

**I N D E X .**

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**Notice of Appeal.**

(Filed Feb. 9, 1928.)

**New Jersey Supreme Court**

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ESSEX COUNTY.

MARGARET A. WILSON, Administra-  
trix *ad prosequendum* of the  
Estate of Harold E. Wilson,  
deceased,

*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,  
*Defendant.*

Action at Law.

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SIRS:

TAKE NOTICE that the plaintiff appeals to the  
Court of Errors and Appeals in the State of New  
Jersey from the judgment of nonsuit entered in  
the above entitled cause in favor of the defendant,  
Dairymen's League Co-operative Association, Inc.  
and against the plaintiff Margaret A. Wilson, ad-  
ministratrix *ad prosequendum* of the Estate of  
Harold E. Wilson, deceased.

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Dated February 7, 1928.

MARK TOWNSEND, JR.,  
Attorney of Plaintiff.

A true copy.

FRED L. BLOODGOOD,  
Clerk.

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**Grounds of Appeal.**

(Filed February 18, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

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MARGARET A. WILSON, Administratrix *ad prosequendum* of the Estate of Harold E. Wilson, deceased,

*Plaintiff-Appellant,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,  
*Defendant-Appellee.*

Action at Law.

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Now comes the plaintiff-appellant Margaret A. Wilson, administratrix *ad prosequendum* of the Estate of Harold E. Wilson, deceased, by her attorney Mark Townsend, Jr., and sets down the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above stated cause:

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1. The Court erred in granting the motion for a nonsuit made by the defendant upon the opening of plaintiff's counsel to the jury.

MARK TOWNSEND, JR.,  
Attorney for and of Counsel  
with Plaintiff-Appellant.

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**Summons.**

(Filed August 7, 1923.)

THE STATE OF NEW JERSEY

TO

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC. 10

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

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WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of the Supreme Court at Trenton, this Twenty-fifth day of July, Nineteen Hundred and Twenty-three.

MULLIGAN & KOENIG,  
Attorneys.

EDWARD J. KELLEHER,  
Clerk.

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**Complaint.**

(Filed August 7, 1923.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

MARGARET A. WILSON, Administra-  
trix of the Estate of Harold E.  
Wilson, deceased,  
*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,  
*Defendant.*

Plaintiff, Margaret A. Wilson, administratrix  
*ad prosequendum\**  
~~of all and singular the goods and chattels, rights  
and effects, which were~~ of Harold E. Wilson, de-  
ceased, resid- at 27 South 10th Street, in the City  
of Newark, County of Essex and State of New  
Jersey, says that:

The defendant is a corporation of the State of  
New York with principal office in this State located  
at 15 Exchange Place, in the City of Jersey City,  
County of Hudson and State of New Jersey.

FIRST COUNT:

1. On December 5, 1922, the said Harold E.  
Wilson was carefully and lawfully riding a bi-

\*Matter in italics written in original.

*Amendment al-  
lowed at Trial over  
objection of Deft. &  
exception allowed.  
Jun. 18, 1926.  
WM. A. SMALL,  
C. C. J.\**

*Complaint.*

cycle along Orange Street, a public highway, near  
Clifton Avenue, in the City of Newark, County of  
Essex and State of New Jersey, and riding his bi-  
cycle on the "right" or southerly side thereof in  
an easterly direction.

2. On that day and at that place the defendant  
by its agents and servants had parked its auto-  
mobile truck on said southerly side of Orange  
Street near Clifton Avenue, and when the said  
Harold E. Wilson approached riding his bicycle on  
the said side of the said highway, the said defend-  
ant by its agents and servants negligently and care-  
lessly started up, drove and operated said auto-  
mobile truck in a backward direction, that is west-  
erly, without giving any or proper warning and  
without having any light on said automobile, al-  
though the morning was dark and a light was re-  
quired, so that it ran into and against the said  
Harold E. Wilson and his said bicycle and caused  
him to be thrown to the ground.

3. The defendant was negligent in this that it  
by its agents and servants drove said automobile  
truck at the time in a backward direction on the  
"wrong" side of the street without giving any or  
proper warning of its approach and without due  
care to the rights of the said Harold E. Wilson and  
without lights although the morning was dark.

4. As a result of said collision the said Harold  
E. Wilson was thrown to the ground, his legs and  
body were cut and bruised and he received severe  
bodily injuries, and because of said injuries he  
lingered and languished until the thirtieth day of  
January, 1923, when he then and there died at the  
Newark City Hospital in the City of Newark afore-  
said.

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Complaint.

5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, administratrix and the plaintiff herein, and four children, Kathleen aged five years, Harold E., aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars.

6. Plaintiff's action against the said defendant was commenced within twenty-four calendar months from the date of the decease of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of *ad prosequendum*\* administration ~~granted on the Estate of the said Harold E. Wilson by Howard Isherwood, Surrogate of the County of Essex, on the twenty-seventh day of April, 1923,~~ whereby it fully appears to the said Court, that the said plaintiff is administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, &c.

SECOND COUNT.

1. On December 5, 1922, the said Harold E. Wilson was carefully and lawfully riding a bicycle along Orange Street, a public highway, near Clifton Avenue, in the City of Newark, County of Es-

\*Matter in italics written in original.

Complaint.

sex and State of New Jersey, and riding his bicycle on the "right" or southerly side thereof in an easterly direction.

2. On that day and at that place the defendant by its agents and servants was driving an automobile truck on said southerly side of Orange Street near Clifton Avenue, in a westerly direction and on the "wrong" side of the street, and when the said Harold E. Wilson approached riding his bicycle on the said side of the said highway, the said defendant by its agents and servants negligently and carelessly drove and operated said automobile truck without giving any or proper warning and without having any lights on said automobile truck, although the morning was dark and a light was required, so that it ran into and against the said Harold E. Wilson and his said bicycle and caused him to be thrown to the ground.

3. The defendant was negligent in this that it by its agents and servants drove said automobile truck at the time on the "wrong" side of the street without giving any or proper warning of its approach and without due care to the rights of the said Harold E. Wilson and without a light, although the morning was dark.

4. As a result of said collision the said Harold E. Wilson was thrown to the ground, his legs and body were cut and bruised, and he received severe bodily injuries, and because of said injuries he lingered and languished until the thirtieth day of January, 1923, when he then and there died at the Newark City Hospital in the City of Newark aforesaid.

5. The said Harold E. Wilson was thirty years

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*Amended at trial over deff's objection and Exception allowed.*

*Jun. 18, 1926.*

WM. A. SMALL,  
C. C. J.\*

Complaint.

of age at the time of his death and left him surviving Margaret A. Wilson, his wife, administratrix and the plaintiff herein, and four children, Kathleen aged five years, Harold E., aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars.

6. Plaintiff's action against the said defendant was commenced within twenty-four calendar months from the date of the deceased of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of administration granted on the Estate of the said Harold E. Wilson by Howard Isherwood, Surrogate of the County of Essex, on the twenty-seventh day of April, 1923, whereby it fully appears to the said Court, that the said Plaintiff is administratrix of the said Harold E. Wilson, deceased, &c.

Plaintiff demands \$25,000 damages.

MULLIGAN & KOENIG,  
Attorneys of Plaintiff.

Answer.

(Filed August 7, 1923.)

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY.

MARGARET A. WILSON, Administra- trix <i>ad prosequendum</i> of the Estate of Harold E. Wilson, deceased,  <i>Plaintiff,</i>	10
<i>v.</i>	
DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., <i>Defendant.</i>	20

Defendant, answering the complaint filed in the above entitled cause, says that:

FIRST COUNT.

1. It denies paragraphs 1, 2, 3, and 4 of this count.

2. It has no knowledge or information sufficient to form a belief as to paragraphs 5, 6 and 7 of this count, and therefore leaves the plaintiff to his proof thereof.

SECOND COUNT.

1. It denies paragraphs 1, 2, 3, and 4 of this count.

2. It has no knowledge or information sufficient to form a belief as to paragraphs 5, 6 and 7 of this count, and therefore leaves the plaintiff to his proof thereof.

*First Amended Complaint.*

SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

Defendant alleges that plaintiff's intestate was guilty of contributory negligence in that he carelessly, negligently and improperly rode his bicycle into a place of danger without due regard for his own safety.

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KALISCH & KALISCH,  
Attorneys of Defendant.

Filed Aug. 6, 1923.

**First Amended Complaint.**

(Filed August 14, 1925.)

NEW JERSEY SUPREME COURT,

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ESSEX COUNTY.

MARGARET A. WILSON, Administra-  
trix of the Estate of Harold E.  
Wilson, deceased,

*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,

*Defendant.*

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Action at Law.

Plaintiff, Margaret A. Wilson, administratrix of all and singular the goods and chattels, rights and effects, which were of Harold E. Wilson, deceased, residing at 27 South 10th Street, in the City of Newark, County of Essex and State of New Jersey, says that:

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The defendant is a corporation of the State of New York with principal office in this State lo-

*First Amended Complaint.*

cated at 15 Exchange Place, in the City of Jersey City, County of Hudson and State of New Jersey.

FIRST COUNT.

1. On December 5, 1922, the said Harold E. Wilson was carefully and lawfully riding a bicycle along Orange Street, a public highway, near Clifton Avenue, in the City of Newark, County of Essex and State of New Jersey, and riding his bicycle on the "right" or southerly side thereof in an east-erly direction.

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2. On that day and at that place the defendant by its agents and servants had parked its automobile truck on said southerly side of Orange Street near Clifton Avenue, and when the said Harold E. Wilson approached riding his bicycle on the said side of the said highway, the said defendant by its agents and servants negligently and carelessly started up, drove and operated said automobile truck in a backward direction, that is west-erly, without giving any or proper warning and without having any light on said automobile, al-though the morning was dark and a light was required, so that it ran into and against the said Harold E. Wilson and his said bicycle and caused him to be thrown to the ground.

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3. The defendant was negligent in this that it by its agents and servants drove said automobile truck at the time in a backward direction on the "wrong" side of the street without giving any or proper warning of its approach and without due care to the rights of the said Harold E. Wilson and without lights although the morning was dark.

4. As a result of said collision the said Harold

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*First Amended Complaint.*

10 E. Wilson was thrown to the ground, his legs and body were cut and bruised and he received severe bodily injuries, and because of said injuries he lingered and languished until the thirtieth day of January, 1923, when he then and there died at the Newark City Hospital in the City of Newark aforesaid.

20 5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, administratrix and the plaintiff herein, and four children, Kathleen aged five years, Harold E., aged three years, Robert, aged two years, and Margaret, aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars.

30 6. Plaintiff's action against the said defendant was commenced within two years from the date of the decease of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of administration granted on the Estate of the said Harold E. Wilson by Howard Isherwood, Surrogate of the County of Essex, on the 27th day of April, 1923, whereby it fully appears to the said Court that the said plaintiff is administratrix of the said Harold E. Wilson, deceased, &c.

## SECOND COUNT.

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1. On December 5, 1922, the said Harold E. Wil-

*First Amended Complaint.*

son was carefully and lawfully riding a bicycle along Orange Street, a public highway, near Clifton Avenue, in the City of Newark, County of Essex and State of New Jersey, and riding his bicycle on the "right" or southerly side thereof in an easterly direction. 10

2. On that day and at that place the defendant by its agents and servants was driving an automobile truck on said southerly side of Orange Street near Clifton Avenue, in a westerly direction and on the "wrong" side of the street, and when the said Harold E. Wilson approached riding his bicycle on the said side of the said highway, the said defendant by its agents and servants negligently and carelessly drove and operated said automobile truck without giving any or proper warning and without having any lights on said automobile truck although the morning was dark and a light was required, so that it ran into and against the said Harold E. Wilson and his said bicycle and caused him to be thrown to the ground. 20

3. The defendant was negligent in this that it by its agents and servants drove said automobile truck at the time on the "wrong" side of the street without giving any or proper warning of its approach and without due care to the rights of the said Harold E. Wilson and without a light, although the morning was dark. 30

4. As a result of said collision the said Harold E. Wilson was thrown to the ground, his legs and body were cut and bruised, and he received severe bodily injuries, and because of said injuries, he lingered and languished until the 30th day of January, 1923, when he then and there died at the 40

*First Amended Complaint.*

Newark City Hospital in the City of Newark aforesaid.

10 5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, administratrix and the plaintiff herein, and four children, Kathleen aged five years, Harold E., aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars.

20 6. Plaintiff's action against the said defendant was commenced within two years from the date of the decease of the said Harold E. Wilson.

30 7. Plaintiff brings into Court here letters of administration granted on the Estate of the said Harold E. Wilson by Howard Isherwood, Surrogate of the County of Essex, on the 27th day of April, 1923, whereby it fully appears to the said Court, that the said plaintiff is administratrix of the said Harold E. Wilson, deceased, &c.

## THIRD COUNT.

1. The plaintiff repeats paragraph one of the second count with the same force and effect as though herein repeated and set forth at length.

40 2. That the defendant, its agents, servants and employees permitted the automobile truck owned,

*First Amended Complaint.*

operated and controlled by it to stand unattended on the southerly side of Orange Street near Clifton Avenue, in the night time, without lights, on the wrong side of the road, and in such manner that persons approaching, including this plaintiff's intestate, were unaware of its presence. 10

3. The defendant was further negligent in that it permitted the said automobile truck so to stand in a locality upon which vehicles were passing and re-passing, as a result of which the bicycle of said Harold E. Wilson collided therewith.

4. As a result of said collision the said Harold E. Wilson was thrown to the ground, his legs and body were cut and bruised, and he received severe body injuries, and because of said injuries he lingered and languished until the 30th day of January, 1923, when he then and there died at the Newark City Hospital in the City of Newark aforesaid. 20

5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, administratrix and the plaintiff herein, and four children, Kathleen, aged five years, Harold E., aged three years, Robert, aged two years and Margaret, aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars. 30 40

6. Plaintiff's action against the said defendant

*Answer to First Amended Complaint.*

was commenced within two years from the date of the decease of the said Harold E. Wilson.

10 7. Plaintiff brings into Court here letters of administration granted on the estate of the said Harold E. Wilson, by Howard Isherwood, Surrogate of the County of Essex on the 27th day of April, 1923, whereby it fully appears to the said Court, that the said Plaintiff is administratrix of the said Harold E. Wilson, deceased, &c.

WHEREFORE plaintiff demands judgment against the defendant in the sum of \$25,000.00.

MARK TOWNSEND, JR.,  
Attorney for Plaintiff.

20 **Answer to First Amended Complaint.**

(Filed August 19, 1925.)

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY.

30 MARGARET A. WILSON, Administra-  
trix *ad prosequendum* of the  
Estate of Harold E. Wilson,  
deceased,  
*Plaintiff,*

v.

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,  
*Defendant.*

40 Defendant answering the amended complaint filed by the plaintiff in the above entitled cause says that:

*Answer to First Amended Complaint.*

FIRST COUNT.

1. It denies paragraphs 1, 2, 3, 4 and 5 of this count of the complaint.

2. It has not any knowledge or information sufficient to form a belief as to the contents of paragraphs 6 and 7 of this count of the complaint, and leaves the plaintiff to her proof thereof. 10

SECOND COUNT.

1. It denies paragraphs 1, 2, 3, 4 and 5 of this count of the complaint.

2. It has not any knowledge or information sufficient to form a belief as to the contents of paragraphs 6 and 7 of this count of the complaint, and leaves the plaintiff to her proof thereof. 20

THIRD COUNT.

1. It repeats its answer to paragraph 1 of the second count and makes it part of this count.

2. It denies paragraphs 2, 3, 4 and 5 of this count of the complaint.

3. It has not any knowledge or information sufficient to form a belief as to the contents of paragraphs 6 and 7 of this count of the complaint, and leaves the plaintiff to her proof thereof. 30

SEPARATE DEFENSE TO FIRST, SECOND AND THIRD COUNTS.

Plaintiff's intestate was guilty of contributory negligence in that he carelessly, negligently and improperly rode his bicycle without due regard for his own safety and physical surroundings.

KALISCH & KALISCH,  
Attorneys of Defendant. 40

Second Amended Complaint.

(Filed March 3rd, 1927.)

NEW YORK SUPREME COURT,

ESSEX COUNTY.

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MARGARET A. WILSON, Administra-  
trix *ad prosequendum* of the  
Estate of Harold E. Wilson,  
deceased,

Plaintiff,

v.

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,

Defendant.

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Action at Law.

The plaintiff, Margaret A. Wilson, administra-  
trix *ad prosequendum* of Harold E. Wilson, de-  
ceased, residing at 27th South 10th Street, City of  
Newark, County of Essex, State of New Jersey, for  
her amended complaint, by her attorney Mark  
Townsend, Jr., says that:

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The defendant is a corporation of the State of  
New York with principal office in this State lo-  
cated at 15 Exchange Place, in the City of Jersey  
City, County of Hudson and State of New Jersey.

FIRST COUNT.

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1. On December 5, 1922, the said Harold E. Wil-  
son was carefully and lawfully riding a bicycle  
along Orange Street, a public highway, near Clif-  
ton Avenue, in the City of Newark, County of  
Essex and State of New Jersey, and riding his bi-

Second Amended Complaint.

cycle on the "right" or southerly side thereof in an  
easterly direction.

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2. On that day and at that place the defendant  
by its agents and servants had parked its automo-  
bile truck on said southerly side of Orange Street  
near Clifton Avenue, and when the said Harold  
E. Wilson approached riding his bicycle on the  
said side of the said highway, the said defendant  
by its agents and servants negligently and care-  
lessly started up, drove and operated said auto-  
mobile truck in a backward direction, that is west-  
erly, without giving any or proper warning and  
without having any light on said automobile, al-  
though the morning was dark and a light was re-  
quired, so that it ran into and against the said  
Harold E. Wilson and his said bicycle and caused  
him to be thrown to the ground.

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3. The defendant was negligent in this that it  
by its agents and servants drove said automobile  
truck at the time in a backward direction on the  
"wrong" side of the street without giving any or  
proper warning of its approach and without due  
care to the rights of the said Harold E. Wilson and  
without lights although the morning was dark.

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4. As a result of said collision the said Harold  
E. Wilson was thrown to the ground, his legs and  
body were cut and bruised and he received severe  
bodily injuries, and because of said injuries he  
lingered and languished until the thirtieth day of  
January, 1923, when he then and there died at the  
Newark City Hospital in the City of Newark afore-  
said.

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5. The said Harold E. Wilson was thirty years  
of age at the time of his death and left him sur-  
viving Margaret A. Wilson, his wife, and four chil-

*Second Amended Complaint.*

10 dren, Kathleen aged five years, Harold E., aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-five Thousand Dollars.

20 6. Plaintiff's action against the said defendant was commenced within two years and within twenty-four calendar months of the date of the decease of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of administration *ad prosequendum* granted on the Estate of the said Harold E. Wilson by Garfield Gifford, Surrogate of the County of Essex, whereby it fully appears to the said Court, that the said plaintiff is administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, &c.

## 30 SECOND COUNT.

1. On December 5, 1922, the said Harold E. Wilson was carefully and lawfully riding a bicycle along Orange Street, a public highway, near Clifton Avenue, in the City of Newark, County of Essex and State of New Jersey, and riding his bicycle on the "right" or southerly side thereof in an easterly direction.

40 2. On that day and at that place the defendant by its agents and servants was driving an automobile truck on said southerly side of Orange Street

*Second Amended Complaint.*

near Clifton Avenue, in a westerly direction and on the "wrong" side of the street, and when the said Harold E. Wilson approached riding his bicycle on the said side of the said highway, the said defendant by its agents and servants negligently and carelessly drove and operated said automobile truck without giving any or proper warning and without having any lights on said automobile truck, although the morning was dark and a light was required, so that it ran into and against the said Harold E. Wilson and his said bicycle and caused him to be thrown to the ground. 10

3. The defendant was negligent in this that it by its agents and servants drove said automobile truck at the time on the "wrong" side of the street without giving any or proper warning of its approach and without due care to the rights of the said Harold E. Wilson and without a light, although the morning was dark. 20

4. As a result of said collision the said Harold E. Wilson was thrown to the ground, his legs and body were cut and bruised, and he received severe bodily injuries, and because of said injuries, he lingered and languished until the 30th day of January, 1923, when he then and there died at the Newark City Hospital in the City of Newark aforesaid. 30

5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, and four children, Kathleen aged five years, Harold E., aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and they have sustained great pecuniary loss, damage and injury for and by reason of the death 40

*Second Amended Complaint.*

of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administratrix of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-Five Thousand Dollars.

6. Plaintiff's action against the said defendant was commenced within two years and within twenty-four calendar months from the date of the decease of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of administration *ad prosequendum* granted on the Estate of the said Harold E. Wilson by Garfield Gifford, Surrogate of the County of Essex, whereby it fully appears to the said Court, that the said plaintiff is administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, &c.

## THIRD COUNT.

1. The plaintiff repeats paragraph one of the second count with the same force and effect as though herein repeated and set forth at length.

2. That the defendant, its agents, servants and employees permitted the automobile truck owned, operated and controlled by it to stand unattended on the southerly side of Orange Street near Clifton Avenue, in the night time, without lights, on the wrong side of the road, and in such manner that persons approaching, including this plaintiff's intestate, were unaware of its presence.

3. The defendant was further negligent in that it permitted the said automobile truck so to stand in a locality upon which vehicles were passing and

*Second Amended Complaint.*

re-passing, as a result of which the bicycle of said Harold E. Wilson collided therewith.

4. As a result of said collision the said Harold E. Wilson was thrown to the ground, his legs and body were cut and bruised, and he received severe body injuries, and because of said injuries he lingered and languished until the 30th day of January, 1923, when he then and there died at the Newark City Hospital in the City of Newark aforesaid.

5. The said Harold E. Wilson was thirty years of age at the time of his death and left him surviving Margaret A. Wilson, his wife, and four children, Kathleen aged five years, Harold E. aged three years, Robert aged two years and Margaret aged two months, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Harold E. Wilson, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, to demand and have from the said defendant the sum of Twenty-Five Thousand Dollars.

6. Plaintiff's action against the said defendant was commenced within two years and within twenty-four calendar months from the date of the decease of the said Harold E. Wilson.

7. Plaintiff brings into Court here letters of administration *ad prosequendum* granted on the Estate of the said Harold E. Wilson, by Garfield Gifford, Surrogate of the County of Essex, whereby it fully appears to the said Court, that the said Plaintiff is administratrix *ad prosequendum* of the said Harold E. Wilson, deceased, &c.

*Answer to Second Amended Complaint.*

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$25,000.00.

MARK TOWNSEND, JR.,  
Attorney for Plaintiff.

10

**Answer to Second Amended Complaint.**

(Filed March 5, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

MARGARET A. WILSON, Administra-  
trix *ad prosequendum* of the  
Estate of Harold E. Wilson,  
deceased,

20

*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,  
*Defendant.*

30

Defendant, a corporation having a place of busi-  
ness in the City of Newark, County of Essex and  
State of New Jersey, answering the complaint filed  
in the above entitled cause says that:

FIRST COUNT.

1. It denies paragraphs 1, 2, 3, 4 and 6 of this  
count of the complaint.

2. It has not any knowledge or information  
sufficient to form a belief and leaves the plaintiff  
to her proof thereof as to the age of the deceased,  
and whom the deceased left him surviving, and

40

*Answer to Second Amended Complaint.*

who were his next of kin, and what loss, if any,  
they suffer by reason of his death; but it denies  
the balance of the 5th paragraph relating to the  
accrual of a cause of action to this plaintiff as  
administratrix *ad prosequendum*.

10

3. The letters of administratrix *ad prose-  
quendum* referred to in paragraph 7 of this count  
of the complaint, have no legal effect since the  
same were granted more than two years after the  
death of the deceased, Harold E. Wilson, and the  
Surrogate who granted them had no jurisdiction  
for so doing.

SECOND COUNT.

1. It denies paragraphs 1, 2, 3, 4 and 6 of this  
count of the complaint.

20

2. It has not any knowledge or information  
sufficient to form a belief and leaves the plaintiff  
to her proof thereof, as to the age of the deceased,  
whom the deceased left him surviving, who were  
his next of kin, and what loss, if any, they suffer  
by reason of his death; but denies the balance  
of the 5th paragraph relating to the accrual of  
a cause of action to this plaintiff as administratrix  
*ad prosequendum*.

30

3. The letters of administratrix *ad prose-  
quendum* referred to in paragraph 7 of this count  
of the complaint, have no legal effect since the  
same were granted more than two years after the  
death of the deceased, Harold E. Wilson, and the  
Surrogate who granted them had no jurisdiction  
for so doing.

THIRD COUNT.

1. Defendant repeats its answers to paragraph  
1 of the second count.

40

*Answer to Second Amended Complaint.*

2. It denies paragraphs 2, 3, 4 and 6 of this count of the complaint.

10 3. It has not any knowledge or information sufficient to form a belief and leaves the plaintiff to her proof thereof, as to the age of the deceased, whom the deceased left him surviving, who were his next of kin, and what loss, if any, they suffer by reason of his death; but denies the balance of the 5th paragraph relating to the accrual of a cause of action to this plaintiff as administratrix *ad prosequendum*.

20 4. The letters of administratrix *ad prosequendum* referred to in paragraph 7 of this count of the complaint, have no legal effect since the same were granted more than two years after the death of the deceased, Harold E. Wilson, and the Surrogate who granted them had no jurisdiction for so doing.

## FIRST SEPARATE DEFENSE.

30 Deceased, Harold E. Wilson, was guilty of contributory negligence in that he carelessly, negligently and improperly placed himself in a position of danger without due regard for his own safety.

## SECOND SEPARATE DEFENSE.

40 Application for letters of administration *ad prosequendum* by Margaret A. Wilson, upon the estate of Harold E. Wilson, was made more than two years after the latter's death, at which time the jurisdiction of the Surrogate to make such appointment no longer existed. The appointment by Surrogate Gifford of Essex County of Margaret A. Wilson, as administratrix *ad prosequendum* was without any legal right since the application for

*Answer to Second Amended Complaint.*

such appointment was made more than two years after the death of the deceased.

## THIRD SEPARATE DEFENSE.

At the time of the application for letters of administration *ad prosequendum* on the estate of Harold E. Wilson and the appointment, the right of action, if any, against this defendant was outlawed. 10

## FOURTH SEPARATE DEFENSE.

Circuit Judge William A. Smith, had no legal authority or jurisdiction to grant the motion of the plaintiff's counsel to substitute for the general administratrix who had originally brought the suit, an administratrix *ad prosequendum* who had been appointed by the Surrogate of Essex County more than two years after the death of the deceased. 20

## FIFTH SEPARATE DEFENSE.

Circuit Judge William A. Smith's order for amendment of an administratrix *ad prosequendum* for the general administratrix, is without legal sanction because at the time applied for and made, any right existing under the Death Act of New Jersey to institute suit by an administratrix *ad prosequendum* was then outlawed. 30

## SIXTH SEPARATE DEFENSE.

No suit was instituted by an administratrix *ad prosequendum* for the death of Harold E. Wilson within two years after his death.

## NOTICE.

PLEASE TAKE NOTICE that at the time of the trial defendant will move for a nonsuit on each and 40

*Postea.*

every ground set up in separate defenses #2 to #6, inclusive, and because the plaintiff does not set up a cause of action against the defendant.

KALISCH & KALISCH,  
Attorneys of Defendant.

10

**Postea.**

(Filed Feb. 16, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

MARGARET E. (or A.) WILSON,  
Admx. of the Estate of Harold  
E. Wilson, deceased,

20

*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC., a corp.,  
*Defendant.*

30

This matter was tried by Honorable William A. Smith, and a jury on February 11, 1927, to whom by a previous order of Chief Justice Gummere the same was referred for trial, and upon motion of the defendant a judgment of nonsuit was ordered against the plaintiff.

Feb. 15th, 1927.

WM. A. SMITH,  
Judge.

40

**Judgment.**

(Filed February 16, 1927.)

NEW JERSEY SUPREME COURT.

MARGARET E. (or A.) WILSON,  
Admx. of the Estate of Harold  
E. Wilson, deceased,

*Plaintiff,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC., a corp.,  
*Defendant.*

10

Action at Law.  
On Postea.  
Judgment of  
Non-Suit.

No Costs.

20

KALISCH & KALISCH, Attorneys.

Judgment entered this sixteenth day of February, A. D. nineteen hundred and twenty-seven in favor of defendant and against the plaintiff without costs.

WM. S. GUMMERE,  
C. J.

30

40

**Substitution of Attorneys.**

(Filed August 14, 1925.)

NEW JERSEY SUPREME COURT.

10

MARGARET WILSON,	}	Action at Law.
<i>Plaintiff,</i>		
<i>v.</i>		
DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., a corporation,	}	Stipulation.
<i>Defendant.</i>		

Consent is hereby given to the substitution of Mark Townsend, Jr., as attorney for the above named plaintiff in the above matter for

20

Dated

MILLIGAN & KOENIG,  
Attorneys of Plaintiff.

30

40

Case.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Before—Hon. WILLIAM A. SMITH, J., and a jury.

MARGARET A. WILSON, Admx.	}	Action at Law.	10
<i>v.</i>			
DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION.	}		

Friday, February 11, 1927.

For the plaintiff appears MARK TOWNSEND, JR.

20

For the defendant appear KALISCH & KALISCH (by ISIDOR KALISCH).

A jury is called and sworn.

Mr. Townsend: I move to amend the complaint by making Margaret A. Wilson, administratrix *ad prosequendum*, the plaintiff in this action. Before we appeared in the case letters of administration had been issued to her, and the action had been started by her as general administratrix of the estate of her husband. Under the statute, I know, she should be appointed administratrix *ad prosequendum*.

30

The Court: Has she been appointed administratrix *ad prosequendum*?

Mr. Townsend: Yes, sir; on June 18, 1926. General administration was granted on April 27, 1923.

The Court: As I understand it, at the last trial, which was declared a mistrial, an amendment was allowed over the objection of the defendant, grant-

40

Case.

ing the motion you requested, and you now re-  
new that motion.

Mr. Townsend: Yes, sir.

10 Mr. Kalisch: I object to the amendment on the  
ground that at the time of the appointment of Mrs.  
Wilson as administratrix *ad prosequendum* there  
appeared a limitation in which the time a suit un-  
der our Death Act should be brought, had elapsed;  
that is, if she had been appointed at the time she  
was appointed general administratrix.

(Argument.)

20 The Court: It has been repeatedly held that  
the action must be brought by the proper person  
under the statute. I do not think you have a right  
of action. However, I will allow you to amend,  
provided you will state in your opening when she  
was appointed, and I will grant a nonsuit on the  
opening. That will permit you to go to the upper  
Court.

30 I am convinced that there is no right to sustain  
that sort of action where the twenty-four months  
have elapsed before the appointment of the admin-  
istratrix *ad prosequendum*. In a case of this kind  
I do not want to deny you your right of appeal;  
if I deny the amendment you have no right of  
appeal.

I will grant the motion to amend the complaint  
by making as party plaintiff Margaret A. Wilson,  
administratrix *ad prosequendum* of the Estate of  
Harold E. Wilson, deceased, and the summons will  
be so amended as well.

40 Mr. Kalisch: I ask for an exception to your  
Honor's ruling upon the ground that more than  
twenty-four calendar months having elapsed after  
the death of the deceased when this application

Case.

is made, the Court has no jurisdiction to permit  
the amendment.

Exception noted as ground of appeal.

Mr. Kalisch: I also ask that your Honor put this  
condition upon the application of Mr. Townsend:  
That he put the amendment in the form of a plead- 10  
ing so that I may properly file an answer to it.

The Court: You can answer it now because  
this order has substituted "Margaret A. Wilson,  
administratrix *ad prosequendum*" for "Margaret  
A. Wilson, administratrix" wherever it appears.

I think all you need to put on the record is that  
counsel for the plaintiff opened to the jury and  
stated that the death occurred on the fifth day of  
December, 1922, and that the administratrix *ad*  
*prosequendum* was appointed— 20

Mr. Townsend: General administratrix, April  
27, 1923; administratrix *ad prosequendum*, June  
18, 1926. However, I would like to have the record  
show what the accident is about.

The Court: Very well.

Mr. Townsend: (Opened to the jury as follows:)

May it please the Court, and Gentlemen of the  
Jury: This is an action under our Death Act by  
Margaret A. Wilson, administratrix *ad prosequen-*  
*dum* of the Estate of Harold E. Wilson, deceased, 30  
for pecuniary damages to the next of kin as the  
result of an accident which occurred in Newark  
on Orange Street near Newark Street on Decem-  
ber 5, 1922.

The original action was started in this case by  
a summons issued by other attorneys for the widow  
as general administratrix on July 25, 1925, and  
the widow, Margaret A. Wilson, had been ap-  
pointed general administratrix of the estate of her  
deceased husband on April 27, 1923. Thereafter, 40

## Case.

in 1926, I was substituted as attorney for the plaintiff and thereupon, on June 18, 1926, I had Mrs. Wilson appointed administratrix *ad prosequendum* of her husband's estate in order to maintain this suit.

10 The facts in the case, briefly, are: That the defendant's automobile milk truck had stopped on the southerly side of Orange Street about fifty feet west of the building line of the intersection of Newark and Orange Streets. This was about six o'clock in the morning on December 5, 1922, when it was very dark and foggy.

The driver had taken out a can of milk and had taken with him the lantern that he had in the car; the defendant was riding a bicycle on his way to work, and because of the fact that there was no light on the back of this truck in accordance with the provisions of our Motor Vehicle Act, the deceased was unable to see this truck and ran into it head on. The result was that he sustained very serious injuries and was taken to the hospital, and died some seven or eight weeks afterward.

We charge that they were negligent in that they failed to maintain a red light on the back of this truck to give warning that the truck was parked.

30 Mr. Wilson was thirty years of age and left surviving him his wife, Margaret A. Wilson, and four children: Kathleen, aged five; Harold E., aged three; Robert, aged two years; and Margaret, aged two months.

He was employed as a stationary fireman and engineer, and received a salary of \$35 a week, of which he contributed approximately \$1,300 a year to the widow and next of kin.

40 If we show you these facts, we will ask you for a verdict for the next of kin.

## Case.

Mr. Kalisch: I move for a nonsuit on the same grounds as those I urged when I objected to the Court's permitting the amendment.

Mr. Townsend: In the event that the Court of Errors and Appeals reverses the Court's ruling, it may be that we will be confronted with the loss of the testimony of the only eye-witness to this accident. I assume it will take a year, at least, to have this matter decided by the Court of Errors and Appeals. 10

The Court: His testimony was already taken?

Mr. Townsend: No, sir. In the midst of the taking of the testimony your Honor declared a mistrial because of an irresponsive answer.

Mr. Kalisch: No, you were on redirect at that time. 20

Mr. Townsend: There was a question asked as to the identity of a certain man. He said, "I think he is the insurance man." Mr. Kalisch immediately asked for a mistrial and the Court granted it.

Mr. Kalisch might stipulate as part of this record the testimony of this witness, Mr. Samuel Brockman.

Mr. Kalisch: Under the Evidence Act, if he should die you have a right to introduce this testimony. 30

Mr. Townsend: Provided you are willing to stipulate that you had asked all the questions you wished to ask. In view of my redirect examination you had a right to go ahead with cross examination.

Mr. Kalisch: I am willing to stipulate in connection with this case, whether it be disposed of now, or if it is to be retried, that my examination of this witness Samuel Brockman on cross exami- 40

*Case.*

10 nation and such redirect as you had already introduced, was concluded when a mistrial was granted, upon one condition, and that is, that you strike out from this testimony that part where the Court, upon the improper statement of that witness, granted a mistrial; that is, I do not want it to appear in the record.

The Court: On the condition that you strike out the answer.

Mr. Townsend: You stipulate in the event there is a retrial of this action and the witness is not available, that this record of his previous testimony—

Mr. Kalisch: Not if he is not available; only if he is dead.

20 Mr. Townsend: Or if he is out of this jurisdiction.

The Court: You can locate him then.

30 It is stipulated on the record that in the event there is a retrial of this case, and the witness Samuel Brockman is dead, his testimony taken at the previous trial may be used, upon the condition that where a question was answered: "I think he is the insurance man" the question and the answer will be stricken from the record; the same will be done with the motion for a retrial and the ruling.

I will grant the motion of the defendant to nonsuit on the opening on the ground that the twenty-four months after the deceased's death had elapsed before the plaintiff was appointed administratrix *ad prosequendum*.

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

40 Exception noted as ground of appeal.

**Plaintiff's Exhibit No. 1.—Letter of Administration Ad Prosequendum.**

STATE OF NEW JERSEY

ESSEX COUNTY SURROGATE'S COURT.

I, E. GARFIELD GIFFORD, Surrogate of the County of Essex, do hereby certify that on the 18th day of June in the year of our Lord, one thousand nine hundred and twenty-six ADMINISTRATION AD PROSE-  
 QUENDUM was granted by me to Margaret A. Wilson of the County of Essex, for the purpose of enabling her to prosecute an alleged claim of the widow and next of kin of Harold E. Wilson, late of the County of Essex, against Dairymens Cooperative League Inc. who it is alleged caused the death of the said Harold E. Wilson by its wrongful act, neglect or default. 10  
 20

WITNESS MY HAND AND SEAL OF OFFICE, this 18th day of June, in the year of our Lord, one thousand nine hundred and twenty-six.

(SEAL) GARFIELD GIFFORD,  
 Surrogate.

30

40

57 MAY.T.1928

## New Jersey Court of Errors and Appeals

MARGARET A. WILSON, Adminis-  
tratrix *ad prosequendum* of  
the Estate of Harold E. Wil-  
son, deceased,  
*Plaintiff-Appellant,*

*v.*

DAIRYMEN'S LEAGUE CO-OPERATIVE  
ASSOCIATION, INC.,  
*Defendant-Appellee.*

Action at Law.  
On Appeal from  
Supreme Court.

### BRIEF ON APPEAL OF PLAINTIFF- APPELLANT.

#### Statement.

This is an appeal from a judgment of nonsuit entered by Judge SMITH at the Essex Circuit of the Supreme Court at the conclusion of the opening of plaintiff's counsel to the jury, in an action under the Death Act, because it appeared therein that the plaintiff had not been appointed as administratrix *ad prosequendum* until more than two years after the death of the plaintiff's intestate, who had died as a result of the negligence complained of on January 30th, 1923.

The action was originally instituted by the plaintiff as general administratrix of the estate of the deceased on July 25th, 1923, and an answer filed therein by the defendant in which no objection

to the complaint in point of law was made or reserved by it (Case, pp. 4-9).

On August 14th, 1925, we were substituted as attorneys for the plaintiff. The case was reached for trial in June, 1926, on which date the plaintiff was appointed administratrix *ad prosequendum*, and the Court, upon our motion, permitted the proceedings to be amended in open court, over the objection of defendant's counsel (Case, p. 4), by substituting the administratrix *ad prosequendum* as a party plaintiff. A mistrial was declared on grounds not affecting this question. Upon the second trial, which was on February 11th, 1927, it appearing that no formal order had been entered permitting this amendment, other than the stenographic record which had not been transcribed, counsel again moved for an amendment, which was granted (Case, pp. 31-32).

It appearing, upon our opening to the jury (Case, pp. 32-34) that although the action had been begun within time by the general administratrix, yet her appointment as administratrix *ad prosequendum* and the amendment of the action by substituting administratrix *ad prosequendum* as party plaintiff had not taken place until more than two years after the death of the intestate, the Court granted a nonsuit. It is from this judgment that this appeal is taken. No claim is made that otherwise the complaint and the opening did not disclose a proper cause of action; nor the same cause of action that was originally instituted by the general administratrix.

*Cleaves v. Yeskel* (Court of Errors and Appeals. Not officially reported), 4 Adv. Rep. 1002.

### POINT I.

**The Court erred in granting defendant's motion for a nonsuit.**

It is to be noted that these proceedings were thus amended on June 18th, 1926, and further again amended on February 11th, 1927. The Court having permitted this amendment, which did not state a new cause of action, the record, therefore, stood before it in the same position as if the original action had been instituted by the administratrix *ad prosequendum*.

*Fidelity Trust Co. v. DuBois Electric Co.*,  
253 U. S. 212.

Therefore, when it thereafter appeared in counsel's opening that the amendment had not been made until more than two years had elapsed from the date of the death of plaintiff's intestate, it presented no ground for a nonsuit.

It is, of course, fundamental that it is a matter in the sound discretion of the Court to permit a pleading to be amended, and the action of the Court is not error unless there has been an abuse of discretion.

*Goodyear Tire & Rubber Co. v. Harry Cruvant*, 96 N. J. L. 352;

*Joslyn v. N. J. Car Spring Co.*, 36 N. J. L. 141;

*Redstrake v. Insurance Co.*, 44 N. J. L. 294;

*Mick v. The Corporation*, 87 N. J. L. 628.

This amendment was permitted by the Court on June 18th, 1926, after a full declaration had been made to it (Record, p. 4) and again permitted under the same circumstances on February 11th,

1927 (Record, p. 31). No claim is made that the causes of action are not identical; that is, the death of the intestate on July 25th, 1923, by reason of the alleged negligent acts of the defendant.

While perhaps it might be considered academic to discuss the power of the Court to amend a pleading, we herewith point out the following provisions of the Practice Act.

The Practice Act of 1903, found in Volume 3, Compiled Statutes, page 4091, provides:

"In order to prevent the failure of justice by reason of mistakes and objections of form the Court or Judge at all times may amend any defects and errors in any proceedings in civil actions, whether there is anything in writing to amend by or not and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs and upon terms, and all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties shall be so made."

Under this section a similar situation with respect to the amending of a complaint arose in the case of *Giardini v. McAdoo*, 93 Law, page 138.

In that case action had been instituted in the Courts of this State under the Pennsylvania Death Act, and the defendant raised an objection for the first time on appeal, on the ground of misjoinder of the party plaintiff. The Court ordered an amendment to substitute the proper party plaintiff, and in passing cited several cases:

*Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L. 142;

*Lower v. Segal*, 59 N. J. L. 66;

*Rankin v. Central Railroad*, 77 N. J. L., page 175

which appeared to be contra to the attitude assumed in the *Giardini* case, and said:

"The cases of *Lower v. Segal*, *supra*, and *Fitzhenry v. Consolidated Traction Co.*, *supra*, are ones in which the questions raised were decided upon demurrer; and there can be little, if any, doubt but that if a motion to strike out had been interposed *in limine* in the case at bar, it would have been granted. But the questions are, are we precluded from permitting a proper amendment at this time, and must we reverse the judgment resulting from a trial upon the merits, because, on appeal, for the first time, the defendant raises the jurisdictional questions?"

The Court in this passage points out and designates exactly how the defendant in the case at bar could have, if it desired so to do, taken advantage of the defect in the complaint, namely, by a timely motion to strike out the complaint. *The defendant has utterly failed to follow this rule.* The Court goes on further to discuss Section 23 of the Practice Act of 1912, which provides that no civil suit or proceeding shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the Court in which the matter is pending shall have jurisdiction to grant the remedy by any procedure, and further, Section 8 of the Practice Act provides that where a person not a party has an interest which a judgment will affect, the Court, on his application, may direct him to be a party, and Section 9 of the Practice Act of 1912, which provides that new parties may be added, and parties misjoined may be dropped by the Court, at any stage, as the ends of justice may require.

In the case of *Public Service v. Post*, 257 Federal Reporter 933, Circuit Court of Appeals, Third Cir-

cuit, in an opinion by Judge MORRIS, the following statement is found, applying the above rules:

"2. \* \* \* An examination of the two statutes discloses that the supplemental act in no wise affected the liability of the defendant and that it changed neither the persons for whose benefit recovery might be had in this suit, nor their respective interests in such recovery. The amount recovered does not go into the personal estate of the deceased, to be applied to the payment of his debts, but is for the exclusive benefit of the widow and next of kin. The administrator upon the record, whoever he is, is therefore merely a formal party for the maintenance of the action. *Pisano v. Shanley Co.*, 66 N. J. Law 1, 48 Atl. 618. The supplemental act, in substituting one person for another as the formal party to prosecute the action consequently did not affect rights theretofore existing, but only the manner or method of their enforcement. We therefore think that the supplemental act applied to this case and made it necessary that the suit be brought by an administrator *ad prosequendum*."

There is evidenced therefore, a clear intent of the Courts to construe the requirement that the administrator *ad prosequendum* institutes an action for death as a matter of form and not one of substance. No new cause of action is substituted and in the language of the Court in the *Giardini* case, p. 146:

"Surely the issue that the parties to the case *sub judice* hoped and intended to try was the merits of the complaint, namely, whether or not the defendant was responsible for the death of Giardini, and consequently liable to respond in damages for his death."

Again, in the *Giardini* case the Court says further (p. 147):

"We incline to the opinion that under the provision of the Practice Act of 1903, concern-

ing amendments, as interpreted in *City of Hoboken v. Gear*, and other cases, an amendment of these proceedings might be ordered by substituting the name of Adele Giardini, the widow, as plaintiff, and striking out the description of her representative character, and also by striking out the reference to the next of kin left by the deceased; but, whether so or not, the provisions of the Practice Act of 1912 are broad enough to permit of its being done. And these statutes, as is known, are to be liberally and beneficially expounded; and every intendment that can be, should be made in aid of a judgment and verdict thereon, where the parties have gone to trial upon the merits of the case, and where no attack has been made upon the pleadings and procedure prior to appeal."

We take it that the Court again sets forth a clear and concise rule and method of procedure for a party who finds itself in the position of the defendant in the case at bar. To meet the intendment of the above declaration by this Court it was necessary that the defendant directly attack the pleadings either before or at the trial. No such attack has ever been made in this case.

An examination of the record will reveal that the defendant here never asserted in any pleading or motion directed to a pleading the fact that it intended to rely upon the objection now raised. The first amendment to cure the formal defect as to the party plaintiff was made on motion of the plaintiff (State of the Case, p. 4). The second motion was also that of the plaintiff, and the only exception taken thereto (State of the Case, p. 32, line 35) was that twenty-four calendar months having elapsed after the death of the deceased, the Court had no jurisdiction to permit the amendment.

The objection made cannot be construed as a

direct attack upon the pleadings within the meaning of the Practice Act. No motion was made by the defendant in lieu of demurrer at any time.

Rule 40 of the New Jersey Supreme Court seems to lend further merit to this argument. It provides that a complaint may be struck out, on motion, on the ground that it discloses no cause of action, and that in lieu of such a motion the same objection may be raised in the answering pleading and may be disposed of at or after the trial.

Rule 41 provides that objections to a pleading, other than those provided for in Rule 40 shall be made by motion.

In the case of *Jarvis v. Johnson*, not officially reported but found 3 Misc., page 777, a similar situation there arose as in this case. The motion of nonsuit was there granted on the same ground as here by Judge JESS at the Monmouth Circuit. The defendant in that case, however, had followed the provisions of Rule 40 and had filed an answer in which he gave notice that he would object at the trial that the complaint failed to set forth a cause of action. True, the opinion in that case does, by way of dictum, intimate that if the plaintiff in the case had not been appointed administratrix *ad prosequendum* prior to the passage of the two-year limitation she could not thereafter acquire a status to proceed with the action. But that statement of the Court is also dependent upon the timely raising of the point by the defendant.

In the case of *Fitzhenry v. Consolidated Traction Co.*, *supra*, an action had been instituted by the father of the decedent rather than the general administrator in accordance with the provisions of the Death Act as it then existed. The defendant raising the point, proceeded as we have urged in this brief, the defendant should have proceeded in the case at bar, namely, it filed a demurrer to the

complaint. Thereafter, a motion was made to amend the complaint, the Statute of Limitations having run. The Court denied this motion, and properly so.

In the case of *Lower v. Segal*, *supra*, an action had been instituted by an administratrix appointed in this State, whereas the accident having occurred in the State of Pennsylvania the suit should have been instituted under the Pennsylvania Act, by the widow of the decedent. In this action the defendant objected timely and filed a demurrer, which was sustained.

In the case of *Rankin v. Central Railroad*, where a similar amendment was denied, the motion there was not made until after a judgment of nonsuit had been granted. There can be no doubt that the motion was dilatory and was properly denied.

A valuable discussion of the whole subject is contained in the University of Pennsylvania Law Review of April, 1928, Volume 76, #6, page 756. This note refers us to an opinion of Mr. Justice HOLMES in the case of *New York Central Railroad v. Kinney*, 260 U. S. 340, where under somewhat similar circumstances the Court permitted an amendment to be made which expanded or amplified the cause of action already pleaded. In answer to the objection that the amendment introduced a new cause of action, Mr. Justice HOLMES said:

“\* \* \* But when the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the Statute of Limitations do not exist, and we are of the opinion that a liberal rule should be applied.”

It will be noted from the complaint (p. 4) that the defendant was charged with negligent opera-

tion of its automobile on December 15, 1922, whereby it was permitted to strike Harold E. Wilson, who was riding a bicycle upon the public highway, and caused him to sustain injuries from which he died on January 30th, 1923; that he left him surviving a widow and five infant children, who suffered pecuniary loss because of his death. The amended complaint at page 18 set forth the identical cause of action. The defendant, prior to the running of the statute had notice that the widow and the next of kin were attempting to enforce this claim. They sat by and made no objection to the form of action. We, therefore, submit that in accordance with the above authorities a liberal rule should be applied.

WHEREFORE we respectfully submit that the judgment of nonsuit should be set aside.

FIRST.—Because the Court having granted the amendment, the defect was cured and the motion of nonsuit should have been denied.

SECONDLY.—Because the motion to amend the complaint to state a proper plaintiff, is a matter of form, and not one of substance.

Respectfully submitted,

GEORGE B. SLEIGH,  
Attorney of Plaintiff-Appellant.

MARK TOWNSEND, JR.,  
Of Counsel.

## New Jersey Court of Errors and Appeals

MARGARET A. WILSON, administratrix *ad prosequendum* of the Estate of Harold E. Wilson, deceased,

Plaintiff-Appellant,

vs.

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,

Defendant-Appellee.

Action  
at Law.

On Appeal.

### BRIEF OF RESPONDENT.

This is an appeal from a judgment of non-suit by Judge Smith at the Essex Circuit of the Supreme Court at the conclusion of the opening by the plaintiff's counsel to the jury, which opening and subsequent argument were taken stenographically (pp. 31 to 36).

The suit was based upon the death of the plaintiff's intestate for the alleged negligence of the defendant; the accident occurring on December 5, 1922, and the death occurring on January 30, 1923. Since the statement of the facts in the appellant's brief is not entirely accurate we are giving a chronological history of the case as the record will disclose it. The original complaint was filed August 7, 1923, by Margaret A. Wilson, *as administratrix of the estate of Harold E. Wilson* (p. 4); the complaint having been filed by Mulligan & Koenig, her then attorneys, and to which the defendant duly filed an answer, and thereupon on August 14, 1925, her present attorney, Mark Townsend, was substituted for the latter firm (p. 30) and on August

14, 1925, Mr. Townsend filed an amended complaint (pp. 10 to 16), to which the defendant duly filed an answer (pp. 16 and 17). At this time, I wish to call the Court's attention to a mistake in the State of the Case, with reference to the answer to the first amended complaint at the caption of which the State of the Case indicates that it was entitled Margaret A. Wilson, *administratrix ad prosequendum, etc.* (p. 16). This is incorrect and the attention of Mr. Townsend was called to it, since the pleading filed by the defendant to the first amended complaint was captioned *similarly to the complaint which described Margaret A. Wilson as general administratrix and not as administratrix ad prosequendum.* In view of this situation Mr. Townsend wrote defendant's counsel a letter, a copy of which is attached to each brief submitted to this court, by which letter, the Court will observe, that the caption of this issue as it appears on page 16 of the case should have been Margaret A. Wilson *as general administratrix.*

On June 18, 1926, this case came on for trial and upon the application of the appellant and *over our objection* the Court stated that he would permit the appellant to make an amendment of the complaint, substituting Margaret A. Wilson, *prosecutrix ad prosequendum* in place of Margaret A. Wilson, *administratrix, to which exception was noted* (p. 4). The glossary on this page of the case explains this situation. Thereupon on February 11, 1927, the case was started before Judge Smith and a jury which resulted in the action of the trial judge in granting respondent's motion for a non-suit on the appellant's opening and which action of the Court is now being reviewed. The case had once before been started before the same judge on June 18, 1926, and terminated in a mistrial.

### ARGUMENT.

After the motion to amend on June 18, 1926, the appellant obtained letters of administration *ad prosequendum* from the Surrogate of Essex County (p. 37).

It will be observed that *no* amended complaint, substituting the administratrix *ad prosequendum*, for the general administratrix, was ever filed or served previously to the date of trial February 11, 1927, but that a motion was renewed on February 11, 1928, by Mr. Townsend to amend the complaint substituting the administratrix *ad prosequendum* for the general administratrix, this being something over five years after the death of the person and for whose death the suit was started (pp. 4 and 5). The date of the appointment by the Essex County Surrogate as administratrix *ad prosequendum* therefore, was three years and five months after the death of the deceased.

Appellant's brief suggests that the substitution of an administratrix *ad prosequendum* for a general administratrix is a mere matter of form and not of substance, but a reading of the cases on this question which will appear later on in this brief clearly refutes such a statement.

At the trial on February 11, 1927, as will be observed by a reading of pages 31 to 36 inclusive, it appeared that the application for the appointment of Mrs. Wilson as administratrix *ad prosequendum* was *more* than two years after her husband's death, that the suit was instituted originally by her as *general administratrix*, and that the application to amend so as to substitute her as administratrix *ad prosequendum* was also more than two years after the death.

The motion to amend was allowed *over respondent's objection and an exception to the granting of the motion to amend the complaint was taken* (p. 32 bottom, top of 33). Upon each action where application for amendment was made, the record will disclose, that objection to the amendment was made by us and an exception taken to the granting of the amendment; *at no time did we sit back and permit it without objection.*

After all these facts were stated by appellant's counsel in his opening, which was taken by the stenographer as will be observed by the State of the Case, the trial court granted the motion to non-suit on the ground that twenty-four months after the deceased's death had elapsed before the plaintiff was appointed administratrix *ad prosequendum* (p. 36, l. 33 to bottom).

Appellant's counsel refers to the case of *Giardini v. McAdoo*, 93 Law, p. 138, as support for his contention that the respondent had practically waived the point upon which the motion for non-suit was made and granted. An examination of that case clearly indicates that counsel completely tried out the issues raised by the pleadings, *no objection being made at the time of trial to the capacity in which the then plaintiff sued*, and this court, on appeal, permitted the necessary amendments to cover the issues which the record disclosed both counsel intended to try out and refused to consider the then appellant's argument anent the capacity in which the plaintiff below sued. That situation does not exist in this case.

Appellant's counsel further argues that the practice adopted by the respondent here in the pleadings was incorrect. An examination of the

original complaint (p. 4) and the first amended complaint (p. 10) in both of which cases the plaintiff is described as general administratrix discloses that they are identical as regards the legal situation present on this argument. Paragraph 5 of the first count of the original complaint (p. 6) and of the first amended complaint (p. 12) are identical, and after reciting the names of the persons the deceased left him surviving, charged "whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff as *administratrix* of the said Harold E. Wilson, etc." Respondent's answer to paragraph 5 of the first count of the original complaint was "It had no knowledge or information sufficient to form a belief \* \* \* and therefore leaves the plaintiff to his proof thereof" (p. 9, ll. 29 to 32). Respondent's answer to paragraph 5 of the amended complaint is a denial of the contents thereof (p. 17, ll. 27 and 28). Paragraph 5 of the second count of the original complaint (bottom of p. 7, top of p. 8) is identical with paragraph 5 of the second count of the first amended complaint (p. 14, ll. 7 to 21) and paragraph 5 of the third count of the first amended complaint. Respondent's answer to paragraph 5 of the second count is identical with its answer to paragraph 5 of the first count of the original complaint (p. 9, ll. 37 to 40). In other words the respondent admitted nothing and called for formal proof *that a general administratrix* was entitled to recover damages in this action.

We feel that we need not have answered this paragraph at all, because it was the pleading of a legal conclusion. Paragraph 5 of the second and third count of the first amended complaint (pp. 12, 14 and 15 respectively) are identical

and respondent's answers thereto are similar and indicates a complete denial of the allegation that a cause of action has accrued *to the general administratrix* (p. 17).

Paragraph 6 of the original complaint (p. 8) and paragraph 6 of the first, second and third count of the first amended complaint (pp. 12, 14 and bottom of 15, to top of 16 respectively) are identical and alleged that plaintiff's suit against the defendant was commenced within two years from the date of the decease, etc. Respondent's answer to this paragraph of the original complaint was to leave the plaintiff to her proof (p. 9), and respondent's answer to this paragraph of the first, second and third counts of the first amended complaint was identical (p. 17). Respondent did not admit that the action was commenced within twenty-four calendar months after the decease and it, therefore, became incumbent upon the plaintiff below to prove, in addition to negligence, that the action *was* instituted within twenty-four calendar months. It was necessary for the plaintiff below to set out and to prove facts that would negative the existence of the limitation provided in the Death Act, since no part of it was admitted and the plaintiff was left to her proof. (*Lapsley v. Public Service Corporation*, 75 Law, p. 266.)

In other words where the limitation is a condition attached to the right to sue at all as is stated in the Lapsley case, it is not incumbent upon the person answering the complaint to do anything more than to place upon the plaintiff the necessity to prove that he or she comes within the act which not only gives the right, but which also incorporates the limitation thereof. The plaintiff could not be surprised by being obliged to prove as is stated in the Lapsley case,

her right to sue under the Death Act, particularly with regard to the time limitation.

In *Jarvis v. Rankin*, 130 Atl., p. 221, a Circuit action, an amendment was permitted, but *there* it appeared that the party plaintiff had been appointed administratrix *ad prosequendum* within the two years following the death of the deceased, and irrespective of any other question as to the correctness of the views expressed by the Circuit Judge it is plain from a reading of that opinion that if the party plaintiff had not been appointed within the two-year limitation the amendment would not have been permitted. See also *Rankin v. Central R. R. Co.*, 77 L., p. 175.

In *Bryce v. Atlantic Coast Elec. Co.*, 132 Atl., p. 253, Justice Katzenbach in the Supreme Court, in affirming the action of the trial court of permitting an amendment where the letters of administration had been granted within the two years following the death of the deceased, suggested that the defendant could not be harmed because the plaintiff was well within the two-year limitation. That situation is clear because the plaintiff could have instituted another action, after discontinuing the first and still have been within the limitation period of the Death Act.

To the same effect in *In re: Post*, 104 Atl. 552.

Appellant's brief is singularly void of any New Jersey cases which will support his theory that the amendment was a mere matter of form after two years subsequent to the death of the deceased.

A very enlightening case on this question and practically adopting the views which have been expressed in the cases cited in this brief is *Boniewsky v. Polish Home of Lodi*, 136 Atl., p.

741, in which case Chancellor Walker on page 744, said:

“It may be that if the defendant had objected to the amendment, etc., it might have prevailed *as it was substituting a new cause of action.*”

And then follows a line of cases which support the theory we are now arguing for.

It will be observed that this excerpt from that opinion indicates clearly that the amendment, asked for at the time, it was asked for and where the letters were obtained more than two years subsequent to the death, was not a mere matter of form.

It will also be observed that at no time did the respondent consent to the amendment, but on the contrary objected at the opening, when the applications were made, both on June 18, 1926, when the case came up first and on February 11, 1927, when it again came up for trial.

As we understand the rules of pleading, an amended pleading takes the place of the previous pleading and a second amended pleading takes the place of the first two pleadings. The plaintiff below as we have heretofore shown and previous to February 11, 1927, had filed an original complaint to which an answer was filed and a first amended complaint, and then on February 11, 1927, asked leave to file a second amended complaint; this, after the amendment applied for was allowed. This second amended complaint appears on page 18 to top of 24 inclusive. If plaintiff was allowed to file an amended complaint over defendant's objection the Court could not deprive defendant of right to answer it. It is true that it was not physically filed with the clerk, until after the trial court had disposed

of the motion for non-suit, but it *was* filed and became the pleading upon which the plaintiff below intended to rely. The answer to the second amended complaint appears on page 24 to top of page 28, inclusive, and this was the answer upon which the defendant below intended to rely as against the last amended complaint.

It is our contention that the final pleadings, alone, would warrant the Court in granting the motion to non-suit. Ordinarily the last pleading filed and the answer thereto control the issue between the parties. *Ruskin v. Armn*, 82 N. J. L. 72. Certainly if the plaintiff is not to be controlled by his original pleadings, the defendant cannot be controlled by his answering pleadings to them. Therefore, the final form of the pleadings as they appear on the records of the Court should control the issue between the parties, and that being so there can be no question, but that the points raised by the answer will support the Court's action. Irrespective of the final pleadings we maintain we were entitled to the non-suit.

It is to be remembered that the only pleading filed by the plaintiff below in which the plaintiff appears as administratrix *ad prosequendum* was the second amended complaint (p. 18) and the answer to that second amended complaint (p. 24) clearly sustains the action of the trial court.

The action of the trial court was identical with the request made by the defendant's counsel below (p. 32), and the *postea* is a complete answer to the appellant's argument.

Even though the Court had granted the motion to non-suit upon an improper ground, still the action should be sustained, if the Court's action was correct. Under any circumstances a non-

suit must have ultimately followed in this case. *Rankin v. Central R. R. Co.*, 71 Atl. Rep. 55 (end of opinion). We maintain that under all the cases, reference to which we have made herein, the motion to non-suit should have been granted, as there were no facts to go to the jury on the opening of the appellant's case, because the legal bar to the action appeared on such opening.

We respectfully submit that the judgment under review should be affirmed.

KALISCH & KALISCH,  
Attorneys of Respondent.

ISIDOR KALISCH,  
On the Brief.

Mark T  
George

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May 10th, 1928

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In re: Wilson v. Dairymen's League

Gentlemen:

Confirming my telephone conversation of today I have to advise you that the State of the Case, in the above action, as served upon you, contains an error, as pointed out by you, on Page 16 thereof. The title to the Answer to the First Amended Complaint should read "Margaret Wilson, administratrix" rather than "Margaret Wilson, administratrix ad prosequendum".

I will arrange to see to it that the original copies forwarded to the Secretary of State are corrected in accordance therewith.

Very truly yours,

Mark Townsend, Jr.

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