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New Jersey Supreme Court

Notice of Appeal.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

ANNIE PEPOON,
Petitioner-Respondent,

vs.

SAMUEL RACHELS,
Respondent-Appellant.

To Annie R. Pepoon, Petitioner, and Jacob I. Jaffe, Attorney of Petitioner:

Take notice, that the respondent hereby appeals to the Court of Common Pleas of the County of Passaic, from all of the judgment rendered herein by Harry J. Goas, Deputy Commissioner of the Workmen's Compensation Bureau, which judgment is dated November 2nd, 1925.

Dated November 12th, 1925.

Yours respectfully,

FRANK G. TURNER,
Attorney of Respondent-Appellant.

New Jersey State Library

Order Fixing Day.

PASSAIC COUNTY COURT OF COMMON PLEAS

ANNIE PEPOON,
Petitioner,

vs.

SAMUEL RACHELS,
Respondent.

It is on this Twenty-seventh day of November, One Thousand Nine Hundred and Twenty-five, Ordered, that the hearing of the appeal herein be and the same is hereby fixed for Tenth day of December, One Thousand Nine Hundred and Twenty-five, at 10 A. M. at the Court House, Paterson, New Jersey.

JAS. A. DELANEY,
Judge.

Writ of Certiorari.

New Jersey, ss:

(Seal)

The State of New Jersey to the Clerk of the Court of Common Pleas, in and for the County of Passaic, in the State of New Jersey, and the Judge of said Court; and the Secretary of the Workmen's Compensation Bureau of New Jersey; and Harry J. Goas, Deputy Commissioner of Labor of the Workmen's Compensation Bureau of the State of New Jersey, GREETINGS:

We being willing, for certain reasons, to be certified of and concerning certain proceedings taken by Harry J. Goas, Deputy Commissioner of the Workmen's Compensation Bureau of New Jersey; the Workmen's Compensation Bureau of New Jersey; and the Passaic County Court of Common Pleas in and for the County of Passaic in the State of New Jersey, for the determining and awarding of compensation, counsel fees and other allowances to Annie R. Pepoon for the death of Robert Pepoon alleged to have been sustained while he was in the course and scope of his employment as an employee of Samuel Rachels, and the Determination and Order made by said Harry J. Goas and the Determination and Order affirming the judgment and dismissing the appeal made by the Judge of the Passaic Common Pleas, which said respective determinations and orders have been filed with the Clerk of the Court of Common Pleas in and for the County of Passaic and State of New Jersey; do command you that

Return

said proceedings, together with all matters touching and concerning the same as fully as before you, they remain or are in your custody or control, you do certify and send, together with this Writ, to our Justices of our Supreme Court of Judicature at Trenton, on the 31st day of July, One Thousand Nine Hundred and Twenty-six, that therein may be done what of right and according to law ought to be done.

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court at Trenton, aforesaid, this 12th day of July, One Thousand Nine Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

FRANK G. TURNER,
Attorney.

Endorsed on cover:

ALLOCATUR

This Writ is allowed this third day of July, 1926. Let it be sealed.

CHARLES C. BLACK,
C. J., S. C.

Return.

The return of the Court of Common Pleas of the County of Passaic to the Writ of Certiorari of our Supreme Court of Judicature of the State of New Jersey.

Dependent's Claim Petition for Compensation.

ANNIE PEPOON, Petitioner, vs. SAMUEL RACHELS, Respondent.	Claim Petition No.

March 18th, 1925.

(Stamped): Mar 26 1925

Attorney for Petitioner Jacob I. Jaffe, 625 Main Ave., Passaic, N. J. (Address)

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent? Robert Louis Pepoon.

2. Where did decedent live? 68 Henry Street, Passaic, N. J. (Street Address) (City or Town)

3. Sex of decedent. Male. 4. Date of birth of decedent April 18th, 1899.
(Day, month and year)

5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Annie R. Pepoon	55	May 24, 1870	mother
Catherine Pepoon	21	May 2, 1904	sister
Bernard D. Pepoon	15	Dec. 5, 1910	brother
Anna Pepoon	13	Aug. 13, 1912	sister

6. By whom was decedent employed at the time of accident? (Give name and business address) Samuel Rachels,
(Name)
34½ Howe Avenue,
(Street Address)
Passaic, New Jersey.
(City or Town)

7. What was the business of the employer? Newspaper distributor.

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did he receive such notice from the employer? No.

10. Did the employer have knowledge of this accident? Yes.

11. Did you notify the employer of this accident? Yes.

12. If so, on what date? March 15th, 1925.

13. Have you made claim to the employer for compensation? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Driver of truck and attended to cartage and delivery of papers.

15. When did the accident happen? March 15th, 1925, at 2 A. M.
(State month, day, year and hour)

16. Where did the accident happen? Paterson Plank Road, East Rutherford, N. J.

17. What was the nature of the accident, and how did it happen? Deceased was driving south on Paterson Plank Road toward Hoboken on right side of road and car coming in opposite direction and wrong side of road, struck auto which deceased was driving. After collision decedent lost control of car, and car struck telegraph pole. Decedent was taken to Passaic General Hospital where he died Tuesday, March 17th, 1925, at 5 A. M.

18. Did deceased work any after the accident? No.

19. If so, give date he was compelled to stop work.

20. Give date of death. March 17th, 1925, 5 A. M.

21. Were his wages fixed by piece work?

22. If so, what was his average weekly wage?

23. If wages were fixed by the hour, state rate per hour.

24. Give number of hours in an ordinary working day.

25. Give number of days in an ordinary working week. Seven days.

26. State the amount of weekly wages. $30.00.

27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.

28. Has the employer promised to pay you any compensation? No.

29. If so, how much?

30. Was medical aid required? Yes.

31. If so, was this service furnished by the employer? No.

32. What other sum did you expend for medical, surgical or hospital service?

33. Give name and address of physician and hospital. Doctors M. Joseph, Leo H. Joyce, J. H. Carlisle, and Dr. Hilling at Passaic General Hospital.

34. What other facts are there which you believe important?

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes.

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

ANNIE R. PEPOON,
(Petitioner)
68 Henry Street, Passaic, N. J.
(Address)

State of New Jersey, }
County of Passaic. } ss:

Annie R. Pepoon, of full age, being duly sworn according to law, on her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of her knowledge and belief.

ANNIE R. PEPOON.
(Petitioner)

Subscribed and sworn to before me,
this 19th day of March, 1926,
at Passaic,
Jacob I. Jaffe,
A Master in Chancery of N. J.

Dependent's Claim Petition for Compensation

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within seven days from the date of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU
W. E. Stubbs,
Secretary.

Respondent's Answer to Dependent's Claim Petition.

Annie Pepoon, Petitioner, vs. Samuel Rachels, Respondent.	Claim Petition No. 2784.

Attorney for Respondent, Frank G. Turner, 76 Montgomery St., Jersey City, N. J.
(Address)

In answer to Claim Petition filed in this cause:

1. What was decedent's name? Robert Louis Pepoon.

2. Where did decedent reside? 68 Henry Street, Passaic, N. J.
(Street Address) (City or Town)

5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify. No knowledge. Proof is required.

6. Was the decedent in your employ at the time of the accident? Yes.

7. State your business. Newspaper distributor.

8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did you give such notice to him? No.

Respondent's Answer to Dependent's Claim Petition

10. When did you first have knowledge of this accident? March 15, 1925.

11. Did you receive notice of this accident from the Petitioner? No.

12. If so, on what date? No.

13. Has any claim for compensation been made? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Driver.

15. When did the accident happen? March 15, 1925.

(State month, day, year and hour)

16. Where did the accident happen? No knowledge.

17. What was the nature of the accident, and how did it happen? Respondent was not present at accident. Respondent has no knowledge that accident arose out of and in the course of employment.

18. Did the decedent work any after the accident? No.

19. If so, give date he stopped work? No.

20. Give date of death. March 20, 1925.

21. Were his wages fixed by piece-work? No.

22. If so, what was his average weekly wage? $30.

Respondent's Answer to Dependent's Claim Petition

23. If wages were fixed by the hour, state rate per hour.

24. Give number of hours in an ordinary working day.

25. Give number of days in an ordinary working week.

26. State the amount of weekly wages.

27. How much have you paid as compensation (not medical aid) since the accident? None.

28. Have you promised to pay compensation? No.

29. If so, how much? Nothing.

30. Was medical aid required? Yes.

31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness?

32. Between what dates was service rendered?

33. Give name and address of physician and hospital rendering service at your direction?

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion. Respondent was not present at accident. Respondent has no knowledge that accident arose out of and in the course of employment.

SAMUEL RACHLES,
(Respondent)
34½ Howe Ave., Passaic, N. J.
(Address)

Respondent's Answer to Dependent's Claim Petition

State of New Jersey, }
County of Passaic. } ss:

Samuel Rachels, of full age, being duly sworn according to law, on his oath deposes and says: That he is the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

SAMUEL RACHLES.
(Respondent)

Subscribed and sworn to before me,
this 6th day of May, 1925,
at Passaic, N. J.
Victor J. Kantor.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Finding of Facts and Determination.
On Petition for Compensation.

NEW JERSEY DEPARTMENT OF LABOR

WORKMAN'S COMPENSATION BUREAU

ANNIE R. PEPOON, Petitioner, and SAMUEL RACHELS, Respondent.	On Petition for Compensation.

The above matter coming on for hearing, and having been submitted to me for decision, I hereby find and determine as follows:

1. That this is a proceeding brought by Annie R. Pepoon and against the above named Samuel Rachels, under an act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing and elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplemental thereto; that a petition was filed on the 26th day of March, 1925, that an order was made setting the same down for hearing for the 8th day of May, 1925, that process was served upon the respondent on or about the 3d day of April, 1925, that answer of the respondent was filed on the day of , 1925, that the case came on for hear-

ing on the 8th day of May, 1925, and was continued from time to time, which hearings were held in the presence of Jacob I. Jaffe, Attorney of the petitioner and Frank G. Turner for respondent, on which days both parties produced witnesses who were examined in the presence of said counsel.

2. That Robert Pepoon, son of the petitioner, was employed by the respondent as a truck driver on or about the 15th day of March, 1924, and that he continued in such employment up to the 15th day of March, 1925, that his duties consisted of going to the various railroad depots and handling newspapers at said depots for the respondent, and delivering the said newspapers among the several routes to the customers of the said respondent.

3. That the son of the petitioner at the time of the injuries received for his services wages amounting to Thirty ($30.00) Dollars per week.

4. That on the 15th day of March, 1925, Robert Pepoon, the son of petitioner was engaged in the capacity above mentioned, and his duties, as testified to by this respondent, were to go to the depot of the Delaware, Lackawanna & Western Railroad at Hoboken, New Jersey, and there handle newspapers for delivery on the truck operated by the respondent.

5. That on said date the said Robert Pepoon made arrangements with the respondent to leave for Hoboken at an hour, later than the usual time and did arrive at Hoboken by a conveyance other

than the truck operated by the respondent. The respondent's testimony on that point was that the deceased had an errand to do in Passaic and would be detained, and the respondent consented to the arrangement and stated that as long as he, Robert Pepoon, de'd would get there in time to handle the papers, it would be satisfactory.

The testimony of the respondent was that in getting to Hoboken the usual route taken by his drivers was the Paterson Plank Road in East Rutherford and then south into Hoboken. On the night of the accident the deceased procured an automobile belonging to a friend and proceeded along Paterson Plank Road and at a certain point he engaged another friend and made arrangements with him to drive this automobile back from Hoboken to Passaic.

He met this friend on Paterson Plank Road enroute to Hoboken. The testimony was that after proceeding some distance from where he met his friend along Paterson Plank Road, a truck or automobile came in the opposite direction and forced the car in which the deceased and his friend were riding off the road and into a telegraph pole, causing the car to turn over and throwing the deceased into a ditch, as a result of which injuries received, the deceased died forty-eight hours afterwards.

There is no doubt that if the accident had occurred while Robert Pepoon was on his personal errand that no recovery could be had. If the accident had happened on a road to which Robert

Pepoon could have deviated on his private business, then no recovery could be had in that instance, for compensation. But in view of the fact that testimony was adduced that the deceased was proceeding on the usual route employed by the respondent's drivers, and in view of the fact that arrangements had been made to bring the automobile back from Hoboken by the witness who was with the deceased at the time of the accident, there can be no doubt that the deceased was engaged in his usual and general duties for which he was employed by the respondent.

This accident occurred while the deceased was carrying out the duties of the respondent, and since the accident arose out of and in the course of employment, the respondent is, therefore, liable to the dependents, of the deceased for compensation in accordance with law. On this night he was on his way to Hoboken in an automobile instead of a truck and at a later hour by special arrangement made previously with his employer. He was accordingly engaged in the work of his employer, and since the accident might well have occurred earlier in the evening while in the truck of the respondent no prejudice is shown. The respondent, by acquiescing in this arrangement, tacitly assumed any additional hazards if there were any.

In the case of *Kilaszynski v. Klie,* 102 Atl., page 5, the Court was confronted with the question as to whether or not a employee was entitled to compensation where she had disobeyed instructions as to the manner of doing her work. In that case

the employee used wood alcohol to assist her at lighting a fire, although she was instructed never to use kerosene or anything like that, and the court said "it was a fortuitous event, which might indeed be expected but might never happen. We must conclude that it arose out of and in the course of employment unless the disobedience of orders prevents that conclusion. The disobedience of orders in this case was a disobedience of orders as to the way in which the work should be done. The work itself was the very work decedent was expected to do. It was done at the very place where it was meant to be done." So in the case at bar the decedent was expected to drive along this particular route in order to reach his destination where he was to unload papers. In the case at bar the decedent followed the instructions of the employer and this case makes out a stronger case for the dependents than the case of *Kolaszynski v. Klie.*

6. That the petitioner incurred expenses for medical services and for burial of the said Robert Pepoon amounting to Two Hundred ($200.00) Dollars, of which amount $150.00 represents the alowance made by law for funeral expenses.

7. I find therefore, that the petitioner is entitled to compensation for a period of three hundred (300) weeks and I find further that the petitioner, Annie R. Pepoon is entitled to eighty-six (86) weeks compensation at a rate of Thirteen Dollars and Fifty ($13.50) cents per week from March, 18th, 1925, to December 5th, 1926, which period covers the period of dependency of the

dependents, Bernard D. Pepoon and Anna Pepoon, and that from and after December 5th, 1926, petitioner, Anna R. Pepoon is entitled to compensation of eighty-five (85) weeks at the rate of Twelve ($12.00) Dollars per week from the said 5th day of December, 1926, to the 13th day of August, 1928, which said period covers the period of dependency of the dependents, the petitioner, Annie R. Pepoon and the dependent, Anna Pepoon, and from and after the said 13th day of August, 1928, the petitioner is entitled to compensation for a period of One Hundred twenty-nine (129) weeks at the rate of ten ($10.00) Dollars and Fifty cents per week.

8. The legal adviser of the petitioner is entitled to compensation to be determined as hereafter provided in addition to his costs allowed by law in the sum of Forty-three ($43.00) Dollars representing stenographer's fees to be paid in the following manner, that is to say,

9. Costs will be allowed the petitioner. It is, therefore, on this 2d day of November, 1925, ORDERED, that judgment finally be entered in favor of the petitioner, Annie R. Pepoon, and against the respondent, Samuel Rachels, in the sum of Thirty-five hundred Dollars ($3500.00) and Fifty Cents, for a period of three hundred (300) weeks, beginning with the 18th day of March, 1925, payable as follows:

The sum of Three Hundred Ninety-one Dollars and Fifty ($391.50) cents, being compensation from March 18th, 1925 to October 26th, 1925, shall be paid forthwith.

The sum of Twelve ($12.00) Dollars commencing the 5th day of December, 1926, up to and including August 13th, 1926, and from and after the said 13th day of August 1928 the sum of Ten Dollars and Fifty ($10.50) cents per week for a period of one hundred twenty-nine (129) weeks from said date.

It is further ORDERED that the said Respondent pay to petitioner forthwith funeral expenses in the sum of One Hundred and Fifty ($150) Dollars.

The Attorney fee will be disposed of later by a supplemental Determination and Order.

HARRY J. GOAS,
Referee.
Deputy Commissioner.

Finding of Facts and Determination on Appeal.

PASSAIC COUNTY COURT OF COMMON PLEAS

ANNIE R. PEPOON, Petitioner-Appellee, vs. SAMUEL RACHELS, Respondent-Appellant.	On Appeal

The above matter coming on for hearing and having been submitted to me for decision, I hereby find and determine as follows:

1. That this is a proceeding brought by Annie R. Pepoon, mother of Robert Pepoon, and employee of the respondent-appellant, for herself and two minor children against Samuel Rachels, respondent-appellant, under an act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplemental thereto; that a petition was filed with the Workmen's Compensation Bureau on the 26th day of March, 1925, and that a copy of said petition was served upon the Respondent on the 3d, day of April, 1925, at Passaic; that answer was filed with said Bureau on

or about the 14th day of April, 1925, that due notice of hearing of said petition and answer was given to the Respondent; and that hearing was had and the following award was made by the Workmen's Compensation Bureau:

That compensation be allowed the petitioner, Annie R. Pepoon, for a period of three hundred (300) weeks, which was reported by a Deputy Commissioner of Labor, to be divided as follows:

That the petitioner, Annie R. Pepoon is entitled to compensation at the rate of Thirteen Dollars and Fifty ($13.50) cents to December 5th, 1926, which covers the period of dependency of the dependent, Bernard D. Pepoon, brother of the decedent and Anna Pepoon a sister of the decedent; and that from and after December 5th, 1926, the petitioner, Annie Pepoon be awarded compensation for a period of eighty-five (85) weeks at the rate of Twelve ($12) Dollars per week, to the 13th day of August, 1928, which covers the period of dependency of the petitioner, and Anna Pepoon, a sister of the decedent, and from and after the said 13th day of August, 1928, the petitioner is entitled to compensation for a period of One Hundred and twenty-nine (129) weeks at the rate of Ten Dollars and Fifty ($10.50) cents per week; and that the Respondent further pay to the petitioner the sum of One Hundred and Fifty ($150) Dollars funeral expenses, Five Hundred ($500.-00) Dollars Counsel fee, and Forty-three ($43.00) Dollars for stenographer's fees; that notice of appeal was filed with the secretary of said Workmen's Compensation Bureau on or about the 12th

day of November, 1925, and with the County Clerk of Passaic County on or about the 13th day of November, 1925, that order fixing time and place for hearing was served on the petitioner on the 4th day of December, 1926; that transcript of the record of the Workmen's Compensation Bureau was filed on the 4th day of December, 1925, at which time counsel for respective parties agreed that the appeal be based upon the transcript of the record submitted to the Court, and that thereupon an order was made that briefs be submitted by counsel for the respective parties on or before the 22d day of December, 1925.

2. That Robert Pepoon, son of the petitioner, was employed by the respondent-appellant as a truck driver on or about the 15th day of March, 1924, and that he continued in such employment up to the 15th day of March, 1925, that his duties consisted of going to the various railroad depots and handling newspapers at said depots for the respondent-appellant and delivering the said newspapers among the several routes to the customers of the said respondent-appellant.

3. That the son of the petitioner at the time of the injuries, received for his services wages amounting to Thirty ($30.00) Dollars per week.

4. That on the 15th day of March, 1925, Robert Pepoon, the son of petitioner was engaged in the capacity above mentioned and his duties, as testified to by the respondent-appellant were to go to the depot of the Delaware, Lackawanna & Western Railroad at Hoboken, New Jersey, and there handle newspapers for delivery on the truck operated by the respondent-appellant.

5. That on said date the said Robert Pepoon made arrangements with the respondent-appellant to leave for Hoboken at an hour, later than the usual time and did arrive at Hoboken by a conveyance other than the truck operated by the respondent-appellant. The respondent-appellant's testimony on that point was that the deceased had an errand to do in Passaic and would be detained, and the respondent-appellant consented to the arrangement and stated that as long as he, Robert Pepoon, deceased would get there in time to handle the papers, it would be satisfactory.

The testimony of the respondent was that in getting to Hoboken the usual route taken by his drivers was the Paterson Plank Road in East Rutherford and then south into Hoboken. On the night of the accident the deceased procured an automobile belonging to a friend and proceeded along Paterson Plank Road and at a certain point he engaged another friend and made arrangements with him to drive this automobile back from Hoboken to Passaic.

He met this friend on Paterson Plank Road enroute to Hoboken. The testimony was that after proceeding some distance from where he met his friend and along Paterson Plank Road, a truck or automobile came in the opposite direction and forced the car in which the deceased and his friend were riding off the road and into a telegraph pole, causing the car to turn over and throwing the deceased into a ditch, as a result of which injuries received, the deceased died forty-eight hours afterwards.

There is no doubt that if the accident had occurred while Robert Pepoon was on his personal errand that no recovery could be had. If the accident had happened on a road to which Robert Pepoon could have deviated on his private business then no recovery could be had in that instance, for compensation. But in view of the fact that testimony was adduced that the deceased was proceeding on the usual route employed by the respondent-appellant's drivers, and in view of the fact that arrangements had been made to bring the automobile back from Hoboken by the witness who was with the deceased at the time of the accident, there can be no doubt that the deceased was engaged in his usual and general duties for which he was employed by the respondent-appellant.

This accident occurred while the deceased was carrying out the duties of the respondent-appellant, and since the accident arose out of and in the course of employment, the respondent-appellant, is, therefore, liable to the dependents of the deceased for compensation in accordance with law. On this night he was on his way to Hoboken in an automobile instead of a truck and at a later hour, by special arrangement made previously with his employer. He was, accordingly, engaged in the work of his employer, and since the accident might well have occurred earlier in the evening while in the truck of the respondent-appellant no prejudice is shown. The respondent-appellant, by acquiescing in this arrangement, tacitly assumed any additional hazards, if there were any.

6. That the petitioner incurred expenses for medical services and for burial of the said Robert Pepoon amounting to Two Hundred ($200.00) Dollars of which amount One Hundred and Fifty ($150.00) Dollars represents the allowance made by law for funeral expenses.

7. The legal advisor of the Petitioner-Appellee in addition to the compensation allowed him by the Workmen's Compensation Bureau, is hereby awarded an additional fee of Two Hundred ($200.00) Dollars, to be paid forthwith.

8. Costs will be allowed the petitioner.

It is, therefore, on this 2d day of November, 1925, ORDERED, that judgment finally be entered in favor of the petitioner-appellee, Annie R. Pepoon, and against the Respondent-Appellant, Samuel Rachels, in the sum of Thirty-five Hundred Thirty-five Dollars and Fifty ($3535.50) cents, for a period of three hundred weeks, beginning with the 18th of March, 1925, payable as follows:

The sum of Three Hundred Ninety-one Dollars and Fifty ($391.50) cents, being compensation from March 18th, 1925 to October 26th, 1925 shall be paid forthwith.

The sum of Twelve ($12.00) Dollars commencing the 5th day of December, 1926 up to and including August 13th, 1928, and from and after the said 13th day of August, 1928, the sum of Ten Dollars and Fifty ($10.50) cents per weeks for a period of one hundred and twenty-nine (129) weeks from said date.

It is further ORDERED that the said respondent-appellant pay to petitioner-appellee forthwith

Reasons.

funeral expenses in the sum of One Hundred and Fifty ($150.00) Dollars.

It is further Ordered that the sum of Two Hundred ($200.00) Dollars be paid by the respondent-appellant to the attorney for the petitioner-appellee, as Counsel fee, which shall be paid forthwith.

JOSEPH A. DELANEY,
Judge of the Passaic County,
Court of Common Pleas.

Reasons.

NEW JERSEY SUPREME COURT

Samuel Rachels, Prosecutor, vs. Annie H. Pepoon, Respondent.	On Certiorari.

The following are the Reasons on which the Writ of Certiorari in this cause is based, which Reasons will be urged at the argument of this cause:

1. The Court of Common Pleas of Passaic County, was without jurisdiction to affirm the Workmen's Compensation Bureau.

Reasons.

2. The Workmen's Compensation Bureau was without jurisdiction to hear and determine the said cause in favor of the respondent herein.

3. There was no evidence to sustain the findings of the Workmen's Compensation Bureau.

4. There was no evidence to sustain the findings of the Passaic County Court of Common Pleas.

5. The said alleged accident to the deceased did not arise out of and in the course of his employment.

6. The said alleged accident to the deceased occurred at a time when he was in and about his own personal business, riding on the public highway, in an automobile not owned by the prosecutor and up to the time of the accident he had not reported for work.

FRANK G. TURNER,
Attorney of Prosecutor.

Testimony.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

PATERSON, PASSAIC COUNTY, DIST.

ANNIE PEPOON,
Petitioner,

vs.

SAMUEL RACHELS,
Respondent.

TRANSCRIPT OF TESTIMONY taken in the above entitled matter before HON. HARRY J. GOAS, Deputy Compensation Commissioner, at the Department of Labor Building, Paterson, New Jersey, May 8th, 1925.

Appearances:

Jacob I. Jaffe, Esq., for the Petitioner.

Frank G. Turner, Esq., for the Respondent.

ANNIE PEPOON, the petitioner, sworn:

Direct-examination by Mr. Jaffe:

Q. Mrs. Pepoon, where do you live? A. 68 Henry Street, Passaic.

Q. You are the mother of Robert Louis Pepoon? A. Yes.

Q. How old was your son? A. 25 years.

Q. He was 25 years at the time of his death? A. Yes.

Q. What was his age? A. 25 years.

Q. Did your son live with you? A. Yes.

Q. Up to the time of his death? A. Yes.

Q. By whom was he employed? A. Mr. Samuel Rachels, at Passaic.

Q. That is the respondent in this case? A. Yes.

Q. How long had he been employed by Mr. Rachels before he died? A. About a year.

Q. Do you know what his work was? A. He was paper distributor.

Q. For Mr. Rachels? A. Yes.

Q. Do you know his salary?

Mr. Turner: Are you telling what you know or what your son told you?

The Witness: What I know.

Mr. Jaffe: I think that it is admitted that it was thirty dollars a week. I think that is all we are claiming.

The Court: You may ask what he did with his money.

Q. What did he do with his money? A. He gave it to me—all but some spending money.

Q. Did you allow him his spending money? A. I did.

Q. How much? A. About three dollars.

Q. Every week? A. Yes.

Q. And the rest was used by you? A. Yes.

Q. Who are the minor children living with you? A. A son, Bernard, and a daughter, Annie.

Q. Catherine is also a sister—that is, your daughter? A. Yes.

Q. Now, Mrs. Pepoon, anyone else besides your deceased son contribute towards your support? A. No.

Q. Is there anyone else that now contributes towards your support? A. No.

Q. Do you know anything about the accident which caused the death of your son? A. Only what I read in the paper.

Q. How old is Bernard Pepoon? A. 15 years.

Q. When was his last birthday? A. December 5th.

Q. And the daughter, Annie Pepoon? A. 13 years.

Q. When was her last birthday? A. Thirteenth of August.

Q. State whether or not your son, Robert Louis Pepoon, contributed towards the support of your two minor children?

Mr. Turner: Just a moment, Mr. Jaffe. Annie was thirteen at her last birthday?

The Witness: Last August.

Mr. Turner: That would make her born what year?

The Witness: 1911.

Mr. Turner: You are sure she was thirteen last birthday?

The Witness: Yes.

Mr. Turner: That would have to be amended, Mr. Jaffe.

The Court: If she was thirteen last birthday, she was born in 1911.

Mr. Jaffe: I ask that that be amended, if the Court please—the petition.

The Court: Yes. Bernard was fifteen last December?

The Witness: Yes.

The Court: Make that 1909.

Q. Where were these children born? A. In Passaic.

Q. (Showing witness) I show you birth certificates—are these the birth certificates of your two children, Annie and Bernard? A. Yes.

Mr. Jaffe: I offer these. I presume that it isn't the correct way to prove these certificates—if Mr. Turner has any objection at this time I will offer them for identification only. Any objection, Mr. Turner?

Mr. Turner: No.

(Certificate for Annie marked P-1.)

(Certificate for Bernard marked P-2.)

Q. Mrs. Pepoon, was the money that you received from your son Robert in his life used by you towards the support and maintenance of the children, Annie and Robert?

Mr. Turner: I don't think that is a proper question.

Mr. Jaffe: I will reframe it.

Q. State whether or not the money you received from your son Robert was used in the support and maintenance of your children, Annie and Bernard?

Mr. Turner: Isn't the question what she did with the money after she got it? Isn't this also a leading question?

The Court: I think the question is is there any other source of income.

Q. Mrs. Pepoon, have you any other source of income or did you have any other source of income besides the wages earned by your son Robert? A. No, I had not.

By the Court:

Q. Was Bernard working at all at the time? A. Bernard has never worked.

Q. What did Catherine do at the time of the accident? A. Catherine was home sick at that time—no, Catherine was home working. Catherine was sick afterwards.

Q. She lived with you right along? A. Yes.

By Mr. Jaffe:

Q. Where was Catherine working? A. Criterion Handkerchief Company in Passaic.

Q. State her physical condition, Mrs. Pepoon—was she working all the time? A. No, part of the time she was unable. She was not very strong.

Q. Can you tell us what she earned per week? A. Fifteen dollars.

Q. Did you receive any part of that? A. No, she was just about able to take care of herself—she dressed nicely.

Q. So that she would just have money enough for her own maintenance and clothing? A. Yes.

Q. How many months a year did Catherine work—can you tell us—was she working steady? A. No, not so steady—a few weeks.

Q. Why was she obliged to stop work, do you know? A. She had weak spells.

Q. Was she under the care of a physician? A. She was.

Q. Who was the doctor? A. Dr. John N. Ryan, of Passaic.

Q. Do you know the kind of work she did at the mill? A. Yes.

Q. What was it? A. She boxed handkerchiefs, and besides, she was a sort of an errand girl—she went to the bank and to different stores that they wanted her to go to.

Mr. Jaffe: If your Honor please, the only purpose of my having included Catherine is because of the fact that she was quite ill some time during the year, and that when she was working she was able to take care of herself. However, when she didn't work that duty also devolved upon the mother to support her from the earnings she received from her son. I haven't a doctor here, but if your Honor wants to receive any further proof as to her physical condition, I can get the doctor here.

CROSS-EXAMINATION by Mr. Turner:

Q. Now, during the year 1924, how much of that year did Catherine work? A. Really, to the exact days, how many—is that what you want to know?

Q. She worked the whole year, didn't she, 1924? A. Yes, she did—that was last year.

Q. She worked all of last year, didn't she? A. Yes.

Q. Now, do you mean to say that Catherine, who was working all of last year, didn't pay any board at all to you? A. When I come to consider it, she did not.

Q. Did she pay you anything at all last year? A. No, she did not.

Q. Did she make more than the fifteen dollars any of the time last year? A. No, sir.

Q. She kept the entire fifteen dollars herself? A. Yes.

Q. How much of the year 1925, up to March 15th, did Catherine work? She worked all the time up to March 15th, didn't she? A. Yes.

Q. And she got fifteen dollars a week, or did she get more? A. Fifteen dollars a week.

Q. And she kept all of that, did she? A. Yes.

Q. Do you own your own house? A. No, I do not.

Q. Are you widow? A. Yes.

Q. How long have you been a widow? A. Eleven years.

Q. Now, Robert Louis, you said you gave him three dollars a week for spending money—who bought his clothes? A. Well, he did odd jobs on the side. He worked Wednesday afternoons and he worked in the evening before he went on the paper route.

Q. He worked afternoons, did he? A. Yes.

Q. For whom did he work when he worked afternoons? A. He worked for Mr. Zabriskie, a butcher in Passaic.

Q. And what is Mr. Zabriskie's first name? A. John.

Q. And he is a butcher, is he? A. Yes.

Q. And where is his place of business? A. On Washington Place, Passaic.

Q. Washington what? A. Washington Place.

Q. How many afternoons a week did he work

for John Zabriskie? A. He didn't work every afternoon, certainly, he could not. He worked—well, I would say two afternons a month for him.

Q. Two afternoons a month? A. A month.

Q. What afternoons were they? A. Wednesday. I am wrong—it was morning—didn't work in the afternoon because Mr. Zabriskie went away for the whole day and Robert was there in the morning and took care of his place up until one o'clock.

Q. How many mornings did he take care of Mr. Zabriskie's place during the month? A. I don't know—it might have been more, but I would say two.

Q. He always did that every month, did he? A. Yes.

Q. Now, did he have any other jobs that he worked at every month? A. Yes, he took care of a man named George, who had a little store on Main Avenue, Passaic, and in the evenings he helped him out.

Q. Did he help him out every evening? A. Practically.

Q. What is George's name? A. George Rosenfelt.

Q. He went there every evening? A. Yes, he did.

Q. What time did he get there? A. Seven o'clock.

Q. And he worked until what time? A. Until the truck came along and took him to business.

Q. And what hour was that? A. I think he left at eleven.

Q. From seven until eleven he worked every evening for George Rosenfelt? A. Yes.

Q. And what number is that? A. That is on Main Avenue, Passaic.

Q. Now, did he work anywhere else? A. Yes, he did. He took charge of Friedman's delivery mornings.

Q. Did he work there every morning? A. No, not every morning, but every other morning.

Q. Did he get paid for that? A. Yes, sir; he did.

Q. Now, you say he worked on Friedman's delivery? A. Bread wagon.

Q. Bread delivery—when you say every other morning, what time in the morning was it he worked on that? A. Well, when he got through with his work on the truck after delivering the papers he stopped there and he came home about eleven o'clock, sometimes later and sometimes a little earlier. He worked for Friedman until eleven, about, from eight o'clock, about.

Q. Where is his place of business? A. On Monroe Street, Passaic.

Q. Did he work anywhere else? A. Not that I can remember now.

Q. That is the only steady job, is it not? A. Practically, as near as I know.

Q. All of his money was turned into you, was it? A. Yes.

Q. Outside of the three dollars a week that you gave him? A. Yes.

Q. Then you didn't give him back any money to buy his clothes with, did you? A. I did not—how could I?

Q. What did he buy his clothes with—if you know? A. He didn't pay very much for them I

don't think. He just saved a few dollars and then he bought his clothes. He didn't have a great number of suits of clothes, you must understand.

Q. Do you know how far he went on Friedman's route to deliver bread? A. Just around the city of Passaic.

Q. Did you ever go with him on those trips when he would deliver bread? A. No.

Q. You don't know then, of course, what his route was? A. No.

Q. Now, Catherine is still living home with you, is she? A. Yes.

Q. Doesn't she pay you any board or contribute to her support? A. No.

Q. She keeps her wages herself? A. Yes.

Q. And spends it all on her own clothes and her own pleasures and her own support? A. Yes.

Q. Bernard isn't working and Annie doesn't work? A. No.

Q. And neither one of them have ever worked? A. No, they have not.

Q. Do they both go to school? A. They do, yes.

RE-DIRECT EXAMINATION by Mr. Jaffe:

Q. Mrs. Pepoon, I forgot to ask you one important question—what is your age? A. 55 years.

Q. Last birthday? A. Yes.

Q. When was that? A. Twenty-fourth of last May.

Q. Be fifty-six this May? A. Yes.

Mr. Jaffe: If the Court please, I didn't know—as a matter of fact, the answer wasn't filed until now, and I didn't know that they were going to deny the accident; I didn't know that they were going to deny that the deceased was in the course of his employment when this accident occurred, and for that reason I did not produce the other witness—the witness who was riding with decedent at the time of the accident or just prior thereto. For that reason may I be permitted to have this case continued until such time as this witness may be produced? I tried to locate him this morning.

The Court: Very well.

ANNIE PEPOON, sworn on behalf of the petitioner:

Direct-examination by Mr. Jaffe:

Q. You are the daughter of the lady who was just on the stand? A. Yes.

Q. And sister of Robert Louis Pepoon? A. Yes.

Q. Where do you live, Annie? A. 68 Henry Street.

Q. With your mother? A. Yes.

Q. What is your age? A. 13.

Q. When was your last birthday? A. August 13th.

Q. Do you go to school? A. Yes.

Q. What school? A. High School.

Q. What year are you in? A. First year.

Q. Are you working? A. No.

Q. Your mother takes care of you? A. Yes.

No cross-examination.

BERNARD PEPOON, sworn on behalf of the petitioner:

Direct-examination by Mr. Jaffe:

Q. How old are you Bernard? A. Fifteen.

Q. When was your last birthday? A. December 25th.

Q. You will be sixteen this coming birthday? A. Yes.

Q. You live with your mother, Mrs. Annie Pepoon? A. Yes.

Q. You are a brother of Robert Pepoon? A. Yes.

Q. Are you working? A. No.

Q. Have you worked at all within the last year or two? A. No.

Q. Do you go to school? A. St. Nicholas School, Passaic.

Q. What grade are you in? A. 7-A.

Adjourned until May 21st.

WORKMEN'S COMPENSATION BUREAU

PATERSON, PASSAIC COUNTY, DISTRICT

ANNIE R. PEPOON
vs.
SAMUEL RACHELS.

Transcript of stenographer's notes of evidence taken in the above-entitled matter before the Honorable Harry J. Goas, Deputy Compensation Commissioner, at the Workmen's Compensation Bureau, Paterson, New Jersey, on the 18th day of June, A. D. 1925, at 2:00 o'clock P. M.

Appearances:

Jacob I. Jaffe, for the petitioner.

Frank Turner, Esq., for the respondent.

DR. MAURICE JOSEPH, produced as a witness on behalf of the petitioner, sworn.

Direct-examination by Mr. Jaffe:

Q. Dr. Joseph, you are a licensed and practicing physician in the state of New Jersey? A. I am.

Q. And where is your office? A. 271 Lexington Avenue, Passaic.

Q. How long have you been practicing medicine? A. I have been practicing six years.

Q. You are a graduate of what institution? A. John Hopkins, Baltimore.

Q. What institutions are you at present connected with, if any? A. I am one of the attending surgeons Passaic General Hospital; also one of the senior examiners Metropolitan Life Insurance Company; chief medical inspector of schools of Passaic.

Q. I believe during the service you held a commission in the United States Army? A. Yes, I was.

Q. Did you have occasion to examine Robert Pepoon at the General Hospital? A. Yes.

Q. Had you known him at that time? A. Yes; I treated him before.

Q. And do you recall the date of your examination of Mr. Pepoon? A. Well, it was the morning after he was brought in. I remember that.

Q. The morning he was brought in to the Passaic General Hospital? A. Yes, sir.

Q. What time in the morning did you see him? A. About ten o'clock. I was making my round in the ward.

Q. He was a patient in the ward? A. He was a patient in the ward, yes; brought in as an emergency.

Q. What did you find wrong? What was his condition? A. As near as we could determine at the time he had several fractured ribs, and suffering from severe shock and mostly internal hemorrhage.

Q. You say— A. I suspected that he had pulmonary hemorrhage at the time; pulmonary hemorrhage, from the lungs.

Q. What was that pulmonary hemorrhage caused by?

Mr. Turner: I object what it was caused by.

Q. What was the cause of this pulmonary hemorrhage?

The Court: If he had pulmonary hemorrhage and fractured ribs, he can surely venture an opinion as to the possible cause.

The Court: He cannot tell absolutely.

Mr. Turner: I do not want him to tell something he did not see or know. I don't want him to venture an opinion as to the cause. That is something that is subject to proof.

The Court: Very well, probably connect it up better.

Q. You say he had several fractured ribs? A. Yes.

Q. And do you recall just what ribs were fractured? A. No, we can't tell that with a person in shock and particularly when the chest is full of blood as his chest was, you see. We usually wait for the X-ray findings on findings of this kind. We can only tell approximately whether two or three ribs were broken and whether they were broken in one or more places.

Q. And in this case you cannot say how many ribs were broken? A. No; I suspected several were broken and I suspected—I didn't suspect—I knew he had several broken ribs and that he had blood in his pleural cavity, as we call it.

Q. What caused the blood in his pleural cavity?

Mr. Turner: I object to that. I do not understand the doctor examined him. You did not examine him.

The Witness: Yes.

Mr. Turner: Internally?

Witness: We don't examine patients of that kind internally. We make X-rays.

Mr. Turner: You just looked at him?

Witness: No. Examined the chest and found—

The Court: He said the chest was full of blood.

Mr. Turner: That fact speaks for itself. But I object to the doctor forming any opinion as to how it came in the chest.

Mr. Jaffe: He testified there were fractured ribs and certainly fractured ribs would cause this hemorrhage and blood condition. The doctor cannot be expected to testify he saw the blood shoot out the minute the fracture occurred. It would be preposterous for any doctor to say that. All he can do is testify to conditions he found and what in his opinion caused those conditions.

Mr. Turner: I object to his testifying to what in his opinion caused this condition. If this is an accident it must be proven by facts as to the accident. Why should the doctor be asked what caused the accident?

(Discussion off the record.)

Mr. Jaffe: I am trying to show a hemorrhage was caused by the fact the ribs were fractured.

Mr. Turner: Oh, we do not care about that, but I do not want the doctor to go beyond that.

The Court: Very well, he can testify what opinion he came to.

Witness: When I examined the injured, the interne at the hospital was present, and in my opinion, as I said before, there were several fractured ribs and fluid in the pleural cavity which I diagnosed as blood, because of his general condition, and I told the interne at the time to have some X-rays taken that morning to determine actually by X-ray what the condition of the chest was.

Q. About what time in the morning did you see him? A. About ten or eleven o'clock. I can't say exactly.

Q. Did you see him the next day? A. Yes.

Q. And the following day? A. He was already—we only saw him the next day because he died the night after that.

Q. I see. A. During the night after that.

Q. During the time that you examined him was he conscious or unconscious? A. He was conscious, he spoke to me, but he was very, very weak, and in a very marked shock.

Q. Doctor, what would you say was the cause of his death? A. Well, I should say the result of his injury.

Q. Injuries to the ribs? A. Injuries to the ribs and the loss of blood particularly.

Q. I see. A. I think he died more primarily as the result of the hemorrhage he had as the

result of the accident, than the fractured ribs—they in themselves could not cause death.

Q. And the hemorrhage caused by fracture of the ribs— A. Yes.

Q. —caused death? A. Yes. Injury to the lung with resulting hemorrhage would cause death.

Q. You say the injury to the lung was caused by what? A. I couldn't see any other reason but the fractured ribs in this case. Of course, it could also be the tearing of the actual lung in the course of the accident. That would be hard to do.

Q. You say you attended this man before? A. Yes.

Q. How long before? A. Oh, I would say probably a year and a half before, for another condition entirely.

Q. And you knew him? A. Yes, yes.

Mr. Jaffe: Cross-examine.

Mr. Turner: No cross.

Mr. Jaffe: That is all.

MRS. ANNIE PEPOON, the petitioner, recalled.

Direct-examination by Mr. Jaffe:

Q. Did you pay the funeral bill as the result of the accident? A. Yes, I did.

Q. Of your son, Robert Pepoon? A. Yes, I did.

Q. Have you the bill with you? A. My sister has.

Q. How much was it? A. It was almost five hundred dollars. Four hundred and I don't know exactly the amount.

Mr. Turner: Do you know the amount?

Witness: I can find out.

Q. Is this the bill? A. Yes, that's it.

Q. Did you pay that? A. Yes, I did.

Mr. Jaffe: I suppose it is a little improper just to offer in evidence. I offer that in evidence, four hundred and fifty-four dollars and nineteen cents.

The Court: You identify that as the bill?

Witness: Yes.

The Court: And that is the amount, four hundred and fifty-four dollars and nineteen cents?

Q. When did you pay this? A. Just as soon as I got the insurance. I paid for it.

Q. You had insurance on your boy? A. Yes; took every cent I had to pay for it.

Q. Did you have occasion to talk to Mr. Rachel right after this thing occurred? A. Yes, I did. He came to my home.

Q. He came to your home? A. Yes.

Q. How soon was that after your boy's death? A. Just the second day. He was just home. They brought him home.

Q. What did Mr. Rachel say to you?

Mr. Turner: I object to that, because that would not be binding on the carrier in this case.

Mr. Jaffe: I know, but the carrier is not at all concerned in this case, Mr. Turner.

The Court: Who is Mr. Rachel?

Mr. Jaffe: The respondent.

The Court: She can testify to what the respondent said.

Mr. Turner: Mr. Rachel did not see the accident. He was not there.

The Court: But he is the respondent.

Mr. Turner: But he is the respondent, yes.

The Court: The respondent talking to the petitioner.

Mr. Jaffe: Yes, absolutely; why isn't it proper?

Mr. Turner: He was not at the scene of the accident. He does not know anything about it.

Mr. Jaffe: There are certain admissions—

Mr. Turner: I object to any admissions he made concerning the accident. He was not there. She has been sworn and testified. Now she is called back to prove the funeral bill. Now she is going to wander off into some admissions. That is a total surprise to us.

Mr. Jaffe: Suppose Mr. Rachels may have been up at the north pole with the explorers and he came in and made statements apparently to the petitioner, why is not that binding even if he wasn't near the accident?

The Court: I think she may testify to that. That is made by the respondent or

the agent of the respondent himself. He may come in and try to disprove that by the parties themselves.

Mr. Turner: If it is for the purpose of proving an accident I don't know how it is material, because he wasn't there. He did not see the accident.

Mr. Jaffe: Perhaps he has inquired and told this lady and he is willing—

Mr. Turner: If you prove anything like that, Mr. Rachel will defend his own case, for I shall withdraw from the case.

Mr. Jaffe: I do not know what your contract of liability is with Mr. Rachel.

The Court: That will go to the weight of the testimony. If it is just simply purely based on hearsay which he cannot substantiate and told her something which he heard which he could not prove it is true, it all goes to the weight of the testimony. If he has a proper basis for telling that here, not only his narration to her, but on the basis of his being put on the stand later. I think it may go in for what it is worth.

Mr. Turner: Exception.

The Court: Allow you an exception.

Q. What did Mr. Rachel say to you?

The Court: What is Mr. Rachel?

Mr. Jaffe: Mr. Samuel Rachel is the respondent.

The Court: Samuel Rachel is the respondent.

Mr. Turner: I object to that unless they prove the whole conversation.

The Court: Tell the whole conversation.

Q. When was the first time after your boy's death Mr. Rachel called at your home? A. The night before he was buried, that is the 19th, the night before.

Q. What time did Mr. Rachels come to your home, was it? A. Yes, he came to my home.

Q. At 68 Henry Street? A. Yes.

Q. What time in the evening? A. Well, I just couldn't tell you the time. It was dark. It might have been eight o'clock. It might have been nine o'clock. I just couldn't tell it to you.

Q. What did Mr. Rachels say to you?

Mr. Turner: I renew my objection, of course.

The Court: Subject to the same disposition.

Q. Yes. What did Mr. Rachels say to you? A. He said he was very sorry that my boy was killed working for him, in his line of duty.

Q. I see. What did you say to him? A. Well, I didn't say anything much. I couldn't say anything. I was too upset. I couldn't say anything.

Q. All told, how long was Mr. Rachels there? A. About ten minutes, no more. He just came in and spoke to me and went out, looked at my boy.

Q. Anyone else there besides yourself when this conversation was going on? A. There was other people. The place was crowded with folks,

but I don't know if they paid any attention to what he said.

Mr. Jaffe: That is all. Cross-examine.

CROSS-EXAMINATION by Mr. Turner:

Q. What was the date you had this conversation with Mr. Rachels you have just repeated now? A. 19th of March.

Q. 19th of March? A. Yes, sir.

Q. And you say that Mr. Rachels said this thing although you knew that your boy was killed outside of the line of his duty, did you not?

Mr. Jaffe: I object to that. There is no testimony, if the Court please, to her knowledge that Robert Pepoon was killed outside of his line of duty. I think the question is unfair. It is based on the same theory when a lawyer might ask a witness, "When did you stop beating your wife?"

The Court: That will probably resolve itself into a question of law.

Mr. Turner: It is not so fine a question as that. It is not. It is a matter that anybody would know that this boy was not in the line of his duty when he was killed. This lady would know it. Anybody would know it.

The Court: Let her answer.

Mr. Jaffe: I think the question ought to be split up, if the Court please, because if she said yes, that this conversation went on, her answer is such that it may be implied or inferred from that answer, if the Court please, that this lady knew that the boy

was killed out of the line of his duty, and Mr. Rachels made that statement. You see, that would be an answer to two questions. If Mr. Turner will split up the question I have no objection to it.

Mr. Turner: I won't split up the question. I press the question.

Mr. Jaffe: I object to it, if the Court please.

The Court: I am at a disadvantage. I do not have the papers here.

Mr. Turner: Just think of a man, an employer coming to this lady and saying this almost in the words of the statute. He said he was very sorry my boy was killed working for him in the line of his duty. Imagine any human being saying that. And yet this lady comes here and swears that man said that thing to her, in the line of his duty.

The Court: I suppose that is the point at issue. You see, I do not have the pleadings.

Mr. Turner: The question is whether he was hurt while working for the respondent at all at the time he was killed.

The Court: Arising out of and in the course of his employment. She answers that question. At least gives a reply to it. If she testifies this conversation Mr. Rachels had with her, he said, "He said he was very sorry my boy was killed in the line of duty," she has clearly given what he was talking about.

Mr. Jaffe: May I interrupt the Court?

That part of the question I have no objection to. But Mr. Turner goes on to say although you knew that your boy and everybody else knew that your boy was not killed in the line of his duty.

Mr. Turner: She knew it herself.

The Court: We won't presume that.

Mr. Jaffe: Absolutely not. That is what I object to.

The Court: Ask her. She may answer that yes or no.

Q. You knew, you had learned how your boy was killed, hadn't you? A. I heard others.

Q. And you knew your boy was hurt—was out on business of his own, in his own automobile at the time he was killed, didn't you? A. I knew he was going to work. That's all I know.

Q. You knew he was out in an automobile, a touring car, didn't you? A. I don't know what kind of a car it was. It was a car.

Q. You do not know what kind of a car it was? A. I do not.

Q. Do you know where he got the car he was killed in? A. I know nothing about the car at all in any way. What it looked like or where it was he got in.

Q. Where did you learn what kind of a car it was he was killed in?

Mr. Jaffe: I object. I think cross-examination is confined to matters brought out on direct, not on collateral issues. Mr. Turner had the opportunity to cross-examine her when she was first on the stand.

The Court: There are two features brought up here: funeral bill and this other very short conversation with Mr. Rachels.

Mr. Jaffe: Nothing about automobiles.

Q. Now, didn't you learn what kind of a car your son was riding in when he was killed? A. No, sir; I did not.

Q. You never knew? A. I never knew.

Q. Did you learn where he was killed? A. I learned. I wasn't there.

Q. You know where it was? A. It was on the Plank Road, I believe.

Q. Do you know the place? A. No, sir; I don't. They said it was two miles from Nazo's Place. But I don't know where Nazo's place is.

Q. What do you mean by Nazo's Place? A. Some sort of a little inn or hotel.

Q. A road house, wasn't it? A. Maybe it was. I don't know.

Q. And you learned your son had been to that road house? A. I heard them say here he was there.

Q. And you heard them say he was leaving the roadhouse at the time he was killed, didn't you?

Mr. Jaffe: I object to that.

The Court: She may answer. If she does say—

Q. You knew that? A. I heard it here, yes.

Q. Yet, in the face of your knowing that you say that Mr. Rachels came to you and told you what you have testified to here? A. Yes, and I believe my son.

Q. And you know you swore to tell the truth

when you say that? A. I know that, and I would swear again I know my son was going to work.

Q. No, no. I ask that that be stricken out. A. Yes, Mr. Turner.

The Court: Strike it out.

Q. You knew what you have testified to here and yet you say that Mr. Rachels, the man you are suing here, came to your house and had this conversation with you, and then walked out? You say that and you know you are under oath when you say it?

The Court: Yes?

A. Yes.

Q. Why didn't you tell that when you were on the stand before? A. I wasn't asked that question.

Q. Did you suggest to anybody to ask you that question? A. I certainly did not.

Q. Then were you surprised when your counsel asked you that question to-day? A. No, I wasn't. He was a lawyer.

Q. Why weren't you surprised if you hadn't told that to anyone and anyone asked you that? A. I wasn't surprised about it.

Q. You didn't tell him of this conversation? A. No.

Q. You never told your attorney of this conversation, did you? A. Yes, I did.

Q. When? A. I don't know just when.

Q. How many days ago? A. The last time I was at his office probably.

Q. When was that? A. I just don't remember when.

Q. How many days ago? A. Let us see. It might be a month or more.

Q. That was after the last hearing or before it? A. It was before it.

Q. Before the last hearing? A. I don't know whether it was before or not. I couldn't say that positively.

Q. You could not say that positively? A. No, I couldn't say that positively.

Q. It was after you had been sworn in this Court here, wasn't it? A. I don't know whether it was or not.

Q. You knew Mr. Rachels was not with your son when he was killed, don't you? A. Yes, I knew Mr. Rachels wasn't with him.

Q. You knew that? A. Yes, I knew Mr. Rachels wasn't with him.

Q. And you knew that when you had the conversation with your attorney about this statement that you say Mr. Rachels made, didn't you?

Mr. Jaffe: I do not see that is very material. Suppose she did know Mr. Rachels was not there. What difference does that make. She certainly could not have questioned Mr. Rachels and said to Mr. Rachels, "I don't believe you, because you weren't there."

Mr. Turner: We will see what Mr. Rachels says when we put him on the stand.

Q. You and Mr. Rachels are very friendly, aren't you? A. Yes, naturally.

Q. And you are still very friendly, aren't you? A. Yes.

Q. And has he visited you since you were here last time? A. No, no.

Q. Have you talked to him since you were here last time? A. No, I have not; no, sir.

Q. How did you get home from this Court last time you were here? A. I went home in Mr. Nazo's car.

Q. Did Mr. Rachels go with you? A. He did not.

Mr. Turner: That is all.

Mr. Jaffe: All right. That is all.

PAUL CORONTO, produced as a witness on behalf of the petitioner, sworn.

Direct-examination by Mr. Jaffe:

Q. What is your first name? A. Paul.

Q. Paul Coronto? A. Yes, sir.

Q. Where do you live? A. I live Passaic Park now, River Road.

Q. What address? A. 376.

Q. What? A. River Road.

Q. River Road? A. Yes.

Q. Talk up, please, Paul. A. Yes, sir.

Q. By whom were you employed? A. By Joe Nazo at that time.

Q. By whom are you employed now? A. Now?

Q. Yes. A. A. & P.

Q. A. & P. Grocery Company? A. Yes, sir.

Q. In March, 1925, by whom were you employed? A. By Joe Nazo.

Q. And where is his place of business? A. Travelers Hotel, East Rutherford.

Q. Did you know Robert Pepoon? A. Yes, sir.

Q. How long had you known him? A. I know him for a long time.

Q. Before this accident? A. A long while.

Q. Go out with him? A. Never used to go out with him.

Q. On the day in question did you meet Mr. Pepoon? A. I didn't meet him, but he phoned up to the place that he wanted me to drive him down.

Mr. Turner: I object to any conversation with him.

Witness: That ain't no conversation.

Mr. Turner: That is a conversation.

Mr. Jaffe: Do not argue with the lawyer.

The Court: Do not argue.

Q. You say there was a telephone call? A. Yes, sir.

Q. As the result of the call what happened? A. What happened? He missed the truck—

Mr. Turner: I object to any conversation between you and Mr. Pepoon.

Q. Answer that yes or no. I do not want to be leading. Did Mr. Pepoon call to see you at Joe Nazo's place? A. Yes, sir.

Q. Did he go inside? A. No, sir.

Q. Had you, before Mr. Pepoon came to meet you, made any arrangements about his meeting you at that place? A. No, sir; but that same night he missed his truck. That is what I was trying to say.

Mr. Turner: I ask that that be stricken out.

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

Q. I see. Now, Mr. Pepoon met you at Joe Nazo's place, is that correct? A. At Joe Nazo's place.

Q. What time of the day was that? A. It was night time.

Q. What time? A. Between a quarter after twelve and a quarter to one, something like that.

Q. I see. Did you go into Mr. Pepoon's car? A. Yes, sir.

Q. Who was driving? A. He was at that time.

Q. What kind of a car was it? A. A Buick, a Buick car.

Mr. Turner: A Buick what?

Witness: Touring.

Q. Anybody else in the car with you? A. No, sir; only me and him.

Q. And where were you going with him?

Mr. Turner: I object to that if it relates to any conversation between him and Pepoon.

Mr. Jaffe: No. It is an act I am asking him to testify to.

Q. Did you get into Mr. Pepoon's car? A. Yes, sir; I was getting paid for it.

Q. For what purpose did you get in? A. To drive the car back.

Q. Back from where?

Mr. Turner: I object.

A. Back from Hoboken.

Mr. Turner: To the purpose of driving the car back. Of course, that relates to a conversation. That is all it does relate to. nothing else.

Witness: I got to tell my story. I was getting paid.

Mr. Jaffe: Don't argue.

The Court: Let your lawyer attend to that. He testified he met Pepoon and Pepoon drove the Buick touring car; that he was going to get paid for driving the car back.

Witness: Yes, sir.

Mr. Turner: That must be a conversation he had with Pepoon. Otherwise he could not know anything about it.

The Court: I think he may testify to that, although not the conversation leading up to it.

Mr. Jaffe: No. I do not want the witness to testify to anything about that.

Mr. Turner: I pray an exception.

The Court: He may testify why he was in the car. For some reason.

Q. Where were you to drive the Buick car back from?

Mr. Turner: Just one minute.

A. From Hoboken.

Mr. Turner: I object to that. How could he know that? Only by conversation.

The Court: That is what it would lead to.

Mr. Turner: Here he is anticipating what he was going to do hours hence. Why not get down to the time it occurred?

Mr. Jaffe: If an act occurs as the result of a conversation, why isn't he permitted to testify to the act without the conversation?

Mr. Turner: The act did not occur.

The Court: Let him testify to the acts that did occur. There he was in the car. That is visible, tangent.

Mr. Jaffe: Yes.

The Court: With Pepoon, as he testified, with Pepoon driving and he saw. That is his testimony. What is the next step? Trace it along.

Q. Where were you going with Pepoon? A. Hoboken. He was going to load up the truck—

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

The Court: Do not testify to what he was going to do. Where were you going?

Witness: Over the road.

Q. Where were you going? A. Hoboken.

Q. On what road were you driving? A. Plank Road.

The Court: Was Pepoon driving or were you?

Witness: Pepoon was driving at that time.

Q. You were seated in what part of the car? A. In the front right hand side.

Q. What kind of a car was it right or left-hand drive? A. Left-hand drive.

Q. Was it a clear night? A. Yes it was a clear night.

The Court: Where was he seated? In the back? I didn't catch it.

Mr. Jaffe: No in the front.

The Court: With Pepoon.

Q. In what direction was the car being driven? A. To Hoboken.

Q. Towards Hoboken. That is south on the Plank Road? A. South on the Plank Road.

Q. Do you recall the accident? A. Yes sir.

Q. Will you tell the Court just how the accident happened? A. Sure. Well there was another car coming down see? And he had bright lights this other car.

Q. Coming in the opposite direction? A. In the opposite direction so Bob this here boy tried to get over more—

Mr. Turner: No conversation.

Witness: I didn't have no conversation there. I was there.

Mr. Turner: Do you know what a conversation is?

Witness: Sure.

Mr. Turner: No talk between you two.

Witness: That is what I am saying. I didn't have any talk between him and me.

The Court: Don't give a speech.

Witness: That is what I am saying. What I seen. So he was moving over, little by little. Just as he got there, the other car hit him on the left wheel there.

He must have lost control of the wheel near the pole and we tipped over.

The Court: He must have lost control of the wheel—who must have lost control of the wheel?

Witness: Bobby, after the other car hit him.

The Court: Pepoon?

Witness: Yes. After the other car struck him on the wheel.

The Court: The other car struck him on the left wheel?

Witness: On the left wheel.

The Court: He lost control of the car and what about the telegraph pole?

Witness: We hit the pole and tipped over.

Q. You mean the car hit the pole? A. The car hit the pole.

Q. And you tipped over? A. We tipped over.

The Court: The whole car overturned?

Witness: The whole car overturned.

Q. What happened to you? I imagine I jumped out. I don't know whether I jumped out or was thrown out. When I got up I was dizzy.

Q. Do you know how long you were lying there? A. No, sir; maybe half an hour or an hour. I don't know.

Q. You do not know? A. It must have been about an hour, because when we got to the hospital it was about half-past three or something like that.

Q. When you got up what did you do? A. I hollered for Bobby.

Q. Did you find him? A. Well, he yelled he was under the car.

Q. He yelled, "I am under the car"? A. He yelled, "I am under the car."

Q. Did you go over to him? A. Sure, tried to lift the car up, but I couldn't see him.

Q. You could not see him? A. No, sir.

Q. Did you find him under the car? A. When we came back we find him ten feet away from the car.

Q. What did you do when you got up? A. What did I do when I got up? I looked for him.

Q. Yes. A. I looked for him.

Q. What did you do after that? A. I tried to stop somebody on the road, but nobody stopped, so I went all the ways down where I worked, I got Joe Nazo's car out and I drove up there.

Q. Who drove? A. I drove the car up there.

Q. You drove it to the scene of the accident? A. I drove it to the scene of the accident.

Q. What did you do? A. I looked for Bobby and somebody hollered, "Here he is" ten feet away from the car, so me and my cousin Joe Nazo, and another man, we picked him up, and put him in the car, and drove to the doctor.

Q. What is the doctor's name? A. Boiling Springs Avenue. I don't know the name.

Q. Boiling Springs Avenue where? A. East Rutherford.

Q. What did you do with him there? A. He told us, "Bring him to the hospital right away."

Q. Did you bring him to the hospital? A. Yes, General Hospital.

Q. Passaic? A. Passaic.

Q. What time in the morning was he brought to the hospital? A. I imagine it was a quarter to four, half past three or something like that.

Q. How long did you stay there after that? A. I stood there about an hour.

Q. Did Bobby say anything to you? A. No, sir.

Q. He was unconscious? A. He was unconscious all night.

Q. Did you see Bobby again? A. Yes, I seen him next afternoon.

Q. Did he say anything to you then? A. Well, he told me that was—

Mr. Turner: I object to anything he said.

Mr. Jaffe: This is part of the res gestae.

The Court: It is too long after, for that.

Q. When did he die? A. He died Tuesday morning, five o'clock.

The Court: That is when? The accident happened what day?

Witness: March 15th.

The Court: Being what?

Witness: Sunday morning.

The Court: And he died Tuesday morning?

Witness: And he died Tuesday morning, I think. I ain't sure, though.

Q. Did you go to the funeral too? A. Yes, sir.

Q. Now, when you picked Bobby up, what was his condition? A. Well, he—

Q. As you recall it. A. Well, he was all cut up. I seen his face cut up here. I didn't know he was bad.

Q. I see. Was he moaning or groaning, anything like that? A. Yes, he was hollering.

Q. You mean at the time you picked him up? A. At the time I picked him up and put him in the car, that's all he was doing.

Q. Did you say hollering or yelling? A. He was going to holler, "Ah! Ah!"

Mr. Jaffe: Cross examine.

CROSS-EXAMINATION by Mr. Turner:

Q. March 15th, 1925, around midnight or one o'clock in the morning it was cold, wasn't it? A. No, it wasn't cold.

Q. Was it warm March 15th? A. Well, it wasn't cold or wasn't warm; it was just right.

Q. Just right at one o'clock in the morning? A. Yes, sir.

Q. And did you have the top of this touring car up or down? A. Up.

Q. Top was up. Did you have any curtains on it? A. No curtains.

Q. Do you recall whether you had an overcoat on? A. No, sir; didn't have no overcoat.

Q. Did Mr. Pepoon have an overcoat? A. No, sir.

Q. Do you know how long he was at Joe Nazo's hotel? A. He wasn't there two minutes.

Q. Well, what did he—did he drive up in this Buick car to the hotel? A. Yes, sir.

Q. Did you see him drive up? A. Yes, sir.

Q. Did he get out of the car? A. No, sir; he just called me.

Q. Did not get out of the car? A. No, sir.

Q. Not at all? A. Not at all.

Q. Now, Joe Nazo's place is a hotel, isn't it? A. Hotel.

Q. Regular hotel? A. Regular hotel.

Q. And you got rooms for lodgers there?

Mr. Jaffe: I object to that.

Q. What kind of lodgers, though?

Mr. Jaffe: I object to that. I do not think that is very material, if the Court please.

Mr. Turner: Counsel may not think it is, but I think it is.

Mr. Jaffe: What has that to do with the decedent?

The Court: Well, the defense is this accident occurred at a time when he was not in their employment.

Mr. Jaffe: Even so, the type of hotel may have been maintained there, what has that to do with the decedent?

Mr. Turner: Might have a lot to do with him.

Mr. Jaffe: No. The testimony so far is both—both on cross and direct, he did not get out of the car. Now, if the testimony were he was in there, I would say it is perfectly proper.

Mr. Turner: Because he says so does not bind us.

Mr. Jaffe: Well, you are cross-examining him.

Mr. Turner: I am not bound by what he says.

The Court: I think he may be allowed to examine him, to explain more at length what they were doing out in the road at that time in the morning.

Mr. Jaffe: All right.

Q. Just answer the question. (Question repeated by the stenographer.) A. Yes, but what kind of lodgers?

Q. I said lodgers. Do they have rooms for lodgers there? People to put up for the night? A. Oh, yes; but there is all kinds of lodgers.

Q. Have you something bad in your mind?

The Court: Just answer the question.

Q. You have not anything bad in your mind? A. No, I haven't anything bad in my mind, but there is a lot of different kind of lodgers.

The Court: He may not ask you that question.

A. Do you mean ladies or men?

Q. Do not think anything bad unless I ask you something bad. A. All right.

Q. You got a bar there, too? A. Oh, yes.

Q. Got a brass rail in front of the bar? A. Not a brass rail.

Q. What kind of a rail? A. Iron rail.

Q. Iron rail in front of the bar. And you sell soft drinks over the bar. A. Soft drinks; that's all.

Q. No liquor of any kind? A. No liquor of any kind.

Q. Was the barroom open at one o'clock on the morning of March 15th? A. Yes; barroom was open.

Q. How late in the morning do you keep the barroom open? A. Until the people go out, because that is a spaghetti house, too.

Q. How late did you keep it open that morning? A. We kept it open that morning because when I came back they wanted to see what was the matter.

The Court: What do you mean by saying "We" kept that open that morning?

Witness: I kept it open that morning.

The Court: Did you work there?

Witness: I worked there.

The Court: At that time?

Witness: At that time.

Q. What kind of work did you do there? A. Chauffeur.

Q. And what else? A. And bartender, too.

Q. And bartender, too? A. Yes, sir.

Q. Did you do anything else besides tending bar there? A. What?

Q. Did you do anything else besides tending bar there? A. Certainly; I got all the work around there.

Q. You do all kinds of work around there? A. Yes, sir.

Q. Is Joe Nazo related to you? A. Yes, sir.

Q. Your cousin, wasn't he? A. Cousin.

Q. When Mr. Pepoon drove up, did you leave the bar, leave the customers in front of the bar, alone? A. There was no customers there.

Q. You just opened it alone by yourself? A. By myself, because of the business inside of the restaurant there.

Q. Then you were not waiting for the customers to go home that morning? A. They were all home except the customers inside eating.

Q. And when you got back there after the accident, the barroom was still open, was it? A. Oh, yes; my cousin was there.

Q. That was about what time in the morning? A. I can't say, about half-past two or a little later.

Q. About half-past two or a little later. Does the barroom stay open all night? A. No, not all night. Until they go to bed.

Q. When you went out to the car did you take any packages out with you? A. No, sir.

Q. Did you take any bottles out with you? A. No, sir.

Q. Were there any bottles in the car? A. I don't know.

Q. Could you see the car? A. Certainly I seen the car.

Q. Did you see anything in the car? A. No, sir.

Q. Not a thing? A. Not a thing.

Q. Did not see a package or a bottle? A. No, sir.

Q. Nor anything of the kind in the car? A. No, sir.

Q. You are sure about that? A. Yes, sir.

Q. You looked at it? A. I looked at the car.

Q. Did you look in the front seat or back seat? A. No, I looked in the front seat where I was going to sit. I didn't have no business looking in the back seat of anybody else's car.

Q. You could not see in the car? A. Yes, sir.

Q. Did you see any bottles in there? A. Nothing at all.

Q. Nothing at all? A. No, sir.

Q. You left the hotel at East Rutherford, did you say? A. Yes, sir.

Q. And how many miles did you drive or did Mr. Pepoon drive in this Buick car when the accident happened? A. Well, I imagine between—

The Court: I do not get the connection. You left the hotel at East Rutherford. After they left Nazo's place they both got in the car and kept on driving toward Hoboken.

Mr. Jaffe: Yes.

The Court: He left the car at East Rutherford?

Mr. Jaffe: No.

(Discussion of counsel off the record.)

Q. That is East Rutherford where the hotel is? A. Yes, sir.

Q. That is where Nazo's hotel is?

(Further discussion regarding East Rutherford off the record between counsel.)

Q. After you left the hotel in East Rutherford, how far did you drive before the accident happened? A. I imagine about a mile and a half or two miles.

Q. About a mile and a half or two miles. And did you make any stops between the time you left Joe Nazo's hotel and the time the accident happened? A. No stops at all. There was nothing on the road there.

Q. Now, did you drive, did you yourself drive any of that distance from Joe Nazo's hotel to the place of the accident? A. No, sir.

Q. Do you know what car it was struck you? A. Well, it looked like a Buick, brand new Buick.

Q. Did you get the number of it? A. I couldn't. How could I get the number?

Q. I did not ask you that. Did you get it? A. No.

Q. You do not know whose car struck you? A. No, sir.

Q. And you never found out, have you? A. No, sir.

Q. And the man did not stop? A. Didn't stop.

Q. So his car was not very badly damaged, was it? The other fellow's car? A. I don't know if it was damaged or not.

Q. Isn't it a fact you ran that car off the road and hit the pole there? Isn't that what happened? A. That's what happened.

Q. And you are not sure that any other car hit you, are you? A. Oh, sure, I am sure. I was there sitting in the front seat.

Q. Did you hear any sound of the other car hitting you? A. Sure I heard the sound of it.

Q. And yet the other car went right along? A. Right along.

Q. How did you get back to Joe Nazo's hotel? A. I run all the way down there. When I got down there I was out of wind.

Q. Ran back? A. Ran back all the way down.

Q. You think it was a mile and a half? A. That

is what I think. Maybe a mile for all I know. I never measured up.

Q. You say Joe Nazo's hotel at East Rutherford. How far is that from the Hackensack bridge? A. Hackensack bridge and Joe Nazo's?

Q. Yes. A. I don't know.

Q. What part of East Rutherford is it in? A. It is in East Rutherford and Carlstadt, Hackensack bridge.

Q. East Rutherford and Carlstadt, Hackensack bridge? A. Carlstadt is on that side, and East Rutherford is on this side.

Q. It is down near Carlstadt? A. Where? Where the accident occurred?

Q. No. Near Joe Nazo's hotel. A. No, it is in East Rutherford.

Q. It is towards Carlstadt, on the east end of East Rutherford? A. Yes, sir.

Q. Did you ever see that Buick car before that night? A. No, sir.

Mr. Turner: That is all.

RE-DIRECT EXAMINATION by Mr. Jaffe:

Q. You said you were going to Hoboken? A. Yes, sir.

Q. With Mr. Pepoon. What part of Hoboken were you going to?

Mr. Turner: I object to that, because that must relate to conversation. How could he know?

Witness: I didn't get no conversation. I knew where he was going.

Mr. Turner: I object to it. It is just another way of getting in a conversation.

Q. Do you know to what part of Hoboken you—A. Certainly I knew.

Mr. Jaffe: If he knows, why can't he testify?

The Court: I think he may testify. It is material why they were out on the road that time of night.

Mr. Turner: This is a conversation. He could not know about it unless Mr. Pepoon told him, and I object to it for that reason.

Mr. Jaffe: If this man has knowledge where he was going.

Mr. Turner: Did you know anything about it except what Mr. Pepoon told you?

Witness: I know where he was going at that night.

Mr. Turner: Who told you?

Witness: Who told me? I knew where he was working. He starts his work in—

Mr. Turner: Who told you he was going to Hoboken?

Witness: I know he was going to Hoboken.

Mr. Turner: Did anybody tell you?

Witness: Nobody told me because I know he was going to Hoboken.

Mr. Turner: If he knows. He could not know it. I object.

Mr. Jaffe: How do you mean he could not know it?

Mr. Turner: He does not work there.

Witness: I know I don't work there. But I know he works in Mr. Rachels'. The boy I hang around drives the truck.

Mr. Turner: I ask that be struck out as not responsive.

The Court: Strike that out as not responsive. I think he may testify where he was going if he knows.

Mr. Turner: I pray an exception.

The Court: It does not matter where he got the information.

Witness: I was going down.

Q. What do you know? A. What I know?

Q. Testify, if you know.

The Court: Where was your car bound for when this thing happened?

Witness: Hoboken.

Q. What part of Hoboken? A. Near the tubes.

Q. If you know, tell us whom you were to see in Hoboken.

Mr. Turner: I object to that.

Q. If you know. A. All I know we was to meet—

Mr. Turner: That must be a conversation.

The Court: He does not know.

Witness: I say I know.

The Court: You know?

Witness: Sure I know. He was going down there—

The Court: Just a minute. Had you been over that route before to go to Hoboken before this particular night with Pepoon?

Witness: Yes, sir; he was taking me

home. Some nights I used to take a ride with him, with the fellow drives the truck.

The Court: How many times had you gone over that route with Pepoon before?

Witness: How many times?

The Court: Yes.

Witness: I never went with Pepoon. I used to go with the boy drives the truck.

Mr. Turner: I object to it and move it be stricken out.

Witness: Pepoon rode with the fellow drives that truck.

The Court: What truck?

Witness: Conklin's truck. Auto truck they put the papers on.

Q. Whose trucks are you referring to? A. A. Conklin's.

Q. Whose? A. Conklin's trucks. That is the truck Rachels hires.

Mr. Turner: I do not see how these matters can be within the knowledge of the witness, and I ask the Court to strike them out.

The Court: We have gone far enough. He said he was going to Hoboken.

Mr. Jaffe: If the Court please, I am just going to use Mr. Rachels for one or two questions. If the other side is going to make him their witness on other questions, I want leave to cross-examine him.

Mr. Turner: We will see what the questions are.

Mr. Jaffe: And if you bring out any-

thing further, I want the privilege of cross-examining Mr. Rachels. He is placed in a very peculiar position.

Mr. Turner: I do not think counsel ought to preface his calling the witness by any such remarks as that.

The Court: Let the future take care of that.

SAMUEL RACHELS, the respondent, called by the petitioner, sworn.

Direct-examination by Mr. Jaffe:

Q. Mr. Rachels, you are the respondent in this case? A. Yes, sir.

Q. What is your business? A. My business is wholesale newspaper business.

Q. Was Robert Louis Pepoon an employee of yours on or about March 15th of this year? A. Yes, sir.

Q. In what capacity was he employed? A. He was employed as night man.

The Court: As what?

Witness: Night man.

Q. What were his duties? A. To go to Hoboken with a truck to put the papers on and make a trip from Hoboken to Suffern, New York, and drop off papers on various places.

Q. You said he had to go to Hoboken? From where did he start? A. He always starts from my place.

Q. In Passaic? A. In Passaic.

Q. On this night of March 14th, which is Saturday night, was the decedent, Robert Louis Pepoon, an employee of yours?

Mr. Turner: I object to that unless counsel fixes the particular time.

Q. Was he on your payroll? A. Yes, sir.

The Court: That is better, that is more general.

Q. What time of the day, if at any time, did you see Pepoon at your place of business? A. I had seen him at ten o'clock or a little after, probable half-past ten at night.

Q. At night?

The Court: That is, he left that night and at the time of the accident, as late as ten or half-past ten o'clock?

A. He left—he left—you let me tell the story.

Q. Just a moment. Did you have a conversation with Mr. Pepoon just before he left your place? A. Yes, sir.

Q. Tell the Court what that conversation was. A. That conversation was, Mr. Pepoon came down at ten o'clock as usual on Saturday nights.

Mr. Turner: A little louder.

A. (Continued.) The conversation was Mr. Pepoon came down at ten o'clock as usual on Saturday night; he comes down ten or half-past ten, but the boys or trucks was starting Saturday night about ten o'clock from Passaic to get to Hoboken about twelve or a quarter after twelve. As the papers come on Saturday, Sunday morn-

ing which I had the loads, so I got about eight or ten or twelve men working. So he came down and asked me whether he could stay off. Not to go with the truck, but he would be there at the time it is necessary to be there.

Q. Did he tell you how he would get down there? A. No, sir.

Q. I see. A. And so I said to him, "Robby"—"Robby," I used to call him—I said, "Robby, now listen. If you want to stay off, just let me know so I will get another man in your place, and you can stay off." "No, Mr. Rachels, I want to be there. But I will be there on time. I just have a little business to attend to, but I will be there in time."

Q. Did he say where his business was? A. In Passaic. He got some business in Passaic to attend to. And he will be there in time. I asked him again.

The Court: To be there in your place at Passaic to start off on that trip?

Witness: No; he will be in Hoboken in time. I asked him again, because I said it is very necessary for me to know that on Saturday night, it is hard work and I don't want a man to leave, because I want the goods delivered. He said, "Mr. Rachels, when I say I will be there on time, I will be there on time." I said, "You can go off an hour or an hour and a half, I don't care which way you go there. But I want you to be there on time to load the papers on the truck." And he promised to be there.

Q. Now, Mr. Rachels, between what hours could he have arrived at Hoboken and done whatever work was required of him?

Mr. Turner: I object to that. That calls for a conclusion.

The Court: If he knows from his own experience.

Q. From your own experience, how late could he have gotten to Hoboken and get done the work required of him? A. My experience, I am there lots of the time. I go over there and see how the work is done. Otherwise I couldn't tell you.

Q. You tell the Judge. A. As a rule, the first papers come there about two-thirty, a quarter after two. Runs about on the quarter, but when the men is there at three o'clock just to load the truck, because they are sorting the papers over there by the trough. Sorting them on the ground and separating them—separate for each customer. And they load the papers for the truck for the throw-off. The principal work is putting the papers on at the time. The sorting we have enough men to do with it. And as long as he would be there about three o'clock, just to help the next man, the second man on the truck help him load the papers, that would be satisfactory to me. That is what I told him, "As long as you be there in time to load the truck."

Q. At any time before three o'clock? A. Any time at three o'clock, yes.

Q. At the time of his death, how much was he earning a week? A. Thirty dollars.

Q. How long had he been working for you? A. Oh, about a year and a half, I guess. A little over. I couldn't tell you that.

Q. Were his habits steady? A. Absolutely.

Q. Did you ever have any trouble with him? A. No, sir.

Q. Did you visit him while he was in the hospital? A. No, sir.

Q. When did you learn of the accident? A. Well, on Sunday morning it was reported to me.

Q. On Sunday morning they reported to you? A. And I called up my agent.

Q. I see. And of course you went to the funeral or didn't you go to the funeral? A. I was to the services to the house.

Mr. Jaffe: All right. Cross-examine.

CROSS-EXAMINATION by Mr. Turner:

Q. Now, Mr. Rachels, did you call and see Mr. Pepoon's mother and say to her, "I am very sorry your boy was killed, working for me in his line of duty"?

Mr. Jaffe: If your Honor please, may I just know this: I have no objection to this question, but I want to know whether that is part of his direct or part of his cross-examination, so I know just what I can go into.

Mr. Turner: You show he called at the house. I am asking when he called at the house did he say all this.

Mr. Jaffe: I did not ask about any conversation.

Mr. Turner: No. You asked him did he call at the house. That corroborates your witness. Now I am asking him did he say this.

The Court: We will regard it, for the time being, as cross-examination.

Q. Did you say to Mrs. Pepoon you were very sorry her boy was killed working for you in his line of duty? A. Absolutely I did.

Q. Did you say that? A. Yes.

Q. And when did you say that to her? A. When I was up to the house.

Q. And you did not report that to your insurance carrier, did you? A. Why should I report that?

Q. You did not report it to the Georgia Casualty Company that you had made that statement? A. It wasn't necessary for me to report it.

Q. I say, you did not tell them? A. No.

Q. And it has never been conveyed, that information has never been conveyed to them until today, has it? A. It is common when you come to the house—

Q. This is the first time any such information has been conveyed. A. When I come up to the house I felt sorry the boy got hurt when he was working for me.

Q. Did you say in his line of duty? A. What do you mean "in his line of duty"?

Q. What did you mean when you said this? A. I said, because at the time he was working for me.

Q. What did you say? A. I said, "I am very sorry your boy got killed at the time he was working for me." That is just what I told her.

Q. I just asked you if you said to her you were very sorry her boy got killed working for you

in the line of his duty. A. What do you mean of duty? The man was working for me.

Q. Do you say you did say that or you did not? A. The man was working for me.

Q. Did you say it? A. I said—now, listen, do you want me to tell you? I told you once.

The Court: Can you say the exact words?

Witness: I will tell you just what I said. I said, "I am very sorry that the boy got killed at the time he was working for me."

Q. That is all? A. That is all.

Q. You did not say when he was working for you in the line of his duty? A. I am telling you I am not such a high educated man.

Q. Did you say that? A. I don't speak that way.

Q. Did you say that? You can answer that. A. No, no; I am telling you.

Q. That is all I am asking you. A. Just what I said to you.

Q. Robert Pepoon worked for you and part of his duty was to take a truck from Passaic to Hoboken, wasn't it? A. Yes, sir.

Q. And to load that truck at Hoboken after he had taken it from Passaic to Hoboken and then go up to Suffern, New York? A. Yes, sir.

Q. And on the night of this accident he did not take the truck, did he? A. No.

Q. And who did take the truck that Robert Pepoon would have taken if he had been doing his regular work? A. Well, is usually a man, there is always two men on the truck. We got the next man.

Q. Do you know who the man was that took it? A. I know—I don't know what his name is.

Q. At any rate, it was not Robert Pepoon took the truck? A. No.

Q. What time did that truck that Robert Pepoon would have driven, what time did that leave your place in Passaic on Saturday night? A. It leaves about eleven o'clock.

Q. Eleven o'clock? A. Yes.

Q. You say about eleven. After eleven? A. Sometimes five minutes later, ten minutes later or before that. It doesn't make any difference.

Q. And you, at ten o'clock, had a conversation with Robert Pepoon in which he told you that he had some business that he wanted to attend to that night? A. Yes, sir.

Q. Some business of his own? A. Yes, sir.

Q. And you said that he could have the time off to attend to it, didn't you? A. Yes, sir.

Q. Now, at the time of this accident, it has been testified he was riding in a Buick touring car. Was that your touring car, your Buick? A. Mine?

Q. Yes. A. No, sir.

Q. You never owned that, did you? A. No, sir.

Q. Do you know whether or not Robert Pepoon owned that touring car? A. I don't know.

Q. Did you ever learn who did own it? A. No, sir.

Q. And you do not know where he got it, do you? A. No, sir.

Q. Did he use a Buick touring car about your business to deliver your papers? A. No, sir.

Q. No. When he told you on that Saturday night that he wanted to attend to some business

of his own, did he tell you what the nature of the business was? A. No, sir.

Q. Did he tell you whether the nature of the business was such that he required the use of a Buick touring car? A. No, sir.

Q. How long had he been driving that truck for you? A. It is not my truck.

Q. Driving this truck. A. About a year and a half.

Q. You say it was not your truck that he drove? A. No.

Q. Do you hire the trucks? A. I got a contract. I got a contract five trucks for Saturday night.

Q. You got a contract for five trucks for Saturday night? Does that contract include the drivers of the trucks? A. Absolutely.

Q. Who furnished the drivers? A. Truckmen furnish the drivers.

Q. The truckmen furnish the drivers? A. And I furnish the man in the back, helper throwing off the papers.

Q. Robert Pepoon, was he one of the men who was furnished by the trucking company? A. No.

Q. Or furnished by you? A. No; furnished by me.

Q. Furnished by you. Now, you have no idea where he went that Saturday night in this Buick touring car? A. Well, it would seem from my opinion or my idea—

Q. You do not know, of course, outside of the accident. You learned of the accident, of course. You do not know where he went. A. He went to work, I am sure.

Mr. Turner: I ask that be stricken out.

Mr. Jaffe: I object to that being stricken out.

A. You asked the question what the idea—

Q. I am asking you about his private business.

Mr. Jaffe: I ask that answer stay as it went. Mr. Turner cannot speculate with witnesses.

Mr. Turner: I am not speculating with the witness.

Mr. Jaffe: He certainly is.

The Court: I will ask a question I think might be helpful. Do you know where this accident occurred, at what part of the road?

Witness: On Plank Road. On the Plank Road.

The Court: Was it at a place that Pepoon was accustomed to drive his trucks?

Witness: Absolutely.

The Court (continuing): Over to Hoboken?

Witness: You couldn't drive it any other way but this way, that is going there seven days a week.

The Court: It was not anywhere in the vicinity of Passaic where he wanted to do this private business?

Witness: No, no, no.

The Court: I think the answer may stand, then.

Q. Did you know where he was going to attend to this private business in Passaic? A. No; I didn't ask him.

Q. What gave you the idea his private business was in Passaic? A. Well, he asked me to let him off for an hour or hour and a half, that's all.

Q. That is all he asked you, didn't he? A. Yes, sir.

Q. And he did not tell you where his private business was, did he? A. No.

Q. And you did not know, did you? A. No.

Q. So, when he said he was going to attend to some private business in Passaic, that was just your guess? You did not know where the private business was? A. What do you mean, I guess?

Q. You did not know where his private business was, did you? A. No, I didn't.

Q. And you have said a few minutes ago his private business was in Passaic. A. That is what he said to me, yes.

Q. He did not tell you that? A. He said to me in Passaic, of course, of course. "I got to be in Passaic for a little private business. Let me off for an hour or an hour and a half." And that is why I let him off. I gave him the privilege.

Q. When he was talking to you, did he then have the Buick touring car? A. No; he was in my place all alone.

Q. He was in your place all alone, without a car? A. Without a car.

Q. And he did not leave the touring car outside? A. I don't know—

Q. And you do not know where he got it? A. No, I don't.

Q. There is more than one way to go from Passaic to Hoboken? A. No, sir.

Q. No? A. No.

Q. Only one way? A. Yes, sir. There is more than one, but this is the nearest way and that is the way they all go.

Q. There are many ways to go? A. There are many ways to go but they want to go this way. I know that a fact.

Q. How many ways have you gone? A. Only one way.

Q. Only one way? A. That's all the way they are going with them trucks.

Q. How do you know the way they are going with the trucks? Do you go on the trucks? A. I certainly do go.

Q. When do you ever go with the trucks? A. I go sometimes once a week; sometimes once a month; sometimes I go sometimes once in a week —once in two or three weeks. If I see some trouble there, I go to inspect the trouble; get an idea it should not happen no more.

Q. This truck Mr. Pepoon worked on, how big a truck is that? A. I guess it is about two and a half tons.

Q. Two and a half tons? A. Two and a half tons, auto car.

Q. And that truck got back to your place what time after it went out at eleven o'clock Saturday night? A. Well, I couldn't tell you that, because I was in bed. I don't know what time they came back.

Q. Mr. Pepoon was not on your truck at all that night, was he, so far as you know? A. Going down or coming up?

Q. At all? A. As far as I discovered, he was not.

Q. As far as you discovered, he was not on your truck? A. He wasn't on my truck going down. I am sure of that. But coming back, I don't know.

Q. You know he was hurt before that truck came back? A. After I got up.

Q. So he was not on your truck at all that night? A. No.

Q. And that was the truck he worked on and he was to have worked on that night? A. That wouldn't make any difference—

Q. I want you to answer the question and not volunteer any information. A. All right, thank you.

Q. You are very friendly with Mrs. Pepoon? A. What did you say?

Q. You know her very well, don't you? A. I know her, yes.

Q. And you employed her boy for many years, didn't you? A. Yes, sir.

Q. And you are friendly to her, aren't you? A. What do you mean, I am friendly to her?

Q. Don't you know what a friend means? A. I probably saw that woman twice, since the man is working with me.

Q. You wish her well? A. I wish her good luck. I wish everybody good luck. I wish you good luck, too.

Q. In this case? A. In this case.

Q. I hadn't thought so up to this time. A. Well, I will tell you something. If the man is not entitled to it, he should not get it. My hon-

est opinion is all I can give you, whether it hurts you or not.

Mr. Turner: I ask that be stricken out. His opinion.

The Court: Strike it out.

Witness: The more—

Mr. Jaffe: I ask the beginning of it be stricken out.

Q. Now, you said Robert Pepoon was not on the truck at all that night, you learned. You have two men on those trucks? A. I had one man.

Q. One man? A. What I paid.

Q. Who served in his place on that truck that night? A. Nobody.

Q. You have to have a man besides the driver, don't you, to throw off the papers? A. What do you mean? Going down or coming back?

Q. Yes, going to Suffern. A. I don't know. It was up to my foreman. I have him over there.

Q. You did put one man to take Robert's place? A. No, sir.

Q. Did one man do it alone? A. We have extra men there.

Q. Did one man do it alone? You put the extra man instead of— A. I didn't put him. We have extra men.

Q. How many men do you put on the truck? A. Only the one.

Q. Did you put somebody on that truck to go in the place that Robert Pepoon would have filled if he had been there? A. No; I didn't know anything about it. But the men over there, they are managing this thing. They got an extra man there all the time.

Q. And they put him on in Robert Pepoon's place? A. And they put him on in Robert Pepoon's place. If it comes to a pinch, they—

Q. I don't want when it comes to a pinch.

The Court: He is describing the system.

Witness: I am describing the system.

Q. The point is this: A man was put on that truck that night to do the work Robert Pepoon would have done if he was there. A. It wasn't put on by me. Pardon me.

Q. Your foreman put him on. A. My foreman put him, naturally; he had to do it.

Q. Then he did it. A. He put on the man he had there.

Q. Who was the man did the work on that truck that night in Robert Pepoon's place? A. I couldn't tell you.

Q. Do you know his first name? A. I don't know anything about it. Whether they put on a man or not.

Q. You pay this man? A. I pay the men whether he comes with the truck or comes to Passaic. I have extra help.

Q. You already testified the man was put on. Do you say now you do not know? A. I testified I didn't put him on.

Q. You testified the foreman did?

Mr. Jaffe: If your Honor please—

A. You didn't hear me right.

Mr. Jaffe: The witness wants to give his honest testimony.

Mr. Turner: I don't know why counsel needs to help him.

Mr. Jaffe: I am not trying to help him. I don't know whether he is my witness or yours.

The Court: As I gather, he has got another extra man over at Hoboken. Is there one or two?

A. Extra man all the time.

The Court: In Hoboken?

Witness: He doesn't go on any truck at all, but in the time of emergency, probably one doesn't show up, or anything happens there, or one gets sick, this man goes on and the other man stays home.

Q. That is what happened that night? A. I don't know; must be. Maybe one man drives himself. I don't know.

Q. Who was the man drove that night? A. Contract driver.

Q. The man who drove this truck, do you know his name? A. I couldn't tell you. I don't know who drove the truck at that time. It is up to the contractor.

Mr. Turner: I think that is all.

RE-DIRECT EXAMINATION by Mr. Jaffe:

Q. Mr. Rachels, the custom you had with your employees is first they call at your shop or office and then from there they go to their various duties, isn't that correct?

Mr. Turner: I object to that on the ground it is leading.

Mr. Jaffe: I am cross-examining him.

New Jersey State Library

Motion to Dismiss Petition

Mr. Turner: You are not cross-examining him at all.

Mr. Jaffe: I am cross-examining him.

Mr. Turner: On the ground that it is leading and on the ground that it is incompetent, calls for a custom. Custom has nothing to do with this case.

The Court: I do not know it is necessary. It is recapitulation.

Mr. Jaffe: All right; all right. That is all. We rest, if your Honor please.

Mr. Turner: If the Court please, I move to dismiss this petition on the ground this accident did not arise out of and in the course of the employment of the decedent; and on the further ground this department, the Workmen's Compensation Bureau, is without jurisdiction to hear and determine this case under the statute.

The Court: Being without jurisdiction on the theory it did not arise out of the employment?

Mr. Turner: Yes, sir. That is our case.

The Court: Don't you want to put any evidence in?

Mr. Turner: No, sir.

The Court: I do not have the other testimony here. I am a little handicapped in not having the full thing. But the gist of the thing to be decided is whether or not the accident occurred—and there was an accident, undoubtedly, whether is occurred in the course and out of the employment. I do not recall the testimony as to the dependency, although I think that is rather secondary. Off the record.

(Further discussion of counsel off the record.)

(Decision reserved.)

(Mr. Turner to submit small memorandum within two weeks' time.)

Notice of Appeal.

NEW JERSEY SUPREME COURT

SAMUEL RACHELS,
Prosecutor,

vs.

ANNIE PEPOON,
Respondent.

To: Jacob E. Jaffe,
Attorney for Respondent.

Take notice, that the prosecutor hereby appeals to the New Jersey Court of Errors and Appeals from all of the judgment entered herein on February 3, 1927.

Yours respectfully,

FRANK G. TURNER,
Attorney of Prosecutor.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

SAMUEL RACHELS,
Prosecutor-Appellant,

vs.

ANNIE PEPOON,
Respondent-Appellee.

To: The Respondent-Appellee:

Take notice, that the following are the grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled action:

1. The New Jersey Supreme Court erroneously affirmed the judgment of the Court of Common Pleas of Passaic County, which was without jurisdiction to affirm the Workmen's Compensation Bureau.

2. The New Jersey Supreme Court erroneously held that the Workmen's Compensation Bureau had jurisdiction to hear the said cause in favor of respondent-appellee.

3. The New Jersey Supreme Court erroneously held that there was evidence to sustain the findings of the Workmen's Compensation Bureau.

4. The New Jersey Supreme Court erroneously held that there was evidence to sustain the findings of the Passaic County Court of Common Pleas.

5. The New Jersey Supreme Court erroneously held that the said alleged accident to the deceased arose out of and in the course of his employment.

6. The New Jersey Supreme Court erroneously affirmed the Passaic County Court of Common Pleas and gave judgment in favor of the respondent-appellee in this cause wherein the said alleged accident to the deceased occurred at a time when he was in and about his own personal business, riding on the public highway, in an automobile not owned by the prosecutor-appellant and up to the time of the accident the deceased had not reported for work for the appellant.

7. The New Jersey Supreme Court erroneously gave judgment in favor of the respondent-appellee when it should have given judgment in favor of the prosecutor-appellant.

FRANK G. TURNER,
Attorney and of Counsel
with Prosecutor-Appellant.

Opinion.

NEW JERSEY SUPREME COURT

No. 208, October Term, 1926

Samuel Rachels,	Prosecutor,	On Certiorari
vs.		
Annie Pepoon,	Respondent.	

Before Justices Black and Campbell.

For Prosecutor, Frank G. Turner.

For Respondent, Jacob I. Jaffe.

Per Curiam:

This writ brings up for review a judgment of the Passaic Common Pleas Court affirming a judgment of the Workmen's Compensation Bureau awarding respondent compensation for the death of her son, Robert Louis Pepoon.

Pepoon worked for Rachels, who was a wholesale and newspaper dealer, taking delivery of his papers in Hoboken, and distributing them by trucks to his customers, who were local, retail dealers. Pepoon was a helper on one of these distributing trucks. The trucks were hired by Rachels and the drivers were furnished by the truck owners. Pepoon's practice and duty was to ride on one of these trucks from Passaic to Hoboken; there assist in assorting and prepar-

ing the papers, and from there accompany a truck over a route and assist in the distribution and delivery to Rachel's customers.

On the night of his injury, he requested Rachels to grant him leave to attend to some personal affair that would detain him beyond the time of the departure of the trucks from Passaic to Hoboken. This privilege was accorded him upon his promise that he would be in Hoboken at 3:00 A. M. to take up his work and duties there. He attended to the item of business which required his attention and then undertook to go from Passaic to Hoboken in an automobile which he hired or borrowed and which he drove himself. While on his way from Passaic to Hoboken, he traveled over the Paterson Plank Road, the route he would have gone over by means of one of the trucks. His car came in collision with another car and he received injuries from which he died.

We think the accident causing the injuries resulting in death, arose out of and in the course of the employment of Robert Louis Pepoon. It did not happen while he was about his own business and personal affairs, but after the conclusion thereof. Under the facts in this case, we think his service began when he left Passaic and proceeded toward Hoboken. While his actual work began in the latter place, yet to reach there was an act within and necessary in his service toward his employer. Such would seem to have been the practice and custom on all other occasions when his means of transportation was one of the trucks in his employer's service.

Such would seem to be the conclusion to be reached from two recent cases in this court:

Theresa Bolds v. Trenton Fire Clay and Porcelain Co., 4 N. J. Adv. Rep. No. 26, p. 1211; and
Ramsey v. Leahey, 4 N. J. Adv. Rep. No. 30, p. .

The judgment under review is affirmed and the writ dismissed.

Order Affirming Judgment.

NEW JERSEY SUPREME COURT

ANNIE PEPOON, Petitioner-Respondent, vs. SAMUEL RACHELS, Respondent-Prosecutor.	On Appeal

The above-entitled matter having been submitted on briefs at the October Term, 1926, and the Court having, on January 18th, 1927, by written opinion, affirmed the said judgment;

It is, therefore, on this 3rd day of February, 1927, Ordered, that judgment of the Court below be affirmed in all respects, with costs, and the record be remitted to the Court below to be pro-

ceeded with according to law and practice of said Court.

Rule entered this 3rd day of February, 1927, on motion of

JACOB I. JAFFE,
Attorney of Petitioner-Respondent.

A true copy.
Edward J. Kelleher, Clerk.

68 MAY.T.1927

New Jersey
Court of Errors and Appeals

SAMUEL RACHELS, Prosecutor-Appellant, vs. ANNIE PEPOON, Defendant-Appellee.	On Appeal On Certiorari Workmen's Compensation Proceeding.

BRIEF OF PROSECUTOR-APPELLANT.

The appeal herein from the Supreme Court on certiorari herein brings up a Workmen's Compensation proceeding brought by ANNIE PEPOON to recover for the death of her son who was to have reported for work at Hoboken, New Jersey, at three o'clock on Sunday morning (Case, p. 81) to load newspapers on a truck. He had taken time off to attend to some private business (Case, p. 80) and never reached Hoboken. About a quarter after twelve, midnight, he left a road house at East Rutherford in a Buick touring automobile which he had procured from some source unknown to his employer, and was killed on his way to Hoboken, when his car ran into a pole and turned over. This evidence is clear and undisputed and yet the learned Compensation Commissioner and learned Common Pleas Judge base their judgments in some degree at least upon the unwarranted assumption, and find, that deceased arrived at Hoboken. The Compensation Referee says (Case, p. 16, l. 40):

"That on said date the said Robert Pepoon made arrangements with the respondent to leave for Hoboken at an hour, later than the usual time and did arrive at Hoboken by a conveyance other than the truck by the respondent."

And the learned Common Pleas Judge falls into the same error (Case, p. 25, l. 10) and finds:

"That on said date the said Robert Pepoon made arrangements with the respondent-appellant to leave for Hoboken at an hour, later than the usual time and did arrive at Hoboken by a conveyance other than the truck operated by the respondent-appellant."

There was no evidence to support the finding of either Judge. All the evidence was to the contrary.

He was out on his own personal matters. He was to report for work at Hoboken the following morning. He was several miles from Hoboken at the time he was killed. No one knows whether he would have gone to Hoboken, but even assuming that he did intend to go to Hoboken and report for work, he was not engaged in his employment at the time of the accident and the accident did not arise out of or in the course of his employment. His work for his employer was to drive a truck. Another man was put on the truck to take the place of the deceased Robert Pepoon.

"Q. The point is this. A man was put on that night to do the work Robert Pepoon would have done if he was there? A. It wasn't put on by me. Pardon me.

Q. Your foreman put him on? A. My foreman put him, naturally; he had to do it.

Q. Then he did it" (Case, p. 92, ll. 10 to 20).

The deceased has picked up a companion at a road house at East Rutherford.

"A. He wasn't there two minutes.

Q. Well, what did he—did he drive up in this Buick car to the hotel? A. Yes, sir.

Q. Did you see him drive up? A. Yes, sir.

Q. Did he get out of the car? A. No, sir; he just called me.

Q. Did you get out of the car? A. No, sir.

Q. Not at all? A. Not at all.

Q. Now, Joe Nazo's place is a hotel, isn't it? A. Hotel.

Q. Regular hotel? A. Regular hotel.

Q. And you got rooms for lodgers there?" (Case, pp. 67-68) .

They collided with an automobile on the road.

"Q. After you left the hotel in East Rutherford, how far did you drive before the accident happened? A. I imagine about a mile and a half or two miles.

Q. About a mile and half or two miles. And did you make any stops between the time you left Joe Nazo's hotel and the time the accident happened? A. Not stops at all. There was nothing on the road there.

Q. Now, did you drive, did you yourself drive any of that distance from Joe Nazo's hotel to the place of the accident? A. No, sir.

Q. Do you know what car it was struck you? A. Well, it looked like a Buick, brand new Buick" (Case, pp. 72-73).

Someone else had driven the truck that Robert Pepoon would have driven.

"Q. Robert Pepoon worked for you and part of his duty was to take a truck from Passaic to Hoboken, wasn't it? A. Yes, sir.

Q. And to load that truck at Hoboken after he had taken it from Passaic to Hoboken, and then go up to Suffern, New York? A. Yes, sir.

Q. On the night of this accident he did not take the truck, did he? A. No.

Q. And who did take the truck that Robert Pepoon would have taken if he had been doing his regular work? A. Well, is usually a man, there is always two men on the truck. We got the next man.

Q. Do you know who the man was that took it? A. I know—I don't know his what his name is.

Q. At any rate, it was not Robert Pepoon took the truck? A. No.

Q. What time did that truck that Robert Pepoon would have driven, what time did that leave your place in Passaic on Saturday night? A. It leaves about eleven o'clock.

Q. Eleven o'clock? A. Yes.

Q. You say about eleven. After eleven? A. Sometimes five minutes later, ten minutes later, or before that. It doesn't make any difference.

Q. And you, at ten o'clock, had a conversation with Robert Pepoon in which he told you that he had some business that he wanted to attend to that night? A. Yes, sir.

Q. Some business of his own? A. Yes, sir.

Q. And you said that he could have the time off to it, didn't you? A. Yes, sir.

Q. Now, at the time of this accident, it has been testified he was riding in a Buick touring car; that your touring car, your Buick? A. Mine?

Q. Yes. A. No, sir.

Q. You never owned that, did you? A. No, sir'' (Case, pp. 84-85).

THE LAW.

The Court of Common Pleas and Workmen's Compensation Bureau were without jurisdiction.

The accident did not arise out of and in the course of the employment of deceased.

In the case of *Fletcher* vs. *Meredith,* 129, at Rep. 795, it is held:

> ''The undisputed facts are that the appellant was struck by an automobile truck as he was walking with his bicycle, at night, along the side of the state road near Parole in Anne Arundel County, and that the truck was owned by the appellees and was being driven by their chauffeur, Frank Dorsey. Dorsey and the appellees all testified that on the morning of that day, he (Dorsey) had asked Mr. William Meredith to lend him a Ford truck belonging to the firm to go to the funeral of an uncle of Dorsey's near McKendree, in the lower part of the county, and that Mr. Meredith had said the Ford could not be spared, but that there was a load of lumber to be delivered at Mason's Beach, in the same direction and Dorsey could take the truck he usually drove, deliver the lumber, and then take the rest of the afternoon off and use the truck to go to the funeral. The plan was carried out, Dorsey taking his sister on the truck and leaving with the lumber early in the afternoon, delivering the lumber and then going on to Annapolis and only a short distance from Annapolis, that the appellant was struck. It was then dark, the headlights of the truck having been lighted.

It is conceded by the appellant that, under the previous decisions of this Court, there could be no recovery by him, if the driver was at the time engaged on his own business or pleasure and not on any business of his employer. The rules of respondent superior or agency are the only rules of common law upon which a vicarious liability of the employer might be based, and under those rules the liability can be extended only to the limits of the employer's business; *Debelius* v. *Benson,* 129 Md. 693, 100 A. 505; *Whitelock* v. *Dennis,* 139 Md. 557, 116 A. 68; *Myers* v. *Shipley,* 140 Md. 380, 116 A. 645, 20 A. L. R. 1460; *Louis* v. *Johnson,* 146 Md. 115, 125 A. 895. Therefore, if the accident had occurred while the truck was going to the funeral, beyond the place of delivery of the lumber, no question of liability of the truck owners would be raised. But recovery is sought on the theory that Dorsey had finished his own use of the truck, and had returned to the employer's business by returning toward Annapolis where the truck was kept. The argument is that the work of delivering the lumber at Mason's Beach, which was, of course, the employer's service, involved as a necessary incident the return to Annapolis, and that therefore the driver resumed the service when the funeral was over and he returned home.

But the opinion of this Court is that the weight of authority, and the better reasoning are to the effect that the bare fact of return toward the garage after a personal use by the employee does not alone constitute resumption of the employer's service; that it may in some circumstances, and in others it may not. It would seem possible that an employer's service could be terminated at a distant point, and the car or truck then delivered over to use of

the employee until ultimately returned to the garage. And we think that is the proper analysis of this case. It may be said upon the testimony here that the whole trip originated as one on personal business for the employee. And when it is added that after the delivery of the lumber at Mason's Beach, the employee and the truck were released from the employer's service for the afternoon it seems to us clear that the return toward Annapolis cannot be taken as a resumption of that service except by way of a fiction and that it would involve a break with the law of agency to hold the employer liable for the results of the accident which then occurred. We do not consider ourselves at liberty to make that break. In *Debelius* v. *Benson,* 129 Md. 393, 100 A. 505, the employee was returning to Baltimore city where the car belonged after a ride authorized by his employer, and the employer was held not liable.

In *O'Rourke* v. *A-G Co., Inc.,* 232 Mass. 129, 122 N. E. 193, a chauffeur generally employed to drive rented cars, was permitted by his employer to take a car on Sunday to carry his family on a pleasure trip and he was returning along, on the way to the garage when the accident out of which the suit arose, occurred. 'The record does not disclose any facts,' said the Court, 'from which, notwithstanding his testimony to the contrary, an inference reasonably could be drawn that Munger was acting for and representing the defendant at the time of the accident.' And the employer was held not liable. And in the case of *Cannon* v. *Goodyear Tire & Rubber Co.,* 60 Utah 364, 208 P. 519, the employer was held not liable for negligence of a driver who, after having made the last delivery of the day for the employer, drove on to

his own home and moved his furniture and then return toward the employer's garage, struck the plaintiff. And to the same effect are *Ludberg* v. *Barghoorn,* 73 Wash. 476, 131 P. 1165; *Danforth* v. *Fisher,* 75 N. H. 11, 71 A. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 370; *Brinkman* v. *Suckerman,* 192 Mich. 624, 159 N. W. 313; *Scheel* v. *Shaw,* 252 Pa. 451, 97 A. 685; *Solomon* v. *Commonwealth Trust Co.,* 256 Pa. 55, 100 A. 534. And see *Matter of Schultz* v. *Champion W. & M. Co.,* 230 N. Y. 309, 130 N. E. 304; *Reich* v. *Cone,* 180 N. C. 267, 1024 S. E. 530; *Menton* v. *Patterson Mercantile Co.,* 145 Minn. 310, 176 N. W. 991; and generally a note reviewing cases in 22 A. L. R. 1, 1400.

"Where Pullman Company's conductor, after donning his uniform in a room provided by the company for his convenience, was killed by a street car before his regular working hours began, while on his way to the station, held that his death was not compensable under Workmen's Compensation Act, Sec. 301 (Pa. St. 1920, Sec. 21984), since he was not engaged in the 'course of his employment' when killed, nor on employer's premises. An injury suffered by an employee, not during hours of his employment, nor on employer's premises, nor while engaged in furtherance of employer's business, is not compensable under Workmen's Compensation Act, Sec. 301 (Pa. St. 1920, Sec. 21984). Whether an employee met his death in course of his employment is a question of law reviewable by the courts, where the facts are not disputed."

Houlehan v. Pullman, 124 Atl. P. 640.

"Where a day-laborer, who was ordered to appear before the company's physician for physical examination after working hours on a certain evening, did not appear at the designated time and place but voluntarily appeared the next evening at another town, and was drowned on returning across a river, his death was not due to an accident in the course of his employment, within the Workmen's Compensation Act."

Wilson v. Frick, 110 Atl. 723.

"The plaintiff's case depended upon the testimony of the driver, whom the plaintiff put on the stand and who testified that at the time of the accident he was driving a car of defendant which he was accustomed to use in the course of his employment. On his cross-examination by defendant's counsel, he testified that at the time of the accident he had departed from his employment and was engaged upon his own matters unconnected with his employment. There was no evidence in contradiction of this, and nothing whatever in the record to indicate that the witness was untrustworthy. The plaintiff's counsel makes the claim that it was the province of the jury to believe or disbelieve the witness when he said he was engaged upon his own business at the time of the accident, and that the Court cannot substitute its finding for that of the jury.

(2) Assuming that the jury did disbelieve the witness in this particular, they had no evidence whatsoever before them from which they could find that the witness was in fact engaged upon the defendant's business at the time of the accident. No presumption arises of this fact out of the mere proof that the car was owned by the defendant, and at other times used by the witness in the business of the defendant,

and this is all of the evidence upon this point."

Lane v. Ajax Rubber Co., 120 Atl. P. 724.

"Where decedent was driving a team in a parade in honor of employees who had enlisted in the military service as his voluntary act and his individual contribution towards the parade, and it was not held during working hours and he was not under pay at the time, compensation for his death from falling under the wheels of his wagon was properly disallowed."

Rutno v. Lehigh, 113 Atl. p. 68.

"The burden was upon the petitioner in the court of first instance to prove a case within the state statute."

Lincks v. Erie, 116 Atl. p. 493.

"In a proceeding under Section 2 of the Workmen's Compensation Act (P. E. 1911, p. 136) to recover compensation for the death of an employee, the burden of proving that death was caused by accident arising out of and in the course of his employment is upon the petitioner."

Geizel v. Regina Co., 114 Atl. p. 328.

"Where the evidence showed that an employee fell from an open doorway, protected only by a bar, when he went there to get fresh air, because the account of an operation given by the superintendent had made him feel faint, and that he fainted when he reached the door and fell out under the bar, the injury did not arise out of his employment, within the Compensation Act, though his employment permitted him to go to the door at that time.

Though a claimant for compensation need not prove that the employment or

some condition connected with it, was the proximate cause of the injury, there can be no award of compensation, unless there is some casual connection between the employment and the injury.

The mere fact that an employee is in the course of his employment when injured does not entitle him to compensation, when his employment permitted him temporarily to depart from the performance of his duties, and he is injured by a risk incidental to his employment, but while he is doing something utterly irrelevant to the employment."

Reeves v. Dady, 113 Atl. p. 162.

"Injuries to a workman did not arise out of and in the course of his employment, within the Workmen's Compensation Act, where they were received after he had quit work for the day when he attempted to board a motor truck to return home, the truck which had been used in the work being also on its homeward journey, but not then under the control of the employer, who rented it by the day and was under no obligation to furnish transportation.

An injury arises out of the employment, within the Workmen's Compensation Act, when it occurs in the course of the employment and is the result of a risk involved in the employment, or incident to it or to the conditions under which it is required to be performed, and in every case there must be a causal connection between the injury and the employment."

Blaz v. Warren Bros., 111 Atl. p. 206.

"An employee engaged in an occupation at his employer's plant, who, while journeying to or from the plant, is accidentally injured on a public street, is not with-

in the coverage of Workmen's Compensation Law, Sec. 3, subd. 4, because not then in the course of his employment."

Traynor v. City of Buffalo, 203 N. Y. S. 590.

"A minor, killed by the overturning of a motor truck while being transported by a third party to his home, after his daily work was done at a point three miles from the employer's premises, and without knowledge that a few days before his employer withdrew from operation of the truck, held not injured upon the premises of his employer, nor during the hours of service, nor at a place where the duties of his service required him to be, so that, under Compensation Act, Sec. 36, subd. 2 (j), his injury did not arise out of and in the course of his employment."

Ex Parte American Fuel Co., 97 So. 711.

"It is a general rule that an accident does not arise out of and in the course of the employment within the Workmen's Compensation Law, when it occurs while the employee is on his way to work, and before he has reached the premises of the employer, or when he is on his way home and has left the employer's premises."

Reed v. Bliss & Van Auken Lumber Co., 196 N. W. 420.

"Injuries to an employee struck by an automobile while riding his bicycle on a street of his own selection on his way to work, after his foreman failed to get an automobile to carry him, as he had stated he might do, did not arise in the course or out of the employment within the Workmen's Compensation Act, the foreman having undertaken to provide transportation

as a mere accommodation without authority from the employer, who was not obligated to do so."

North Point Consol. Irr. Co. v. Industrial Commission of Utah, 214, p. 22.

"Where an automobile salesman, who called at employer's salesrooms each morning for list of prospective customers and made sales anywhere in the city, and was free to take lunch when and where he pleased, spent the forenoon about the salesroom because a sale was being had, and was killed in a collision while returning to the salesroom from luncheon at home, being carried by another employee living in the neighborhood, the accident did not arise out of his employment within the Workmen's Compensation Act, as he was discharging no duty to his employers, though he expected to close a sale at the salesrooms on that day."

Lipinski v. Sutton Sales Co., 190 N. W. 705.

"Ordinarily where the lunch period is not subject to the employer's control, and the employee is free to go where he will at that time, if he is injured on the street off the premises, the injury does not arise 'out of the employment,' within the Workmen's Compensation Act; and this was true where three employees had made a voluntary arrangement to eat lunch on the premises, and one was injured by a fall on the street, where he was sent by the others to obtain provisions."

Pearce v. Industrial Commission, 132 N. E. 440.

"Where an employee left his employer's place of business for the purpose of going to a restaurant between 400 and 500 feet

away for a cup of coffee and was struck by a motor truck while in the public street, the injury did not arise out of the employment or in the course of the employment, within the Workmen's Compensation Law."

Clark v. Voorhees, 231 N. Y. 14, 131 N. E. 553, reversing order (Sup.), 184 N. Y. S. 888.

"Under Workmen's Compensation Act, Sec. 2, cl (d) providing for compensation for accidental injuries arising out of and in the course of employment, an employee cannot recover for injuries by being struck by an automobile while riding his bicycle on his way home to lunch during the noon hour."

Taylor v. Binswanger & Co., 107 S. E. 649.

"Where a railroad company permitted its employees to ride to and from their work without charge, but the contract of employment did not obligate it to transport them, an employee, who, on termination of his actual work for the day, went on the station platform used by the general public to take passage on a train, and was shortly afterwards found dead on the track, was not killed by an injury 'arising out of or in the course of the employment,' within the Compensation Law."

Kowalek v. New York Consol. R. Co., 128 N. E. 888, 229 N. Y. 489, reversing order 179 N. Y. S. 637, 190 App. Div. 160.

It is respectfully urged that there should be a reversal of the judgment of the Supreme Court.

Frank G. Turner

FRANK G. TURNER,
Attorney of and of Counsel
with Prosecutor-Appellant.

The Otsego Press, Cooperstown, N. Y.

58 MAY.1.1927

New Jersey Court of Errors and Appeals

SAMUEL RACHELS,
Prosecutor-Appellant,

vs.

ANNIE PEPOON,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE.

Statement of Facts.

Robert Pepoon, son of the defendant-appellee, was employed by the appellant on or about the 15th day of March, 1924. Appellant's business was that of a wholesale newspaper distributor. The duties of the said Robert Pepoon consisted in going from appellant's place of business in Passaic to the railroad station in Hoboken, loading newspapers at the said station on the appellant's truck and delivering the newspapers to customers of the appellant between Hoboken, New Jersey, and Suffern, New York (Case, p. 78, lines 31-40).

Appellant's place of business was in Passaic, at which place the said Robert Pepoon reported for duty each night at 10:00 o'clock (Case, p. 79, lines 15-35).

It appears from the testimony (Case, p. 86, lines 20 to 25), that the appellant hired trucks for the purpose of his business from a truckman; that said trucks left appellant's place in Passaic for Hoboken at 10:00 o'clock each night, and appellant's employees were conveyed by these trucks from Passaic to Hoboken, the truckman furnishing the driver.

On the night of March 14th, 1925, the said Robert Pepoon reported for work at the usual hour of 10:00 o'clock, but, having some personal business to perform, he requested prosecutor-appellant's permission to be allowed to attend to the same, and then go to Hoboken (Case, p. 79, lines 32-40). As the personal business of the said Robert Pepoon would require about an hour and a half, it was arranged with his employer that he could first perform the same, and then leave Passaic for Hoboken. However, as the trucks left Passaic at 10:30 o'clock, it would be necessary for the said Robert Pepoon to get to Hoboken by some other conveyance, which the prosecutor-appellant said was immaterial to him, just as long as he got to Hoboken in time to load the papers on the truck (Case, p. 80, lines 35-40).

The said Robert Pepoon, having finished his business about 12:00 o'clock, left Passaic at that time in a Buick automobile, which he had borrowed, and while on the way to Hoboken over the Plank Road (the route generally taken by prosecutor-appellant's trucks) (Case, p. 87, lines 21-30), his automobile was forced off the road by a truck, struck a pole, overturned (Case, p. 63, line 19, to p. 64, line 29), and the said Robert Pepoon so badly injured that he died as a result thereof (Case, p. 46, line 39, to Case, p. 47, lines 1-18).

It appears from the testimony that the decedent had made some arrangements with Coronato, a witness, to meet him at about 12:45 A. M. on March 15th, 1925, on the Plank Road in East Rutherford and was to go along in the car driven by the decedent, and that the witness was to proceed with the decedent to Hoboken, the point where Pepoon was to help unload papers on the truck, and the witness, Coronato was to drive the Buick car to Passaic (Case, p. 60, lines 32-38).

ARGUMENT.

The death of petitioner's intestate having resulted from an accident arising out of and in the course of his employment, the award of the Workmen's Compensation Bureau and the Passaic County Court of Common Pleas and its affirmance by the Supreme Court was justifiable in law.

From the testimony of the prosecutor-appellant (Case, pp. 78-82) it is clear that the deceased was in the employ of prosecutor-appellant; that he reported for work at prosecutor-appellant's place of business in Passaic at 10:00 o'clock each night, and that shortly thereafter he was conveyed by prosecutor-appellant's truck to Hoboken where he, and other employees of prosecutor-appellant, unloaded newspapers from various trains and then proceeded to deliver the same by the said truck to prosecutor-appellant's customers on a route extending from Hoboken to Suffern, New York. Prosecutor-appellant further testified that deceased was paid $30.00 a week salary (Case, p. 81, line 37).

It is clear from the testimony that deceased's employment started at the time he reached his employer's place of business in Passaic at 10:00 o'clock, and also that prosecutor-appellant required him to report there each night before starting for Hoboken (Case, p. 78, lines 38-40).

The brief submitted by counsel for the appellant, either wilfully, or negligently misstates certain facts. Counsel states that the deceased was to report for work at Hoboken, New Jersey, at three o'clock Sunday morning, but nowhere can that fact be ascertained throughout the testimony.

The testimony, without dispute, is that he reported for work at Passaic and was to arrive at Hoboken later to complete the duties devolved upon him. The next misstatement is that the deceased left a roadhouse at East Rutherford and from that point proceeded on the Paterson Plank Road to the point of accident and place of injury. This statement is contrary to fact because at page 92, lines 10-15, the witness testified that the deceased did not get out of the car when he arrived at the hotel mentioned, but that the witness immediately boarded the car driven by the deceased.

The general rule is that where transportation is furnished by an employer as an incident of the employment, an injury suffered by an employee while going to or returning from his work in the vehicle furnished by the employer arises out of and in the course of his employment.

The above rule has been followed in:

Dominguez v. *Pendoia* (Cal. 1920), 188 Pac. 1025;
Swanson v. *Latham,* 92 Conn. 87, 101 Atl. 492;
Scalia v. *American Sumatra Tobacco Co.,* 93 Conn. 82, 105 Atl. 346;
Harrison v. *Central Construction Co.* (Md. 1919), 108 Atl. 874;
Donovan's Case, 217 Mass. 76, 104 N. E. 431;
State ex rel. London & L. Indemnity Co. v. *District Court,* 141 Minn. 348, 170 N. W. 218;
Littler v. *Geo. A. Fuller Co.,* 223 N. Y. 369, 119 N. E. 554.

The general rule has also been followed in England:

Holmes v. *Great Northern R. Co.* (1900), 2 Q. B. 409, 69 L. J. Q. B. N. S. 854;
Walton v. *Tredegar Iron & Coal Co.* (1913), 6 B. W. C. C. 129;
Richards v. *Norris* (1914), 110 L. T. N. S. 496.

If the injuries sustained by an employee during the time he is transported to and from work are compensable, then surely in the case at bar there must be a recovery because immediately upon the reporting to duty at the employer's office the duties of the deceased commenced, and the employee's trip to Hoboken was one of the duties devolved upon the employee, the contention being that the employee was on duty from such time that he reported to work.

This rule has been interpreted liberally in favor of the employee and has been held to apply to diverse situations having the common fact of an acquiescence, either express or implied, on the part of the employer to the use by the employee of some means of transportation to reach his work. In a recent decision of this Court, in *Fisher* v. *Tidewater Bldg. Co.,* 96 N. J. L. 103 (affirmed by the Court of Errors and Appeals in 97 N. J. L. 324), Justice Black stated (p. 105) that "The Workmen's Compensation statute is a remedial law of prime import and should be liberally construed."

The employer in that case as part of the contract of hiring, furnished an employee with tickets for transportation over a railroad to and from his home, and after the employee stopped work on the date of the accident he proceeded to the station, and while attempting to board a train provided for employees was struck by a train and killed.

Justice Black in the aforementioned case stated the governing principle to be that:

> "Where the workman is employed to work at a certain place, and as a part of his contract of employment, there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation, it is held to have arisen out of and in the course of the employment. This rule has the support of English and American Cases."

In the case at bar the employee's duty was to go to Hoboken and the method of transportation was usually provided by the employer. There can be no doubt that the going to Hoboken was part of the employment, and for which the employee was paid, and therefore this case comes within the purview of the decision of Justice Black.

In *Bryant* v. *Fissel,* 84 N. J. L. 72, Justice Trenchard concluded after a review of the authorities:

> "An accident arises in the course of the employment if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." * * * "An accident arises out of the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it." * * * "A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service." * * * "A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment."

In the case at bar the employee was under a duty to travel from Passaic to Hoboken, and after loading the papers on a truck furnished by the employer delivered them enroute from Hoboken to Suffern, New York (Case, p. 78). Adopting the rule stated by Justice Trenchard, the accident to the deceased occurred "out of and in the course of his employment." On the night of the accident the employer permitted deceased to attend to certain matters in Passaic, and instructed him to be sure to leave Passaic for Hoboken in time to assist in the loading of the newspapers on the employer's distributing truck (Case, p. 80, line 35). Iasmuch as the trip from Passaic to Hoboken was made regularly every night in the course of deceased's employment, the risk of an accident on the road between Passaic and Hoboken would clearly have been contemplated by a reasonable person as incidental to this employment. This risk was just as much incidental to the employment on the night in question, when the employer authorized deceased to proceed to Hoboken in any manner so long as he arrived in time to perform his usual duties, as on any other night during deceased's contract of service.

In this State the case of *Bryant* v. *Fissel* was followed in every case where the question was raised as to whether or not an injury occurred out of and in the course of employment, and in the most recent case of *Bolos* v. *Trenton Fire Clay and Porcelain Co.,* 4 N. J. Adv. Rep., 1211, the doctrine laid down in the Bryant case was restated.

In that case the decedent at the regular lunch time left his employer's truck, on which he was

a helper, at the brick shed on his employer's premises, and ate his lunch at the barn, also on the premises. When the whistle blew for him to resume work at the termination of the noon recess, he started for his truck. Observing another of his employer's trucks starting from the vicinity of the barn and going to the brick shed, he jumped upon its runningboard. To get to the brick shed it was necessary for the truck to travel about six hundred feet, in part over a public street abutting and paralleling a part of the premises. In turning back from the street into the premises the decedent was thrown from the truck and killed. The Court in that case held that the accident arose out of and in the course of his employment.

In the case of *Ramsey* v. *Leahey,* 5 N. J. Adv. Rep., page 511, where the petitioner was captain of a coal barge, and was required by the conditions of his employment to supply his own food, and to that end it was necessary that he should leave the barge, where his duty was continuous, and go ashore to buy such food. On the occasion in question he had gone ashore for this purpose and while returning to the barge by the usual route was injured at a railroad crossing. The Court held that the Trial Court was justified in finding that the accident arose out of and in the course of the employment.

The authorities cited cover the legal questions raised in the case at bar, which justifies affirmance of the decision made by the Supreme Court in this case.

An examination of the authorities in the other states cite with approval the rules of law laid down in the case of *Bryant* v. *Fissel,* and this case has been followed throughout. In the case of *Mann* v. *Glastenburg Knitting Co.,* 96 Atl. 368, the

Supreme Court of Connecticut laid down the following rule of law (at page 369):

> "Finally the same right to compensation will follow if an injury arising from a risk of the business is suffered while the employee is doing something which, although quite outside of his obligatory duty, is permitted by his employer for their mutual convenience, such as eating his dinner on the premises or any similar act to the performance of which the employer has assented."

Following this principle, the Supreme Court of Errors of Connecticut recently held in *Saba* v. *Pioneer Contracting Co.,* 131 Atl. 394, that an injury to one riding to work on a truck, as instructed by the foreman, with knowledge and acquiescence of the employer, was an injury arising out of and in the course of the employment not withstanding the time spent on the truck was not paid for. The Court said that when the employee mounted the truck to go to the job, "in accord with the employer's contemplation of what his conduct would be in going to the place of the job, he came within the zone of his employment as contemplated by his employers." The Court further held that the time spent on the truck was not paid for by the employers was immaterial. In the case at bar, however, the evidence is uniform that the time consumed by the trip from Passaic to Hoboken was part of the daily period of employment for which the employees were compensated.

While it is believed that the New Jersey cases cited above are controlling, and that the Connecticut cases are strong, persuasive authorities because of the similarity of the facts involved, I submit for the Court's consideration cases in other jurisdictions which indicate a clear weight

of authority in favor of the position of the beneficiaries of the deceased employee.

In *Donovan's Case,* 217 Mass. 76; 104 N. E. 431, where one was employed cleaning out catch basins two miles from his home, and was injured while riding home after his day's work in a wagon furnished by the employer to take employees to the barn if they wished to ride, it was held that a finding was justified that the injury arose out of and in consequence of his employment within the Workmen's Compensation Act.

In *Littler* v. *George A. Fuller Co.,* 233 N. Y., 369, where bricklayers employed to build a house two miles from the railroad refused to remain on the job unless furnished with free transportation back and forth, and the employer hired a truck to transport them, which went into a ditch while returning to the station at night, and injured an employee, it was held that his injuries arose out of and in the course of the employment. In this case the Court stated that the day's work began when the employee entered the automobile truck in the morning, and ended when he left it in the evening, and further said that the rule was well established that in such cases compensation should be awarded.

And in *Cremins* v. *Guest* (1907), 24 Times L. R. (England) 189, 1 B. W. C. C. 160, it was held that an accident to an employee in a mine arose out of and in the course of his employment, where he was injured after work when attempting to board a train to go home, it appearing that the train was run by the employer exclusively for the benefit of the workmen, to carry them to and from work, although they were not obliged to travel on it, and no difference in wages was made between those who did and did not use it. The decision was based on the implied term of the contract that the trains should be run for the workmen.

And in *Hackley-Phelps-Bonnell Co.* v. *Industrial Commission,* 165 Wis. 586, 162 N. W. 921, an employee of a logging camp, which was near a town where the company's office was located, and between which and the camp employees were furnished transportation by the company on trains used in its business, it was held an employee when on a train going to the office for his pay, after notifying the company that he intended to lay off a few days, and receiving his time slip, and an injury through the negligent management of the train was held to have grown out of his employment.

In *Kirby Lumber Co.* v. *Scurlock* (Texas, 1922), 246 S. W. 76, the employee was held to have been injured in the course of employment within the meaning of the Workmen's Compensation Act, where an employee of a lumber company, who lived some distance from the mill, was killed by one of the employer's trains when he was riding home on his velocipede over the employer's tramway, although the mill did not run on the day of the injury and he did no work for the employer, but worked on his velocipede and left the mill for home about noon, and no report of any time for the employer was put in on that day; and it was held immaterial to the question considered whether the employer had expressly obligated itself to furnish the employee the tramway as a means of access to and exit from the mill, or whether he held a mere implied revocable license to use the tramway; since, in either event, he had the right to use it.

In the case of *McClain* v. *Kinsport Improv. Corp.* (Tenn., 1922), 245 S. W. 837, the injury was held to have arisen out of and in the course of the

employment, where an employee who was furnished a horse by the employer to ride back and forth between him home and his place of work, was thrown from the horse when it became frightened at a train, while he was riding along a highway to work in the morning at the usual time. In reaching its conclusion the Court stated that the fact that the employee was in immediate control of the horse did not take the case out of the general rule.

In *Payne* v. *Industrial Commission* (1921), 296, Ill. 223, 129, N. E. 830, the Court refused to disturb a finding that the injury arose out of and in the course of the employment, where there was evidence that a locomotive engineer who had been relieved from duty during a trip because of the provisions of the Hours of Service Act, was injured while attempting to board one of the employer's trains on which he had permission to deadhead into a terminal, and there was testimony that he was paid for the time necessary for him to ride to the terminal, from which, after a period of rest, he would again resume his duty.

In the case of *Horn* v. *Arnett,* 91 N. J. L. 110, the employee was engaged to assist in hauling bricks from a property where a building had been torn down to another property in a different part of the City. The employe assisted in loading the bricks on a cart, and, after the cart was filled, walked along with it to the location where the bricks were to be unloaded. He then assisted in piling up the bricks, and, when the cart was empty got on the wagon to return for another load. While the team was being turned in the street, the employe was jarred from the wagon and received injuries which caused his death. In that case Mr. Justice Kalisch said that the act of the deceased in getting on the wagon after it

was unloaded and riding back to the place for another load, was a natural act connected with his employment.

So, in this case it was a natural act connected with the employment of Pepoon to get to Hoboken, and endeavored to reach that point by using the route taken by the employer seven nights of the week as the testimony shows.

In the case of *Kearon* v. *Kearon,* 45 Ir. L. T. 96; 4 B. W. C. C. 435, a seaman while off duty left the vessel. When he returned to the vessel it had moved five or six feet from the pier. The seaman seeing no ladder jumped from the pier to the vessel, with the result that his leg was injured. It was held that the accident arose out of and in the course of the employment.

The Court stated:

> "This man was rightly on shore, and, having been on shore, he was entitled to return to the vessel. When he arrived at the quay about half past ten o'clock the vessel had moved out some five or six feet, and the top rail was about three feet lower than the level of the quay. It was his duty to get on board, and the question is not whether he adopted a way which was not exactly the right one, but whether, intending bona fide, to return, he was acting in the course of his employment."

Paraphrasing this determination of the Court, we may say that Pepoon was rightly on the Paterson Plank Road which is the most direct route to Hoboken, and it was his duty to get to Hoboken and the question is not whether he adopted a way which was not exactly the right one, but whether intending, bona fide, to get to Hoboken to continue his duties, he was acting in the course of his employment.

A master's duty to protect his servant continues as long as the latter may be said to be actu-

ally or constructively in his employment and under his control. The duty is not necessarily confined to the precise period during which the services are actually rendered. The relation exists when the servant is on the premises of his master in anticipation of his work although the actual time of taking up his work has not arrived. (*Feniff* v. *Boston,* 196 Mass. 575; *Bannert* v. *Thompson-Starrit Co.,* 110 N. Y. S. 521.)

The relation also continues during the servant's progress to or from his place of work along a path or way over his master's premises which he and other employees are accustomed to use. 39 Cyc. 273; *Alsen* v. *Andrews,* 168 Mass. 261; *Bolat* v. *N. Y. Central,* 18 N. Y. 432.

It is undisputed that if deceased had been killed while going from Passaic to Hoboken on appellant's truck the injury would have occurred out of and in the course of the employment.

And the same must necessarily be true in this case. Deceased reported for work at his regular hour of 10:00 o'clock. His employer then granted him permission to attend to a personal matter, and after finishing the same to go direct to Hoboken. It was not necessary for deceased to go back to appellant's place of business in Passaic before starting for Hoboken. He had reported once that night.

After finishing his business deceased started for Hoboken and followed the regular route of the truck. He was then in the same position as if he had been on appellant's truck. He was working for appellant, and although he was using a Buick automobile which he had borrowed from a friend, he was, nevertheless, working for appellant and was on appellant's business from the time he left Passaic for Hoboken the same as if he had started for Hoboken with the truck at the regular hour.

It is clear from the testimony that appellant acquiesced in deceased's conduct. He gave his permission for deceased to take the time off, and said it did not matter to him how deceased reached Hoboken just so he got there in time to unload the papers. The arrangement of the decedent with the appellant as to the time of leaving and the arrival at Hoboken coupled with the fact that he was killed on the Paterson Plank Road, the route taken by appellant's trucks to reach Hoboken, leave no room for doubt that the deceased was engaged in the employment of the appellant and was performing a duty required of him when the accident occurred.

Counsel respectfully calls the Court's attention to page 16, State of Case, line 40, wherein, counsel made a typographical error in drafting the determinations of fact. Line 41 should read "and did leave for Hoboken, etc." instead of "and did arrive at Hoboken, etc." The same is also true of the determination of the Passaic County Court of Common Pleas (Case, p. 25, l. 8). It will be noted that the following paragraphs in both determination refer several times to the fact that deceased met with the accident on the Plank Road while on the way to Hoboken. Neither the Deputy Commissioner of Compensation nor the Judge of the Common Pleas Court actually misinterpreted the facts, as appellant's counsel contends in his brief.

In view of the fact that deceased, on leaving Passaic for Hoboken, was working for appellant and was then in the same category as if he left with the truck at the regular time, it is respectfully submitted that the determinations and judgments of the New Jersey Supreme Court, the Passaic County Court of Common Pleas, as well as of the Workmen's Compensation Bureau, are,

for the reasons above advanced, regular, just and legal, and that the same should be affirmed.

A careful perusal of the authorities citated by counsel for appellant will show that of the many authorities cited, none are in point, and do in no wise apply to the case at bar.

Counsel for this petitioner (defendant-appellee) respectfully asks that this Honorable Court assess a fee against the prosecutor (prosecutor-appellant) to cover expenses and services on appeal, in accordance with the Laws of 1921, Section 19, Chapter 229.

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