

INDEX

	PAGE
Notice of Appeal	1
Grounds of Appeal	2
Summons	3
Complaint	4
Answer	7
Reply	9
Postea	10
Judgment	11
Motion to Amend Complaint	48
Motion for a Non-suit	56
Charge to Jury	75

TESTIMONY.

For Plaintiff.

Vasco Martelli,		
direct examination		15
cross "		18
Victor Panconi,		
direct examination		26
cross "		29
re-direct "		35
Peter Rasmussen,		
direct examination		35
cross "		37
Eugene Pincelli,		
direct examination		39
cross "		42
Michael Norko,		
direct examination	47, 52	
cross "		55
John Norko,		
direct examination		55

	PAGE
<i>For Defendant.</i>	
Benjamin W. Rau,	
direct examination	57
cross "	62
Irving Schwartzman,	
direct examination	66
Herbert Rau,	
direct examination	69
cross "	71
Walter G. Petry,	
direct examination	72

EXHIBITS.

	Off'd	P't'd
P. 1, P. 2. Sections of Pennsylvania		
Statute	14	13-14
P. 3. Undertaker's Bill	57	
D. 1, D. 2. Photographs	19	
D. 3. Photograph	61	
D. 4. Photograph	73	

NOTICE OF APPEAL.

New Jersey Supreme Court

MICHAEL NORKO, individually and as administrator <i>ad</i> <i>prosequendum</i> of ANDREW NORKO, deceased, <i>Plaintiff,</i> <i>vs.</i> BENJAMIN W. RAU, <i>Defendant.</i>	}	<i>Action at Law. Notice of Appeal.</i>	10
--	---	---	----

To Michael Norko, individually, etc., plaintiff, or
David T. Wilentz, his attorney: 20

TAKE NOTICE that the defendant in the above-entitled matter hereby appeals from the whole of the judgment entered herein, to the New Jersey Court of Errors and Appeals of last resort in all causes.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

30

40

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

10	MICHAEL NORKO, individually and as administrator <i>ad</i> <i>prosequendum</i> of ANDREW NORKO, deceased, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		}
	BENJAMIN W. RAU, <div style="text-align: right; margin-right: 20px;"><i>Defendant.</i></div>		}
			}

20 The defendant hereby appeals to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court rendered herein, on the following grounds:

1. That the Court permitted the plaintiff to amend the first count of the complaint to state a cause of action on behalf of the plaintiff Michael Norko individually, instead of as administrator *ad prosequendum*, to which ruling of the Court defendant prayed and was granted an exception.
- 30 2. That the trial court denied the defendant's motion for a non-suit.
3. That the trial court, over the objection of defendant, permitted the plaintiff to offer in evidence the undertaker bill of Michael Zylka of \$904.50, to which ruling of the trial court defendant prayed and was granted an exception.
4. That the trial court permitted the plaintiff to amend the complaint by inserting the statute

Summons.

of the State of Pennsylvania known as the Death Act, in the first paragraph of the complaint, to which ruling of the trial court defendant prayed and was granted an exception.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

10

SUMMONS.

The State of New Jersey to Benjamin W. Rau:

(SEAL) YOU ARE SUMMONED to answer the annexed complaint of Michael Norko, individually, and as administrator ad prosequendum of Andrew Norko, deceased, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of the Supreme Court, at Trenton, this thirteenth day of September, nineteen hundred and twenty-eight.

30

FREDERICK L. BLOODGOOD,
Clerk.

A. J. & J. S. WIGHT,
Attorneys.

40

COMPLAINT.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	MICHAEL NORKO, individually and as administrator <i>ad</i> <i>prosequendum</i> of ANDREW NORKO, deceased, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	BENJAMIN W. RAU, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>		<i>Complaint.</i>

20 The plaintiff above named, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, says that:

FIRST COUNT.

1. On or about the 24th day of September, 1927, Andrew Norko, a minor of the age of nineteen years, was lawfully driving an automobile in a westerly direction along and over Roosevelt Boulevard, which is a public highway in the City
 30 of Philadelphia and State of Pennsylvania.

2. That on the aforesaid date, the defendant while operating his automobile in an easterly direction along and over the said Roosevelt Boulevard, which is a public highway in the City of Philadelphia and State of Pennsylvania, and in an endeavor to pass a car which was ahead of him and which was proceeding in the same direction, the said defendant ran into and collided with the car operated by the said plaintiff.

40

Complaint.

3. Because of the negligence of the defendant, the said Andrew Norko was so badly injured that he died as a result thereof on September 24, 1927.

4. That the occurrence and death were caused through the negligence and carelessness of the defendant, in that said automobile was being operated at a high and excessive rate of speed contrary to law, in failing to have the said car under proper control and in driving said car on the wrong side of the road, and being otherwise negligent. 10

4. The said Andrew Norko left him surviving the plaintiff, his father, and the following-named next of kin: Anna Norko, his mother; John and Michael Norko, his brothers, and Annie, Mary and Elizabeth Norko, his sisters, all of whom have suffered pecuniary injury because of his death. 20

5. On the nineteenth day of October, 1927, letters of administration ad prosequendum were granted upon the estate of the said Andrew Norko by the Surrogate of Middlesex County, to this plaintiff and were accepted by him.

6. This action is commenced within twelve calendar months after the death of plaintiff's intestate. 30

By reason of the premises, plaintiff, as administrator, as aforesaid, demands on this count \$50,000.00 damages.

SECOND COUNT.

1. Plaintiff, Michael Norko, alleges that he is the father of the said Andrew Norko, deceased, and, as a result of the negligence and carelessness

40

Complaint.

of the defendant in operating said automobile at the time hereinbefore stated, causing the death of the said Andrew Norko, he was forced to lay out sums of money for burial expenses.

10 Plaintiff, Michael Norko, demands on this count the sum of \$500.00.

A. J. & J. S. WIGHT,
Attorneys for Plaintiff.

20

30

40

ANSWER.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

MICHAEL NORKO, individually and as administrator <i>ad</i> <i>prosequendum</i> of ANDREW NORKO, deceased, vs. BENJAMIN W. RAU, Defendant.	}	Action at Law. Answer.	10
---	---	------------------------------	----

The defendant residing in the City of Lake- 20
 wood, County of Ocean and State of New Jersey,
 answering the complaint of the plaintiff filed
 herein, says that:

FIRST COUNT.

1. He admits the allegations of paragraph one
 of the first count of plaintiff's complaint.
2. He denies the allegations of paragraphs.
 two, three, four, five and six of the first count of
 plaintiff's complaint. 30

SECOND COUNT.

1. He denies the allegations of paragraph one
 of the second count of plaintiff's complaint.

FIRST SEPARATE DEFENSE.

The plaintiff's intestate was guilty of contribu-
 tory negligence in that he operated said auto-
 mobile at the time and place stated in the com- 40

Answer.

plaint at a high and reckless rate of speed; without having same properly equipped with brakes and appliances; that he operated said automobile on the wrong side of the road and in divers and various other ways was guilty of negligence which was the sole cause of the accident.

10

OBJECTIONS IN POINT OF LAW.

Please Take Notice that at the trial of the above-entitled matter, the defendant will move to strike out the second count of the plaintiff's complaint on the ground that the said second count does not set forth any cause for action.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant.

20

30

40

REPLY.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

MICHAEL NORKO, individually and as administrator <i>ad</i> <i>prosequendum</i> of ANDREW NORKO, deceased, <i>Plaintiff,</i> <i>vs.</i> BENJAMIN W. RAU, <i>Defendant.</i>	}	<i>Action at Law. Reply.</i>	10
--	---	--	----

Plaintiff denies the allegations set forth in the first separate defense of the answer filed by the defendant herein. 20

A. J. and J. S. WIGHT,
Attorneys for Plaintiff.

30

40

POSTEA.

Filed April 25, 1930.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	MICHAEL NORKO, as parent of Andrew Norko, deceased, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	BENJAMIN W. RAU, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Postea.</i>

20 This case was tried before the Honorable John P. Kirkpatrick, Judge, and a jury in the Middlesex County Court House, in the City of New Brunswick, on the 22nd and 23rd days of April, 1930.

The jury rendered a general verdict against the defendant and in favor of the plaintiff in the sum of two thousand six hundred and fifty-four dollars and fifty cents (\$2,654.50).

JOHN P. KIRKPATRICK,
Judge.

30

Damages	\$2,654.50
Costs	72.71
	\$2,727.21

40

JUDGMENT.

NEW JERSEY SUPREME COURT.

MICHAEL NORKO, as parent of Andrew Norko, deceased, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action</i>	10
<i>vs.</i>		<i>at Law.</i>	
BENJAMIN W. RAU, <div style="text-align: right;"><i>Defendant.</i></div>		<i>On Postea.</i>	

\$2,654.50
 72.71

\$2,727.21

20

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand six hundred fifty-four dollars and fifty cents, besides costs to be taxed nisi.

Entered April 25, 1930.

On motion of

DAVID T. WILENTZ,
 Attorney. 30

Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

April Term, 1930.

10

MICHAEL NORKO, individually
and as administrator *ad*
prosequendum of ANDREW
NORKO, deceased,

Plaintiff,

vs.

BENJAMIN W. RAU,

Defendant.

20

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. John P. Kirkpatrick, Judge, and a jury, at the Middlesex County Court House, on the twenty-second day of April, 1930.

Appearances:

David T. Wilentz, by Francis M. Seaman, Esq., attorney for plaintiff.

30

Messrs. Stein, McGlynn & Hannoch, attorneys for the defendant, by Edward R. McGlynn, Esq.

(A jury was duly empaneled and sworn.)

(Mr. Seaman made an opening statement to the jury on behalf of the plaintiff.)

(Mr. McGlynn made an opening statement to the jury on behalf of the defendant.)

Mr. Seaman: If the Court please, counsel for the defendant has consented to the amendment

40

Opening.

of paragraph one of the second count to read, "Michael Norko demands on this account the sum of \$1,000," instead of \$500.

Mr. McGlynn: No objection.

Mr. Seaman: By permission of counsel for the defense, I want to introduce the death certificate. 10

Mr. McGlynn: No objection.

Mr. Seaman: And letters of administration *ad prosequendum*.

Mr. McGlynn: No objection.

Mr. Seaman: I also want to read with consent of counsel, the statute in Pennsylvania—

Mr. McGlynn: That is, I consent to this manner of proof of the statute to avoid the necessity— 20

Mr. Seaman: "Action may be brought after death of party injured. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her lifetime, the widow of any such deceased or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."

I also want to read on the record— 30

Mr. McGlynn: Pardon me. Will you read that next section?

Mr. Seaman: "Persons entitled to maintain action for injuries causing death. The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased and no other relative, and that such husband, widow, children, or parents of the deceased shall be entitled to re-

Opening.

cover whether he, she, or they be residents of the commonwealth of Pennsylvania or citizens or residents of any other state or place subject to the jurisdiction of the United States or of any foreign country, or subject of any foreign potentate, and the sum recovered shall go to them
 10 in the proportion they would take his or her personal estate in the case of intestacy, and that without liability to creditors under the laws of this commonwealth.”

I also want to read on the record, laws of Pennsylvania, 1927, page 992, number 480, “An act concerning damages recoverable in actions for death by unlawful violence or negligence. Section 1, be it enacted and so forth that when-
 20 ever any person or persons who are authorized by law so to do shall bring an action to recover damages for a death caused by unlawful violence or negligence of the defendant, the plaintiff may recover in addition to the damages now recoverable in such actions, the expenses incurred for medical and surgical care and for nursing of the deceased, such other expenses caused by the injury which resulted in death as could have been recovered in an action begun by the injured person in his lifetime; the plaintiff may also re-
 30 cover the reasonable funeral expenses of the deceased if plaintiff has paid or incurred such expenses.”

I will offer that.

(The articles referred to were received in evidence and marked “Plaintiff’s Exhibits 1 and 2” respectively.)

Mr. McGlynn: Mr. Seaman read the second section of that at my request and not because he figured it was a part of his case.

Vasco Martelli, direct.

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

Direct examination by Mr. Seaman.

Q Mr. Martelli, where do you live? A 295 10
Washington street.

By Mr. McGlynn.

Q Would you mind speaking up, so I can hear you? A 295 Washington street, Perth Amboy, New Jersey.

By Mr. Seaman.

Q On the night of September 24, 1927, were you a passenger in a car of Andrew Norko, driven by Andrew Norko? A Yes, sir. 20

Q On the night in question did you have an accident on Roosevelt Boulevard? A Right.

Q Will you please explain to the Court and jury just how this accident happened? A Well, we were on the Roosevelt Boulevard about ten o'clock at night, and the road was bumpy.

Q Speak up. A It was an extra large hole about three or four foot away from the curb. We tried to avoid it so we pulled over about a foot or two, and there was a Ford car coming on the road very slowly, and there was another car behind it. When we got about twenty-five feet away from the Buick, he pulled out to pass the Ford and in again. 30

By Mr. McGlynn.

Q What? A He pulled out to pass the Ford, and then he pulled in again. 40

Vasco Martelli, direct.

By Mr. Seaman.

Q What happened? A Well, then he hit the front of our car.

Q What happened to Andrew Norko? A He was killed.

10 Q Now, where was this hole that you tried to avoid with reference to your right edge of the highway? A Oh, the edge of the hole, I should say, was about four feet away from the curb.

Q Four feet from what curb? A The right curb.

Q Your right curb? A Yes.

Q You say you pulled out to avoid this hole. How far out did you pull? A About a foot or two.

20 Q About a foot or two. Now, after you pulled out, what was the course of your automobile after you pulled out to pass this automobile? A We were coming on our right-hand side.

Q About how far from the right edge of the road? A About five feet. Five or six feet.

Q So you were proceeding along about five or six feet from the right edge of the road, is that true? A Right.

Q Now, how fast were you going? A Twenty to twenty-five miles an hour.

30 Q Twenty to twenty-five miles an hour? A We weren't going very fast. The road was bumpy.

Q Now, when this Buick that you speak of pulled out to pass the Ford was there any signal or warning given? A Nothing. He just pulled out and pulled in again when he thought—

40 Q When you say, "He just pulled out and pulled in again," what do you mean? In what direction did he pull? A Well, he pulled out to the left to pass the Ford, and then after he

Vasco Martelli, direct.

was parallel with the Ford—we were a few feet away—he pulled in again to get on his right side, and he hit him over there.

Q Now, where with reference to your right side of the road, did the accident happen? How many feet from the right edge of the road? A About ten feet. 10

Q About ten feet from your right edge of the road? A Yes.

Q How wide is the road? A About thirty feet.

Q Now, how far were you from the Ford when the Buick pulled out to pass the Ford? A Oh, about fifteen or twenty feet.

Q How far was the Buick from you when it first pulled out? A About fifteen feet. 20

Q About fifteen feet? A Yes.

Q Now, how far were you from the Ford when the Buick pulled out? A About seven or eight feet.

Q You were about seven or eight feet? A Eight feet.

Q You were about seven or eight feet from the Ford when the Buick pulled out to pass this Ford. Now, after the accident happened, how far did your car go? A Fifteen or twenty feet. 30

Q Where did it stop? A On the right curb.

Q On what curb? A On the left—

Q On your left curb? A Yes.

Q What part of the car was up over the left curb? A The two front wheels.

Q Where was the Buick car at the time? A Fifty or sixty feet down the road across the left—

Q Speak up. A It was fifty or sixty feet down the road and across the left. 40

Vasco Martelli, cross.

Q It was fifty or sixty feet down the road and across the left, is that what you say? A Yes.

Q Speak up so we can hear you, Mr. Martelli.
A Yes.

Q What part of your car was struck by the Buick, by what part of the Buick? A The rear of the Buick.

10 Q And what part of your car was struck? A Our front. Our left front.

Q How fast was the Buick car going at the time of the accident? A Well, I should say about thirty or thirty-five miles an hour.

Q Did you say thirty to thirty-five miles an hour? A I can't tell exactly.

Q What was the position of the Buick car on the road after the accident? A Right across—
20 across the road.

Q Facing what direction? A North, I think.

Q Facing your right-hand or your left-hand?
A Our right-hand.

Q Facing your right-hand side of the road?
A Yes.

Mr. Seaman: That is all. You may take the witness.

Cross examination by Mr. McGlynn.

30 Q Did you see the cars after the accident, Mr. Martelli? A Yes, sir.

Q I show you what purports to be two pictures of two automobiles and ask you if the one I show you first is a fair representation of the Nash car, the left side of the Nash car after the accident? A That is it.

40 Mr. McGlynn: May I mark it for identification, or, with your consent, use it right away?

Vasco Martelli, cross.

Mr. Seaman: Let me see it.

Mr. McGlynn: Sure. While you are looking at that, Mr. Seaman, I will show him this one.

By Mr. McGlynn.

Q I show you another picture and ask you if that is a fair representation of the Buick car after the accident? A Yes. 10

Mr. McGlynn: Counsel does not object to having them marked in evidence, so I can use them now.

(The two pictures referred to were received in evidence and marked "Defendant's Exhibits 1 and 2," respectively.) 20

By Mr. McGlynn.

Q Looking at Exhibit D. 2, Mr. Martelli, the left-hand side of the Buick, as it was coming toward Trenton— A Yes.

Q (Continuing.) —is that the portion of the Buick that was struck? A Yes, sure, right at the driver's seat.

Q The door at the driver's seat? A Yes, that is the Buick. 30

Q Is that the place where it was hit, the door at the driver's seat? A Well, that is what it shows on there. I don't know.

(Mr. McGlynn handed the photograph to the jury.)

Q Now, you say that the car you were riding in—by the way, what seat were you in? A I was right next to the driver. 40

Vasco Martelli, cross.

Q How many people on the front seat? A Three.

Q Who was the third man? A Mr. Panconi.

Q The second man here (indicating)? A No, the third man.

10 Q You three men were in the front seat? A Yes.

Q The top was down? A Yes.

Q And two young men sitting in a rumble seat? A Yes.

Q Are the other two men sitting in the court room? A Right.

Q What time did you leave Perth Amboy? A Between seven and seven-thirty.

Q You are sure of that? A Positive.

20 Q What time was it when you reached this point in Philadelphia? A Near ten.

Q Just before this accident how fast do you say the Nash car was being driven? A About twenty to twenty-five miles an hour.

Q Do you recall having made a statement to the police down there on that occasion? A I don't remember.

Q And telling them then, twenty-five to thirty miles an hour? A I don't remember.

30 Q What is your recollection now, twenty to twenty-five or twenty-five to thirty? A Twenty to twenty-five.

Q Twenty to twenty-five? A Yes.

Q Now, you say this hole in the road was rather large? A Well, it was two or three feet wide.

Q How deep? A I don't know. I didn't measure it.

40 Q Did you see it before the accident? A I saw it, yes.

Vasco Martelli, cross.

Q And you say that it was two or three feet wide, and do you remember how far from your right-hand curb? A Right near the right-hand curb.

Q How far away from it? A A few inches.

Q And extended two or three feet out in the street? A Yes. 10

Q And just before that had your car been driven close to the curb or out in the center of the road? A Close to the curb.

Q So in passing this hole in the roadway, Mr. Norko turned the front of his car to the left? A A few feet, and then kept it straight. He didn't keep going to the left.

Q But in passing the hole he had to turn the car to the left, did he not? A Yes, we were a few feet away from the curb. I know we weren't— 20

Q Now, did he continue to bear straight down this road or did he turn the front of his car to the left? A He turned slightly to pass the hole.

Q Now, did the accident happen while the front of his car was turned to the left or after he had gotten it back straight on the right-hand side of the road? A After he had gotten it back. 30

Q Had your car been going straight to Philadelphia parallel with the curb? A Right.

Q Now, you say there is no doubt that the front left of your car is the portion that was hit? A Oh, yes.

Q There is no question about that? A There is no question about that.

Q And the Buick car was coming in the opposite direction from you? A Yes. 40

Vasco Martelli, cross.

Q Did you see the Buick car before the accident? A Well, I saw him when he pulled out.

Q You saw him when he pulled out. That was the first you saw him? A Well, I saw the cars coming down, but I didn't notice what they were.

Q The traffic was rather heavy? A Yes.

10 Q In both directions? A Well, I don't know. On this side going up there wasn't so many, but coming down.

Q Had your car passed many cars in there? A No.

Q It had not pulled out of line at all? A We were following the traffic.

Q What? A We were following the traffic.

Q You are sure you had not passed any cars? A We may have passed them before, but not on the Boulevard.

Q Did you see the Ford before the accident? A Yes. Well, I didn't know if it was a Ford, but I saw the cars coming down. As I said before, I didn't know what kind until after the accident we found out then what kind they were.

Q I hate to go over this again, Mr. Witness, but I didn't get this straight in mind. How many feet did you say your car was from the Ford when the Buick started to turn out? A The Ford from our car?

Q How far was the car in which you were riding from the Ford car when the Buick first started to turn out? A About fifteen feet. I don't know.

Q Fifteen feet. Now, at that time was your car parallel with the curb or was the front of it toward the left passing this hole? A It was parallel with the curb. We was past the hole.

Q You had passed the hole? A Yes.

40

Vasco Martelli, cross.

Q No question about that? A Yes, just a few feet past the hole.

Q You had passed the hole and your car was back in the roadway parallel with the curb on its right-hand side? A It was.

Q And then it was about fifteen feet from the Ford car? A Yes. 10

Q Fifteen feet from the Ford car that was coming toward you? A Fifteen or twenty; I didn't measure.

Q The Buick at that time had started to come out and pass the Ford? A That is when I first saw it. When I saw it, it was half out.

Q Did he continue all the way out? A Surely he came all the way out until he got parallel with the Ford, and he pulled in again. 20

Q Pardon me just a second? A Yes.

Q You say he pulled all the way out? He was parallel with the Ford, coming along side by side, is that right? A Yes, about that.

Q He was parallel with the Ford, was he? A Well, he was coming out.

Q Well, you told me he was all the way out? Now, was he or wasn't he? A Yes, I guess he was.

Q You guess he was? A Yes. 30

Q Just started to turn in, is that right? A Yes.

Q Is that when the accident happened? A That is right.

Q And the rear left— A In other words, he was coming down—

Q Pardon me?

Mr. Seaman: Let him explain.

Mr. McGlynn: No, sir. 40

Vasco Martelli, cross.

Mr. Seaman: Let him answer the question.

Mr. McGlynn: He will answer my question. He won't demonstrate. I will start that over.

10 *By Mr. McGlynn.*

Q The Buick car was out in the roadway passing the Ford parallel with it when this accident happened, is that right? A Yes.

Q It started to turn in again? A But he was beyond the center of the roadway when he passed that.

Q Beyond the center of the roadway when he passed that? A Yes.

20 Q Was he parallel with the curb? A What do you mean? When he was parallel with the Ford he was parallel with the curb.

Q That is not when the accident happened? A No, when the accident happened he tried to pull in again.

Q He tried to pull in again? A Yes.

Q He was right alongside of the Ford when he tried to pull in again, is that right? A Yes.

30 Q And in turning to his right, his rear left came over and struck the front left of your car, is that your explanation of it? A Right, and then his front hit the Ford.

Q His what? A His other side.

Q His front or rear? A I don't know.

Q You don't know? A Something hit the Ford.

Q Did he hit the Ford first or your car first? A I guess at the same time when he tried to pull in again he must have hit the Ford.

40 Q You are not sure of that, are you? A The Ford was hit by the Buick.

Vasco Martelli, cross.

Q Did you look the Buick over? A No, I didn't.

Q Oh, you didn't see the right-hand side of the Buick after the accident? A I don't remember. I looked the car over, but it was dark, you know.

Q I show you a picture and ask you if that looks like the condition of that roadway at the time of the accident? A I couldn't say. 10

Q Now, another thing. Did I understand you to say your car went about fifteen to twenty-five feet after the accident? A About fifteen or twenty feet, I guess. I don't know.

Q If your car only went fifteen or twenty feet, how is it it was sixty feet away from the Buick? A The Buick went down.

Q The Buick went down? A Yes. 20

Q How did it get past the Ford? A How?

Q How did it get past the Ford? A I don't know how, but it went down past the Ford, away down past the Ford.

Q Away down past the Ford? A Certainly.

Q No question about that? A Yes.

Q Do you know what part of the Ford was hit by the Buick? A I guess the whole side and pushed it against the curb and the lamp post. 30

Q You are sure the Buick passed the Ford? A Yes.

Q On towards Trenton? A Right, and across the road, it stopped right across the road.

Q That is, so that it blocked traffic going north? A The road was wide. It could pass around it.

Q The traffic going north was blocked? A I don't know whether it was blocked or not. 40

Victor Panconi, direct.

Q And your car continued on— A Toward Philadelphia.

Q (Continuing)—to your left-hand side, went over the curb, the two front wheels? A Went over the right curb.

Q Your right or your left? A My left.

10

Mr. McGlynn: That is all.

Mr. Seaman: That is all.

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

Direct examination by Mr. Seaman.

20

Q Mr. Panconi, where do you live? A 68 Maxwell avenue, Fords, New Jersey.

Q On the night of September 24, 1927, were you a passenger in a car which was being driven by Andrew Norko? A Yes, sir.

Q Did you meet with an accident on Roosevelt Boulevard in Philadelphia? A Yes, sir.

Q Will you please tell the Court and jury just how this accident happened? A Certainly.
30 Well, we just entered the Boulevard. It is a single road about thirty feet wide, and we was traveling down about ten or fifteen minutes on the Boulevard at the rate of speed about twenty-to twenty-five miles an hour, and the traffic was coming down, going towards Trenton. You stay in a single line, and being on the right side of the car, I noticed a pretty big hole about a foot away from the curb, and our driver pulled slightly, about one foot from the hole, which

40

Victor Panconi, direct.

makes it about five feet away from the curb—
right curb. In doing so I took notice of a car
pulled out of line. I didn't know what kind of
car it was. And in front of that was another
car. I knew after the accident that it was a
Ford and the other was a Buick. He comes out
at a pretty good rate of speed and turned. He 10
realized maybe he could not make it—

By Mr. McGlynn.

Q Just tell us what you saw. A What?

Q Just tell us what you saw. Don't tell us
what you think. A He came out all of a sudden
and he turned, and he came out and turned in on
us all of a sudden, and his rear came up and hit
our left side all the way back past the driver's 20
seat, and I don't know whether or not after that
he bounced back and hit the Ford. I don't know
where he hit the Ford. I know after the accident
the Ford hit the lamp post and came back, and
our driver was killed.

Q Now, Mr. Panconi, how far is this hole from
the right edge of the road? A About a foot.

Q And you pulled out to avoid this hole, is
that true? A Yes, sir.

Q How far from where you pulled out to 30
avoid this hole did the accident happen? A It
is about ten feet.

Q In other words, you were ten feet past the
point where you pulled out to pass the hole? A
Right.

Q At that point how many feet were you from
the right-hand side of the highway upon which
you were riding? A About four or five feet.

Q What part of your car was about four or
five feet from the right edge of the curb? A 40
The right side of the car.

Victor Panconi, direct.

Q Now, where, with reference to the right side of the highway upon which you were riding? How many feet from the right edge? A How many feet from the right edge?

10 Q Did the accident occur? A About five feet. I mean the right side of the car from the right curb. It happened about five feet. That makes about five or six feet. Always on the right side of the street.

Q With reference to the center line of the Boulevard? A From the center line of the Boulevard, about two or three feet.

Q On which side of the Boulevard? A On the right.

Q Whose right? A Our right.

20 Q So the contact took place two or three feet from the center line? A Yes, sir.

Q How far away was this car from the Ford car when the Buick pulled out to pass the Ford? A About five feet almost came parallel with each other.

Q You were almost parallel with the Ford car when the Buick pulled out? A We were almost parallel with the Ford car when the Buick pulled out.

30 Q Did the Buick give any signal or warning? A It didn't give any signal or warning. It just pulled out.

Q How fast was the Buick going? A Being a driver I should say about thirty-five to forty.

Q Now, how far away was the Buick when you were five feet from the Ford? A How far away?

Q Yes. A Repeat that question.

Q How far away was the Buick from you when it first started to pull out to pass the Ford?

40

Victor Panconi, cross.

A About five feet. A little over five. Close to ten.

Q Was that five or ten feet from you or from the Ford? A From me.

Q Where was the Ford at that time? A That was about five feet away from me. It was almost parallel. 10

Q Now, you say that the Ford was damaged after the accident? A Yes, sir.

Q What part of the Ford? A I didn't take notice, but I suppose it was on the right side.

Q Did you strike the Ford car? A No, sir.

Q What car struck the Ford? A The Buick.

Q After the accident happened how far did the Buick go from the point of the collision? A About fifty to fifty-five feet.

Q How far did your car go after the accident? A About twenty feet. Fifteen or twenty. 20

Q Fifteen or twenty? A Yes, sir.

Q Where did it stop? A On the left side, above the curb. The two front wheels were on the curb, and the rear was on the street.

Mr. Seaman: That is all.

Cross examination by Mr. McGlynn.

Q Mr. Witness, you say that your car always was on the right-hand side of the center of the road. No question about that? A Right. 30

Q Even at the time of the collision? A Right.

Q And you say the street is about thirty feet wide? A Yes, sir.

Q And you say that after the collision your car only went fifteen or twenty feet? A Yes.

Q And landed over the curb on your left-hand side? A Yes, sir. 40

Victor Panconi, cross.

Q Well, do you mean fifteen feet actually on the pavement or fifteen feet nearer Philadelphia from where you are? A Going toward Philadelphia.

Q I can't understand your distances. You say— A Well, I say fifteen or twenty. It might be more. That is what I judge.

Q This accident happened at night, didn't it? A At night.

Q What time? A About ten o'clock.

Q And all these other distances, you are quite sure your car was five feet from the Ford? A Yes, sir.

Q Where was the Buick when you were five feet from the Ford? A He just started to pull out.

Q How far in back of the Ford? A Pretty close. I could say about five feet.

Q He was about five feet in back of the Ford? A Yes.

Q How far did he get in turning out before the collision? A Not very far, because right after that he just came out and banged, we heard a crash.

Q Did you see the crash? A I heard it and I seen it.

Q Are you sure of that? A Positively.

Q Do you recall testifying in Philadelphia before the coroner? A Yes, sir.

Q Do you remember this question being asked you on that occasion?

Mr. Seaman: What case is that?

Mr. McGlynn: Sir?

Mr. Seaman: What case is that?

Mr. McGlynn: Page 14 in my—

Victor Panconi, cross.

By Mr. McGlynn.

Q "Question: Just tell what happened.
 Answer: We were going along Roosevelt Boulevard, and it is a pretty bad road all along there. We were going along, and there was a hole near the curb. He pulled to his left, and when he got in again, there was two cars coming there, both toward him. In the front was the Ford and in the rear was the Buick, and when we pull back again, just slowly to the left of the car, the Buick pulls out and pulls out to go past the Ford, when I heard a crash in the rear, and his car struck the left front of our car and the rear of the driver's seat." 10

Do you remember giving that answer?

20

A Yes, sir.

Q Is that answer correct? A Well, maybe parts of it. It is mostly correctly stated.

Q Well, is there any doubt about it in your mind that the portion of your car that was hit was the left front from the rear of the driver's seat? A It was the left side to the rear of the driver's seat.

Q You are sure of that? A Positively.

Q The point of collision, there is no question about it in your mind, was the left side of the front to the rear of the driver's seat? A Yes. 30

By Mr. Seaman.

Q He said left side front. A Left side front.

By Mr. McGlynn.

Q But beyond the rear of the driver's seat?
 A But beyond the rear of the driver's seat. 40

Victor Panconi, cross.

Q Did you see the Nash after the accident?

A Yes, sir.

Q I show you Exhibit D. 1, and ask you if that is a good picture of the left front of the Nash car after the accident? A Yes.

10 Q Do you see any signs on that picture to indicate that that car was hit on the left front to the rear of the driver's seat? A Yes, sir.

Q What? Where? A (Pointing).

Q You don't call that to the rear of the driver's seat? A Here is where the rear of the driver's seat would be.

Q Is that what you say—well? A The left front was sideswiped.

20 Q The whole left front was sideswiped? A Certainly.

Q You didn't say that down in Philadelphia a few days after the accident? A I said the rear came up and sideswiped it.

Q Did you ever use the word sideswipe down there? A Maybe I didn't.

Q Didn't I ask you just a few moments ago whether the point of collision was on the left of it and in the rear of the driver's seat? A No, sir. I said the left side front and the rear of the driver's seat.

30 Q Show me where to the rear of the driver's seat that there is any signs indicating— A (Pointing)—This was hit first and then it continued on like a sideswipe.

Q What continued on like a sideswipe? A The rear of the Buick.

Q Well, was the Buick parallel with the Ford when this happened? A No, sir.

Q How was he facing? A He just came out and went in like.

40

Victor Panconi, cross.

Q Wait a minute. Did this accident happen when he was going out or coming in? A Just when he came out, when he went to turn in his side came up and sideswiped us.

Q Your car was still running parallel to your right? A Yes.

Q On the right-hand side? A Yes. 10

Q Where was the Ford car with reference to its curb on the side of the road? A Say it again?

Q Where was the Ford car with reference to the curb on its side of the road? A Well, I don't know exactly how far away from the curb it was, but it was on the right side if it is going down.

Q Without giving the number of feet was he close or a little distance from the curb? A He was quite a little distance. I would say two or three feet. I am not sure. 20

Q He was two or three feet from his curb? A Yes.

Q Could you tell how far apart the Ford and the Buick were when the Buick was trying to pass him? A No, sir. The only thing I remember that he came right out. He was coming out at a pretty good rate of speed, and he made to pass the Ford, and he just came out and sideswiped us and hit the Ford. 30

Q What did you say the speed of your car at that time was? A About twenty to twenty-five miles an hour.

Q Do you remember your testimony down in Philadelphia before the coroner? Were you asked this question?

Victor Panconi, cross.

By Mr. McGlynn.

Q (Continuing)—“How fast were you going?
Answer: About twenty-five or thirty miles an
hour.” Is that correct? A Well, now, I remem-
ber it was about twenty or twenty-five.

10 Q Oh, now you remember? A Yes.

Q Do you think your memory is better today?
A I guess it was.

Q This accident happened in 1927. Do you
think your memory is better today than it was
at the coroner's hearing, which was held October
7, 1927? A Well, at just that point I happen to
recall it pretty good, just lately.

20 Q What makes you recall just lately that your
car was going twenty or twenty-five miles an
hour? A Well, I know that you have asked that
question so I thought to make sure.

Q How did you make sure since the coroner's
hearing that your speed changed from twenty-
five to thirty to twenty to twenty-five? A It
just happened to come out.

Q Didn't you know it then? A I just
thought twenty-five to thirty.

Q Did you tell the truth then in Philadel-
phia? A Well, I thought I did.

30 Q Are you telling the truth now? A Now,
I know I am.

Q What has happened since 1927 to make you
so sure that the speed of your car was only
twenty to twenty-five miles an hour? A Nothing
happened.

Q What? A I don't know what you mean.

Q Well, I know that you testified in Phila-
delphia twenty-five to thirty, didn't you? A
Certainly.

40 Q And today twenty or twenty-five? A Yes.

Peter Rasmussen, direct.

Q And you say twenty to twenty-five is correct? A Yes.

Q What made you change your mind? A I thought it was more correct.

Q Why do you think it was more correct? Can you give me any explanation for it? A Well, being as I was sitting in the front there, I figured the question would be asked, and I thought I would give it more correct. It was a little exaggerated before, but it is more correct now. 10

Q I see. What time did you leave Perth Amboy that night? A About seven or seven-thirty.

Q Are you sure of that? A Yes, sir.

Mr. McGlynn: That is all.

20

Re-direct examination by Mr. Seaman.

Q How fast did you say the Buick was going when it pulled out past the Ford? A Thirty-five to forty.

Mr. Seaman: Thank you, that is all.

PETER RASMUSSEN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith: 30

Direct examination by Mr. Seaman.

Q Mr. Rasmussen, when do you live? A 348 Laurie street, Perth Amboy.

Q On the night of September 24, 1927, were you a passenger in a car which was being driven by Andrew Noroko? A Yes, sir. 40

Peter Rasmussen, direct.

Q And did you meet with an accident on Roosevelt Boulevard in Philadelphia? A Yes, sir.

10 Q Will you please tell the Court and jury just what you know about this accident? A Well, I was sitting in the left side of the rumble seat.

By Mr. McGlynn.

20 Q I can't hear you when you turn your head. A I was sitting in the rumble seat on the left side going towards Philadelphia, and at the time just before the accident—at the time of the accident I was talking to Eugene Pincelli, facing him, then I heard a crash. I didn't know nothing until we landed over the curb with the two front wheels after the accident.

Q What happened to Andrew Norko? A Andrew Norko, he got killed.

Q What happened? A He got killed.

Q How fast were you proceeding along this highway, if you know? A About—we were going about twenty-five miles an hour.

Q Going about twenty-five miles an hour? A Yes.

30 Q How far from the right edge of the highway, your right edge? A About four feet.

Q Now, where, with reference or how far from the right edge of the highway did the accident occur? A That happened about five—about five feet from the right-hand, our right.

Q You will have to speak louder. I can't hear you. A About five feet.

40 Q What was five feet from the right-hand side? A Our car.

Peter Rasmussen, cross.

Q How far from the center line of Roosevelt Boulevard was your car when the accident occurred? A I should say about three feet.

Q On your right or on your left? A On our right.

Q So that your car was about three feet to the right of the center line of the Boulevard going towards Philadelphia, is that true? A That is right. 10

Q Did you see this Buick at all before the accident? A No, I didn't.

Q Did you hear any signal or warning given by the Buick before the accident? A No, I didn't.

Q How far did your car go after the accident, if you know? A I don't know on account of being like sort of shocked from the accident. 20

Q Did you see the cars after the accident, after you had come to? A Yes.

Q Where was your car? A Our car was about twenty feet from where the accident happened.

Q How far was the Buick from where the accident happened? A I figure he was about fifty feet.

Q Are you sure you heard no signal or warning given by any car before the accident? A No, sir. 30

Q By the Buick car? A No, sir.

Cross examination by Mr. McGlynn.

Q You didn't see these at all hit, did you? A No, I didn't see the cars at all before.

Q You just heard the crash? A I just heard the crash and that is all I remember. 40

Peter Rasmussen, cross.

Q And when you came to your car was up over the left side curb with both front wheels?

A Yes.

Q How can you tell us then how many feet your car was after the accident from the point of the collision? How do you know where the
10 collision was? A On account of the glass and everything being there we went back.

Q You say your car was on the right-hand side all the time? A Yes, sir.

Q Were there any white marks, distinguishing marks, in the center of the roadway? A I didn't take notice of any.

Q You say that your car after the accident went fifteen to twenty-five feet away from where the glass was on the roadway? A Yes.

Q Where was the Ford car from the glass?
20 A I figure that was about five or ten feet away from it.

Q Where was the Buick? A He was about— from the Ford or from where the glass was?

Q From the Ford. A I figure about forty feet.

Q On toward Trenton? A Yes.

Q Are you sure of that? What time did you say it was when you left Perth Amboy? A
30 It was round seven-thirty.

Q And the accident happened about ten? A Yes.

Eugene Pincelli, direct.

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

Direct examination by Mr. Seaman.

Q Mr. Pincelli, where do you live? A 284 10
Washington street, Perth Amboy.

Q On the night of September 24, 1927, were you a passenger in a car which was being operated by Andrew Norko? A I was.

Q Did you meet with an accident that night? A Yes, on Roosevelt Boulevard.

Q Now, will you please tell the Court and jury just how this accident happened? Speak slowly and loud. A We was riding along about twenty-five miles an hour and there was a big— there was a hole on the right of the road, which extended out about three feet, a little more than that, from the right of the gutter, and Norko pulled about a foot out from the hole to avoid that bump, and he went straight out on his left. He was on his right of the road when he did that, and I saw a car coming, which I found out later was the Ford, and then without any warning, I saw another pair of headlights, and the first thing I knew we were struck. 20

Q Now, how far were you from the right edge of the right side of your road when this accident happened? A Well, the car was about five feet from the right of the road, and the car was about five or six feet wide, that makes about eleven or a little over. 30

Q And so you were eleven feet or a little over to the right edge of the road when the accident happened? A Yes.

Q Now, where was this hole that you speak of? A On the right of the road. 40

Eugene Pincelli, direct.

Q Now, you say Mr. Norko pulled out. How far would you say he pulled out to avoid this hole? A Just about a foot.

Q Just about a foot after he pulled out to pass this hole, how far were you riding from the right edge of the road? A He was riding
10 about five feet.

Q About five feet and were you continuing straight on? A Straight on.

Q And how many feet had you gotten past this hole when the accident occurred? A Not very far.

Q Were you going straight? A Straight.

Q Well, how many feet had you gotten past the hole when the accident occurred? A I imagine maybe fifteen, around fifteen feet.

20 Q Around fifteen feet. You say the first time you saw the Buick—how far were you from the Ford when you first noticed the Buick? A He was about five feet from the Ford, and the Buick was pulling out from in back of the Ford.

Q You were five feet from the Ford and the Buick was pulling out to pass the Ford? A Right.

Q Now, tell us just how this Buick came out. A He pulled out and he couldn't make it, and he
30 pulled in, and in doing so his left rear hit our left front, and he landed right up against the Ford, and he rebounded and hit the Ford and knocked the Ford over against the telegraph pole that was on the right-hand side.

Q So this Buick pulled out to the left? A Yes.

Q And then pulled in to the right again? A Yes.

Q Was that when he was pulling in to the right again that he struck you? A Yes.
40

Eugene Pincelli, direct.

- Q And then hit the Ford? A Yes.
- Q Now, from the point of the accident how far did the Buick go? A About forty feet.
- Q How far did your car go from the point where the collision took place? A About twenty to twenty-five feet.
- Q Twenty to twenty-five feet? A Yes. 10
- Q And where did the Ford go? A The Ford?
- Q How far did it go? A I don't believe the Ford went very far, because it was just pushed right over when the Buick hit it and landed up against the telegraph pole. It was right at the spot of the accident.
- Q And it stayed in the same place? A It stayed in the same place. 20
- Q Was there any signal or warning given by this Buick as it pulled out to pass the Ford car? A No signal at all.
- Q How fast would you say the Buick was going at the time of the collision? A Oh, forty or more.
- Q Forty or more miles per hour? A Yes, sir.
- Q Did you know the deceased Andrew Norko? A I did. 30
- Q Did you go to school with him, Mr. Pincelli? A Not to school with him. I worked with him.
- Q Where did he work? A Over in Tottenville in the Atlantic Terra Cotta.
- Q What was his work? A He was a modeler.
- Q What grade of wages do you get at that place? A I don't know what he was getting. 40

Eugene Pincelli, cross.

By Mr. McGlynn.

Q What? You don't know?

Mr. Seaman: Well, I will withdraw that question.

10 *By Mr. Seaman.*

Q Did Mr. Norko go to school with you? A He did.

Q Did you go with him? A No, a different line of work.

Mr. Seaman: Take the witness.

Cross examination by Mr. McGlynn.

20 Q How did you go to Philadelphia from Perth Amboy that night? A How did we go?

Q That was the question. A We went through Trenton and right out, right out to the highway. We went right to Roosevelt Boulevard.

Q Is that the first time you five had been down together? A The first time.

Q Who knew the road? A The driver.

Q What time did you start from Perth Amboy? A Around a quarter after seven.

30 Q What time did the accident happen? A Around ten.

Q Now, how long after the crash of these cars did you see this Buick car? A How long?

Q Yes, for how long a time were you looking at it? A Just about a second.

Q And in that second you estimate he was going from what, thirty-five to forty, or what? A He was going around forty miles an hour.

Q And you say your car was going how fast?

40 A Twenty-five.

Eugene Pincelli, cross.

Q Had your car completed pulling out around this hole? A It did.

Q Straightened out? A Straightened out.

Q He was parallel with the curb? A Yes, sir.

Q How far to the right of the center of the road was its left-hand side? A The left of our car from the center of the road was about three feet. 10

Q Three feet, and have you any idea how far the Buick was out from the curb? A No, sir.

Q Any part of this Buick car pass the Ford car before the collision? A No, the Buick was not past the Ford.

Q So the collision happened in back of the Ford? A No, it didn't happen in back of the Ford, but his left was just about even with the Ford rear when we hit. 20

Q What is that? A The rear of the Buick was about even with the rear of the Ford.

Q I asked you a minute ago if any part of the Buick passed the Ford. A It was not past it; it was even with it.

Q It was running parallel with it? A Yes, sir.

Q How far away from it? What was the space between them when they were running side to side? A I couldn't say that. 30

Q Were they close together or far apart? A Well, they might have been a little distance apart.

Q Then you say the Buick after being parallel, as you just described it to us, with this Ford car, started to turn in to his right? A The Buick did.

Q The Ford was in his way? A That is when he hit, the Buick. He pulled in, he couldn't make it. 40

Eugene Pincelli, cross.

Q What do you mean he pulled in? A The Buick pulled in.

Q Wasn't the Ford alongside of him? A You can cut a man off.

Q He wasn't past the Ford. A He was going to pass the the Ford.

10 Q This accident happened while the Buick was trying to pass the Ford and cut in front of him? A While he was trying to pass.

Q Did this accident happen in front of the Ford? A No, it must have happened on the side of it because the—

Q Do you know what part of the Ford car was hit by the Buick? A No.

20 Q Did you see the Ford? A I didn't see it afterwards.

Q You didn't see it afterwards? A I didn't go over and look to see what damage was done to it.

Q Did you see whether the rear of the Ford was hit by the Buick in this accident? A I didn't see whether or not that was hit.

30 Q Suppose I said it was, what explanation then could it be if the back of the Ford was the portion of the car that was hit by the Buick as it swung around, if you find the accident happened, the crash with your car, while the Buick was ten feet from there, alongside of it, and was trying to cut in front of him? A I don't know how it would happen that way.

Q It happened while he was trying to cut in front? A Yes.

Q And some part of the Buick hit the Ford? A Yes.

40 Q And the Buick went on fifty to fifty-five feet? A Yes.

Eugene Pincelli, cross.

Q And the Ford slammed up against the telegraph pole and stayed there? A Yes.

Q And your car went fifteen feet to twenty-five feet? A Yes.

Q That is the amount the rear of your— A Our car was on the left-hand side of the street and two wheels were over the gutter, and the distance between the two cars was about seventy feet after the accident. 10

Q Between the Buick and your car? A Yes.

Q And the Ford was how far away from your car after the accident? A About twenty feet.

Q And your car was lying at an angle? A Right.

Q Although it was traveling to Philadelphia parallel with the curb on the right-hand side of this street, the car in which you were riding went to its left on that street and stopped with both front wheels above the curb? A Yes, the driver was dead and nothing to stop the car. That is why it went that way. 20

Q Did you actually see this hole in the road that you are talking about? A I was in the right-hand side of the rumble seat.

Q In the back? A In the back.

Q Ten o'clock at night? A Ten o'clock at night. 30

Q And the top was down? A The top was down.

Q And you could see this hole in the road as you were going twenty-five miles an hour? A I didn't see the hole. There were lights along the road.

Q Did you see the hole? A I didn't say exactly I saw the hole. I know there was a hole there, because that is why he pulled out. 40

Eugene Pincelli, cross.

Q Well, if you were on the right-hand side of this Nash in the rumble seat in the rear— A Yes.

Q (Continuing)—did you see these other cars coming in the other direction? A Yes. You are sitting up high in the rumble seat.

10 Q You saw the Ford car going down the road and then the Buick coming out and trying to pass the Ford? A Yes, sir.

Q All that from the rear right rumble seat? A Yes, sir.

Q And at the same time you saw the hole in the road? A I knew there was a hole in the road.

Q Were you casting your eyes down at the pavement or weren't you? A Did I have to?

20 Q I am asking you, were you doing it? A No.

Q How much more of your testimony is based upon what you think rather than what you saw? A No more.

Q That is all of it? A Yes, sir.

Q Now, from where you sat did you see these cars coming in the opposite direction before you pulled out for this bump or hole in the road? A There is a lot of cars coming. You can see the headlights.

30 Q We are not interested in the other cars, sir. We are interested in whether you saw the Ford car coming down and the Buick trying to pass it. A When we got close to it, yes.

Q Did you see all that before your car passed this bump or hole in the road, or afterwards? A Afterwards.

Mr. McGlynn: I think that is all.

Mr. Seaman: Thank you, that is all.

Michael Norko, direct.

MICHAEL NORKO, the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Seaman.

Q What is your name? A Michael Norko.

Q Are you the father of Andrew Norko? A I am. 10

Q How old was Andrew on the twenty-fourth day of September, 1927? A He was nineteen year and ten months.

By Mr. McGlynn.

Q What? A He was nineteen year and ten months.

By Mr. Seaman.

20

Q And do you have any other children, Mr. Norko?

Mr. McGlynn: I object, if your Honor please, for this reason: The time has arrived when the question of the issue in this case must be passed upon, and I think this is the proper place. I had Mr. Seaman read into the record this morning two sections of the Death Act of Pennsylvania, for the purpose of having the record disclose the differences in the situation between our statute and the Pennsylvania statute. Your Honor will find, upon reading the complaint, that the pleader who drew the complaint alleged no statutory right of action. There is nothing in the complaint to indicate that the suit was commenced under the Pennsylvania statute, which I understand must be pleaded if recovery is sought thereunder. 30 40

Motion to Amend Complaint.

Recovery could not be under the New Jersey statute because the accident did not happen in New Jersey.

(Argument off the record.)

The Court: Objection sustained.

10 Mr. Seaman: May I have an exception to your Honor's ruling?

The Court: Certainly.

By Mr. Seaman.

Q How old did you say Andrew was on September 24, 1927? A He was nineteen year and ten months.

20 Q Where was he working prior to the accident, Mr. Norko? A He work some time on Atlantic Terra Cotta plant.

Q Where is this plant? A Tottenville.

Q Tottenville, New York? A New York, yes.

Q How much did he make a week there, Mr. Norko?

Mr. McGlynn: I object, if your Honor please.

30 A He—

The Court: Wait a minute.

I don't see why that is not proper. The jury has got to have some idea to base the laws on.

(Argument off the record.)

40 Mr. Seaman: Then we would like to have an amendment of the complaint, which is proper at this time, and I move to have the father as an administrator of the estate.

Motion to Amend Complaint.

The Court: To have the father what?

Mr. Seaman: As the administrator for the son.

The Court: You have already got him in here as administrator ad prosequendum. As I understand, the argument of counsel is that the right of action lies in the father and mother in this case, and it does not lie in the representative. It does not lie in the administrator or anyone else. It lies in the individual and the individual has not started suit here. 10

Mr. Seaman: At this time we would like to amend the complaint to allow Michael Norko and Anna Norko to sue as parents of Andrew Norko, the deceased.

The Court: Mrs. Norko has not started any action yet. She is not a party in this action. Michael Norko sues invidiually. It is possible he may come under the first count. 20

Mr. Seaman: As I understand when I spoke to Mr. McGlynn about this, he gave me the impression he was not going to object to this. He was going to try the case on its merits.

Mr. McGlynn: I said nothing of the kind. 30

Mr. Seaman: Will the Court allow us to amend it?

The Court: I don't know. I think it is extremely doubtful whether you have the right to amend at this stage of the matter. I think you are either in or out. Right now I don't think there is anything I can do to remedy the situation. That is my opinion at the present moment. That is not final. I 40

Motion to Amend Complaint.

just want to read the complaint through and see how it stands.

(To the jury.) Come back at two P. M., members of the jury.

10

 AFTERNOON SESSION.

The Court: Is there anything before me now?

Mr. Seaman: Yes, sir, the question—

The Court: You made a motion to amend.

Mr. Seaman: Yes.

The Court: What is your motion?

20

Mr. Seaman: My motion is that the complaint be amended to have Michael Norko as administrator of the estate of Andrew Norko, the plaintiff.

The Court: Michael Norko is not the administrator of the estate of Andrew Norko.

Mr. Seaman: Well, as a personal representative of the deceased Andrew Norko, if your Honor please. It is merely a formality.

30

The Court: I have not decided whether or not you are entitled to amend. I am trying to get the situation straightened out, to get your motion in proper, so that you move in such a way that somebody competent can be made a party plaintiff. You started suit here by Michael Norko individually and as an administrator ad prosequendum of Andrew Norko, deceased. The administrator ad prosequendum, in my opinion, under the Pennsylvania statute, upon which your suit must be based, has no right to prosecute such

40

Motion to Amend Complaint.

an action. That is my opinion from what I now know about the statute. Of course, Mr. Norko is not the general administrator of the estate, and he could not proceed here as the general administrator of the estate, because he does not occupy that position, although he might be entitled to be appointed general administrator, but at the present moment he is not the general administrator of the estate. 10

Mr. Seaman: As I understand it, according to the statute, the parents of the deceased may bring the action.

The Court: You have one parent a party to the suit now. The first count in the suit makes him a party and the first count, it would seem to me, would be ample to sustain the recovery by Michael Norko individually. I think it will be enough anyway in its present form. Certainly I think it would be enough if the last clause in the paragraph were amended to read: "By reason of the premises, plaintiff demands on this count \$50,000 damages or whatever the amount may be." 20

If you will make a motion to grant that the first count of the complaint be amended in that way, if you think that is proper, I will grant that motion. 30

Mr. Seaman: I will make that motion, if your Honor please.

The Court: Now, counsel for the defendant wants an exception on the record?

Mr. McGlynn: Yes.

The Court: Now, of course, that does not make Mrs. Norko a party, and there is not 40

Michael Norko, direct.

any way that you can make Mrs. Norko a party that I know of.

Mr. Seaman: If your Honor please, we will proceed.

10 The Court: I will dismiss the complaint so far as the administrator ad prosequendum is concerned.

Mr. McGlynn: The stenographer will note an exception to that.

The Court: You don't want an exception to the last?

Mr. McGlynn: No, the other. I just wanted to make sure he has got an exception.

20 The Court: Yes, it is understood you will have an exception to my ruling permitting the amendment.

MICHAEL NORKO, resumed the stand and testified further as follows:

Direct examination (continued) by Mr. Seaman.

Q Mr. Norko, are you the father of Andrew Norko who was killed in the automobile accident?

30 A I am the father, yes, sir.

Q And you were the father on September 24, 1927? A Yes.

Q Did you bring this action for the death of your son as the father of the boy? A Yes, sir.

Q Now, how old was Andrew—

40 The Court: That is already in, Mr. Seaman.

Michael Norko, direct.

Mr. Seaman: I will withdraw the question, if your Honor please.

The Witness: Nineteen and ten months.

The Court: All right.

By Mr. Seaman.

Q Now, if your Honor please, I think there is some question as to where the boy worked. How much did your son Andrew earn a week at the Tottenville Terra Cotta factory? A The first time seventy-five cents an hour. He made thirty-two and thirty-four dollars in a week. 10

Q What did he do with his weekly payment?

A He gave all the money to me.

Q Did he turn his pay over to you every week? 20

Mr. McGlynn: Don't lead, please, Mr. Seaman.

The Court: He says he gave all the money to him. I don't know what further you can get from that.

By Mr. Seaman.

Q Mr. Norko, how old was Andrew when he first started to work? 30

Mr. McGlynn: I object.

The Court: Objection sustained.

Mr. Seaman: If your Honor please, the purpose of my question is to show the kind of boy he was. I want to show just what his tendencies to work were.

The Court: At the present moment the testimony would indicate that he worked all 40

Michael Norko, direct.

the time. You can ask him the question, whether he worked steadily or not.

By Mr. Seaman.

10 Q Did your son Andrew work steadily? A Steadily, yes, sir.

Q What did he do with his money from the time that he worked? A Well, all his money he give it to me.

Q Always turned the money over to you?

The Court: Now, you got that in four times, Mr. Seaman, and it don't get stronger if it is said four times than if it is said once.

20 Mr. Seaman: If your Honor please, I withdraw that.

By Mr. Seaman.

Q Was your son living with you at the time of the accident, Mr. Norko? Was Andrew living with you at the time of the accident?

By the Court.

30 Q What counsel wants to know is whether your son lived home just before he was killed.

By Mr. Seaman.

Q Did you son live at home just before he was killed? A Always home; no place.

Q Was your boy an ambitious boy, Mr. Norko?

Mr. McGlynn: I object.

40 The Court: The objection to that question will have to be sustained.

John Norko, direct.

Mr. Seaman: I will withdraw the question.

By Mr. Seaman.

Q Did your son attend school while he worked? A Yes, sir.

Q Where did he go to school? A He goes three times a week, Cooper Union. 10

Q Three times a week? A After work.

Q What did he study there? A He was studying for modeler.

Q He was studying for what? A A modeler.

Mr. Seaman: That is all.

Cross examination by Mr. McGlynn.

Q How much did you give your boy back a week? A I give one or two dollars a week. 20

Q One and two? A That is all he gets.

Q Your wife is living, is she not, the boy's mother? A Yes, sir.

Q She was living at the time of the accident? A Yes, sir.

Mr. McGlynn: That is all. 30

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

Direct examination by Mr. Seaman.

Q John, are you a brother of Andrew Norko? A Yes, sir. 40

Motion for a Non-suit.

Q Will you please state to the Court and jury just what kind of work Andy was doing at the time that he was killed or prior to the time he was killed?

10 Mr. McGlynn: If your Honor please, I object to the question. I can't see it makes any difference. As I understand the damages now, they are limited to the boy's earnings returnable to his father until he is twenty-one.

The Court: Objection sustained.

20 Mr. Seaman: If the Court please, the reason for my question is this: As I understand the law, the plaintiff would be entitled to—or the jury is to determine from the evidence as to the characteristics of the boy, the kind of work he did, the possibilities of the future—

The Court: You have got in the record he was earning thirty to thirty-five dollars a week, and he turned it all over to his father.

Mr. Seaman: If the Court please, I want to show he was trying to improve himself. (Argument off the record.)

The Court: I sustained the objection.

30 Mr. Seaman: May I have an exception?

The Court: Yes.

Mr. Seaman: I withdraw this witness. That is our case, if your Honor please.

40 Mr. McGlynn: If your Honor please, I move for a non-suit on the ground that the plaintiff, in my opinion, is not entitled to recover under the Pennsylvania statute. I contend it should be the both parents;

Benjamin W. Rau, direct.

secondly that the complaint contains no allegation which brings the Pennsylvania statute within its scope, therefore the inference of the statute having failed, the plaintiff is not entitled to recover.

The Court: I will deny your motion. One thing, Mr. Seaman, I don't think you have got any proof here, or do you claim to be able to recover expenses? You haven't got any proof about that in here. 10

Mr. Seaman: I want to introduce in evidence the undertaker bill of Michael Zylka of \$904.50.

Mr. McGlynn: I object to it, of course, on the theory that the Pennsylvania statute is not a part of the complaint and ask for an exception. 20

The Court: You may have it.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 3.")

BENJAMIN W. RAU, the defendant, being duly sworn according to law, on his oath saith:

30

Direct examination by Mr. McGlynn.

Q Where do you live now? A 1815 Eighteenth street, northwest, Washington, D. C.

Q At the time of this accident, where were you living? A 312 Clinton avenue, Lakewood, New Jersey.

Q On this night in question, what sort of car were you driving? A Buick coupe.

Q Who was with you? A My daughter.

40

Benjamin W. Rau, direct.

Q In which direction and on what road were you going? A On the Roosevelt Boulevard going easterly toward Trenton.

Q From Philadelphia? A Yes, sir.

Q Do you recall at about what time this accident happened? A Just a few moments before ten o'clock.

Q Now, what condition was the pavement of this Boulevard that you were riding on? A It was a very rough condition.

Q What was the condition of traffic at that night at that place? A Very heavy.

Q Do you recall what sort of a car was a little in front of you just before the accident? A Ford sedan.

Q About what rate of speed were you going just prior to the accident? A Approximately twenty-five or thirty miles an hour.

Q What sort of lights did you car have on? A New York state license.

Q What sort of lights? A Regulation Buick headlights with a special frosted glass and dash light.

Q Were they on or off? A They were on.

Q Suppose you tell us just what happened in the few seconds or minutes as you approached this Ford car? A I had been following this Ford sedan for about a half a mile, bearing just simply to his left, hoping to pass him. The road was too crowded to make any attempt, and I was still waiting for a chance when all of a sudden I saw a pair of headlights quite bright lurch forward in the road, and I immediately steered to the right to avoid, and it seems to me as though in a second the crash came.

Q Now, where did this car hit you? What part of your car was hit? A On the door ad-

Benjamin W. Rau, direct.

jaacent to where I was sitting on the left side of the car.

Q I show you a picture marked "D. 2," I think, in evidence, Mr. Rau. Is that a picture of your Buick car that you were driving that night? A Yes, sir.

Q Is that a fair representation of this condition after the accident? A It is. 10

Q And will you hold that up and point out to the jury just where this car hit you so they can see it? A I was sitting at the driver's wheel, and at the force of the collision the other car came directly—hit me right here on the door just where I was sitting.

Mr. McGlynn: Witness points to the left door on the left-hand side of the car, about the center. 20

The Witness: About the center of the car.

Q What caused the rest of these injuries or damages that are noted on the car? The fender, what happened to that? What caused the marks on the rear fender? A The other car came with such force as to throw the whole rear of the body almost off the car, as you see. 30

Q What happened to your car when it was struck by this car? A The front of the car remained almost still, and the rear of the car was pushed around with such a terrific force that the rear end of the car swung completely around and smashed into the Ford sedan in front of it.

Q Which rear, your right or left as you were coming towards Trenton? A I was hit on the left center and the right-rear wheel. 40

Benjamin W. Rau, direct.

Q So that your car, riding towards Trenton, the way I am standing now, he was hit on the left and swung around in a complete circle, and the right rear hit the Ford which had been in front of you? A Yes.

10 Q No question about that, in your mind, is there? A None whatsoever.

Q Now, then, what was done to the Ford which you say your right rear swung around and hit? A He was pushed over to the curb and up against a telephone pole, electric light pole.

Q Did he proceed north in a direction which would be toward Trenton thereafter, after the impact? A About five feet only.

20 Q That is the Ford? A Yes.

Q No, where were you with reference to the Ford when your car stopped? A I was about five feet west of the Ford.

Q What do you mean by west? I am not sure of my direction. A Behind the Ford.

Q Toward Philadelphia? A Toward Philadelphia.

Q Is there any question about that in your mind? A No, sir.

30 Q You were not forty or fifty feet on toward Trenton ahead of the Ford, were you? A No, sir.

Q You were back of the Ford? A Yes, sir.

Q What was the direction that your car occupied on the road? A Directly perpendicular to the road.

Q So that the traffic coming from Philadelphia towards Trenton was blocked? A Yes.

Q Where was this Nash car that hit you? What became of that? A The Nash car was

Benjamin W. Rau, direct.

about fifty feet back of me over on the curb on the wrong side of the road.

Q That is the same side you were coming up on? A Yes, sir.

Q I show you picture D. 1 and ask you if that is a fair representation of the Nash car as it appeared after the accident? A Yes, sir. 10

Q Will you point out to the jury which part of the Nash car hit your Dodge or Buick, as you showed us a few minutes ago? A Their left-front wheels struck directly into the center of my car. This section right here (indicating).

Mr. McGlynn: The witness points to the part shown as the headlight and the part underneath that.

The Witness: Yes, sir. 20

By Mr. McGlynn.

Q I show you another picture of your car and ask you if that is a fair representation of your car, looking at it from the front, showing the right side of it? A Yes, sir.

Q Were there any or many marks of damage to the right rear of your car where it went into the Ford? A Near the right rear fender.

Q Is that the portion of your car that hit the Ford? A Yes, sir. 30

Q Your right rear fender hit that part of the Ford? A I don't know.

Q Was it the front or the rear of the Ford? A The rear.

Mr. McGlynn: I offer this in evidence.

(The photograph referred to was received in evidence and marked "Defendant's Exhibit 3.") 40

Benjamin W. Rau, cross.

Q Have you any idea, Mr. Rau, as to how long before the crash you saw this car coming to you?

10 Mr. Seaman: I object to the "idea," if your Honor please. He asked the witness whether he had the idea.

Mr. McGlynn: If he says no, I am through; if he says yes, I am going to follow it up.

The Court: I will permit it.

A About a split second.

By Mr. McGlynn.

20 Q Did you see it long enough so that you were able to form any intelligent idea of the speed as it approached you? A No.

Q What about the force of the impact with this Nash car when it hit the side of your Buick, was it light or severe? A Very severe.

Q Very severe? A Very severe.

Mr. McGlynn: Cross examine.

Cross examination by Mr. Seaman.

30 Q Where did you say you lived, Mr. Rau?

A 1815 Eighteenth street.

Q Eighteenth street? A Eighteenth street northwest, Washington, D. C.

Q Where were you in Philadelphia that night, Mr. Rau, or where were you that night? A Relatives. Visiting relatives.

Q Where? A On Rockland street.

Q Where? A 929-729 Rockland street.

40 Q Philadelphia? A Yes, sir.

Benjamin W. Rau, cross.

Q So that you were going along this road or Boulevard about twenty-five or thirty miles an hour, is that right? A Yes.

Q How fast was this Ford car that was in front of you going? A I don't know, sir.

Q You don't know. Was it going fast or slow? A Very slowly. 10

Q It was going very slowly and you were following this car for a half mile, you say? A Yes, sir.

Q If you were going twenty-five or thirty miles an hour and you were following this Ford, the Ford must have been going more than twenty-five or thirty miles an hour, is that not true?

Mr. McGlynn: I object, if your Honor please, it is argumentative and not a question. 20

The Court: Objection sustained.

By Mr. Seaman.

Q The fact is, though, that you were behind this Ford following it for a half hour? A Yes, sir.

By the Court.

Q A half hour or a half mile? A A half mile. 30

By Mr. Seaman.

Q A half mile? A Yes.

Q When did you first see the Nash? A Just before it hit me.

Q How many feet away from you? A I don't know.

Q You don't know? A No, sir. 40

Benjamin W. Rau, cross.

Q Did you observe traffic coming in the opposite direction? A Yes, sir.

Q But you didn't observe this Nash car until it came right upon you and hit you, as you say? A Exactly.

10 Q How far from the right edge of the road was the Ford traveling? A Almost to the gutter.

Q How far was the right side of your car from the right edge of the road? A About five feet.

Q About five feet. How far to the left of the Ford did you pull when you attempted to pass the Ford car? A I did not attempt to pass the Ford car.

20 Q Weren't you passing the Ford car when this accident happened? A No, sir.

Q Are you sure of that? A Positive.

Q Where was the front of your car with reference to the Ford when this accident occurred? A About three feet behind the Ford.

Q Three feet behind the Ford? A Yes, sir.

Q How far were you to the left of the Ford in the rear of the Ford? A My right—my right rear wheel—my right front wheel was directly behind the center of his car.

30 Q So that about half of your car was to the left of the Ford, is that true? A Yes, sir.

Q Did the Ford stop when the Nash car collided with your car? A No, sir.

Q What part of the Ford was damaged? A The side where it hit the electric light post and the rear fender where my car collided with it.

Q Was the left front fender smashed? A Not to my knowledge.

Q Was the left side smashed or damaged? A Not to my knowledge.

40

Benjamin W. Rau, cross.

Q Was the left side of the running board damaged? A Not to my knowledge.

Q As a matter of fact, you were passing this Ford car when this accident happened, weren't you? A No, sir.

Q Did you give any signal or warning as you attempted to pass this Ford? A No, sir. I did not attempt to pass the Ford. 10

Q Can you explain how the rear of your car struck the right rear fender of the Ford if you were in back of the Ford when this accident occurred? A Repeat please.

Q Can you explain how the right rear of your car damaged the left rear fender of the Ford if you were in back of the Ford when this accident occurred? A Yes, sir.

Q Will you please tell the jury? A The force of the impact was so great as to spin the rear of my car around so quickly as to have the right rear fender of my car strike the left rear fender of the Ford. 20

Q Isn't it a fact the Ford continued going after the accident? A Yes, sir.

Q And it was going ahead of you when you were going twenty-five to thirty miles an hour, isn't that so? A Yes, sir.

Q After the accident you say you were to the rear of the Ford, is that true? A Yes, sir. 30

Q Where was your rear with reference to the right, your right side of the road? A Repeat, please?

Q Where was the rear of your car with reference to your right edge of the highway, how far from the right edge? A About three feet.

Q About three feet? A Yes, sir.

Q Where was the rear of the Ford with reference to the right side of your car then 40

Irving Schwartzman, direct.

after the accident? A Perpendicular against the edge of the road.

Q How far was the rear from the right side of your car? A His left rear wheel was about between three and four feet from my rear—right rear wheel.

10 Q Isn't it a fact that you were attempting to pass this Ford car, and that you swerved out to your left and then attempted to again swerve in to the right to get in front of the Ford, and that is how the side of your car collided with the left front of the Nash? A No, sir.

Q But you are positive you were going twenty-five or thirty miles an hour? A That was the limit, sir.

20 Q Is that what you were traveling at at the time of the accident? A Yes, sir.

Mr. Seaman: No further questions.

Mr. McGlynn: That is all, Mr. Rau.

IRVING SCHWARTZMAN, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

30 *Direct examination by Mr. McGlynn.*

Q Mr. Schwartzman, you live where? A Trenton, New Jersey.

Q Were you driving on this Roosevelt Boulevard on the night of September 14th, or whatever the night of the accident was? A Yes, sir.

Q Which way were you going? A Towards Philadelphia.

40 Q Did you see this Nash car which figured in this accident? A Yes, sir; I saw him pass me.

Irving Schwartzman, direct.

Q When he passed you, did you form any estimate of the rate of speed he was going?

Mr. Seaman: I object to the question unless the counsel for the defense can show where the Ford passed his car with reference to where the accident took place.

10

Mr. McGlynn: I don't know. He said Roosevelt Boulevard. This man said he was riding on Roosevelt Boulevard.

By Mr. McGlynn.

Q Is that right? A Yes.

The Court: That is only about six miles long.

Mr. McGlynn: I don't know. I have never been on it.

20

By Mr. McGlynn.

Q Did you see the same Nash car afterwards, Mr. Schwartzman? A Yes.

Q Where was it when you saw it the second time? A Half of it was up on the curb and the other half was on the road.

Q On the curb on its right-hand side? A On my left going towards Philadelphia.

30

Q And did you stop at the scene of the accident? A Well, the traffic officer stopped every car.

Q I understand you took Mr. Rau to the hospital, is that correct? A That is correct.

Q Can you give me any idea how far away from the place where you saw this Nash car above the curb it was that you saw him pass you?

A Well, I couldn't tell you in miles, but it was about fifteen minutes later on.

40

Irving Schwartzman, direct.

Q Fifteen minutes later that you saw the—

A Was the scene of the accident.

Q How fast was he going when he passed you?

Mr. Seaman: I object to the question on the ground that it is immaterial.

10 The Court: Objection sustained.

By Mr. McGlynn.

Q Did you see the Buick car that night? A I didn't look it over, no.

Q Did you see the Nash? A I saw the Nash car, because that is where I turned around to come back.

Q Did you see the Ford? A I saw the Ford there.

20 Q You don't remember where the Buick was with reference to the Ford? A Well, they were near each other.

Q Close to one another? A Close to one another.

Q Have you any recollection as to how far away the Nash was from the Buick? A Oh, I should say forty or fifty feet away.

Q From the Buick? A Yes.

30 Mr. McGlynn: Cross examine.

Mr. Seaman: No questions.

Herbert Rau, direct.

HERBERT RAU, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. McGlynn.

Q I understand you are a brother of Mr. Rau 10
who was on the stand a few minutes ago? A
Yes, sir.

Q Were you riding with him on the night of
this accident? A Yes, sir.

Q Where were you sitting? A In the rear
seat.

Q Do you recall about what time you came
along this Boulevard? A It was around ten
o'clock.

Q I see, and have you any recollection as to 20
about what speed you were going just prior to
the crash? A I haven't because I was sleeping.

Q You didn't see the crash? A No.

Q Did you hear it? A Oh, I heard it all
right.

Q Did you get out of the car afterwards?
A A few minutes afterwards, because I was
stunned by the impact. I was thrown forward.

Q Now, when you got out of the Buick, where
was the Buick with reference to the Ford? Did 30
you see a Ford there? A Yes, I saw it. It
was close. It was nearby, about four foot at
the most.

Q And you say Trenton on one side and
Philadelphia on the other, that is the easiest way
for me to understand everything. Now, where,
with reference to your brother's car, was the
Ford? A Towards Trenton.

Q No doubt about that in your mind, is there,
young man? A No, sir. 40

Herbert Rau, direct.

Q You think they were close together? A Yes, sir.

Q Did you see this Nash car we have been talking about? A Yes, sir.

Q Where did you see that car? A That was towards Philadelphia probably fifty or sixty feet.

Q Where was it with reference to the paved part or portion of the street? A The front two wheels were above the curb, and the rear wheels were on the road.

Q What was the position of your brother's car in the street itself? How was it standing? Do you remember? A Horizontally, from one side of the road to the other.

Q Could the traffic coming from Philadelphia go past or not? A The road was wide enough for them to pass.

Q I mean on the right-hand side? A Yes.

Q Did it or did it not block traffic coming from Philadelphia to Trenton? A Yes.

Mr. Seaman: I object to the question. It has already been answered, if your Honor please.

Mr. McGlynn: He has not answered it at all, sir.

Mr. Seaman: He said that traffic was not blocked coming from Philadelphia.

Mr. McGlynn: I knew it was not blocked coming from Philadelphia and you know it was not blocked coming from Philadelphia.

Mr. Seaman: I don't know how it was.

By Mr. McGlynn.

Q Just describe to us, young man, how this automobile of your brother's was on this street?

Herbert Rau, cross.

A It was in the center of the road, the front facing one curb, and the rear facing the other curb.

Q Which curb, indicating the right-hand curb to be the one on your right coming towards Trenton? Was the rear of your brother's car toward your right hand or left hand? A I don't remember. 10

Q You don't remember? A No.

Cross examination by Mr. Seaman.

Q How far was the rear of your brother's car from your right-hand edge of the road going towards Trenton? A You mean while we were riding?

Q Yes. A I don't remember. I was sleeping. 20

Q I mean after the accident, how far was the rear of your brother's car? A From the curb?

Q From the right-hand curb going towards Trenton? A I don't remember.

Q You don't know anything about this accident, do you, Mr. Rau? A I know the position of the cars afterward.

Mr. Seaman: That is all. No further questions. 30

Walter G. Petry, direct.

WALTER G. PETRY, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. McGlynn.

10 Q You are connected with what police department, sir? A Fairmount Park Police Department.

Q Philadelphia? A Yes, sir.

Q Did you produce here these photographs that we have been using, the three of them? A Yes, sir.

Q D. 1, 2, and 3. Did you see these cars yourself? A Yes, sir; I had them taken away and had them photographed.

20 Q Are all those pictures good representations of the condition of the cars after the accident? A They are exactly as they were after the accident.

Q Are you familiar with this Boulevard which runs through Fairmount Park? A In respect to what?

Q Do you know its width from curb to curb? A Thirty-four feet, six inches.

30 Q Does that include the entire space from curb to curb? A No, it is thirty-four feet, six inches, excludes the thirty-inch gutter. That gutter would be used by an automobile if necessary. There is twenty-nine feet, six inches of hard surface.

Q And the thirty inches of gutter that you are talking about? A Is brick.

40 Q What was the condition of the pavement, Mr. Officer, in September, 1927? A It was irregular as far as the surface is concerned.

Walter G. Petry, direct.

Q Yes. Was there any distinguishing marks which showed the center of the roadway at that time? A Do you mean a traffic line?

Q Yes, sir. A No, sir.

Q Is this picture which I have a picture of that roadway taken at that time? A Yes, sir; that is the roadway looking towards Philadelphia. 10

Q Towards Philadelphia? A Yes. That lamp post represents a light 524, where the Ford car was bounced against.

Q The light on the right-hand side of the picture as you look at it? A Yes.

Q That is the light that the Ford— A Came in contact with.

Mr. McGlynn: Have you any objection to marking that picture, Mr. Seaman? 20

Mr. Seaman: No objection.

(The picture referred to was received in evidence and marked "Defendant's Exhibit 4.")

By Mr. McGlynn.

Q How soon did you get there after the accident, Mr. Officer? A Do you mean on the scene of the accident?

Q Yes. A I would say it was about ten o'clock, the following morning. The accident happened on the night at ten o'clock. 30

By Mr. Seaman.

Q You didn't get there that night? A No, my time was engaged in taking statements from the occupants of the Nash car, and the driver of the Buick car. They were placed in custody and began to— 40

Walter G. Petry, direct.

By Mr. McGlynn.

Q I know that—

Mr. Seaman: I object.

Mr. McGlynn: Strike that all out, please.

10 *By Mr. McGlynn.*

Q I was anxious to know whether you were there that night, the night of the accident itself, at the scene of the accident itself? A No, sir.

Q Were the cars moved that night? A Under my direction, yes, sir.

Q Were you there to move them? A No, sir; by telephone they were.

Q Oh, I see. All right.

20

Mr. McGlynn: Cross examine.

Mr. Seaman: That is all, no questions.

Mr. McGlynn: The defense rests.

Mr. Seaman: The motion is this: that we are amending the complaint to have the insertion of the statute, that is, the first section of the statute, that first paragraph should be in the complaint.

30 The Court: Motion granted.

Mr. McGlynn: Exception.

(Mr. Edgar made a closing address to the jury on behalf of the defendant.)

(Mr. Seaman made a closing address to the jury on behalf of the plaintiff.)

40

The Court: Members of the jury: I am going to excuse you until ten o'clock tomorrow morning, because I must confess I don't just know what the rule of damages is

Charge to Jury.

under the Pennsylvania law, and I have got to find out before I can charge you in this case. In the meantime you are not to discuss this case with anybody. If anybody approaches you and attempts to discuss it with you, why, you must not.

You may be excused until ten o'clock tomorrow morning. 10

SECOND DAY.

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. John P. Kirkpatrick, judge, and a jury, at the Middlesex County court house, in the City of New Brunswick, New Jersey, on the twenty-third day of April, 1930. 20

Appearances:

Messrs. A. J. & J. S. Wight, by Francis M. Seaman, Esq., attorneys for the plaintiff.

Messrs. Stein, McGlynn & Hannoeh, by Edward R. McGlynn, Esq., attorneys for the defendant.

The Court: By the consent of counsel, Mr. Smith, juror number eight, will be excused and the case will proceed with eleven jurors. 30

CHARGE TO JURY.

Court's charge to the jury by Hon. John P. Kirkpatrick, Judge, as follows:

Members of the Jury: This is a death action case in which the decedent, Andrew Norko, was killed in a collision between the automobile which he was driving and another automobile in the 40

Charge to Jury.

State of Pennsylvania. The action is therefore brought by virtue of the provisions of the Pennsylvania law and not the provisions of the New Jersey law.

10 The statute of Pennsylvania, which has been introduced in evidence here and is pleaded, shows that a right of actions remains to certain of the relatives of a person who lost his life due to the negligence of another. In the particular case that you have here before you, the right of actions remains through the father and mother, although the mother is not a party in this particular instance.

20 The law concerning the operation of a vehicle so far as it is necessary for your consideration in this case is practically the same in Pennsylvania as it is in New Jersey. That is, in other words, all drivers of automobiles are required to use at all times ordinary care in the operation of their vehicles so that other persons may not suffer the injury as a result of the failure to use that care.

30 If an automobile driver fails to use that care thereby doing that which an ordinary, prudent man would not have done or fails to do that which an ordinary, prudent man would have done in the operation of his car and some other person suffers injury as a result of that failure, then the driver of the automobile is responsible to the injured person for such damages as he sustains.

40 So, in this case, if the defendant, Rau, failed to use the care which the law requires him to use and the plaintiff's decedent, Andrew Norko, was himself using the care which the law required him to use for his own protection, and he met his death solely as a result of the failure of the

Charge to Jury.

defendant to use reasonable care in the operation of his automobile, then the plaintiff, Michael Norko, may recover so much as you find is proper under the rules which I shall give you later for measuring damages.

It is necessary that this plaintiff should establish by a fair preponderance of the evidence everything essential to show his right to recover. That is, in other words, he must bear the burden of establishing by a fair preponderance of the evidence that the death of Andrew Norko resulted from negligence on the part of the defendant, and if he has shown to you by a fair preponderance of the evidence that Andrew Norko's death resulted from the defendant's negligence, then he is entitled to recover provided it also appears that at the time and immediately before he met his death that Andrew Norko was himself exercising ordinary care for his own safety; but if you find from the evidence that Andrew Norko's own failure to use ordinary care for his own safety in any degree combined with the negligent act of the defendant to produce his death, then, of course, there may be no recovery, because where the person injured is guilty of contributory negligence, he may not recover nor may anyone else recover by reason of his injuries from the defendant.

If you come to the conclusion after you have examined all the testimony in this case that the plaintiff has borne the burden of establishing the negligence of the defendant, and it appears that the decedent, Andrew Norko, was not guilty of contributory negligence, then you may award to the plaintiff in this case, Michael Norko, the father of Andrew Norko, such an amount as will

10

20

30

40

Charge to Jury.

represent, this being under the Pennsylvania rule, the reasonable costs of the funeral expenses.

10 There has been a bill introduced here without objection, showing an expense of some \$900. I do not remember the exact amount, but you will see that, and, in addition thereto, such an amount as will represent the financial loss suffered by the parents by reason of the death of their son.

The financial loss under the Pennsylvania rule will be the money loss on the basis of the decedent's earnings up to the time of his majority, that is, up to the time he is twenty-one years of age, less the cost of maintenance and clothing and board, and so forth.

20 There has not been any testimony as to what the actual cost of the maintenance of this young man would have been. There has been testimony as to what he earned, that he was working steadily, and that he turned over all of his money to his father. There has not been any testimony from which you can make a proper appraisal, so far as I can see, as to what it would cost for clothing, board and other incidental expenses, except the testimony of the father that he got two or three dollars a week, I assume—but I have no right perhaps to assume that—for
30 spending money; so you will have to do the best you can with the testimony as it is and determine the amount from the evidence that has been presented to you.

You are not permitted to guess at these things, but you are to determine the amount of damages from the testimony which has been presented to you. Of course, you must take into consideration this further possibility that the young man might have died from natural causes
40

Charge to Jury.

at any time, or he might have become ill, or other obstacles might have obtruded themselves so that he would not have been a contributor to his family up to the time of his majority.

You may retire and consider the case. You will return such a verdict if you find the plaintiff is entitled to recover if you think it is proper under the evidence, and if, on the other hand, you think it is not proper, your verdict will be no cause for action. 10

20

30

40

is the same or no in I have become ill of
after the same manner have certain instances
of the same kind have been observed in
the same manner in the same manner.

11

is the same or no in I have become ill of
after the same manner have certain instances
of the same kind have been observed in
the same manner in the same manner.

12

is the same or no in I have become ill of
after the same manner have certain instances
of the same kind have been observed in
the same manner in the same manner.

13

is the same or no in I have become ill of
after the same manner have certain instances
of the same kind have been observed in
the same manner in the same manner.

Perth Amboy, N. J. Oct 6, 1927

Mr. Michael Norko

To MICHAEL ZYLKA, Dr.

Undertaker and Embalmer

Automobiles and Coaches Furnished for all Occasions.

511 State Street

Telephone 702

Location of Grave



To Burial of Andrew Norko Died Sept 24 1927

Embalming & transporting from Phila.	172 00	✓
Door Crepe	5 00	✓
Draperies	5 00	✓
Candelabra and Candles	12 00	✓
Washing and Laying Out Remains, Shaving		
Preservation of Remains		
Casket	5 00 00	✓
No. Plate Engraved		
Outside Box (Pine, Chestnut, Oak, Cedar)	15 00	✓
No. Refr Burial shoes	3 00	✓
Use of 3 Doz. Chairs	6 00	✓
<u>Accessories</u>		
6 Prs. Gloves for	1 50	✓
Arm Crape Badges Silk Caps		
Flowers		
Cemetery Charges - Opening \$10.00 Trimming \$10.00	20 00	✓
Personal Attendance Porters and Help	25 00	✓
Hearse	15 00	✓
16 Automobiles to @ \$7.00	112 00	✓
Record of Dead		
Notary Public		
Transportation Expenses, Etc.		

3 Record of Dead
Ship to Philadelphia

\$891.50
3 10
10 00
904 50

RECEIVED
NOV 16 1927
RECEIVED

Thanks

Michael Zylka

U 3
4/2/1/3



New Jersey Court of Errors and Appeals

MICHAEL NORKO, individually and
as administrator *ad Prosequen-*
dum of Andrew Norko, de-
ceased,

Plaintiff-Appellee,

vs.

BENJAMIN W. RAU,
Defendant-Appellant.

Action at Law.
On Appeal.

BRIEF OF PLAINTIFF-APPELLEE.

Statement.

This action was brought by the plaintiff, Michael Norko, individually and as administrator *ad prosequendum* of Andrew Norko, deceased, against the defendant, Benjamin W. Rau. The action was based on the alleged negligence of the defendant, who, while driving his automobile in the State of Pennsylvania collided with the car driven by the deceased, which collision caused the latter's death. The accident occurred on February 24, 1927, summons and complaint were issued September 13, 1928, and the cause was tried April 22nd and 23rd, 1930, and a judgment was entered on the verdict of the jury in the sum of \$2654.54 in favor of the plaintiff, Michael Norko, as parent, from which judgment an appeal is now being taken.

The complaint contained two counts, and as originally drawn, Michael Norko, the father of

the deceased, appeared as administrator *ad prosequendum* in the first count. The first count alleged that suit was brought within twelve calendar months after the death of Andrew Norko, and damages were asked for his death. In the second count the father, individually, asked for burial expenses. On June 28, 1929, substitution of counsel was made and at the trial counsel noticed the formal defect that suit was instituted by Michael Norko, as administrator *ad prosequendum* in the first count, whereas it should have been brought, under the laws of Pennsylvania, by the parent. The Court, on motion of the plaintiff's counsel, permitted an amendment whereby the father was permitted to sue in the capacity of a parent rather than as an administrator *ad prosequendum*, to which counsel for the defendant took an exception and which exception was allowed by the Court. This alleged error is argued at great length in the defendant's brief and the three other grounds of appeal the plaintiff will answer in the same order as they appear in said brief.

POINT ONE.

The Court properly permitted the plaintiff to amend the first count of the complaint to have the action brought by Michael Norko, individually, instead of as administrator *ad prosequendum*.

The defendant in his brief relies upon the cases of *Lower vs. Segal*, 59 N. J. L. 67; *Lower vs. Segal*, 60 N. J. L. 99; *Rankin vs. Central R. R. Co.*, 77 N. J. L. 175, and *Fitzhenry vs. Consolidated Traction Co.*, 63 N. J. L. 142, for the proposition that the Court was in error when it permitted the amendment whereby the father, Michael Norko,

was permitted to sue individually as parent of Andrew Norko instead of as administrator *ad prosequendum* (S. C., p. 51, ll. 17 to 37).

In the case of *Giardini vs. McAdoo*, 93 N. J. L. 138, this Honorable Court was confronted with the following set of facts: The plaintiff, a widow, obtained letters of administration in New Jersey upon the estate of her deceased husband and as administratrix brought suit in the Camden Circuit Court under the New Jersey Death Act against the defendant for damages arising from the death of her husband while a passenger on a train in the State of Pennsylvania. On appeal the question of the propriety of the capacity in which the plaintiff sued was first raised. This Court considered *each of the cases relied upon by the defendants*, and notwithstanding these decisions ordered an amendment to substitute the widow as plaintiff (under the Pennsylvania Law, the widow individually being the proper plaintiff) instead of the widow in her representative capacity. Chancellor Walker, in the opinion *inter alia*, said:

“We incline to the opinion that under the provision of the Practice Act of 1903, concerning amendments, as interpreted in *City of Hoboken vs. Gear*, and other cases, an amendment of these proceedings might be ordered by substituting the name of Adele Giardini, the widow, as plaintiff and striking out the description of her representative character, and also by striking out the reference to the next of kin left by the deceased; but, whether so or not, the provisions of the Practice Act of 1912 are broad enough to permit of its being done. And these statutes, as is known, are to be liberally and beneficially expounded; and every intendment that can be, should be made in aid of a judgment and verdict thereon, where the parties have gone to trial upon the merits of the case and where

no attack has been made upon the pleadings and procedure prior to appeal.”

In *Wilson vs. Dairymen's League Co-op. Ass'n., Inc.*, 143 Atl. 454 (not yet officially reported), a parallel case with the present one was before this Court. Suit in that case should have been instituted by an administratrix *ad prosequendum* under the Death Act of New Jersey, but the plaintiff mistakenly brought suit as a general administratrix. A substitution of counsel was made by the plaintiff, and at the trial counsel for the plaintiff made a motion for the amendment of the complaint in order that the administratrix *ad prosequendum* might appear as plaintiff instead of as general administratrix. The trial Court granted the motion to amend, but granted a motion of the defendant to non-suit the plaintiff, the ground being that the right of action had been barred by the two-year limitation of the Death Act at the time the plaintiff was appointed administratrix *ad prosequendum*. On appeal this Court reversed the judgment of non-suit, and, speaking through Katzenbach, J., said:

“Attention should perhaps be called preliminarily to the fact that this action was instituted less than six months after it arose, so that the respondent was fully apprised of the claim that it was responsible for the death of the plaintiff's intestate. Although commenced by Mrs. Wilson, as general administratrix, no motion was made to strike out the complaint. No objection to the form in which the action was brought was raised in the answer. If either had been done, counsel for the plaintiff would have been apprised of the mistake and the mistake corrected. It is, of course, not incumbent upon one party to a suit to inform the other of its mistakes; but, if these mistakes are permitted to pass without action by the other, it is a circumstance

to be taken into account if the mistakes are subsequently relied upon as a technicality to defeat the trial and final determination of what appears upon its face to be a meritorious cause of action.

“In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of courts and Legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried.”

And continuing the Court says:

“In our opinion there was no error in the allowance of the amendment to substitute Mrs. Wilson as administratrix *ad prosequendum* as the plaintiff in the action. Such substitution affected no substantial right of the defendant below. It was the correction of a technical mistake. An amendment of the same character was sustained in *Brice vs. Atlantic Coast Electric Railway Co.*, 102 N. J. L. 288, 132 A. 253. It is true that in this case the amendment was made without twenty-four calendar months. We think, however, the principle which upheld this amendment is the same in its application to the present case, and the time when the amendment was made is no proper basis for differentiations.”

In conclusion the Court said:

“To insure justice in the administration of the law it has been held in this state that an entirely different plaintiff may be substituted during a trial of an action or in the Appellate Court when the judgment is under review.”

Citing the Giardini case, *supra*, with approval.

In response to the defendant's contention that the amendment was prejudicial to the interests of the defendant the reasoning in the case of *Public Service Electric Co. vs. Post*, 257 F. 933, a Circuit Court of Appeals case, cited in the Wilson case, *supra*, is, it is most respectfully urged, applicable. Dealing with a phase of the question presently before the Court that opinion points out that "the act providing for the bringing of the action by an administrator *ad prosequendum* in nowise affected the liability of the defendant. It did not change the persons for whose benefit recovery might be had. Their respective interests in such recovery remained the same * * * the plaintiff upon the record is merely a formal party for the maintenance of the action. The supplemental act in substituting one person for another as the formal party to prosecute the action did not affect rights theretofore existing, but only the manner or method of their enforcement". Thus, it is obvious that the amendment permitted by the Court was with ample legal authority.

POINT TWO.

The Trial Court correctly denied defendant's motion for a non-suit.

It is admitted by the plaintiff that the *lex loci delicti* governed the action in the present case, and the statute of Pennsylvania applied and was to be pleaded. A perusal of the complaint as originally drawn (S. C., pp. 4, 5, 6) will disclose that the pleader endeavored to plead the statute of Pennsylvania and in paragraph six of the complaint (S. C., p. 5, ll. 28 to 31) alleges that the action was commenced within twelve calendar months after the death of the plaintiff's intestate

(limitation under the New Jersey Death Act being two years after the death of the deceased. 1 Cum. Supp. Comp. Stat., p. 928.

The statute of Pennsylvania as far as the period within which suit shall be started reads as follows: “ * * * the action shall be brought within one year after the death and not thereafter”. Pennsylvania Statutes of 1920, paragraphs 15977, 15978, 15979. Counsel for the plaintiff at the trial noticing the dissimilarity between the “12 calendar months” as alleged in the complaint and the “one year” limitation of the Pennsylvania Statute, *supra*, moved to amend the complaint so as to include the Death Act *verbatim* as it was worded in the Pennsylvania Statute. This the Court permitted (S. C., p. 74, ll. 24 to 31). In *Giardini vs. McAdoo, supra*, the plaintiff utterly failed to plead the Pennsylvania Statute and the Court remitted the cause to the Circuit Court with leave to the plaintiff to apply for, and direction to that Court to grant, appropriate amendments so that the cause could be brought under the Pennsylvania Death Act.

Assuming, but not conceding, that the amendment to the complaint was improper, yet the plaintiff contends that the Pennsylvania Statute was sufficiently pleaded, at least by inference. This manner of pleading a statute was recognized in the case of *O'Keefe vs. O'Keefe*, 96 N. J. Equity, 617, in which case this Court stated:

“No specific reference to a ‘statute’ is needed if the pleading states the law of the other state to be thus and so.”

In that case the Court inferred the law of the State of New York to have been pleaded merely because a statement in the bill concluded what the law of the State of New York was.

Moreover, by section 26 of the Evidence Act, Comp. Stat. 2229, the Court may take judicial notice of the reports of the decisions in other states, as evidence of their common law and judicial construction of statutes. Applying this statute, we observe by the decision of *Martin vs. Pittsburg R. Co.*, 227 Pa. 18, 75 Atl. 837, that the Courts of Pennsylvania recognize a cause of action where a person is killed by the negligence of another and where the action is brought within one year after the death of the deceased. The Court in that case stated *inter alia*:

“At common law she had no such right of action, and the act of 1855 (P. L. 309) upon which her claim is based requires that ‘the action shall be brought within one year after the death and not thereafter.’”

It is contended by the defendant that the Court should have granted the motion for a non-suit for the reason that under the Pennsylvania Statute the proper plaintiffs were not parties to the suit for the reason that the Pennsylvania Statute states that:

“The persons entitled to recover damages for any injuries causing death shall be the husband, the widow, the children or parents of the deceased and no other relative.”

And since the term “parents” is plural, the defendant contends it was essential to have a joinder of both parents as parties plaintiff where both parents are living at the time of the institution of the action. This is a construction placed upon the statute for which the defendant cites no authority.

In *Wilson vs. Consolidated Dressed Beef Co.*, 145 Atl. 83, a decision of the Supreme Court of Pennsylvania, it appears that a verdict for damages for the death of a son was brought in by

the jury in favor of the father alone and from the case it will also be seen that the mother was alive at the time suit was instituted, as she appeared as the plaintiff in one of the suits which the Court was reviewing. In *Hoon vs. Beaver Valley Traction Co.*, 54 Atl. 270, a decision of the Supreme Court of Pennsylvania, suit was instituted by the father only for the death of his son, yet the Court in its opinion states that:

“The age, physical and mental condition of the *parents* were shown.”

The Court in this case affirmed the judgment of the lower court wherein a verdict was brought in favor of the father.

It is therefore patent that under the laws of Pennsylvania suit by one of two parents for the death of a child is permissible and the learned Trial Court properly refused to non-suit the plaintiff.

POINT THREE.

The Trial Court properly permitted the plaintiff to offer in evidence the undertaker's bill of Michael Zylka in the sum of \$904.50.

The defendant in his brief, under this point, admits that in Pennsylvania a recovery in a death action of reasonable funeral expenses is permitted. Count Two of the complaint (S. C., pages 5 and 6) specifically alleges that Michael Norko *layed out* sums of money for burial expenses and a demand of this account in the sum of \$500.00 was made therefor. In the opening of the case counsel for the defendant permitted an amendment of paragraph one of the second count to read, “Michael Norko demands on this account

the sum of \$1,000.00", instead of \$500 (S. C., p. 12, ll. 38 and 39; p. 13, ll. 4 to 8). This amendment was obviously for the purpose of having the demand for damages on the second count at least as great as the amount of the bill which was proved (S. C., p. 57, ll. 15 to 18). For the first time counsel for the defendant now argues that the reasonableness of the bill was not proved, and that the bill should have been excluded, but counsel's objection at the trial was ostensibly not directed to reasonableness of the bill but because the Pennsylvania Statute was not a part of the complaint (S. C., p. 57, ll. 18 to 21). The reasonableness of the bill, however, was a question of fact for the jury and since counsel for the defendant did not make objection to the admittance of the said bill on the ground that it was not reasonable and because it is a question of fact, it cannot be argued on appeal. Counsel for the defendant under this point also alleges that no testimony was adduced to show that the plaintiff paid or became liable for the bill directed to Michael Norko by Michael Zylka, the undertaker. This bill offered in evidence (S. C., p. 57, ll. 15 to 18) and marked Plaintiff's Exhibit 3 (S. C., p. 57, ll. 23 to 26), had expressly stamped upon the face of it the words "received November 16, 1927", and the word "Thanks" signed by "Michael Zylka", indicating that payment was made of the funeral bill in the sum of \$904.50 by Michael Norko. It is also to be noticed that the complaint alleges "that Michael Norko was forced to lay out sums of money for burial expenses". No other deduction can be had from this statement other than that Michael Norko actually paid the burial expenses. As to the sufficiency of the pleading of the Statute of Pennsylvania, permitting a recovery for burial expenses, the appellee respectfully directs the attention of

this Court to the argument and citations under Point One as being dispositive of this point. Moreover, the cases of *Milyak vs. Philadelphia Rural Transit Co.*, 150 Atl. 622, and *Regan vs. Davis*, 138 Atl. 751, may be judicially noticed by this Court as giving the right to a plaintiff to recover burial expenses in Pennsylvania.

POINT FOUR.

The Court properly permitted the plaintiff to amend the complaint by inserting the statute of the State of Pennsylvania known as the "Death Act" in the first paragraph of the complaint.

Under this point the appellee respectfully directs the attention of this Court to the argument and citations under Point One of this brief and especially to the case of *Giardini vs. McAdoo*, *supra*, as being dispositive of this point.

Conclusion.

The appellee with the utmost deference submits that the Trial Court properly permitted the necessary amendments in order to insure justice in the administration of the law and respectfully urges that the judgment should be in all things affirmed.

Respectfully submitted,

DAVID T. WILENTZ,
Attorney for and of Counsel
with Plaintiff-Appellee.

6
/

New Jersey Court of Errors and Appeals

MICHAEL NORKO, individually
and as *Administrator ad*
Prosequendum of ANDREW
NORKO, deceased.

Plaintiff-Appellee,

vs.

BENJAMIN W. RAU,

Defendant-Appellant.

Action
at Law.

On Appeal.

BRIEF OF DEFENDANT-APPELLANT.

The Facts.

This appeal brings before this Honorable Court for review a judgment of \$2,654.50 of the New Jersey Supreme Court entered on a verdict of a jury rendered in a cause tried before the Middlesex Circuit of that Court. The suit was based on a cause of action for negligence on the part of the defendant in causing the death of one Andrew Norko. The accident which allegedly caused the death occurred on September 24, 1927, and the cause was tried on April 22 and 23, 1930, so that at the time of the trial, two years and seven months had elapsed since the happening of the accident. The collision occurred and Andrew Norko died in the State of Pennsylvania. The complaint was by Michael Norko, individually and as *administrator ad prosequendum* of Andrew Norko, deceased, and contained two counts, the first, alleged the plaintiff's appointment as *administrator ad prosequendum* by the Surrogate of Middlesex County and demanded damages as such administrator in the sum of \$50,000. The second count was by the father in-

dividually and sought to recover only expenses incurred by him as a funeral bill for the burial of Andrew Norko. The answer was in the usual form. At the trial, plaintiff's counsel by consent of defendant's counsel, read into the record the death act of the State of Pennsylvania. The proofs showed the accident had occurred on the Roosevelt Boulevard in Philadelphia, and that Andrew Norko had died in a hospital in Philadelphia.

THE LAW.

POINT ONE.

The Court permitted the plaintiff to amend the first count of the complaint to state a cause of action on behalf of the plaintiff Michael Norko individually, instead of as Administrator Ad Prosequendum, to which ruling of the Court defendant prayed and was granted an exception.

It is a proposition too well known and of too long standing to require citation of authorities, that at common law no action lay for wrongful death, and whatever action does now exist in favor of any person or account of death resulting from negligence accrues as the result of some statutory enactment.

The Statute of the State of Pennsylvania upon which was predicated the plaintiff's right of action, is as follows:

“Action may be brought after death of party injured whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.”

“The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other state or place subject to the jurisdiction of United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this commonwealth.”

“The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter.”

Pennsylvania Statutes of 1920, paragraphs 15,977, 15,978 and 15,979.

At the trial, formal proof of the statute was waived by the defendant and it was accordingly read into the record. When plaintiff offered to prove the weekly wages of the deceased at the time of his death, objection was made that under the complaint as drawn and the evidence presented, and particularly in view of the Pennsylvania statute, no cause of action was alleged in the complaint which would give the existing plaintiff a right to damages.

Plaintiff's counsel then asked leave to amend by substituting Michael Norko as general administrator as plaintiff. This was denied by the Court. State of the Case page 49, line 10.

Leave was then prayed to substitute Michael Norko and Anna Norko, as parents of the deceased as plaintiffs. This was likewise refused. State of the Case page 49, line 20. After much

argument between counsel and Court, an amendment to the First Count was allowed which made Michael Norko individually the plaintiff. To this ruling of the trial court defendant prayed and was allowed an exception. State of the Case, page 51, line 17, *et seq.*

It was contended at the trial and it is now most strongly urged that this ruling of the Court was legal error. As the matter stood at or near the close of the plaintiff's case, no cause of action existed in anyone, who was a party to the suit. The complaint described the plaintiff as *administrator ad prosequendum* of the decedent and admittedly the Pennsylvania statute created no right of action in any such representative. Under that statute the proper parties plaintiff as indicated by the evidence were the parents of the deceased, to wit: the mother and father, since both were living at the time of the death and at the time of trial. The practical effect of the amendment was to state a new cause of action in favor of an entirely new and different plaintiff. A case in our own books is pertinent at this juncture. That case is *Lower v. Segal*, 59 N. J. L. 67. There an action was commenced by an administratrix *ad prosequendum* who was also the widow of the decedent. The matter was before the Court on a demurrer to the complaint. The Court, speaking through Garrison, J., said:

“A procedure that takes a right of action from the statute of one jurisdiction and a form of redress from that of the other, lacks the legal justification of either. That is the case here. The suit is brought by a personal representative, which is the proper form under our statute; but the action is not under our statute, but under that of Pennsylvania, where the widow and not the personal representative is given the right to sue. *Penná. Stat., Pamph. L. 1851, p. 674, Sec. 19; Id.*

1855, p. 309, Sec. 1. The construction put upon these statutes by the Courts of Pennsylvania is in no state of uncertainty. *Railway Company v. Decker*, 84 Pa. St. 419, 425; *Birch v. Pittsburgh Railroad Co.*, 30 Atl. Rep. 826.

In these cases it is said, referring to the provision of the act of 1855, 'If the deceased leaves a husband, he alone is clothed with the right of action; if the wife is a survivor, she is entitled to bring suit.'

Judicial notice is taken of the law of Pennsylvania as illustrated by these reported cases under the twenty-third section of our act concerning evidence, which provided that 'the reports of the judicial decisions of other states * * * may be judicially noticed by the Courts of this state as evidence of the * * * judicial construction of the statutes and laws thereof.' Gen. Stat. page 1401.

The right of action being vested in the widow, she is the only person who can maintain the suit, whether in the domestic tribunals or elsewhere, since she is everywhere the widow of the husband whom she survives.

From these considerations it is clear that the plaintiff cannot, as administratrix, maintain this action, and upon this ground the demurrer is sustained."

The same case was again before the Supreme Court at a later date on an application for leave to amend the complaint in such a manner that the action might appear to be one brought by the widow of the deceased. The opinion is reported in *Lower v. Segal*, 60 N. J. L. 99. The motion was denied by the Court which there said:

"In my opinion this motion ought not to be granted.

In the first place, such an amendment would be unreasonably vexatious to the defendant. As was pointed out by Mr. Justice Garrison, in the opinion delivered upon the

demurrer, it appears upon the face of the declaration that the action was brought after the lapse of one year from the death of deceased. The law of Pennsylvania which we are asked to recognize and enforce by comity, expressly declares that such an action 'shall be brought within one year after the death, and not thereafter.' The action is created by the statute of that state, and our courts could not enforce it if brought after the period limited by that statute.

Furthermore, I am of the opinion that we are not required to make such an amendment by the provisions of section 138 of the Practice Act (Gen. Stat., p. 2556), which directs us to make all amendments necessary for the determination in an existing suit of the real question in controversy between the parties. In considering whether these provisions require the amendment now asked for, it is obvious that the question presented is the same as would be presented if the present plaintiff were John Doe, administrator of the deceased, and cannot be affected by the fact that the plaintiff is both the administratrix and the widow of deceased. The right of the widow to turn this action into one in her own behalf cannot be greater than her right to intervene with a similar motion in an action brought by some other person as the personal representative of her husband.

The one hundred and thirty-eighth section has been liberally construed by our courts. It has been held to justify and require amendments (when the real question in controversy has been fully and fairly tried and correctly settled), to adapt pleadings to the issue really tried, although not that originally upon the record; to change the form of action so as to present the issue really tried, and that by a Court of review; to change the plaintiff where her action was tried upon sealed instruments, by which it was deemed defendant's liability was shown to be, not

to her, but to her agent, and to make such agent the plaintiff on the record, and to add a wife as plaintiff on the record when the damage done to property of which she and her husband (the original plaintiff) were seized by a conveyance to both, had been fully and fairly settled on a trial by arbitrators.

City of Hoboken v. Gear, 3, Dutcher, 265; *Price v. New Jersey Railroad and Transportation Co.*, 2 Vroom 229; *American Life Insurance Co., v. Day*, 10 *Id.* 89; *Farrier v. Schroeder*, 11 *Id.* 601; *Guild v. Parker*, 14 *Id.* 430; *Ware v. Millville Insurance Co.*, 16 *Id.* 177; *Vunk v. Raritan Railroad Co.*, 27 *Id.* 395; *Excelsior Electric Co. v. Sweet*, 28 *Id.* 224.

But the real question in controversy between the personal representative of the deceased and defendant has never been tried. On the contrary, this court has declared that, upon the statements of the declaration, no such question existed. Nor has the real question in controversy between the widow and the defendant ever been tried, but she seeks by this amendment to intervene in this suit and to present that question which she might have presented in an action brought by her. In my judgment, the provisions of section 138 do not apply to such a case and do not require the amendment to be made. The amendment would not continue the existing suit except in mere form, but would create and institute a new suit with a new question and in a controversy between different parties."

To the same effect is the case of *Rankin v. Central R. R. Co.*, 77 N. J. L. 175, which cites with approval the earlier case of *Lower v. Segal*, *supra*, and holds that a judgment of non-suit will not be disturbed where it would be necessary in order to entitle the plaintiff to recover, to amend the complaint in the same manner in

which it was sought to amend it in the *Lower v. Segal* case and which was refused.

Similarly an amendment to change the plaintiff from an individual to the same person as administrator was refused in *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142, where the Supreme Court said:

“LIPPINCOTT, J. The action in this case was in the name of the father, Joseph Fitzhenry, for damages resulting to him by the death of his son, Joseph Fitzhenry, Jr., by the alleged negligence of the defendant. The summons was issued in the name of the father, and the declaration in the case averred the death of the son and claimed damages by reason of the death, not as administrator, but as father, for the loss of services. No grant of letters of administration was averred in the declaration.

This action was misconceived. It should have been commenced in the name of the personal representative of the deceased son, under the Death Act of this State, for the benefit of the father as the sole next of kin. This form of action is absolutely directed by the statute (Gen. Stat., p. 1188), and it could be maintained in no other way. *Lower, Administratrix v. Segal*, 31 Vroom 99.

To the declaration a demurrer was filed. The father has now obtained administration of his deceased son, and a motion is made to amend by adding the words ‘administrator of the estate of John Fitzhenry, Jr., deceased,’ after the name of the plaintiff in the summons and declaration.

It is to be observed that this amendment would not be the only one necessary to be made in order that action should be in accordance with the Death Act, but conceding, for the purpose of argument, that the amendment be sufficient, yet still it is one which cannot be made under section 138 of the Practice Act. Gen. Stat., p. 2556.

One of the defenses to the action, if it was now commenced in the name of the administrator under the Death Act, would be that the action is barred by the statute of limitations. This appears upon the face of the declaration as it now stands. By this amendment, if it could have any legal effect, it is proposed to deprive the defendant of this defence. Besides, by this amendment, new questions would be raised which are no part of the action as it now exists, and by this amendment the defendant is not only to be deprived of its rights of pleading proper and substantial defences, but the plaintiff, upon such exclusion, desires to present the same questions which might have been presented if the action had originally been instituted in the name of the administrator. The amendment would prejudice the defendant in its defences and also rests under the opprobrium of being vexatious. Lower, *Administratrix v. Segal, supra*.

The motion to amend is denied, with costs."

It is therefore patent that the amendment as allowed by the Court in the instant case was legal error, was prejudicial to the interests of the defendant and was substantially harmful to the defendant's rights in that it created in a new plaintiff a new cause of action not anticipated by the defendant, and which cause of action had previously been barred by the running of the Statute of Limitations, which in the bringing of a new suit would have been a complete defense to the plaintiff's right of recovery. It is therefore strenuously contended on behalf of appellant that for this cause alone the judgment should be reversed.

POINT TWO.

The Trial Court denied defendant's motion for a non-suit at the close of the plaintiff's case to which ruling of the Trial Court defendant's counsel prayed and was granted an exception.

At the close of the plaintiff's case the Court was confronted with this situation: The complaint alleged and the testimony proved an accident in the State of Pennsylvania as a result of which the plaintiff's intestate died in that jurisdiction. Accordingly on well settled principles whatever cause of action existed as a result of the defendant's alleged tort was by virtue of a statute. Since the accident happened in Pennsylvania, the law of that jurisdiction was applicable. The United States Supreme Court has discussed this situation and declared the law on the subject in the case of *Dennick v. Central R. R.*, 103 U. S. 11, 26 Law. Ed. 439, in the following language:

"It is, indeed a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred,

that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

On this question also the case of *Boston & Maine R. R. v. Hurd*, 47 C. C. A. 615, 108 Fed. 116, is dispositive. This case is also cited in 65 L. R. A. 193 and is there followed by a long series of citations and annotations all to the effect that the law of the *lax loci delicti* governs in actions for wrongful death.

Therefore since the plaintiff's right of action was predicated on the statute of a foreign jurisdiction, such statute was a necessary averment of the complaint. In the case of *Rankin v. Central R. R.*, 77 N. J. L., 175 at page 176, the Supreme Court lays down the rule in unmistakable language:

"The declaration in this case shows that the suit was instituted to recover damages for the death of plaintiff's intestate caused by an accident which happened in the State of Pennsylvania, which it is charged resulted from the negligent act of the defendant, but there is no averment in the declaration that there is any statute in that state which would entitle the plaintiff to recover, and no proof can be introduced to support an action for damages resulting from the death of the deceased through the negligence of the defendant, because in the absence of such statute the presumption is that the common law rule prevails, and in order to prove that there is such a statute in a sister state it must be averred in the pleadings."

Quite obviously proof of the statute at the trial could not overcome or cure the defect in the plaintiff's pleadings. That defect, being fundamental and one of substance, could have been cured only by amendment and as we have

shown above, under Point One, the Court had no authority to permit such an amendment.

Furthermore, assuming for the sake of the argument that the statute had been a part of the complaint and had been properly proved at the trial, nevertheless the Court should have granted the motion to non-suit, for the reason that under that statute, the proper plaintiffs were not parties to the suit. There can be no mistake as to the meanings of the statute with respect to the question as to who are proper persons to bring this action. To quote from the statute again:

“The persons entitled to recover damages for any injuries causing death shall be the husband, the widow, the children or parents of the deceased, and no other relative.”

The word as used here is plural, it distinctly says “parents” and requires joinder of both parents as parties plaintiff where they are both living at the time of the institution of the action; and the proofs showed that such was ^{not} the case in the cause *sub judice*. The cases decided in our own Supreme Court and cited above under Point One are all authority for the proposition that the action must fail when the proper parties are not plaintiffs in the suit.

It is therefore respectfully contended that the learned trial court erred as a matter of law in refusing appellant’s motion for a judgment of non-suit.

POINT THREE.

The Trial Court, over the objection of defendant, permitted the plaintiff to offer in evidence the undertaker bill of Michael Zylka of \$904.50.

It is true that the Pennsylvania statute permits the recovery in a death action of reasonable

funeral expenses. State of the Case, page 14, line 29.

To quote the statute we find these words employed:

“The plaintiff may also recover the reasonable funeral expenses of the deceased if plaintiff has paid or incurred such expenses.”

Since the statute was not a part of the complaint, it was contended at the trial and is now most strenuously urged that the proof of such expenses was incompetent.

For this point we rely upon the case of *Rankin v. Central R. R., supra*. Moreover the statute uses the term “reasonable.” No evidence was offered by the plaintiff to show the reasonableness of the charge, and on this further ground the bill should have been excluded. Nor was any testimony adduced which tended to indicate that the plaintiff in the suit, granting that he was the proper party plaintiff, had paid the bill or had become liable for its payment. For all that appears to the contrary it may very well have been that the decedent was a member of a fraternal order the death benefit from which paid the funeral bill. And it is apparent from a reading of the statute that it contemplates the recovery of a sum for funeral expenses only when the plaintiff has paid or has become liable to pay such a bill. Since the amount of the verdict clearly indicates that damages were assessed by the jury by adding in the funeral bill, it is apparent that the appellant was substantially prejudiced by the admission of this testimony.

It is respectfully contended that this action of the trial court alone requires a reversal of the judgment.

POINT FOUR.

The Court permitted the plaintiff to amend the complaint by inserting the Statute of the State of Pennsylvania known as the Death Act, in the first paragraph of the complaint.

It is significant to note that this amendment was not asked for until the conclusion of the whole case. State of the Case, page 74, line 25, *et seq.* However, we cannot perceive that it makes any vast difference in the plaintiff's right of recovery as to when the amendment was grafted on to the complaint. Under this point of the brief the appellant respectfully directs the attention of this Court to the argument and citations under Point One of this brief, as being dispositive of this point.

In conclusion appellant urges that the judgment should be reversed and since this Court has before it the whole case and as nothing new can be developed at a new trial, judgment should be entered by this Court in favor of the defendant and against the plaintiff.

Respectfully submitted,

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellant.

