INDEX.

Notice of Appeal.

Filed April 24, 1934.

New Jersey Supreme Court.

UNION COUNTY. 10

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, etc., Defendant.	Action at Law.

20

To: BENJAMIN GORDON,
Attorney for Plaintiff,
or
To Whom it May Concern.

Sir:

PLEASE TAKE NOTICE that the defendant in the above entitled cause, Antonio Gallerano, Administrator of the Estate of Tony Blumetti, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause. 30

Respectfully yours,

T. MANCUSI-UNGARO,
Attorney for Defendant.

HERBERT A. KUVIN,
Of counsel with Defendant. 40

Service of a copy of the within Notice is hereby acknowledged this 23rd day of Feb., 1934.

BENJAMIN GORDON,
Plaintiff's Attorney.

---

10 **Grounds of Appeal.**

Filed April 24, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), *et al.*, Plaintiff-Respondent, vs. ANTONIO GALLERANO, etc., Defendant-Appellant.	Action at Law.

20

To: BENJAMIN GORDON,
Attorney for Plaintiff,
125 Broad Street,
30 Elizabeth, N. J.
or
To Whom It May Concern:

Sir:

PLEASE TAKE NOTICE that the defendant, Antonio Gallerano, Administrator of the Estate of Tony Blumetti, assigns the following reasons and/or grounds why the judgment and verdict in this case should be set aside and judgment enter-

40

ed in favor of the said defendant, or a new trial granted:

1. The court erred in entering its order of November 10, 1933, striking out as frivolous the second defense to the First and Second Counts setting forth that the plaintiffs' cause of action or a portion thereof was barred by the Statute of Limitations. 10

2. The trial court erred in refusing to grant a non-suit of the plaintiffs' cause of action for the reasons that:

a. Plaintiffs failed to prove a cause of action as is set forth in the Second Count of the complaint filed in the above entitled cause.

b. Plaintiffs failed to prove an offer and acceptance or a meeting of the minds on a contract between the deceased and the plaintiffs. 20

c. The plaintiffs proved merely that they took care of the said decedent, a relative, on the expectation and hope that he may leave them something, but that they failed to prove a cause of action such as would entitle them to a judgment or verdict.

d. Plaintiffs failed to prove a prima facie case entitling them to collect on a quantum meruit in that they failed to prove that deceased agreed to compensate them the reasonable value of their services, or, that the deceased agreed to compensate them at all, or, that the deceased accepted service from the plaintiffs, knowing that said services were usually charged for and that charges would be made therefor, or, that deceased understood that plaintiffs expected payment for said 30

40

services and accepted said services with the understanding that he would pay for them.

3. The court erred in refusing to grant defendant's motion for a directed verdict for the same reasons set forth in paragraph 2 hereof.

10 4. The court erred in refusing to grant defendant's motion for a non-suit for the reason that there was no testimony introduced by plaintiffs which raised a question of fact for the jury on whether or not the plaintiffs proved a prima facie case and was, therefore, a question of law and should have been decided by the court in favor of the defendant.

5. That the court erred in refusing to grant defendant's motion for a directed verdict in its 20 favor for the same reasons set forth in paragraph 4 hereof.

T. MANCUSI-UNGARO,
Attorney for Defendant.

30

40

Summons.

Filed September 6, 1933.

The State of New Jersey to Antonio Gallerano, Administrator of the Estate of Tony Blumetti, Deceased.

(Seal) You Are Summoned to answer the annexed complaint of Saverio Quertorolo in an action at law in the Union Circuit of the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days, after 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.

Witness, Honorable Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this 31st day of August, 1933.

FRED L. BLOODGOOD,
Clerk.

Benjamin Gordon,
Attorney of Plaintiff.

Complaint.

SUPREME COURT OF NEW JERSEY.

UNION CIRCUIT.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

The plaintiff, residing at 224 High Street, Elizabeth, New Jersey, says that:

FIRST COUNT.

1. On or about July 6, 1933, Antonio Gallerano was appointed the administrator of the estate of Tony Blumetti, Deceased, by the Surrogate of Union County.

30

2. On January 26, 1924, Christine Blumetti, the wife of Tony Blumetti, died.

3. For several years prior to the death of said Christine Blumetti she and her husband had boarded with plaintiff.

4. No children were born to said Christine Blumetti and Tony Blumetti.

5. The health of said Tony Blumetti was not good, and from about 1926 he was wholly inca-

40

pacitated, and frequently so ill that he was confined to his bed.

6. In consideration that this plaintiff and his wife, Marie Quertorolo, should board and care for said Tony Blumetti during his life-time, said Tony Blumetti promised that he would leave all the money he had in the bank to said Marie Quertorolo, the wife of plaintiff.

7. Relying upon the promise of said consideration this plaintiff agreed to board, care for, and attend said Tony Blumetti during his lifetime, and, with the help of his said wife, did so board and care for him during a period of nine years until the death of said Tony Blumetti, and faithfully and conscientiously performed his part of the agreement.

8. Said Tony Blumetti continued to board with plaintiff from the date of the death of his wife, on January 26, 1924, to the date of his death on January 31, 1933 (being at that time seventy-four years old), and during that time did not pay plaintiff any money, or other consideration, for his board and care and attendance.

9. At the time of his death, said Tony Blumetti had on deposit in the Mutual Savings Fund Harmonia the sum of $2,607.63.

10. Said Tony Blumetti failed to make a Will and died intestate.

11. Plaintiff demands of defendant, as administrator of the estate of said Tony Blumetti, and in fulfillment of the agreement made by and between said Tony Blumetti and plaintiff as hereinabove set forth, the said sum of $2,607.63, now on deposit with the Mutual Savings Fund Harmonia to the credit of said Tony Blumetti.

SECOND COUNT.

1. Paragraphs 1 to 5 of the First Count are incorporated herein by reference thereto.

2. In consideration that plaintiff, with the help of his said wife, should board and care for said Tony Blumetti during his life-time said Tony Blumetti promised that he would pay plaintiff the reasonable value of his services and the services of his said wife.

3. Relying upon the promise of said consideration this plaintiff agreed to board, care for, and attend said Tony Blumetti during his life-time, and, with the help of his said wife, did so board and care for him during a period of nine years until the death of said Tony Blumetti, and faithfully and conscientionsly performed his part of the agreement.

4. Said Tony Blumetti continued to board with plaintiff from the date of the death of his wife, on January 26, 1924, to the date of his death on January 31, 1933 (being at that time seventy-four years old), and during that time did not pay plaintiff any money, or other consideration for his board and care and attendance.

5. The reasonable value of plaintiff's said services in boarding, caring for, and attending to the wants of said Tony Blumetti was $10.00 per week.

6. Plaintiff demands of defendant the sum of $4,680.00, being at the rate of $10.00 per week from January 26, 1924 to January 31, 1933.

BENJAMIN GORDON,
Attorney of Plaintiff.

Amendment to Complaint.

Filed October 11, 1933.

SUPREME COURT OF NEW JERSEY.

UNION CIRCUIT.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

The plaintiff amends the First Count of his complaint by adding a further paragraph to be numbered 12, as follows:

12. Plaintiff demands of defendant, as Administrator of the Estate of Tony Blumetti, and as the damages of said plaintiff, payable out of the Estate of said Tony Blumetti, the sum of $2,607.63.

30

BENJAMIN GORDON,
Attorney of Plaintiff.

40

Answer.

Filed November 2, 1933.

SUPREME COURT OF NEW JERSEY.

UNION COUNTY.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

Defendant, Administrator of the Estate of Tony Blumetti, of the City of Newark, County of Essex and State of New Jersey, answering the complaint filed in the above entitled cause, says that:

FIRST DEFENSE.

He denies all the allegations contained in the complaint filed in the above entitled cause.

30

SECOND DEFENSE.

The plaintiff's cause of action, if any she may have, is barred by the statute of limitations since the said alleged contract was made or the breach thereof was more than six years before the institution of the suit.

40

Answer.

DEFENSE TO FIRST COUNT.

Defendant denies all the allegations contained in the First Count.

FIRST DEFENSE TO SECOND COUNT.

Defendant denies all the allegations to the Second Count.

10

SECOND DEFENSE TO SECOND COUNT.

Defendant herewith pleads the Statute of Limitations to this count as a bar to the whole or any portion of the claim interposed by the plaintiff against this defendant.

T. MANCUSI-UNGARO,
Attorney for Defendant.

20

30

40

Notice of Motion.

SUPREME COURT OF NEW JERSEY.

UNION CIRCUIT.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

Take Notice that the plaintiff on Friday, November 10, 1933, at 9:30 A. M., or as soon thereafter as counsel may be heard, will move before such Judge of the Union County Circuit Court, sitting as a Supreme Court Commissioner, as shall then be hearing motions in Supreme Court issues, that the defendant's second defense and second defense to the second count be struck out on the ground that the same are frivolous.

30

BENJAMIN GORDON,
Attorney of Plaintiff.

To:

T. MANCUSI-UNGARO,
Attorney of Defendant,
164 Market Street,
Newark, N. J.

40

Order.

SUPREME COURT OF NEW JERSEY.

UNION CIRCUIT.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

This matter being opened to the Court in the presence of Benjamin Gordon, attorney for the plaintiff, and T. Mancusi-Ungaro, attorney for the defendant, and the Court having examined plaintiff's complaint, and it appearing on the face thereof that the defense that plaintiff's cause of action, if any, is barred by the statute of limitations is frivolous, it is, on motion of Benjamin Gordon, attorney of said plaintiff, on this 10th day of November, 1933;

30

ORDERED: that the defendant's second defense to the first count, and defendant's second defense to the second count, that the plaintiff's cause of action, if any, is barred by the statute of limitations, be struck out as frivolous.

JUDGE CLEARY,
Judge of the Union County Circuit
Court, sitting as Supreme Court
Commissioner.

40

Testimony.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January Term, 1934.

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. FRANK L. CLEARY, Circuit Court Judge, and a Jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the fifth day of January, A. D. 1934, at 9:30 A. M.

APPEARANCES:

BENJAMIN GORDON, ESQ., E. EARLE MERRIL, ESQ., Attorneys for the Plaintiff.

T. MANCUSI-UNGARO, ESQ., HERBERT A. KUVIN, ESQ., Attorneys for the Defendant.

(A jury being impanelled and found satisfactory they were sworn.)

(Mr. Merrill opens the case for the plaintiff.)

(Mr. Kuvin opens the case for the defendant.)

Mr. Gordon: I offer in evidence two death certificates first, one covering the death of Christina Blumetti.

(Death certificate entered in evidence and marked Exhibit P-1.)

(Death certificate entered in evidence and marked Exhibit P-2.)

10

GEORGE J. MAUTHE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Gordon:

Q. Mr. Mauthe, what is your business? A. I am secretary of the Mutual Savings Fund Harmonia.

20

Q. And how long have you been secretary of that institution? A. About four years.

Q. And as secretary of that institution have you access to the records of the institution? A. I have.

Q. Have you a record—

Mr. Kuvin: I will admit the man's qualifications as the man connected with the bank and who has charge of the records.

30

Q. Do you know a party by the name of Anthony, or commonly known as Tony Blumetti, Tony being an abbreviation of the word "Anthony"?

The Court: Is this to prove the amount of money that was in the bank at the time of death?

40

Mr. Kuvin: No objection to proving the records.

Q. Have you got his account here? A. I have a copy of it, yes.

Q. Have you got the copy of it? A. Yes.

Q. How much money has he got in the bank?
10 A. The present balance is $2,407.66.

Q. Have you also a memorandum left by Mr. Blumetti, prior to his death, with the bank? A. I have the signature card covering the account.

Q. What else does the signature card cover? A. It has a notation, Mary Quartorolo, sister-in-law, he wishes her to get the money in this book in case of death.

Mr. Kuvin: Unless that is on the card, I object to it.

20 Mr. Gordon: It is on the card.

By Mr. Kuvin:

Q. Is that in his own handwriting? A. No, he didn't write.

Mr. Kuvin: Unless that was made in his presence, I think I had better cross-examine on the notation on the card, if the Court please.

30 Mr. Gordon: I offer the card in evidence and you can cross-examine.

Mr. Kuvin: Before the offer is accepted, may I cross-examine on it?

Cross-examination by Mr. Kuvin:

Q. The book I understand is a true copy of your account? A. Yes.

40

Mr. Kuvin: I have no objection to the book at this time.

Mr. Gordon: I offer this book in evidence.

(Bank book entered in evidence and marked Exhibit P-3.)

Q. You had reference to a certain signature card which you had with you. Does that contain his signature? A. No, it does not. 10

Q. Could he write in any manner, shape or form? A. No, he didn't write.

Q. Was there any mark made on that signature card by him witnessed by anyone else? A. No. He made no mark.

Q. That signature card is not any signature of his whatsoever, but is merely a record of the bank identifying the account? A. That is right.

Q. As I understand it the practice in your bank is that when a man opens an account there, he must sign his card prior to the bank account being opened, with his first deposit, isn't that so? A. No. He could sign at any time after the account was opened. 20

Q. But in any event either at the time that the account is opened, or at any time after the account is opened, the bank must procure some signature from him as a permanent record upon which they will honor withdrawals? A. Should, yes. 30

Q. That card contains no such signature or mark made by him in accordance with the practice and custom of your bank, does it? A. No.

Mr. Kuvin: Obviously it is inadmissible in evidence and I object to it.

Mr. Gordon: It is admissible for the purpose of testing the credibility of the man, and also a statement made by Mr. Blu- 40

metti, at the time when he made his deposits and it is against his interest, if anything, and it is made to this man—

The Court: Was it?

Mr. Gordon: Yes.

The Court: I did not hear him say so.

10 *By Mr. Gordon*:

Q. Was this memorandum that you have got, the statement made in your presence? A. No.

Q. To whom was it made? A. To one of the clerks in the office.

Mr. Kuvin: I object to that and ask it be stricken out.

Q. Is the clerk available? A. Oh, yes.

Q. What is his name? A. Henry Gaedcke.

20 Q. Is he still with the bank? A. Yes.

Mr. Gordon: At this time, if your Honor please, I will ask the permission to bring in this afternoon, Henry Gaedcke, to whom he made that statement.

The Court: No objection to your bringing him in I take it.

Q. Mr. Mauthe, how do you know that he has made that statement? A. It is written on the

30 card.

Q. Only from what it is written? A. That is right.

Mr. Gordon: That is all. I will withhold this card here until I get Mr. Gaedcke.

By Mr. Kuvin:

Q. Mr. Mauthe, I show you a pass book and ask you whether or not you can identify that as the original pass book which is issued to the deposi-

40

tor, especially the deceased in this case? A. Yes.

Q. Is that pass book up to date, as far as you know, from it, with the amounts of deposits and withdrawals as set forth therein? A. It is not up to the present date, no. It has not been balanced for the year 1933.

Q. It has not been balanced for the year 1933, but for the entries shown up until October 1933? 10
A. Oh, yes.

Q. It is? A. Yes.

Mr. Kuvin: I ask this be marked for identification.

(Pass book marked D-1 for identification.)

Mr. Gordon: I am willing this should go in evidence.

Mr. Kuvin: It is not my case. 20

Mr. Gordon: I am agreeable that it should be marked in evidence.

The Court: I suppose the defendant does not want to put his case in yet.

Mr. Kuvin: I am willing to have it marked for the purpose of the record, at this time, as Exhibit D-1, if counsel has no objection.

Mr. Gordon: No objection whatsoever.

(Bank book heretofore marked D-1 for 30
identification, entered in evidence and marked Exhibit D-1).

Mr. Gordon: I ask this card be marked for identification.

Mr. Kuvin: That is the card which I cross-examined upon?

Mr. Gordon: Yes.

Mr. Kuvin: No objection to it being marked for identification.

(Card marked P-4 for identification.) 40

SAVERIO QUARTOROLO, the plaintiff, being duly sworn according to law, on her oath, saith:

Direct-examination by Mr. Gordon:

(Peter Liotta sworn as interpreter.)

Mr. Liotta: I cannot interpret for this woman.

10 (Witness withdrawn from the stand.)

JOSEPH LAPOLA, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Gordon:

Q. Your name is Mr. Lapola? A. Joseph La-
20 pola.

Q. Where do you live Mr. Lapola? A. I live on 224 High Street. I just moved there a couple of months ago.

Q. Did you know the deceased, Mr. Anthony Blumetti? A. I used to know him since last four years ago.

Q. During his lifetime did you ever have an occasion to visit the home where he lived? A. Every
30 other day.

Q. What was your business? A. I was for New Jersey Central Railroad, watchman.

Q. Do you know what Mr. Tony Blumetti worked at during his lifetime? A. Well, he was working for Standard Oil, only he had to go in the house, he was sick man; not steady; couple of days a week.

Q. Do you remember when he died? A. Oh, yes, I was going on his funeral. I was paralyzed
40 but I was to his funeral.

Q. Do you know his wife? A. Yes. Christina.

Q. Do you remember when she died? A. 1924, in January.

Q. Do you remember after Mrs. Blumetti died, this is the wife of the deceased, with whom Mr. Blumetti remain living? A. Was living with Mr. Quartorolo, his brother-in-law and sister-in-law, on 224 High Street. 10

Q. Did you visit him there? A. Yes.

Q. How often did you have an occasion to visit there? A. Couple of times a week.

Q. Do you remember a talk between Mr. Tony Blumetti—now just listen carefully? A. Yes.

Q. And Mr. Quartorolo? A. Yes.

Q. With reference to— A. Board. Was board with me too.

Mr. Kuvin: At this time this testimony 20 is being admitted subject to my application with relation to the wife, inasmuch as the wife has been withdrawn, because of the difficulty with the interpreter, this testimony is being introduced now—your Honor will recall I suggested we have the preliminary question as to her qualification as a witness first to be decided as to whether or not he would be joined as a party.

The Court: That is right. 30

Mr. Kuvin: I am not making any objection to this witness testifying out of turn, because of the difficulty that was raised before, but I would like to have it noted that it is subject to that.

The Court: I do not just follow you. I understood that it was her testimony.

Mr. Kuvin: Yes. I just want to have it noted that I am not waiving that prelimin- 40

ary question of qualifications as to her, merely by this witness going on out of turn.

The Court: That is right.

A. Dominick Santa Maria was there too.

Q. Tell us in your own language what was the conversation? A. The conversation was talking, his wife was there and said, "what are you going to do, pay board." He said, "I was figuring up to pay ten dollars a week."

Q. When you say he, who said? A. From Mr. Blumetti.

Q. He said that he is going to pay ten dollars a week? A. Ten dollars a week.

Q. To whom? A. To Mr. Quartorolo and Mrs. Quartorolo.

Q. What else was said? A. He say, "I have got my sister-in-law name over at the Harmonia Bank, she is fixed up, and I don't have to pay it no more." That is all gentlemen.

Q. Now, then, after that where did he remain living, in what home? A. He lived all the time for Mr. Quartorolo and Mrs. Quartorolo.

Q. Who took care of him? A. Mrs. Quartorolo, she done washing, cooking, paid everything, ironing.

Q. Do you know was Mr. Blumetti a strong man? A. He was worse than I am today. He had asthma.

Q. Do you remember when Mr. Blumetti was sick in bed? A. Yes. I going over to see him in the hospital. He was at Alexian Brothers, at the General, and I come over and visit him pretty near every week.

Q. During the time when he was living with Mrs. Quartorolo, who else besides him lived in

that house? A. Nobody else, only me a couple of months.

Q. I mean, did he live with Mr. and Mrs. Quartorolo? A. Yes.

Q. And Mr. Blumetti, is that right? A. Mr. Blumetti, Mrs. Quartorolo, because she got nobody else, only wife in the hospital.

Q. How often in the last ten years did you visit Mr. Blumetti? A. Two or three times a week, gentlemen.

Q. And where did you find him? A. Oh, he was come over in my house, or I was go to Mr. Quartorolo's house. He was there living.

Q. He was always at Mrs. Quartorolo's house? A. Yes.

Q. But you remember that there was some talk about Mr. Tony Blumetti paying ten dollars a week to the Quartorolos?

Mr. Kuvin: I object to that as leading the witness, if the Court please.

A. Yes.

The Court: It is leading.

Q. You remember that, don't you? A. Yes. I remember that.

Mr. Gordon: Take the witness.

Cross-examination by Mr. Kuvin:

Q. You saw Tony Blumetti in this house, in the Quartorolo house? A. Yes, sir.

Q. You lived there yourself, didn't you? A. I lived there a couple of months with him.

Q. When did you live there a couple of months? A. 1930.

Q. 1930? A. Yes, sir.

Q. You live there now, don't you? A. I live there now. I move there before Christmas, in December or November.

Q. December of 1933, you moved there again? A. Yes.

Q. And when you were there the first time you paid board, didn't you? A. Now, I pay board too.

10

Mr. Gordon: If your Honor please, it is about twelve-thirty. I would like to ask for an adjournment right now, because I want to get one of the interpreters, and it will probably take me about an hour.

Mr. Kuvin: I will only be two minutes in cross-examination with this gentleman.

Q. You paid board in 1930, didn't you? A. Yes, sir.

20

Q. You pay board now? A. I pay board now; yes, sir.

Q. How much do you pay now? A. I am sick man, she won't take much—he won't take much off me.

Q. How much? A. Well, pay about ten dollars a week.

Q. You pay her ten dollars a week? A. Well, room, washing, everything complete.

30

Q. You pay her now ten dollars a week? A. Yes.

Q. What did you pay her in 1930?

Mr. Gordon: If your Honor please I object as this being improper cross-examination of what he pays or what he is doing. We are not concerned as far as he is concerned.

The Court: Only in so far as we are testing his credibility.

40

Mr. Gordon: If that is so, then I will withdraw my objection.

Q. In 1930, you paid ten dollars a week, didn't you? A. 1930, yes, we was paying ten dollars—

Q. Do you owe her any money now? A. What.

Q. You owe her money now for board? A. The way I am I can't do nothing, I am paralyzed, and a person takes care of a sick man. 10

Q. You owe her money now? A. No, I don't owe. I pay.

Q. You pay? A. Yes, sir; I pay. I pay him every week, every month. I go to the bank and draw a little money, and pay.

Q. Just answer my question. A. You give me crutch, I am sick man.

Q. We will get along much better, Mr. Lapola, if you just answer my questions? A. I answer you anything you want, if you go nice and easy. 20

Q. You are related to Mrs. Quartorolo, aren't you? A. No.

Q. To Mrs. Quartorolo? A. No. No one.

Q. When did you hear Mr. Blumetti say what you told us before? A. Well, was in 1924.

Q. In 1924? A. I was healthy man, I was remember everything.

Q. At that time he said that he was not going to pay her ten dollars anymore, that he was going to leave— A. No. 30

Q. Wait a minute. In 1924, he told Mr. and Mrs. Quartorolo, that he was not going to pay them ten dollars a week anymore, that he was going to leave the money in the bank to Mrs. Quartorolo? A. And the Standard Oil stocks too.

Q. And the Standard Oil stocks too? A. Yes.

40

Q. So in 1924, let us understand each other, in 1924 Mr. Blumetti—that was right after Mr. Blumetti's wife died, wasn't it? A. Yes.

Q. Right after she died, Mr. Blumetti told Mrs. Quartorolo and Mr. Quartorolo, that he was going to leave all the money that he has got in the bank to Mrs. Quartorolo, and the Standard Oil Company stock? A. Yes.

Q. Is that right? A. That is right.

Q. And that he was going to pay her no more ten dollars a week? A. That is right.

Q. He was through, he was going to stop? A. Yes.

Mr. Gordon: That is all.

Mr. Kuvin: That is all.

(Adjourned until 1:35 P. M.)

Afternoon Session 1:35 P. M.

HENRY C. GAEDCKE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Gordon:

Q. Mr. Gaedcke, by whom are you employed? A. Mutual Savings Fund Harmonia.

Q. How long have you been employed there? A. Twelve years.

Q. In what capacity? A. Clerk.

Q. Now, did you know a certain man who was a depositor in your institution by the name of Anthony, or this name abbreviated, Tony Blumetti? A. Did I know him personally?

Q. No, I mean did you know of him? A. Of an account, yes.

Q. I want to show you a card which is marked for identification, and I want you to look at it and explain this card?

Mr. Kuvin: I object to any explanation of the card, if the Court please.

Mr. Gordon: I will withdraw the question.

10

Q. Who made that memorandum? A. Myself.

Q. When did you make it? A. At the time the account was opened.

Q. Is that in your own handwriting? A. It is.

Q. Did Mr. Tony Blumetti tell you anything which you made a memorandum of? A. Yes.

Q. Tell us what he said to you and that you made a memorandum of? A. He wanted the money to be given to his sister, Mary Icitarillo at his death.

20

Q. And this memorandum was made by you? A. Yes.

Mr. Gordon: I offer this memorandum now in evidence.

Mr. Kuvin: I object to the memorandum being offered in evidence.

The Court: Objection sustained. I permitted him to testify from it to refresh his memory as to what was said, but the memorandum by him, if objected to, I will ssutain the objection.

30

Q. Can you tell us by looking at this memorandum when he made that statement to you? A. March 10, 1924.

Cross-examination by Mr. Kuvin:

Q. On March 10, 1924, he made a certain statement to you, is that right? A. That is right.

40

Q. How many times had you seen that man prior to his making any such statement? A. Probably not before.

Q. How many times had you seen him after making the said statement? A. That is something I couldn't say. We do business at the window.

10 Q. Isn't it customary in your bank, in fact, isn't it one of the rules of your bank, when a man opens an account you take his signature on the signature card to identify him for the purposes of withdrawals and claiming the money? A. Yes.

Q. You did not do that in this instance, did you? A. The party couldn't write.

Q. He could make an "X", couldn't he? A. Yes.

20 Q. In instances where a man does not write, don't you take his "X" and witness his cross as his mark?

Mr. Gordon: I object to what instances, unless it is done in this case. Therefore we are not bound by any answer. If he refers to this instance, that is all right, but any other instance, I object to.

Mr. Kuvin: I respectfully submit it is for the credibility of this situation.

30 The Court: I will permit it to be answered.

(Question repeated by stenographic reporter.)

A. Not always on the card. I sign the name for him and just say he can't write.

Q. Have you anything before you with relation to the date upon which it is alleged he made this statement to you, on that date?

40

Mr. Gordon: If your Honor please, he has already answered that and he gave the date when he refreshed his memory from this card. Unless he wants to have him look again at his card.

Mr. Kuvin: He is using it.

Q. Is there anything definite which fixes that date as to the time that he made this statement to you? A. Yes, I remember when he opened the account, the party wanted the money put in under those conditions. 10

Q. Did he withdraw any moneys from the account, that you know of? A. That is something that I couldn't tell you. I haven't seen anything on it.

Q. You didn't know him personally, just from that once at the window that you recall him? A. When I opened the account. 20

Q. And the only thing that brings it to your memory is the notation you made on the card? A. That is right.

Mr. Kuvin: No further cross-examination.

Mr. Gordon: That is all.

30

DOMINICK SANTA MARIA, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Gordon:

Q. Mr. Santa Maria, where do you live? A. I live 608 Montgomery Street.

Q. How old a man are you, Mr. Santa Maria? A. I am sixty-four going on sixty-five.

40

Q. Did you know during your lifetime a man by the name of Tony Blumetti? A. Yes.

Q. How long had you known him? A. About twenty-five years now.

Q. Did you know his wife? A. Yes, sir.

Q. Are you related to the Blumettis in any way? Do you know what I mean? Are you a relative of theirs? A. Yes.

10

Q. How are you related? A. Well, every Saturday night and Sunday—

Q. Now, I asked you whether you are in some way related to the Blumetti's, like a son or a brother or something, are you in any way related? A. No, no.

Q. Do you know where he worked? A. He was working on the Standard Oil.

20

Q. Have you worked with him? A. Yes.

Q. How often did you see him? A. Well, I can see that guy every day. Every Sunday, Saturday, when he quit he was very sick, he quit about, I don't know, he work about ten or eleven years at the Standard Oil.

Q. Now, Mr. Santa Maria, did you ever have a talk to him? A. Yes, I talked to him.

Q. About board and lodging with reference to Mr. Quartorolo? A. Well, I was talk to him before he died.

30

Q. What did he say? A. And he says—I was there that time and he was her place—he says, what good is it to pay money myself every week to my sister-in-law and my brotheri-n-law because maybe I die tomorrow maybe I maybe I die next month. He said he was paying ten dollars a week, and he said, "I am stopping, I won't pay anymore, Tony, he say, any day I die you going to get the money in the bank, and the stock, because

40

the book belong to you, the name on the book. He told me all the time that way.

Q. He did? A. Yes, sir.

Q. Are you a friend of his? A. No.

Q. Were you and he friendly? A. Well, I know on the other side, but not my relation.

Q. You don't understand. You and he were friends, weren't you? A. Yes, he was friend of mine. 10

Q. How often did you see him during the week? A. Well, I can see every week if I wanted, Saturday night and Sunday, he was sick, I go and visit him on Sunday night or Sunday afternoon.

Q. Did you ever have a talk to him before he died? A. Was couple of weeks ago he die, he says, "poor me, I am very sick," he says, "if I don't have my sister-in-law in here I would have died long ago." He said, "she takes care of me, anything I want, washing, cooking, ironing, anything I need." He said, "I am satisfied." 20

Q. And what else did he say? Did he mention anything about the moneys or anything that he had? A. Well, he say that my money he got in the bank and the stock that was belong to Mrs. Quartorolo. Nobody else can take that money, only husband and wife.

Q. Why did he tell you that? Why did he say that? A. He said he have the money in the Harmonia Bank. 30

Q. Did you ever have any conversation with him with reference to what Mrs. Quartolo did for him? What did he tell you that she done for him? A. What she done?

Q. Yes? A. Well, she done everything because he was crippled.

Q. What do you mean crippled? A. The sister-in-law do everything for the other sister. 40

Q. I mean after the sister died? A. Well, Tony Blumetti was over there and never move. He died over there in the same house.

Q. How long did Tony Blumetti live there? A. Well, I remember that guy, that is 1924, he living together.

Q. From 1924? A. Yes, sir.

10 Q. He lived at Mr. and Mrs. Quartorolo's house until when, until he died? A. Yes, he was there when he died. Funeral and everything.

Q. Could you tell us, please, how soon after his wife died did he tell you that he is going to give all the money, everything he had to Mr. and Mrs. Quartorolo?

Mr. Kuvin: I object to that if the Court please as highly leading.

20 A. Yes, sir.

Mr. Gordon: I admit that, if your Honor please, but we are working a little under difficulty.

Q. Do you remember having a talk to your friend Mr. Blumetti, after his wife died? Do you understand that? A. Yes.

Q. How soon after did he have the talk with Mr. Quartorolo and Mrs. Quartorolo? A. Yes. 30 He says—

Q. How long after, one month? A. Well, about couple of weeks ago when the wife died.

Q. Now, tell us what he said then? A. Well, he says, "I won't pay no more board no more because I got all my money in that bank, and the stock." He says, "What good is it to pay the money myself?" He said, "Maybe tomorrow die, or after tomorrow die." He said, "You are go-
40 ing to get that money in the bank because you

have got your name on the book. Mrs. Quartorolo and Mr. Quartorolo. Nobody else, only the husband and wife."

Q. And since then did Mr. and Mrs. Quartorolo board that man? A. Yes.

Q. Give him lodging? A. Yes.

Q. Do everything they can? A. Do everything, that poor woman over there. 10

Q. How often did you go to the house and see them do these things for this man? A. Well, when I going there I see that poor lady and she do everything because he was sick. He can't move. If he want coffee, get coffee, if he want milk, get milk, anything he needed.

Q. In other words, Mrs. Quartorolo acted like a sister to him, is that right? A. Yes, sir.

Q. Do you know whether Mr. Blumetti had any relatives in this country? 20

Mr. Kuvin: I object as immaterial.

A. He don't say me nothing that way.

Mr. Gordon: Cross-examine.

Cross-examination by Mr. Kuvin:

Q. Mrs. Quartorolo treated him like a daughter would treat a father, didn't she? A. Yes, sir. 30

Q. She took care of him the same as you would expect your daughter to take care of you?

Mr. Gordon: I object.

Mr. Kuvin: It is helping you out.

Mr. Gordon: Don't help me out, please. I will help myself out.

The Court: Objection sustained.

Q. Mrs. Quartorolo took care of every need that Mr. Blumetti had, didn't she? A. Yes, sir. 40

Q. She was a sister-in-law of his? In other words, Mr. Blumetti's wife, who died, was a sister to Mrs. Quartorolo? A. Yes.

Q. Isn't that right? A. Yes.

Q. Where was Mr. Blumetti at the time he told you a couple of weeks after his wife died? A. Yes.

Q. That he will not pay any more the ten dollars a week board, but that he will leave the money to both Mr. and Mrs. Quartorolo together? Where was he? A. On Harmonia Bank.

Q. In the bank? A. Yes. Stock and money.

Mr. Gordon: He didn't understand this question right.

Mr. Kuvin: That is for the witness and the jury to say.

Mr. Gordon: All right, go ahead.

Q. Understand me on this now. You told us before that Mr. Blumetti told you a couple of weeks after his wife died? A. Yes.

Q. That he wasn't going to pay ten dollars a week board any more, he was through with that? A. Yes.

Q. But instead he was going to leave the money he had in the bank to both Mr. Quartorolo and Mrs. Quartorolo, is that right? A. Yes.

Q. Where was he at that time he told you that? A. Well, I was in the house.

Q. In the house? A. Yes.

Q. Who else was there? A. Well, me and Mr. Lapola over there.

Q. Just the three of you? A. Yes, me and two together.

Q. You and Mr. Lapola who was on the witness stand first? A. Yes.

Q. And Mr. Blumetti? A. Yes.

Q. And nobody else? A. Was Mrs. Quartorolo and her husband.

Q. They were there too? A. Yes.

Q. Was this at a table in the kitchen? A. Well, sure he have a table. Do you think he eat on the floor?

Q. You were eating together at that time? A. Yes, was five together. 10

Q. You were eating at that time? A. Yes.

Q. You are sure now he said he was going to leave all the money in the bank to both Mr. Quartorolo and Mrs. Quartorolo? A. Yes, sir.

Q. He did not say he was going to leave it to Mr. Quartorolo alone? A. No.

Q. He was going to leave it to both? A. To both.

Q. He wasn't going to leave it to Mrs. Quartorolo alone? A. He say, "wife and husband". 20

Q. Wife and husband, two together? A. Yes.

Q. Not one separate, or the other one separate, but two together?

Mr. Gordon: If your Honor please he has answered that about ten times now.

Mr. Kuvin: I don't want you to claim that he misunderstood me. I want to make it clear to the witness.

The Court: I think I have counted six. 30

Mr. Kuvin: There is not any question about it at this time.

The Court: There is not any question about it.

Mr. Kuvin: That is all.

Mr. Gordon: That is all.

40

MARY QUARTOROLO, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

(Madeline Buckley sworn as interpreter.)

Direct-examination by Mr. Gordon:

10 Q. Mrs. Quartorolo, where do you live? A. 224 High Street.

Q. Elizabeth? A. Yes.

Q. Who lives with you now? A. Her husband lives with her, and Mr. Joseph Lapola.

Q. Who supports you?

Mr. Kuvin: I object as immaterial.

A. Her husband.

Q. And in the last ten years, who supported

20 you?

Mr. Kuvin: I object to that as immaterial.

The Court: I will hear you on it, Mr. Gordon. I do not think it is material.

Mr. Gordon: I will withdraw the question.

Q. Do you know, or did you know a certain man by the name of Tony Blumetti, now dead? A. Yes, she knew him.

30 Q. Did this man live at your house in the last ten years? A. Yes, he always live with her, she said.

Q. What did you do for him when he lived at your house?

Mr. Kuvin: At this time, if the Court please, I object to this witness testifying to any transactions had with the decedent. The testimony up to this time clearly shows

40 that this witness is an interested witness,

not only interested in the fact that she was to receive anything, but the testimony is clear and uncontradicted that the other witnesses testified that he had agreed that he would leave the money to both, not to one or the other, but to both, up to this point. Both witnesses testified to that.

The Court: I think the question is objectionable, perhaps. 10

Mr. Gordon: I will withdraw the question.

Q. Did you ever cook for this man?

Mr. Kuvin: Same objection.

Q. Did this Mr. Blumetti work for anybody, that you know of? A. He worked for the Standard Oil. 20

Q. And while he was away, did you fix up his bed?

Mr. Kuvin: I object to that, if the Court please. Transaction with the deceased.

Mr. Gordon: It is not a transaction. It is not in his presence. He was away when she used to do that.

The Court: I will permit her to testify what she did around the house while he was not there. 30

Q. What did you do for this man while this man was away from the house?

Mr. Kuvin: I object to that question, if the Court please. As to what she did for this man while he was not in the house. It is pre-supposing that she did anything for this man, in the first instance. And in the second instance, it surely would be a trans- 40

action on behalf of the deceased. It is objectionable because of this woman's interest in the case.

The Court: I will allow this woman to testify as to what she did at the house, as long as it is not anything which attempts to connect up any transaction or conversation which she had with this decedent.

10

A. She said she used to wash and iron, and wash the bed room, and cook, and sew.

Q. Did you do all the work around the house for everybody? A. Yes, she did.

Mr. Gordon: Cross-examine.

Mr. Kuvin: No questions.

20

KATIE LOPRETE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

Direct-examination by Mr. Gordon:

(Through interpreter Buckley.)

Q. Mrs. Loprete, where do you live, please? A. 24 Christina Street.

30

Q. Do you know Mrs. Mary Quartorolo? A. Sure.

Q. Do you know Mr. Quartorolo? A. Yes.

Q. Do you know Tony Blumetti, the man who died? A. Yes.

Q. How long do you know them people? A. Ten years.

Q. During the ten years how often did you visit the home of Mrs. Quartorolo? A. Every time going, every day, two days.

40

Q. What if anything did you see Mrs. Quartor-

olo do for this man? A. Do everything. Because he is bad sick. Got asthma, and this lady doing everything. Nobody going do something.

Q. Was Mr. Blumetti a sick man? A. Sure sick man.

Q. How long was he sick, if you know? A. Well, me I am twenty-two years stay in America. I know he has been with him for ten years.

Q. When you come in Mrs. Quartorolo's house, did you see this woman cook for him and wash? A. Everything doing, because bad sick and can't do nothing.

Q. The man could not do nothing? A. Sure. Nobody going do something.

Mr. Gordon: Cross-examine.

Mr. Kuvin: No cross-examination.

MOTION FOR NONSUIT.

Mr. Kuvin: I make a motion for a nonsuit and I will confine myself to the second count on the ground that there is no testimony in this case with relation to the second count. The testimony by the plaintiff is expressly to the effect that after this man's wife died he expressly repudiated any ten dollar a week, for any board provision. He said, "I am not going to pay ten dollars a week board any more," taking the most favorable light of the testimony. "I am going to leave to both of you what money I have in the bank." Assuming the most favorable position. They do not prove a contract up until March 1924, or any time prior to that. The most favorable testimony is that he expressly repudiates any arrangement to pay board, and he is going to leave the money to

the wife. Therefore, that there is no proof whatever under the second count in the complaint.

The Court: I do not know under what circumstances it would apply more, in a case where it is alleged a person agrees to do something under a contract, and he has not done it, and does not do it, and if the other party then wants to waive their rights under that promise and sue on a quantum meruit, that is just where a quantum meruit comes in, where there is not anything definite, where there is not anything specific as to the amount. They say that this man under this proof in this case, agreed to leave something which he did not do. We did not get anything. Therefore we are now asking—I do not know whether they are pressing the claim on the contract, or not, but on the quantum meruit we say, he did not do what he agreed to do, which led us to believe him, but we are not going to bother with the contract feature of it. We are going to ask that his estate pay to us whatever the jury feels is the reasonable value of the services and board he got there, under a quantum meruit. That is exactly the contention of the plaintiff.

Mr. Gordon: Exactly right.

Mr. Kuvin: They have not proved the contract. They have not proved an offer and acceptance by one or the other. All they have proved is a statement that he was going to stop paying the ten dollars and leave them the money in the bank. That is all. They have not proved any offer or acceptance, or otherwise.

The Court: They have proved that he lived there ten years, boarded there and had the services done for him, and was waited upon, and so forth.

Mr. Kuvin: A relationship of sister-in-law and brother-in-law. The relationship that this woman did everything for this man that she would do for a relative. They have not proved, by the wording of either party—

The Court: I do not think they have to prove a contract under this second count. Is there some relationship? 10

Mr. Gordon: There is no relationship at all, because the testimony is, and the death certificate shows that her sister died. So that relationship ended right there. And then he continued to live on the same as any stranger.

Mr. Kuvin: The cross-examination of the second witness was that the woman that died, the deceased's wife, was the sister of this woman, Mrs. Quartorolo. They were related by marriage. The mere fact that one dies, does not stop off the relationship between the parties. Especially in view of the fact that they had been living there before the sister died. 20

Now, the only testimony in this case, if the Court please, is the statement by Mr. Lapola where he said he was figuring not to pay ten dollars a week any more to Mr. and Mrs. Quartorolo. "I want to pay it no more."

The Court: What about the contract? What have you to say as to the first count? Supposing they should decide, now the contract not having been proven by this woman, suppose the plaintiff should decide to join this woman as plaintiff, and seek to recover under the contract which is alleged to have been the promise that he made, that he would not pay them—in the presence of the plaintiffs and the defendant, that the defendant stated that he would not pay ten dollars any more, that 30

40

"I am going to leave it all to you hereafter anyhow and I will let it stand that way."

Mr. Kuvin: That then is not a contract proved. The only words he said, "I am not going to pay ten dollars a week any more, because I am going to leave you the money I have in the bank."

10 The Court: I think that is enough from which a contract could be drawn, if the jury wants to find it. I do not know just what position the plaintiff has taken, of course. I will hear him, whether he is going to rely on the contract, or on the quantum meruit.

Mr. Kuvin: Even where they attempt to prove quantum meruit, they have to prove a contract, but the amount is not fixed, and therefore, they are allowed to sue under a quantum meruit.

20 Mr. Merrill: The plaintiff will rely on the theory of the quantum meruit. The proof is that ten dollars a week had been paid and of course, that is up to the jury.

The Court: What is the value of it?

Mr. Merrill: Not exceeding ten dollars a week. The work was done. We must admit that the defense is highly technical, and purposely intended, apparently, to divert money, evidently unquestionably intended for these people who took care of 30 him for nine years, when he has no father, no mother, no wife, no brothers, no sisters, no children for it to go to, and the only place it can go to, apparently, is to some one else who may continue this fight, in order to pile up expenses and fees and divert it.

Mr. Kuvin: On the contrary the estate shows that there are eighteen relatives of this man, so that there are relatives plenty to get this money.

Aside from that, do I understand counsel now

40

abandons the first count and relies on the quantum meruit?

Mr. Gordon: That is what I said.

Mr. Kuvin: With that I am going to urge, if the Court please, my motion for a nonsuit, that even under the second count, as I said before, that under the second count, which is the quantum meruit count, that they are not entitled—there is no jury question raised here to go to the jury, because they have not proved a prima facie case. Under the cases, the one case that I handed your Honor up there, I think it is in forty-five Equity, by the Court of Errors and Appeals.

The Court: Have you your motion on the record?

Mr. Kuvin: Yes, sir.

The Court: I will deny the motion. I will let the case go to the jury on the quantum meruit feature.

Mr. Kuvin: May I also say this, if the Court please, that the testimony in this case expressly dissipates any contract and repudiates any contract on the quantum meruit, or any other means of payment, where the testimony of the plaintiff's own witnesses is that in 1924, when this thing is supposed to have sprung into existence, this man said, "I will not pay board any more, I will leave what money I have in the bank." Expressly repudiating any implication of any contract to pay weekly, monthly, on the installment plan, or otherwise, and that there is absolutely no testimony in this case to warrant a finding of a jury of any kind, and especially, if the Court please, in those other cases, in early Equity, where the Court held where one performs work for another, relying solely upon his generosity and expectation of be-

ing rewarded by a case of legacy, wages are not demandable in an action at law for the value thereof, if the party benefited dies without making such provision. Which is expressly and identically the situation here. The best inference to be drawn therefrom.

The Court: I will deny the motion. Exception.

10 Mr. Kuvin: Praise exception.

The Court: What was the testimony? Didn't they say they had heard this decedent say to this other man something about, "I may only live a month, or I may live with you for years, and what is the use of paying monthly or weekly board, as I have heretofore paid, that I will leave to you, that it is all going to be yours anyhow, at the end, when I die, I will leave whatever money is there to you"?

20 Mr. Gordon: Yes, sir.

The Court: There could be inferred a contract to live there and to get what he had been getting before, his lodging and his board, upon a reservation, instead of paying it weekly as he had been heretofore, he would pay them by leaving his money to them when he died. That he did not do, and they are now giving up their right to seek recovery under the contract, and are seeking a right under the quantum meruit, because of the

30 fact that there was no express amount agreed upon, whereby they could specify that, and they seek under a quantum meruit to recover that which, by agreement with him, they had extended to him and he had accepted. That is the theory, isn't it?

Mr. Gordon: That is it exactly.

Mr. Kuvin: Included in my motion I have overlooked one further ground, that the wife is a necessary party, inasmuch as he had agreed to leave

40

it to both, and she is not a party to the action. I therefore move for a nonsuit for non-joinder, this being the first time, your Honor will recall, that the testimony has come up, and under Platten vs. Ryan there, a motion for non-joinder could be entered, or have her joined as a party plaintiff to the action. On the grounds the testimony clearly shows that it was for the benefit of both parties, and not for one only, and under the law, she is a necessary party, and that under the 1928 amendment to the Married Woman's Act, the wife is a necessary party. Under the law as expounded there, and the reasons which we expounded to your Honor prior in the case, that she is a necessary party; in fact, the sole party. That the testimony shows that he was to leave the money to the wife and not to the husband and, therefore, she being the beneficiary, she is the party plaintiff, and not the husband. So, therefore, I add two more grounds to my motion for a nonsuit, the first one being that they have not proved, or the testimony shows no cause for action.

Secondly, that the wife is a non-joinder, that the wife is a necessary party plaintiff, and is not the party plaintiff suing here, and therefore, the husband is an improper party plaintiff and cannot recover.

My third ground being that in the best phase, the most favorable aspect of the testimony, either the wife is the sole party plaintiff, or the wife should be joined with the husband as a party plaintiff. Those are additional grounds why the nonsuit should be entered upon the second count.

Mr. Merrill: Of course, everything goes out with respect to the contract. And on the quantum meruit it is to be borne in mind that the husband is the head of the family.

The Court: I am ready to rule. I do not think it makes a particle of difference. I do not see what difference it makes now whether she is made a party plaintiff or is not. If you want to, all right, and if you do not want to, all right. The only reason for her not being a party plaintiff in the first instance, I take it, was so she could testi-
10 fy to certain transactions, which did not become necessary for her to testify to. If she was a party plaintiff here this case could have been presented just exactly as it was, because she did not attempt to testify to any transaction with the deceased. So, whether she was a party plaintiff or not, I do not think makes much difference.

Mr. Kuvin: With the exception of this, that we represent an executor, and for the husband or administrator to recover—

20 The Court: Is there any objection to making her a party plaintiff?

Mr. Gordon: None whatsoever.

Mr. Kuvin: We would be subject to a separate suit.

The Court: Suppose the motion is made for the plaintiff to join this woman as a party plaintiff, is there any objection to that?

Mr. Kuvin: No objection. I will make such a motion.

30 The Court: Such an order will be made. Now, the action is as between the husband and wife against the defendant on a quantum meruit.

The Court: So as not to have any question raised afterward as to whether a separate action might be brought afterward by some one for her interest, if she had any.

The Court: Counsel for the defendant having moved that this woman be joined as a party plain-
40 tiff, and counsel for the plaintiff being willing,

the Court has no objection to her being joined and such will be the order.

Mr. Kuvin: The plaintiff rests and I understand your Honor has denied my application for a nonsuit?

The Court: Yes.

Mr. Kuvin: May I have an exception?

The Court: Yes.

Mr. Kuvin: We rest.

10

MOTION FOR DIRECTION OF A VERDICT.

Mr. Kuvin: I move for a directed verdict on the same grounds.

The Court: Same ruling and exception.

Mr. Kuvin: Exception.

20

(Mr. Kuvin sums up the case for the defendant.)

(Mr. Gordon sums up the case for the plaintiff.)

30

40

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January Term, 1934.

SAVERIO QUARTOROLO (also known as Saverio Quartarillo), Plaintiff, vs. ANTONIO GALLERANO, Administrator of the Estate of TONY BLUMETTI, Defendant.	Action at Law.

10

20

Court's charge to the Jury by Hon. FRANK L. CLEARY, Circuit Court Judge, as follows:

Gentlemen of the Jury: This is an action brought by these plaintiffs, there are two of them now since the amendment, the husband and wife, Mr. and Mrs. Quartorolo, against the administrator of the estate of Tony Blumetti, and they are seeking to recover for the reasonable value of the services rendered to Mr. Blumetti, for board and services rendered to Mr. Blumetti during his lifetime.

30

You will recall the testimony is that prior to 1924, Mr. Blumetti, the decedent whose administrator is here in Court today, and his wife, were boarding with these plaintiffs; that in 1924, Mr. Blumetti's wife died and he continued to live with the plaintiffs afterward.

40

The testimony which the plaintiffs contend establishes their right to recover is that after the death of Mr. Blumetti's wife, that he continued to live with these plaintiffs; that prior to her death he had been paying board of ten dollars, I think, per week; that after his wife's death he continued to work for some three or four years afterward, and then became incapacitated and continued to live with the plaintiffs until his death. But the plaintiffs contend that after his wife's death, Mr. Blumetti then said to these plaintiffs, I will discontinue the payment of board as heretofore, because I do not know how long I will live, whether it will be a month, or what it will be, but what money I have you can have as payment, after my death, for these services; so the plaintiffs allege that there was a specific agreement in which Blumetti promised to pay them, only in a different manner than that in which he had been paying them prior to the death of his wife, and they say that that was not complied with, that the money was not left to them, and they seek on a quantum meruit, which means what a thing is worth, or what a person seeking on a quantum meruit deserves for his services. That is what a quantum meruit means. In other words, where a person employs another to do work for him, without any agreement as to compensation, the law implies a promise to pay for the services as much as they may deserve or merit. The latter part is what I am trying to get to you in simple language. A quantum meruit means such payment as the services, or whatever it may be, deserve, or are worth. So the plaintiffs seek to recover the amount which you think the services and board of this man, during the time when he lived with them, deserve or are worth.

10

20

30

40

The question has been raised in this case, and the law says where a relationship exists between parties, that in the absence of a specific agreement to pay board, or otherwise, the presumption is that it is a gratuity that it is gratuitous on behalf of he relatives. So, where a sister takes a sister in, or a brother takes a brother, or a father takes his children, if you will, or children take the father or mother, and nothing said about it at all, and when those relatives keep them until the time of death, or keep them for any length of time, without any specified agreement, and nothing said as to how much that they will ever be paid, or any payment is to be made, or anything of that kind, then there is not any such thing as a quantum meruit arising or a right to recover under a quantum meruit, because the presumption is that it is a gratuitous giving of one relative to another.

There is a different relationship entirely from that where strangers come in. When a stranger comes in there does not have to be the specified amount agreed upon, or any specific terms agreed upon. If the services are given, and accepted by the other side, there is a presumption there that they will be paid for at their reasonable worth, under a quantum meruit, if no specified amount has been agreed upon, then it is for the jury to say what they are worth. That is the question which has been raised here in this case, as to whether or not there was not such a relationship existing between these parties as to destroy any presumption of payment, and raise the presumption of a gratuitous relationship. Now, what was the relationship existing between them? I do not know. The law says, that any degree of relation-

ship is sufficient to raise the gratuitous presumption, if it exists. You see, however, that the facts and circumstances of a case may destroy that presumption. This plaintiff, the woman plaintiff was the sister of this defendant's wife. She was not keeping her sister, because while the sister lived, the board was paid. When the sister died, then came into existence this situation over which this suit arises. Then it was the relationship, if any, of the brother-in-law. Now, from that facts in each given case, is there a presumption that that was gratuitous. If it was not gratuitous to her sister, while she lived, does the presumption arise that it was gratuitous to her brother-in-law? If, while her sister lived, she had to pay board, can you arrive at the presumption that after her sister's death she would keep her brother-in-law, when she would not keep her sister during her lifetime? But it is not necessary in this case to go upon presumptions at all.

If the plaintiff is correct, and you believe him to be correct, the burden is upon the plaintiff of establishing the correctness of their theory, and the burden is upon the plaintiff of satisfying you, by a fair preponderance of the evidence, the burden of proof is upon him to establish what? Their right to recover for board and services rendered to this decedent during his lifetime, under this quantum meruit, which must pre-suppose first, in order for them to recover, that there was an agreement existing between the plaintiffs and the defendant, except as to the amount, which was not agreed upon.

The plaintiffs claim that the contract, if you will, that the agreement, as it were, entered into

between this decedent and them, after his wife's death, was to continue on as it had continued prior to his wife's death. When he said, the decedent, to the plaintiffs, in the presence of these other witnesses who were produced, that he would discontinue the payment of the weekly payments as had been heretofore made, I think it was ten dollars, while his wife was living, and that he didn't know just how long he would pay, but he would pay—he did not say he would pay ten dollars a week, he said he would not, as a matter of fact—he did not say he would pay five dollars a week, he did not say he would pay two dollars a week, he did not say any amount; except when he was finished, when he was gone, they could have whatever he had left, and he had money in the bank. And the plaintiffs say when he died they found themselves with money in the bank, but they could not get it. So, in the absence of any specific agreement as to how much they were to be paid, they say that having agreed to pay them in some amount, at least, and it having been accepted by them to the extent of being kept there, boarded by them, and services rendered to him, and he having accepted of that board and services during his lifetime, that the agreement to continue to stay there, and to be paid a certain amount, at least, had already been established, the only thing in dispute was how much they were to be paid, and that here there being no specified amount agreed upon that, therefore, the theory of a quantum meruit arises, and they ask you to say how much they should be paid.

What is the proof upon which you can predicate any value to this service? I do not know, ex-

cept to say this, that it cannot be more than ten dollars a week, because the amount pleaded and asked for is the sum of ten dollars a week, so that the plaintiffs could not get more than they asked for. But whether they can get that or not—and I may be wrong about the testimony, but if the amount paid by this decedent while his wife was living with them, was ten dollars a week—I do not believe there was any testimony here that that was for one—certainly if he paid ten dollars a week for himself and his wife, it might be of some assistance to you in saying whether he ought pay ten dollars for himself after his wife was gone. What is it worth? What do these people deserve? If they had been having the wife and himself there for ten dollars a week, do they deserve, is it worth as much for the man alone while he lived there as it was when both he and his wife lived there? The time they suggest is four hundred and sixty-eight weeks. I think that is the amount stated, around nine years, which would come to something like that. How much per week, having in mind, if you will, that I am correct in the testimony as to how much he was paying when there were two of them, he and his wife there, and his wife now dead, how much then in your judgment, would be the fair compensation to be paid to these plaintiffs, on their quantum meruit, during the time when just he himself was there? If he is entitled to anything, such a sum as in your judgment, would represent what was the reasonable value of the board and services, if, as I say, the plaintiff has satisfied you, by the greater weight of the evidence has borne the burden of proof which is placed upon him, after showing, first of

10

20

30

40

all, their right to recover at all. If they have borne that burden and you think the plaintiffs are entitled to a verdict, then how much are they entitled to under this quantum meruit. If you find for the plaintiff, then it will be in such an amount as you think would represent the reasonable value of the services rendered to this decedent while he was living with these people after his wife's death.

If you believe the plaintiff is not entitled to recover, your verdict would be then in favor of the defendant and against the plaintiffs of no cause for action.

You may retire.

Exhibit P-1.

STATE OF NEW JERSEY
State Department of Health
Bureau of Vital Statistics

1. Place of Death: County, Union; State, New Jersey; Registered No. 103; City, Elizabeth; No. 224 High St.
2. Full Name: Cristin Bulmit. 10
3. Residence: No. 224 High St.

Personal and Statistical Particulars

4. Sex: Female.
5. Color or Race: White.
6. Single, Married, Widowed or Divorced (write the word): Married.
7. If married, widowed or divorced Husband of (or) Wife Of (Give full maiden name): Tony Bulmit. 20
8. Date of Birth: 1869.
9. Age: 55 years.
10. Occupation of Deceased: (a) Trade, profession or particular kind of work: Housework.
11. Birthplace: Italy.

Parents

12. Name of Father: Antony Triano.
13. Birthplace of Father: Italy.
14. Maiden Name of Mother: Mary Osdmado. 30

13 (a) Birthplace of Mother: Italy.

15. Signature of Informant: Husband.
(Address): 224 High St.
16. Received Jan. 28, 1924.

THEO W. BROKAW,
Local Registrar.

Medical Certificate of Death.

17. Date of Death: January 26, 1924.

40

Exhibit P-1.

18. I hereby certify that I attended deceased from Jan. 8, 1924 to Jan. 26, 1924. I last saw her alive on Jan. 26, 1924 and death occurred on date stated above, at ....m. The Cause of Death was (see over) Arthritis Deformans.

Contributory: Chronic Myocarditis.

19. If an operation preceded death give date: No.

10

Was there an autopsy? No.

(Signed) GEORGE KNAUER, M. D.
(Address) Elizabeth, N. J.

20. Place of Burial: Rosedale Cem.

Date of Burial: Jan. 28, 1924.

21. Undertaker: D. Petruccello.

Address: Elizabeth, N. J.

20

Exhibit P-2.

STATE OF NEW JERSEY
State Department of Health
Bureau of Vital Statistics

1. Place of Death: County, Union; State, New Jersey; Registered No., 135; City, Elizabeth; No. Rear of 1114 Elizabeth Ave.

30

2. Full Name: Antonio Blumetti.

3. Residence No. 224 High St.

Length of residence in city or town where death occurred 21 yrs. How long in U. S., if or foreign birth? 45 yrs.

Personal and Statistical Particulars

4. Sex: Male.

5. Color or Race: White.

6. Single, Married, Widowed or Divorced: Married.

40

Exhibit P-2.

7. If married, widowed or divorced Husband of (or) wife of Christine Turiano.
8. Date of Birth: June 28, 1872.
9. Age: Years, 60; Months, 7; Days, 3.

Occupation

Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc.: Laborer. 10

Industry or business in which work was done, as silk mill, saw mill, bank, etc.: Standard Oil Co. N. J.

Date deceased last worked at this occupation (month and year): 1926.

11. Birthplace: Italy.

Father

12. Name: ? Blumetti. 20
13. Birthplace: Italy.

Mother

14. Maiden Name: ?

13a. Birthplace: Italy.

15. Signature of Informant: Mrs. Savario Quartardo.

(Address) 224 High St., Elizabeth, N. J.

20. Place of Burial: Rosedale Linden Cem., Linden, N. J. 30

Date: Feb. 3, 1933.

21. Funeral Director: M. M. Martin & Son.

(Address) Elizabeth, N. J.

N. J. License No.: 11.

40

Exhibit P-2.

Medical Certificate of Death

17. Date of Death: January 31, 1933.

18. I Hereby Certify, That I attended deceased ....19.. to Jan. 31, 1933. I last saw h.... alive on....19...., death is said to have occurred on the date stated above, at....m.

10 The princapl cause of death and related causes of importance in order of onset were as follows: Probable Cerebral Hemorrhage.

If death was due to external causes (violence) fill in also the following:

Accident, suicide, or homicide? No.

(Signed) C. A. BROKAW, M. D.
(Address) Elizabeth, N. J.

20

30

40

Exhibit P-3.

No. 21294
MUTUAL SAVINGS FUND HARMONIA,
Elizabeth, N. J.
IN ACCOUNT WITH
TONI BLUMETTI

	Deposits	*Withdrawals*	*Balance*	
Mar.	2000.—			10
April	150.—		2150.—	
July	150.—			
Aug.	150.—		2450.—	
Dec.	50.—		2500.—	
Int.	76.82			
Divid.			2576.82	
1925			2576.82	
Jan.	50.—			
April	100.—		2726.82	
July	100.—			20
Aug.	50.—		2876.82	
Dec.	50.—		2926.82	
Int.	124.90			
Divid.	3.—		3054.72	
1926			3054.72	
Jan.	20.—			
Feb.	120.—		3194.72	
April	100.—		3294.72	
Sept.	100.—		3394.72	
Int.	148.15			30
Divid.	3.—		3545.87	
1927			3545.87	
Jan.		450.—	3095.87	
Mar.	80—			
April	25.—		3200.87	
Oct.		120.—	3080.87	
Int.	141.76			
Divid.	3.—		3225.63	
1928			3225.63	
Jan.	475.—	100.—	3600.63	40
May		100.—		

New Jersey Court of Errors and Appeals

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), *et al.*, Plaintiff-Respondent, vs. ANTONIO GALLERANO, etc., Defendant-Appellant.	Action at Law. On Appeal from New Jersey Supreme Court, Union County.

BRIEF OF APPELLANT.

Statement of Facts.

This was an action by plaintiffs, Saverio Quertorolo and his wife, against the administrator, defendant, for services alleged to have been performed by the plaintiffs for and on behalf of the deceased. The issues in the case, as indicated by the pleadings, are as follows:

I. *Complaint*:

First Count. It was alleged that the decedent, in consideration of the plaintiffs' agreement to board and care for said decedent during his lifetime, would leave all the money he had in a certain bank at the time of his death to said plaintiffs.
Second Count. In consideration that plaintiffs should board and care for decedent during his lifetime, said decedent promised he would pay plaintiffs the reasonable value of the plaintiffs' services. (S. C., p. 6 to 8).

II. *Answer*:

The administrator denies the making of the contracts and interposed the plea of the statute of limitations as a bar to the whole or any portion of the claim interposed by the plaintiffs against the defendant.

III. *Portion of Defense Struck Out*:

Pursuant to a notice of motion on November 10, 1933 an order was made in said cause striking out the defendant's second defense to the first and second counts, namely, that the plaintiffs' cause of action, if any, is barred by the statute of limitations to which an exception was taken.

At the trial, the only issue submitted to the jury was on the second count set forth in said complaint. Plaintiffs' attorneys withdrew the first count from the case. (S. C., p. 42, ll. 40 to p. 43, l. 41).

The state of case does not contain a copy of the postea or the record of the judgment entered in the above cause because all the parties in interest were desirous of bringing the matter on for an early hearing on appeal and the transcript of the record was not procured from the Clerk at the time the said state of case went to print but a stipulation is filed with the court waiving this defect so that the court can decide the issues on appeal upon the merits of the case in the present term.

Facts.

At the trial, plaintiffs proved the following facts:

Mr. Mauthe, Secretary of the Mutual Savings Fund Harmonia Bank, proved that there was a

balance in that bank in amount $2407.66 in the account of the decedent, Mr. Blumetti. (S. C., p. 16, Ex. P-3; S. C., pp. 59 to 60).

Joseph Lapolla testified that he visited the deceased in the home of the plaintiffs frequently, knew that the deceased was working for the Standard Oil Company during his lifetime and knew the decedent's wife who died in January 1924. (S. C., p. 21, Ex. P-1; S. C., p. 55). He testified that in a conversation with the deceased, the decedent advised him that he was going to pay board; he was figuring on $10.00 a week but that since he had placed his money in the bank, she was fixed up and he did not have to pay it any more. (S. C., p. 22, ll. 10 to 25) He further testified that Mrs. Quertorolo, plaintiff, did the washing, cooking and ironing and that in the later part of the decedent's life, he spent his time in a hospital in Elizabeth.

He testified that although there was some talk of the decedent intending to pay $10.00 per week for the board and lodging rendered him, the testimony is clear and unequivocal that he was not going to pay her that sum; that in 1924 the decedent definitely stated that he was through paying $10.00 a week board; that he was going to stop those payments and did not pay her that any more. This is on both direct and cross-examination.

Mr. Gaedcke, a clerk in the said savings bank, testified that the decedent wanted the money in the bank to be given to his sister-in-law, Mary Quertorolo, at his death. (S. C., p. 27, ll. 15 to 20).

Mr. Santamaria, another witness called on behalf of the plaintiffs, testified to the same effect that Mr. Lapolla did and stated that the plaintiff, Mrs. Quertorolo, decedent's sister-in-law, did everything for decedent's wife (S. C., p. 21, l. 40)

and after the said decedent's wife died, the decedent remained there and that about one month after the decedent's wife died, the decedent stated: "I won't pay no more board no more because I got all my money in that bank and the stock." He says, "What good is it to pay the money myself?" He said, "Maybe tomorrow die, or after tomorrow die." * * * On cross-examination this party testified that this was a comman household arrangement that the decedent was related to the plaintiff, living with them as a member of the household and family; that Mrs. Quertorolo, one of the plaintiffs, did not perform any unusual or extra services but carried the work on the same as if he were a member of the household. She did not give up any part of her life or time but merely took care of him as an added person of the household, which sonsisted of herself and her husband, the other plaintiff. This was the end of the testimony.

At the trial, a motion was made for a nonsuit, which motion was denied. The defendant rested without the introduction of any further testimony and moved for a direction of verdict in favor of the defendant, which motion was denied, exceptions as grounds of appeal being duly taken to each of said rulings. (S. C., p. 47). Upon the court's charge, the case was submitted to the jury which rendered its verdict in the amount of $4680 against the defendant and in favor of both plaintiffs, husband and wife. This appeal is taken from the court's order striking out the defense to the second count and sets forth that the plaintiffs' cause of action *or a portion thereof* was barred by the statute of limitations and also from the court's refusal to grant a nonsuit and a direction of the verdict.

The jury arrived at its verdict, basing their

computations upon the allegations in the complaint, paragraph 6 (S. C., p. 8) at the rate of $10.00 per week from January 26, 1924 to January 31, 1933.

Grounds of Appeal Relied Upon by Defendant.

Defendant-appellant relies upon all the grounds of appeal set forth in this cause (S. C., p. 2) which are based on the general propositions that the court erred in striking out the defense of the statute of limitations and further the court's refusal to grant the defendant's motion for both a nonsuit and a directed verdict in defendant's favor.

The grounds of appeal will be argued under the following heads:

1. That the court erred in striking out the defense of the statute of limitations.

2. That the court erred in refusing to grant the defendant's motion for a nonsuit.

3. That the court erred in refusing to direct a verdict in favor of the defendant.

ARGUMENT.

POINT I.

That the Court erred in striking out the defense of the Statute of Limitations.

The second count set forth in the complaint, being the only count upon which the cause of action was tried and submitted to the court, (S. C., p. 8) alleged that the plaintiff, with the help of his wife, agreed with the deceased that the plaintiffs would board and care for the deceased during his lifetime and the deceased promised to pay the plaintiffs the reasonable value of their services. It continued to allege the performance on the part of the plaintiffs and that the decedent died without fulfilling his part of the contract. It alleges services performed from January 26, 1924 to January 31, 1933.

To this cause of action the defendant entered a general denial plus the second separate defense which pleaded the statute of limitations as a bar to the whole or any portion of the claim interposed by the plaintiffs.

By order dated Nov. 10, 1933 the court struck out this defense to the complaint *as frivolous.* It requires very little argument to show that the court erred in striking out this defense. The contract alleged was not one to be performed at the death of the decedent because it alleges that the decedent promised "that he would pay plaintiffs". The complaint does not allege in this count that decedent would will or leave the money he had to the plaintiffs in consideration thereof.

The plaintiffs, if they were entitled to enforce

any remedy under a contract as alleged, would be entitled to recover for six years prior to the date of the issuance of the summons which was on August 31, 1933 and would be entitled to, if anything at all, to the number of weeks between August 31, 1927 to August 31, 1933 and not from January 26, 1924 to January 31, 1933 as claimed in the complaint and as decided by the jury.

Our Supreme Court, in the case of *Stone* v. *Todd and others,* 49 N. J. L. 274; 8 Atl. 300, a case similar to the one at bar, stated:

> "The time for which a recovery may be had is another point of dispute in the case. The jury have allowed compensation for the full time of service, from May, 1859, to January 25, 1883, when the intestate died. It is contended that the statute of limitations bars a recovery beyond six years and six months prior to the commencement of this suit on January 18, 1886. It is a general rule that, when a party stands in a position that he can enforce a claim by action at law, the statute at that time attaches and begins to run thereon; or, in other words, limitation or prescription does not begin to run until the creditor has a perfect right to prosecute his demand. In this case, therefore, it is essential to sustain this verdict to show that the decedent recognized the right of the plaintiff to compensation, and promised to make it at a future time—that is, at his death—to which she assented. If there was an agreement relating to the time of the promisor's death, then the right of action was suspended until that time, and the statute would not run until the breach occurred. *Tuckey* v. *Hawkins,* 56 E. C. L. 655; *Wittersheim* v. *Carlisle,* 1 H. Bl. 631; *Fenton* v. *Emblers,* 1 W. Bl. 353.

This inquiry in the trial was limited by the court's order striking out the defense, so that testimony or inquiry with relation to the actual agreement, if any there were, was barred to the defendant who is not the individual, who entered into the contract, but a representative performing his duty in attempting to preserve the assets of the estate and to see that the proper persons in law and conscience received, first, the moneys due them as creditors and, secondly, the moneys due them by virtue of their relationship to the decedent. With this defense struck out, the defendant was unable to carry on the inquiry.

It is very significant that the plaintiffs should abandon their cause of action as set forth under the first count of their complaint (S. C. p. 6) wherein they alleged that the decedent promised that he would leave all the money he had in the bank to the plaintiffs in consideration of their promise to board and care and attend him during his lifetime.

The Answer did not contain the defense of the statute of limitations to the first count but did contain this defense (which was struck out by the order complained of) with relation to the second count which pleaded a straight contract without any provision for payment upon the condition being performed, namely, the death of the defendant's decedent.

We are dealing here with a personal representative who has no knowledge or information concerning the transactions had with the plaintiffs by the decedent who must be given every fair advantage that the law will allow to protect the estate from unfounded claims.

Our Legislature has even thrown barriers in the way of claimants by preventing them and making them incompetent from testifying concerning

transactions had with the decedent unless the administrator first takes the witness stand and testifies.

The cases in our reports are legion with the reasons for these impediments, one of them being to equal the balance of justice so that where the decedent is prevented, by death, from denying, the other party to the transaction will be stopped from assenting.

The statute of limitations is a very vital and important defense in all cases and especially so in cases of this type and a defendant administrator should not be foreclosed of taking advantage of such defense especially where the complaint permits him and, therefore, the defense of the statute of limitations was not frivolous.

Our courts have said that a frivolous defense is one that is invalid in law. The notice of motion and the court's order did not allege that the said defense was sham but both were founded upon the grounds that the said defense was frivolous.

The court could look only to the complaint and the defense to determine if it was frivolous.

Obviously, on November 10, 1933, there being nothing before the court but the pleadings, the court erred in striking out the said defense of the statute of limitations.

Was this action prejudicial to defendant? The answer can be nothing but "Yes". If the defense was permitted to stand as in law it should have been permitted to stand, the plaintiff's proof and limit to damages, if any they were entitled to, would have been governed by the said defense. But, inasmuch as the said defense was struck out, the plaintiffs were permitted to claim for a period of approximately nine years instead of six years, which was wholly improper under the circumstances existing at that time.

It is, therefore, respectfully submitted that the judgment should be set aside and a new trial granted for the reason that the trial court erred in striking out the defense to the second count, setting forth the statute of limitations, and that said error was prejudicial to the defendant.

POINT II.

That the Court erred in refusing to grant the defendant's motion for a nonsuit.

This court, in the case of *Disbrow* v. *Durand*, 54 N. J. L. 343; 24 Atl. 545, held:

> "Ordinarily where services are rendered and voluntarily accepted, the court will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication, from the mere rendition and acceptance of the services. In order to recover for the services, *the plaintiff must affirmatively show, either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation.*" (italics ours)

This court further held:

> "The family relation contemplated in this exception to the ordinary rule is not limited merely by propinquity or kindred. Where there is a household relation, it will embrace, *not only remote kindred, but also those who stand in the place of kindred.*" (italics ours.)

In the case at bar, the facts proved by the plaintiffs were as follows: That for some time prior to January 1924, Blumetti and his wife resided with the plaintiffs; Mrs. Blumetti was a sister of Mrs. Quertorolo, the plaintiff; that they all lived together in the same apartment. During this time Mr. Blumetti paid the Quertorolos $10.00 per week for the board and lodging *of his wife and himself.*

On the death of Mrs. Blumetti, Mr. Blumetti continued to live with the plaintiffs and the only testimony in the case with relation to the arrangement between the parties is from both Mr. Lapolla and Mr. Santamario. Their Testimony is that within a month or so after Mrs. Blumetti's death, Mr. Blumetti said: "I will not pay board any more" or that he said, "I will not pay the $10.00 a week any more."

These statements were testified as having been made to the respective witnesses but not as having been made to the plaintiffs nor that the plaintiffs had any agreement with the decedent or *vice versa* that the decedent would pay them the reasonable value of their services or that he would leave them the money upon his death.

There was no proof in the entire case that an express contract for the remuneration existed, namely, that there was a meeting of the minds; that there was an offer on the part of one of the parties and an acceptance on the part of the other or that the plaintiffs, relying upon such promise, performed the services in such reliance. On the contrary, the case is totally bare of any such testimony. The testimony indicates a mere probable intent on the part of the decedent in appreciation of the kindness rendered to him that he may leave something to the plaintiffs.

The testimony at its best, merely indicates that

the plaintiffs performed their services relying solely upon the decedent's generosity, or expectation of being rewarded by a gift or legacy. They never did demand nor did they ask for nor agree upon any wages for any services.

It has been held in the case of *Davidson* v. *Davidson,* 13 N. J. Eq. 246; that where one performs work for another, relying solely upon his generosity in expectation of being rewarded by a gift or legacy, wages are not demandable in an action at law for the value thereof if the party benefited dies without making such a provision.

Our Supreme Court, in the case of *Heinz* v. *Jacobi,* 76 N. J. L. 189; 68 Atl. 1069, held that:

> "The law does not imply a promise between near relatives and members of the same family to pay for board; and, in the absence of an *express promise to pay,* or proof that payment was *mutually expected to be made,* the presumption is that it was gratuitous." (italics ours)

The said court reversed a judgment in favor of the plaintiff and against the executors. The plaintiff was the son-in-law of the decedent, said decedent living with them as a member of the household. In that case it was held that there was no proof of an express agreement or a mutual understanding, the same as in the case at bar.

The case is totally barren and void of such facts, namely, that the decedent agreed with the plaintiffs or understood that the plaintiffs were to be paid wages for their services.

On the contrary, Exhibit P-3 (S. C., pp. 59 to 60) clearly shows that the decedent withdrew $450 in January of 1927 and varied amounts whereby he depleted his savings account from

$3500 to $2400 over a period of seven years. Surely, this money must have gone as contributions towards the maintenance of the common household which was occupied by the plaintiffs and the decedent.

It is, therefore, respectfully submitted that the court erred in refusing the defendant's motion for a nonsuit.

POINT III.

That the Court erred in refusing to direct a verdict in favor of the defendant.

Immediately after the court's refusal to grant a nonsuit, defendant rested without interposing any testimony and moved for a verdict in favor of the defendant upon the same grounds urged upon the motion for a nonsuit. This motion was denied and the case was submitted to the jury. For the same reasons urged under the motion for a nonsuit, defendant contends that the court erred in denying the motion for a directed verdict, namely, the plaintiffs' failed to prove a cause of action as set forth in the second count of the complaint; they also failed to prove an offer and acceptance or a meeting of the minds or a contract between the deceased and the plaintiffs. Also, they failed to prove a mutual understanding that the services rendered by the plaintiffs were to be paid for by the decedent and further that the only proof interposed by the plaintiffs showed that they took care of the said decedent, a relative, a member of the household, on the mere expectation and hope that he may leave them something and, finally, they failed to prove that they were entitled to a judgment.

The facts were uncontradicted and uncontroverted as introduced by the plaintiffs and were totally barren of any proof which would entitle them to collect on a quantum meruit inasmuch as they failed to prove that the deceased agreed to compensate them the reasonable value of their services, or, that the deceased agreed to compensate them at all *for such services*, or that the deceased accepted the services from the plaintiffs *knowing that the said services were being charged for and that the plaintiffs expected payment for the same, and that said services were accepted by the deceased with the express understanding that he would pay for them.*

On the contrary, the proofs show unequivocally, from plaintiff's own witnesses, that the decedent expressly stated that he would not pay board and lodging any more for further services rendered to him.

And it is, therefore, submited that the court erred in denying the defendant's motion for a directed verdict, having in mind the issues under which the cause was tried before the court.

The court was probably confused on the issues as contained in the first count and those contained in the second count of the complaint and as soon as plaintiffs' counsel withdrew the first count, they withdrew the consideration of the trial court from said cause of action, leaving only the second count, and the motion for nonsuit and for directed verdict were both based upon the second count and the defense of the statute of limitations was interposed to the second count.

Conclusion.

It is, therefore, respectfully submitted that the judgment in the above entitled cause should be reversed and a new trial granted for the reasons that:

1. The court erred, prejudicially to the defendant, in striking out the defense of the statute of limitations as addressed to the second count;

2. The court erred in refusing to nonsuit the plaintiffs on the cause of action as set forth in the second count; and,

3. The court erred in refusing to direct a verdict in favor of the defendant upon the cause of action as set forth in the second count.

Respectfully submitted,

T. MANCUSI-UNGARO,
Attorney for Appellant.

HERBERT A. KUVIN,
Of Counsel.

A

N

S

A

T
y
Q
3

J
a
b
y
l.

S
h
w
o
c

n

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

SAVERIO QUERTOROLO (also known as Saverio Quartarillo), *et al.*, *Plaintiffs-Respondents*, *vs.* ANTONIO GALLERANO, Administrator of the Estate of Tony Blumetti, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the Supreme Court, Union County.*

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS.

Statement.

Previous to the death of his wife, Christine, Tony Blumetti and his wife boarded for many years with the plaintiffs, Saverio and Mary Quertorolo, and paid board (Case, p. 30, l. 31; p. 34, l. 9; p. 51, l. 7).

Christine, a sister of Mary Quertorolo, died January 26, 1924 (Case, p. 55, l. 39), and thereafter her husband, Tony Blumetti, continued to board with the plaintiffs until his death nine years later, on January 31st, 1933 (Case, p. 58, l. 5).

Tony Blumetti had been an employee of the Standard Oil Company. He had no children. He had no near relatives. After the death of his wife he became totally incapacitated, and for six or seven years was virtually an invalid, requiring constant care and nursing.

From the death of his wife until his own death no payments were made by Tony Blumetti for

board, or for care and nursing, but he repeatedly stated to mutual friends that everything he had was to go to plaintiffs. He died possessed of a bank account with Mutual Savings Fund Harmonia amounting, at the time of his death, to, $2,607.63 (Case, p. 60, l. 34), and a few shares of Standard Oil stock (Case, p. 25, l. 37).

Cross examination of Lapola:

> Q Right after she died Mr. Blumetti told Mrs. Quertorolo and Mr. Quertorolo that he was going to leave all the money that he has got in the bank to Mrs. Quertorolo, and the Standard Oil Company stock? A Yes.
>
> Q Is that right? A That is right (Case, p. 26, l. 6).

Cross examination of Santa Maria:

> Q That he will not pay any more the ten dollars a week board, but that he will leave the money to both Mr. and Mrs. Quertorolo together? Where was he? A On Harmonia Bank.
>
> Q In the bank? A Yes. Stock and money (Case, p. 34, l. 9).

Tony died intestate.

This suit was begun by Saverio Quertorolo as the sole plaintiff under the authority of *Peterson* v. *Christianson*, 68 N. J. L. 392; *Stevenson* v. *Akarman*, 83 N. J. L. 458; *Wooster* v. *Eagan*, 88 N. J. L. 687; and *Kleinert* v. *Hutchinson*, 98 N. J. L. 831.

The complaint states two counts—one on an express contract, and one on an implied contract on a *quantum meruit*.

At the trial, after the introduction of considerable testimony, defendant's counsel insisted that plaintiff's counsel should elect to rest upon one or the other of these counts, and he elected to stand on the second count. Defendant's coun-

sel also strenuously argued that plaintiff's wife should be made a co-plaintiff. Without conceding the *right* of defendant to make this demand counsel for plaintiff consented to add Mary Quertorolo, the plaintiff's wife, as co-plaintiff, and this was done (Case, p. 46, l. 30).

A more detailed statement will be found in the clear and concise charge of the trial judge (Case, p. 48).

POINT I.

Defendant's defense to the second count that the claim was barred by the Statute of Limitations was frivolous, and was properly struck out.

As plaintiffs elected to stand on the second count it is unnecessary to argue matters affecting only the first count.

The allegation in the complaint was that "in consideration that plaintiff, with the help of his said wife, should board and care for said Tony Blumetti *during his life-time* said Tony Blumetti promised that he would pay plaintiff the reasonable value of his services and the services of his said wife."

There was no agreement that such services should be paid for if not continued throughout the "life-time" of Blumetti. It was a continuing contract which could not be sued upon until completed. It was never in the contemplation of the parties that, when services sufficient to absorb Blumetti's funds should have been furnished, he could be compelled to pay over to plaintiffs his entire estate, and then be turned, penniless and ill, into the street. The plaintiffs took the chance of an unprofitable bargain—and so it turned out. The estate is insolvent and will

pay only about one-half the amount of the judgment.

A cause of action for the agreed consideration arose only when the consideration became due and payable upon the death of Blumetti on January 31, 1933. The statute of limitations does not apply.

POINT II.

Plaintiffs proved services performed and accepted, promises to pay, and that no payments had been made. The denial of the motion for a non-suit was proper.

The testimony for the plaintiffs under this point was full, complete, and uncontradicted.

Examination of Gaedcke, a clerk in Mutual Savings Fund Harmonia. Shown a signature card, taken from the bank files, with a memorandum thereon:

> Q Who made that memorandum? A Myself.
>
> Q When did you make it? A At the time the account was opened.
>
> Q Is that in your own handwriting? A It is.
>
> Q Did Mr. Tony Blumetti tell you anything which you made a memorandum of? A Yes.
>
> Q Tell us what he said to you and that you made a memorandum of? A He wanted the money to be given to his sister, Mary Quertorolo at his death.
>
> Q And this memorandum was made by you? A Yes.
>
> Q Can you tell us by looking at this memorandum when he made that statement to you? A March 10, 1924 (Case, p. 27, l. 11).

Testimony of Lapola:

Q Who took care of him? (Mr. Blumetti.) A Mrs. Quertorolo, she done washing, cooking, paid everything, ironing (Case, p. 22, l. 27).

Testimony of Santa Maria:

Q How often did you see him during the week? A Well, I can see every week if I wanted, Saturday night and Sunday, he was sick, I go and visit him on Sunday night or Sunday afternoon.

Q Did you ever have a talk to him before he died? A Was couple of weeks ago he die, he says, "poor me, I am very sick," he says, "if I don't have my sister-in-law in here I would have died long ago." He said "she takes care of me, anything I want, washing, cooking, ironing, anything I need." He said "I am satisfied" (Case, p. 31, l. 12).

Q Now, tell us what he said then? A Well, he says, "I won't pay no more board no more because I got all my money in that bank, and the stock." He says, "What good is it to pay the money myself?" He said, "Maybe tomorrow die, or after tomorrow die." He said, "You are going to get that money in the bank because you have got your name on the book. Mrs. Quartorolo and Mr. Quartorolo. Nobody else, only the husband and wife."

Q And since then did Mr. and Mrs. Quartorolo board that man? A Yes.

Q Give him lodging? A Yes.

Q Do everything they can? A Do everything, that poor woman over there (Case, p. 32, l. 33).

Testimony of Katie Loprete:

Q During the ten years how often did you visit the home of Mrs. Quartorolo? A Every time going, every day, two days.

Q What if anything did you see Mrs. Quartorolo do for this man? A Do everything. Because he is bad sick. Got asthma,

> and this lady doing everything. Nobody going do something.
>
> Q Was Mr. Blumetti a sick man? A Sure sick man (Case, p. 38, l. 37).

Tony Blumetti was not a relative. Christine Blumetti was a sister of Mary Quertorolo, but even during the life of Christine board was paid (Case, p. 51, l. 7); there was no occasion for any change after the death of Christine had severed the blood relationship—quite the contrary.

Exhibit P. 3, showing the account with Mutual Savings Fund Harmonia, is very significant.

Except for interest and dividends there were no deposits after the year 1926 except two deposits amounting to $105.00 in 1927, and a deposit of $475.00 in January, 1928. It may fairly be assumed that this last deposit was a bonus or pension payment by the Standard Oil Company.

The reduction in deposits was doubtless due to Blumetti's increasing incapacity for work.

The withdrawal of $450.00 in January, 1927 may have been for bills incurred at the two hospitals he was in.

Testimony of Lapola:

> Q Do you remember when Mr. Blumetti was sick in bed? A Yes. I was going over to see him in the hospital. He was at Alexian Brothers, at the General, and I come over to visit him pretty near every week (Case, p. 22, l. 34).

From the date of the first deposit in March, 1924, to January, 1927, there were no withdrawals, and the subsequent withdrawals were for varying amounts and at irregular intervals. In no year were they so large that they cannot

be accounted for as needed for doctor's bills, medicines, clothing, and personal incidentals. The $300.00 withdrawn in 1933 was after his death, and for administration expenses.

POINT III.

The only verdict which could have been directed was a verdict for the plaintiffs on the issue of liability, leaving it to the jury to determine the amount of the verdict.

Two issues of fact were raised by the pleadings: was defendant liable? if so, for how much.

There was no contradiction of plaintiffs' testimony as to liability, and the jury could not have found otherwise than as they did on that issue. The services agreed to be performed were performed, and were continuous from the death of Tony's wife to the date of his own death nine years later; the services were not paid for by decedent; decedent promised to pay. As to the value of the services the jury had sufficient testimony to support the verdict, and, in addition, had their own experience to draw upon as to the weight of the testimony. As the estate is insolvent the plaintiffs are unlikely to actually receive more than the equivalent of about $5 per week.

> "When he (Mr. Blumetti) quit (work) he was very sick" (Case, p. 30, l. 23).
>
> "He is bad sick. Got asthma. * * * Sure sick man" (Case, p. 39, l. 4).
>
> Mrs. Quertorolo "used to wash and iron, and wash the bed room, and cook, and sew" (Case, p. 38, l. 13).
>
> Mrs. Quertorolo was "everything doing (for Mr. Blumetti) because bad sick and can't do nothing" (Case, p. 39, l. 12).

The witness Lapola was partially paralyzed (Case, p. 25, l. 10), and had boarded with plaintiffs for several years. He paid $10.00 per week for board, lodging and care (Case, p. 24, l. 30).

The testimony for the plaintiffs was complete, credible, and uncontradicted. It is a *fact* case. The judgment should be affirmed with costs.

Respectfully submitted,

BENJAMIN GORDON,
Attorney of Plaintiffs-Respondents.

INDEX.