herself the administration of the estate and is now acting as such administratrix.

8. That the said decedent, Florence K. Dartnell, left her surviving a brother and sister, her next of kin, and that they sustained great pecuniary loss, damage and injury from and by reason of the death of the said Florence K. Dartnell, to wit, the sum of fifty thousand ($50,000) dollars.

9. Whereby and by force of the statute in such case made and provided, an action has accrued to the plaintiff as administrator of the goods and chattels, rights and credits of the said Florence K. Dartnell, to demand and have of and from said defendant, for the exclusive benefit of the next of kin, damages as aforesaid.

10. That this action is commenced within twenty-four calendar months after the death of the decedent, Florence K. Dartnell.

11. And the said plaintiff brings herein to court its letters of administration on the goods and chattels, rights and credits of the said Florence K. Dartnell, deceased, granted to it on the ninth day of February, nineteen hundred and fifteen, by the Surrogate of the County of Bergen, which is the County in this State wherein the said Florence K. Dartnell resided at the time of her death.

The plaintiff, therefore, demands as damages, the sum of fifty thousand ($50,000) dollars.

FREDERICK S. TAGGART,
Attorney for Plaintiff.

Answer of Defendant, Van Den Berg.

The defendant Eva Van Den Berg answered as follows:

Answer.

Filed February 15, 1916.

The defendant, Eva Van Den Berg, administratrix of the estate of Wynand Van Den Berg, deceased, a resident of Tenafly, in the County of Bergen and State of New Jersey, says:

1. She has no certain information, except that contained in said complaint, as to the matters alleged in the first paragraph thereof, and leaves the plaintiff to make such proofs thereof as it may deem proper.

2. She admits the statement contained in the second paragraph of said complaint.

3. She admits the first paragraph of the first count of said complaint.

4. She admits the allegations in the second paragraph of the first count of said complaint.

5. She admits the allegations in the third paragraph of the first count of said complaint.

6. She has no information as to the allegations contained in paragraph six of the first count of said complaint, except that contained therein, and leaves the plaintiff to make such proof thereof as it may be advised is right and proper.

7. She denies the allegations of the seventh paragraph of the first count of the complaint, so far as she as a defendant is concerned.

8. She admits the allegation of the eighth paragraph of the first count of the complaint.

9. She admits the allegations of the first paragraph of the second count of the complaint, except as herein specifically denied. She denies that on the thirty-first day of December, nineteen hundred and fourteen, the plaintiff's intestate was seated in a certain automobile or motor vehicle owned and driven by the said Wynand Van Den Berg, riding along a certain highway, in the Borough of Tenafly, at least defendant has no information of such an occurrence, except that contained in said complaint. She admits, however, that she is informed and believes it to be true that such an occurrence as in said paragraph alleged did take place on the following day, to wit, January 1st, 1915.

10. She admits the allegations of the second paragraph of the second count of the complaint.

11. She denies the allegations of the third and fourth paragraphs of the second count of the complaint.

12. She denies the allegations of the fifth paragraph of the second count of the complaint, and alleges that the said Wynand Van Den Berg by reason of said collision was instantly killed.

13. She admits the allegations of the sixth paragraph of the second count of said complaint.

14. She has no information as to the allegations of the seventh paragraph of the second count of said complaint, except as contained in said complaint, and leaves the complainant to make such proof as it may deem wise and proper.

15. She denies the allegations of the eighth paragraph of the second count of the complaint.

16. She admits the allegations of the tenth paragraph of the second count of the complaint.

17. She has no information as to the allegations of the first paragraph of the third count of said complaint, except that therein contained, except that defendant's intestate on the thirty-first day of December, nineteen hundred and fourteen, was the owner and proprietor of a certain automobile or motor vehicle for the carriage and conveyance of passengers for hire and reward.

18. She admits the allegation of the second paragraph of the third count of said complaint.

19. She denies the allegation of the third paragraph of the third count of the complaint.

20. She admits the allegation of the fourth paragraph of the third count of the complaint.

21. She denies the allegation of the fifth paragraph of the third count of the complaint.

21½. She denies the allegation of the sixth paragraph of the third count of the complaint, except that she is informed that the said Florence K. Dartnell was killed.

22. She denies the allegation of the seventh paragraph of the third count of the complaint. and alleges that as a result of said accident the said Wynand Van Den Berg was instantly killed.

23. She admits the allegation of the eighth paragraph of the third count of the complaint.

24. She has no information as to the allegations of the ninth paragraph of the third count of the complaint, except as stated therein.

25. She denies the allegations of the tenth paragraph of the third count of the complaint.

26. She admits the allegations of the first paragraph of the fourth count of the complaint.

27. She has no information except that therein contained of the allegations of the second paragraph of the fourth count of the complaint.

28. She admits the allegations of the third paragraph of the fourth count of the said complaint.

29. She denies the allegations of the fourth paragraph of the fourth count of the complaint.

30. She denies the allegations of the fifth paragraph of the fourth count of the complaint.

31. She denies the allegation of the sixth paragraph of the fourth count of the complaint, and alleges that the said Wynand Van Den Berg was instantly killed as she is informed and believes it to be true.

32. She admits the allegation of the seventh paragraph of the fourth count of the complaint.

33. She has no information as to the allegations of the eighth paragraph of the fourth count of the complaint, except that therein given.

34. She denies the allegation contained in the ninth paragraph of the fourth count of the complaint.

35. She admits the allegations of the tenth paragraph of the fourth count of the complaint.

36. The defendant further answers said complaint and alleges as a further defense thereto, that upon the granting of said letters of administration, as in said complaint alleged, by the Surrogate of the County of Bergen, she applied to the said Surrogate to cause to be published a notice to the creditors and the persons having demands and claims against the estate of the said

Wynand Van Den Berg, to bring in their debts, demands and claims against his said estate, under oath within nine months from the date of the said order requiring said notice to be given; that said notice was published and that during said period of nine months no claim was presented to said defendant by or on behalf of the said Florence K. Dartnell or the said plaintiff as her representative, or otherwise, and that on or about the expiration of said nine months, to wit, on the twentieth day of October, nineteen hundred and fifteen, the Surrogate of the County of Bergen did by final decree of the Orphans' Court of said County, order and decree that all creditors or persons who had not brought in their debts or claims or demands, within the time in said order directed should be barred from any action therefore against said administratrix; that by reason of said failure and decree or order, and the provisions of the statute in such case made and provided, the said plaintiff has no right to maintain suit against the defendant, and is barred thereby.

37. And this defendant further answers said complaint and alleges as a further defense thereto, that as the said Wynand Van Den Berg died on the first day of January, nineteen hundred and fifteen, at the same time as the said Florence K. Dartnell, as a result of the same accident, no action can be brought against the representatives of the said Wynand Van Den Berg, according to the statute in such case made and provided, or otherwise.

R. P. WORTENDYKE,
Attorney for defendant, Eva Van Den Berg.
Administratrix, etc.

Answer of Defendant, Van Den Berg.

STATE OF NEW JERSEY,
COUNTY OF BERGEN. } *ss.*

Eva Van Den Berg, of full age, being duly sworn according to law, upon her oath, deposes and says; that she is the administratrix of the estate of Wynand Van Den Berg, deceased, and as such administratrix is one of the defendants in the above entitled cause; that the foregoing answer filed by her in the said cause is not filed for the purpose of delay; and deponent further says that she believes that she has a just cause and legal defense to the said action on the merits of the case.

EVA VAN DEN BERG.

Sworn and subscribed to before me this fifteenth day of February, A. D. 1916, at Englewood, N. J.

J. MARSHALL GORHAM,
[SEAL] *Notary Public, New Jersey.*

Reply.

The plaintiff replies as follows:

Reply to Answer of Eva Van Den Berg.

Filed March 3, 1916.

FIRST DEFENSE, Paragraph 36.

1. The plaintiff denies the statements contained in paragraph 36 of the answer of the said defendant, Eva Van Den Berg, administratrix of the estate of Wynand Van Den Berg, deceased, and each and every of them.

SECOND DEFENSE, Paragraph 36.

1. That the plaintiff was not required to present this cause of action to the said defendant, as administratrix of the estate of Wynand Van Den Berg, deceased, and that any decree of the Surrogate of the County of Bergen or the Orphans' Court thereof, barring and limiting presentation of claims against said estate, does not bar and limit the plaintiff in this action, for the reason that this cause of action is not a debt, demand of claim against the estate of the said Van Den Berg within the contemplation of the statute in such case made and provided.

FREDERICK S. TAGGART,
Attorney for Plaintiff.

Postea.

Filed March 11, 1918.

SUPREME COURT OF NEW JERSEY.

BERGEN COUNTY.

HACKENSACK TRUST COMPANY, administrator of estate of Florence K. Dartnell, deceased,

Plaintiff,

vs.

THE ERIE RAILROAD COMPANY, a corporation of the State of New Jersey, and EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased,

Defendants.

Action at Law.

Postea.

This case was tried before Judge Willard W. Cutler, with a jury, at the Bergen County Circuit on February fourteenth, fifteenth and eighteenth, nineteen hundred and eighteen.

The jury rendered a general verdict in favor of the defendant Erie Railroad Company and against the plaintiff, Hackensack Trust Company, administrator of estate of Florence K. Dartnell, deceased, and upon the direction of the Judge and under his instructions so directing them, rendered a verdict in favor of the defendant Eva Van Den Berg, as Administratrix of the estate of Wynand Van Den Berg, deceased,

Postea.

and against the plaintiff, the Hackensack Trust Company, administrator of estate of Florence K. Dartnell, deceased.

WILLARD W. CUTLER,
Circuit Court Judge.

WHEREUPON it is adjudged that the complaint of the plaintiff be dismissed.

No COSTS.

Judgment entered March 11, 1918.

WM. S. GUMMERE,
C. J.

Excerpts From Testimony in Above-Entitled Cause.

The jury was empanelled, accepted and sworn.

Mr. Taggart opened the case to the jury on behalf of the plaintiff.

Mr. Hobart opened the case to the jury on behalf of the defendant railroad company.

Mr. Wortendyke opened the case to the jury on behalf of the defendant Van Den Berg.

Mr. Taggart. If your Honor please, I would like to offer in evidence and have placed on the board, a map entitled "Hackensack Trust Company, Administrator, and so forth, against the Erie Railroad Company, and so forth," prepared by Watson G. Clark, and I understand that it is stipulated by the defendants that the map is a correct map and may go in evidence without formal proof. Mr. Hobart agreed with me on that.

The Court. It should not go on the board unless it is going to be admitted in evidence. Proceed.

THEODORE L. TAVENEER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Taggart.

* * * * *

Mr. Wortendyke. If your Honor please, I want to at this time, it seems to me would be a proper time, that I should say something more about what I alluded to in my opening; that is the question of a motion for a non-suit upon the ground that this

cause of action did not survive as against Mrs. Van Den Berg.

The Court. I will hear you on that question. That is another proposition.

Mr. Wortendyke. I would say as to that, that that motion was made before Judge Parker and argued at considerable length, and finally determined against us, and I simply make the motion now so as to preserve our rights upon an appeal if an appeal becomes necessary.

The Court. Then you need not argue it out if Judge Parker decided it once. Did you raise before Judge Parker the question as to the liability on the ground that you had not filed a claim?

Mr. Wortendyke. We raised it, if your Honor please, but as to that question, the plaintiff had not made any full answer, or rather denied the assertion, so that we were compelled, and the Court thought it necessary, to try it before a jury. I am prepared to meet that.

The Court. I will allow you both exceptions to my ruling, refusing you a non-suit, so that you may have the benefit.

Mr. Hobart. May I note my exception?

The Court. Note the exception of both the railroad company and the estate.

Excerpts from Testimony.

DEFENSE.

WILLIAM A. ROBERTSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Hobart.

* * * * *

EVA VAN DEN BERG, recalled, as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Wortendyke.

Q Mrs. Van Den Berg, you are the widow of Wynand Van Den Berg, are you not? A Yes, sir.

Q And also the administratrix of his estate? A Yes, sir.

Q Being appointed by the Orphans' Court of the County of Bergen? A Yes, sir.

Mr. Wortendyke. That is an admitted fact, if your Honor please.

Q Now, did you at any time previous to October 20, 1915, have filed with you by representatives of the estate of Florence K. Dartnell, any claim? A No, sir.

Q There was a claim filed long after that, was there not? A Yes, sir.

Mr. Taggart. I object to that. Anything that happened after that is not material.

Mr. Wortendyke. I do not know that it is, if your Honor please. I press it, however, unless the Court rules it is out of order.

The Court. I do not see how it has any materiality as it stands now. Has the estate been settled?

Mr. Wortendyke. The account has been filed, and it has virtually been terminated, and exception filed to the account and overruled.

The Court. Has the account been settled? There is something in the statute in reference to claims being made after the account has been settled.

Mr. Wortendyke. There hasn't been anything of that kind, no, sir. That is our case.

The Court. Does it appear now where this estate stands? If I recall that state a claim may be filed and may be received after the estate has been settled.

Mr. Wortendyke. Yes, your Honor, but as I say, that condition has not arisen.

The Court. Isn't it your place to show it?

Mr. Wortendyke. I very much question whether it is our part to show that, because it is a proceeding that has to be initiated by the other side. They can, and that statute provides for that condition of things, that if they maintain or attempt to maintain that certain conditions exist after the settlement of an account, they can, by taking certain proceedings, avail themselves of any subsequent estate that they may find, or anything of that kind.

The Court. You rest yourself upon the decree to bar?

Mr. Wortendyke. Yes, sir.

* * * * *

Motion for Direction of Verdict and Argument.

Mr. Wortendyke. If your Honor please, I desire to apply for a direction of a verdict on the part of the jury in behalf of the administratrix of Wynand Van Den Berg, the first ground being that which I have already made use of when the case was closed, viz: that the action against the representative of Wynand Van Den Berg does not survive the death of Wynand Van Den Berg, and, as I intimated to your Honor at that time, that question has already been passed upon by Judge Parker adversely to us, and I assume your Honor will follow in his footsteps at this time and make a determination as to that.

My second ground for moving for a direction of the jury to find for Eva Van Den Berg, the defendant, is based upon the offer that I just made with reference to the claim being barred. Upon that question I think there is no doubt the statute is explicit as to the conduct of creditors in that direction, and they have not followed its provisions, and the decree barring all creditors against the estate having been entered, and no appeal taken thereon, except the bringing of this suit, I claim that there can be no question but that there should be a direction in this case,—that there should be a direction to the jury to render a verdict in favor of the defendant on that ground. If your Honor desires to hear any allusions to authorities on the subject—

The Court. I would like to hear what you have to say on the subject.

Mr. Wortendyke. My first assertion, if your Honor please, is to the effect that there can be no question under the language of the statute, that such course should be pursued by any person presenting any claim or demand in order to avail himself of his remedy against the person surviving in that situation I refer your Honor in the first place to the third volume of Compiled Statutes, page 3833, section 67:

> "The Orphans' Court, or the Surrogate of "the proper county, is hereby empowered to "order executors and administrators to give "public notice to the creditors of the dece- "dent to bring in their debts, demands and "claims against his estate under oath within "nine months of the date of such order, by "setting up such notice in five of the most "public places in said county for two months, "and also by advertising the same at least "once in each week for the like time in one "or more of the newspapers of this state, as "may be directed in said order, and any "further notice in case the court or surrogate "shall judge the same necessary, which order "may be made at any time after the granting "of letters testamentary or of administration, "whether the estate be insolvent or not, and "notice shall be given and advertised within "twenty days after the date of such order."

Now, I have shown by the certified copy of the record that that provision of the statute was complied with, as your Honor will notice. I did not read by your Honor's direction, but your Honor will notice that the transcript shows that condition clearly. Now, it seems to me that the language of that statute shows clearly that this

is one of the claims or demands that should have been presented at that time in order to avail the defendants of their right to bring suit as they have brought in this case, and not having done so, by the decree of the Orphans' Court made on October 20th, 1915, barring all creditors from bringing any claim against the estate, or suing thereunder, they have been barred, and have no right to come into this court at this time, or at the time when they started their suit. The reason for that provision is a very plain one and perhaps requires no authority to be cited by me upon the question. I refer to Probate Law, page 558, which lays down the doctrine that the reason for a provision of that kind is that the administratrix may know what claims there are against him so that he, or she, as the case may be, can proceed with the settlement of the estate within the time provided by law. The object of the statute is to inform the personal representatives of the claims which may be outstanding against the estate, that they may know how to administer it, and not be subject to suits after they have disposed of all the assets; and it refers to Smith *v.* Wilson, 79, pp. 310 and 314; also Ryan *v.* Flanagan, 38 New Jersey Law, 161 and 164. This is the case, 38 Law, 164, Patrick Ryan, Ellen Flanagan Administratrix of Thomas Flanagan, deceased. The neglect to exhibit the claim within the limited time is constituted a complete bar by this 22nd section. No further default on the part of the creditor is necessary to exclude him and no further action is essential on the part of the personal representative to shield him from a prosecution, nor can any presentation which the creditor may subsequently choose to

make restore his right to institute a suit, the default itself the statute declares shall be an absolute bar; but in pleading such bar, all the facts showing due notice and publication must be particularly set forth and proved upon the trial.

That has been changed by a subsequent provision of the statute, so that the setting out as has been done here in the record and offering in evidence, rids the person taking that stand of any necessity of pleading in that way. The 23rd section of the Act of 1855 is preserved in full. The final decree taken under section 2nd of the Act of 1849 of itself establishes all the facts essential to the protection of the executor. The executor may, if he chooses, rely upon his ability to prove all the facts which constitute a bar, but if he desires to perpetuate his testimony and to have a decree which will save him the necessity of proving the facts, he must proceed according to the second section.

As I say, that was not necessary under the present situation. The decree has been entered and that establishes all the facts that are necessary, and takes away the necessity of pleading or establishing in any other way other than I have already done.

The reference I give your Honor in Kocher cites 79 Equity, page 310. This is rather special in its character, and relates to some claim under a mortgage, but the principle enunciated is substantially the same as I have already announced.

I also refer to 68 Equity, page 189, Seymour *v.* Goodwin. A decree of a surrogate barring claims against decedent's estate having been pleaded in defense of an action at law on a claim against the estate, the creditor may main-

tain a suit in equity to restrain setting up or proving such defense. This case goes into the whole question which I have been dealing with, and the effect of a decree barring creditors.

I submit, if your Honor please, upon the authorities, upon the law itself, which I have alluded to and the authorities to which I have referred and which are amplified, or rather emphasized by numerous authorities which I have here which I do not think it is necessary to take the time to read to the Court, I think there can be no question but what there should be a direction to the jury to find a verdict for this defendant.

The Court. Mr. Taggart, what have you to say?

Mr. Taggart. This is not a debt, claim or demand within the terms of the statute. The statute contemplated a liquidated demand or debt in the form of a demand or promissory note. If the claim was disputed it could be submitted to a court upon proper notice and tried. There seemed to be no case found and counsel can not cite any cases where an unliquidated demand, a tort action, has been in question. They have all been liquidated claims.

The Court. Do you find any to the contrary?

Mr. Taggart. Yes, I find one that looks to the contrary in 100 Atlantic, page 209, decided by Judge Swayze. Ray Estate Corporation *v.* Steelman. That involved the payments of some taxes and water rents on land where the defendant set up no other defense than an order of the Hudson County Orphans' Court on a certain date barring action against the defendant. In that case Judge Swayze barred payment of the

taxes and water rents which were ascertained and known before the date barring creditors, and held the right to submit to them and bring an action for recovery; those that were unascertained or in dispute and litigation after decree barring creditors.

The Court. If I recall that case, he did it on the ground that there was not a debt at the time.

Mr. Taggart. That is practically our contention here.

The Court. The taxes had not accrued; they were not levied at that time.

Mr. Taggart. The second ground is that the very section that was read, section 70 of the Orphans' Court Act provides nevertheless in case a creditor so failing to present his debt claim of demand shall, after final settlement of the estate, find some other estate, shall have his debt or claim paid therefrom. Then in section 75 of the Orphans' Court Act, it provides, nothing herein contained shall prevent or bar any person from bringing and maintaining any action against the administrator for or in respect of the personal estate of his testator or intestate, or for or in respect of any waste or misapplication.

Now, the cases all hold that the intention of this act is to enable an executor or administrator to settle the estate. At the end of nine months he is entitled to pay the debts which have been presented to him in proper form and undisputed, and close his estate, render his account, and under the direction of the Court, make any distribution that may be made, but it doesn't bar rights of action against him and against

any surplus there may be after those accounts are filed and passed. In other words, it is not a limitation; it is simply a protection for the executor in settling his estate.

The Court. You have nothing to show in this case that there has been a settlement?

Mr. Taggart. No; it hasn't been settled. It comes in under the 75th section.

The Court. Hasn't the Court held that that decision applied?

Mr. Taggart. I don't think it does apply.

The Court. I thought there was a decision by the Chief Justice that the 75th section did not apply to cases of this character.

Mr. Taggart. In Dodson *v.* Sevars in 52 Equity, p. 611, the Court said: A creditor of a decedent whose claim was not presented in due time may, nevertheless, maintain an action against the executors for the payment of a ratable portion of his debt from any legacy or legacies which shall not have been paid over by the executors, or have been attached in their hands. Such a creditor may go into equity for the discovery of such assets in the hands of the executors and when there will be permitted to establish the validity of his claim and have it satisfied out of the assets.

In O'Donnell *v.* McCann, 77 Equity, p. 188, which cites this Sevars case, and there it says: The rule to limit creditors and the decree barring creditors provided for by the Orphans' Court Act operate only to protect the executor from molestation by belated claims of creditors, to the end that the estate of a decedent may be speedily settled; and the provisions mentioned

do not operate as a statute of limitation against the claims of creditors.

Now, this Orphans' Court Act was passed in 1898. At that time the Railroad Act placed a limitation of one year upon actions against railroads for accidents arising under that act. Later, in 1908 or 1909, that was amended, increasing the limitation to two years, evidently to correspond with the Death Act. Now, the Death Act itself, as your Honor will recall, originally passed in 1877, and amended in 1897, provided that the action be commenced within twelve months. In 1907 the Legislature amended that and increased the time to twenty-four months; and in 1912 the Legislature increased the Railroad Act from one year to two years to correspond. So, both under the Railroad Act and Death Act, there is two years from the death of the deceased person within which the action can be brought.

Now, on the motion originally made in this cause to dismiss the complaint on the ground that the action did not survive against the executor, these same positions were taken, and the Supreme Court has held that it does survive.

The Court. You need not argue that question, because I shall hold to the Supreme Court.

Mr. Taggart. If the right of action survives and comes under the Death Act, necessarily those who benefit under the Death Act are entitled to the full limitation of two years. Otherwise, the provisions of the Executors' Act giving succession and right of action against successors is null and void; otherwise, by construction, the two years can be cut down to nine months. The only effect would be that if an

executor has settled his estate and there is no surplus, or settled his estate and made distribution, and then within the two years' period, an action is brought against the *tort-feasor,* or the estate, and the recovery is found, he finds nothing, he gets nothing. That is his penalty for waiting for twenty-four months. But it does not bar him from an action within that period, and under that case that I have cited, not being a limitation, the nine months' period is simply for the purpose of settling the estate. The limitation is twenty-four calendar months under both the Railroad Act and the act providing for recoveries in cases of death.

Our contention secondly is that the rule barring creditors is not a limitation; it simply enables the settlement of the estate at an early time, and that we have a right to come in at any time within two years and maintain our action. There have been cases—in this very case the question arose as to whether we were a creditor under the terms of that Orphans' Court Act. Judge Seufert held we were not a creditor until we established our claim, and that question arose in this very estate in the Orphans' Court in which he held we were not a creditor until we obtained a judgment and therefore had something in a tangible, liquidated form on which to file a claim. So I submit that the Orphans' Court decree does not bar us from this action, and what we may get later is another question entirely.

The Court. Yes, but the question, Mr. Taggart, in reference to the claim that you made about there being a bar within the statutory time. Suppose, instead of having an unliqui-

dated claim for damages, they had a claim on a note which was not due at the testator's death. Would they not have six years after that note became due to bring their suit under the statute of limitations?

Mr. Taggart. No, that can be presented before.

The Court. Would they not have the right if the statute did not apply?

Mr. Taggart. The statute permits it.

The Court. Suppose the note came due three days prior to the testator's death. Would they not have six years in which to file their claim? Would not the rule limiting creditors cut them off from the nine months?

Mr. Taggart. I don't think so.

The Court. Isn't that the same argument in reference to the—

Mr. Taggart. No, that is on the note; it is a question of whether the note is a good note or not. Here is a question of liability under a statute. This is a noval question on the survivorship, and we are certainly entitled to bring our action within that time. Your Honor can conceive cases wherein it was impossible to bring the action in nine months; yet they should not be deprived of their remedy, because they have two years in which to bring this action. The lapse of time may bar them from finding anything later; when they get the judgment the estate may be closed.

The Court. Mr. Taggart, look at the statute of the case that you referred to decided by Justice Swayze, and see if it does not decide the other way practically.

Mr. Taggart. Yes; this is the end of the second paragraph: It says, referring to the rents due, November 1st, 1916, and May 1st, 1914, both were liquidated demands which might be presented for allowance under section 69 of the Orphans' Court Act.

The Court. Is there anything in there that indicates that unliquidated damages would not stand in the same line?

Mr. Taggart. Only by inference; there is no direct assertion to that effect. Section 69 that is referred to in Judge Swayze's opinion there: Debts and demands liquidated not due and payable, but which are payable in the future, may be presented for allowance; a reasonable rebate of interest being made when interest is not accruing on the same; and if any such debt or demand be disputed, and action be brought therefor, the plaintiff shall not fail in such action on account of such debt and demand being payable in the future if the same be otherwise a legal debt or demand.

There seems to be no question of the Legislature and no question of the practice. I submit it is a novel question for me that you cannot bring an action within two years on an unliquidated demand, and are barred within nine months by reason of an Orphans' Court order.

The Court. Anything further on either side?

Mr. Wortendyke. I simply want to say this: Counsel has attempted—bases his argument upon mere inference. There is no doubt that what the statute provides in section 69, that claims which are not yet due may be filed and a reasonable consideration given to the question of interest and so forth It seems to me that the

inference is not justifiable because it speaks of claims of this character which are not due, which anybody naturally would suppose couldn't be put in within the provisions of the statute as it then stood, and could be put in at that time by allowing interest, it would justify the inference that unliquidated claims couldn't be put in at all. The statute, I think, is broad enough, and without any decision upon that subject, they are not such claims as should be included under the terms of the statute as it stands. It seems to me the Court ought not to determine the matter upon mere inference.

Mr. Taggart. This is one of the questions in this case that I have raised in arguing on the intention of the statute. A certain will was ruled out of evidence here, but assuming, for instance, that the next of kin, by reason of litigation in other states, or in other jurisdictions, was prevented before nine months in bringing their action, and as a result of the other litigation, when it finished, a cause of action did come to them in this state. Is this Court going to say that because they are deprived of their right of bringing their cause of action in another jurisdiction that they have no right to bring it here? It seems to me that the two years is the limitation and not the nine months.

Mr. Wortendyke. It seems to me, your Honor, that is rather begging the question. There is no difficulty in their filing their claim. Counsel had no difficulty in filing a claim subsequently when he found out in all probability that he did not file it in time; he did file one in the month of March, and I do not know why he should have a change of heart now.

The Court. In this case I think the statute limiting creditors applies, and I shall direct a verdict as far as the estate of Van Den Berg is concerned.

Mr. Taggart. Your Honor will grant me an exception?

The Court. Yes; take your exception.

Mr. Wortendyke. If your Honor please, I desire to apply for a direction of a verdict on the part of the jury in behalf of the administratrix of Wynand Van Den Berg, the first ground being that which I have already made use of when the case was closed, viz: that the action against the representative of Wynand Van Den Berg does not survive the death of Wynand Van Den Berg, and, as I intimated to your Honor at that time, that question has already been passed upon by Judge Parker adversely to us, and I assume your Honor will follow in his footsteps at this time and make a determination as to that.

My second ground for moving for a direction of the jury to find for Eva Van Den Berg, the defendant, is based upon the offer that I just made with reference to the claim being barred. Upon that question I think there is no doubt the statute is explicit as to the conduct of creditors in that direction, and they have not followed its provisions, and the decree barring all creditors against the estate having been entered, and no appeal taken thereon, except the bringing of this suit, I claim that there can be no question but that there should be a direction in this case,—that there should be a direction to the jury to render a verdict in favor of the defendant on that ground.

* * * * *

Charge to Jury.

The Court charged the jury as follows:

CUTLER, *J.*: The suit was brought against the railroad company and the administratrix of the driver of this car. The Orphans' Court of this county having made its decree barring the creditors of Mr. Van Den Berg's estate from any action against the administratrix of that estate, and the plaintiff in this case having failed to present its claim to the administratrix before the making of the Orphans' Court decree, there can be no recovery in this suit against this administratrix, and you will find a verdict in favor of the administratrix of the Van Den Berg estate.

Whereupon the Court ordered a general verdict to be found in favor of the defendant Eva Van Den Berg and against the plaintiff and the jury returned the verdict as directed by the Court, in favor of the defendant Eva Van Den Berg and against the plaintiff.

Exhibit D. 1 for Defendant, Van Den Berg.

Annexed is a list of the documentary evidence relevant to the questions on review.

EXHIBIT D. 1 FOR DEFENDANT VAN DEN BERG.

To Robert A. Sibbald, Surrogate of the County of Bergen:

The Subscriber, Eva Van Den Berg, Administratrix of Wynand Van Den Berg, late of the County of Bergen, deceased, pray that you will make an order that he give notice to the Creditors of the Estate of said deceased to bring in their Debts, Demands and Claims against said Estate, under oath, within nine months from the date of said Order, upon the same being set up and advertised according to law.

Dated January 12th, A. D. 1915.

EVA VAN DEN BERG.

Exhibit D. 1 for Defendant, Van Den Berg.

SURROGATE'S OFFICE, BERGEN COUNTY:

EVA VAN DEN BERG, Administratrix of Wynand van den Berg, *Deceased.*	*Order to Limit Creditors.*

Upon application made to me for that purpose, by the above named Administratrix, I do hereby, on this twelfth day of January in the year of our Lord one thousand nine hundred and fifteen, order the said Administratrix to give Public Notice to the Creditors of the Estate of said deceased, to bring in their debts, demands and claims against the same, under oath, within Nine Months from the date of this order, by setting up such notice in five of the most prominent places in the County of Bergen, for the space of Two Months, and advertising the same for the like period in the Bergen Record, one of the newspapers of this State; such notice to be given and advertised within Twenty Days from the date hereof, and to be continued for Two Months.

ROBT. A. SIBBALD,
Surrogate.

BERGEN COUNTY, ss.: William J. Lawrenson, of said County, being by me duly sworn, on his oath saith that a notice, of which the annexed is a true copy, was by him put up in five of the most public places of said County, to wit.: One at Clerk's, Sheriff's and Surrogate's offices, one at Cor. State & Warren Sts., Hackensack, N. J.

Exhibit D. 1 for Defendant, Van Den Berg.

and one at Pierrepont & Park Aves., Rutherford, N. J.

WILLIAM J. LAWRENSON.

Sworn and Subscribed at Hackensack
January 15th, A. D. 1915, before me,

ROBT. A. SIBBALD,
Surrogate.

Creditors of Wynand Van den Berg, deceased, are by order of Robt. A. Sibbald, Surrogate of Bergen County, dated January 12th, 1915, upon application of the subscriber, notified to bring in their debts, demands and claims against his estate, under oath, within nine months from above date.

EVA VAN DEN BERG,
Administrator.

Jany. 15-22-29, Feb. 5-12-19-26, March 5-12.

Exhibit D. 1 for Defendant, Van Den Berg.

STATE OF NEW JERSEY,
COUNTY OF BERGEN. } *ss.*

John Z. Demarest of full age being duly sworn, deposes and says: that he is the Editor of the BERGEN RECORD, a newspaper published in the Borough of Tenafly, County of Bergen, State of New Jersey, and that a notice of which a copy is hereto annexed, was published in the said BERGEN RECORD for (9) nine successive weeks. Said issues in which it appeared being dated as follows:

Jan. 15-22-29. Feb. 5-12-19-26. March 5-12-1915.

JOHN Z. DEMAREST.

Sworn to and subscribed before me this 23rd day of April, 1915.

(SEAL) ALEX. B. ROBERTS,
Notary Public.

Exhibit D. 1 for Defendant, Van Den Berg.

BERGEN COUNTY ORPHANS' COURT.

Term of September, A. D. 1915.

EVA VAN DEN BERG, Administratrix of Wynand Van den Berg, *Deceased.*	*Decree to Limit Creditors.*

It appearing to this Court that the Surrogate of the County of Bergen did, by his order bearing date the twelfth day of January in the year of our Lord one thousand nine hundred and fifteen, direct the above named Administratrix to give public notice to the Creditors of the Estate of said decedent, to bring in their debts, demands and claims against the same, under oath, within nine months from the date of said order, by setting up such notice in five of the most public places of the County of Bergen, for the space of two months, and advertising the same for a like period in the Bergen Record, one of the newspapers of this State; and that such notice should be given and advertised within twenty days from date of said order, and continued for two months. And it further appearing to the Court, by satisfactory proof, that such notices were set up in five of the most public places in said County, and were advertised in said Bergen Record within twenty days from the date of said order, and continued for two months.

IT IS THEREFORE, on this Twentieth day of October in the year of our Lord one thousand nine hundred and fifteen, ordered, adjudged and decreed by the Court here, that any creditor of

Exhibit D. 1 for Defendant, Van Den Berg.

said decedent, who has neglected to bring in and exhibit his or her debt, demand or claim, within the time so as aforesaid limited by said Surrogate, shall be and is hereby forever barred of his or her action therefor against said Administratrix.

W. M. SEUFERT,
Judge.

FREDERICK S. TAGGART,
Attorney for Plaintiff-Appellant Hackensack Trust Company, Administrator of Estate of Florence K. Dartnell, Deceased.

RAYMOND P. WORTENDYKE,
Attorney for Defendant-Appellant Eva Van Den Berg, Administratrix of the Estate of Wynand Van Den Berg, Deceased.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

HACKENSACK TRUST COMPANY, administrator of the estate of Florence K. Dartnell, deceased, *Plaintiff and Appellant,* *vs.* EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased, *Defendant and Respondent.*	*Action at Law.* *On Appeal from Supreme Court.* *No. 69 on the List.*
HACKENSACK TRUST COMPANY, administrator of the estate of Florence K. Dartnell, deceased, *Plaintiff and Respondent,* *vs.* EVA VAN DEN BERG, administratrix of the estate of Wynand Van Den Berg, deceased, *Defendant and Appellant.*	*Action at Law.* *On Appeal from Supreme Court.* *No. 77 on the List.*

Brief for Plaintiff-Appellant, Hackensack Trust Company, Administrator of the Estate of Florence K. Dartnell, deceased.

STATEMENT OF THE CASE.

Two Points of law are presented to the Court by the respective appellants, the parties hereto, the plaintiff, the Hackensack Trust Company, appealing from certain directions of the Trial

Judge to the jury and from the verdict of the jury as the result of such directions, and the defendant-appellant, Eva Van Den Berg, as administratrix, etc., appealing from a ruling of the Trial Judge on her motion to non-suit and to direct a verdict.

The suit was brought by the Hackensack Trust Company, as administrator of the estate of Florence K. Dartnell, deceased, against the Erie Railroad Company and Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, for the death of the plaintiff's intestate, as the result of a grade crossing accident at the Jay street crossing of the Erie Railroad Company in the Borough of Tenafly in this State, on the first day of January, nineteen hundred and fifteen. The defendant Van Den Berg's intestate, Wynand Van Den Berg, was the driver of an automobile in which Florence K. Dartnell was riding at the time of the accident and as a result thereof both Van Den Berg and the plaintiff's intestate were killed. The case against the Erie Railroad Company was permitted to go to the jury and the jury brought in a verdict for the defendant, the Erie Railroad Company, the learned Trial Judge directing a verdict in favor of the defendant Van Den Berg. Only so much of the testimony as is pertinent to the two legal questions involved is printed.

Counsel for the defendant Eva Van Den Berg, upon the close of the plaintiff's case (Case, p. 27), moved for a non-suit upon the ground that the cause of action did not survive against the defendant Eva Van Den Berg as administratrix, which motion was overruled and exception allowed by the Court. Upon the completion of the case, counsel again moved (Case, p. 30) for a

direction of the verdict on the same ground, that the cause of action did not survive against the representative of Wynand Van Den Berg, and upon the second ground that the claim of the plaintiff was barred by a decree of the Bergen County Orphans' Court barring creditors of the Van Den Berg estate. The evidence shows (Case, p. 28) that no claim against the estate of Van Den Berg had been filed by the representative of the estate of Florence K. Dartnell before the entry of the decree barring creditors, October 20, 1915 (Case, p. 48). After considerable argument, the Trial Judge (Case, p. 42, l. 1) held that the statute limiting creditors applied and directed a verdict in favor of the estate of Wynand Van Den Berg. Thereafter, the Trial Judge charged the jury (Case, p. 43) to find a verdict in favor of the administratrix of the Van Den Berg estate, and ordered a general verdict to be found in favor of the defendant Eva Van Den Berg, and the jury so returned the verdict (Case, p. 43), upon which judgment was entered March 11, 1918, in favor of the defendant Eva Van Den Berg, as administratrix (Case, pp. 24 and 25).

The first ground of appeal relied upon by the Hackensack Trust Company, the appellant herein, is that the Court granted a motion for a direction to the jury to find a verdict for the defendant Eva Van Den Berg, as requested by the attorney for the defendant.

The second ground of appeal is that the Court directed a verdict in favor of the defendant Eva Van Den Berg, as administratrix of the estate of Wynand Van Den Berg, deceased, and that pursuant to such direction the jury brought in a verdict in favor of Eva Van Den Berg, as administratrix.

The third ground of appeal is that the Court charged the jury as follows:

> "The suit was brought against the railroad company and the administratrix of the driver of this car. The Orphans' Court of this county having made its decree barring creditors of Mr. Van Den Berg's estate from any action against the administratrix of that estate, and the plaintiff in this case having failed to present its claim to the administratrix before the making of the Orphans' Court decree, there can be no recovery in this suit against the administratrix, and you will find a verdict in favor of the administratrix of the Van Den Berg estate."

The fourth ground of appeal is that the jury brought in a verdict in favor of the defendant Eva Van Den Berg, as administratrix, as directed by the Court, upon which a judgment was entered in the Supreme Court, in favor of the defendant Eva Van Den Berg.

The single question is whether the rule barring creditors was a limitation upon the right of action and barred the plaintiff from maintaining this action.

POINTS OF LAW.

Point I.

The rule limiting creditors does not bar this action by the plaintiff, and the Trial Judge was in error in so holding and in so instructing the jury.

The determination of the legal question involved requires the consideration of a number of statutes and of the decisions of the courts, together with the development of the laws affecting cases of the class such as this.

It may be premised that the point raised by the defendant Van Den Berg, that this cause of action did not survive against the estate, has already been passed upon by the Supreme Court, sustaining the complaint in this case. (*Hackensack* v. *Erie Railroad Co., et als.*, 88 N. J. Law 518.)

The "Death Act" so called (Comp. Stat. 1907), under which this action is brought, originally passed in 1848 as a modification of Lord Campbell's Act, reads as follows:

> "1. That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or fault is such as would if death had not ensued, have entitled the party injured *to maintain an action and recover damages in respect thereof,* then and in every such case the person who or the corporation which, would have been liable if death had not ensued, *shall be liable to an action for damages,* notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."
>
> "2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin of such deceased person, and shall be distributed to such widow, surviving husband, and next of kin, their proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife, surviving husband, and next of kin of such deceased person; provided, that where such deceased person has left or shall leave him

> or her surviving a widow or husband but no children or descendant of any children and no parents, the widow or surviving husband, as the case may be, shall be entitled to the whole of the damages which she or he shall sustain, and which shall be hereinafter recovered in any such action, and the same shall be paid to her or to him; and provided further, that *every action shall be commenced or sued* within two years after the death of such deceased person and not after" (as amended by Chapter 287, Laws of 1913, p. 586).

No action will lie in this State for an injury resulting in death, with the exception of that prescribed in the Death Act.

Grosso v. *D., L. & W. R. R. Co.,* 50 N. J. Law 317.

Myers v. *Holborn,* 58 N. J. Law 193.

Gregutis v. *Warclark,* 86 N. J. Law 610.

There can be no question that if Van Den Berg were living, the suit could have been maintained against him (*Hackensack Trust Co.* v. *Erie R. R. Co.,* 88 N. J. Law 518). Nor can it be denied that had he been living at the time of the institution of this suit and he had later died, the suit could have been continued by the present plaintiff against the personal representatives of Van Den Berg, by amendment.

See Abatement Act, Comp. Stat., page 4, paragraph 3.

Alpaugh v. *Conkling,* 88 N. J. Law 64.

The remedy prescribed by the Death Act was against living persons only and it was not until seven years after (1855) that the Legislature took a long step in extending remedial legislation, when it passed the "Act concerning executors and the administration of intestate's estate"

(Comp. Stat 2260) where there was given a survival of certain classes of rights of action.

The pertinent sections are the 4th and 5th, which read as follows:

> "4. That executors and administrators may have *an action for any trespass done to the person* or property, real or personal, of their testator or intestate against the trespasser or trespassers, and recover their damages in like manner as their testator or intestate would have had if he or she was living."
>
> "5. That where any testator or intestate shall have in his or her lifetime * * * committed any trespass to the person or property, real or personal, of any person or persons, such person or persons, his or her executors or administrators *shall have and maintain the same action against the executors or administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate, and shall have the like remedy and process for the damages recovered in such action* as are now had and allowed in other actions against executors or administrators."

These sections of the Executors Act have been construed to apply to any "trespass arising out of a tort to the person," that "trespass" means "tort."

> *Tichenor* v. *Hayes,* 41 N. J. Law 193.
> *Alpaugh* v. *Conkling,* 88 N. J. Law 64.
> *Hackensack* v. *Erie,* 88 N. J. Law 518.
> *Ten Eyck* v. *Runk,* 31 N. J. Law 428.
> *Hayden* v. *Vreeland,* 37 N. J. Law 378.
> *Noyes* v. *Brown,* 39 N. J. Law 571.

The action is a new action and has been held not to be a survival of any right that existed in the plaintiff's intestate before death. Had the plaintiff lived for several months and then died as the result of the accident, a suit might

have been maintained by her for injury resulting from the accident, which, if reduced to judgment, would have been for the benefit of the next of kin.

> *St. Louis & San Francisco R. R. Co.* v. *Goode,* L. R. A. 1915-E, 1141.

Cooper v. *Shore Electric,* 63 N. J. Law 558, where the Court of Errors reviews the history of legislature affecting such causes of action, and it was held in *Tichenor* v. *Hayes* (*supra*) that the quoted sections of the Executors' and Administrators' Act were to relieve the harsh injustice of the old rules of law and that the statute should be liberally construed.

The Executors' Act, read in conjunction with the Death Act, clearly shows the legislative intent to give a right of action by the personal representative of the injured party against the *tort feasor,* or, if he be deceased, against his personal representative.

In answer to this, the defendant contends that the action is barred by reason of the provisions of Section 70 of the Orphans' Court Act (Comp. St., page 3835), which reads as follows:

> "After the expiration of the time in such order limited, the Orphans' Court or the surrogate of the proper county, upon proof to its or his satisfaction that notice thereof has been set up and advertised as directed, may, by final decree, order that all creditors who have not brought in their claims within the time in said order directed, shall be barred from any action therefor against the executor or administrator; and *any creditor* who shall have neglected to bring in *his debt, demand or claim* within the time so limited, shall, by such decree, be forever barred of his or her action therefor against such executor or administrator, except as hereinafter provided; provided, neverthe-

less, that in case such *creditor* so failing to present his *debt, demand or claim,* shall, after the final settlement of the account of the executor or administrator, find some other estate not accounted for, he shall be entitled to have his *debt, demand or claim* paid thereout, or to a ratable proportion thereof, in case other creditors shall be barred of their debts, demands or claims" (P. L. 1898, p. 740).

It is contended that the Legislature did not intend and should not be held to have intended to place any limitation upon this cause of action by the paragraph of the Orphans' Court Act, but that the plaintiff's right to the action remains for two years after the death of the injured party. If recovered after the settlement of the estate of the deceased *tort feasor,* the personal representative of such injured party can recover only the estate unaccounted for, or legacies or distributive shares in the hands of the personal representative of the deceased *tort feasor.*

The Death Act, in the 1st paragraph, gives the right of action against

> "the person who * * * would have been liable if death had not ensued, to an action for damages."

There is nothing in this act which contemplates anything more than a suit at law for the damages occasioned.

The Executors' Act extends this right of action for damages,

> "against the executors or administrators of such testator or intestate *as he, she or they might have had or maintained against such testator or intestate and would have the like remedy and process for the damages recovered* in such action."

These two sections form a complete remedy by and against executors and administrators, aris-

ing out of a *tort* and a proper reading and consideration of the Executors' and Death Act embraces all such causes of action. It is clearly the legislative intent that where the defendant has committed a *tort,* action may be commenced against him if living or, if dead, against his executors or administrators to establish the amount of the damage. Until this is done and the damage is determined, who shall say whether the estate of the deceased is liable at all? The judgment, if any is recovered, becomes a debt of record, the recovery being by procedure outlined in the Orphans' Court Act.

The courts have continually held that the Death Act and the Executors' Act are to be most liberally construed. *Cetefonte* v. *Camden Coke Co., infra.*

It has been held that a suit may be brought in New Jersey for a death resulting in another jurisdiction.

Lower v. *Segal,* 59 N. J. Law 66.

Rankin v. *Central R. R. Co.,* 77 N. J. Law 175.

McCarty v. *N. Y., Lake Erie & Western,* 62 Fed. 437 (56 L. R. A. 213).

Boulden v. *Penn. R. R. Co.,* 205 Penn. St. 264 (18 L. R. A., N. S. 252).

and that the law of place where the cause of action arose governs.

Adopting the defendant's reasoning, it would simply mean that a suit arising in another state where no such provision as our Orphans' Court Act was in force, could be instituted here against a resident administrator and the Court must follow the law of that state, while a citizen of our own state would be faced with our Orphans' Court Act. This construction would place our

citizens, for whose benefit the statutes were passed, at a less advantage than the citizens of a foreign jurisdiction.

It has been held that this act is for the benefit of aliens as well as for citizens of the state and the fact that the next of kin are without the country is no defense to the suit. (*Gregutis* v. *Warclark*, 91 Atl. 98, affirmed in 86 N. J. Law 610.)

See *Taylor* v. *Albion Company*, L. R. A. 1918-B 185.

It must be considered whether aliens or others who do not or cannot comply with the provisions of the Orphans' Court Act, are to be deprived of the benefit of the act. It can be conceded that there are numerous cases where it would be practically impossible for them to comply with the provisions of the Orphans' Court Act and as to them the construction contemplated by the counsel for the defendant would bar them from maintaining a suit, which by all the decisions of the courts of this country are held to be for the benefit of the next of kin and the provisions of the acts upon which they are founded have been declared to be remedial and to be liberally construed.

At the present time, an accident resulting in death might find the next of kin residents of some foreign country and, by reason of the circumstances of the war, would require more time than nine months in which to obtain the necessary information, that they might be advised of their rights and to file a claim which the defendant contends should be filed with the administratrix.

Furthermore, to apply the construction asked for by the defendant Van Den Berg would re-

quire a claim to be filed by each of the next of kin. Sections 68 and 70 of the Orphans' Court Act refer to the filing of a "claim, debt or demand" by a "creditor" and to be a "creditor" one must have a substantial and pecuniary interest in the claim filed.

It has been held that *the administrator is a mere trustee,* occupying the place of a trustee for a special purpose, the funds which he may obtain or hold being solely for use of those who are entitled to the same under the statute and *the cause of action* created by the suit *inures to the widow and next of kin as a vested right.*

Gottlieb v. *North Jersey R. R. Co.,* 72 N. J. Law 480, at 484.

Encyclopedia of Law & Procedure, Vol. 13, page 380.

Cetefonte v. *Camden Coke Co.,* 78 N. J. Law 662, at 668-9.

Cooper v. *Shore Electric Co.,* 63 N. J. Law 558.

If the vested right and the entire pecuniary advantage is in the next of kin, are not they the "creditors" within the contemplation of the statute upon the construction asked for by the defendant Van Den Berg? If so, what he asks in substance is that the next of kin, no matter where resident, how many or of whatever age, must present claims to the administrator of the deceased *tort feasor,* else a suit begun by their trustee for their benefit would be defeated.

If this contention is correct and a claim must be filed by the next of kin as a "creditor," suppose the next of kin are widely scattered and only one or two caused the administrator to be appointed to bring suit and these filed a claim while the other next of kin did not. The recov-

ery cannot be apportioned for the benefit of those who have filed a claim nor can the defendant plead the decree barring creditors a bar of the claim on the ground that some of the next of kin have not filed a claim. The recovery is for the benefit of *all* of the next of kin of the deceased. (*Paulmier* v. *Erie R. Co.*, 34 N. J. Law 151.)

Another difficulty is that the statute specifically provides who shall bring the action, *i. e.*, the personal representative, and he alone can sue (*Fitzhenry* v. *Cons. Traction Co.*, 63 N. J. Law 142; *Gottlieb* v. *N. J. R. R. Co.*, 72 N. J. Law 480). In cases where the action must be brought by the next of kin in their own names, they must sue and *all* must join (*Cowan* v. *A. T. and S. F. R. Co.*, L. R. A. 1918-B, page 1141; *Lower* v. *Segal*, 59 N. J. Law 66; *Rankin* v. *C. R. R. of N. J.*, 77 N. J. Law 175).

In this state the next of kin cannot bring the action, and if they, as the real parties to the action cannot bring it, must sue in the name of a trustee (the administrator), his failure to file the claim would deprive innocent beneficiaries of the legislative right of action for their just claim. The trustee might even intentionally permit the time to pass and deprive them of their remedy.

It is contended that an action founded on negligence, under the Death Act, is not a "debt, demand or claim," within the provisions of the statute.

Is an administrator prosecuting a right of action for negligence resulting in death, a creditor under the terms of this act? The term "creditor" is a correlative of "debtor." *Hebert* v. *Handy*, 72 Atl. 1102.

A creditor has been defined as one "who has the right to require the settlement of *an obli-*

gation or contract'' (*Bovier's Law Dictionary*). A debt is not a contract but the result of one. In *New Jersey Insurance Company* v. *Meeker,* 37 N. J. Law 282, at page 301, Chief Justice Beasley construed the meaning of the word "creditor" and its correlative "debtor" and quotes with approval Burrill's definition:

> "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes *all that is due to a man under any form of obligation or promise.''*

and he also cites, with approval, the definition of "creditor," given in Bovier above. This cited cause arose under the "Act for the relief of Creditors against Heirs and Devisees," to recover damages for breach of covenant against encumbrances. The Chief Justice construed the terms of that statute liberally so as to permit the action to lie within the term "creditor" as set forth in that act, but at the end of the opinion he says:

> "The remedy provided by this statute should not be abridged by the ascription of a narrow meaning to the term 'creditor' and 'debtor,' as to limit it to that class of contracts which call for the payment of specific sums of money, but, in furtherance of the general policy of our laws, and of the evident design of the act itself, *should be extended in meaning so as to make it applicable to every obligation growing out of contract, which rested on the decedent at the time* of his decease."

See *Smith* v. *Wilson,* 79 N. J. Equity 310.

Boston v. *Turner,* 201 Mass. 190.

Craig v. *Webber,* 36 Maine 504, holding that the party having claim for damages arising out of a *tort,* is not a creditor of the person liable on such claim.

Furthermore, it has been generally held that the term "creditor" as used in the statute relating to settlement of death claims, applies only to those who are creditors *of the decedent* before his death, for claims arising out of contracts with him or obligations incurred by him. The cases in New Jersey cited by defendant Van Den Berg are all such cases and bear out this theory. The only exceptions to this are funeral expenses, which, as a matter of public policy, are chargeable against the estate of the deceased and are given a preference by statute.

All the cases cited in support of defendant's contention, are just such cases arising out of contract. None of them involve *damages* for a *tort* of the *tort feasor*. They are all for liquidated claims. *Ryan* v. *Flanagan,* 38 N. J. Law 161, was on two promissory notes. *O'Neill* v. *Freeman,* 45 N. J. Law 208, is on mechanics lien claim and common money accounts. *Newbold* v. *Fenimore,* 53 N. J. Law 307, is upon a promissory note. *Hopper* v. *Smith,* 70 N. J. Law 403, was for work and labor done and performed. *O'Donnell* v. *McCann,* 77 Equity 188, was for the recovery of a board bill. *Cunningham* v. *Stanford,* 68 N. J. Law 7, on contract. *Feigenspan* v. *O'Neill,* exoneration from a mortgage debt. *Seymour* v. *Goodwin,* 68 N. J. Equity 189.

The Orphans' Court Act, on which the defendant relies for support of his motion to non-suit and direct a verdict, is not intended in anywise to apply to *tort* actions or to causes of action not arising out of contract.

The contention made by the defendant was also made in a Kansas case (*Douglass* v. *Loftus,* L. R. A. 1915-B, 797) where, at page 810, the Court said:

> "Another contention is that the claim, not having been presented for probate and al-

lowed as a claim against the estate, is barred by the limitation provided in the Executors' and Administrators' Act. The statute as it stood prior to 1899 provided a special procedure for enforcing the liability of stockholders for corporate debts. We are not aware of any cases where it has ever been held that a claim of the character sued upon here must be probated. Cases will be found holding that, before the estate of an heir or devisee can be held liable upon an unpaid subscription to stock by the decedent, the claim must be proved against the estate; *but this follows from the nature of the claim, which is upon a direct liability of the decedent, the same as upon an unpaid promissory note or account. The plaintiff had no claim provable in the probate court, until it was reduced to a judgment against the estate.* All plaintiff had was a judgment against the coal company. Now *the probate court could not allow it as a demand against the estate until the right to collect it from the estate had been determined in an action brought by the judgment creditor in some court of competent jurisdiction, under the provisions of the statute, which authorized the creditor to maintain such action.*"

This is exactly the plaintiff's contention here, that until a judgment is recovered by a proceeding under the Executors' Act and the Death Act, there is nothing on which a claim could be based nor is there any debt or obligation which could be presented to the executors.

It applies only to liquidated demand. *Ray Estate* v. *Steelman,* 90 N. J. L. 184. When such a judgment has been obtained the plaintiff becomes a "creditor" and may then maintain his action against the executor or administrator for the payment of a ratable proportion of his debt and any legacies which have not been paid over.

Dodson v. *Seavers,* 52 N. J. E. 611.

O'Donnell v. *McCann,* 77 N. J. E. 188.

In this very case a Judge of the Orphans' Court refused to permit the plaintiff herein to appear in the Van Den Berg estate matter as a "creditor" until it had obtained a judgment (see Case, p. 38), holding in effect that the plaintiff was not a "creditor."

The net result of which has been to place us between two constructions of the statute. Van Den Berg, in one suit in one court, claims that we are "creditors" and should have filed a claim; and in a proceeding in the Orphans' Court successfully contended that we are not "creditors" and therefore not interested in the estate.

In construing the Orphans' Court Act, our courts have held that it is the intention of the Legislature to permit the estate to be settled as expeditiously as possible, that the provisions of the section are not a limitation or bar to an action. (See *Newbold* v. *Freeman, supra,* 53 N. J. Law 307 at 309.)

Assets not inventoried, legacies and distributive shares are liable to creditors (Sections 72 and 73, Orphans' Court Act). Section 70, in itself, specifically provides that any creditor, after final settlement of the account, is entitled to have his debt, claim or demand paid from any of the estate not accounted for or to a ratable proportion thereof, in case there are other creditors who are also barred of their debts, claims or demands.

It appears by the testimony and by the statements of counsel for the defendant (see Case, p. 29) that at the time of the trial, February, 1918, the estate had not yet been settled. The action accrued on January 1, 1915, and, under the Death Act, but two years is permitted in which to bring the action. Delay on the part of the defendant in settling the estate would pre-

vent a new action on the part of the plaintiff against any legatee for distributive share unless this action be sustained to establish such claim and recovery had against the surplus of the estate. There is no contention that any recovery in this action would be entitled to be paid as a debt of the estate, with those presented to and paid by the administratrix before the rule limiting creditors, but simply that the plaintiff is entitled to establish its claim by judgment for the benefit of the next of kin, against the estate of the deceased *tort feasor,* and, having so established its claim, to proceed against any estate which may not have been accounted for or against the distributive interest which may be in the hands of the administratrix.

It is further contended that so far as this action is concerned, the Legislature has extended the period in excess of nine months within which to commence an action of this nature, to a period of two years. The Orphans' Court Act was passed in 1898. At that time the "Railroad Act" (Comp. St. 4246) had a limitation of one year within which actions could be brought against railroads, for accident. The "Death Act" originally provided that action should be commenced within twelve calendar months after death. The Legislature amended this in 1907 (P. L., page 387), increasing the time to twenty-four months, as the same now is, and in 1912, the Legislature amended the Railroad Act, increasing the time in which the action might be brought from one to two years. Both of these amendments are broader than the Orphans' Court Act of 1898 and it must be the legislative intent that the plaintiff should have twenty-four months within which to commence his action for the benefit of the next of kin. To say, as the Trial

Judge said, that the limitations in the Orphans' Court Act cut the provisions of the statute down to nine months, is construing away the benefit of the Death Act and placing a court-martial limitation upon the right of action given in that Act. The Act gives the personal representative of such deceased the right to maintain an action to recover damages, and does not require or compel the making of any other claim against the *tort feasor*. The fact that the *tort feasor* in this case died as a result of the accident cannot affect the situation in any respect as the right of action survives against the estate and if he could be sued if living, the same suit might be maintained against his representatives if he be dead.

The Court has always refused to allow anything to be read with the Death Act. Attempts have been made to do so. In the case of *Cetefonte* v. *Camden Coke Co.*, 78 N. J. L. 662, in considering whether the statute applied to a non-resident alien, the Court of Errors said:

> "Had the legislature intended to restrict recovery to a resident widow or a resident next of kin or to a widow and next of kin who are citizens of the United States, it would have so said."

Furthermore, the Legislature has, in the Death Act, framed a general rule covering the entire subject. Under the decisions, all earlier or different rules touching this same matter are to be discarded in favor of the latter rule. *Eldridge* v. *P. & R. Railroad Co.*, 83 N. J. Law 463, where the one-year limitation for action for death in the Railroad Act of 1903, was superseded by the Death Act, passed in 1907, by which later act action might be brought at any time within two years. The general principle was considered, the

Court holding that the Death Act of 1907 is a general law framing a new and different rule covering the entire matter, giving a right of action and the right to bring suit at any time within a period of two years and holding that all earlier and different rules touching the same subject matter are and will be discarded in favor of such later rule.

See also *Harrington & Sons* v. *Jersey City,* 78 N. J. Law, 610.

See also *Chancellor Magie's opinion in Smith* v. *Heighton,* 71 N. J. Law 436, where considering the passage of a general act relating to boroughs, the Court held special, local laws repealed. The Court said:

> "When the legislature, by the act, conferred authority upon the councils of boroughs, it could not have been unmindful of the fact that the power to license had been frequently conferred upon such governing bodies. * * * With such knowledge the legislature passed this general act for all boroughs."

The provisions of the Orphans' Court Act so much relied upon by the defendant, were passed in 1898, previous to the amendment of the section of the Death Act in 1908, which was again amended in 1913 (Chapter 287, page 586), which enlarged the class benefited by the recovery in such action and which changed the phraseology of the limitations upon the action by providing

> "that every action shall be commenced or *sued* within two years after the death of such deceased person, and not after."

changing the provision from twelve calendar months to two years and enlarging the phraseology for the commencement of the action. Theretofore this section had required that "ac-

tion'' be commenced, which might give color to an interpretation that the commencement of the action would involve the filing of a claim. There are statutory remedies such as Workmen's Compensation Act, where a claim of some kind must be filed before suit is brought and the courts have held the giving of a notice is a prerequisite to the commencement of the action, and is, in effect, the commencement of the action. But any force which there might be in such an attenuated reasoning is done away with in this case by the amendment of 1913, providing that every action must be commenced or *''sued,''* so that the issuance of a summons within two years is a compliance with the statute. The Legislature has thus twice since the Orphans' Court Act was passed, adopted a new and different rule covering the subject matter of actions for death and with a provision requiring the giving of notice, such construction cannot be read into these sections. The Orphans' Court has no jurisdiction to try death claims.

Partridge v. *Partridge,* 46 N. J. Equity 434.

Point II.

The cause of action did survive against the administratrix of the estate of Wynand Van Den Berg.

At common law, no right of action for the death of a person survives, and it was not until Lord Churchill's Act, passed in England in 1846, that the common law rule, *actio personalis moritur cum persona,* was overcome and a right given to the personal representative of the deceased for the benefit of the next of kin.

See *History of Legislation. Cooper* v. *Shore Electric Company,* 63 Law 558.

Our "Death Act" (C. S. 1907) and the "Act Concerning Executors" (C. S. 2260) created a new cause of action. At common law there was no right of survival against the executors or administrators of the deceased for any action arising out of a *tort* or trespass, the common law being as set forth in the leading case of *Tichenor* v. *Hayes, supra,* and in *Ten Eyck* v. *Runk, supra,* that if either party to an action died, no action could be supported either by or against the personal representatives when the action was not in form *ex delicto.*

The action at bar is founded upon negligence and negligence is a *tort.* The Death Act covers the deaths caused by "wrongful act, neglect or default," and it has been held in a number of cases and is cited in Tiffany "On Death by Wrongful Act," 2nd Edition, 1913, Section 65, that this phraseology included actions of negligence.

See *Wells* v. *Sibbly,* 56 Hun. 644; *Tiffany* (*supra*), Section 62, and U. S. Supreme Court in *Northern Pacific R. R. Co.* v. *Adams,* 191 U. S. 440, where the Court says:

> "The statute does not provide that when one's life is taken by another, the heirs of the former may recover damages, but only when it is wrongfully taken—that is, when it is taken in violation of the rights of the decedent, wrongfully as to him."

A consideration of the construction of the Executors' Act by our courts is in a line of reasoning commencing with *Ten Eyck* v. *Runk,* 2 Vr. 428; *Tichenor* v. *Hayes,* 12 Vr. 193, and cases of *Hayden* v. *Vreeland,* 8 Vr. 378; *Noyes* v. *Brown,* 10 Vr. 571; *Crane* v. *Ketcham,* 83 L. 331, and *Alpaugh* v. *Conkling,* 95 A, 618.

In *Ten Eyck* v. *Runk,* the Court considered whether damages for flow-back of water upon plaintiff's land abated upon the death of the defendants, after issue joined, or could be continued against the executor.

Chief Justice Beasley held that "the word 'trespass' must be received as equivalent in meaning to the word '*tort,*'—so that the effect of the provision is to give a right of suit against the personal representative of a deceased wrongdoer for any injurious act of a suable nature, without reference to the form in which the remedy must be sought," and he quotes, with approval, the definition of the word "trespass" in Tomlin's Law Dictionary.

The leading case on the subject in this state is *Tichenor* v. *Hayes* (*supra*), where the action was founded on negligence and was, in form, a *tort* action, and Chief Justice Beasley, in the opinion, says:

> "The fact is, the real question to be solved is whether these clauses of this act are to be construed strictly, *or with the utmost latitude of interpretation in view of its being a remedial act.* In the case of Ten Eyck *v.* Runk the latter course was pursued and it seems to me that method was strictly correct. * * * By ascribing to the term '*trespass' the signification of tort, or wrong,* and which is one of its meanings, *the remedy is made approximately commensurate with the evil to be eradicated,* and in this way actions for deceit and neglects will survive, as well as those in which the loss follows immediately from the tortious act. The language of the act is comprehensive enough for this purpose, and *it is hardly permissible to impute a lesser design to the legislature,* for there is a great incongruity in a plan that imparts the quality of survival to an action for a forcible injury, and which

withholds the same quality from an action for a neglect or deceit. The one class of wrongs is, in general, no more culpable than the other, and the injurious results, in some cases, are identical in each. If a physician should intentionally inflict a wound on his patient, the action, it is clear, would, by force of the statute, survive; and, surely, if the same wound were occasioned by want of skill, or carelessness, the same result would obtain."

"As an illustration, it appears in these cases that if a personal injury is occasioned by the negligence of a carrier, that in a suit by the administrator of such person injured, in an action *ex contractu,* which is the only one the common law keeps alive after the injured person's death, the only damages recoverable are those that go to the impairment of the estate, and that there can be no compensation claimed for personal suffering. *Such a redress is so imperfect that it can raise up no implication against a legislative design to keep alive the concurrent remedy for the tort, which is somewhat adequate, if not absolutely complete."*

The statutes are remedial and should be liberally construed.

Cooper v. *Shore Electric Co.* (*supra*), *Tichenor* v. *Hayes* (*supra*), *Ten Eyck* v. *Runk* (*supra*), *Murphy* v. *Board of Chosen Freeholders,* 28 Vr. 245, where the word "corporation" in the Death Act was construed not only to include private corporations but also boards of chosen freeholders as public corporations.

Negligence has been variously defined. Judge Cooley, Cyc. 29, page 415, said it to be "failure to observe for the plaintiff or the interests of another person that degree of care, precaution and vigilance which the circumstances fully demand whereby such person suffers injury," and in *Rowe* v. *Richards,* L. R. A. 1915-E, page 1080,

the elements of a cause of action are given as a "breach of duty owing from one person to another and a damage resulting to the other from such breach." In this case when Van Den Berg turned upon the tracks of the Erie Railroad, he was negligent. If he had crossed safely, there would have been the failure to observe and the breach of duty resting upon him, but no damage. The moment the automobile was struck and before either of them were killed or even injured, damage resulted and instantaneously an action against Van Den Berg arose for Miss Dartnell. Had she lived, that right of action would have entitled her to have sued for damages. When she died, a new right of action arose for her next of kin under the Death Act, but, in either case, the right of action was perfect the instant of impact and before Van Den Berg's death.

Other cases are cited in 52 L. R. A. (N. S.) 886.

The Court's attention is also called to the interesting discussion of the general principles of the right of survival of actions for death in a number of cases and the notes thereto, in 1915-E, L. R. A., pages 1069 to 1163.

New York cases cited by the defendant before are *Hegerich* v. *Keddie,* 99 N. Y. 258, and the following cases construing the New York statute, where the Court holds that the death of the wrongdoer terminated the action. It is to be noted in this case, however, that the New York statute specifically provides that the right of action shall not survive. It is as follows:

> Revised Statute, Birdseye, 2nd Edition, page 1231, Section 166.
>
> 166. "But the preceding action shall not extend to actions for slander, for libel, or

actions for assault and battery or false imprisonment, nor for actions on the case of injury to the person of the plaintiff or to the person of the testator or intestate, or any executor or administrator."

The New York cases in their consideration of this statute all hold that were it not for this specific provision that the right of action would survive against the estate of the deceased *tort feasor* and by the reasoning in these cases and cases in other states where a statute such as ours exists, there can be no question that it does survive.

For the reasons given, the Trial Court was correct in holding with the Supreme Court and the Supreme Court was correct in holding that the right of action survived, but the Trial Court was in error in directing a verdict in favor of the defendant on the ground that this right of action was barred and the verdict of the jury upon such direction is error. Judgment should be reversed and a new trial ordered.

Respectfully submitted,

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