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TESTIMONY.

*For Plaintiff.*

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*Opinion of Supreme Court on Rule to Show Cause.*

**OPINION OF SUPREME COURT.**

Filed November 9, 1922.

**New Jersey Supreme Court**

JUNE TERM, 1922.

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ANNIE MENDEL, Admx., &c.,

*vs.*

JOSEPH ROTH.

---

REGINA MENDEL, Admx., &c.,

*vs.*

SAME.

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DEFENDANT'S RULES TO SHOW CAUSE.

Argued before Gummere, *C. J.*, and Justices Swayze and Trenchard.

For the rules, M. Casewell Heine.

Contra, Jacob L. Newman and Leo Stein.

*Per Curiam:*

These two actions were tried together at the Essex Circuit, before Judge Mountain. They were brought to recover the pecuniary loss sustained by the widow and next of kin of the respective decedents; the claim in each case being that each of these decedents came to his death solely by reason of the negligence of the defendant in driving his truck over the public highway between New Brunswick and Elizabeth. The trial resulted in a verdict in favor of the plaintiff, Annie Mendel, as administratrix, for \$35,000, and of the plaintiff, Regina Mendel, as administratrix, for \$20,000.

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*Opinion of Supreme Court on Rule to Show Cause.*

The only ground upon which we are asked to set aside these verdicts is that each of them is excessive.

We have carefully examined the testimony sent up with the rule, and are fully convinced that the claim of the defendant in each case is justified. For this reason the rules to show cause will be made absolute, the verdicts set  
10 aside only in respect of damages, and the new trials will be limited accordingly.

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30

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Order.

**ORDER.**

NEW JERSEY SUPREME COURT.

ANNIE MENDEL, Administratrix *ad*  
*prosequendum* of JACOB MENDEL,  
deceased,

Plaintiff,

vs.

JOSEPH ROTH,

Defendant.

On Rule to  
Show Cause.  
Order.

10

Argument on the rule to show cause obtained by the above-named defendant in the above-entitled cause having been duly brought on for argument and heard by this court, and this court having given due consideration to the said matters and examined the record in said court, it is on this 14th day of November, nineteen hundred and twenty-two,

20

ORDERED that the rule to show cause obtained in the above-entitled cause by the defendant, Joseph Roth, be made absolute on the matter of damages only, and that a *venire de novo* do issue for the trial of the cause of action of the plaintiff, Annie Mendel, administratrix *ad prosequendum* of Jacob Mendel, deceased, as to damages only.

30

Rule entered on this 14th day of November, 1922.

WM. S. GUMMERE,

C. J.

On motion of

JACOB L. NEWMAN,

Attorney of Plaintiff.

40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

**AMENDED COMPLAINT.**

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

ANNIE MENDEL, administratrix *ad*  
*prosequendum* of JACOB MENDEL,  
deceased,

Plaintiff,

*vs.*

JOSEPH ROTH,

Defendant.

*Action at Law.*

*Amended  
Complaint.*

20

The plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, for her amended complaint herein, says:

1. That heretofore and on the eighth day of June, nineteen hundred and twenty-one, at about nine-thirty o'clock in the evening, the defendant, Joseph Roth, owned and operated an automobile truck in a northerly direction on St. George's avenue, near Grand street, in the City of Rahway, County of Union and State of New Jersey.

30

2. That it thereupon became the duty of the defendant to operate said automobile truck with care and at a moderate rate of speed, and to give to all persons lawfully on said avenue due warning and signal of his approach, and to have the same under proper control, and to have the said automobile truck properly and carefully equipped with lights and other appliances and equipment, so as to enable the defendant to make proper observation with respect to other persons and automobiles lawfully on said avenue, so as not to collide with the same and to operate

40

*Amended Complaint.*

said automobile truck in such a manner as not to lose the proper and safe control thereof.

3. That on the aforesaid date and time the plaintiff's intestate, Jacob Mendel, was lawfully on St. George's avenue, a public highway near Grand street, in said city, standing near an automobile truck owned by Edward Mendel, which last mentioned truck was at a complete standstill. 10

4. Notwithstanding the defendant's duty as aforesaid, the said defendant negligently and carelessly operated said automobile truck and ran into and collided with the truck owned by Edward Mendel, causing the latter truck to run into and upon the body of Jacob Mendel, deceased, whereby the said Jacob Mendel, deceased, received severe and fatal injuries.

5. That by reason of the injuries received as aforesaid, Jacob Mendel, the deceased, died on June twelfth, nineteen hundred and twenty-one, and this plaintiff, therefore, states that the death of the deceased was caused by the aforesaid negligence of the defendant. 20

6. The negligence of which the plaintiff complains and of which the defendant was guilty, consisted in the fact that the defendant operated his said automobile truck at a high and unreasonable rate of speed, under the circumstances; that no bell or horn or other signal was sounded of the approach of the defendant's automobile; that the defendant's automobile was not properly equipped with suitable lights or other appliances or equipment so as to enable the defendant to make proper and careful observation so as to avoid running into and colliding with the automobile belonging to Edward Mendel, and causing said automobile to run into and upon the deceased; that the defendant did not make proper and careful observation and did not use due and proper care in operating his said automobile truck so as to avoid colliding with the automobile truck of Edward Mendel, causing the same 30 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

to run into and upon the deceased; that the defendant did not have his automobile truck under proper control and operated the same without due regard to the rights of the deceased.

10 7. On the twentieth day of June, nineteen hundred and twenty-one, the Surrogate of Essex County granted letters of administration *ad prosequendum* upon the estate of the said Jacob Mendel to the plaintiff who accepted the same.

8. Said decedent left him surviving the plaintiff, his widow, and seven infant children, Ruth, Thelma, Seymour, Dorothea, Sylvia, Myrtle and Alvin, who are his only next of kin, all of whom were dependent upon the decedent for their support at the time of his death, and who have by reason of his death suffered great pecuniary injury.

20 9. This action is commenced within twenty-four calendar months after the death of the plaintiff's intestate.

Judgment will be claimed in favor of the plaintiff and against the defendant for the sum of fifty thousand dollars (\$50,000.00), and the costs and disbursements of this suit to be taxed.

Dated October 15, 1921.

JACOB L. NEWMAN,  
*Attorney of Plaintiff.*

30

40

*Answer to Amended Complaint.*

**ANSWER TO AMENDED COMPLAINT.**

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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|  |                                  |  |
|--|----------------------------------|--|
| ANNIE MENDEL, administratrix <i>ad</i><br><i>prosequendum</i> of JACOB MENDEL,<br>deceased,<br><br><br>vs. | Plaintiff,<br><br><br>Defendant. | } <i>Action at Law.</i><br>} <i>Answer to</i><br>} <i>Amended</i><br>} <i>Complaint.</i> |
|--|----------------------------------|--|

JOSEPH ROTH,

20

The defendant, residing in the City of Elizabeth, County of Union and State of New Jersey, answering the plaintiff's complaint herein, says that:

1. He admits the allegations of paragraph one of the complaint.
2. He denies the allegations of paragraphs two, three, four, five and six of said complaint.
3. He has no knowledge or information upon which to form a belief as to the allegations of paragraphs seven and eight of said complaint.
9. He admits the allegations of paragraph nine of said complaint.

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FIRST DEFENSE.

Defendant says that the plaintiff's intestate was guilty of contributory negligence.

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*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

OBJECTION IN POINT OF LAW.

Defendant will object at or before the trial of the issue joined that said complaint does not contain facts sufficient to sustain a cause of action.

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant.*

10

REPLY.

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

|    |   |   |                       |
|----|---|---|-----------------------|
| 20 | ANNIE MENDEL, administratrix <i>ad</i><br><i>prosequendum</i> of JACOB MENDEL,<br>deceased,<br><div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> | } | <i>Action at Law.</i> |
|    | <i>vs.</i>  |   | <i>Reply.</i>         |
|    | JOSEPH ROTH,<br><div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>  |   |                       |

30 The plaintiff, replying to the answer to the amended complaint herein, says:

1. She denies each and every allegation contained in the first defense.

Dated October 27, 1921.

JACOB L. NEWMAN,  
*Attorney of Plaintiff.*

40

*Postea.***POSTEA.**

## NEW JERSEY SUPREME COURT.

|   |   |  |   |    |
|---|---|--|---|----|
| ANNIE MENDEL, administratrix <i>ad</i><br><i>prosequendum</i> of JACOB MENDEL,<br>deceased,<br><br><i>vs.</i><br><br>JOSEPH ROTH,<br><br> | } | <i>Plaintiff,</i><br><br><br><br><br><br><br><i>Defendant.</i> | <i>Action at Law.</i><br><br><i>Postea.</i> | 10 |
|---|---|--|---|----|

This case having been referred to the Essex Circuit by an order of this Court, dated November 14, 1922, to the end that if a *venire de novo* do issue for the trial of the cause of action of the plaintiff, Annie Mendel, administratrix *ad prosequendum* of Jacob Mendel, deceased, as to damages only. 20

This case was tried before the Honorable Nelson Y. Dungan, Circuit Court Judge, to whom the above-entitled cause was referred by the Honorable William S. Gummere, Chief Justice, by an order made and entered on the opening day of the December, 1922, term, with a jury at the Essex Circuit on January 31, 1923.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of fifteen thousand dollars (\$15,000.00). 30

Dated January 31, 1923.

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Wednesday, January 31, 1923.

|    |  |   |                       |
|----|--|---|-----------------------|
| 10 | ANNIE MENDEL, Adm., <i>ad prosequen-</i><br><i>dum</i> of JACOB MENDEL, deceased,<br><br><i>vs.</i><br><br>JACOB ROTH. | } | <i>Action at Law.</i> |
|----|--|---|-----------------------|

Before Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appears Jacob L. Newman.

For the defendant appear Heine, Bostwick & Bradner  
(by M. Casewell Heine and Palmer Bradner).

20 (A jury is called and sworn.)

*Mr. Bradner.* I desire to make an objection on the ground that this is not the jury that heard the case as to the liability and, therefore, having two juries, is a denial of the constitutional right of the defendant, both under the United States Constitution, the Fourteenth Amendment, and the State Constitution, which provides that a trial by jury shall remain inviolate.

30 *The Court.* Are you sure you raised the point by your objection?

*Mr. Bradner.* I am not absolutely certain.

*The Court.* I would like to have the point raised, but I have a little doubt whether you are raising the point on this objection.

*Mr. Bradner.* I object to the swearing of the jury to try the damage question in this case because it is not the same jury that tried the liability.

40 *The Court.* It is that form of objection that does not raise the question. It would be better to object to the hearing of this case upon the question of damages only.

*Annie Mendel, direct.*

*Mr. Bradner.* That is the broader objection.

*The Court.* And then during the trial of the case you might object to the proof of damages.

*Mr. Bradner.* I intend to do that.

*The Court.* The objection will be overruled.

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

(A jury is sworn.)

ANNIE MENDEL, plaintiff, sworn in her own behalf.

*Direct examination* by Mr. Newman.

Q What is your full name? A Annie Mendel.

Q And what was your husband's name? A Jacob Mendel.

Q When did he die? A The 8th of June, 1921. 20

Q How old was he when he died? A Thirty-eight.

Q At the time of his death how old were you then?  
A Thirty-five.

Q How many children did you have by him? A Seven.

Q And how old was the oldest child at the time of his death? A Thirteen.

Q What is her name? A Ruth.

Q What was the age of the next child and her name? 30  
A Thelma, age eleven.

Q Are those two going to school? A Yes, sir.

Q How old was the next child? A Seymour.

Q A boy? A He was nine at the time.

Q How old was the next child? A Dorothy, six.

Q And the next child? A Sylvia, four.

Q And the youngest? A Myrtle, two; and then the baby was six weeks.

Q Six weeks old at the time of your husband's death?

A Yes, sir. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q What was your husband's business at the time he was killed? A In the produce business.

Q At the time that he was killed? A Yes, sir.

Q What did he do? A Selling vegetables and fruits.

Q From a truck? A Yes, sir.

Q That was just before he died? A Yes, sir.

10 Q Just prior to that what line of business was he in?  
A Trucking business.

Q How long had he been in the trucking business?

A Close to five years.

Q And in his trucking business he had wagons or trucks, did he? A Yes, two trucks and one wagon.

Q And how long was he out of the trucking business?

A For six months he has been out of the trucking business before his death.

20 Q And do you know what he made a year in the trucking business? A Well, on an average of seventy-five dollars to a hundred a week.

Q Was that net? A Seventy-five dollars net.

Q How do you know that? A I have my books here.

Q Did you run the books? A Yes, sir.

Q Is your knowledge gained from the books? A Yes, sir.

Q And they are in your handwriting? A Yes, sir.

Q Out of the income what did he give you? A Well, I got seventy-five dollars weekly.

30 Q What did you do? A Out of that I paid for household expenses, clothing for the children and myself, and food for myself and Mr. Mendel.

Q How many years prior to his death did he pay you that amount? A Four years.

Q And prior to that time what did you get per week?

A Thirty-five dollars. He was working for commission dealers on Commerce street.

Q What did he do? A He drove a truck.

40 Q Did that necessitate the carrying of heavy barrels, and so forth? A Yes, sir.

*Annie Mendel, cross.*

Q Prior to that time, when he paid you thirty-five dollars a week, what did you get from him? A Fifteen dollars a week.

Q And out of that did you keep what children you had at that time? A Yes, sir.

Q How long in all were you married? A Thirteen and a half years.

Q I suppose you clothed the children and fed them and paid your rent out of that? 10

Objected to as leading.

Q Did that also embrace his lodging? A Yes, sir.

Q How about his clothing? A I paid for that.

Q How tall was he? A He was five feet six.

Q How much did he weight? A About a hundred and fifty pounds.

Q Did he ever have any serious illness during his married life? A No, sir. 20

Q Did he ever have any illness? A One time he had a slight attack in influenza when the epidemic was around.

Q How long before his death was that? A About three or four years before he died.

Q How about his recovery from that? A His recovery was full recovery.

Q How many of the children go to school? A Five.

Q And the others are home? A Yes, sir.

Q None of them earn anything? A No, sir.

Q I think you spoke of your age, didn't you? A Yes, sir; thirty-five. 30

Q What is the condition of your health? A Perfect.

*Cross examination by Mr. Heine.*

Q From what source do you derive your income at the present time?

Objected to.

Objection sustained.

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q There was a falling off in the trucking business, wasn't there, just after the war? A Not after the war, not until six months prior to his death.

Q It fell off then? A Yes, sir.

Q It had been going down? A It hadn't been going down.

10 Q Did it fall off suddenly or gradually? A It had fallen off for awhile, at the time the Pennsylvania Railroad had a strike, and he could not get any goods from the railroad, so we would have to go down to the country to get the goods. Of course, it had not been quite as good at that time as it had been before and after.

Q What kind of trucking did your husband do prior to the six months before his death? A For the commission merchants on Mulberry street.

Q Handling produce? A Yes, sir.

20 Q And the strike interfered with that about the latter part of 1920 or the early part of 1921? A I don't remember exactly what year it was; I don't know exactly what year, but my books show that.

Q That was when your husband undertook to go into business for himself? A 1921.

Q Had he ever before that been in business independently? A He had been in business before this accident for five years—not quite five years.

30 Q Doing a general trucking business for the produce men? He wasn't employed by any particular man, was he? A No, sir.

Q When was he last employed by some firm or individual in the business? A Well, he was in his own line of business.

Q Not his own line; when was he last employed? A He was last employed, I think it was in 1912—just a moment.

40 Q Whom did he work for then? A H. I. Rothman; I think it was 24 or 26 Commerce street; I don't remember the number, but I know it was H. I. Rothman, a broker.

*Annie Mendel, cross.*

- Q How much did he earn at that time? A \$35.
- Q What did he do there for Rothman? A He went to New York to bring in his fruit, mostly fruits, oranges and so forth, barrels of apples.
- Q Driving a truck? A Yes, sir.
- Q (*By the Court.*) Their truck? A Yes, sir.
- Q (*By Mr. Heine.*) How long did he work at this broker's business? A He worked there about seven or eight years. 10
- Q It was before 1912? A Yes, sir.
- Q And he started in business for himself immediately after leaving Rothman? A Yes, sir.
- Q By 1912? A Yes, sir.
- Q What equipment did he have, if you know, when he started in business for himself? A He had one truck.
- Q And between 1912 and the 1st of 1921 he had increased to two trucks and a wagon? A Yes, sir. 20
- Q What kind of trucks were those? A Acme.
- Q Were both the trucks Acmes? A Yes, sir.
- Q Was this a double or a single wagon? A A single wagon.
- Q And he had a horse for that? A Yes, sir.
- Q How long before 1921 had he acquired the second truck? A I think it was in 1917.
- Q During the war? A Yes, sir.
- Q Business picked up quite materially when the war came on, did it not? A Yes, sir. 30
- Q His business receipts went up? A Yes, sir.
- Q When did he put on the wagon? A The same year.
- Q So that from 1912 to '17 the one truck was sufficient for his business purposes. What size truck was that? A Three and a half ton.
- Q From 1917, with the war conditions then existing, business picked up sharply and he added the second truck and the wagon? A Yes, sir. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q There was, of course, with his increased business, an increase in the receipts, the profits, of course? A Yes, sir.

Q That fell off again at the end of the war? A At the time the strike came on.

Q That was after the war? A Yes, sir.

10 Q You had seen these trucks, had you? A Yes, sir.

Q Was the first truck that he bought a three and a half ton Acme? A Yes, sir.

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

Q Are you sure it wasn't a one-ton truck? A A three and a half ton truck. I can even tell you when it was bought.

Q Was the second truck the same? A A three and a half ton Acme.

20 Q And was that the truck that was involved in the accident? A No, sir.

Q That was another one? A No, sir.

Q Whom did that belong to? A That belonged to Edward Mendel, my husband's brother.

Q The period after the war, and when this strike was involved, resulted in his going out of the independent trucking business and disposing of one of the trucks and the wagon? A Yes, he did dispose of them.

30 Q Business fell off so that he didn't have any use—  
A No; the truck was old, used out, and we couldn't use much of it and I thought business wasn't very good and I advised him not to bother with it.

*By the Court.*

Q And when was that disposed of? A I don't remember exactly the date—I don't remember the exact time of the year. Right after the strike.

Q How long before his death? A Right after the strike.

Q You haven't told us when that was, how long before his death was it that he disposed of one of the

*Annie Mendel, cross.*

trucks and wagons? A I think it was the beginning of 1920.

*By Mr. Heine.*

Q About a year before he went into the produce business? A Yes, sir.

Q And the produce business is the last business he was in where he was actually selling vegetables and fruits himself from a wagon? A Yes, sir. 10

Q And not trucking for others? A No, sir.

Q And was the wagon sold about the same time, 1920? A No; the wagon was sold later on; the wagon was sold in 1920, around Christmas time.

Q Just before he went in the produce business? A Yes, sir.

Q And he retained simply the one truck? A Yes, sir. 20

Q And was that the truck he had bought, first or the second one? A The second one.

Q During that period of 1920 the trucking business had petered out, hadn't it? A It wasn't since; it was before.

Q It wasn't good enough to stay in? A Yes; it was plenty good enough to stay in, but we had an accident with the second truck and that is how we gave it up.

Q The second truck that he bought? A Yes, sir.

Q When did that happen? A It burned. 30

Q It burned up? A Yes, sir.

Q And was the insurance collected from that? A No, sir; not yet.

Q Had the premiums been paid? A The premiums had been paid, but the insurance company hadn't paid it out; I had insurance paid on that truck and the insurance company had cancelled the policy before—it was paid for fifteen months and the insurance company had cancelled the policy in nine months and I have a case now. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q You have a case with the insurance company for the premium on that truck? A Yes, sir.

Q When did that accident happen? A January 17, 1921; that was the year before he was killed.

10 Q I just understood you to say that he disposed of that truck— A Not that truck; I said one truck and one wagon he disposed of in 1920 and the second truck was burned up in 1921.

Q And that was the reason he was using the other truck in the produce business? A Yes, sir.

Q Had they gone in partners? A Yes, sir; the truck wasn't partners, but otherwise they were partners.

Q What did your husband put in? A My husband was the one that invested the money. He bought the produce because my husband had experience in the business and the brother didn't.

20 Q Did your brother put up any money? A Yes, sir; they both put in whatever the stock required. I didn't keep track of that.

Q They started in the produce business in the early part of 1921? A Yes, sir.

Q About six months before your husband's death? A Yes, sir.

Q That they went in partnership? A Yes, sir.

Q With his brother? A Yes, sir.

30 Q With his brother Edward? A Yes, sir.

Q His brother Edward put in the truck? A Yes, sir.

Q And your husband put in his experience? A Yes, sir.

Q Do you know whether your husband put any money in? A Yes, sir.

Q How much did he put in? A That I couldn't exactly say.

Q Have you any idea, approximately? A Yes, sir.

Q Do you know how much Edward put in? A No, sir.

*Annie Mendel, cross.*

Q Do you know what the money which they put in was used for? A Buying produce, fruits and vegetables.

Q How much? A I don't know. It was only twice they had gone out. Had they gone out more I would have kept books.

Q They would go down in the country and buy a load?  
A No, sir; they bought it in the city and sold it in the country. 10

Q Whereabouts in the country? A They went around as far as Keansburg, New Jersey.

Q What was the nature of the produce that they bought here and sold down as far as Keansburg, what kind of stuff? A Apples, potatoes, oranges, fruits and vegetables.

Q The amount of money would be about the amount necessary to load up that kind of vegetables or fruit on each occasion when they bought in the market? A Yes, sir. 20

Q And do you know whether your husband provided all of the money for this produce in the market or whether his brother Edward provided some? A Both of them provided.

Q Do you know in what proportion? A Well, it was understood, together, fifty-fifty.

Q Have you any idea what a load such as they would buy to take down to Keansburg to sell along the line would cost in the market? A Between \$100 and \$150. 30

Q And that would require a capital contribution of about \$75 apiece? A Yes, sir.

Q And the brother-in-law had no other vehicle or wagon? A No, sir.

Q What was the size of this truck? A I don't know whether it was a one-ton or two-ton, Springfield-Kelly.

Q It was the truck that was in the accident? A Yes, sir.

Q Was there any insurance carried on your husband's life? A Yes, sir. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

*Mr. Newman.* I object. How is that important?

*The Court.* Objection sustained.

*Mr. Newman.* I move to strike out the answer.

10 *Mr. Heine.* The fact of the insurance is not so important; I was about to follow it up as to whether the premium had been paid, with a view to meet the issue of the family income not being sufficient to meet the insurance premiums.

*The Court.* You may ask her what payments were made, which may include the payment of insurance.

Q Directing your attention to the subject of your husband's life insurance, was the premium on that paid and the policy in force at the time of his death? A At the time of his death, do you mean whether his life was insured?

20 Q Yes. A Yes, sir.

Q Was the premium paid on that at that time? A Yes, sir.

Q Have you collected that insurance? A Yes, sir.

*The Court.* I am inclined to strike all that testimony out.

*Mr. Heine.* I will consent to strike out that part of the testimony.

30 Q What was the kind and total of that policy that was held? How were the amounts of the premiums payable? A Every three months it was twelve dollars and thirty-eight cents.

Q How long had that policy been in force? A Three years.

Q Had your husband carried life insurance before that time? A When we were first married we didn't bother about that, we left that go by.

40 Q Three years before his death he had taken out this policy which required a payment of twelve dollars and thirty-eight cents every three months? A Yes, sir.

*Annie Mendel, cross.*

Q And those payments had been continued up until the time of his death? A Yes, sir.

Q During the period between the sale of the truck and the wagon and the time of his death, what amount did you receive for household expenses? A I received the same amount as I did before, \$75.

Q Notwithstanding the fact that his earning capacity and profits were less? A That made no difference. He gave me that amount anyhow. 10

*By the Court.*

Q Did you keep his books after he went into the produce business? A No, sir. You see, he only went on two trips and I thought had he continued it then I would have taken a record of the two trips that he made, but I was going to keep books, but I didn't bother.

Q I understood you to say he had been in that business for about six months? A Well, off and on then. 20

Q That is what I asked you, whether you kept any books? A No, sir.

Q You don't know what his income was from that business? A No, sir.

*By Mr. Heine.*

Q How were you accustomed to receive this weekly payment of \$75, in cash or checks? A Sometimes by check, sometimes by cash. 30

Q Do you know in what bank your husband kept his checking account? A In the National Newark and one time in the American Bank on Springfield avenue.

Q The last six months where did he keep his account? The National Bank.

Q Did you receive checks occasionally from the National Newark? A Yes, sir.

Q Was your husband's account there? A Yes, sir.

Q Was there a regular time when you received this money each week? A Every Saturday. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q Were there more occasions on which you received the payments during the last six months of his life in cash or were there more occasions that you received it by check? A Sometimes in cash and sometimes by check.

Q About half and half? A Yes, sir.

10 Q When you received by check, how did you secure the cash on it? A I went to the grocery store and had the check cashed.

Q Whose grocery store? A On Sixteenth avenue, corner Fairmount avenue and Sixteenth, Mr. Schwartz.

Q Was that the usual place where you cashed the checks? A Yes, sir.

Q Did you know Mr. Weinstein, who lived in your neighborhood there where you lived? A Yes, sir.

Q What is his first name? A I don't know.

20 Q Where does he live there? A On Littleton avenue. I don't know what number.

Q Were the families intimate? A No, sir.

Q Did you know Mrs. Greenstein? A Yes, sir; just lived across the way from me.

Q Did you know the wives of either of those people? A Just by sight.

Q They were not intimate friends at all? A No, sir.

30 Q Has there ever been any occasion when there have been any financial transactions between you or your family during the last year or so and a half and the people I have mentioned? A No, sir.

Q You have never received any money of any kind from either of them? A No, sir.

Q Is it or is it not a fact that one occasion both or either one of these parties was instrumental in taking up a collection for your family's immediate necessities at one time?

*Mr. Newman.* I object unless it appears it was before the husband's death.

40 Q Before the death of your husband? A No, sir.

*Annie Mendel, cross.*

Q Did your husband have to borrow money after the burning up of his truck in 1921 to go into the produce business? A No, sir.

Q Before his death? A No, sir.

Q After the truck was burned in 1921 about along the early part of 1921, down to the time when he started in the produce business, which was before his death, they had been out on about two loads? A Yes, sir. 10

Q It was in June? A Yes, sir.

Q During that six months, from January to June, did you receive every week on Saturday \$75? A Yes, sir.

Q How much rent during those last six months were you paying at the place where your family lived? A \$26.

Q A month? A Yes, sir.

Q And to whom was that paid? A Well, at that time a man by the name of Spiro. 20

Q Do you know his first name? A Morris. He is dead now.

Q And up to the time of your husband's death the rent was paid to him? A It was paid to him until about a year before his death and then another party bought the place, Siasseli, Italian people.

Q The rent was paid to him about a year before your husband's death? A Yes, sir.

Q Was the rent raised during that period? A No, sir. 30

Q Are you living in the same place now? A Yes, sir.

Q Has the rent been raised since? A No, sir.

Q About what were the expenses of the family, ordinary living expenses of food and heat, and so on, six months prior to your husband's death? A Around fifty dollars a week.

Q Is that five rooms and bath? A Yes, sir; five rooms and a bath. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q Have any of the other children, that is, the boy and the three girls, ever been employed, earning any money?

A No, sir.

Q They continued to go to school from the time they became of school age? A Yes, sir.

10 Q And are still continuing to go to school? A Yes, sir.

Q Were you able, from the beginning of the time when your husband increased his business by buying the extra truck, to save any money from the weekly allowance that he gave you? A Yes, sir.

Q About what did that saving amount to after you began receiving \$75 a week? A Why, between ten dollars and fifteen dollars weekly.

Q Was that rate of saving continued down to the time of his death? A Yes, sir.

20 Q You are a good housekeeper and you were able to lay away a little bit every week? A I should hope I did.

Q And you should judge it would average ten or fifteen dollars a week? A Yes, sir.

Q Was that money deposited by you anywhere? A No, sir.

Q You never had any bank account yourself? A No, sir.

30 Q Did you have any authority to draw from the account of your husband in the National Newark or in the American? A I did.

Q It was a joint account? A No, sir; the bank account practically went with my name.

Q The bank account was in your name? A Yes, sir.

Q And then you drew the checks on your signature for your husband to pay his business needs? A Yes, sir.

Q How long had that account been in your name? A About the last three years of his life.

40 Q All of the time that you deposited in the Newark National the account was in your name? A No, the first

*Annie Mendel, cross.*

two years I think it was in his name and then he changed it to my name.

Q It wasn't changed after you withdrew from the American Bank on Springfield avenue? A No, sir; that was on my name.

Q You were in the National? A Always.

Q And was there any account there at the time of his death, in the National? A Yes, sir; we had it in the National Newark Bank and then we went to the American. 10

Q I understood the National Newark was the last. A Three years; in all it was about five years altogether; the first two years it was in his name in the National Newark and then the last three years—I think it was about a year in the National in my name and then we went to the American.

Q So the last two years it was in the American National Bank on Springfield avenue? A Yes, sir. 20

Q So the checks you received that I referred to previously were from the American National Bank and not from the National Newark, the last six years of your husband's life that was in the American Bank? A Yes, sir.

Q (*By the Court.*) And you drew those checks then to your own order and signed them; is that right? A Yes, sir.

Q (*By Mr. Heine.*) And then you would take it over to the grocery store, to Schwartz's, and he cashed them? A Yes, sir. 30

Q And you endorsed them? A Yes, sir.

Q And he cashed them for you? A Yes, sir.

Q When you got the cash your husband took the check that you signed away and cashed it at the bank; is that it? A When I made the checks to myself he was there when I done it and then I took the check and went to the store, cashed it. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q You say your husband gave you cash. How would he get the cash, from the bank? A He would come home from the collections that he would make, the work that he done, he generally collected on a Saturday morning and naturally that was most all of it in cash, so he used to give the cash and if he didn't have it he gave me a  
 10 check.

Q And during the six months before his death, when he was out of the trucking business and hadn't yet gone into the produce business, did he pay cash, and where did he collect the cash from? A Mostly by check.

Q So during the last six months of his life the payments were drawn in your own name, to your own order, and cashed at the grocery store? A Yes, sir.

Q In other words, his cash income at that time practically was nil, it was nothing, there was no substantial  
 20 income at that time? A No, sir.

Q And you drew those checks on the American Bank where you had your savings, you had your real money there that had been accumulated during the time of the war when business was profitable? A Yes, sir.

*By the Court.*

Q You don't know just how much your husband actually made during the last six months of his life? A  
 30 No, sir; I really don't know, not the last six months of his life.

MAX STERN, sworn in behalf of plaintiff.

*Direct examination by Mr. Newman.*

Q Where do you live? A 13 Eighteenth avenue.

Q Are you the father of Annie Mendel that was on the witness stand? A Yes, sir.

Q Did you know Mr. Jacob Mendel in his lifetime? A  
 40 Yes, sir.

*George M. Crogan, direct.*

Q How long did you know him? A I know him about seventeen or eighteen years.

Q And during that time he was married to your daughter for about thirteen years, wasn't he? A Yes, sir; a little over thirteen.

Q What was his business? A He was always in the driving business and afterwards in the trucking business. 10

Q Whom did he drive for, what kind of business? A Produce business, commission market. I couldn't mention the name.

Q What was the condition of his health as long as you knew him? A He was a very strong man.

Q Can you tell us how much he weighed? A I didn't weigh him, but I think he weighed about 150 or 160 pounds.

Q Can you give us any idea how tall he was? A Five foot six or five foot eight, something like that. 20

Q Do you know how many children your daughter had by him? A Seven.

Q Did he ever have any illness to your knowledge when you knew him? A Once.

Q And how long before his death was that? A About two or three weeks, maybe three weeks.

Q I don't mean how long the sickness was; I mean about how long before his death? A Three or four years.

Q Did he recover from that fully? A Yes, sir. 30

Q What was his sickness? A I think grippe or something.

Cross examination waived.

GEORGE M. CROGAN, sworn in behalf of plaintiff.

*Direct examination by Mr. Newman.*

Q What is your business? A I am connected with the actuarial department of the Mutual Benefit Life Insurance Company. 40

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

Q How long have you been connected with that department? A Over thirty years.

Q And are you familiar with the different tables of mortality and the term "expectation of life"? A I am.

Q What kind of a mortality table is the Carlisle table?  
A The Carlisle table is a general mortality table, that  
10 is, a table made up of lives not having come under the benefit of a medical examination.

Q Taken from what, mainly? A Taken from registers of towns according to population.

Q In the case of the Carlisle table what is the expectancy of life of a man 38 years of age in good health?

A According to the Carlisle table age 38 is 28.96, almost 29.

Q What is the present value of the earnings of a man who is in receipt of an income from his work amounting to \$5,000 at the age of 38, assuming that he is in good health, if the sum was invested at 5 per cent.? A  
20 Based on this expectancy that I have just spoken of?

Q Yes. A Based on the expectancy of the Carlisle table the sum in hand, or the single payment that would provide \$5,000 a year during this term of expectancy, on the basis of 5 per cent. interest would be \$68,475.

Q Will you tell us the average expectancy of a woman aged 35 who has enjoyed good health, according to the  
30 Carlisle table? A According to the Carlisle table the expectancy of life at age 35 is 31 years.

*By the Court.*

Q What is the joint expectancy of a man 38 and a woman 35? A At ages 38 and 35, the joint expectancy, according to the Carlisle table, is 21.78.

Q And what would be the present value of \$5,000 at 5 per cent.? A Based on the general expectancy, the present value of \$5,000 a year at 5 per cent. interest,  
40 compound interest, is \$57,630.

*Motion to Strike Out Testimony.*

Q Now, suppose you express that in terms of \$100; that would be simply dividing at by fifty, would it? A Precisely, on the basis of a hundred dollars, it would be \$1,052.60.

Cross examination waived.

PLAINTIFF RESTS.

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*Mr. Heine.* I move to strike out the evidence. The question is predicated on \$5,000 a year, and I move to strike it out on the ground that there is no evidence to warrant that there was an income of a hundred dollars in the case.

*The Court.* Seventy-five dollars a week, multiplied by fifty-two, amounts to \$3,900. Of course, from that amount must be deducted certainly whatever was expended for the husband's clothing which the wife says she bought from what came to her, so I don't think the \$5,000 really amounts to a demonstration in the case as to a figure which ought to be awarded by the jury, and that is the reason I asked Mr. Crogan the present worth of a hundred dollars, and I think we can eliminate all the other testimony and take it upon the present worth of \$100. 20

*Mr. Heine.* I move to strike out so much of the testimony that is based on the \$5,000 income to her. 30

*Mr. Newman.* There was some evidence that it was a hundred dollars a week; that while the income did not amount to that; that was his earning power.

*The Court.* I do not recall such testimony.

*Mr. Newman.* I would like to recall Mr. Crogan.

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*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

GEORGE M. CROGAN, recalled.

*Direct examination by Mr. Newman.*

10 Q Mr. Crogan, what is the present value of the earnings of a man who is in receipt of an income resulting from his work of \$3,800 at the age of 38, assuming that he is in good health, if the same was invested at 5 per cent. and the expectancy was as you have already given it?

*Mr. Heine.* I would like to object to that question on the ground that it is based on the gross income of the husband, apparently so based on the theory that that was the amount actually received by the wife.

20 *Mr. Newman.* That is based on the precise figure that the wife said she received \$75 a week, which is \$3,800 a year.

*Mr. Heine.* She testified from that that she bought his clothing and took care of his lodging, and it is not based on what came to her.

*The Court.* The objection will be overruled.

Exception noted as ground of appeal.

A \$52,041.

*By the Court.*

30 Q You are basing that on the single life? A I am basing that on the single life.

*The Court.* I do not think that is proper.

*Mr. Heine.* I make the same objection to the joint.

*The Court.* The objection will be noted.

Objection noted as ground of appeal.

*The Witness.* \$43,798.80. That is based on the joint lives, \$3,800 a year.

*Joseph Roth, direct.*

Q I suppose they are all based in the same proportion, are they not? A Yes, sir; it is all based on a dollar or a hundred dollars or a thousand dollars, as your Honor suggested.

PLAINTIFF RESTS.

JOSEPH ROTH, defendant, sworn in his own behalf. 10

*Direct examination by Mr. Heine.*

Q Where do you live? A Elizabeth.

Q What is your business? A Live poultry.

Q On the 8th of June, 1921, were you the owner of a truck? A Yes, sir.

Q Was that truck being driven by you? A Yes, sir.

*Mr. Newman.* I object to this testimony. Evidently the testimony is directed to the question of this accident and is therefore not proper nor admissible. 20

*The Court.* The purpose of this testimony is to show absence of liability, Mr. Heine?

*Mr. Heine.* The purpose of this testimony is to show the details of the accident and that we are not liable under the rules of law applicable to this accident and we offer to prove that.

*The Court.* And I suppose it is raised for the same purpose that you raise the question on the motion to non-suit? 30

*Mr. Heine.* Yes. The testimony is designed to show that there was no liability.

*The Court.* That offer will be overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

DEFENDANT RESTS.

*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

*Mr. Heine.* I will make a formal motion for the direction of a verdict upon the same grounds and inject the same question upon which the court has already ruled.

*The Court.* The motion will be denied.

10 Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Heine sums up in behalf of the defendant.

Mr. Newman sums up in behalf of the plaintiff.

### CHARGE TO JURY.

The Court charges the jury as follows:

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DUNGAN, J:

Gentlemen of the jury. This case has been tried once before and in that case the liability of the defendant was established, so that that is a question that you will not have to determine in this suit, whether or not the defendant is liable to the plaintiff in damages because you start with that by the verdict of the former case, but the Supreme Court, when that verdict was reviewed, found that a mistake had been made in assessing the damages in the previous trial and sent it back for the mere assessment of damages, and that is just what your duty will be in this case, to assess the damages, that is to say, how much the plaintiff is entitled to recover, and the amount in dollars and cents. The principle upon which the plaintiff is entitled to recover is stated in chapter 180 of the laws of 1917. This is a supplement, however, to an old act, in which the same statement substantially appears, and this statute says that, "In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such

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*Charge to Jury.*

death to the wife and next of kin of said deceased person." In other words, and to put it very bluntly, the question has nothing to do with sympathetic damages as has been stated in the argument to you. It has nothing to do with the loss by the plaintiff of the society and sympathy and advice of her husband, but has only to do with the question of how much she has lost in dollars and cents through his death. What has she lost in money through his death? The husband was at the time of his death thirty-eight years of age; the wife was thirty-five years of age, they had seven children ranging in age from six weeks to thirteen years, none of them wage earners, the five older children being in school and two of them too young to go to school. The wife says that when they were first married the husband was employed and gave her fifteen dollars a week, that subsequently he went into the trucking business and did some trucking for a commission man on Commerce street, and then gave her thirty-five dollars a week; that for some three or four years before his death he had been in the trucking business himself, that is, he had one truck, and then in 1917 he bought another truck, and then he had a single horse and wagon with which he did trucking, and when he went into that business, or soon after, he started giving her seventy-five dollars a week. He gave her seventy-five dollars a week as long as he lived. But it appears that in 1920 there was a strike on the railroad which decreased the amount of business which he was able to do, and in the early part of 1920 he sold one of the trucks, that is, the older one of the two, and then around Christmas, 1920, he sold the horse and wagon, and retained the truck which he had bought in 1917, but on the 17th day of January, 1921, this truck was burned and in the early part of 1921 he started in the produce business in partnership with his brother Edward, who owned a truck and who put it into the partnership business, and her husband did work and divided the expenses and profits she says about

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*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

fifty-fifty; but while she says she received seventy-five dollars a week during that period from Januray, 1917, to the date of his death, which was June 8, 1921, about five months later, she does not know how much he made after he went into this produce business, and then it appears from her cross examination that during the time her husband had been making her this allowance she had saved more than ten dollars or fifteen dollars a week, which she said she did not deposit, but later she said that the account which was at one time in the National Newark Bank in the last two years of her husband's life was in the American National Bank, and was in her name, and that the seventy-five dollars a week which she drew during the last six months of his life, or last few months of his life, was by checks made by herself on her own bank account, and which she said had accumulated during the war when business was good. Now, of course, if that be the situation, without any knowledge of what the husband was earning during that period, it is problematical, without knowing the amount which was actually in the bank, how long that bank deposit would have lasted, and how long the husband, from his vegetable business, peddling of vegetables, would have been able to turn in an income of seventy-five dollars a week, or what sum he would have been able to have turned over to her. These are things which you must take into consideration. Then she also says that from the money that he did turn over to her she furnished the food which he ate and she furnished the money which purchased his clothing, and, of course, she does not have to furnish those things now, and from whatever sum you find the husband probably would have turned over to her, those amounts must be deducted for the value of the food he ate and for the clothing which she purchased, or for any amount which she expended for her husband. That seems like whittling it down pretty fine, but that is the law just the same, because, as I have said, the question is, how much money has the wife been deprived of by the death of her husband?

*Charge to Jury.*

The adjudications in this state say to us that after having determined the amount per week, per month or per year of which the wife and family have been deprived, you cannot multiply that amount by the number of weeks, months or years the husband would have lived and the wife and family would have lived to enjoy the husband's bounty, because then the wife and family would have in a lump sum all that the husband would have brought in during his entire life which, put at interest during that period, would amount to a much larger sum than the husband would have brought in over that period; so you must find the present worth of that sum, how much it is worth now; in other words, you must find the amount, which, put at interest at the prevailing rate, will give to the wife and family the net weekly income or monthly or yearly income of which the wife and family have been deprived for the length of time you decide the husband would probably have lived and been able to have produced such an income and which his widow and children would probably live to receive and enjoy that income and which would be entirely exhausted at the expiration of that period. We are helped in this matter and guided by the actuarial figures which have been given. Mr. Crogan, of the actuarial department of the Mutual Benefit Life Insurance Company, says that the joint expectancy of lives of people of their age, that is, thirty-eight years and thirty-five years, is 21.78 years; that the present worth, which corresponds to this definition which I have given you here of \$3,800, which would be seventy-five dollars a week for fifty-two weeks would be for the 21.78 years, \$42,798.80; but that figure of \$3,800 does not take into consideration at all the deduction which must be made from that amount, as I have already stated, for moneys turned over to the husband or expended for his benefit for board, clothing, and so forth, and to what extent it takes into consideration the vicissitudes of life, which are not told. Of course, there is a possibility, even in a

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*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

person in good health, as the husband and wife appear  
 to have been, that ill health may come along, that the  
 husband or wife, neither one of them would live all this  
 period which the actuarian has given us; that he may have  
 been incapacitated by accident or disease from earning  
 the amount of money which would permit him to turn in  
 this amount of money which the wife says she was de-  
 10 prived immediately before his death or he may have lost  
 his life in some other accident or disease. All these things  
 must be taken into consideration by you, and then when  
 you have determined the amount per week, per month, or  
 per year of which this wife and family have been de-  
 prived, and have determined the number of years of which  
 they have been deprived of it, then you may multiply  
 those two sums together and find the present worth of  
 it, and Mr. Crogan has told us that assuming the length  
 of life would have been 21.78 years \$100 would be worth  
 20 now \$1,152.60. If you find it to be less than that those  
 amounts must be reduced proportionately. For instance,  
 if you decided the general expectancy was half that time,  
 then the present worth would be half that amount. These  
 are figures which you must examine when you go to the  
 jury room. As I have said, it must be the amount per  
 week, per month or per year of which this wife and fam-  
 ily have been deprived; secondly, the number of weeks,  
 months or years of which they have been deprived of it,  
 and multiply them together and find the present worth  
 30 of that sum.

(The jury retires.)

(The jury returns into court.)

*The Court.* Gentlemen of the jury. As soon as you  
 retired my attention was called to a bit of testimony  
 which it is agreed by the attorneys of both the plaintiff  
 and defendant was the proven fact, and which rather es-  
 caped me when I submitted the charge, and that was that  
 after the of January, 1921, and up until the time  
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*Exceptions to Charge.*

of his death, which occurred on June 8, 1921, Mr. Mendel had only taken out two loads of produce with his brother's truck, but I did, I think, substantially say to you, that Mr. Mendel had earned practically nothing from January 17, 1921, or at least there is no evidence that he did earn anything much from the time his truck burned until June 8th, but that the amount which the wife drew on were from accumulations in the bank. That is the correct situation to which both attorneys agree in this case and that is what you are to take into consideration. 10

*Mr. Heine.* I would like to except to that portion of the charge at the very beginning where the Court says in regard to the non-consideration of liability as bringing that judgment before the jury in the light of the case already having been passed upon favorably to the plaintiff with respect to liability. 20

Exception noted as ground of appeal.

*Mr. Heine.* Also to the statement of the rule of damage before the Court referred to the joint expectancy. The Court covered the expectancy of the wife's life in connection with the expectancy of life of the husband and that the rule was improperly stated in the fact that the element involving the wife were omitted.

Exception noted as ground of appeal.

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*Annie Mendel, Administratrix, &c. v. Joseph Roth.*

**NOTICE OF APPEAL.**

Filed March 23, 1923.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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ANNIE MENDEL, administratrix *ad*  
*prosequendum* of Jacob Mendel,  
deceased,

*Plaintiff,*

*vs.*

JOSEPH ROTH,

*Defendant.*

*Action at Law.*  
*Notice of*  
*Appeal.*

20 To Jacob L. Newman, Esq., attorney of plaintiff:

Please take notice that the defendant herein appeals to the Court of Errors and Appeals, the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause.

Dated March 15, 1923.

Respectfully yours,

HEINE, BOSTWICK & BRADNER,

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*Attorneys of Appellant.*

Service of the within notice is hereby acknowledged this twenty-third day of March, 1923.

JACOB L. NEWMAN,

*Attorney of Plaintiff.*

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*Grounds of Appeal.*

**GROUND OF APPEAL.**

Filed April 18, 1923.

**New Jersey Court of Errors and Appeals**

|   |   |   |           |
|---|---|---|-----------|
| <p>ANNIE MENDEL, administratrix <i>ad</i><br/><i>prosequendum</i> of the estate of Jacob<br/>Mendel, deceased,<br/><i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>JOSEPH ROTH,<br/><i>Defendant-Appellant.</i></p> | } | <p><i>Action at Law.</i></p> <p><i>On Appeal from</i><br/><i>New Jersey</i><br/><i>Supreme Court.</i></p> <p><i>Grounds of</i><br/><i>Appeal.</i></p> | <p>10</p> |
|---|---|---|-----------|

The appellant, Joseph Roth, states the following grounds of appeal: 20

1. The refusal of the Trial Court to sustain the objection to the swearing of the jury in this case on the grounds that Rule 72 and 73 of the Practice Act of 1922, allowing a new trial as to damages only are violative of the Constitution of the State of New Jersey and of the Fourteenth Amendment to the United States Constitution.

2. The refusal of the Trial Court to sustain the objection to the following question: 30

“Q Mr. Crogan, what is the present value of the earnings of a man who is in receipt of an income resulting from his work of \$3,800 at the age of 38, assuming that he is in good health, if the same was invested at 5% and the expectancy was as you have already given it.”

3. The refusal of the Trial Court to sustain the objection to the following question:

“Q You are basing that on the single life? A I am basing that on the single life.” 40

*Grounds of Appeal.*

*The Court.* I do not think that it is proper.

*Mr. Heine.* I make the same objection to the joint.

4. The refusal of the Trial Court to permit testimony by the defendant as to the liability of the defendant.

- 10 5. The refusal of the Trial Court to sustain a motion for direction of the verdict on the grounds that Rules 72 and 73 of the Practice Act of 1912 are in violation of the New Jersey State Constitution and of the Fourteenth Amendment of the United States.

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant-Appellant.*

Service of a copy of the within grounds of appeal is hereby acknowledged April 16, 1923.

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JACOB L. NEWMAN,  
*Attorney for Plaintiff-Respondent.*

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Order.

**ORDER.**

## NEW JERSEY SUPREME COURT.

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REGINA MENDEL, administratrix *ad*  
*prosequendum* of EDWARD MENDEL,  
deceased,

Plaintiff,

*vs.*

JOSEPH ROTH,

Defendant.

On Rule to  
Show Cause.

Order.

10

Argument on the rule to show cause obtained by the above-named defendant in the above-entitled cause having been duly brought on and heard by this Court, and this Court having given due consideration to the said matters and examined the record in said Court, it is on this 14th day of November, nineteen hundred twenty-two.

20

ORDERED, that the rule to show cause obtained in the above-entitled cause by the defendant, Joseph Roth, be made absolute on the matter of damages only, and that a *venire de novo* do issue for the trial of the cause of action of the plaintiff, Regina Mendel, administratrix *ad prosequendum* of Edward Mendel, deceased, as to damages only.

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Rule entered on this 14th day of November, 1922.

WM. S. GUMMERE,

C. J.

On motion of

STEIN, STEIN & HANNOCH,  
*Attorneys of Plaintiff.*

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*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

**AMENDED COMPLAINT.**

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

REGINA MENDEL, administratrix *ad*  
*prosequendum* of EDWARD MENDEL,  
deceased,

Plaintiff,

vs.

JOSEPH ROTH,

Defendant.

*Action at Law.*

*Amended  
Complaint.*

20

The plaintiff, residing in the City of Newark, County of Essex, and State of New Jersey, for her amended complaint herein says:

1. That heretofore and on the eighth day of June, nineteen hundred and twenty-one, at about 9:30 o'clock in the evening, the defendant, Joseph Roth, owned and operated an automobile truck in a northerly direction on St. George's avenue, near Grand street, in the City of Rahway, County of Union, and State of New Jersey.

30

2. That it thereupon became the duty of the defendant to operate said automobile truck with care and at a moderate rate of speed, and to give to all persons lawfully on said avenue due warning and signal of his approach and to have the same under proper control, and to have said automobile truck properly and carefully equipped with lights and other appliances and equipment so as to enable defendant to make proper observation with respect to other persons and automobiles lawfully on said avenue, so as not to collide with the same, and to operate

40

*Amended Complaint.*

said automobile truck in such a manner so as not to lose the proper and safe control thereof.

3. That on said date and at the same time, the plaintiff's intestate was lawfully on said St. George's avenue, a public highway, near Grand street, in said city, standing near his own automobile truck, owned by him, which last mentioned truck was at a complete standstill. 10

4. Notwithstanding the defendant's duty, the said defendant negligently and carelessly operated said auto truck and ran into and collided with the truck owned by the deceased, causing the latter truck to run into and upon the body of the said deceased, whereby the deceased received severe and fatal injuries.

5. That by reason of the injuries so received the said deceased died, on June 13, 1921, and the plaintiff therefore states that the death of the deceased was caused by the aforesaid negligence of the defendant. 20

6. The negligence of which the plaintiff complains, and of which the defendant was guilty consisted in the fact that the defendant operated said truck at a high and unreasonable rate of speed under the circumstances; that no bell or horn, or other signal was sounded of the approach of the said defendant's automobile; that the defendant's automobile was not properly equipped with suitable lights or other appliances or equipment so as to enable the defendant to make proper and careful observation so as to avoid running into and colliding with the automobile of the deceased; that the defendant did not make proper and careful observation and did not use due and proper care in operating said automobile truck so as to avoid colliding with the automobile of the deceased; that the defendant did not have his automobile truck under proper control, and operated the same without due regard to the rights of said deceased. 30

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

7. On the twenty-third day of June, 1921, the Surrogate of Essex County granted letters of administration *ad prosequendum* upon the estate of the said Edward Mendel to the plaintiff, who duly accepted the same.

10 8. Said decedent left him surviving the plaintiff, his widow, and two infant sons who are his only next of kin, all of whom were dependent upon the decedent for their support at the time of his death, and who have by reason of his death suffered great pecuniary injury.

9. This suit is commenced within twenty-four calendar months after the death of the aforesaid decedent.

Judgment will be claimed in favor of the plaintiff and against the defendant for the sum of \$25,000 and the costs and disbursements of this suit to be taxed.

20 STEIN, STEIN & HANNOCH,  
*Attorneys of Plaintiff.*

30

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*Answer to Amended Complaint.*

**ANSWER TO AMENDED COMPLAINT.**

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

REGINA MENDEL, administratrix *ad*  
*prosequendum* of EDWARD MENDEL,  
deceased,

Plaintiff,

vs.

JOSEPH ROTH,

Defendant.

*Action at Law.*

*Answer to  
Amended  
Complaint.*

20

The defendant, residing in the City of Elizabeth, County of Union and State of New Jersey, answering the plaintiff's complaint herein, says that:

1. He admits the allegations of paragraph one of said complaint.

2. He denies the allegations of paragraphs two, three, four, five and six of said complaint.

3. He has no knowledge or information upon which to form a belief as to the allegations of paragraphs seven and eight of said complaint.

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4. He admits the allegation of paragraph nine.

FIRST DEFENSE.

Defendant says that the plaintiff's intestate was guilty of contributory negligence.

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*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

OBJECTION IN POINT OF LAW.

Defendant will object at or before the trial of the issue joined that said complaint does not contain facts sufficient to sustain a cause of action.

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant.*

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REPLICATION.

Filed.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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|--|----------------------------------|---|---|
| REGINA MENDEL, administratrix <i>ad</i><br><i>prosequendum</i> of EDWARD MENDEL,<br>deceased,<br><br>vs.<br><br>JOSEPH ROTH,<br><br> | Plaintiff,<br><br><br>Defendant. | } | <i>Action at Law.</i><br><br><i>Replication</i><br><i>to Answer to</i><br><i>Amended</i><br><i>Complaint.</i> |
|--|----------------------------------|---|---|

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The plaintiff denies the allegations of the first defense of the answer to the amended complaint.

STEIN, STEIN & HANNOCH,  
*Attorneys of Plaintiff.*

40

*Postea.***POSTEA.**

## NEW JERSEY SUPREME COURT.

|   |   |                   |   |    |
|---|---|-------------------|---|----|
| REGINA MENDEL, administratrix <i>ad</i><br><i>prosequendum</i> of EDWARD MENDEL,<br>deceased, | } | <i>Plaintiff,</i> | } <i>Action at Law.</i><br><i>Postea.</i> | 10 |
| <i>vs.</i>  |   |                   |   |    |
| JOSEPH ROTH,  |   | <i>Defendant.</i> |   |    |

This case having been referred to the Essex Circuit by an order of this Court, dated November 14, 1922, to the end that if a *venire de novo* do issue for the trial of the cause of action of the plaintiff, Regina Mendel, administratrix *ad prosequendum* of Edward Mendel, deceased, as to damages only. 20

This case was tried before the Honorable Nelson Y. Dungan, Circuit Court Judge, to whom the above-entitled cause was referred by the Honorable William S. Gummere, Chief Justice, by an order made and entered on the opening day of the December, 1922, term, with a jury at the Essex Circuit on January 31, 1923.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of Eight thousand six hundred sixty-six dollars and sixty-six cents (\$8,666.66). 30

Dated January 31, 1923.

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Wednesday, January 31, 1923.

|    |  |   |                       |
|----|--|---|-----------------------|
| 10 | REGINA MENDAL, admx., &c.,<br><i>vs.</i><br>JOSEPH ROTH. | } | <i>Action at Law.</i> |
|----|--|---|-----------------------|

Before Hon. Nelson Y. Dungan, *J.*, and a jury.

For the plaintiff appears Jacob L. Newman.

For the defendant appears Heine, Bostwick & Bradner  
 by M. Casewell Heine).

Mr. Newman opens for the plaintiff.

20 Mr. Heine opens for the defendant.

30 *Mr. Heine.* If your Honor please, I would like, before the jury is sworn, to have the record show that we object to these proceedings, on the jury being called to assess a matter of damage only, on the ground that it is violative of the State constitution, being paragraph seven of Article one, and also violative of the United States Constitution, the Fourteenth Amendment, and that, for that reason, the matter is improper as it now stands before the Court.

*The Court.* The objection to the swearing of the jury will be overruled.

*Mr. Heine.* Exception.

A jury is called and sworn.

40 *Mr. Newman.* This is a suit brought to recover damages against Joseph Roth. She brings this suit as widow and next of kin, Edward Mendel having been killed in an accident for which Joseph Roth is responsible. The only

*Opening.*

question that this jury will have to determine will be the amount of damages to be awarded to the plaintiff, because it has been determined by another jury; that is, his liability was ascertained and fixed and determined, and the Supreme Court of this State has sent the case back here for this jury simply to fix the amount of damages, because they allege that there was a mistake made in the assessment of damages in the case when it was tried previously. 10

Now, we will show you that Edward Mendel was about 44 years of age at the time of his death; that he was five feet, five and three-quarters inches in height; that he weighed about 128 pounds; that he left a widow with two sons at the time of his death, one boy was 21 years and the other 19; that he was engaged in the scrap iron business; that his gross income was \$250 a week; that he gave to his wife an average of about \$100 a week for the support of himself and his family. They were married for 22 years, and we will show you that there was a period in his life from 1914 to 1919 when he was confined to a penal institution in the City of New York, for what crime it is not material nor important. It is important, however, for this jury to know that fact because it affects the question of damages and will necessarily—I might say, affect the question of damages because during that time he brought no earnings to his widow, and that is an element which the jury may consider in assessing the damages. 20 30

You will fix such amount as you consider fair and reasonable, in considering his age and his earnings and the other elements that enter into this matter.

Toward the last six months of his life—I may be wrong—I am not quite as familiar with this case as I should be—towards the end of his life he was engaged with his brother in some enterprise, but I believe he still continued his junk business and we will show you that he made such sums that he was enabled to give his widow at the rate 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

of about a hundred dollars for the board and rent, and other incidentals. We will show you that he was a good, strong, healthy man at the time of this accident, and when we show you those facts, we will ask you to award such damages as are fair and just, considering the penal damages which his widow and next of kin have sustained. That money is an element for you to determine—what is fair and reasonable under the circumstances of the case, it being admitted that his death was caused by the neglect of the defendant, Joseph Roth.

10 *Mr. Heine.* If your Honor please, I would like to move for a non-suit on the opening of counsel on the ground that it shows no element of liability upon which damages may be predicated and in the absence of such evidence, the proceeding is illegal under the same principle that I have incorporated in my former objection, the article mentioned, and of the Constitutional Amendment, fourteenth.

20 *The Court.* Overruled.

Mr. Heine opens for defendant.

REGINA MENDEL, sworn in her own behalf.

*Direct examination* by Mr. Newman.

Q Mrs. Mendel, where do you live? A At 542 South 20th street.

30 Q Are you the widow of Edward Mendel? A Yes, sir.

Q And he was killed in an accident, wasn't he? A Yes, sir.

Q When did he die? A June 13, 1921.

Q And how old was he at the time of his death? A 44.

Q And how old were you at the time of his death? A 42.

40 Q And how many children had you by him? A Two boys.

*Regina Mendel, direct.*

Q What are their names and ages? A Nathan is now 19, was born in 1900, and Elmer was born in 1902.

Q And at the time of your husband's death what business was he in? A At the date of his death, when the accident occurred, he was in the vegetable business.

Q How long had he been in that business? A That was his second trip. 10

Q Second trip out in that business? A Yes, sir.

Q And prior to that, what business was he in? A Scrap iron and metal.

Q In the iron and metal business? A Yes, sir.

Q And what did he make in that business per week, if you know? A Well, he made between \$150 and \$200.

*Mr. Heine.* I object to that, if your Honor please, unless the witness submits some further information as to the source of her knowledge.

*The Court.* Yes, I think that's very dangerous. That may be stricken out. 20

Q Did you know what he made? A I don't know exactly, but about.

Q How did you get that information? How did you know it? A Well, I know from the time that he was in business that I could get my allowance, and that he paid his expenses, and he clothed himself, and gave me so much to live on and to run my house.

Q How much did he give you to live on? A About \$100 a week, about. 30

Q And was that—I mean with reference to the time of his death. How much before his death did he pay you a hundred a week? A From 1919 'till 1921.

Q 1919 to 1921? A Yes.

Q Now, prior to 1919 where was he? A He was away from 1914 to 1919.

Q So that during those five years, from 1914 to 1919, he contributed nothing to your support from his earnings? A No. 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

Q That's correct? A Yes, sir.

Q Before 1914 what business was he in? A Scrap iron and metal.

Q The same line? A Yes.

Q And at that time, prior to 1919, what did he contribute to your support? A Well, I told you.

10 Q Prior to 1914? A Prior to 1914 I told you about a hundred. Of course, at times less, but then at times more.

Q Well, how much less? A Well, there would be times it would not be so much and at times, when business was good, I could make up for that and more than that.

*Mr. Heine.* I renew the motion to strike out what his earnings were.

*The Court.* It will be stricken out.

20 Q You are referring to when he gave you \$75? A Yes.

Q After your husband came home, that was in 1919—he came back home? A I reckon so—1919.

Q Am I right about the date? A 1919.

Q Between 1919 and the time of his death, how much did you receive for the care of the household per week?

*The Court.* She has already answered that.

30 Q Now, then, when you were first married to him, how much did you receive at that time—I mean the first years of your married life? A First off, I got \$40, then so on, \$50, and after, \$100—after 1900 he got a good business and I was getting about a hundred dollars a week and my first boy was born.

Q So that at first, during the first years of your married life, you got \$40; then you got \$50. Now, can you tell how long, about, you got the \$40? How many years, can you tell us? A Well, about a year.

40 Q And then how long did you get the \$50? A About six months.

*Regina Mendel, cross.*

Q And then what did you get? A Then gradually I got \$75.

Q For how long a time? A I should say about two years.

Q And then a hundred? A A hundred.

Q Now, at the time of your husband's death, about how tall was he? A Five feet, five and three quarters. 10

Q And about how much did he weigh? A About 170.

Q And what was his health? A Very good.

Q What kind of work did he do? A Scrap iron and metal.

Q That was his business. What kind of work did he do? A Lifting all kinds of machinery and barrels.

Q And did he ever have any serious illness in the last years of his life? A Once in 1913, I believe he had an operation on appendicitis. 20

Q Did he recover from that all right? A As well as ever.

Q At the time of the accident, I believe you testified he was in the fruit and vegetable business? A Yes, sir.

Q Had he given up the metal business entirely? A No, sir.

Q He was still running that, too? A Yes, sir.

Q Who took care of that at that time? A This was just one day that he didn't have much to do, and he put that into fruit and vegetable, gave his time. 30

Q But he still continued his metal business up to the time of his death? A Yes, sir.

*Cross examination by Mr. Heine.*

Q He was in partnership with his brother in this produce business, wasn't he? A Yes, I believe that they went to divide profits.

Q He didn't happen to help his brother out one day? A No, sir. 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

Q They had an arrangement by which they were to go into this produce business together? A So I understood.

Q And that arrangement was started about June, just before his death, June, 1921? A In June.

Q And they had made just two trips? A Yes, sir.

10 Q On this produce game? A Right.

Q Did your husband contribute this truck or the use of this one and a half ton Kelly-Springfield truck to the business? A They went out with the truck.

Q He contributed that to the produce business, did he? He put it in? A Well, they went out with it, but what understanding they had, I can't tell.

Q You understood they were going into this business, 50/50, to sell produce, is that right? A That was they was going to pay—the profits were going to be divided.

20 Q And they were both going to work to produce those profits, weren't they? A They worked, both.

Q They were both going to work in the produce business? A While they was out, of course.

Q And this truck that belonged to your husband, that was to go into the selling of produce in this produce business, wasn't it? A I don't know,

30 Q It was to be used for that, wasn't it? What's the answer? A I know they loaded the truck with fruit and vegetables, so that is what it was used for.

Q You knew your husband and his brother went into this produce business together, that right? A Right.

Q What business— And the business was selling produce over a route, wasn't it? A Was what? I don't understand it.

Q Well, what kind of a business did your husband go in with his brother? A They went out to sell a load of fruit and vegetables.

40 Q And you knew that his brother's truck had been burned up? A I did not.

*Regina Mendel, cross.*

Q Did you know whether or not his brother had a truck at the time they went into business in June, 1921?

A I did not.

Q Did you have any knowledge that your husband's truck was going to be used in the general business that he and his brother were going in, of selling produce? A It was used. I know that it was used. They went out and bought a load of fruit and vegetables.

10

Q And at that time that was what they expected to continue to do, wasn't it? A That's what they did.

Q Did you know that the business in which your brother and your husband was to continue along this line? A I don't know. I know this was their second trip.

Q Before his death, do you know whether your brother and husband proposed to make other trips, further trips? A That was hard to tell. It was not possible to discuss business after that second trip.

20

Q You knew something about what your husband's business was before his death? A Well, I understood it was fruit and vegetables.

Q And how long were they going to be in this selling vegetable business when they started in June, 1921—a day or was it to go on for longer period? A Well, they went one day and this was the second time.

Q And if he hadn't been killed, would he have continued in business with his brother? A Probably.

30

Q In the business of selling these vegetables, is that right?

*The Court.* What's the answer.

*The Witness.* Well, if he would live—is that what you mean?

Q Yes. A He was on certain days to go out with his brother.

Q And he had given up the junk business? A He had not.

40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

Q He was using his truck in the vegetable business, didn't he? A Just one or two days a week. This was the following Tuesday.

10 Q So, as you understood the arrangement between your husband and his brother, they were not to be in the produce business every day, is that right? Only certain days in the week? A Not every day. Of course not, not every day.

Q And was the idea that your husband was to use his truck in the junk business part of the week and in the produce business part of the week? A Yes, sir.

Q And do you know what his brother who didn't have any truck was supposed to do the days when they didn't go out with produce?

*Mr. Newman.* I object to that.

*The Court.* Well, if she knows.

20 *The Witness.* I do not.

Q But they are in partnership, 50/50, on this vegetable business, you know that? A The days they were out the profits were to be divided.

Q Do you know what kind of an arrangement your husband made as to how many days they were to go out in that vegetable business? A I do not.

Q Well, the junk business got pretty poor after about 1920, 1921, didn't it? A It was a little poorer.

30 Q It was very good during the war, wasn't it? A I can't remember. When was the war?

Q For about a year, before your husband's death the junk business was poor, wasn't it? A Well, it was poorer than it has been years ago, but it was poorer than it was in 1912 or 1913, and I called it poorer.

Q You mean it was poorer for a year before his death than it was in 1913? A A little slower.

40 Q You say it was poorer in the year before his death than it was in 1912 and 1913, is that right? A That's right.

*Regina Mendel, cross.*

Q And yet during this time that the business was poorer, you received the same amount of money, a hundred dollars? A I did.

Q What kind of a man was your husband in disposition, pleasant, agreeable kind of man, or was he rather stern and severe? A Very good natured; very good provider and agreed with all the business men; every one liked him. 10

Q Did he ever have any business troubles at any time that you knew of? A I don't remember.

Q And after you were first married, he was then in the junk business, was he? A Yes, sir.

Q Where? A Where I lived.

Q Where was that? A That was 51 Morton street I lived then.

Q He conducted the business right there from his home? A Yes, sir.

Q And where did you move from there and when? A Well, I did not leave there for a long time. I moved next to Barclay street. 20

Q How long did you stay in Barclay street? A I can't tell exactly; not very long because the place was too small.

Q You mean the house? A The house.

Q Did he have a yard adjoining these two houses where he could store junk and so on? A Not there, just buy and sell.

Q Without bringing any stuff home? A Right. 30

Q And from Barclay street where did you move? A Fifteenth avenue.

Q What number? A Wait a minute.

Q Between what streets? A 327.

Q And about what time was that, what period? A I can't recollect the time of the year.

Q Was it before your first boy was born? A After.

Q That would be after 1900, is that right? A That's right. 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

Q Did you have any yard or place where he could store junk in the Fifteenth avenue place? A In a different place. He had a stable and also room for stock.

Q And at that time how many horses and wagons did he have? A One horse and wagon.

10 Q And from Fifteenth avenue where did you move?  
A To 76 Monmouth street.

Q And about when did he move there? A Well, I am not sure whether it was 1910 or 1911; I am not sure.

Q Did you have a yard? A Yes, sir.

Q Or place where he could store junk and metal scrap? A Yes, sir.

Q Next to the building? A Yes, sir.

Q And a place for the horse and wagon? A Yes, sir.

Q And he had one horse and wagon then? A For a  
20 while.

Q Well, how long? A I don't know exactly because he bought a lot of stuff and the people would cart it that would buy it.

Q Yes, but he had just one horse and wagon? A Yes.

Q About 1910? A Yes, sir.

Q Between 1910 and 1914 when he was sent away, did he have any additional horse and wagon? A Horse and wagon?

30 Q Did he have two or one? A One; he had at times two but at 1914 I remember he had only one.

Q When he had two he would hire a horse and wagon for a special job? A Hire trucks or he would sell his goods and the same people would get the stuff under those conditions—it was sold.

Q But then from the time you were married down to 1914 he only had the actual ownership of one horse and wagon? A Part of the time two horses.

Q He owned two horses? A Yes.

40

*Regina Mendel, cross.*

Q But not two wagons? A At one time I remember he had two wagons, but I don't recollect how long.

Q You say in 1914 he only had the one horse and one wagon? A One horse and one wagon.

Q Would you be sure that you hadn't moved down to Monmouth street where he had this yard in 1906? A I am not sure. 10

Q It might have been 1906, might it not? A That's how many years ago? I am not good at figuring right now.

Q Do you remember about 1906 that he had some difficulty with some court trouble in his business? A I don't remember.

Q Do you recall whether or not he ever had to make a payment out of his business income and earnings for any purpose, any special purpose, such as a fine or anything of that kind? A I don't know. 20

Q During the time he was conducting his business down to 1914, do you know whether he had any trouble with the police in connection with that business?

*Mr. Newman.* I object to that.

*Mr. Heine.* I think I have a right in pressing the evidence as to the kind and type of business man he was, and any penalties or payments that were made as a result of that.

*The Court.* Any payments I think are proper; the mere fact that he had trouble with the police is not. 30

Q During that period, do you know whether he ever had to make any payment as a result of any violation in his business of the municipal ordinances or the state laws? A I don't know.

Q Do you know whether or not down to 1914—I am not speaking of since 1914—down to 1914 he was ever kept away from business by reason of being arrested? A I don't know. 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

Q Would you say between the time you married him and the year 1914 he was never away from his business by reason of being arrested and held?

*The Court.* That's down to 1914?

*The Witness.* I don't remember.

10 Q Wouldn't you remember an occurrence where your husband was deprived of conducting his business temporarily by reason of his liberty being taken away? A I don't remember because he hasn't been away any length of time.

Q Well, down to 1914—not beyond that time, but before that—can you state whether or not he was ever arrested? A I don't remember.

Q Would you swear that he was not? A I can't recollect; I don't know when so I don't remember. How can I say it?

20 Q You don't remember? A I don't recollect.

Q Would you swear that he was not, down to 1914, at any time, arrested?

*Mr. Newman.* I objected to that.

*The Court.* She has already answered that.

Q Do you know whether or not before 1914 he had to pay any fine for a wrong-doing of any kind in connection with his business?

30 *Mr. Newman.* I object.

*The Court.* The question was asked a while ago and she said she didn't remember.

Q Do you know whether or not before 1914, your husband was ever convicted of a crime?

*Mr. Newman.* I object to that.

*The Court.* Sustain the objection.

40 Q Do you know whether or not before 1914, whether he was put under arrest and had to stand trial for any offense?

*Regina Mendel, cross.*

*Mr. Newman.* I object to that.

*The Court.* Sustain the objection.

*Mr. Heine.* Exception.

Q Was your husband, before 1914, convicted of the crime of receiving stolen goods at 76 Norfolk street in Essex County?

10

*Mr. Newman.* I object to that and ask that the Court to charge the jury to disregard it.

*The Court.* Sustain the objection.

*Mr. Heine.* Exception.

Q You testified at the previous trial, did you not?  
A I did.

Q And, referring to page 27, at line ten—I read from the stenographic minutes—you were asked the following question, “How far back was it that he (your husband) commenced to give you as high as \$100 a week?” and your answer, “Well, the last twenty years.” Did you so testify?

20

*By the Court.*

Q Did you say that in the other trial? A I don't know what I said because, under the conditions I was under on the stand—I don't know what I said.

*By Mr. Heine.*

Q Would you deny that you said that? A I don't remember.

30

Q Is it true? A I don't know.

Q On the previous trial you were asked the following question, “Where was your husband in business?” and you answered, “Previous? Well the last 11 years at 76 Monmouth street.” Did you so testify?

*By the Court.*

Q Did you say that at the other trial? A I don't remember what I said.

40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

*By Mr. Heine.*

Q Is that true? I will read the question and answer for you again. "Where was your husband in business?" Answer, "Prior? Well, the last 11 years we are at 76 Monmouth street." Is that true? A Well, I was at 76 Monmouth street.

10 Q I call your attention to a further question. Did you testify, in answer to the following question, "And during that 11 years has he (referring to your husband) continued to conduct the business from there—from his house?" your answer being, "Yes, we got a yard there." Did you so testify? A Well, we had a yard there.

Q I will read the question and answer to you again. "And during that 11 years has he continued to conduct the business from there—from his house?" and your answer, "Yes." Is that true?

20 *By the Court.*

Q What's the answer? A I don't remember what I said then—don't recollect.

*By Mr. Heine.*

Q I call your attention to another question, Mrs. Mendel—the same page, about 929—this question was asked, "And during the last ten or eleven years I understand you to say his uniform contribution to you has been about \$100 a week?" Is that true? And your answer, "Before that, also, and I now recollect it was that." Did you so testify. A Well, I understood before that—

30 Q (Interrupting.) Can you answer the question? Did you testify to that—to what I have just read? A Before that? I received that, I understood before 1914.

Q I don't want to confuse you, but I will read this question. You were testifying on the 25th day of January, 1922—bearing that in mind—that date—you were asked this question, "And during the last ten or eleven

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*Regina Mendel, cross.*

years I understand you to say that his uniform contribution to you has been about \$100 a week, is that true?" and you answered, "Before that, also, and I now recollect it was that." Did you so testify at that time? A I meant all the time that he was home.

Q Did you so testify?

*By the Court.*

10

Q Did you say that at the other trial? A I don't know whether I said that, but I meant all the time that he was home.

*By Mr. Heine.*

Q Can you answer, or will you answer: Did you so testify at this previous trial? A I remember I testified, but I understood while he was home.

*By the Court.*

20

Q The question is: Did you say that at the other trial tried last January, a year ago, what he has just read—did you say at that trial what he has just read? A If I said it, I didn't understand it that way. I understood the question was while he was home.

*By Mr. Heine.*

Q When did your husband return from Sing Sing Prison? 30

*Mr. Newman.* I object to that. There is no evidence here that he went to Sing Sing Prison.

Q Do you know in what penal institution your husband was confined, as referred to by your attorney?

*Mr. Newman.* I object to that.

*The Court.* I will sustain the objection.

*Mr. Heine.* Exception.

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Q When did your husband return from whatever penal institution he was in after 1914? A 1900.

*By the Court.*

Q What? A 1919.

*By Mr. Heine.*

10 Q What time of year? A I think it was in November. I am not sure.

Q November, 1919? And between 1914 and 1919, how was your support provided for?

*Mr. Newman.* I object to that. How is that material?

*The Court.* Overrule the objection.

*Mr. Newman.* Very well. Allow me an exception.

20 *By the Court.*

Q Tell us now how were you supported during that time, between 1914 and 1919? A I saved money and it kept me going.

*By Mr. Heine.*

Q You lived on your own savings, is that right? A I have goods left in the yard—that I sold.

30 Q And immediately after your husband came back in November, 1919, did you again receive from him a hundred dollars a week?

*The Court.* These long waits take up a great deal of time.

A He did.

Q Did he start right in in business again? A He did.

Q And you can be positive that he returned from this institution in the year 1919? A I think so.

40 Q Don't you know when he came back? A I don't remember exactly, but I am most sure it was 1919.

*Regina Mendel, cross.*

Q Could you be sure it wasn't in 1921? A No, it was not in 1921.

Q He didn't serve his full sentence?

*Mr. Newman.* I object to that.

*The Court.* Sustain the objection.

Q Have you anything here by which you can fix any family event, or any other event, by which you can fix the year, and the time in the year, that he returned so as to be positive about it? A I don't remember exactly. 10

Q Can you be sure of the year, whether it was 1921 or 1919? A I know it was not 1921.

Q It might have been 1920? A I don't think so.

Q Can't be sure of that—whether it was 1920 or 1919? A I don't recollect. I am most sure he was home two years and that's how I could figure it was 1919.

Q What time of year—the summer time or the winter time? A I think it was around Thanksgiving. 20

Q And can you be sure of certain whether it was Thanksgiving in the year 1919 or the year 1920? A I don't remember.

Q Is there any way in which you can refresh your memory on that particular date and time? A I can—My memory don't work right. I can't recollect. I can't remember exactly.

Q Are there any members of your family here in court? A Yes. 30

Q If you talked to them, do you think you could refresh your recollection so as to remember that? A Probably.

*Mr. Heine.* I will ask the Court that the witness may be permitted to refresh her recollection as to the particular date or year when the husband returned.

*The Court.* I don't think that would be a proper way to refresh her recollection. You might call them. 40

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Q You are willing to swear that it was not later than 1920 in any event, is that correct? A I said I didn't remember.

Q Your husband's operation for appendicitis was in 1913. Was he ever sick after that? A Never.

10 Q You don't know whether he was sick while he was away or not? A He was well.

Q While he was in this institution, do you know whether or not he was sick? A He was always well and strong.

Q Did you visit him while he was in this institution? A I did.

Q How many times? A As often as I was permitted.

Q And during that four-year period how often? A I don't remember.

*By the Court.*

20 Q Did you go every month or every week? A Why, I was not so often as that, not quite so often.

*By Mr. Heine.*

Q And was he always in good health when you saw him there? A Yes, sir.

Q What time of year did he have this operation for appendicitis? A Some time in the fall, but I don't remember what month.

30 Q And where was it you visited him?

*Mr. Newman.* I object to that.

*The Court.* Sustain the objection.

*Mr. Heine.* It might be in a healthy place or an unhealthy place. It might have some materiality.

*The Court.* I don't think so.

Q What became of the horse and wagon while he was away? A I sold it.

40 Q Did you use the money for the support of yourself and family? A I did.

*Regina Mendel, cross.*

Q You had two boys at this time? A I did.

Q Neither one of them worked? A They were going to school then.

Q And they continued to go to school until 1919? A I believe the older one was out of school.

Q He got married, did he? A He is married now.

Q Is the other one married? A Not yet.

Q And during the time between 1914 to 1919, did the older one go away to Minneapolis or some other place?

A 1914, he was away, but I don't remember what year.

Q Between 1914 and 1919, was he within the draft age? A He was in Minneapolis. No, he was twenty then.

Q Twenty? A He was born in 1900? A Yes.

Q And 1918, do you know whether he was in the draft? A No, he was not.

Q Do you know whether or not he had his draft record taken before any local board here?

*Mr. Newman.* I object to that.

*The Court.* I don't see any relevancy to that.

*Mr. Heine.* I will withdraw it.

Q And when your husband came back in 1919, where did the money come from to start the junk business again?

*The Court.* We can't wait so long for these answers, Mrs. Mendel.

A I drew money from the building loan, and he started in business.

Q Bought another horse and wagon? A He bought a truck.

Q This one and a half ton truck? A Yes, sir.

Q And at the time of his death that truck was not entirely paid for? A One note was due.

Q And that was between 1919 and June, 1921, that you have been paying instalments on that truck—that he had been? A He paid on it.

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Q You didn't draw any money from your account for that—the purchase of that truck? A No, sir.

Q In whose name was this building and loan? A Mine.

Q In what building and loan? A The Home.

Q Did you dispose of all the shares at that time that you owned there, did you? Did you borrow on them?  
10 A Yes, sir.

Q Has that loan been repaid?

*Mr. Newman.* I object to that. How is that material?

*The Court.* I think the money transactions can be gone into pretty thoroughly. I overrule the objection.

*Mr. Newman.* Allow me an exception.

Q Has the loan been repaid? A Well, I am paying  
20 it until—I paid it until July 1st, 1922—I was paying on it.

Q How much was it—all paid up then? A I paid at the rate of \$20 a month.

Q Did you pay it all up? A I did not.

Q What became of the shares?

*Mr. Newman.* Now, is that material? After July, 1922, what became of the shares—what happened to the mortgage?

*The Court.* I don't believe so.

Q The only money that your husband had to start in  
30 business in 1919, at Thanksgiving time, 1919, was what you borrowed and gave to him, is that correct? A I don't think this was all. I gave him some money to start in business.

Q And he gave you back a hundred dollars a week?  
A He was doing business.

Q How soon after he got back, did he pay you the  
40 hundred dollars a week? Right away? A I don't remember how soon, but he went right in business.

*Regina Mendel, cross.*

Q Did any one ever come to the yard there in Norfolk street and claim part of the junk that was there—to take it away.

*Mr. Newman.* I object to that.

*The Court.* Sustain the objection.

Q Your husband only did business about a year after he came back in 1919, until the junk business began to get poor, is that right? A Well, he started in business right after he came home, and if it's a year I don't know. It isn't a year until 1921, and I am most sure that it was two years. 10

Q A year prior to June, 1921, when he was killed, the business was poor? A It was not poor. It was poorer than what it used to be—than when you used to have to hire a couple of trucks.

Q Did your husband have a bank account? A He did. 20

Q Did he give you a check or cash? A Cash.

Q Never gave you any check? A Not that I remember of.

Q Did you have any bank account of your own? A I did not.

Q Never have had any independent bank account of your own? A No, sir.

Q Where was your husband's bank account after 1919? A I think it was the Ironbound Trust Company. 30

Q And did he have a bank account continuously there up to the time of his death? A Yes, sir.

Q Was that account in his own name or a joint account on which you could draw? A His own.

Q You couldn't draw on it? A It was his own.

Q There was no provision made so that you could draw on it? A No, sir.

Q Sure about that, are you? A Well, it was his account. 40

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Q Did you ever, in any way, draw the funds from that account yourself? A It was on his name.

*By the Court.*

Q You are not answering the question? A It was on his name, and he was the only one could draw.

10 Q It is frequently arranged that other people can draw on other people's funds? A I did not draw on his account.

*By Mr. Heine.*

Q And did he pay the money to you always on some particular time of the week, like Saturday or Wednesday, or was it different times? A No particular time.

Q Would you say every week he paid you a hundred dollars? A Every week, of course, about.

20 Q In cash. Did he give it to you at one time or different times during the week? A At one time.

Q Always about this hundred dollars? A Always about a hundred.

Q And never after 1919 by check?

*The Court.* We already have that.

Q Did you own that house in which you lived at the time of your husband's death? A I did.

Q Your name? A Yes, sir.

30 Q When was that bought? A About 12 or 13 years ago.

Q And from the present time is it mortgaged?

*Mr. Newman.* How is this material?

*The Court.* Sustain the objection.

Q Was that house, during your husband's life-time, the subject of a mortgage?

*Mr. Newman.* I object to that.

*The Court.* Overruled.

*Regina Mendel, cross.*

*By the Court.*

Q Was there a mortgage on your house? A A building loan mortgage.

*By Mr. Heine.*

Q And up to the time of his death, what was the amount of that? A I paid. It was in my name. It was my house. 10

Q And with your money? A It was my money that I got from him.

Q Out of this hundred dollars a week? A I saved part of it until we bought the house.

Q How much had you saved up to the time that you bought this house? A About a thousand dollars.

Q And was that what was paid in at the time you bought the house? A Yes, sir.

Q That was all the cash? A I think so. 20

Q And the rest was on mortgage? A Yes, sir.

Q How much did it amount to? A I don't remember whether it was 48 or 32; I can't recollect right now.

Q About how much had that mortgage been reduced up to the time of your husband's death in 1921? A I paid it monthly.

Q Had you kept your payments up to the time of his death out of this \$100 a week? A I did.

Q You kept it up all the time during the time he was in the institution? A I did. I got in some of it. I rented part of the house out. 30

*By the Court.*

Q Was that what you paid the \$20 a month on? A No, this was additional mortgage.

*By Mr. Heine.*

Q At the time of his death, do you remember the amount that was then due and unpaid? A I don't remember. 40

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Q Well, can't you state whether it was \$4,000 or \$5,000? A I would have to figure it up good. I paid monthly and I don't know how much was due.

Q And those payments have been made every month since the mortgage was put on there? A Yes, sir.

Q Never lapsed? A No, sir.

10 Q You are living in that house now? A No, sir.

Q Were you, at the time of your husband's death?

A I was.

GEORGE M. CROGAN, sworn on behalf of plaintiff.

*Direct examination by Mr. Newman.*

Q Mr. Crogan, what is your business? A I am connected with the mathematical or actuarial department of the Metropolitan Insurance Company.

20 Q You are familiar with the table of expectation of life? A Yes, sir.

Q What kind of a table is the Carlisle table? A It is called a population table of mortality that's made of lives having had the benefit of a medical examination.

Q What is the expectation of a male in good health, age 44? A At age 44, the expectation of life, according to the Carlisle table of mortality is 25 years and 9/100.

30 Q Tell us what is the average expectancy of the life of a woman, age 42, who enjoys good health? A At age 42, the expectation of life is 22 years, and 44/100.

*By the Court.*

Q Let's have the joint expectancy? A The joint expectancy is 18 years and 55/100.

*By Mr. Newman.*

Q And what is the present value of the earnings of a man with an income of \$5,000 at the age of 44? A At age 44?

40 Q If the sum were invested at five per cent?

*Maurice Grubner, direct.*

*Mr. Heine.* I object on the ground that the evidence is too indefinite as to income, as it now stands.

*The Court.* The objection will be overruled.

*Mr. Heine.* Exception.

A The value of \$5,000, according to the expectancy by the Carlisle Table at age 44, with 5% interest, is \$64,030.

Q What is the present value on the joint basis? A 10  
According to the joint expectancy, the value of \$5,000 a year would be \$52,875.

*By the Court.*

Q Just give us that for \$100? A For \$100 it would be \$1,057.50.

*Mr. Heine.* No question by defendant.

MAURICE GRUBNER, sworn on behalf of plaintiff.

*Direct examination by Mr. Newman.* 20

Q Mr. Grubner, where do you live? A New London, Connecticut.

*By the Court.*

Q Where? A New London, Connecticut.

*By Mr. Newman.*

Q And are you a brother of Regina Mendel? A I am. 30

Q Who was on the witness stand? A I am.

Q And did you know Edward Mendel in his lifetime?  
A I did.

Q Can you tell us how much he weighed? A Weighed approximately 175 pounds, I would think.

Q And can you tell us how tall he was? A Perhaps my judgment would be about five feet, six or seven.

Q And what kind of health did he enjoy? A Very good; very healthy, strong man.

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Q And how long did you know him, sir? A Since 1899.

Q And at the time of his death do you know what business he was in? A Scrap iron, metal.

Q Were you here in Newark frequently to see him? A Well, yes, every time I came down.

10 Q Did you have occasion to come here? A Yes.

Q Did they come up and visit you? A Yes; they stayed up there a few days.

*Cross examination by Mr. Heine.*

Q You always lived up in Connecticut? A No, sir.

Q Where was your residence in 1899? A I lived in Newark—I beg your pardon—I think it was New York City. The following year I believe I moved to Newark.

Q How long have you lived in Connecticut? A Just a little bit over three years.

20 Q Were you accustomed to seeing very much of your brother-in-law? A When I lived down here, yes, regularly.

Q A great deal? A Oh, yes.

Q How long did you live in Newark? A About five years.

Q Then where did you go? A Cleveland, Ohio.

Q And from there to Connecticut? A No, from there back to New York—New York City.

30 Q I see—so the association with this man was only about five years, while you were in Newark? A Oh, no.

Q Was he over in New York? A Regularly, yes.

Q Occasionally? A Regularly; either he would visit me or I would visit him; call on each others regularly.

*By the Court.*

Q How old are you? A 39.

*By Mr. Heine.*

40 Q Were you in any kind of business with him? A No, sir.

*Motion for a Non-suit.*

Q At any time? A No, sir.

Q Did you have anything to do with his junk business just prior to 1913? A No, sir.

Q Where did he conduct the business just prior to 1914? A 1914, they lived in the same place where they lived at the time of his death.

Q Monmouth street? A Monmouth street, I believe. 10

Q What business took him over to New York? A Oh, yes; he often came in and told me he went in to see different people.

Q Regularly? A I wouldn't say often. I don't know whether you would call it regularly.

*Mr. Newman.* Plaintiff rests.

*Mr. Heine.* I renew the motion, and I will make a motion for non-suit, as there appears no case or proof of liability in the case, and therefore, under the rule that I claimed in this previous case, the defendant cannot be legally held. If so, it would be a violation of the State and Federal Constitutions. 20

*The Court.* The motion will be denied with an exception.

*Mr. Heine.* The defendant will offer to prove, by Mr. Roth, the facts concerning the accident which resulted in the death of the plaintiff's husband.

*Mr. Newman.* I object to the offer. 30

*The Court.* The offer will be overruled as the case has been sent back for the determination of damages by the Supreme Court on the verdict previously rendered, and an exception to that ruling may be noted, for the defendant.

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ARTHUR TENCH, sworn on behalf of defendant.

*Direct examination* by Mr. Heine.

Q Just read into the record the entry regarding Edward Mendel.

*Mr. Newman.* That is subject to my objection.

10 *The Court.* The Court overrules the objection.

*Mr. Newman.* I would like to make my objection on the ground that it is too remote to have any binding effect or be evidence in this case.

A I am reading from the criminal record of the Court of Special Sessions of Essex County. James Newcombe charged with larceny and receiving stolen goods; presented by the grand jury on March 24, 1906; defendant Edward Mendel pleaded not guilty on March 30, 1906.  
20 The case was carried over and on April 1, 1908, the defendant was found guilty by a jury.

*By the Court.*

Q April 1, 1908. When was the indictment? A On March 24, 1906.

Q And when was the plea? A Plea was on March 30, 1906.

Q Now, then, give us the other date? A April 1st, 1908.

30 Q Pleased guilty? A Found guilty by a jury. On April 27, 1908, the defendant was fined \$500 without costs; on April 30, 1908, the sentence was that defendant be placed on probation for one year, to have to pay \$150 cash down and \$20 a month.

Q For one year, did you say? A Yes, sir.

*Mr. Heine.* Now I will offer, if your Honor please, an exemplified copy of the Court of Special Sessions of the Peace of the County of New York.

40 *Mr. Newman.* I object to it on the same ground.

*Motion for Direction of a Verdict.*

*The Court.* I will overrule the objection, and an exception may be noted. Suppose you just tell us what it shows.

*Mr. Heine.* I will read the main items. This shows an indictment by the Grand Jury. They accuse Edward Mendel of the crime of robbery in the first degree committed on the eighth day of January, 1914, in the night-time with force and arms with one Pauline Ketzle in taking one lavalier and one ring of the value of \$1,000, each the property of Pauline Ketzle, and said Edward Mendel inflicted bodily harm and injury upon said Pauline Ketzle. 10

*Mr. Newman.* Was there a conviction or a plea?

*Mr. Heine.* It contains other indictments by the Grand Jury, but the conviction was on that one of robbery. Motion to set aside verdict for a new trial. There is a motion to dismiss the indictment March 26th. Tried and convicted of robbery in the first degree; continued to April 9, 1914. State Prison—sentenced to State Prison for 18 years. The names of the jury appear here. Monday morning, April 6, 1914. This was Thomas C. T. Crane, Judge of the Court of Special Sessions. 20

*The Court.* Was it set aside?

*Mr. Heine.* No, sir; and after due deliberation, it was denied. There was a motion to arrest judgment. That was denied. It is ordered and adjudged by the Court that the said Edward Mendel having been convicted of the felony be imprisoned in the State Prison. I ask to have that marked. 30

(Paper received in evidence and marked "Defendant's Exhibit A.")

*Mr. Heine.* I renew the motion for the direction of a verdict on the same grounds that I made at the beginning of the trial.

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*The Court.* The motion will be denied.

Exception noted as ground of appeal.

Mr. Heine sums up for the defendant.

Mr. Newman sums up for the plaintiff.

10

### CHARGE.

The Court charges the jury as follows:

DUNGAN, *J.*

20

Gentlemen, as you have heard stated in the argument and also in the opening, another jury has decided that the defendant is liable for such damages as the plaintiff has sustained, so you are not called upon, in this case, to settle the question of liability at all. When the case was completed, the Supreme Court, which reviewed this case, said the verdict of the other jury, establishing liability was right, but the amount of their verdict was wrong, and they have sent it back here for you to assess the damage, and to say how much this plaintiff is entitled to. In other words, your sole duty is not to determine whether or not there is liability for that's been settled, but to state how much the plaintiff is entitled to recover now.

30

We have a statute in New Jersey which may be used as a guide in determining damages in a case of this kind, and that statute uses these words: "And in every such action—that's an action like this—the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person."

40

The deceased husband left a wife and two children, aged respectively at the time of his death, 21 and 19 years of age, and the question for you to determine is what this wife and these children have lost through the death of the husband and father in dollars and cents. In a case of

*Charge to Jury.*

this kind, the wife may not recover anything for the loss of the sympathy and companionship of her husband—for the distress of mind which she may suffer because of his death. She may not even recover the amount of the doctor's bill in the last illness, or the funeral expense, but under this statute what she is entitled to recover is what she has lost in dollars by the cutting short of his life, and that will be your duty in this case: to endeavor to ascertain from the evidence the amount of money of which she has been deprived by the death of her husband. They were married—I don't know that she gives the exact date of their marriage. She says that Nathan was born in 1900, so we may assume that they were married, at the time of the husband's death, around 22 or more years, and she says that her husband was in the scrap iron and metal business; that when they were first married he paid her about \$40 a week for a year and then he gave her \$50 a week for about six months more, and then he gave her \$75 a week for about two years, and then in about 1900, he commenced to pay her \$100 a week, which he paid her up to the year 1914, when, for an offense which you have heard mentioned, he was sent to prison and remained in prison until 1919, and during that period contributed nothing to her support; that when he came out of prison in 1919 he again went into the metal and junk business and continued in that business down to the time of his death, the last few months being in connection with the vegetable business which he went into with one of his brothers, and it was upon the second trip made in this vegetable business that he met his death.

Now, in a case of this kind you can readily see that it wouldn't do to give in a lump sum to the plaintiff at this time, the whole amount of money that she would have received from her husband during the continuance of his and her life because if you do that she would receive the

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whole amount which put at interest now would amount to much more than what she would receive if her husband had lived. For instance, to use an example, if in 20 years he would bring in \$1,000 a year, he would have brought in \$20,000 in the 20 years but if you give her \$20,000 now that \$20,000 in 20 years at 5% would just double itself, and that would be the same as giving her \$40,000. That is not what you are to do. You are to give such sum as Mr. Mendel would have contributed to his family as long as his family would have lived; that is, total amount he would have contributed to them during their joint lives. As an example and using a sum so small that it cannot be understood as indicating any amount which the Court would suggest to you because it would be probably totally inadequate, suppose, for instance, the husband brought in a hundred dollars a year and that he brought that in for five years, he would bring in \$500 in five years. Now what sum, with the interest for five years, would amount in five years to \$500. Well, we know that the way to do that is to say that the \$500 represents 125% of what he would bring in in the five years. Therefore, 100 per cent. would be \$400, and the interest on \$400 at 5 per cent. for one year would \$20. I think that will illustrate what I mean. In other words, you must find the present value of the amount of money of which this woman has been deprived.

Now, as an aid to determining what this amount is, Mr. Crogan has been produced here, and he says that the expectancy of the man, in good health, at 44 years, is 25 years; that the joint expectancy of a man, 44 years, and his wife, 42 years, would be 18½ years, and he says that the present value of \$5,000 for 18.55 years—that, such sum as I have said, with the interest at 5 per cent. for 18.55 years would be produced by the \$5,000—is \$52,875, but the Court asked him what it was, assuming that the amount was \$100—he said that it is \$1,057.50. That's

*Charge to Jury.*

only a guide. You are not bound by any such figures as that because, as was suggested in the argument, this man may have lived longer or may have lived a shorter time. Then you must take into consideration the vicissitudes of life through which a person passes; even though he was in good health he may have had some illness or some accident which would have impaired his earning capacity ( 10 or which might have ended his life, or the same thing might occur to his wife, and of course, even though his life should be continued and hers should end, that would end her expectancy of receiving any profit from it, so you have to consider not only the possibilities of what will happen to one of them, but to both of them. And then there has been given evidence of the conviction of this man in Essex County in 1906 for which he was sentenced, and of his conviction in New York State in 1914 of the crime of robbery in New York State. In 1919 he was ( 20 released from imprisonment. There is nothing so far as that sentence is concerned which would impair his earning capacity, and, of course, if, after 1919, when he was released, he would continue to live in the paths of rectitude for the balance of his life and would earn and contribute to his wife, his former convictions should have nothing to do with the amount of your verdict in this case, but the reason that that evidence was admitted was because of its bearing upon the vicissitudes of life and the probabilities which you may consider as to whether this man ( 30 would, having been convicted in 1906 of one crime and then committing robbery in 1914, probably have done something which would result in future imprisonment which would withdraw from this plaintiff his support during the time of such incarceration. Now all of these things are matters which you may consider in determining how much this wife and family—of how much this wife and family—have been deprived by the death of Mr. Edward Mendel. Now, when you have determined the ( 40

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amount per week, month or year of which the family has been deprived, then the next thing to do is to determine, considering all these vicissitudes of life, the length of time they have been deprived of it, and then, having obtained that total, find, as I said to you, the present worth of that sum total, and the result of that calculation should be the amount of your verdict.

10

*Mr. Heine.* I respectfully except to that part of the Judge's charge in which he refers to the previous jury having disposed of the question of liability.

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*Exhibit A for Defendant.*

**Exhibit A for Defendant.**

THE PEOPLE OF THE STATE OF NEW YORK.

By the Grace of God Free and Independent.

TO ALL TO WHOM THESE PRESENTS  
SHALL COME, GREETING: 10

(SEAL). KNOW YE, That we, having inspected the files of our Court of General Sessions of the Peace of The City and County of New York, holden at the Building for Criminal Courts, in the Borough of Manhattan of The City of New York, in and for the County of New York, do find a certain *indictment, extract of minutes, and minute of conviction*, there remaining of Record, in the words and figures following, to wit:

COURT OF GENERAL SESSIONS OF THE PEACE  
IN AND FOR THE COUNTY OF NEW YORK. 20

THE PEOPLE OF THE STATE OF NEW YORK,  
*against*  
EDWARD MENDEL.

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse *Edward Mendel* of the Crime of Robbery in the *First* Degree, committed as follows:

The said *Edward Mendel*, late of the Borough of *Manhattan* of The City of New York, in the County of New York aforesaid, on the *eighth* day of *January*, in the year of our Lord one thousand nine hundred *fourteen*, in the *night* time of the said day, at the Borough and County aforesaid, with force and arms, in and upon one *Pauline Koetzle* in the peace of the said People then and there be- 40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

ing, feloniously did make an assault, and *one lavelliere* of the value of five hundred dollars and two earrings of the value of one thousand dollars, each, of the goods, chattels and personal property of the said *Pauline Koetzle* from the person of the said *Pauline Koetzle*, against the will and by violence to the person of the said *Pauline Koetzle* then and there violently and feloniously did rob, steal, take and carry away, the said *Edward Mendel* in order to accomplish the said robbery did then and there feloniously inflict grievous bodily harm and injury upon the said *Pauline Koetzle*, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

## SECOND COUNT—

AND THE GRAND JURY AFORESAID, by this indictment, further accused the said *Edward Mendel* of the Crime of Grand Larceny in the *First Degree*, committed as follows:

The said *Edward Mendel*, late of the Borough and County aforesaid, on the day and in the year aforesaid, in the time of the said day, at the Borough and County aforesaid, with force and arms, the same goods, chattels and personal property mentioned, described and set forth in the first count of this indictment to which reference is hereby made, of the value mentioned and set forth therein, of the goods, chattels and personal property of one *Pauline Koetzle* on the person of the said *Pauline Koetzle* then and there being found, from the person of the said *Pauline Koetzle* then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

## THIRD COUNT—

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said *Edward Mendel* of the Crime of Assault in the *Second Degree*, committed as follows:

*Exhibit A for Defendant.*

The said *Edward Mendel*, late of the Borough and County aforesaid, on the day and in the year aforesaid, at the Borough and County aforesaid, in and upon the said *Pauline Koetzle* in the peace of the said People then and there being, feloniously did wilfully and wrongfully make an assault, and *her*, the said *Pauline Koetzle* then and there feloniously did wilfully and wrongfully strike, beat, cut, bruise and wound, with intent then and there and by the means aforesaid to commit a felony, *to wit*, with intent the goods, chattels and personal property of the said *Pauline Koetzle* on the person of the said *Pauline Koetzle* then and there being found, from the person of the said *Pauline Koetzle* against the will and by violence to the person of the said *Pauline Koetzle* then and there violently and feloniously to rob, steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

## FOURTH COUNT—

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the said *Edward Mendel* of the Crime of Criminally Receiving Stolen Property, committed as follows:

The said *Edward Mendel*, late of the Borough and County aforesaid, on the day and in the year aforesaid, at the Borough and County aforesaid, the same goods, chattels and personal property mentioned, described and set forth in the first count of this indictment, to which reference is hereby made, of the value mentioned and set forth therein, of the goods, chattels and personal property of one *Pauline Koetzle*, then lately before, by a certain person or persons to the Grand Jury aforesaid unknown, feloniously stolen, taken and carried away from the said *Pauline Koetzle*, unlawfully and unjustly did feloniously receive and have, the said *Edward Mendel* then and there well knowing the said goods, chattels and personal property to have been feloniously stolen, taken and carried



*Exhibit A for Defendant.*

THE PEOPLE

*vs.*

EDWARD MENDEL

Robbery, 1st Degree; Grand Larceny, 1st Degree; Assault, Second Degree, and Receiving. (Sections 2120, 2124, 1290, 1294, 242 and 1308 Penal Law.)

10

*P.*

*April 6th, 1914, motions to set aside verdict &c. New trial denied.*

*April 9th, 1914, motion in arrest of Judt. denied.*

*Jan. 19, 1914.*

*Motion to reduce bail from \$15,000—denied.*

*C. C. N. Jr.*

*L. C. G. S.*

20

CHARLES S. WHITMAN,

*District Attorney.*

A TRUE BILL.

WM. C. MULCHENHEIM,

*Foreman.*

*P. 5 March 26, 1914*

*Tried and convicted of Robbery in the first degree. Part five, March 1914 Term, continued*

30

*April 9th, 1914,*

*State Prison Eighteen (18) years.*

*T. C. T. C.*

*J. C. G. S.*

*Notice of Approval filed by Silverman & Silverman.*

*99 Nassau St.,*

*Jan. 16/14.*

40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

AT A COURT OF GENERAL SESSIONS OF THE  
PEACE OF THE CITY AND COUNTY  
OF NEW YORK,

holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the said City, on *Tuesday*, the *24th* day of *March*, in  
10 the year of our Lord one thousand nine hundred and *fourteen*

PRESENT, The Honorable *Thomas C. T. Crain*, Judge of the Court of General Sessions, Justice.

*Edward Mendel* is in due form of law arraigned at the bar upon an indictment for *Robbery in First Degree &c.* filed *January 16, 1914*, and having heard the indictment read and being asked whether he demanded a trial thereon, answers that he does require a trial, and says that he is not guilty thereof;

20 Whereupon the following jury is balloted and sworn to well and truly try and a true verdict give according to evidence, viz.:

|                    |                   |
|--------------------|-------------------|
| Raphael J. Levy    | Andrew O. Taylor  |
| Edwin O. Sonneborn | Edward J. Shanley |
| Benjamin W. Wells  | Charles Kurzman   |
| Adolf Landesman    | Raymond C. Darrow |
| Frank Demarco      | Maurice Davis     |
| Joseph Michaelis   | George H. Cappers |

30 who upon their oath aforesaid do say that the said *Edward Mendel* is guilty of *Robbery in the First Degree* as by the indictment is alleged against him.

*Monday morning, April 6th, 1914.*

*Court meets: present, as before.*

*Counsel for defendant (Mr. Elder) moves to set aside the verdict and for a new trial upon various grounds, which motions after due deliberation are severally in all things denied.*

*Exhibit A for Defendant.**Thursday morning, April 9th, 1914.**Court meets: Present, as before.**William M. Silverman, Esq., of Counsel for defendant, moves in arrest of judgment upon various grounds, which motion after due deliberation is in all things denied.**The defendant is arraigned at the bar.**The District Attorney moves for judgment against the defendant.* 10*It is thereupon demanded of the said Edward Mendel what he hath to say why judgment should not be pronounced against him according to law, who nothing further saith unless as before he hath said.**Whereupon it is considered, ordered and adjudged by the Court, that the said Edward Mendel for the felony aforesaid whereof he is convicted as aforesaid, be imprisoned in the State Prison at hard labor for the term of eighteen (18) Years.* 20*A True Extract from the minutes.**EDWARD R. CARROLL,  
Clerk of Court.*

30

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*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

AT A COURT OF GENERAL SESSIONS  
OF THE PEACE

10 of the City and County of New York, holden in and for the  
County of New York, at the Building for Criminal Courts,  
in the Borough of Manhattan of the said City, on *Thurs-*  
*day*, the *9th* day of *April*, in the year of our Lord one  
thousand nine hundred and *fourteen*

PRESENT, The Honorable *Thomas C. T. Crain*, Judge of  
the Court of General Sessions, Justice.

|  |   |   |
|--|---|---|
| THE PEOPLE OF THE STATE OF NEW<br>YORK<br><br><i>against</i><br><br>EDWARD MENDEL. | } | <i>On Conviction<br/>by Verdict of<br/>Robbery in the<br/>First Degree.</i> |
|--|---|---|

20

Whereupon it is ORDERED and ADJUDGED by the Court  
that the said *Edward Mendel* (he having been heretofore  
convicted of a felony) for the FELONY aforesaid, whereof  
he is convicted, be imprisoned in the STATE PRISON, at hard  
labor, for the term of *Eighteen (18)* years.

A true extract from the Minutes.

EDWARD R. CARROLL,  
*Clerk of Court.*

30

LD.

40

*Exhibit A for Defendant.*

COURT OF GENERAL SESSIONS OF  
THE PEACE

COUNTY OF NEW YORK

---

THE PEOPLE OF THE STATE OF NEW YORK

against

*Edward Mendel*

10

---

*April 9th, 1914.*

---

COPY OF SENTENCE TO

STATE PRISON

for the term of *Eighteen (18) Years.*

---

And that the same has been compared with the original,  
and is a correct transcript therefrom and of the whole of  
such original.

20

All which we have caused by these presents to be ex-  
emplified, and the seal of our said Court to be hereunto  
affixed.

WITNESS, *John F. McIntyre*, Esquire, Judge of the Court  
of General Sessions, and presiding Judge of our said  
Court of General Sessions of the Peace, this *30th* day of  
*January*, in the year of our Lord one thousand nine hun-  
dred *and twenty-three*, and of our independence the one  
hundred and *forty-seventh*.

30

EDWARD R. CARROLL,  
*Clerk of Court.*

40

*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

10 I, JOHN F. McINTYRE, Judge of the Court of General Sessions and presiding Judge of the Court of General Sessions of the Peace of the City and County of New York, do certify that EDWARD R. CARROLL, Esq., whose name is subscribed to the preceding exemplification, is the Clerk of said Court of General Sessions of the Peace, duly appointed and sworn, and that full faith and credit are due to his official acts; and I further certify that the seal thereto affixed is the seal of the said Court of General Sessions of the Peace, and the attestation thereof is in due form.

Dated at the Borough of Manhattan of the City of New York, in the County of New York, aforesaid, this *30th* day of *January*, 1923.

20 JOHN F. McINTYRE,  
*Judge of the Court of General Sessions.*

I, JAMES A. DONEGAN, Clerk of the County of New York, do hereby certify that JOHN F. McINTYRE, Esquire, whose name is signed to the foregoing certificate, was at the time of signing the same Judge of the Court of General Sessions of the said County, and Justice of said Court duly elected and sworn, and that his signature is genuine, as I verily believe.

30 (SEAL) IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the County of New York, the *30th* day of *January*, 1923.

JAMES A. DONEGAN,  
*Clerk.*

*Exhibit A for Defendant.*

COURT OF GENERAL SESSIONS OF  
THE PEACE

COUNTY OF NEW YORK

---

THE PEOPLE OF THE STATE OF NEW YORK

against

*Edward Mendel*

10

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EXEMPLIFIED COPY

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*Regina Mendel, Administratrix, &c. v. Joseph Roth.*

**NOTICE OF APPEAL.**

Filed March 23, 1923.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

REGINA MENDEL, Administratrix *ad*  
*prosequendum*, of EDWARD MENDEL,  
deceased,

Plaintiff,

*vs.*

JOSEPH ROTH,

Defendant.

*Action at Law.*

*Notice of  
Appeal.*

20 To Stein, Stein & Hannoeh, Attorneys for Plaintiff:

Please take notice that the defendant herein appeals to the Court of Errors and Appeals, the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Dated: March 15, 1923.

Respectfully yours,

HEINE, BOSTWICK & BRADNER,

*Attorneys of Appellant.*

30

Service acknowledged this 21st day of March, 1923.

STEIN, STEIN & HANNOCH,

*Attorneys of Plaintiff.*

40

*Grounds of Appeal.*

**GROUNDS OF APPEAL.**

Filed April 18, 1923.

**New Jersey Court of Errors and Appeals**

REGINA MENDEL, Administratrix of the  
estate of EDWARD MENDEL, deceased,  
*Plaintiff-Respondent,*

*vs.*

JOSEPH ROTH,

*Defendant-Appellant.*

*Action at Law.*

*On Appeal from  
New Jersey  
Supreme Court.*

*Grounds of  
Appeal.*

10

The appellant, Joseph Roth, states the following grounds of appeal:

1. The refusal of the trial court to sustain the objection to the swearing of the jury in this case on the grounds that the jury was called to assess the matter of damages only, under rules 72 and 73 of the Practice Act of 1912, which said rules are violative of the Constitution of the State of New Jersey and also the Fourteenth Amendment to the United States Constitution.

20

2. The refusal of the trial court to grant motion for non-suit on the opening of counsel on the grounds that said opening showed no element of liability on the part of the defendant, and on the further grounds that the proceeding was illegal because it was violative of the New Jersey State constitution and of the Fourteenth Amendment of the United States Constitution.

30

3. The refusal of the trial court to grant a motion for non-suit on the grounds that there was no proof of liability on the part of the defendant and that therefore the defendant cannot be legally held as it would be in violation of the state constitution and of the Fourteenth Amendment of the United States Constitution.

40

*Grounds of Appeal.*

4. The refusal of the trial court to permit the defendant to prove facts showing no liability on his part.

5. The refusal of the trial court to direct a verdict for the defendant because no liability was proven against the defendant.

Dated: April 13, 1923.

10

Respectfully yours,

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant-Appellant.*

Service of a copy of the within grounds of appeal is hereby acknowledged this            day of April, 1923.

STEIN, STEIN & HANNOCH,  
*Attorneys for Plaintiff-Respondent.*

20

30

40

55 JUN. T. 1923

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

## New Jersey Court of Errors and Appeals

ANNIE MENDEL, Administratrix, etc.,  
*Plaintiff-Respondent,*  
*vs.*

JOSEPH ROTH,  
*Defendant-Appellant.*

REGINA MENDEL, Administratrix, etc.,  
*Plaintiff-Respondent,*  
*vs.*

JOSEPH ROTH,  
*Defendant-Appellant.*

*On Appeal.*

*Cases 54-55.*  
*June Term,*  
*1923.*

### BRIEF FOR RESPONDENTS.

These causes were tried in the Essex Circuit of the New Jersey Supreme Court and resulted in a verdict in the first case of fifteen thousand (\$15,000) dollars and in the other case of eighty-six hundred sixty-six dollars and sixty-six cents (\$8,666.66) on January 23, 1923. These were second trials of the causes and the second trial was limited by order of the Supreme Court made November 14, 1922 (Case, pp. 3, 41) to the question of damages. The cases having been previously tried and resulted in larger verdicts from which the defendant took a rule to show cause which was argued before the Supreme Court and decided at the November term, 1922, in the opinion of the Court, printed on page 2, the Supreme Court says:

“The only ground upon which we are asked to set aside these verdicts is that each of them is excessive.”

The printed case now before the Court does not show the original rule to show cause granted or any of the

proceedings upon said rule but merely give the *per curiam* opinion of the Court and the order remitting the cases back for trial as to damages only. It will be noticed that the grounds of appeal assigned do not attack or bring up for review the orders made on November 14, 1922, but merely attack the ruling of the Trial Court on the second trial, refusing to permit a trial on any subject other than the question of damages for practically the only point now raised is that rules 72 and 73 of the Practice Act of 1912 are in violation of the New Jersey State Constitution and of the Fourteenth Amendment of the Federal Constitution (pp. 39, 40, 95 and 96).

### The State Constitution.

Article 1, Section 7 of the State Constitution says:

“The right of a trial by jury shall remain inviolate.”

This section of the Constitution has been before our Court many, many times and was only recently declared violated in the case of

*Katz v. Eldridge*, 117 Atl. Rep., 841.

In that case, however, the right of trial by jury was wholly denied on the ground that it offered substantive rights.

In *Condon v. Royce*, 68 N. J. L. 222, the Supreme Court held: “The constitution was not violated by the requirement for demand for a jury at least one day before the time fixed for the trial.”

In *Humphrey v. Eakley*, 72 N. J. L. 424, the statute required the payment of costs in order to procure a jury trial but was held not to violate Section 7 of Article 1.

Mr. Justice Garrison said:

“The essential meaning of ‘inviolate’ is freedom from hurt, harm, defilement, profanation or such other idea connoting partial destruction or sub-

stantial impairment, and that it in no sense imports immunity from all regulation."

Affirmed unanimously, 74 N. J. L. 599.

Rule 72 under the New Practice Act, Pamphlet Laws, 1912, page 377, reads as follows:

"When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects."

This rule was adopted as rule 132 by the Supreme Court in 1913.

In the case of *Gaffney v. Illingsworth*, 90 N. J. L. 490, this Court approved of the rule and affirmed a judgment of the Circuit Court, based upon such rules. The Court, however, also said:

"That the order for granting of a new trial does not definitely settle the rights of the parties and was not reviewable upon error."

The next case is *Giardini v. McAdoo*, 93 N. J. L. 138, in which this Court at page 149 approved of the proceedings which is now attacked by the appeal before this Court. In that case, this Court by a vote of ten to two followed the practice which is attacked by the present appeal because this Court said in the opinion written by Chancellor Walker:

"Were it not for rule 73 annexed to the Practice Act (1912), now rule 132 of those of the Supreme Court (1913), it would be necessary for us to reverse this judgment *in toto* and order a new trial after allowing proper amendments to be made; but, by that rule, it is provided that when a new trial is ordered because the damages are excessive or inadequate, the verdict shall be set aside only in respect to damages and shall stand good in other respects.

The result reached is, that the judgment under review will be sustained, with the exception of the quantum of damages recovered. \* \* \*

As the judgment is to 'stand good' on the question of liability, it will be affirmed in that respect,

and as a 'new trial' is ordered because the damages are excessive, it will be reversed to that extent."

While it does not expressly appear from the reported case that the question of the constitutionality of the statute was raised, nevertheless, this Court considered the legislation good legislation, passed upon it and approved of it and adopted it, so we feel that where ten Judges of this Honorable Court voted in favor of the Practice that there must have occurred to the minds of the Judges so voting that the act was a proper constitutional statute for the very reason the Chancellor says:

"Were it not for the statute, it would have been necessary to reverse the judgment *in toto*."

This phrase shows that the former practice was present to the minds of the Court in making the determination in the Giardini case.

However, in the case of *Oppicci v. Erie Railroad Co.*, 108 Atl. Rep., 759, in the concluding paragraph, Justice Swayze said:

"The question of the constitutionality of ordering a new trial as to damages alone will not then be presented, and we ought not to decide it now."

And it seems evident that it was not called to the attention of the Court that the practical effect of the statute and the rules had been passed upon as above stated in the Giardini case two terms before the decision of the Oppicci case.

Our Courts and the Courts of the United States have recognized the rights of the Legislature to modify and regulate trial by jury but that the Constitution prohibits the taking away or impairment of the rights of trial by jury.

Now in this case the Statute of 1912 does not take away the right of trial by jury but after a trial has once been had of the full case, either party has the right to question, by rule to show cause, the excessiveness or in-

adequacy of the verdict rendered and in selecting that mode of review, the parties doing so must be mindful of the statute which gives the Court the right in ordering a new trial to limit it merely to the question of damages. If the party taking the rule to show cause does not want to be limited, they have the regular method of appeal, which, upon a reversal will give a full new trial if there are questions involved other than the question of damages.

In this case, as appears from the *per curiam* opinion of the Supreme Court (p. 2 of the printed case), the only objection that the defendant made was that the damages were excessive. He did not object to the jury's findings of his liabilities and has never raised any question in respect to the first trial relating to the admission or rejection of the evidence. He was, therefore, in no better or worse position than if he had permitted a judgment by default to be entered against him. In that case judgment interlocutory by default would have been entered and a writ of inquiry to assess damages awarded. The defendant, after the first trial, by taking a rule to show cause limited only to the question of damages, placed himself practically in the position of a defendant who had permitted judgment by default to be entered and he asked the Supreme Court to send the case back for re-assessment of damages and his rights of a trial by jury were not in any manner violated. The whole procedure is outlined by the Act of 1912 which is to simplify and expedite the trial of causes. It is a mere regulation and does not in any manner take away from the defendant the rights of trial by jury.

In *Queen v. Jennings*, 93 N. J. L. 353, the Supreme Court acted upon these same rules. Upon a rule to show cause, the only question with respect to which the verdict was found to be wrong was the measure of damages, the rule was discharged as to liability and granted a new trial limited to the question of damages only, the verdict to stand good in all other respects. That case involved over \$450,000.00.

It must be remembered that the granting of a new trial is discretionary and that our Courts have always exercised the rights of granting a new trial and the statute in question is merely in a sense declaratory of the practice in this respect exercised by the Court. The Court in the present case did not have to grant a new trial but granted it upon condition that it be limited only to the question of damages. The defendant accepted the condition and went to trial on the question of damages. The mere fact that the granting of a new trial is discretionary shows that the statute does not take away any substantive rights. Therefore, the enactment in its present form cannot be contrary to the Seventh Section of Article 1 of the Constitution.

The respondent will possibly rely upon the decision of the Circuit Court of Appeals, Third Circuit, in

*McKeon v. Central Stamping Co.*, 264 Fed. Rep. 385.

That case first came before District Court Judge Davis in the District Court of the United States, for the District of New Jersey, 259 Fed. Rep. 917, where he followed the practice of setting aside the verdict only on the question of damages. The upper Court, however, determined the Seventh Amendment to the United States Constitution preserves the right of trial by jury as the jury trial was under the English common law and that the Federal statutes did not justify the Court below in conforming to the statutes of New Jersey regulating the granting of new trials, and that such a restricted form for a new trial was not one known to England at the time the Constitution was formed and that the restricted trial was not the trial by jury granted by the Seventh Amendment and the judgment below was reversed.

This decision is not applicable to the case before the Court for the reason the *McKeon* case was commenced in the Federal Court and was wholly subject to the provisions of the Federal Courts and Federal statutes. The

procedure is merely governed by State law unless the same conflicted with the Federal Constitution.

In the case of *Brown v. New Jersey*, Vol. 20, National Supreme Court Reporter 77, 175 U. S., p. 172, the question of the New Jersey statute relating to struck jury came before the United States Supreme Court and that Court held that if the highest court in New Jersey determined that the statute did not violate the New Jersey statute, the United States Supreme Court could not go into that question. It was further held that the first ten amendments to the Federal Constitution contained no limitation on the power of the State, but were intended to operate solely on the Federal Government.

Mr. Justice Brewer, in delivering the opinion of the Court, said:

“The State has full control over the procedure in its Courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

“The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies.

“Due process and equal protection of the laws are guaranteed by the Fourteenth Amendment. ‘It follows that any legal proceeding enforced by public authority whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.’

“The law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied.

“The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons sub-

jected to such legislation shall be treated alike, under like circumstances, both in the privileges conferred and in the liabilities imposed."

In the case of *Maxwell v. Dow*, 20 National Supreme Court Reporter, page 448, 176 U. S. 581, the question determined was whether the trial of the plaintiff-in-error by a jury composed of eight instead of twelve jurors was valid. The opinion was written by Mr. Justice Peckham and the Court in such opinion said regarding the first ten amendments to the Constitution:

"They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states."

By Article 7 of the Amendments it is provided that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. This, as has been many times decided, relates only to trials in the Courts of the United States. The states so far as this amendment is concerned, are left to regulate trials in their own Courts in their own way. A trial by jury in suits at common law pending in the state courts is not therefore a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state.

"This case shows that the Fourteenth Amendment in forbidding a state to abridge the privileges or immunities of citizens of the United States does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment."

The foregoing acts and decisions show that inasmuch as the proceedings applied to Roth in this case is the same proceeding which would apply to any person in New Jersey; that it is due process of law within the meaning of the Fourteenth Amendment to the United States Constitution and as the first Ten Amendments apply only to proceedings in the Federal Court, it seems that the only real question before the Court is whether the 72d and 73d Rules of the 1912 Practice Act are within the prohibition of Section 7 of Article 1 of the State Constitution.

The decision of Judge Buffington in the case of *McKeon v. Central Stamping Co.*, *supra*, is not at all binding upon this Court for the reason that the only real point decided was that the Federal Court was not obligated to follow the practice in that respect as laid down by the state statute. In so determining, that learned Judge stated that the trial, if given, on a new trial under our statute was not the same sort of jury trial as given by the English common law, and that, therefore, even if the state statute was constitutional there was no provision under the Federal procedure for the granting of a new trial limited only to the question of damages as above pointed out. This Court has at least twice, if not oftener, passed upon these statutes and acted upon them, although it may be said that the true question of the constitutionality of the statute was not urged or decided by this Court. The defendant here has had a trial by jury and what our State Constitution means is that the right of trial by jury should not be wholly destroyed or so far impaired as to in effect do away with that right. What our State Constitution says shall remain inviolate is the right of a jury trial. The Constitution does not, as pointed out by Mr. Justice Buffington, preserve the particular jury because it has been the practice in all Courts on a new trial where a full new trial has been granted that a different twelve men hear the case on second trial.

While our statute does devise a new scheme of procedure it does not take away the right of jury trial. It merely changes the method of arriving at the verdict. The procedure devised is one of experience and economy and where the sole question relates to the excessiveness or inadequacy of damages. There is certainly no necessity of retrying the question of liability. The defendant has once had a trial by jury, that jury has found liability. It must be borne in mind that the language of the Federal Amendment is different than the language of the State Constitution. The Federal Constitution says that the right of trial by jury shall be preserved, while our Constitution says the right shall remain inviolate and Mr. Justice Buffington, in his opinion, says that the word "preserved" relates to that which already exists and that what was intended to be preserved by the makers of the United States Constitution was the state of trial as it existed under the English common law. Our Constitution does not require us to preserve the same kind of a trial, it merely requires that we shall not prohibit the giving of a trial by jury in any statutory method which will not violate the rights.

The case principally relied upon by the appellant seems to be

*Clark v. N. Y., N. H. & H. R. R. Co.*, 80 Atl. Rep. 406.

But we cannot see what comfort the appellant gets from that case for the reason, that in our minds, the case is decidedly against the contention now advanced by the appellant.

Mr. Justice Johnson, in the third paragraph on page 409 of the Reporter, cites two cases where a new trial was granted on the question of damages only. And after reviewing a number of English cases, says, on page 413:

"Upon the authority of the decisions of this Court, as well as those cited from other jurisdictions, we are satisfied that the claim that the indivisibility of the verdict constitutes an obstacle at

common law to the granting of a new trial otherwise than upon all the issues is untenable.”

And the Court concludes that the plaintiff should have been granted a new trial in the limited form requested and reversed the finding of the Superior Court which denied plaintiff's application for a new trial.

On page 16 of his brief, appellant raised a question as to the validity of the order of the Supreme Court in granting a new trial and it is respectfully urged that this point was not made in the Court below nor is it assigned in the grounds of appeal.

The entire analysis of the complaint now made seems to be, not that the defendant was deprived of right of trial by jury, but that he had too much jury and in conclusion it is most respectfully insisted that the present statutes do no more than regulate the mode of jury trial and do not violate the constitutional provision that the right of trial by jury shall remain inviolate.

It is respectfully submitted that the appeal be dismissed and the judgments below affirmed with costs.

Respectfully submitted,

STAMLER, STAMLER & KOESTLER,  
*Attorneys of Plaintiffs.*

SAMUEL KOESTLER,  
*Of Counsel.*



55 JUN. T. 1923

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

## New Jersey Court of Errors and Appeals

ANNIE MENDEL, administratrix *ad*  
*prosequendum* of the estate of JACOB  
MENDEL, deceased,  
*Plaintiff-Respondent,*

*vs.*

JOSEPH ROTH,  
*Defendant-Appellant.*

REGINA MENDEL, administratrix of the  
estate of JACOB MENDEL, deceased,  
*Plaintiff-Respondent,*

*vs.*

JOSEPH ROTH,  
*Defendant-Appellant.*

*Action at Law.*

*On Appeal from  
Supreme Court.*

### BRIEF OF DEFENDANT.

#### Statement.

This is an appeal taken from judgments rendered on the thirty-first day of January, 1923, in the New Jersey Supreme Court, Essex Circuit. The two cases which had originally been tried together with resulting judgment in favor of the respective plaintiffs were both reversed by the New Jersey Supreme Court on rules to show cause by reason of excessive damages rendered and both cases sent back for trial on the question of damages only. Upon this new trial the cases were separately tried and the defendant in both cases appeals from the judgment rendered on the sole ground of the unconstitutionality of the statute and rules of the Court and of the procedure taken in connection with a trial on the question of damages only. The brief herein submitted is substantially the same as

that submitted to the New Jersey Supreme Court in the case of *Marsella v. Rivetti* and now under consideration by that tribunal.

### Facts.

These two cases are both based on the alleged negligence of the defendant through his servant in the operation of a certain automobile truck, the negligent operation of which, plaintiffs claim, causing the death of their respective decedents. The defendant herein specifically abandons all grounds of appeal other than those having to do with the constitutional question heretofore referred to and the points made in the two cases relative to this constitutional question being substantially the same, we purpose to proceed with the argument as if the cases had been actually tried together.

### Grounds of Appeal.

Annie Mendel, administratrix, &c., vs. Joseph Roth:

1. The refusal of the Trial Court to sustain the objection to the swearing of the jury in this case on the grounds that Rules 72 and 73 of the Practice Act of 1922, allowing a new trial as to damages only are violative of the Constitution of the State of New Jersey and of the Fourteenth Amendment to the United States Constitution.

2. The refusal of the Trial Court to sustain the objection to the following question:

“Q Mr. Crogan, what is the present value of the earnings of a man who is in receipt of an income resulting from his work of \$3,800 at the age of 38, assuming that he is in good health, if the same was invested at 5% and the expectancy was as you have already given it.”

3. The refusal of the Trial Court to sustain the objection to the following question:

“Q You are basing that on the single life? A I am basing that on the single life.”

*The Court.* I do not think that it is proper.

*Mr. Heine.* I make the same objection to the joint.

4. The refusal of the Trial Court to permit testimony by the defendant as to the liability of the defendant.

5. The refusal of the Trial Court to sustain a motion for direction of the verdict on the grounds that Rules 72 and 73 of the Practice Act of 1912 are in violation of the New Jersey State Constitution and of the Fourteenth Amendment of the United States.

### Grounds of Appeal.

Regina Mendel, administratrix, &c., vs. Joseph Roth:

1. The refusal of the Trial Court to sustain the objection to the swearing of the jury in this case on the grounds that the jury was called to assess the matter of damages only, under Rules 72 and 73 of the Practice Act of 1912, which said rules are violative of the Constitution of the State of New Jersey and also the Fourteenth Amendment to the United States Constitution.

2. The refusal of the Trial Court to grant motion for non-suit on the opening of counsel on the grounds that said opening showed no element of liability on the part of the defendant, and on the further grounds that the proceeding was illegal because it was violative of the New Jersey State Constitution and of the Fourteenth Amendment of the United States Constitution.

3. The refusal of the Trial Court to grant a motion for non-suit on the grounds that there was no proof of liability on the part of the defendant and that therefore the defendant cannot be legally held as it would be in violation of the State Constitution and of the Fourteenth Amendment of the United States Constitution.

4. The refusal of the Trial Court to permit the defendant to prove facts showing no liability on his part.

5. The refusal of the Trial Court to direct a verdict for the defendant because no liability was proven against the defendant.

**POINT I.**

It was error on the part of the Trial Court:

(1) To fail to sustain the objection of the defendant to the swearing of the jury on the ground that the calling of the said jury to assess the matter of damages only under Rules 72 and 73 of the Practice Act of 1912 was unconstitutional and that the said rules are themselves unconstitutional and violative of the Constitution of the State of New Jersey and of the Fourteenth Amendment of the Constitution of the United States.

(2) To refuse to grant the motion for non-suit and direction of verdict on the part of the defendant on the ground that there was no proof of liability on the part of the defendant, and that, therefore, the defendant cannot be legally held to respond in damages.

(3) To refuse the offer of the defendant to introduce testimony to the effect that there was no liability on the part of the said defendant upon which a verdict could be predicated.

Rules 72 and 73 of the New Jersey Practice Act of 1912 reads as follows:

72. "In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable."

73. "When a new trial is ordered because the damages are excessive or inadequate and for no other reason the verdict shall be set aside only in respect of damages and shall stand good in all other respects."

Our claim is that these rules is so far as they permit or require a new trial on the question of damages only leaving the verdict of the first jury to stand in all other respects, violates the Constitution of the State of New Jersey, and of the United States, and that so far at

least as this State is concerned that the question is properly raised by the exceptions taken (*Robinson v. Payne, Director General*, 1 N. J. Mis. R., p. 189).

This point so far as our search has indicated has never been expressly passed upon by the Appellate Courts of this State. It is true that the case of *Gaffney v. Illingsworth*, 90 N. J. L. 490, 101 Atlantic 243, decided by the Court of Errors and Appeals at the June term, 1917, declares in favor of the right of the Court to order a new trial as to damages only. This case held that under Rules 72 and 73 (by rule 219 of the Supreme Court made applicable to the practice of the Circuit Courts in civil matters as far as appropriate) a Judge of the Circuit Court had power to grant a new trial because of inadequate damages and under Rule 122 (giving the Judge to whom application is made power to prescribe the terms of the rule) to impose terms that if the defeated party pay a certain amount within the specified time the rule should be discharged, otherwise made absolute. This action (*Gaffney v. Illingsworth*) was brought in the Essex County Circuit Court for damages for personal injuries. Rules to show cause were taken by both parties and the Trial Court discharged defendant's rule and made an order granting plaintiff a new trial as to damages only on terms that if the defendant paid a certain amount (which was greater than the original verdict) within ten days plaintiff's rule should be discharged. The defendant did not make the payment and the plaintiff's rule became absolute. Thereafter, a second trial was had on the question of damages only. As a result of this second trial, judgment was duly entered for the plaintiff in the amount found by the second jury which was considerably in excess of the amount found by the first jury and from this judgment an appeal was taken to the Court of Errors and Appeals. The judgment was there affirmed under the rule cited *supra* prescribing terms and in the event of the refusal of the defendant to accept the terms to order a new trial as to damages only. The opinion further states that the

affirmance was made upon another ground, namely, that the order under review was not appealable, the proceeding of the Circuit Court in common law actions being reviewable only after final judgment. It may well be that this part of the opinion was based upon the claim that the defendant did not appeal from the judgment but only from the order for a new trial. However that may be, no point was made that the statute permitting a new trial on damages only was invalid because in violation of the State or Federal constitution and hence the question which we now have was not before the Court for consideration and was not considered. The question is, therefore, open so far as concerns the decisions of our Courts.

In the later case of *Oppicci v. Erie Railroad Co.*, 93 N. J. L. 394, the question of the constitutionality of the statute and rule was directly presented but the case was decided on other grounds, the Court saying "The result will be that the question of the constitutionality of ordering a new trial as to damages alone will not then be presented and we ought not to decide it now." In the present case the defendant-appellant contends that the proceedings are violative of paragraph 7, Article 1 of the State Constitution, in that he was denied the right of trial by jury. The paragraph referred to reads as follows: "The right of trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed \$50, by a jury of six men."

It is true that in a number of States having constitutional provisions regarding the right of trial by jury similar to those of our own that these provisions have been held valid but as far as our search discloses the direct question of their constitutionality under either State or Federal constitutions has not in the great majority of instances been raised. In several states, however, the question has been raised and the case of *Clark v. New York, New Haven and Hartford Railroad Co.*, 80 Atlantic Reporter 406, is perhaps the leading case on the subject.

We cite *verbatim* as follows from the opinion of Johnson, *J.*:

“In a long line of English cases new trial of a part of the issues in a case was refused because of the supposed indivisibility of a verdict. *Bond v. Sparks*, 12 Mod. 275 (1700), was trespass against three defendants. ‘Two were acquitted, and Sparks found guilty; and it was certified by the Judge to be against evidence; and motion for a new trial. But the Court said a new trial could not be granted except against all. Whereupon the attorney for the defendant consented for the two defendants who were acquitted, that they should undergo a new trial, and quit the costs which they might have from the plaintiff on their acquittal; and Sparks consented to pay the plaintiff’s costs. And so a new trial was granted against all.’

Berrington’s case, 3 Salk. 362 (1707), was trespass against several defendants. The plaintiff had a verdict, ‘and afterwards it was moved for a new trial, because as to one of the defendants the verdict was against the evidence. *Sed., per curiam*. This cannot be done, for the Court cannot set aside the verdict as to some, and not as to others, and to grant a new trial as to all would be a prejudice to those who are duly acquitted.’

In *King v. Mawbey*, 6 T. R. 619, 638 (1776), four defendants were indicted for a misdemeanor, two were acquitted, and two, who were found guilty, moved for a new trial. ‘The Court on this day discharged the rule for a new trial on the merits saying, at the same time that, if the conviction of the two defendants had appeared to them improper, they might have granted a new trial, and given the following reasons.’ Then followed the opinions by Lord Kenyon, Amherst, Grove and Lawrence, *JJ.* ‘Lord Kenyon, *Ch. J.* It was contended on behalf of the prosecutor that, as two of the defendants had been acquitted the record could not be set down again to another trial without putting their guilt or innocence again into a state of inquiry, and that inasmuch as defendants who had been acquitted in criminal cases cannot be tried a second time, the necessary consequence was, that in this case, we could not grant a new trial, even though we were

clearly of opinion that the other two defendant had been improperly convicted \* \* \* but I think that the rule was correctly stated by the counsel for the defendants, that in granting new trials, the Court knew no limitations (except in excepted cases), but they will either grant or refuse a new trial, as it will tend to the advancement of justice \* \* \* I have studiously gone out of the way in order to express my opinion on this point, an opinion formed on great deliberation lest the public should be misled by the arguments used on behalf of the prosecutor, and imagine that manifest injustice must be effected in this case because the forms of law cannot yield to substantial justice.' Rule for a new trial discharged.

*Parker v. Godin*, Stra. 813 (in 1729), was trover for plate. The question was, 'What meddling with the effects of a bankrupt is a conversion.' The verdict was for the defendant, and a new trial was granted. At the end of the report of the case is the following: 'N. B. A difficulty arose upon the motion for a new trial, which was this: "There were other things besides plate in the declaration, and as to them the verdict *pro def.* was right; and yet a new trial must be granted upon the whole. But on consideration the Court held that could be no reason to refuse a new trial, for if the merits as to those other things were with the defendant, it would be found for him as to them. But it was agreed on all hands that if one defendant be acquitted, and another one found guilty, that defendant can have no new trial.'" Here the court were still holding to the idea of the indivisibility of a general verdict.

In *Bond v. Sparks* three joint defendants were so bound together that a verdict acquitting two and finding the other guilty could not dissolved their union, and therefore, 'it was agreed on all hands' that there could be no new trial at all.

In *Parker v. Godin* 'there were other things besides plate in the declaration' therefore, although as to said 'other things' the verdict for the defendant was right, there must be a new trial upon the whole. The conclusion of *Bond v. Sparks* as to the indissoluble union of the two defendants who were

acquitted with the one who was found guilty was applied to the 'plate' and 'other things' in *Parker v. Godin*.

In *Edie v. East India Co.*, 1 W. Bl. 295, there were two counts upon different bills of exchange, the first of which the defendant did not resist, and a verdict was taken upon it for the plaintiffs without objection. Upon the second a verdict was found for the defendant. On motion of the plaintiffs a new trial was granted for error in the admission of evidence relating to the second count. Lord Mansfield, *C. J.*, said: 'But for form's sake, we must set aside the whole verdict.' And a new trial was granted without payment of costs.

In *Hutchinson v. Piper*, 4 Taunt. 555 (1812), there were a number of counts, but the plaintiff's evidence was ultimately restricted to the fourteenth. The plaintiff was non-suited because certain proof was not given, but the Chief Baron, MacDonal, reserved the point on that single count. It was held that the non-suit must be set aside. But the rule made absolute for a new trial generally.

*Thwaites v. Sainsbury*, 7 Bing. 437 (in 1831), was 'assumpsit for goods sold and delivered. Plea *non assumpsit*. At the trial, proof having been given of the sale and delivery of the goods, the defense set up was, that the plaintiff has subsequently received in full for his demand three bills of exchange, accepted by Leigh Hunt, and Clarke; that he had taken these bills on his own risk and had released the defendant from all responsibility in respect of them. This was the only question in the cause.' The plaintiff obtained a verdict which the defendant moved to set aside on the ground that it was contrary to the evidence. 'The court proposed to grant a new trial, but to limit the inquiry to the single question whether the plaintiff had agreed to take the bills on his own risk, expressly releasing the defendant from any responsibility. Spankie, Serj't, objected that the Court in the exercise of its discretion as to granting a new trial, had seldom or never restricted a party in this way to a single point of inquiry; and he prayed to be allowed, as usual, to go to trial again gener-

ally, without restriction.' The rule for a new trial was made absolute on terms.

In *Bernasconi v. Farebrother & A.*, 3 B. & Ad. 372 (in 1832), it was held that certain evidence received on one point was incompetent; and the party who had introduced the evidence claimed that on a new trial the inquiry should be restrained to that point. Lord Tenterden, delivering the judgment of the Court, said, 'We have considered also whether we could limit the inquiry upon the new trial to one point. In *Hutchinson v. Piper*, 4 Taunt. 555, Gibbs, J., lays it down that in certain cases of which he gives instances a new trial may be restrained to one point. But in the particular case now before the Court, the objection which arose as to the admissibility of the evidence might have been taken by way of exceptions. The application for a new trial was substituted for a bill of exceptions. Now, if there had been a bill of exceptions in this case and the judgment were that the evidence had been improperly received, the Court of Errors could only have awarded a *venire de novo*, sending the whole to a new trial; and as the application for a new trial is substituted for a bill of exceptions, we think that, by analogy to that proceeding, the defendants are entitled to a new trial generally. Here nothing was said of the inseparable nature of a general verdict, but the sole difficulty was found in the old form of a *venire*. The difficulty of the *venire* was imported by an analogy into new trials granted on motion.

*Price v. Harris*, 10 Bing. 331 (in 1833), was a case against seventeen defendants. Two were defaulted, and fifteen pleaded the general issue. The plaintiff entered a *nol. pros.* as to one of the two and obtained a verdict against the other for nine hundred pounds and the verdict was in favor of the fifteen. The plaintiff moved for a new trial as to five of the fifteen on the ground that, as to them, the verdict was against the evidence. Rule for a new trial against one and for a new assessment of damages against another was made absolute.

*Stroud v. Stroud*, Executor, 7 N. & G. 417, was an action of debt. The defendant pleaded, first, that the testatrix was never indebted; secondly,

payment; thirdly, *plene administravit*. The plaintiff had a verdict. A new trial was granted on the last issue because the verdict was against the evidence, but the verdict on the first and second issues was not disturbed. Tindal, *Ch. J.*, said: 'With respect to the first part of the case, I entertain no doubt but that it ought to rest where it is on the finding of the jury. \* \* \* With regard to the question arising on a plea of *plene administravit*, which I think has not been properly sifted, it seems to me that the case ought to go down for a new trial.' Cresswell, *J.*: 'The proper course will be to enter a verdict for the plaintiff on the first issue with eleven pound two shillings damages, and for the plaintiff on the second issue; and that, on payment of costs, there be a new trial on the last issue, the plaintiff admitting that the twenty pound were paid in a due course of administration.' Rule absolute accordingly.

In *Moore v. Tuckwell*, 1 M. G. and S. 607, an action of debt, decided in 1845, the plaintiff had a verdict for four pound nineteen shillings and nine pence, and Shee, Serj't, for the defendant moved for a new trial on the grounds of misdirection. And it was held that, as to one item of the plaintiff's claim amounting to four pound, five shillings the jury had been misdirected. During the argument, Tindal, *Ch. J.*, said, 'If, however, the plaintiff will consent to the verdict being reduced to the amount of four pound, five shillings, the sum to which alone the misdirection applies, I think justice will be answered without sending the cause down to a new trial.' Shee, Serj't, in support of his rule, insisted that he was as a matter of right entitled to a new trial, the verdict being the result of an erroneous direction of the Judge; and that the Court had no power to compel him to submit to the entering of a verdict different from that which the jury had found. Tindal, *Ch. J.*, delivered the judgment of the Court, saying:

'This was a rule for a new trial, in a case tried before a Judge of the Sheriff's Court on the ground of misdirection, and upon no other ground. \* \* \* Now the only misdirection being that which related to a separate cause of action amounting to four

pound, five shillings and the plaintiff's counsel on showing cause, having consented to abandon that sum altogether we think the whole justice of the case, so far as we can look at it, has been attained by the plaintiff's consenting to reduce the damages, by the whole sum in respect of which such misdirection took place. It was objected, in argument, that the court has no authority to alter the verdict of the jury. We do not alter the verdict which still remains a verdict for the plaintiff for the same amount of damages, unless the plaintiff consents to such alteration. All that we do, is to secure to the defendant the option of paying fourteen shilling, nine pence only instead of the sum recovered. If at the time the rule was moved for, we had seen the whole of the facts in the case as clearly as we now do, we should not have granted the rule in its present shape, but, as it often occurs, a rule would have been granted, with a condition attached for a new trial, unless the plaintiff consented to reduce the damages. It is not the practice, as stated at the bar, that in all cases where there has been a misdirection, a new trial must be granted *de jure*, because a bill of exceptions might have been tendered; for, where the court can see clearly that real and substantial justice has been done, or may be done, without a new trial, the rule has been refused' (citing cases). 'We, therefore, treat this as a rule drawn up in the alternative; and, as the plaintiff consents that the damages shall be reduced, we make the rule absolute for that purpose, and discharge it as to the new trial.' Rule accordingly.

Upon the authority of the decisions of this court, as well as those cited from other jurisdictions, we are satisfied that the claim that the indivisibility of the verdict constitutes an obstacle at common law to the granting of a new trial otherwise than upon all the issues is untenable. As we find that new trials have been and are granted at common law, not only generally, but upon such part of the issues as the court in its discretion deems necessary for the attainment of justice, the conclusion necessarily follows that by section 485 of the Court and Practice Act which is now section 12 of chapter 298, Gen. 1909, the power to so grant such new trials was given to the Superior Court.

(4) The plaintiff in this case moved for a new trial alleging that the damages allowed by the verdict were grossly inadequate. That a new trial may be granted for the inadequacy of damages is well settled. *McNeil v. Lyons*, 20 R. I. 672, 40 Atl. 831; *Hill v. Union R. R. Co.*, 25 R. I. 565, 57 Atl. 374. As a new trial may be granted upon that ground it would seem to follow that a party has a right to move for it upon that ground.

(5) While the trial judge may limit the inquiry upon the new trial to the question of damages alone, he must be left to work out and decide the matter in his discretion. A party cannot demand on a motion for a new trial, that, without regard to the views of the trial judge, the findings which are in his favor shall remain undisturbed, while only those which are prejudicial or unsatisfactory to him shall be passed upon. While the trial judge may grant a new trial on the question of damages or upon a single issue where the evidence bearing upon it is separable from and does not hinge upon that bearing upon other issues, and he thinks such action proper, it is nevertheless always within his discretion in granting a new trial to make it general instead of partial. A party by moving for a new trial on the question of damages only cannot restrict a judge so as to prevent the exercise of his sound, judicial discretion.

The trial judge should have decided the motion for a new trial filed in the Superior Court. His denial of said motion on the ground that the Superior Court had no jurisdiction to grant a new trial for the assessment of damages only was error.

The plaintiff's exception is sustained, and the case is remitted to the Superior Court with direction to pass upon and decide the plaintiff's motion for a new trial.

Blodgett, *J.* (dissenting). I am unable to concur in the opinion of the majority of the Court for the reason that the cases cited in support of the historical question there considered seems to me, in so far as they are applicable at all to support the precise contrary of the conclusion therein reached."

It seems impossible to escape the conclusion that the dissenting opinion accurately states the facts.

The question now under consideration has been, however, passed upon by the Federal Courts in a case arising in this jurisdiction and on all 4's with the present situation. The facts were that on a trial in the United States District Court the jury awarded a verdict which upon application to the Federal Judge who presided at the trial was set aside on the ground of inadequate damages and a new trial granted on the question of damages alone in conformity with Rules 72 and 73 of the Practice Act of 1912 of this State. Upon this re-trial objection was made by the defendant that the 7th Amendment of the Constitution of the United States was violated by the procedure allowing a new trial on the question of damages only. The 7th Amendment of the Constitution of the United States reads as follows:

“In suits at common law where the value in controversy shall exceed \$20.00 the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.” While, concededly, the 7th Amendment to the Federal Constitution does not govern the State courts, nevertheless the language of the amendment is so similar to the provision of our own constitution governing trial by jury that the reasoning in the case referred to (*McKeon v. Central Stamping Co.*, 264 Fed. 385) is applicable to a case arising under our own constitution, for surely the phrase “right of trial by jury shall be preserved” is no stronger than, if as strong, as “the right of trial by jury shall remain inviolate.”

In addition, it is plain that the common law in existence at the time of the adoption of the Federal Constitution was the same common law in existence at the time of the adoption of the first Constitution of the State of New Jersey. In our first Constitution, Article 22 provides “that the common law of England as well as so much

of the statute law as have been heretofore practiced in this colony shall still remain in force—and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal forever.”

We assume as a fact and proceed on the assumption, as we believe it too apparent to require argument, that the later amendations of our constitution do not change the essential meaning of the right of trial by jury (*McGear v. Woodruff*, 33 N. J. L. 213). In the *McKeon* case, *supra*, Judge Buffington in his opinion states the following: “What do these few simple words used in the Constitution, ‘the right of trial by jury shall be preserved’ mean? Manifestly, in answering that question we naturally ask, ‘What did these words mean to those who used them when they were written into the Constitution?’ and it will be noted that we are not dealing with an indefinite but a very definite, concrete, well understood thing that at that time had such a recognized meaning that it was described not as ‘a right of trial by jury’ not as some or any right of trial by jury, but as ‘the right of trial by jury.’”

The opinion then points out that one of the twenty-seven charges leveled against the King of Great Britain in the Declaration of Independence, namely the eighteenth charge, was for “depriving us in many cases of trial by jury,” and the adoption of the Federal Constitution was only secured on the understanding that the right of trial by jury in civil cases would be secured by the adoption of an amendment to that effect.

In conclusion the Court says: “As then the Federal Statutes did not justify the Court below in conforming to the statutes of New Jersey regulating the granting of new trials, the only ground of justification of such course must be the general inherent power of the Court below to grant a new trial of the restricted character ordered in this case. In our view such restricted form of new trial was one not known to the law of England at the time the constitution was formed. Such restricted trial

where the whole case is not submitted *in toto* to a jury of twelve men is not the trial by jury guaranteed by the Seventh Amendment of the Federal Constitution and was, therefore, beyond the power of the Court below to impose on the defendant," citing *Hughey v. Sullivan*, 80 Federal 172.

The defendant-appellant here contends that the whole procedure, that is to say not only the trial itself but the granting by the Court of the new trial on the question of damages only was a violation of his inherent constitutionally guaranteed right of trial by jury and in this connection we cite from the case of *Hughey v. Sullivan* above referred to, as follows: "The control of the Court over the verdict after it is given is as much a part of the trial by jury as the giving of the verdict itself and the right to have the issues tried by a second jury or even by a third jury when the verdict of the first jury is effected by some infirmity for which the common law required the Trial Court to set that verdict aside, is as much a right of trial by jury preserved by the constitution as the first trial." We desire to again point out that the entry of judgment in this case after the second trial was unquestionably brought about as the result of the deliberations of twenty-four men, and the issue framed by the pleadings were passed upon not only in theory but in fact by twenty-four men, twelve of whom passed upon one phase of the case and twelve under the direction of a different judge upon another phase. Citing again from *Hughey v. Sullivan, supra*, "If a statute should be passed requiring the minority of a jury to conform their judgment to the majority and return a verdict accordingly, it would be conceded everywhere that this would be an impairment of the right of trial by jury because it would be imposing by law upon the jury a rule of judgment not known to the common law." Is it not true then that in this case judgment final is entered on the deliberations of twenty-four men but that these deliberations are not expressed in the terms of the judgment by the assent of the entire twenty-four, but on the contrary, twelve jur-

ors have expressly stated their dissent as to the amount of damages awarded?

The courts of this State have themselves recognized that the right of trial by jury means a trial in which all the issues are passed upon by a body of twelve men. We cite from the case of *State v. Parkhurst*, 9 Law, at page 444 (549):

“At an early period of our Government, while the minds of men were yet unbiased by party prejudice, this question was brought forward in the case of Holmes & Walton raising on what was then called the Seizure Laws, and it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six men jury, was repealed and a constitutional jury of twelve men substituted in its place. This then is not only a judicial decision but a decision recognized and acquiesced in by the legislative body of the State.”

In the case of *Brown v. State*, 62 N. J. L. 666, the common law status of trial by jury is gone into *in extenso* and it is there pointed out that “before *magna charta* the trial by jury was a trial by twelve men whose decision could only be by consent of all,” and that the phrase in *magna charta* “legal judgment of his peers or by the law of the land” preserves the rights above outlined (citing 1 Reeves, 246, note). The Court in the *Brown* case then goes on to state (opinion by Depue, *J.*) that in this country, where the constitutions provide that the right of trial by jury shall remain confirmed as part of the law of the land or the right of trial by jury shall remain inviolate, the words “trial by jury” imparts a trial by a jury of twelve men, impartially selected, who must concur in the verdict and further “in the treatises of this subject as well as in the decisions of the courts there is a consensus of opinion in defining right of trial by jury under constitutional provisions such as ours as it is here de-

fined with respect to the legislative power over trial by jury. An act diminishing the number of a jury or altering any of its essential features \* \* \* would be clearly unconstitutional." See also *Briant v. Russel*, 2 N. J. L. 146, and *Raphael v. Lane*, 56 N. J. L. 108, and *Johnson v. Barclay*, 16 N. J. L. 1.

The same essential conclusions are reached by the Supreme Court of the United States in the case of *Slocum v. The New York Life Insurance Co.*, reported in 228 U. S. 361, 57 Law Edition 879, where the Court states as follows: "According to the rules of common law such an error like other errors in law effecting a verdict could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. This procedure was regarded as of real value because in addition to fully recognizing that right it afforded an opportunity for adducing further evidence as conducive to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity and for anything that appears in the record it might enable her to supply omissions in her own evidence or to show inaccuracies in that of the defendant which will rightly entitle her to a verdict in her favor." Then again the Court said: "The only modes known to the common law to re-examine such facts are the granting of a new trial wherein the issue was tried and to which the record was probably returnable on the award of a *feri facias de novo* by an appellate court for some error of law which intervened in the proceeding." This, of course, was a trial of the entire case, leaving the parties free to introduce any and all of the evidence that they might then be in a position to urge, some of which may not have been available or known theretofore. It also gives the parties their rightful opportunity to expose any error or untruth in the opposing evidence, and as is said in Blackstone's Commentaries, volume 3, page 391, "A new trial is a re-hearing of a cause before another jury \* \* \* the parties come better informed, counsel

better prepared. The law is more fully understood, the Judge is more master of the subject and nothing is now tried but the real merits of the case." In theory of law the trial jury are aided in reaching a just verdict by seeing the witnesses upon the stand, watching their demeanor and hearing them testify. Frequently the same witnesses will testify as to circumstances giving rise to a cause of action and also to items of damage rising out of that cause of action. In the Slocum case, *supra*, the opinion of Mr. Justice Miller in the case of *Barney v. Schmeider*, 9 Wallace 248, is referred to. In that case the trial in the Circuit Court was before a jury and the evidence consisted of the testimony taken a few days before on another trial. This testimony was voluminous and was put in with the consent of the parties and the approbation of the Court, but it was not read to the jury because the Court regarded it as necessarily requiring a verdict for the plaintiff. In the opinion reversing this judgment Mr. Justice Miller said: "As the defendant in this case did not waive his right to have the facts tried by a jury it was the duty of the Court to submit such facts to the jury that was sworn to try them. It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on the former trial and not read before this jury because the Court had heard it in the first place and did not deem it necessary to be heard by the jury in this case \* \* \* but we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them by the Judge of the Court. It is obvious that if such a verdict can be supported here when the very act of the Court in doing this is accepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value and become nothing but the machinery through which the Court exercises the functions of a jury without its responsibility." Continuing in the Slocum

case, the Court says: "Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact either party is entitled to have them tried by the Court and a jury and this is as true of a second trial as of the first \* \* \* the issues to which the jury must respond are those presented by the pleadings and this whether the evidence be disputed or undisputed, and whether it be ample or meagre." In the present case we desire to point out that no new pleadings were filed and as the case stood at the time of its presentation to the second jury the original pleadings filed were still the pleadings in the cause. As to the question of what constitutes the extent of the right of trial by jury which the constitution declares shall be preserved, Mr. Justice Van Devanter says that "the right so preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve under the direction and superintendence of the Court. That the rendition of a verdict is of the substance of the right because to dispense with the verdict is to eliminate the jury which is no less a part of the tribunal charged with the trial than is the Court." Apart from the strict question of the constitutionality of Rules 72 and 73, there should be considered the practical question of the necessity or desirability of such legislation, certainly as regards tort claims. The objections are three fold:

First. Jury verdicts in such cases are practically always the result of compromise and the opinion of Juror #1 who stands for a verdict of \$10,000 becomes merged with the opinion of Juror #12 who stands for a verdict for the defendant. Right or wrong this is the inevitable result of the jury system. When, therefore, a new trial is granted on the question of damages only, the plaintiff receives the benefit of the vote of the juror corresponding to Juror #1 on the first trial, while the defendant is robbed of the vote of the juror corresponding to Juror #12 on the first trial.

Second. In order for the verdict to be set aside the Trial Court must find that the jury was incompetent and that their judgment was so improper as to require the intervention of the Court. In a tort case the jury's finding is necessarily one based largely on inferences drawn from the testimony and is largely a matter of sound discretion. In our judgment if the result arrived at as to damages is so outrageous as to justify a new trial, the jury by their verdict have proven their own incompetence and the defendant should not be bound by their findings as to any part of the case.

Third. The testimony on the question of liability is so inextricably bound up with that of damage that it is impossible to separate them with justice to the parties. Suppose a case in which on the first trial the plaintiff testified that he was cut by flying glass and likewise dislocated his spine. The jury believes (after cross examination) that plaintiff was cut as a result of the accident, but it is not believed that he received the spinal injury as the result. The Trial Judge believes the contrary and grants a new trial as to damages only. On the new trial as a practical matter, the second jury will grant a verdict covering both items of damage for the reason that as a practical matter the defendant is precluded from going into the details of how the accident happened to the same extent as if the question of liability were being threshed out. Thus the opinion of the judge on the first trial is fixed upon the defendant in the form of a judgment which is the judgment that never had the sanction of a jury in accordance with the moral as well as the constitutional rights of the parties. In closing the argument on this point we desire to refer to the case of *Simon v. Fish*, 210 Mass. 563, where the Court says "The ancient common law doctrine that a verdict of the jury was final or indivisible and must stand or fall as a whole was early modified by the custom of this commonwealth," and continuing, "it is undoubtedly true that in England there can be no limitation of a trial to specific

issues without consent of both parties. There a new trial means a new trial as to all issues unless by agreement of parties. (*Watt v. Watt*, 1905, A. C. 115.) Overruling *Bilt v. Lawes*, 12 Q. B. D. 336, a contrary decision in the Court of Appeals." This case is the leading case in Massachusetts declaring that partial new trials may be granted, but the Court says in its opinion; "the bald question raised upon this branch of the case is as to the power of the Superior Court to grant new trial upon this restricted issue. It is only in exceptional and rare instances that the inadequacy of damages will not be so interwoven with liability that justice cannot be done without a new trial upon the whole case. Although we do not say that there cannot be such a case, it is hard to conceive of one."

The legal and moral doctrines above outlined find support in standard text books and in the adjudications of our own courts. The following quotation from Sutherland on Damages, Volume I, pages 108 to 114, is in point:

"The court concludes that the jury was influenced by passion or prejudice or both because they found such excessive damages, and yet allows their findings covering the major proposition of the case, upon which the damages are consequent, to stand. Why should a verdict be in part retained if the jury was really influenced by passion or prejudice? Where their estimate is rejected and another substituted, is the latter a verdict?"

In the case of *Miller v. D., L. & W. Railroad*, 58 N. J. L. 428, in which a woman suffering serious injuries was given a six-cent verdict by the jury, Beasley, *C. J.*, says:

"This result of the trial in this case cannot be explained on any ground that will harmonize with justice or common sense. Counsel's argument that the jury thought there was no cause of action but in a spirit of favoritism found for a woman against a corporation is suicidal as it proved the jury distinctly in the wrong and on that account their action should be annulled, for so unscrupulous a body should not be allowed to settle the rights of plaintiff or defendant."

In *Caswell v. North Jersey Railroad*, 69 N. J. L. 226, the Court said:

“\* \* \* where the inadequacy is so great as to indicate passion or prejudice on the part of the jury, a new trial should be granted on the whole case.”

See also *Murray v. Leonard*, 75 N. W. Reports 272;

See also 39 L. R. A. New Series, p. 488, note.

It is, of course, well settled by repeated decisions in this State that in order to determine the powers of the constitutional courts of the State reference must be had to the common law. *Traphagen v. West Hoboken*, 39 N. J. L. 62; *Lighthipe v. Orange*, 75 N. J. L. 365; *Katz v. Eldridge*, N. J. L. , 117 Atl. 841.

## POINT II.

It is respectfully submitted that the judgment in the case at bar should be reversed and a new trial granted on the entire issue.

HEINE, BRADNER & LAIRD,  
*Attorneys for Defendant-Appellant.*

M. CASEWELL HEINE,  
*Of Counsel.*

JOHN A. LAIRD,  
*On the Brief.*





