

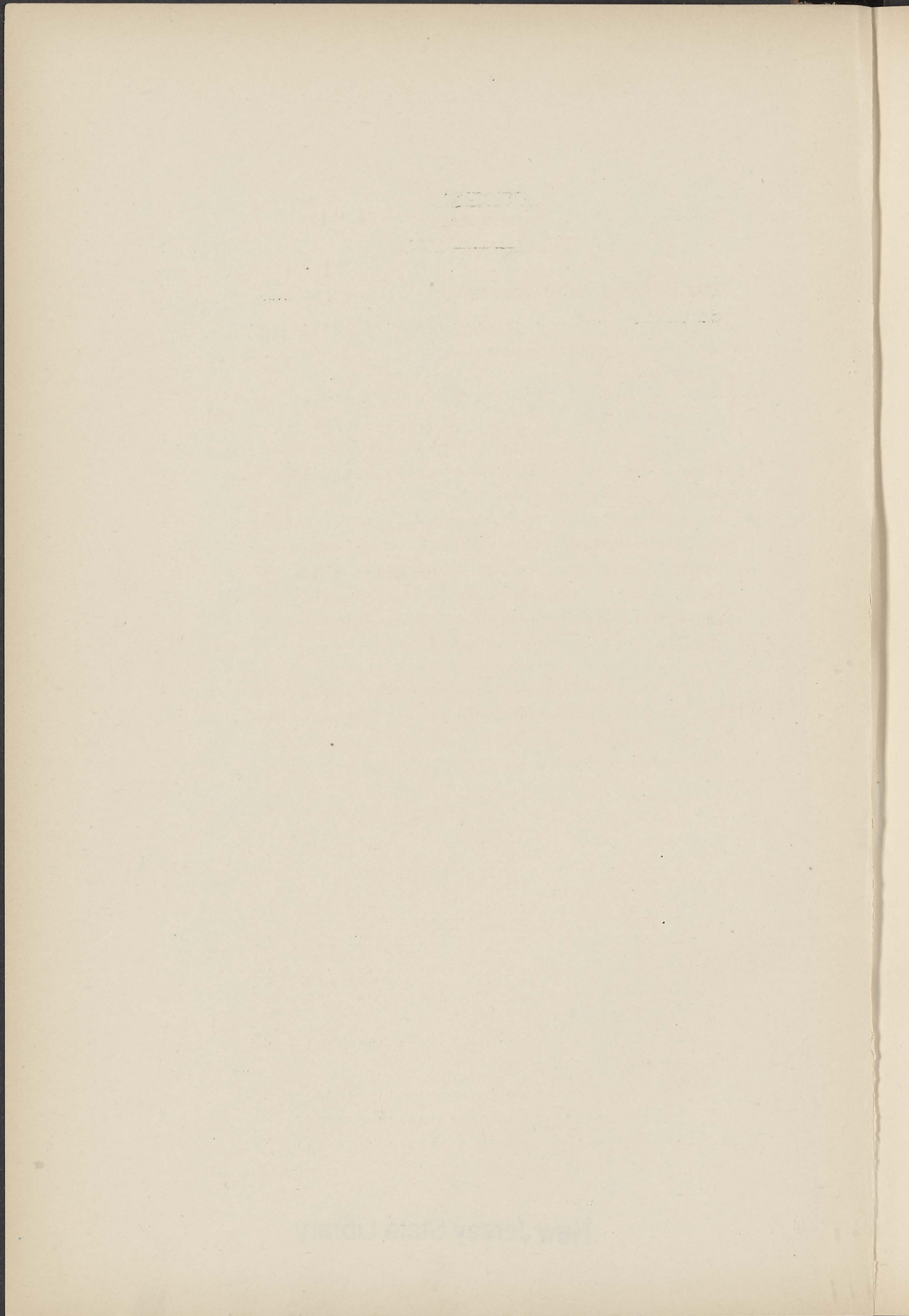
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Summons.

(Filed Dec. 9, 1931.)

THE STATE OF NEW JERSEY to

DOROTHY K. WINANT, Executrice of the ESTATE OF
WILHEMINA BERGE, deceased.

(L. S.)

10

You are summoned to answer the annexed complaint of Frank G. Carlisle in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, William S. Gummere, Chief Justice of the New Jersey Supreme Court, at Trenton, this twenty-third day of July, Nineteen hundred and thirty-one.

FRED L. BLOODGOOD,
Clerk.

RYMAN HERR,
Attorney.

30

40

Complaint.

(Filed December 9, 1931.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

10	FRANK G. CARLISLE, Plaintiff, vs. DOROTHY K. WINANT, Executrice of the Estate of WILHEMINA BERGE, deceased, Defendant.	}	Action at Law.
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20 The plaintiff, Frank G. Carlisle, residing in the Borough of Flemington, County of Hunterdon and State of New Jersey, says that:

30 1. On the 27th day of November 1930, Wilhemina Berge died testate and on the 8th day of December 1930, Letters Testamentary upon her estate were duly issued by the Surrogate of Hunterdon County to Dorothy K. Winant, and the said Dorothy K. Winant took upon herself the burden of administering said estate.

40 2. During the lifetime of the said Wilhemina Berge, plaintiff furnished her with certain material and performed certain work and labor, as set out in Schedule A. hereto annexed. Said Wilhemina Berge promised to pay therefor the sum of \$618.05, and paid on account the sum of \$205.81, leaving a balance due of \$412.24, with interest thereon from the fourth day of August 1930.

Complaint.

3. The plaintiff has duly presented to the defendant a sworn claim as provided by law, but the defendant has not paid the same although more than six months have elapsed since she took upon herself the burden of administering said estate.

Plaintiff demands as damages the sum of \$412.24, together with interest thereon from August 4, 1930. 10

RYMAN HERR,
Attorney of Plaintiff.

20

30

40

Schedule A.

Dorothy K. Winant, Executrice
of the Estate of Wilhemina Berge,
Deceased,

To—FRANK G. CARLISLE, Dr.

	1929			
	Dec. 19	1 pipeless furnace installed	\$155.00	
	23	1½x1¼ coupling	.20	
10		1 1½ nipple	.15	
		1 1½ tee	.45	
		1 1½ plug	.15	
		1 1½ solder bushing	.40	
		1 1½ sink trap	1.50	
		sink strains, tail pce. connection	.80	
		2 hours Mason and helper	1.70	3.40
	1930			
	Jan. 3	Repairs to gasoline engine	3.00	
20	13	Contract for water system	450.00	
	Feb. 21	Repairing Generator	.50	
	June 13	Fixing Magneto	1.50	
	Aug. 4	Fixing Magneto	1.00	
				<hr/>
		TOTAL		\$618.05
		CREDITS		
	1929			
30	Dec. 23	Credit by Cash	25.00	
		“ “ 2 doz. eggs @ .65	1.30	
		“ “ 6½ lb. meat @ .20	1.30	
	1930			
	Mar. 18	“ “ merchandise Jan. 6, Feb. 26	18.40	
	June 12	“ “ “ Mar. 3-May 31	28.45	
	Aug. 30	“ “ merchandise	59.66	
		“ “ cash	20.00	
		“ “ Merchandise	51.70	205.81
			<hr/>	<hr/>
40		BALANCE DUE		\$412.24

Demand for Bill of Particulars.

(Filed Sept. 8, 1931.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

<p style="text-align: center;">FRANK G. CARLISLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DOROTHY K. WINANT, Executrix of the Estate of Wilhelmina Berge, deceased, Defendant.</p>	}	Action at Law.	10
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To:

RYMAN HERR, Esquire,
Attorney for Plaintiff,
Flemington, N. J.

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SIR:

PLEASE TAKE NOTICE that the defendant demands a bill of particulars of plaintiff's claim set out in the complaint within the time prescribed by law, as follows:

1. State on what premises pipeless furnace was installed?

30

2. State if plaintiff's books show items of Schedule A to complaint, charged against Wilhelmina Berge or against her and George H. Bryan?

3. Was there a written contract for the installation of the pipeless furnace, if so, who signed the contract, and who are the parties to the contract?

4. Re item of January 3, 1930, of what did the repairs consist and upon whose gasoline engine?

40

Demand for Bill of Particulars.

5. Re item of January 13th, contract for water system, is the contract in writing, and if so, who are all the parties to the contract?

6. If a water system was installed, upon what premises was it installed, and of what does it consist?

10 7. Did plaintiff render a bill for any of the items in suit to or in the name of both Wilhelmina Berge and George H. Bryan, if so, when was such bill rendered and to whom?

8. Re items of February 21-June 13 and August 4, 1930, state particularly of what machine or equipment the generator and magneto are part, and who advised said work done?

20 9. Does or did the name of George H. Bryan appear on books of plaintiff as debtor of any of the items in suit, and was any of said work or material ordered by said George H. Bryan?

10. Were any of the credit items in Schedule A delivered to plaintiff by George H. Bryan, and if so, state each one and kind of merchandise indicated?

30 11. Are any of the original entries in books of plaintiff of the various items of Schedule A of the complaint charged in the name of the defendant in suit, if so, state which?

12. Did plaintiff on January 8, 1931 render a bill or statement of the items and credits in suit to and in the name of Berge & Bryan?

Dated, September 1, 1931.

Yours, etc.,

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

Answer.

(Filed Oct. 20, 1931.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

<p style="text-align: center;">FRANK G. CARLISLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DOROTHY K. WINANT, Executrix of the Estate of Wilhelmina Berge, deceased, Defendant.</p>	}	<p>10</p> <p>at Law. Action</p>
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The defendant residing at Harrison, in the County of Hudson and State of New Jersey, answering the complaint of plaintiff, says: 20

1. She admits the first paragraph.

2. This defendant has no knowledge or information of the matters alleged in paragraph 2 of the complaint, and therefore denies the same.

3. She admits the third paragraph.

30

FIRST SEPARATE AND DISTINCT DEFENSE.

Defendant, Executrix as aforesaid, says that the decedent, Wilhelmina Berge, did not promise in manner and form as in paragraph 2 of the said complaint is alleged.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys of Defendant.

40

Reply.
(Filed Oct. 21, 1931.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

10

FRANK G. CARLISLE,
Plaintiff,

vs.

DOROTHY K. WINANT, Executrix of
the Estate of Wilhelmina Berge,
deceased,
Defendant.

Action
at Law.

20

The plaintiff denies each and every allegation
contained in defendant's answer, except so much
as admits facts stated in the complaint.

HERR & FISHER,
Attorneys of Plaintiffs.

30

40

Notice.

(Filed Oct. 22, 1931.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

<p style="text-align: center;">FRANK G. CARLISLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DOROTHY K. WINANT, Executrix of the Estate of Wilhelmina Berge, deceased, Defendant.</p>	}	<p>10</p> <p>Action at Law.</p>
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To:

Messrs. HERR & FISHER, Attorneys for Plaintiff.	20
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SIRS:

TAKE NOTICE that the defendant will make objection on the trial of the above stated cause, that George H. Bryan, who is living, and whose address is within the knowledge of plaintiff and unknown to the defendant, is not joined in the said action as defendant, although he should have been made a party defendant therein because in the Bill of Particulars served on the defendant by plaintiff in this cause it is alleged:

30

1. The plaintiff's books show the items charged in Schedule A of the complaint against Wilhelmina Berge and said George H. Bryan.

 2. Said Bill of Particulars allege a verbal contract between the plaintiff and Wilhelmina Berge
- 40

Notice.

and said George H. Bryan for installation of a pipeless furnace charged in the complaint.

3. The said bill of particulars alleges that all the items and amounts sued for are the joint obligation of Wilhelmina Berge and George H. Bryan.

10 Dated, October 20th, 1931.

Yours respectfully,

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

20

30

40

Postea.

(Filed December 17, 1931.)

NEW JERSEY SUPREME COURT,
HUNTERDON COUNTY.

<p>FRANK G. CARLISLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>DOROTHY K. WINANT, Executrice of the Estate of WILHELMINA BERGE, deceased, Defendant.</p>	}	<p>Action at Law.</p>	<p>10</p>
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This case was tried before Judge Francis B. Davis with a jury at the Hunterdon Circuit on December 15, 1931. 20

The jury rendered a general verdict against the defendant and for the plaintiff for Four hundred forty-five dollars and twenty-one cents (\$445.21).

FRANCIS B. DAVIS,
Judge.

Endorsed on Postea		30
Damages	\$445.21	
Costs	78.52	
	\$523.73	

Recorded Judgments.
Volume 27, page 241.

Notice of Appeal.
(Filed December 29, 1931.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10	<p style="text-align: center;">FRANK G. CARLISLE, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">DOROTHY K. WINANT, Executrix of the Estate of WILHELMINA BERGE, deceased, Defendant.</p>	}	Action at Law.
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To:

20 RYMAN HERR, Esq.,
Attorney for Plaintiff,
Flemington, New Jersey.

SIR:

30 TAKE NOTICE that the defendant herein appeals
from the judgment and every part thereof rendered
in the Hunterdon County Circuit of the New Jersey
Supreme Court, to the Court of Errors and Appeals
of the State of New Jersey, and that she will within
the time required by law file and serve upon you
her grounds of appeal in said case, as provided by
the rules and statute in such case made and pro-
vided.

Dated, December 28, 1931.

40 POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

Substitution.

(Filed January 8, 1932.)

NEW JERSEY SUPREME COURT,

HUNTERDON COUNTY.

FRANK G. CARLISLE,
Plaintiff,

vs.

DOROTHY K. WINANT, Executrix
of the Estate of WILHELMINA
BERGE, deceased,
Defendant.

Action
at Law.

10

I, Henry Pomerehne, member of the concern of
Pomerehne, Laible & Kautz, Newark, N. J. do here-
by consent in the name of said law concern to the
substitution of Hervey F. Winant, 763 Broad
Street, Newark, N. J. as attorney of record for the
above named defendant, in our place and stead, in
the above entitled matter.

20

POMEREHNE, LAIBLE & KAUTZ,
By HENRY POMEREHNE.

Dated, January 7, 1932.

30

40

Grounds of Appeal.
(Filed January 27, 1932.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	FRANK G. CARLISLE, Plaintiff-Appellee, vs. DOROTHY K. WINANT, Executrix of the Estate of WILHELMINA BERGE, deceased, Defendant-Appellant.	}	On Appeal from New Jersey Supreme Court.
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To:

20 RYMAN HERR, Esq.,
 Attorney of Plaintiff-Appellee,
 Flemington, New Jersey.

SIR:

PLEASE TAKE NOTICE that the grounds of appeal of the defendant-appellant in the above entitled cause are as follows:

30 1. The court below erred in permitting counsel for the plaintiff-appellee, in his opening, over objection, to refer to statements not made by the deceased but by the executrix.

2. The court below erred in permitting one George H. Bryant, over objection, to testify, on behalf of the plaintiff-appellee, as to conversations between the plaintiff-appellee and Wilhelmina Berge, defendant-appellant's decedent.

40

Grounds of Appeal.

3. The court below erred in permitting the said George H. Bryant, over objection, to testify, on behalf of the plaintiff-appellee, that the said Wilhelmina Berge, defendant-appellant's decedent, in the presence of the said George H. Bryant and the plaintiff-appellee, ordered the said plaintiff-appellee to do plumbing work and install plumbing fixtures.

10

4. The court below erred in directing a verdict in favor of the plaintiff-appellee and against the defendant-appellant.

HERVEY F. WINANT,
Attorney for Defendant-Appellant.

Service of the within grounds of appeal is hereby acknowledged this 27th day of January, 1932.

20

RYMAN HERR,
Solicitor of Complainant.

30

40

Depositions.

NEW JERSEY SUPREME COURT,

No. 21, HUNTERDON CIRCUIT.

December Term, 1931.

10

FRANK G. CARLISLE,
Plaintiff,

vs.

DOROTHY K. WINANT, Executrix
of the Estate of WILHELMINA
BERGE, deceased,
Defendant.Action
at Law.

20

Transcript of shorthand notes of testimony etc., taken in the above entitled cause on the trial thereof before Hon. Francis B. Davis, Circuit Court Judge, and a jury, at the Court House, Flemington New Jersey, on Tuesday December 15, 1931.

APPEARANCES :

RYMAN HERR and LLOYD FISHER for the Plaintiff;

30

HENRY POMEREHNE (POMEREHNE, LAIBLE & KAUTZ) for the Defendant.

40

Mr. Herr: If the Court please, at the opening of the term counsel for the defendant argued before your Honor a motion to have Mr. George Bryant added as a party defendant in this case. He based his motion upon the fact that Wilhelmina Berge, during her lifetime, and George T. Bryant were partners trading as Berge & Bryant, and he stated

Depositions.

in open court that he was willing to stipulate that Berge & Bryant were partners. Following his argument I have called Mr. Bryant in and he tells me that they were partners and that he is now ready to come in and be made a party defendant and acknowledge service as of time so that the trial may proceed against the two of them as partners.

The Court: Your request at the opening was to have Mr. Bryant made a defendant. 10

Mr. Pomerehne: My motion was that in as much as the bill of particulars disclosed this book account in the name of two people, Bryant and Berge, that they should be joined, and your Honor denied that motion, and I said if the motion were denied I would be willing for the purpose of this motion to admit that they were partners in these transactions. Your Honor denied the motion and suggested a stipulation, which Mr. Herr said would have to be agreeable to him, as he wanted it, and I left the courtroom at that time and we have not been able to agree on such terms. 20

The Court: What is the situation now?

Mr. Pomerehne: The motion is dismissed, as far as we are concerned.

The Court: Is Mr. Bryant now being made a party defendant?

Mr. Herr: Yes. He is in Court and I have drawn a summons and complaint adding him as a party, and he has acknowledged it as of time and indicated his willingness to go to trial. 30

The Court: Did he file an answer?

Mr. Pomerehne: I do not object to him being made a party, but I do object now because the Court denied the motion.

The Court: The situation is now that he is a party. 40

Depositions.

Mr. Herr: Yes, sir.

The Court: Is he represented by counsel?

Mr. Herr: I represent him.

Mr. Pomerehne: How can that be?

The Court: You are representing the plaintiff and one of the defendants in the same trial?

10 Mr. Herr: I represent him for the purpose of producing him here in Court.

The Court: You cannot represent the plaintiff and one of the defendants in the trial.

Mr. Herr: I certainly cannot, so far as putting in a defense is concerned, but so far as producing him here, I can.

The Court: He has filed no answer?

20 Mr. Herr: He has not filed an answer. He has acknowledged service of the summons and complaint as of July 24, 1931, and files no answer.

The Court: Acknowledging service as of when?

Mr. Herr: July 24, 1931, the date of the original summons.

The Court: He cannot do that. Here is a case that is noticed for trial and application was made to have him made a party defendant.

30 Mr. Herr: I have met the application by making him a party defendant. A party can acknowledge service as of any date he cares to, and he has acknowledged service as of the time the original summons was served.

The Court: He cannot acknowledge service of a paper that was never issued four months ahead.

Mr. Herr: That is done frequently. That is his privilege, if he cares to do it.

40 Mr. Pomerehne: It might be, if your Honor please, that under these circumstances that are apparent before the Court now that my defendant may have a cross defense against any answer he may file.

Depositions.

The Court: I do not see how the case is in shape for trial. If you are going to add this party defendant—there is no answer filed, is there?

Mr. Herr: No. He has no intention of filing an answer. I intend to assess damages against him and against the other defendant. He is honest enough to come into Court and say that the bill is owing, and he does not attempt to put up a defense. 10

The Court: Are you agreeable to all that situation?

Mr. Pomerehne: No, sir. We say, if your Honor please, that Mr. Herr represents both the plaintiff and the defendant in this case for the purpose of confessing judgment.

The Court: I cannot see how Mr. Herr can represent both the plaintiff and defendant in this case. 20

Mr. Herr: Your Honor fails to remember that I stated that I am not representing him for the purpose of trying this case. He is my client and I have advised him that if he owes the bill he ought to pay it, and he very candidly said that the partnership owes the bill, and he says "I do not care to put any defense in."

Counsel opened this case by stating that he was willing to stipulate there was a partnership, and now the man comes in and he says there was a partnership and he is willing to be made a party defendant so that the matter may be finally adjudicated against the partnership. 30

The Court: I understand you have drawn a new summons and complaint since this matter was up?

Mr. Herr: Yes, sir.

The Court: Dated when?

Mr. Herr: It is dated as of the time of the original summons and complaint. 40

Depositions.

The Court: And he has acknowledged service as of a certain date?

Mr. Herr: That is correct.

The Court: It seems to me that is very irregular practice. Are you prepared to go on with the case in the present situation?

10 Mr. Pomerehne: Not in having a general partnership proved. Your Honor stated that this motion involved a Chancery action, and this matter as it stands now in the form in which Mr. Herr makes it, would be prejudicial to that Chancery case. I cannot go into court— Your Honor can see—
 20 counsel for the complainant and counsel for the defendant and confession of judgment—without a chance on our part to answer and put in any defense we might have. If he alleges a general partnership in his complaint we might come in and deny that.

The Court: What I think about the situation is this: If this defendant is to be made a party defendant he will have to be made a party defendant as of the time that you are making it. It certainly cannot relate back to predating the summons and complaint and having the defendant acknowledge service of the summons and complaint at this stage, and I will not recognize that sort of a situation.

30 Mr. Herr: Very well. I will proceed with the case as it is.

The Court: Without him being a defendant?

Mr. Herr: Exactly. I only brought him in because the defendant aswed that he brought in. Here is the transcript. I am ready to go ahead.

The Court: The case now proceeds as against this one party. Are you ready now, Mr. Pomerehne?

Mr. Pomerehne: Yes, sir.

40 (Jury empaneled and sworn.)

Depositions.

Mr. Herr: May it please the Court, and members of the jury, this is a case in which Mr. Carlisle, whom you see sitting here, brings suit against Dorothy K. Winant, Executrix of the Last Will and Testament, or of the Estate, of Wilhemina Berge, deceased.

He brings the suit for a furnace and some plumbing work and some other odds and ends that he did on a farm between Whitehouse and Flemington. At the time there was on the farm Wilhemina Berge and a man by the name of Bryant. So far as Mr. Carlisle knew when he put the furnace in Mrs. Berge and Mr. Bryant were partners about the place, and he charged the account on his books to Wilhelmina Berge and Mr. Bryant as partners, and he always understood that they were partners and charged the bill accordingly. We will show you that although it is charged against the two of them, still Mrs. Winant, who is executrix of the deceased, Wilhemina Berge, and since Mrs. Berge has died, Mrs. Winant has handled her affairs and is the proper person against whom suit should be brought. We will show you that when we went to her and told that we had this bill against the partnership and asked her to pay her half of it because—

Mr. Pomerehne: I object, if your Honor please, to that opening to the jury, because there is nothing in the complaint to indicate that fact, and it is not pleaded by us.

The Court: What was the statement?

Mr. Pomerehne: That promise was made by the executrix—

Mr. Herr: I am not suing on that promise. That is part of my evidence.

The Court: What is the statement?

Depositions.

Mr. Herr: That the executrix when presented with a bill against her testatrix and against Bryant as partners, denied that they were partners and said that the bill came to her individually, and that is what I expect to prove.

10 We will show you that the farm machinery was considered partnership property and was sold and other debts ostensibly of the partnership paid out of the pool that was formed by the sale of this material. We will show you that at that very time this particular bill on which we are suing now was presented as a partnership bill and that the executrix denied that it was a partnership bill and said that it belonged to Wilhemina Berge as her own—

Mr. Pomerehne: I object again and ask to have the objection noted on the record.

20 The Court: Captain Herr, you are serving the executrix in a representative capacity.

Mr. Herr: Exactly.

The Court: It seems to me your opening should be confined to the matters set forth in the complaint.

Mr. Herr: I am confining myself very strictly to my complaint. I am now referring to statements not made by the deceased but by the executrix.

The Court: An exception may be noted to this.

30 Mr. Herr: Now, the executrix made these statements and we will show you that we went so far as to send an officer of the law over there with this bill and that after she had denied her identity to him and finally had to admit it that she stated that she would pay the bill in a few days. We waited a few days and no check was forthcoming. We brought suit and had the matter at issue and noticed it for trial and on the opening day of the term were faced with a motion to make Mr. Bryant a co-defendant.

40

Lloyd Fisher—Direct.

Mr. Pomerehne: Objected to.

The Court: That is no part of the case, Captain Herr. It is not a part of this trial—preliminary motions not for the consideration of the jury, and I will request you to leave out matters which concerned the Court alone and had nothing to do with the consideration of the jury.

Mr. Herr: I pray an exception upon the ground that our books are going to show that this matter was charged to Berge and Bryant, and I have a right to show the reason why Mr. Bryant is not made a party to this action, and to show why it is charged the way it is on our books. 10

Now if we prove these facts to you, members of the jury, we shall expect a verdict at your hands against Mrs. Berge's estate for the full amount of our claim plus interest. 20

(Mr. Pomerehne opened for the defendant.)

LLOYD FISHER, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. HERR:

Q. Mr. Fisher, you are acquainted with Dorothy K. Winant? A. Yes, sir. 30

Q. Did you see her prior to the commencement of this suit, with relation thereto? A. Yes, sir.

Q. Tell us the conversation that you had with her. A. It was the time the sale was had of the personal property on the farm where Mrs. Berge had resided near Whitehouse. There was a number of bills presented against the partnership, and I was there representing some creditors and Mr. Bryant. Mr. Stout, an attorney here at Fleming- 40

Lloyd Fisher—Direct.

ton at that time represented Mrs. Winant, and she also had her son with her and a man named Pierson, I believe, from Newark. Before the sale we met in one of the rooms of the house to go over the matter of accounts. The accounts were presented one at a time, and there was a number of them, I think some eighteen or twenty, some for cows, some for fertilizer, and a number of accounts, which as they were gone over Mrs. Winant would look at each bill and say, "Yes, that is a partnership bill", along with others, without any special comment, and I got out the bill of Mr. Carlisle, which was for some four hundred dollars. Mrs. Winant first looked at it and said, "Yes, that is all right", and Mrs. Winant shouted very loudly that it was no bill against the partnership, and Mr. Stout, who was representing her, chimed in and said no, it was certainly not, and Mr. Pierson, who seemed to be her agent, said the same thing, and I said, "Why?" and she said, "That hasn't anything to do with the partnership; that is Mrs. Berge's personal bill". And I said, "What are you going to do with it?" And she said, "You leave that bill with me and I will send you a check." I said, "When?" And she said, "As soon as I get back to Harrison". And I said, "You don't want this bill in the partnership?" And she said, "Indeed not, because it is not a partnership bill, and George Bryant had nothing to do with this and had nothing to do with this bill."

Q. That is a copy of the bill attached to the complaint? A. Yes. And I gave it to her on the spot. That is all the conversation we had there that day. I communicated with her again about it but not at that time.

40

Mr. Herr: Take the witness.

Mr. Pomerehne: No questions.

Harry L. Stout—Direct.

HARRY L. STOUT, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. HERR :

Q. Mr. Stout, you were present when a bill of Mr. Carlisle against Mrs. Berge and Mr. Bryant was presented to Dorothy K. Winant in the sum of \$412.24? A. I was.

10

Q. What did Mrs. Berge have to say about it?

Mr. Pomerehne: I object.

Q. Or Mrs. Winant, rather?

Mr. Pomerehne: I withdraw the objection.

A. My recollection about the matter is that Mrs. Berge was the owner of a farm they were operating jointly, by Mrs. Berge and a man by the name of Bryant. There was some partnership indebtedness, and after several conferences it was agreed that the property owned by Mrs. Berge and Bryant should be sold and out of the proceeds the partnership indebtedness was to be paid, and we agreed that—Mrs. Winant was present and her son was present and a man named Pierson, I think, was present, and Mr. Bryant was present, and Mr. Fisher, and Anderson Kinney was to take charge of the funds and liquidate the partnership indebtedness. A list of claims was presented, and among the claims presented was the bill of Mr. Carlisle and Mrs. Winant stated that it was not a partnership indebtedness but it was an indebtedness due from the owner of the property, Mrs. Berge, and it was then agreed that it should not be paid out of the partnership proceeds of the sale but she

20

30

40

Frank G. Carlisle—Direct.

would liquidate the indebtedness as the representative of Mrs. Berg's estate.

Mr. Herr: That is all.

Mr. Pomerehne: No questions.

10

FRANK G. CARLISLE, the plaintiff, sworn.

DIRECT EXAMINATION BY MR. HERR:

Q. Mr. Carlisle, where do you reside? A. 20 North Broad Street, Flemington.

Q. What is your business? A. Plumbing and heating.

20 Q. Did you ever do any work for Wilhelmina Berge and George Bryant? A. I did.

Q. What do you do? Do you want your book?
A. (Witness refers to book.)

Mr. Pomerehne: Fix the time, please.

The Witness: The first work I done for her was in 1928, September first.

Mr. Pomerehne: Now just a moment please, before you answer the question any further.

30 Was that 1928?

The Witness: That is right.

Mr. Pomerehne: No objection.

The Witness: That is not included in this account.

Q. Now start with this account. A. That amounted to \$11.96.

Q. No. Start with this account.

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Frank G. Carlisle—Direct.

Mr. Pomerehne: Now, if your Honor please, may I cross examine this witness about what he is testifying from?

Mr. Herr: I will do that myself, first, and then if you are are not satisfied you may cross examine him.

Q. Mr. Carlisle, what is that book you have in your hand? A. That is my ledger. 10

Q. Who keeps that? A. My wife mostly.

Q. Who makes the material from which she copies into the ledger? A. I do.

Q. When do you make that? A. I make my list out every day, and at night she copies it on the book.

Q. Does she copy it while you are there? A. Yes.

Q. Under your supervision? A. Yes. 20

Q. And do you know that it is correct? A. I do.

Q. By refreshing your memory with the memorandum can you tell what work you did there? A. Yes, sure.

Q. All right, proceed.

Mr. Pomerehne: Just a moment. At this time I enter an objection. If this work involved any transaction with the decedent I object to it, under the Compiled Statutes of New Jersey, Volume 2, Page 2218, paragraph 4, which provides that in all civil actions any party thereto may be sworn and examined as a witness, notwithstanding that any party thereto may be sued or sue in a representative capacity, provided this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or state- 30
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Frank G. Carlisle—Direct.

ment by any testator or intestate represented in such action, unless the representative offers himself as a witness on his own behalf to testify to any transactions with or statement by his testator. Upon those grounds, if this leads into any transaction with the decedent, I submit, if your Honor please, that it is objectionable.

10

The Court: This is not a book of original entry, I understand.

Mr. Herr: I am not offering the book. I am simply using it to refresh his memory.

The Court: He says it was copied by his wife, as I understand.

Mr. Herr: Yes, from his original slips.

20

The Witness: This is the original ledger. I write this on a slip of paper or pad or whatever I happen to have with me and when I get home my wife writes it into this book and I go over it after she gets through.

The Court: Do you keep any other book?

The Witness: No, I do not.

The Court: It is not a ledger; it is a daily time book, apparently.

The Witness: We use it as a ledger and day book.

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The Court: You are not objecting to the book; you are objecting on the ground of transactions with the decedent by the plaintiff to the suit?

Mr. Pomerehne: Yes, sir.

Mr. Herr: I am very familiar with that. I am not going to have him testify to anything she said or anything he said to her. I am going to have him testify to the actual work he did on the place.

40

Frank G. Carlisle—Direct.

Q. Now can you tell us what actual work you did there on the place? A. On December 19, 1929 I installed—

Mr. Pomerehne: I object.

The Court: Apparently he is trying to show what work was done on a certain place without going into the question—the question eliminates entirely the decedent from this testimony. It merely shows what specific work was done on some place and he is not now testifying to transactions with the decedent. He is stating the work done—what is the question—doing work on a certain— 10

Mr. Herr: A particular place.

The Court: Then this should be done without going into anything— 20

Mr. Herr: Yes. I am not asking whether she promised to pay for it or ordered it or anything else.

The Court: He may testify to the extent of showing what was actually installed on the place.

The Witness: On December 19, 1929.

The Court: Is there any dispute about that? Do you raise any question about the items set forth in the account as being taken from that book? 30

Mr. Pomerehne: No, we do not raise any question about them being the items sued on.

The Court: You do not raise any question but that what he is now testifying to represents the items set forth in the complaint.

Mr. Herr: That is right.

The Court: And the same as far as the credits are concerned? 40

Frank G. Carlisle—Direct.

Mr. Herr: That is correct.

The Court: Then it is admitted that this witness will now testify to items set forth in the complaint and credits, so that would dispose of that.

Mr. Herr: Yes, leaving a balance due of \$412.24.

10

Q. The work upon which there is \$412.24 plus interest was performed on this place where Mrs. Berge and Mr. Bryant lived? A. It was.

Q. Were you present when a conversation was had with Mrs. Winant concerning this bill? A. Do you mean with Mr. Fisher?

Q. Yes. A. No; I was not present at the time. I was there but I was outside; I was not in the house.

20

Q. Since then have you had any conversation with Mrs. Winant? A. Yes. Right—well, within a few minutes after they came out the sale started and I met Mr. Fisher and he said he gave the bill to Mrs. Winant—

Q. Not what Mr. Fisher said, unless Mrs. Winant was present. A. Well, she was not present.

30

Q. Then you cannot tell that. You will have to confine yourself to what Mrs. Winant said. A. I met Mrs. Winant a few minutes after I met Mr. Fisher and she told me that—she said, “I got your bill from Mr. Fisher. That is a personal bill of my sister’s.”

Q. Who did she mean by “her sister”? A. Well, she meant Mrs. Berge. And she said, “I will see that your bill is paid and you will receive a check from me for the amount within a very few days”. That is the last I ever heard from her.

Q. Has the bill ever been paid? A. No, sir.

40

Q. It is still due and owing? A. Yes.

Frank G. Carlisle—Direct.

Q. And the work represented by that bill, were they reasonable charges for the work you did? A. Certainly was. Most of it was contract.

Q. Do you know who owned the place where the work was done? A. Well, I always supposed they owned the place together.

Q. Wilhemina Berge and George Bryant? A. Yes.

Q. But you have no positive knowledge? A. No, I have not. 10

Q. Did you hear Mrs. Winant tell Mr. Stout that Mrs. Berge was the owner of the place?

Mr. Pomerehne: I object.

A. No. I did not.

The Court: What was that?

Mr. Pomerehne: Did he hear someone else tell about ownership? 20

The Court: As I recall his testimony, he would have to show he was present at some conference that took place between Mr. Stout and Mrs. Winant. He has testified to a conference or conversation, apparently, that took place between Mrs. Winant and Mr. Stout. Now, what is the question?

The Witness: Well, I didn't hear it, anyway.

Q. Do you know who lived on the place? A. Why, yes, George Bryant lived there and Mrs. Wilhelmina Berge lived there, and then they had a boy and a girl that was living there with them. 30

Q. Were they always there when you went there to do the work? A. Well, most always, yes.

Q. And it had the appearance of being their home? A. Well, I know it was their home. I was there every few days myself.

Mr. Herr: Take the witness. 40

Frank G. Carlisle—Cross.
Frank G. Carlisle—Redirect.

CROSS EXAMINATION BY MR. POMEREHNE:

Q. You say that part of this work was contract?

A. It was.

Q. Did Mr. Bryant make a contract with you for that work? A. No.

10 Q. Was the contract in writing? A. No; it was a verbal contract.

Q. The bill that you rendered—there is an item appears of \$450 for a water system, contract for water system? A. Yes.

Q. Was the contract in writing? A. No.

Q. Was Mr. Bryant on the farm at the time it was installed? A. He was.

20 Q. A pipeless furnace, December 19, 1929. Was Mr. Bryant on the farm when that was installed? A. He was.

Q. You say that you always knew that there was a partnership between them? A. I always thought so. I was led to believe there was.

Q. Did Mr. Bryant ever tell you so? A. I think he has.

Q. In other words, all the bills that you rendered were in the names of Berge and Bryant? A. They were.

30 Q. I notice one item in the bill, February twenty-first, repairing generator, fifty cents. What generator? A. The generator on the gasoline engine that they ran their pump with.

Mr. Pomerehne: That is all.

REDIRECT EXAMINATION BY MR. HERR:

40 Q. Where was this gasoline engine situated? A. It was down at the well. I put a water system in

Frank G. Carlisle—Recross.

and I put a new platform on their well, and this gasoline engine was one that they had there to pump this water in this water system.

Q. It was a thing that was used about the water works rather than for thrashing or something of that nature? A. This was only a small engine. They used it for pumping water only.

Q. Now I notice you have fifty cents for repairing generator. A. That was the generator on this gasoline engine. 10

Q. And \$1.50 for fixing magneto. A. Well, that was on the same engine.

Q. So that all this work was either about the water system or about the furnace? A. That was labor, yes.

Q. Now, I notice an item of a zinc trap. Where did that go? A. In the kitchen sink. 20

Q. And it was in the kitchen on this place? A. On that place, yes.

Q. I notice something for soldering bushing. Was that plumbing in the kitchen, or what? A. Yes, it was on that sink, also.

Q. And one plug, fifteen cents. A. That was all right on that same item.

Q. And one coupling and one nipple and one "T". A. That was done December 23rd. That was all on that sink. 30

Q. And the total amount due you for that work now is \$412.24, with interest from August 1930?

A. That is the balance that is due, yes.

Mr. Herr: That is all.

RE-CROSS EXAMINATION BY MR. POMEREHNE:

Q. Do I understand you to say that your wife makes entries in that book? A. Yes. 40

Frank G. Carlisle—Recross.

Q. After the entries were made did you check them up? A. Yes.

Q. I notice some credits on this bill. A. Yes, several of them.

Q. Were those credits paid to you personally? A. Yes, I think they were all paid to me personally.

10 Q. Who made the entries of the credits in the book? A. Well, my wife, she does all the bookkeeping on that.

Q. As you told her to make them? A. Why, sure. When I came home—I had very little money out of that—

20 Q. Did you stand right there and see her make the entries in the book? A. No, not always as I know of, on that I wouldnt say that I did, but when those credits were made I had a slip that Mrs. Berge gave me. They ran a service station out there and—

Q. I am not asking for any volunteer information.

Mr. Herr: He is answering the questions. Just answer the questions and stop, Mr. Carlisle.

30 Q. If there had been any payments made on account of this account, made to your wife, would you have known about it? A. I certainly would, and there was none made.

Mr. Pomerehne: That is all.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

William Saunders—Direct.

WILLIAM SAUNDERS, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. HERR:

Q. Mr. Saunders, you are a Constable? A. Yes.

Q. Did you deliver to Mrs. Berge a copy of the bill attached to the complaint in this matter? A. I did.

10

Q. What did she say? A. She said that the bill would be taken care of in a couple of days; that she would be over with a check.

Q. Did she admit her identity when you first approached her? A. No.

Mr. Pomerehne: Do you mean Mrs. Berge or Mrs. Winant?

The Witness: Mrs. Winant.

Mr. Herr: I mean Mrs. Winant.

20

The Witness: I went there and there was a man working outside, doing carpenter work, and I asked if Mrs. Winant was there and he said yes, that was the lady inside. There was a new room being built to the house and he said "Go on inside", and I went inside and said "Is this Mrs. Winant?" And she said, "No". And I said "That is very funny. The man outside told me you were Mrs. Winant".

And she said, "I am not". And about that time this gentleman came in and I said, "I thought you told me this was Mrs. Winant". And he said, "I did". And I said, "I guess I will have to take you to Flemington and find out who you are". And I gave her the bill and she said, yes, she knew about it, and in a couple of days—she had some other things to straighten out—she would take care of it.

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George H. Bryant—Direct.

GEORGE H. BRYANT, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. HERR:

Q. Mr. Bryant, were you present at a conversation between Mr. Carlisle and Wilhelmina Berge?

10 Mr. Pomerehne: I object—I withdraw the objection.

That calls for a Yes or No answer.

The Court: Answer the question.

A. I was present.

Q. Did that conversation concern the work covered by the bill attached to the complaint in this matter?

20 Mr. Pomerehne: I object to that, if your Honor please.

A. It was.

30 Mr. Pomerehne: Wait. I object on the ground that this man has been shown by the testimony of the plaintiff to be a party in interest, although not a party defendant. He testified he was a party in interest, and he comes under the ban of the statute.

The Court: Objection overruled and exception allowed.

Q. What did Mrs. Berge say about this work?

A. She said she would call Mr. Carlisle in and I said—

40 Q. I am not asking about the conversation between you and Mrs. Berge prior to the arrival of Mr. Carlisle. I am asking what Mrs. Berge said

George H. Bryant—Cross.

after Mr. Carlisle arrived there. A. She said she would like to have some work done about the water system and a few more things, and she asked about an estimate and Mr. Carlisle gave her an estimate and she said, "Yes, that is satisfactory. We will have the work done."

Q. Was the work done? A. Yes, sir.

10

Mr. Herr: That is all.

CROSS EXAMINATION BY MR. POMEREHNE:

Q. You were there at the time the conversation took place? A. I was.

Q. Did you have anything to say about the work? A. I asked Mrs. Berge "Don't you think the work should be done—" this work—"instead of letting the children carry water to the buildings?" And she said, "I think it should be done, too."

20

Q. You told Mr. Carlisle what was necessary to be done? A. We spoke it over, the three of us, and Mrs. Berge said yes, that should be done.

Q. Did you order that work done? A. Mrs. Berge ordered it done.

Q. You did not? A. We spoke together but I do not believe I ordered it. I said, "It is up to you. What do you say, Mrs. Berge, about having the work done?" And she said, "Yes".

30

Q. The work was for your benefit, was it not?

Mr. Herr: I object to that question.

The Court: Objection overruled.

(Last question read.)

Mr. Herr: I object to the question unless counsel explains what he means by "for your benefit". I do not know what he means and

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George H. Bryant—Cross.

the Court does not know and the jury does not know.

The Court: You may explain what you mean.

Mr. Pomerehne: I will reframe the question.

10 Q. The work was necessary to be done for your business, was it not? A. For the welfare of the farm and to make it easier for the party that was on the farm.

Q. You had an interest in that business, did you not? A. Yes.

Q. As to the rest of the work—have you ever seen the bill submitted by Mr. Carlisle in this case? A. I have.

Q. And all that work was done for the benefit of you and Mrs. Berge? A. For Mrs. Berge.

20 Q. And yourself? A. Well, to make it lighter for us.

Q. You had an interest in that concern, didn't you? A. It was mostly for the children, to make it lighter for them to carry water.

Q. You ran the farm on shares, did you, together? A. On shares?

Q. Together? A. Yes.

Q. The profits and losses were shared equally? A. In certain things, yes.

30 Q. Is that right? A. Yes, sir.

The Court: I did not get this. Did this question refer to the water system only?

Mr. Herr: No; it referred to the pipeless heater and the whole thing.

The Court: I do not think he testified about the furnace.

Mr. Herr: He said he was present when the work was ordered.

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George H. Bryant—Cross.

The Court: But in his answer he referred to the water system.

Mr. Herr: That is because his attention was directed to that.

BY MR. HERR:

Q. You were present when the pipeless heater was ordered? A. Yes, sir. 10

Q. And the water system, both? A. Everything that is on his bill, I was there.

Q. Mrs. Berge told him it was satisfactory to go ahead? A. Yes, sir.

Mr. Pomerehne: I object to that again under the same section of the statute, Section 4. It is a transaction with the deceased. The testimony now shows that this man was a partner in the case and is a party in interest whether he was so made in the suit or not. 20

The Court: The question is objectionable on the ground it is leading.

Mr. Herr: It is merely a reiteration of what he said before.

The Court: I will sustain the objection.

Q. State what Mrs. Berge said when the pipeless furnace was ordered? 30

Mr. Pomerehne: I ask an exception.

The Court: The objection is overruled and an exception allowed.

A. We called Mr. Carlisle in and she gave Mr. Carlisle the order to put the pipeless furnace in and she said she would pay him and he said he would

Motion for Non-Suit.

Mr. Pomerehne: And this, if your Honor please: The testimony now shows that this man Bryant was a partner; that by his own recognition of the partnership he shared in the profits and losses and the case as it stands now is prejudicial to the defendant. We should have an opportunity to come in on a regular summons and to appear and answer any answer that may be filed by Bryant; that we are entitled to have our day in Court. 10

The Court: What is your motion?

Mr. Pomerehne: For a non-suit on that ground.

The Court: The motion for a non-suit will be denied. Have you any other grounds?

Mr. Pomerehne: No.

(Court and counsel return into Court.)

Mr. Pomerehne: The defense rests. 20

Mr. Herr: I move for a directed verdict.

The Court: I think under the proof the plaintiff is entitled to a directed verdict. Have you calculated the interest, Mr. Herr?

Mr. Herr: No, I have not, but I will in just a moment.

The Court: There were no witnesses called on the part of the defense and there seems to be no dispute as to the items in the account, and there is proof that the work was ordered by Mrs. Berge and that the work was done by Mr. Carlisle. So that the plaintiff is entitled to a verdict. 30

Ladies and gentlemen of the jury—

Mr. Pomerehne: If your Honor please, before you make the direction, will you allow an exception to your ruling?

The Court: Yes. 40

Verdict.

No defense has been offered in this case, ladies and gentlemen of the jury, and the proof shows, as I have already stated, that the amount due the plaintiff is \$412.24 together with interest from August 4, 1930.

Mr. Herr: That is \$32.97.

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The Court: Is there any question about the interest? It has been agreed that the interest is \$32.97, so the total is \$445.21.

Ladies and gentlemen of the jury, by direction of the court you will find a verdict in favor of the plaintiff and against the defendant for \$445.21, representing the amount of the claim together with interest from August 4, 1930. The Clerk may take the verdict.

(The jury returned a verdict accordingly.)

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I do hereby certify that the foregoing is a true and correct transcript of stenographic report of proceedings in the above entitled cause.

JOHN S. VAN BLARCOM,
Official Court Reporter.

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Certificate of Judge.

I, FRANCIS B. DAVIS, Judge of the Hunterdon County Circuit Court, sitting as Supreme Court Commissioner, do hereby certify that the foregoing is a true and correct transcript of the testimony of the case of Frank G. Carlisle, Plaintiff, vs. Dorothy K. Winant, Executrix of the Estate of Wilhelmina Berge, dec'd., Defendant, tried before me, sitting with a jury on Tuesday, December 15, 1931. 10

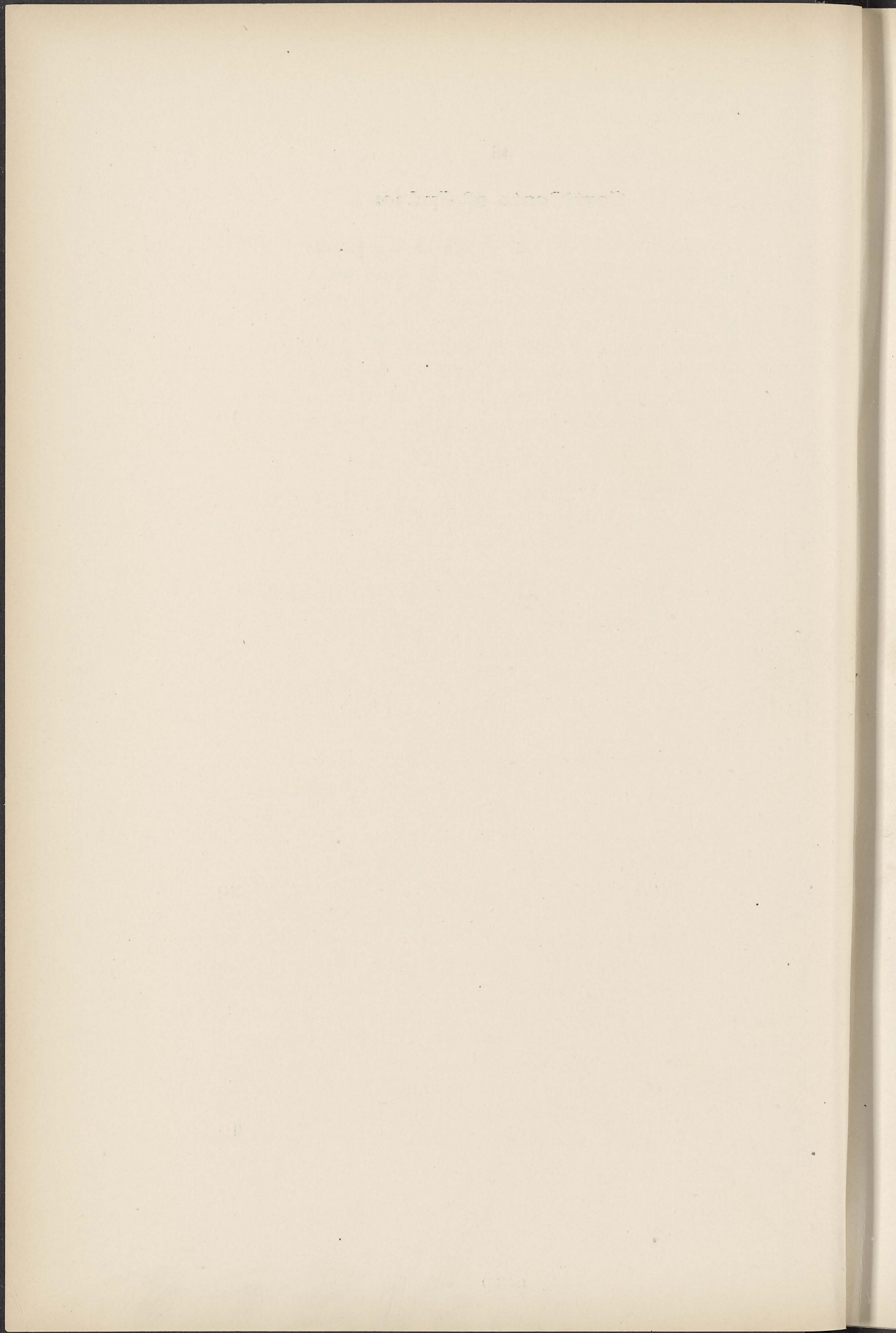
IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of January, 1932.

FRANCIS B. DAVIS,
Judge.

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New Jersey Court of Errors and Appeals

FRANK G. CARLISLE,
Plaintiff-Appellee,

vs.

DOROTHY K. WINANT, Executrix
of the Estate of Wilhelmina
Berge, deceased,
Defendant-Appellant.

On Appeal from
New Jersey
Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

Frank G. Carlisle, plaintiff in the Court below, brought suit against Dorothy K. Winant, defendant in the Court below, Hunterdon County Circuit of the Supreme Court, alleging the following facts: that on the 27th day of November, 1930, Wilhelmina Berge died testate, and on the 8th day of December, 1930, letters testamentary upon her estate were duly issued by the Surrogate of Hunterdon County to Dorothy K. Winant, and the said Dorothy K. Winant took upon herself the burden of administering said estate; that during the lifetime of the said Wilhelmina Berge, plaintiff furnished her with certain material and performed certain work and labor, as set out in Schedule A annexed to the complaint; that said Wilhelmina Berge promised to pay therefor the sum of \$618.05, and paid on account the sum of \$205.81, leaving a balance due of \$412.24, with interest thereon from the fourth day of August, 1930; that the

plaintiff duly presented to the defendant a sworn claim as provided by law, but the defendant did not pay the same although more than six months elapsed since she took upon herself the burden of administering the estate.

The case was brought to issue and tried before Judge Francis B. Davis with a jury at the Hunterdon Circuit on December 15, 1931, the jury rendering a directed verdict against the defendant and for the plaintiff for \$445.21. The defendant appeals to this Court from the judgment rendered upon such verdict.

POINT ONE.

The Court below erred in permitting one George H. Bryant, over objection, to testify, on behalf of the plaintiff-appellee, as to conversations between the plaintiff-appellee and Wilhelmina Berge, defendant-appellant's decedent.

POINT TWO.

The Court below erred in permitting the said George H. Bryant, over objection, to testify, on behalf of the plaintiff-appellee, that the said Wilhelmina Berge, defendant-appellant's decedent, in the presence of the said George H. Bryant, and the plaintiff-appellee, ordered the said plaintiff-appellee to do plumbing work and install plumbing fixtures.

The objectionable testimony of Bryant is to be found on pages 36 and 39 of the State of the Case. The testimony of Bryant was objected to at the trial, and is now urged as a reason for reversal on appeal, on the ground that the testimony

showed Bryant to be a party in interest, although not made a party defendant, and his testimony was, therefore, incompetent under section 4 of the Evidence Act. Opposing counsel in his opening made the following statement:

“Mr. Herr: If the Court please, at the opening of the term counsel for the defendant argued before your Honor a motion to have Mr. George Bryant added as a party defendant in this case. He based his motion upon the fact that Wilhelmina Berge, during her lifetime, and George T. Bryant were partners trading as Berge & Bryant, and he stated in open court that he was willing to stipulate that Berge & Bryant were partners. Following his argument I have called Mr. Bryant in and he tells me that they were partners and that he is now ready to come in and be made a party defendant and acknowledge service as of time so that the trial may proceed against the two of them as partners” (Case, pp. 16 and 17).

One Lloyd Fisher, called on behalf of the plaintiff, testified that there were a number of bills presented against the partnership, and he was there representing some creditors and Mr. Bryant (Case, p. 23). The plaintiff testified that he did work for Wilhelmina Berge and George Bryant (Case, p. 26). All the bills he rendered were in the names of Berge and Bryant (Case, p. 32). Bryant himself testified that he had an interest in the business, and that he and Wilhelmina Berge ran the farm together, and shared the profits and losses equally (Case, p. 38).

All of Bryant's testimony was adverse to the interests of the decedent and her estate.

The real party in interest, although not a party to the record, is, according to some authorities,

incompetent, as is also one who, although not a party to the record, is a necessary party to the litigation. 40 Cyc. 2275.

In enforcing the subject of the statute, courts will look at the substance of the cause and observe, through the forms of the procedure, who are the real parties whose interests are antagonistic, and then will see that when one is put at a disadvantage by death, the other shall not be permitted to profit by the misfortune of his adversary. *Smith v. Burnet*, 35 N. J. Eq. 314, 321 (Court of Errors and Appeals).

In a suit to enforce specific performance of a contract to leave certain property by will, witnesses who were made parties by defendant's counterclaim, and who assigned their interests to complainant, who was their sister, were held not competent, under 2 Comp. St. 1910, p. 2218, section 4, relating to testimony by parties as to statements made by a decedent. *Wells v. Fidelity Trust Co.*, 93 N. J. Eq. 94, 115 A. 73.

Vice-Chancellor Foster, on page 75 of 115 A. says:

“If it were necessary to consider them as parties, admittedly made such for the purpose of preventing them from testifying, I should regard, with the same suspicion, the pleading making them parties, as I regard the assignments intended to qualify them as witnesses; as it is just as impossible to raise the bar of the statute by a subterfuge as it is to remove it by such means.”

It may well be conceived that the purpose of the statute is clear, and that whenever one who is really a party in interest, and whose testimony is adverse to the interests of a decedent, is not actually a party, his testimony will be excluded and disregarded as incompetent, equally as though he were a party of record to the action.

POINT THREE.

The Court below erred in directing a verdict in favor of the plaintiff-appellee and against the defendant-appellant.

A jury should not be controlled in its action, except when the testimony will support no other verdict than that which is directed. *Markey v. Consolidated Traction Co.*, 65 N. J. Law 82, 46 A. 573, judgment affirmed, 65 N. J. Law 682, 48 A. 1117. Where plaintiff might have been non-suited had such a motion been made, direction of a verdict in his favor on the same evidence was erroneous. *Jordan v. Reed*, 77 N. J. Law 584, 71 A. 280.

The proof adduced at the trial below, far from being such as would support no other verdict than that which was directed, was so inadequate as to support no other verdict than one in favor of the defendant and against the plaintiff, in the court below. The defendant offered no testimony on her own behalf, the evidence being all part of the plaintiff's case. I respectfully urge that from a most favorable view of the COMPETENT testimony offered on behalf of the plaintiff, the latter failed to make out a *prima facie* case, and should either have been non-suited, or a verdict directed in favor of the defendant.

Lloyd Fisher, Harry L. Stout and William Saunders testified on behalf of the plaintiff concerning matters all of which transpired subsequent to the death of the decedent, Wilhelmina Berge. Lloyd Fisher testified as to certain alleged statements made by the defendant executrix at a sale of the personal property on the farm where Mrs. Berge had resided near Whitehouse (Case, pp. 23 and 24). Stout testified as to certain alleged statements made by the defendant

executrix when a bill of the plaintiff against Mrs. Berge and Mr. Bryant was presented to the defendant executrix. Saunders testified to certain alleged statements made by the defendant executrix when he served a copy of the said bill upon her. The alleged statements were to the following effect, that the bill had nothing to do with the partnership, that it was Mrs. Berge's personal bill (Case, p. 24); that the bill was not a partnership indebtedness but was an indebtedness due from the owner of the property, Mrs. Berge, and it was then agreed that it should not be paid out of the partnership proceeds of the sale but she would liquidate the indebtedness as the representative of Mrs. Berge's estate (Case, pp. 25 and 26); that she knew about the bill and in a couple of days would take care of it (Case, p. 35).

Such alleged statements cannot be taken as admissions binding upon the estate of the decedent or prejudicial to its rights. In the first place, under section 4 of the Evidence Act an executor or administrator cannot be compelled to testify as to transactions with, or statements by, decedent. *Deak v. Perth Amboy Gaslight Co.*, 1 N. J. Misc. R. 457, 140 A. 439. If an executrix cannot be compelled to testify as to such matters, then any testimony as to statements by an executrix in the nature of admissions, is purely hearsay and entirely incompetent for that reason alone, since the executrix cannot be examined or cross-examined as to such alleged statements by her unless she first offers herself in her behalf.

In the second place, even were the hearsay rule excluded from consideration, an administrator or executor, as such, has no such legal interest in the estate that he may prejudice its interests by statements to third persons. In a legal sense, it is to him a matter of indifference whether claims are allowed or disallowed, or whether the assets are

distributed among creditors or among heirs and next of kin. *Jones Commentaries on Evidence*, Second Edition, section 939, page 1732; *Hueston v. Hueston*, 2 Ohio St. 488; *Jones v. Jones*, 21 N. H. 219; *Church v. Howard*, 79 N. Y. 415; *Crandall v. Gallup*, 12 Conn. 365; *Marshall v. Adams*, 11 Ill. 37; *Whisner v. Whisner*, 122 Md. 195, 89 A. 393; *Dent v. Dent*, 3 Gill. 482; *Mangun v. Webster*, 7 Gill. 78; *Fellows v. Fellows*, 37 N. H. 75; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Osgood v. Pres. etc. of Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304; *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. 1045.

Bryant's testimony may be disregarded for the reasons advanced in Points One and Two.

This leaves only the testimony of the plaintiff below to be considered. The only evidence adduced by this witness is to the effect that he did certain work and furnished certain materials on the decedent's place or farm, and that certain items contained in a day book or ledger (A BOOK WHICH WAS NEITHER ONE OF ORIGINAL ENTRY NOR INTRODUCED IN EVIDENCE, Case, p. 28), represented the work that he did and its value. There was no evidence whatsoever of any request by the decedent or any promise by her, since it was recognized by Court and counsel that such testimony could not be introduced by the plaintiff.

Any evidence derived from such day book or ledger was incompetent, since even were such books of original entry, they would be incompetent. An attempt by the plaintiff to prove work done on the place or farm of the decedent is itself an attempt to testify concerning transactions with the decedent, whether with or without the books.

Original books of account are admissible in evidence notwithstanding the death of one of the par-

ties, and an interested witness is competent to establish the authenticity of such books or the entries therein. But an interested witness is not competent to explain the entries in such books, to testify as to the correctness of an account, or to the transactions under which the entries were made. 40 Cyc. 2326.

The syllabus of *Chandler v. Woodward* (Del.), 76 Atl. 623, says:

“16 Del. Laws, c. 537, sec. 1 (Rev. Code 1852, amended to 1893, p. 798, c. 107), provides that, in an action where a judgment may be rendered against an administrator, neither party shall be allowed to testify against the other as to any transaction with or statement by the intestate, unless called to testify thereto by the opposite party. Held that, in an action against an administrator to recover attorney’s fees for services rendered decedent, plaintiff’s books of original entry were inadmissible to establish the services, etc., notwithstanding Rev. Code 1852, amended to 1893, p. 799, c. 107, section 11, declaring that a book of original entries regularly kept shall, together with the oath of plaintiff, be admitted in evidence to charge the defendant with matters properly chargeable in an account.”

Under the rule prohibiting a party from testifying as to transactions between himself and a deceased party, a plaintiff is incompetent to prove an account founded upon such a transaction. *Miller v. Jones*, 32 Ark. 337:

“The question presented for decision in this case is, whether, in a suit brought by an administrator of a deceased person against a defendant, the latter is competent, under section 3058 of the present Code (1876), to prove for himself certain entries made by him, which had reference to a transaction with the deceased during his lifetime. The above sec-

tion removes all incompetency based upon the fact of the witness being a party, or interested in the issue, in other than criminal cases, 'except that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction acted in any representative of fiduciary relation whatever to the party against whom such testimony is sought to be introduced'. Code of 1876, section 3058.

"The reason upon which this statute is based seems to be, that there should be no admissibility unless there is mutuality; that when the lips of one party to a transaction are sealed by death, those of the other must in like manner be sealed by law. 1 Whart. Ev. section 466; Kumpe v. Coons, 63 Ala. 448. Its purpose and policy is to exclude the living from testifying against the dead, because the latter cannot be heard in explanation or contradiction, and it has been held to apply to all cases involving a direct, immediate conflict of interest between the proposed witness and the estate of a decedent, where the purpose or effect of such evidence is to diminish the rights of the decedent, or of those claiming in succession under him. Insurance Company v. Sledge, 62 Ala. 566; Key v. Jones, Adm'r. 52 Ala. 238; Beadie v. Graham's Adm'r. (present term, M. S. S.), 66 Ala. 99.

"Applying these principles, we do not think that the defendant Tolson was a competent witness, under the statute, to prove the various book entries to which he was permitted to testify in the court below. These entries were a mere written declaration of the fact that the defendants had paid for the corn which they purchased from the deceased in his lifetime. They were contemporaneous with the principal fact of payment, and are regarded in the eye of the law as verbal acts, being part and parcel of the *res gestae*. 1 Greenl. Ev.

section 120. They clearly constituted a part of the transaction with the deceased, and come within the statutory prohibition. To allow a defendant to prove such entries by his own oath, against the estate of a decedent, would be to permit him to accomplish indirectly what he is prohibited from doing directly by the express mandate of the statute." *Dismukes v. Tolson*, 67 Ala. 386.

In certain California cases, it has been stated in general terms that a party may himself lay the foundation for the introduction in evidence of his books of account in an action against the estate of a deceased person (*Roche v. Ware* (1886), 71 Cal. 375, 60 Am. Dec. 539, 12 Pac. 284; *Cowdery v. McChesney* (1899), 124 Cal. 363, 57 Pac. 221; *City Sav. Bank v. Enos* (1901), 135 Cal. 167, 67 Pac. 52); but in *Stuart v. Lord* (1903), 138 Cal. 672, 72 Pac. 142, it was remarked that it may be going too far to say that a party may testify as to the correctness of books kept by him, and that his testimony should be limited to the fact that he kept books of original entries made at the time of the transaction, and to the identity of the books produced.

In *Colburn v. Parrett* (1915), 27 Cal. App. 541, 150 Pac. 786, the Court said:

"The purpose of the rule stated in section 1880 of the Code of Civil Procedure is to prevent a plaintiff in an action to recover upon a claim against the estate of a deceased person, from giving testimony which would in itself tend to establish plaintiff's claim or demand. We cannot escape the conclusion that this purpose would be disregarded and the rule of the statute would be violated if the plaintiff were permitted to testify (and in this instance to give the only testimony) to the effect that the entries made by him at or about the time of the transactions to which they related were true and correct. This is,

in substance, the same as to allow him to testify that he rendered to the decedent the services mentioned, and that they were of the value stated in the account."

Section 329 of the Nebraska Code of Civil Procedure, which provides that "no person having a direct interest in the result of any civil cause or proceeding shall be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person, unless", etc., operates to exclude the plaintiff as a witness in his own behalf, even for the purpose of proving his account book. *Martin v. Scott* (1881), 12 Neb. 42, 10 N. W. 532.

In *Schwartz v. Stock* (1901), 26 Nev. 128, 65 Pac. 351, it was held that under the Nevada statute (section 379 of the Practice Act) which provides: "No person shall be allowed to testify under the provisions of sections 376 and 377 when the other party to the transaction is dead or when the opposite party to the action or the person for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proven transpired before the death of such deceased person", one claiming property as the surviving member of a firm as against the executrix of his alleged partner was not a competent witness for the purpose of authenticating his books and testifying to the correctness of the transactions therein contained.

The testimony of the plaintiff in proof of the correctness of his book is incompetent under section 829 of the Code of Civil Procedure, which prohibits a party or one interested in the outcome of an action by or against the representatives of a deceased person to testify "concerning a personal transaction or communication" between the

witness and such deceased person. *Davis v. Seaman* (1892), 64 Hun 572, 19 N. Y. Supp. 260.

One who is prohibited by law from testifying in an action brought by an administrator as to transactions between himself and the decedent may not testify that entries in his book of account against the decedent were made by him at the time of such transactions, and that the book was correctly kept. *Watson v. Dodson* (1912), 143 S. W. 329.

At the trial, counsel for the defendant-appellant entered two objections to the testimony of the plaintiff-appellee, both on the score that in so far as such testimony tended toward or related to transactions with or statements by Wilhelmina Berge, it was incompetent. The court below did not directly pass upon the question, but permitted the plaintiff to testify on the understanding that it was to be confined to what work was done on a certain place (Case, p. 29). I submit, then, that if the plaintiff's testimony is confined merely to the fact that he did work and furnished materials, then no cause of action has been proven, and the court below, in directing a verdict for the plaintiff on such testimony, fell into error. The complaint in the cause alleged that the plaintiff furnished Wilhelmina Berge with certain material and performed certain work and labor, and that the said Wilhelmina Berge promised to pay therefor. I have indicated above that even the testimony as to the work done and materials furnished was incompetent. *Chandler v. Woodward*, *Dismukes v. Tolson*, *Stuart v. Lord*, *Colburn v. Parrett*, *Martin v. Scott*, *Schwartz v. Stock*, *Davis v. Seaman* and *Watson v. Dodson*, *supra*. But assuming, without conceding, that such testimony is competent, yet, since it constitutes the only possibly competent and admissible testimony adduced by or on behalf of the plaintiff in the cause, it cannot afford a

basis for recovery on the theory of *indebitatus assumpsit*, wherein it must be proven that the work done or materials furnished was either at the special instance or request of the person sought to be charged, or upon the express promise by the latter to pay for them. Neither such request or promise was or could be proven, at the trial, since all testimony as to transactions with the decedent was eliminated by the Court with the consent of opposing counsel (Case, p. 29).

It is respectfully urged, therefore, that the judgment of the Hunterdon circuit be reversed.

Respectfully submitted,

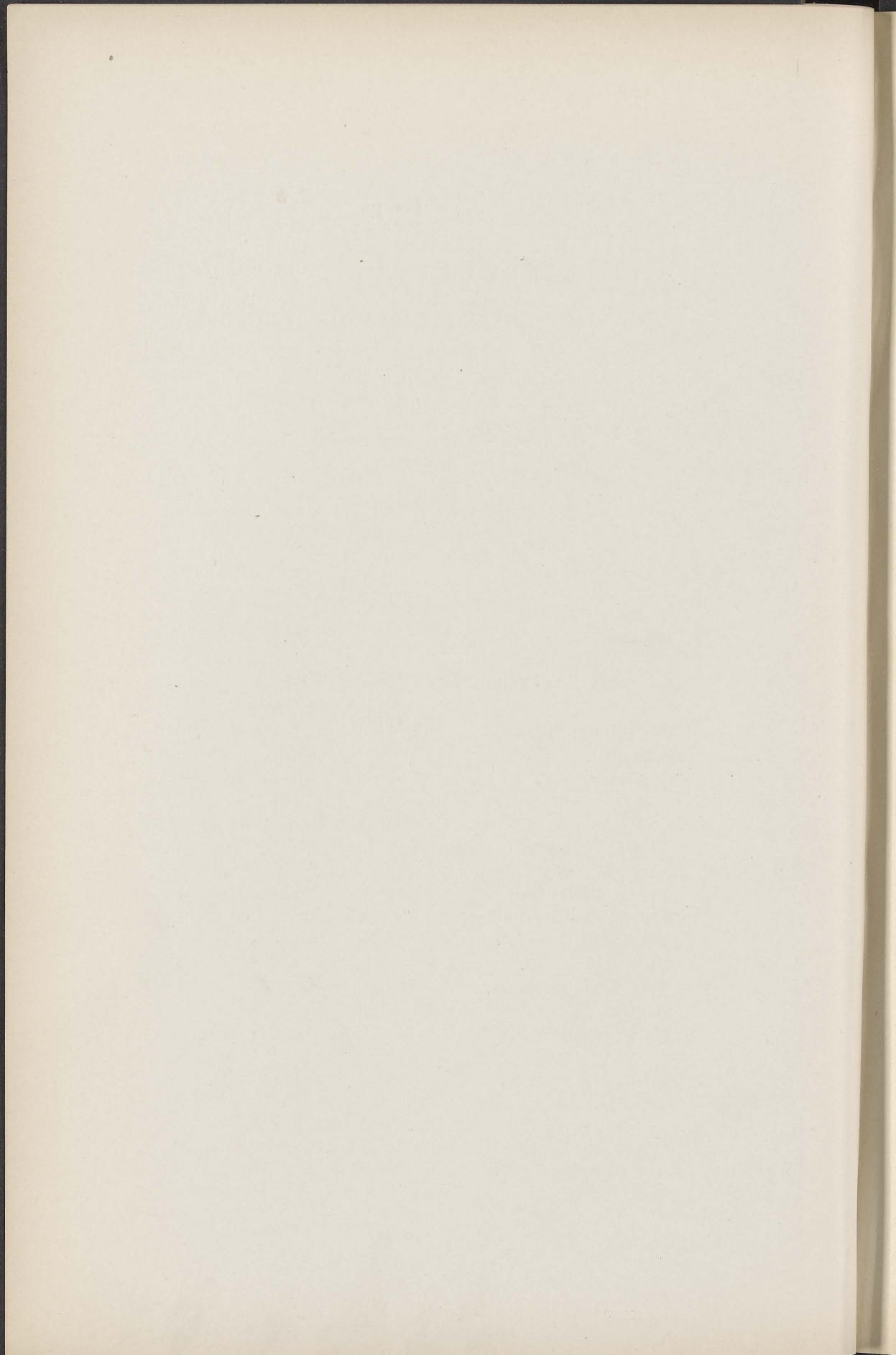
Hervey F. Winant
HERVEY F. WINANT,

Attorney for Defendant-Appellant.

David Roskein

Of Counsel.

DAVID ROSKEIN



**New Jersey Court
of Errors and Appeals**

FRANK G. CARLISLE,
Plaintiff-Appellee,

vs.

DOROTHY K. WINANT, Executrix
of the Estate of Wilhelmina
Berge, deceased,
Defendant-Appellant.

On Appeal from
New Jersey
Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE

The defendant-appellant does not argue his first ground of appeal. It will be taken in this brief that the same has been abandoned.

The SECOND AND THIRD GROUNDS OF APPEAL are taken up under POINTS ONE AND TWO in the defendant-appellant's brief. They will not be answered in this brief as they are not set out as required by the well settled rules of the court. *State Highway Commission vs. Zyk*, 105 New Jersey Law, page 156, Court of Errors and Appeals, where the Court, speaking of eight grounds of appeal worded similar to those used by defendant-appellant, says:

“It is manifest from a reading of these grounds of appeal that none of them points out the particular error which is claimed was made by the trial judge. The grounds of appeal are infected with the same vice as exist-

ed in the grounds of appeal set forth in the case of *Bowen v. State Highway Commission*, 135 Atl. Rep. 340, where the Supreme Court, in commenting upon the grounds of appeal presented in that case (at p. 341), said: 'None of the four grounds discloses the testimony alleged to have been illegally admitted, and the fifth does not set forth the testimony illegally rejected. This method of presenting issues of law arising out of the admission or rejection of testimony is contrary to the well settled rule on the subject.'

The cases bearing on the subject and there collated are: *Donnelly v. State*, 26 N. J. L., 463; *State v. MacQueen et al.*, 69 Id. 476, 522; *Kargman v. Carlo*, 85 Id. 632; *Miller v. Delaware River Transportation Co.*, 85 Id. 700; *State v. Hendrickson*, 95 Id. 10.

In *Bowen v. State Highway Commission*, supra (at p. 341), the Supreme Court, in dealing with the cases cited, said: 'From these cases and the long existing practice which has continued down to the present time, it is essential that *the ground of appeal should state the name of the witness, the question or answers objected to* (Italics are ours) and ruled upon by the trial judge. And so in the case of testimony rejected by the court, such testimony rejected should be set forth in the ground of appeal.'

The later case of *State v. Blaine*, 5 N. J. Misc. R. 633; affirmed, 104 N. J. L. 325, is, in principle, to the same effect.

The view herein expressed applies to the eight grounds of appeal.

The reason underlying the rule of practice as above indicated, is tersely stated in *Donnelly v. State*, supra, by Chief Justice Green, who, speaking for the Supreme Court

(at p. 512), said: 'So in the assignment the grounds or errors should be specified. The adverse counsel are entitled to know what the exception is, and *the courts are not required to search for errors not definitely pointed out*.'" (Italics are ours).

See also Winfield vs. Saunders, 105 N. J. L., page 580, Court of Errors and Appeals, where the Court says at page 581:

"The plaintiff appeals and files two grounds of appeal, neither one of which is effective as grounds of appeal under the cases in this court, such as Burgess v. Noteboom, 100 N. J. L. 116; Anderson v. Green Cab Co., 102 Id. 521; Hygrade Cut Fabric Co. v. United States Stores Corp., ante, p. 324. The first ground states that it was error to admit evidence 'which was incompetent and irrelevant' without specifying the specific evidence complained of. We ought not to be required to search the record for this evidence alleged to be incompetent and irrelevant. Assignments of error, as grounds of appeal, must be specific and definitely point out a ground of error, or they will not be considered. Blanket grounds of appeal are inadequate to raise any ruling for review. Abbe v. Erie Railroad Co., 97 N. J. L. 212."

The Court's attention is further called to a misstatement of fact made in the first full sentence on page 3 of the defendant-appellant's brief, where it is said: "Opposing counsel in his opening made the following statement," quoting at length the alleged statement:

A reference to the State of the Case, page 16, line 30, will show that the quotation is from an argument before the court prior to the drawing of the jury and not from counsel's opening, as the brief alleges. A jury was drawn at the conclusion

of the argument. See State of the Case, page 20, line 39.

THE COURT WAS CORRECT IN GRANTING A MOTION FOR A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFF.

Defendant-Appellant argues the FOURTH GROUND OF APPEAL under POINT THREE in his brief.

The defendant offered no evidence at the trial. The Court granted a motion for a directed verdict for plaintiff. The law governing the direction of a verdict for the plaintiff is found in *Polhemus vs. Prudential Realty Corporation*, 74 N. J. L., page 570, Court of Errors and Appeals, and at page 582:

“In our own state it may be gathered, from *Delaware, Lackawanna and Western Railroad Co. v. Toffey* (1875), 9 Vroom 525, 529; *Fifth Ward Savings Bank v. First National Bank* (1886), 19 Id. 513, 518; *Baumann v. Hamburg-American Packet Co.* (1901), 38 Id. 250, 252, 253, that when a plaintiff has fulfilled the burden of proof laid upon him, and no facts in evidence show that the plaintiff’s testimony cannot be true, the court is warranted in directing a verdict in his favor. This may be simply putting in another form the rule that when no other verdict would be supported by the evidence, a direction is not erroneous. See *Anderson v. Central Railroad Co.* (1902), 39 Id. 269, 272.”

It appears from the evidence of Mr. Stout, State of the Case, page 25, lines 19 to 22:

“A. My recollection about the matter is that Mrs. Berge was the owner of a farm they were operating jointly, by Mrs. Berge and a man by the name of Bryant.”

It thus appears that Mr. Bryant and defendant-appellant's testatrix were operating a farm, title to which was in the name of the testatrix alone.

It further appears from Mr. Stout's testimony, page 25, lines 22-26:

“—There was some partnership indebtedness and after several conferences it was agreed that the property owned by Mrs. Berge and Bryant should be sold and out of the proceeds the partnership indebtedness was to be paid—”

It appears from the testimony of Mr. Fisher, page 23, lines 33-40, that a sale was held of the partnership property, and that at said sale, Mr. Stout represented the defendant-appellant, and that following the sale, all of the parties with their representative counsel, met in one of the rooms of the house, and that the different bills were gone over at the time. The bill sued upon was presented and the defendant-appellant made the following statement—State of the Case, page 24, lines 22-33, inclusive:

“and she said, ‘That hasn’t anything to do with the partnership; that is Mrs. Berge’s personal bill.’ And I said, ‘What are you going to do with it?’ And she said, ‘You leave that bill with me and I will send you a check.’ I said, ‘When?’ And she said ‘As soon as I get back to Harrison.’ And I said, ‘You don’t want this bill in the partnership?’ And she said, ‘Indeed not, because it is not a partnership bill, and George Bryant had nothing to do with this and had nothing to do with this bill.’

This statement of defendant-appellant is further amplified in the testimony of her counsel, Mr. Stout, at page 25 of the State of the Case, lines 33 to 39, inclusive, and lines 1 and 2 of page 26:

“—A list of claims was presented, and

among the claims presented was the bill of Mr. Carlisle and Mrs. Winant stated that it was not a partnership indebtedness but it was an indebtedness due from the owner of the property, Mrs. Berge, and it was then agreed that it should not be paid out of the partnership proceeds of the sale but she would liquidate the indebtedness as the representative of Mrs. Berge's estate.

It further appears from the testimony of Mr. Carlisle, page 30, lines 27-37, that defendant-appellant promised him to pay the bill:

“Then you cannot tell that. You will have to confine yourself to what Mrs. Winant said. A. I met Mrs. Winant a few minutes after I met Mr. Fisher and she told me that—she said, ‘I got your bill from Mr. Fisher. That is a personal bill of my sister’s.’

Q. Who did she mean by ‘her sister’?

A. Well, she meant Mrs. Berge. And she said, ‘I will see that your bill is paid and you will receive a check from me for the amount within a very few days.’ That is the last I ever heard from her.”

It further appears from the testimony of the constable, William Saunders, page 35, lines 7-13, inclusive, that defendant-appellant promised the constable that the bill would be paid:

“Q. Mr. Saunders, you are a Constable?

A. Yes.

Q. Did you deliver to Mrs. Berge a copy of the bill attached to the complaint in this matter?

A. I did.

Q. What did she say?

A. She said that the bill would be taken care of in a couple of days; that she would be over with a check.”

It is thus uncontradicted that the defendant-appellant admitted that the bill was one against

her testatrix, that it should be paid, that it would be paid, and that it was not a proper charge against Mr. Bryant.

The Court in the case of *Meeker v. Executor of Vanderveer*, 15 N. J. L., page 392, at page 398, says:

“—where an executor appears to have acted right, he who would impeach his conduct, must show fraud, or mistake, or that he has acted without authority, or contrary to law. Now, an executor may compromise a law suit; he may buy the peace of the estate he represents, and extinguish even doubtful claims against it, provided he acts discreetly and in good faith.”

And 24 *Corpus Juris*, page 384, says as follows:

“The heir is not bound by the extra judicial statement of the personal representative that he believes the debt to be due, or by his formal approval or allowance of a claim although the admission of the representative that a claim against an estate is valid establishes its validity *prima facie* and puts the burden of proving otherwise upon one who objects to it.”

In the instant case, we have a situation where the executrix admitted the claim, promised to pay it, and did not pay it, and when suit was brought upon it, refused to take the witness stand or offer any evidence to disprove the bill. It is submitted that the law of this state should be that where the personal representative of an estate has stated that a bill presented is correct and that it will be paid that such a statement is *prima facie* proof of the validity of the claim, and places the burden of disproving it upon him who objects to it.

In the instant case it appears further from the evidence that testatrix ordered this work done and there is no dispute but what it inured to the

benefit of testatrix's estate, being improvements to her real estate. Mr. Bryant's testimony, State of the Case, page 37, lines 1-9, inclusive:

"A. She said she would like to have some work done about the water system and a few more things, and she asked about an estimate and Mr. Carlisle gave her an estimate and said, 'Yes, that is satisfactory. We will have the work done.'

Q. Was the work done?

A. Yes, sir."

Lines 22-31, State of the Case, page 37:

"Q. You told Mr. Carlisle what was necessary to be done?

A. We spoke it over, the three of us, and Mrs. Berge said yes, that should be done.

Q. Did you order that work done?

A. Mrs. Berge ordered it done.

Q. You did not?

A. We spoke together but I do not believe I ordered it. I said, 'It is up to you. What do you say, Mrs. Berge, about having the work done?' And she said 'Yes'!"

Lines 14-19, State of the Case, page 38:

"Q. As to the rest of the work—have you ever seen the bill submitted by Mr. Carlisle in this case?

A. I have.

Q. And all that work was done for the benefit of you and Mrs. Berge?

A. For Mrs. Berge."

And lines 10-15, page 39:

"Q. You were present when the pipeless heater was ordered?

A. Yes, sir.

Q. And the water system, both?

A. Everything that is on his bill, I was there.

Q. Mrs. Berge told him it was satis-

factory to go ahead?

A. Yes, sir.

And lines 36-39, page 39, and lines 1 and 2, page 40:

“A. We called Mr. Carlisle in and she gave Mr. Carlisle the order to put the pipeless furnace in and said she would pay him and he said he would stop there and buy, and like that, and she said she would do the best she could to pay him.”

It further appears from the testimony of Mr. Carlisle that he did the work and that he was not paid for the same: Lines 38 and 39, page 30, and lines 1, 2 and 3, page 31, of the State of the Case:

“Q. Has the bill ever been paid?

A. No, sir.

Q. Is it still due and owing?

A. Yes.

Q. And the work represented by that bill were they reasonable charges for the work you did?

A. Certainly was. Most of it was contract.”

It further appears from the statement of the Court and counsel while Mr. Carlisle was testifying, that there was no dispute about the correctness of the bill. Page 29, lines 28-39, inclusive, and page 30, lines 1-9:

“The Court: Is there any dispute about that? Do you raise any question about the items set forth in the account as being taken from that book?

Mr. Pomerehne: No, we do not raise any question about them being the items sued on.

The Court: You do not raise any question but that what he is now testifying to represent thte items set forth in the complaint.

Mr. Herr: That is right.

The Court: And the same as far as the credits are concerned?

Mr. Herr: That is correct.

The Court: Then it is admitted that this witness will now testify to items set forth in the complaint and credits, so that would dispose of that.

Mr. Herr: Yes, leaving a balance due of \$412.24."

It thus appears that defendant-appellant's testatrix ordered the work done and that she promised to pay for it, that the work was done, and that the bill was never paid, that subsequent to the death of testatrix the defendant-appellant promised to pay for the work but never did so. The Court summarized the situation thus on a motion for a directed verdict, page 41 of the State of the Case, lines 28-33, inclusive:

"The Court: There were no witnesses called on the part of the defense and there seems to be no dispute as to the items in the account, and there is proof that the work was ordered by Mrs. Berge and that the work was done by Mr. Carlisle. So that the plaintiff is entitled to a verdict."

It is submitted that there was nothing else that the trial court could do, and that the action of the trial court should be sustained.

Respectfully submitted,

Attorneys for Plaintiff-Appellee.

