

Court of Errors and Appeals of New Jersey.

FRANK A. KLITCH, an infant,
by GEORGE KLITCH, his next
friend,

Plaintiff-Appellee,

vs.

EDWIN BETTS,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF DEFENDANT- APPELLANT.

This case is brought to this Court on appeal from the verdict of a jury and judgment thereon in the Essex Circuit of the Supreme Court, by which verdict damages were awarded the plaintiff in the sum of three thousand dollars.

Facts.

Plaintiff, an infant of ten years, went to the office of defendant after regular office hours and, in the absence of defendant, Dr. Snibely, an employee, extracted a tooth. Plaintiff thereafter suffered pain

and went to defendant, who subsequently treated the jaw. The complaint alleged negligence on the part of Dr. Snibely, who, it was claimed, was at the time, a servant of defendant, and also on the part of defendant for his subsequent treatment.

Plaintiff proved that he went to the office of defendant on the evening of January 20th, 1914, at 8 o'clock (8); in the absence of defendant, Dr. Snibely, an employee, extracted a tooth from plaintiff's lower left jaw, for which he was paid \$.50 (9); on January 29th, 1914, at about 8 o'clock in the evening, plaintiff again went to defendant's office and in the absence of defendant (9) Dr. Snibely extracted another tooth (9); immediately after this extraction the plaintiff underwent great suffering (26); that on January 31, 1914 (Sunday) (27) plaintiff again went to defendant's office and Dr. Snibely treated the injured jaw (27-28); on February 1st plaintiff went to the defendant's office when for the first time, defendant examined him and as plaintiff's mother testified "washed his mouth out" (28) (42); on the following day plaintiff went to defendant's office and defendant again "Washed plaintiff's mouth out with something", and advised the application of witch hazel (29); after two days had elapsed (29), plaintiff went to defendant's office; defendant, after examining plaintiff's mouth, told plaintiff's mother that he thought an operation would be necessary (30); on February 4th plaintiff went to defendant's office and defendant extracted a tooth; Dr. Snibely was not present on that occasion (31); two days after defendant examined the plaintiff and again advised plaintiff's mother that an operation would be necessary (31); plaintiff was taken to a Dr. Povey who gave plaintiff a salve and a mouth wash (32); he attended plaintiff from February 1-16th (32); during which time plaintiff's mother also saw defendant and it was finally decided that an operation would be necessary (32); plaintiff was then examined by a Dr. Sherman who treated the

jaw (33) by making an incision in it (42); both Dr. Povey and Sherman advised an operation (43); on Feb. 22nd Dr. Epstein examined the plaintiff (34); plaintiff was taken to a hospital and an operation performed; he stayed at the hospital five days (35); in March he was taken to the hospital again and a second operation performed (36); between these two operations plaintiff was under the care of Dr. Epstein (36); a third operation took place on May 12 at which time a tooth was removed (38); following which time plaintiff was under the care of Dr. Epstein (41); the operations were to relieve the condition of necrosis, which had developed and to do this it became necessary to cut into the healthy tissue and remove a portion of the jaw bone (67).

It further appeared that Dr. Snibely was employed from 9 until 6 o'clock (57-58) and that he was only authorized to extract teeth under the supervision of defendant (123).

Though the complaint alleged negligence on the part of defendant in the subsequent treatment of the tooth, little if any effort was made by plaintiff to maintain his case on that ground. He rested his case on the alleged negligence of Dr. Snibely and on the contention that the relation of master and servant existed between defendant and Dr. Snibely at the time of the performance of the alleged negligent act (See pages 26, 70, 71, and the portion of the charge of the Court appearing on pages 172 and 173). As there was no evidence which under any circumstances could have established any negligence on the part of defendant in the treatment of the tooth, we will confine our discussion to the question of the act of Dr. Snibely.

We assign the following errors for reversal of the verdict and judgment thereon:

FIRST.

The Court erroneously refused to grant defendant's motion for a non-suit on the ground that the existence of the relation of master and servant between defendant and Dr. Snibely at the time of the extraction of the tooth by Dr. Snibely on January 29, 1914, was not proved.

SECOND.

The Court improperly refused to grant defendant's motion for a non-suit on the ground that under the proof it was impossible to ascertain the damages to be attributed to negligence, if any, on the part of Dr. Snibely.

THIRD.

The damages awarded were excessive.

FOURTH.

The Court erroneously and improperly refused to grant a motion for the direction of a verdict in favor of the defendant on the ground that there was no proof that the fracture resulted from any act on the part of Dr. Snibely.

FIRST.

The Court erroneously refused to grant defendant's motion for a non-suit on the ground that the existence of the relation of master and servant between defendant and Dr. Snibely at the time of the extraction of the tooth by Dr. Snibely on January 29, 1914, was not proved.

In discussing this point the matter will be considered from two distinct viewpoints: (1) whether Dr. Snibely was actually a servant of the defendant *at the time of the extraction* on January 29th; (2) whether defendant by subsequent actions ratified such act and thereby recognized Dr. Snibely as his servant in the doing *of the particular act* which it is alleged resulted in injury complained of.

It is to be noted that plaintiff sought to show that the necrosis of the jaw resulted from a fracture, and the plaintiff's allegation was that that fracture *was caused* by the extraction of the tooth by Dr. Snibely *on January 29th* (70, 71) (26). So, unless Dr. Snibely was the servant of defendant in the performance *of that particular act*, the plaintiff should have been non-suited.

In *McGuire vs. Grant*, 25 N. J. L., Elmer, J., said:

“ A master is responsible for the tortious acts of his servants which were done in his service. This responsibility grows out of, is measured by, begins and ends with his control over them. If it is his duty to control them in what they do, he is responsible for their neglect.”

We recognize the general rule that a master is ordinarily liable to answer in a civil suit for tortious acts of his servant, if the act be done in the course of his employment in his master's service,

and, as an incident of this general rule, it has been held that the master is liable, although he did not authorize or even know of the particular act or negligence on the part of the servant, although he disapproved of or forbade it, if the act was done in the course of the servant's employment, or, as it is sometimes expressed, within the scope of his authority; and as stated in the case of *Aycrigg's Ex'rs vs. New York & Erie R. R.*, 30 N. J. L. 463, the question,

“Whether the servant was acting within the scope of his employment and in pursuance of his master's orders, whether in the course of his employment or on his own responsibility, in the pursuit of his own business or pleasure, *must depend upon the facts of each case.*”

Obviously one may be in the general service of another and yet at times attend to business for himself. Acts done during the time the servant is at liberty cannot render the master liable.

In *Doran vs. Thomsen*, 76 N. J. L. 754, the Court at page 755 said:

“That the master is responsible for the negligence of his servant, when acting within the scope of his employment, is elementary law, but that he is not responsible if the negligence was committed by the servant when engaged *in some private matter* of his own is equally elementary.”

and in regard to the latter of these two propositions the Court quoted, with approval, the case of *Wyllie vs. Palmer* (137 N. Y. 248), where it was said:

“The doctrine of *respondet superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of such neglect or wrong, *at the time and in respect to the very transaction out of which the injury arose.*”

and the Court further said, at page 757:

“Assuming that the relation of master and servant existed generally between the father

and daughter, yet it does not appear in this case that on the occasion in question she was acting as such servant within the scope of her employment."

In *Holler vs. Ross*, 68 N. J. L. 324, the Court said:

"The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did which caused the injury, was an act which was expressly or by necessary implication, within the line of his duty under his employment."

In *Evers vs. Krouse*, 70 N. J. L. ⁶⁵³, the Court used the following language to express the same idea:

"An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work, *but solely for the accomplishment of the independent purpose of the servant*. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed to be so as a matter of law. *As to it* the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible."

And the fact that the act complained of in *Evers vs. Krouse*, was malicious does not make the principle therein enunciated inapplicable to the case at bar for as pointed out in *Doran vs. Thomsen* (*supra*) if an act not malicious "is not expressly or by necessary implication within the scope of the duty, then it cannot be said that the servant was engaged in the performance of the act *for the other*. The act must be done for the purpose of executing the master's orders *and doing his work, and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would*

not have been committed without the facilities afforded by the servant's relation to his master."

"The real test to be applied is whether the act is done by one for another, however trivial, with the knowledge of the person sought to be charged as master with his assent, express or implied * * *. *The act must be done by the one for the other.*"

Doran *vs.* Thomsen (*supra*).

And, again, in the case of Doran *vs.* Thomsen our Court of Errors and Appeals said (on p. 762) that an essential element in the creation of the status of master and servant, as to third persons, was that mere permissive use of an article (purchased in that case by a father for a daughter) did not create the relationship, "but such use must be in furtherance of and not apart from the master's service and control", and must be a use connected with the master's affairs.

In the case at bar no express authority for Dr. Snibely to do the particular act complained of was shown, nor can it be successfully maintained that the work which he did after office hours on this particular evening was, by necessary implication, within the line of his duty under his employment. The plaintiff's case is not only entirely consistent with the theory that Dr. Snibely was working for himself on the evening in question (the use of the office and materials merely being given), but the fact that *he was not then working* for Dr. Betts appears affirmatively as a part of the plaintiff's case (58, 57). It also was shown that Dr. Snibely practiced independently of defendant (57).

The plaintiff produced absolutely no evidence to show whether a fee was paid to Dr. Snibely for the operation on *January 29th*, nor that, if any were paid, defendant received it.

We realize that the rule to be followed by a trial judge in ruling on a motion for non-suit is that he must refuse such motion unless the proof in the case

is so clear that no other reasonable legitimate conclusion can be reached by the jury (*King v. Zierz*, 73 N. J. L. 134).

But here there was absolutely no proof that Dr. Snibely was *at the time of the act complained of* acting as the servant of defendant. The trial Court appreciated this and *the only thing that stood between the plaintiff and a non-suit was the impression of the Court that the defendant had ratified the act of Dr. Snibely by subsequent treatment of the jaw* (59). Mere treatment would not be ratification. There is no evidence *that complaint* was made to Dr. Betts of the alleged negligence of Dr. Snibely, and that he treated the plaintiff *because of this complaint*. The only evidence approaching this point appears in the defendant's case in the testimony of Dr. Betts where he says that he learned of the fact that Dr. Snibely had extracted a tooth for plaintiff four or five days after the act had taken place (113-123).

Subsequently treating a patient who has been under the care of another dentist is not acknowledgment, recognition or ratification of the act of the other.

Appreciating the rule that refusal to non-suit for failure of proof is not error if the defect was supplied by evidence taken in the progress of the cause (*Esler v. Camden and Suburban Ry. Co.*, 71 N. J. L. 180), we contend that this defect was not cured.

The only remaining portion of the testimony wherein reference is made to the question of the relation of master and servant alleged by the plaintiff to exist between defendant and Dr. Snibely *in the performance of the particular act complained of* is in the testimony of the defendant.

He testified that Dr. Snibely was employed by him; that his hours were 9-6 o'clock (103); that Dr. Snibely's duties were the general practice of dentistry (123); that he was known as an assistant; *that he was not authorized to extract teeth without being under the supervision of defendant* (123); that defendant learned of the extraction by Dr. Snibely

four or five days after the same had taken place (113-123).

There is nothing in this testimony which cures the lack of evidence as to the master and servant relation, as it existed at the time motion for non-suit was made. The verdict therefore rests on the anomalous doctrine that the defendant by subsequently treating the plaintiff made himself liable for the injury, if any had been caused, resulting from treatment by another dentist.

SECOND.

The Court improperly refused to grant defendant's motion for a non-suit on the ground that under the proof it was impossible to ascertain the damages to be attributed to any negligence on the part of Dr. Snibely.

It appeared that after defendant's alleged servant extracted the tooth on January 29th, at which time pain developed in plaintiff's jaw, plaintiff was treated by three physicians beside defendant, namely, Dr. Sherman on February 16, 17, 18, who, in attending plaintiff, inserted a probe in his jaw, excavated a portion, washed and treated the jaw for ulcer or abscess (62); Dr. Povey who treated plaintiff from February 1-16th and applied a mouth wash and a salve (32); Dr. Epstein who commenced treating plaintiff on February 22 (34). When it is considered that a month elapsed between the extraction and the discovery of the fracture (namely, when the first operation was performed) (43), and that during that time plaintiff was treated by various physicians in a variety of ways, it becomes manifest that there may well have been an intervening

cause which produced necrosis, which disease could arise by infection.

Plaintiff rested his case on the act of Dr. Snibely, endeavoring to hold defendant by establishing the relation of master and servant. Clearly no jury could intelligently estimate damages which flowed from the alleged negligence of Doctor Snibely when three other physicians treated plaintiff up to the time of the first operation.

All the physicians agreed that necrosis may be caused or the disease may be aggravated by infection (136, 140, 153). Manifestly this infection might arise from a variety of causes including the use of instruments by the physicians who treated the jaw.

“The damage to be recovered must be the natural and proximate cause of the act complained of. The damages must be the legal and natural consequences arising from the tort and not from the wrongful act of a third party remotely induced thereby.”

Cuff Admix. *v.* Newark and New York R. Co. *et al.*, 35 N. J. L. 17, at page 30.

“The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term ‘natural’ imports that they are such as might reasonably have been foreseen; such as occur in the ordinary state of things; the term ‘proximate’ indicates that there must be no other culpable and efficient agency intervening between the defendant’s dereliction and the loss.”

Smith *vs.* Public Service Corporation, 78 N. J. L. 478, at 480.

“If it is obvious that the act or omission was not the natural and proximate cause of the injury, the question is for the Court.”

Smith *vs.* Public Service Corporation
(*supra*).

THIRD.**The damages were excessive.**

The most important information furnished by the plaintiff as to the extent of his injury appears from the testimony of his physician, Dr. Epstein. He described in detail the three operations which were performed (67). The operations, according to Dr. Epstein, were to relieve the condition of necrosis, which from a lay standpoint is "dead bone" (69); that about one-half to three-quarters of an inch of bone were removed (80); after which the two ends of the bone were brought together and perfect union obtained (80); that this condition was brought about by the formation of scar tissue (85); that the only permanency of the injury consisted in the fact that by reason of the removal of the portion of the jaw bone some retraction took place—that is (to use Dr. Epstein's words), "the face is flatter on that side, drawn in".

No evidence whatever was introduced as to any expenditures that may have been made for medical attendance or for the operations at the hospital. The verdict of the jury should represent nothing but compensation for pain and suffering and for the injury sustained. Surely, when the plaintiff's own physician says that "the function of the jaw is fairly good" (86); [a verdict of \$3,000. is excessive and unwarranted by the evidence. The amount of damages awarded, considering the extent of the injury, seems to be punitive rather than compensatory.

FOURTH.

The Court erroneously and improperly refused to grant a motion for the direction of a verdict in favor of the defendant on the ground that there was no proof that the fracture resulted from any act on the part of Dr. Snibely.

We have indicated above that plaintiff rested his case on the point that the necrosis, to relieve which the operations were performed, resulted from fracture, caused by the extraction of the tooth by *Dr. Snibely, on January 29th* (26, 70, 71).

In addition to the argument heretofore advanced that Dr. Snibely was not then the servant of the defendant, we now wish to urge that the fracture which it was claimed resulted in necrosis could not have been caused by Dr. Snibely.

All the physicians agreed that to produce a fracture by the extraction of a deciduous molar from a child ten years of age, a dentist *must have used violence and excessive force in the extraction*, and that it would be impossible to cause a fracture under the circumstance, unless the dentist was grossly negligent (131, 138, 156).

Considering this testimony, it is clear that no negligence on the part of Dr. Snibely was proved, *because there was no evidence of violence*. The fracture may have been caused by some outside injury or agency, but certainly could not have been caused by Dr. Snibely.

Plaintiff's father was present at the time Dr. Snibely extracted the tooth on January 29 (9); Dr. Snibely was obliged to use such a small amount of effort to extract the tooth that Mr. Klitch remarked, "That tooth comes out rather easy" (10-15).

Dr. Snibely, called by the plaintiff as his witness,

testified that the tooth came out very easy (91), and that the only reason he used the forceps was that "if a person brings the patient in the office and you push the tooth out with the finger, they would not feel as if they wanted to give you a fee" (89).

It is respectfully submitted that the judgment should be reversed.

KING & VOGT,
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ELMER KING,
Of Counsel.

New Jersey Court of Errors and Appeals

FRANK A. KLITCH, an infant, by George Klitch, his next friend, Plaintiff-Respondent, against EDWIN BETTS, Defendant-Appellant.	}	Action at Law. On appeal from Supreme Court.
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STATEMENT OF FACTS

The plaintiff recovered a judgment against the defendant in the Supreme Court, Essex Circuit, in the sum of Three thousand (\$3,000) Dollars, for personal injuries sustained as a result of the carelessness and negligence of the defendant, his associates, agents and employes. The plaintiff, about ten years of age, was brought to defendant's office on January 29, 1914, to have a tooth extracted. One Dr. Snively was at that time in the employ of defendant as an assistant (56, 123), and his office hours with defendant were from 9 to 6 o'clock (57), but he had been there later (58). On the date mentioned, Snively extracted a molar tooth, in the doing of which, as is claimed by plaintiff, he fractured the boy's jaw.

Plaintiff suffered great pain for a long time (19, 20, 21, 26, 27), during the continuance of which he was again brought to defendant's office, where he was treated by Snively (20, 27, 28), and thereafter by defendant himself in Snively's presence (28, 29). Finally, defendant being worried about plaintiff's condition, advised an operation (30, 31, 32, 114, 115, 116, 120, 121). Defendant admitted employing Snively (103); that he had been in his employ over two years (124, 125), and that his wages had been paid by the defendant during January, 1914, (93). That Snively was not licensed, and that defendant knew he was violating the law in permitting Snively to practice (110, 111). Defendant did not remember, but did not deny, having received the money which was paid Snively for the service to plaintiff (123).

After the statement by defendant, that plaintiff would require an operation, he was treated by various other physicians, and finally, by Dr. Epstein, who performed three distinct operations, the major one being for the removal of one-half to three-quarters of an inch of the jaw bone, made necessary by necrosis, following the fracture (69, 77, 78, 80), as a result of which plaintiff's face is shorter on one side than the other, and the affected side is not as strong as the opposite side (86). Defendant was informed of these operations in the presence of Snively (38, 39, 40, 113, 115, 120). All physicians called both by plaintiff and defendant admitted that necrosis might be caused by any number of things likely to bring about infection, but that such necrosis could not cause a fracture (48, 49, 51, 52, 54, 55, 70, 71, 72, 73, 74, 76, 133, 134, 136, 137, 140, 141, 153, 156, 162).

Witnesses on both sides also agree that necrosis could not be caused by probing (81, 155), nor by making an incision (156). Snively stated that he did not find any abscess, but only a slightly irritated condition of the gum (fol. 89). Defendant's witnesses admitted that an unskilled dentist extracting a tooth might cause injury to the jaw, so that necrosis might follow as a consequence (116), and that if in a case like the one at Bar, a fracture resulted, the operator had not exercised reasonable care (121, 132, 133, 134, 140, 141, 151, 153, 162, 166, 167, 168). Defendant, himself, stated that Snively came within the scope of his statement, that a man who is not a dentist might fracture a boy's jaw (111), which statement was corroborated in effect by defendant's witness Minez (131). A casual reading of the testimony will disclose that all causes, which might have produced necrosis in this case, except that of fracture, were eliminated by all the witnesses on both sides.

POINT I

Defendant's motion for a nonsuit was properly denied.

When plaintiff originally rested his case, he had presented sufficient evidence to warrant the submission of the facts to the jury, on the theory that Snively was the agent, as well as employe, of the defendant, having worked for him for about two years, and was being paid wages by the defendant at the time of the injury sustained by the

plaintiff, and that the defendant had ratified the acts of his agent by his subsequent treatment of plaintiff (59). These facts were later reiterated by the defendant, himself, in his defense (93).

It nowhere appears that Snively was acting on his own account, or that he had permission to use defendant's office conveniences and appliances to carry on his own business, either after these hours or otherwise, or that his name appeared on any sign or display card, and the testimony of both the defendant and Snively negatives any such inference (56, 93, 103, 110). It was shown by Snively that he was not licensed to practice (56), and by the defendant, himself, later on, that he knowingly permitted Snively to practice dentistry without a license (110, 111), including the treatment and extracting of teeth, and that defendant knew this was contrary to the law. Defendant, within a few days after the injury, examined plaintiff in Snively's presence and treated him (93).

It is obvious that defendant placed Snively in a position, from which it was reasonable to infer that Snively was authorized to act for the defendant in carrying on the latter's business.

The rule in this State is well established, as laid down in the case of *Holler vs. Ross*, 68 N. J. Law, 324, where it is said that unless it be shown that the act which the servant did, which caused the injury, was an act which was *expressly or by necessary implication*, within the line of his duty, the master cannot be held responsible.

Here, Snively was expressly employed as an assistant, and during the two years he was in defendant's employ, extracted numerous teeth. What he did was absolutely within the scope of his employment, and the question of the hours

of his attendance at the office of defendant has no bearing upon the latter's liability.

In the *Holler* case, this Court, at page 473, cited *Goodloe vs. R. R. Co.*, 29 L. R. A., 729, and cases therein cited, where it was said:

“What is meant by the words ‘while acting within the range of the authority of the employment of the servant,’ is made the ground for contention in each case. But that seems, also, to be well settled on authority, and while it is often a matter of nice adjustment to the facts of a case, it has been made clear enough not to be of very difficult application.

“It is said that the rule of the responsibility of the master for the acts of his servant ‘does not apply simply from the circumstances that at the time when the injury is inflicted, the person inflicting it is in the employment of another; but that in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, it must be an act which is fairly incident to the employment; in other words, an act which the master has set in motion.’ And generally where the injury results from execution of the employment, the master is liable.”

The Court in the *Holler* case also quoted, with approval, from *Stone vs. Hills*, 45 Conn., 47, the following rule:

“For all acts done by a servant in obedience to the express orders or direction of a master, or in the execution of a master's business, within the scope of his employ-

ment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given, and the circumstances under which the act is done, the master is responsible."

These conditions clearly existed in the case at bar. Snively acted within the scope of his employment, and there is no suggestion of a willful or malicious act on his part, independent of his employment.

It has also been held that the master is liable, although not actually present at the time of the occurrence complained of.

Post vs. Munn, 4 N. J. Law, 61, 65.

The cases cited by appellant are not in point. In *Maguire vs. Grant*, it was clearly shown that the relation of master and servant did not exist, the facts being that the chairman of a street committee was attempted to be held accountable for the tortious acts of workmen, who were under the direction of the street commissioner.

In *Doran vs. Thomsen*, plaintiff sued to recover injuries by being hurt by an automobile owned by the defendant, but not at the time complained of, under his control, nor used in his business. The case was up on demurrer to the complaint, interposed by the defendant. In reality, the case is an authority for the respondent herein, since the Court, in sustaining one count of the declaration, said:

"There is, perhaps, no rule of law more firmly settled, than that a master is ordinarily liable to answer in a civil suit for the tortious acts of his servant, if the act be done in the course of his employment in

his master's service. Whether so done or not, must depend upon the facts of each particular case."

Citing:

Aycrigg vs. N. Y. etc. R. R., 30, N. J. Law, 460.

If it be assumed that Snively extracted plaintiff's tooth, contrary to defendant's statement that he was not authorized to do so, except under defendant's supervision (123), yet the act was done in the course of his employment, and within his implied authority. Under such circumstances, masters have been held responsible.

See:

Driscoll vs. Carlin, 50 N. J. Law, 28.

McCann vs. Cons. Tr. Co., 59 N. J. Law, 481.

Erie R. Co. vs. Salisbury, 66 N. J. Law, 233.

The case of *Lewis vs. National Cash Register Co.*, 84 N. J. Law, 598, an automobile case, applies here. There a sales agent, authorized to use a horse and wagon in delivering cash registers, did without any express authority, but with the knowledge of the defendant, use an automobile for the same purpose, and in the course of such work injured the plaintiff. The defendant was held liable as the master of the salesman, who was acting within the scope of his employment, notwithstanding the use of the auto was unauthorized by defendant. The Court cited *Singer Mfg. Co. vs. Rahn*, 132 U. S., 518, where this principle had been upheld.

This Court, in the case of *Rhinesmith vs. Erie R. R. Co.*, 76 N. J. Law, 783, a case where the plaintiff was injured through the explosion of a torpedo placed upon the defendant's tracks by a

conductor, who denied having done so, and was supported by other witnesses, and where the defendant, on appeal, contended that even if it be conceded that the conductor did place the torpedo on the track, his act could not be charged to the defendant, because its rules governing employees expressly prohibited the placing of torpedos in close proximity to a station, said, at page 784:

“But this contention under the doctrine of *respondeat superior*, cannot prevail to absolve defendant, unless it be established that what Armstrong did was a wanton act or was not in furtherance of any duty that was within the scope of his employment.”

Citing:

Holler vs. Ross and other cases.

See also:

Hughes vs. Bergen, etc., Co., 75 N. J. Law, 355.

Tier vs. Miller, 80 N. J. Law, 691.

Whether Snively was acting within the general scope of his authority, was a question for the jury.

Bennett vs. Busch, 75 N. J. Law, 240.

The question whether there is any evidence from which a jury might reasonably infer a ratification, is one for the Court, but where there is any evidence which admits of such inference, it becomes a matter for the determination of the jury.

Brautigam vs. Dean Co., 85 N. J., 549.

Unavailing search for a case similar to the one at Bar has been made. The nearest approach is

the case of *Croghan vs. Schwarzenbach*, 81 N. J. Law, 244, where defendant's agent told an employee to wash the bleeding finger of a fellow employee, and also told him to look for bandages in a medicine chest containing medicines for first aid to injured employees, and the employee negligently used crude carbolic acid in dressing the wound, by reason of which gangrene set in and the finger had to be amputated. It was held that the jury might infer, that the use of a medicine found in the chest, was within the authority given by defendant's agent to the employee to dress the wounded finger.

POINT II

It was for the jury to say whether the injuries sustained by plaintiff were caused by the acts of Snively, as defendant's representative, and the motion for nonsuit was properly denied.

The testimony shows conclusively that comment was made by the plaintiff's father to Snively, upon the extraction of the child's tooth, to the effect that "the tooth had come out rather easily," and to which Snively answered that "it did not come out as easy as you think it does" (10). This remark by Snively was not at any time denied. Plaintiff was unable to sleep for practically four days and nights (19, 20, 21, 26, 27), and was unable to eat anything except a little liquid food (21, 28). Several days after the extraction, plaintiff was taken to defendant's office, where Snively examined him and applied some wash (20, 27, 28). The pain kept up for more than a week and his face became swollen

(21, 29). Plaintiff was again brought down to defendant and treated by him in Snively's presence (28, 29). On several other occasions, the defendant treated the boy (29, 30), and finally stated that he was worried about him and thought there would have to be an operation (30, 31, 32).

Snively says that he extracted the tooth on January 29th (87). That the condition of the surrounding tissues of the tooth was very slightly inflamed, but he did not find any abscess (89). He was paid the fee for extracting the tooth (89, 92). He was unable to say how he stood when he extracted the tooth, nor the number or kind of the forceps that he used (90). Dr. Povey testified that he saw the boy on February 1st, two days after the extraction, at his home, and found an inflammation and a swelling of the left side of the jaw. That he made no examination for a possible fracture, not having anything in the history of the case to indicate such a condition (47). That about the 15th of February, witness came to the conclusion that there might be a necrosis of the bone (48). That necrosis of the bone might follow a fracture of the jaw, even without infection, and that the force used in the extraction of the tooth might produce fracture (48, 49). Witness applied a probe on the outside of plaintiff's face, evacuating some pus, but did nothing on the inside of the mouth at all (49). That the nervous condition of plaintiff could not and did not lead to a diseased condition of the jaw bone (50). On cross-examination, witness testified that the force necessary to extract a first molar tooth from a boy ten years of age, might be sufficient to fracture a jaw bone,

but that it was not probable (51, 52). That the primary cause for necrosis of the jaw bone is an injury or an irritant, which might be caused by a blow from the outside, and would have to be sufficient to cause a severe inflammation or at least a break, fracture, or injure the bone, and that it was not necessary to have a fracture in order to have necrosis (54). That a splintering of the bone would be a fracture, but could not be discovered without making an incision (54), 55). Witness said further that he did not make any examination for a fracture, and that a partial fracture might have existed without being discovered by him in the examination he made (55). Dr. Sherman testified that he saw the boy on February 16th, 17th and 18th, suffering with an abscess of the lower left jaw, and treated him (61). That his face was considerably swollen and distorted. Witness excavated the diseased place in the jaw, and thought he inserted the probe in the place where the tooth had been, and for the purpose of letting any pus that was there escape. He made no other examination (62). His recollection as to any search for crepitus was not good (63). Witness refused to state any of the producing causes of necrosis, on the ground that he had not been employed or paid as an expert (64). Dr. Epstein, on examining the boy in February, found the wound on the left side of his face, which was discharging under the jaw. The boy complained of a great deal of pain, had some temperature and was unable to eat. Upon examination, he found a roughening of the jaw bone, indicating presence of necrosis, and that he subsequently operated, scraping the bone and giving it detailed treatment. In March, it was found necessary to operate again,

and then a portion of the jaw bone was removed (67, 68). The third operation was later performed for the removal of the tooth which had begun to grow in the substance of the bone, where the operation had been performed (68). Prior to making the first operation, an X-ray examination was made, and upon palpating the jaw and probing, crepitus was found to exist (68). The X-ray disclosed necrosis and the fracture was found to exist on the left side of the jaw through the entire bone (69, 70). Witness further testified that the conditions found by him in the boy's jaw usually came from injury—from a blow or from manipulation caused by friction, and that the condition of the plaintiff following the extraction of January 29th, was such as could be brought about through a fractured jaw (70), and that these conditions could have been produced in plaintiff's jaw by the extraction referred to (71). That other causes for necrosis might be chronic abscesses at the root of the tooth, causes producing softening of the bone, such as tuberculosis or syphilis (73), none of which conditions, including abscesses or diseased roots, were found by the doctor in the surrounding tissue (73). That any of such causes last referred to would not exhibit themselves by fracture, and that such fracture was not caused by any such diseases (74). That in witness's opinion, the fracture was caused by force or violence, of which witness had no doubt. In the full history of the case obtained by witness, he did not find that plaintiff had received a blow from anybody or had fallen. It was further shown that infection might take place through the use of improper and unclean instruments, but that as a rule, that would not be the producing cause of

necrosis, and *does not cause a fracture* (76). On cross-examination, witness said, on the assumption that decayed teeth had been allowed to remain in the jaw for an undue length of time, that fact might produce necrosis, but not cause a fracture (76, 77). That witness found a complete fracture under the second bicuspid tooth (77). That at the time he scraped the bone, there was a complete fracture there (78). That he found no evidence of an incision having been made on the inside of the boy's mouth (79). That about one-half to three-quarters of an inch of the bone was entirely taken out. That probing, as was done in this case, could not, by any possibility, have caused a fracture.

The defendant himself stated that judging from his experience, it would be impossible to fracture a ten-year-old boy's jaw bone in the extraction of a first molar, but on cross-examination, said that "one acting as a dentist might do most anything." That he knew Snively was not a regular practitioner; that he was still in defendant's employ and extracted teeth, which defendant knew was in violation of the law, but which he permitted to continue (109, 110, 111). That Snively came within the scope of defendant's statement "that a man who is not a dentist might fracture a boy's jaw" (111). Witness, within the week after the extraction, was sure necrosis was present and that the child should be operated upon (115). That necrosis would ordinarily be caused by injury, and that an unskilled dentist extracting a tooth, might cause such injury to the jaw, as to produce necrosis (116). In answer to the question of the Court, he finally stated that in an extraction of the kind complained of, he would say that the dentist had not used reason-

able care (120). This last statement was corroborated by Dr. Minez, one of defendant's witnesses, who also agreed with previous witnesses as to the various causes of necrosis (132, 133, 134). Dr. Knef gave similar testimony (137, 138, 139, 140, 141, 144-151). Dr. Eckler gave similar testimony (153, 155, 136, 162). Dr. Doremus, called by the plaintiff, explained fully how a fracture of the jaw bone might occur in the extraction of a first molar (166, 167, 168).

By process of elimination, as shown by the medical testimony, the cause of the fracture found to exist was shown to have been the extraction of the tooth by Snively on January 29, and the question of his negligence was properly submitted to the jury.

A jury may infer negligence from facts which reasonably impute it, and it is the province of the jury to pass upon testimony from which negligence may be inferred.

Bliss vs. Bergen Co. T. Co., 64 N. J. Law, 601,

Napurana vs. Young, 65 Atl., 1052.

The Trial Court properly refused to order a non-suit, where it could only have been done by entirely disregarding plaintiff's testimony.

Metting vs. No. Jer. St. Rwy. Co., 69 N. J. Law, 605.

A non-suit cannot be ordered, unless the proof in the case is so clear, that no other legitimate conclusion can be reached by the jury

Consol. Tr. Co. vs. Reeves, 58 N. J. Law, 573-577 and cases cited.

Day vs. Donohue, 62 *id.*, 380.

Voorman vs. N. J. St. Rwy., 70 *id.*, 818.

King vs. Zierz, 73 *id.*, 134.

On a motion to non-suit, where fair-minded men might honestly differ as to the conclusions to be drawn from the facts, the questions at issue should go to the jury.

Mumma vs. Easton etc. Rwy. Co., 73
N. J. Law, 653.

Dederick vs Cent. Rwy. Co., 74, *id.*,
424 and cases cited.

Hummer vs. Lehigh etc. R. Co., 65 Atl.,
126.

Nolan vs. Bridgetown etc. R. Co., *id.*,
992.

Weston vs. Pa. R. R. Co., *id.*, 1015.

Bowell vs. Pub. Ser. Corp., 77 N. J.
Law, 231.

Wilkins vs. Standard Oil Co., 78 N. J.
Law, 524.

Where there is conflicting testimony on both sides in regard to a disputed fact, it is a proper question for the decision of a jury, and the Court, on appeal, will not disturb their verdict.

Aycrigg vs. N. Y. etc. Co., 30 N. J.
Law, 460.

Kulman vs Erie Rwy., 65 *id.*, 241.

Friedman vs. N. H. Co. Ry., *id.*, 298.

Hanley vs. No. Jer. St. Rwy., *id.*, 447.

Lee vs. No. Jer. St. Rwy., 66, *id.*, 336.

Bauman vs. Hamb. Amer. P. Co., 67,
id., 250.

Gwynn vs. Hitchner, *id.*, 654.

Hopper vs. Smith, 70 *id.*, 403.

Spargo vs. Cent. R. Co., 86 Atl., 385.

Where the evidence and inferences reasonably arising therefrom, will support a verdict for the plaintiff, non-suit must be denied.

Western E. I. Co. vs. Benecke, 82 Atl.,
878.

This Court has said that the rule applying to motions for non-suit is particularly applicable to cases of negligence, inasmuch as negligence is not so much a fact in itself, as a logical inference from a collocation of facts.

Mumma vs. Eastern etc. Rwy., 73 N. J. Law, 659 and cases cited.

If from the facts in evidence, two inferences or conclusions can be reasonably deduced, one favorable to the plaintiff and the other against him, a question is presented which conclusively calls for the opinion of the jury.

This principle is alike applicable to the question of whether negligence, as the approximate and sole cause of the injury, has been established against the defendant or not.

Con. Tr. Co. vs. Reeves, *supra*, pp. 575, 577.

This Court, in passing upon the Appellant's First and Fourth Points, will necessarily examine the evidence in the case only for the purpose of ascertaining whether there exists any proof, which will reasonably and legitimately sustain the Trial Court in its submission of the case to the jury.

If it be assumed that when defendant moved for a non-suit, plaintiff had not sustained the burden of proof, it was within the discretion of the Court to permit the plaintiff to reopen his case and produce further testimony, and such discretion will not be reviewed on appeal.

Buston vs. Buston, 10 N. J. Law, 184.
Trade Ins. Co. vs. Barracliff, 45 *id.*, 543.

Vogel vs. N. J. St. Rwy. Co, 69 *id.*, 219.

If, after denial of a motion for non-suit, for failure of proof, the defect was supplied in the evidence afterwards adduced, the error of refusal will not lead to a reversal.

Esler vs. Camden etc. Rwy. Co., 71 N. J. Law, 180.

Bostwick vs. Willett, 72 *id.*, 21.

Carey vs. Ham. Amer. P. Co., *id.*, 56.

Van Cott vs. No. Jer. St. Rwy. Co., *id.*, 229.

Dennery vs. Great Atl. etc. Co., 82 *id.*, 517.

Lewis vs. National Cash Reg. Co., *supra*, 598, 599, and cases cited.

Where there is evidence in the case, which, if believed by the jury, fairly tends to support plaintiff's right to recover, the Court does not err in refusing to take the case from the jury.

Sutphin vs. Hedden, 67 N. J. Law, 324,

Corrall vs. Cent. R. R. Co., 80 *id.*, 403 and cases cited.

Where the testimony which proves the occurrence by which the plaintiff was injured, discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense.

Bahr vs. Lombard & Co., 53 N. J. Law, 233.

Bien vs. Unger, 64 N. J. Law, 596.

Where it is shown that the accident is such, that its real cause may be the negligence of the defendant, and that whether it is or not, it is within the knowledge of the defendant, and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident,

by proving the circumstances, and thus raising the presumption, that if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.

Newark Elec. Light Co. vs. Rudd, 62 N. J. Law, 505, affd., 63 *id.*, 357.

Although the statute against employing unlicensed dentists was not pleaded by the plaintiff, yet the fact of such employment in violation of the statute was admitted by both the defendant and Snively. Mention is made of the statute, because of it having been referred to in defendant's motion for non-suit (60). And it has been held in the case of *Evers vs. Davis*, 86 N. J. Law, 196, that penal statutes which give no private right of action (as applies to this case) may, nevertheless, affect private rights upon common law principles, applicable to the action of negligence. Judge Garrison, in this case, said:

“The point to be observed, and it is the only matter with which we are now concerned, is that whatever benefit the plaintiff in a civil action derives from such penal statutes, is through the medium of the action of negligence, from which it follows that if such action be abandoned, the plaintiff thereby cuts himself off from the very benefits of the statutes that he is seeking to derive from it.”

POINT III

The damages awarded were not excessive

The claim that the damages awarded are excessive has not been raised nor assigned as grounds

for the appeal, in the defendant's notice of appeal, and respondent is of the opinion that the matter cannot be properly heard under these circumstances. If the Court is of a different opinion, however, it is respectfully submitted, that for the painful and permanent injuries sustained by the plaintiff, the award is not at all excessive. Plaintiff has lost three teeth and will be compelled to wear artificial teeth the rest of his life, which, while of itself, is not a very serious item, does not by any means, eliminate the damage. There is a deformity on the left side of the face, which will be permanent, and the surgeon who operated was at the time of the trial, unable to say with any reasonable certainty, whether it would or not be necessary to again operate on plaintiff (74). There is some retraction of the left jaw, and the face is drawn in and flatter on that side (74, 75). One-half to three-quarters of an inch of the jaw bone was entirely removed (80). The two ends of the jaw have been brought together, and a union perfected, scar tissue having formed there (80, 85). There is a fibrous union existing, but that the jaw would never be as strong as the opposite side (85, 86).

The jury properly took into consideration the distressing and permanent character of the injuries inflicted on plaintiff, and there is neither suggestion nor statement made that the jury was swayed by prejudice, passion or sympathy.

The appellant complains, in his brief, that there was no evidence as to any expenditures which were or might have been made for medical or surgical attendance and services. Obviously, the plaintiff could not recover for these items, that being an action reserved for the father, who incurred the expense. The boy was in the hospital for

three successive operations—the first for a week, the second for four days, and the third for four days (21). As a result of the injuries and the treatment, the boy was kept out of school from the time of the extraction down to the date of the trial—a period of more than one year. He became quite thin, lost his appetite, and at the time of the trial was still being treated by Dr. Epstein, he having seen the plaintiff after the third operation, daily, from May to July, every other day for about two weeks thereafter, and then about once a month up to the date of the trial (41).

The operation for the removal of the portion of the bone took one hour and forty-five minutes (43).

POINT IV

The judgment recovered was right and should be affirmed.

Respectfully submitted,

WILLIAM HAUSER,
Attorney of Plaintiff-Respondent.

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Errata.

"N. Sively" wherever appearing, should read
"Sively."

W.H.C.

New Jersey
Court of Errors and Appeals

Summons

(Filed, June 8, 1914)

The State of New Jersey, to Edwin
(L. S.) Betts: 20

YOU ARE SUMMONED to answer the annexed complaint of Frank A. Kiltch, an infant etc., in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 28th day of May, 1914. 30

WILLIAM C. GEBHARDT,
Clerk.

William Hauser,
Plaintiff's Attorney.

40

Complaint*(Filed, June 8, 1914)*

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

FRANK A. KLITCH, an Infant, by George W. Klitch, his next friend, Plaintiff, against EDWIN BETTS, Defendant.	}	Action at Law. Complaint.
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20

The plaintiff above named, residing at 530 North Fifth Street, in the City of Newark, County of Essex and State of New Jersey, says that:

I. He is an infant under fourteen years of age, to wit, of the age of eleven years.

30 II. Heretofore and on the 28th day of May, 1914, by an order made by this Court, dated on said last mentioned day, George W. Klitch was duly admitted as next friend of the plaintiff to prosecute his said action herein.

III. At the times hereinafter stated, the defendant was and still is a dentist, practicing in the City of Newark.

40 IV. On or about January 29th, 1914, the plaintiff, being then in need of the professional services of a dentist employed the defendant as such dentist to attend and treat him for his ailment, and for the purpose, defendant, for reward, under-

Complaint

took, as a dentist by his servants, agents and employees, to perform that service for plaintiff.

V. Defendant, as aforesaid, did not use due and proper care or skill in endeavoring to extract one of plaintiff's teeth, but so negligently and unskillfully conducted himself and permitted his associates, agents and employees to conduct themselves, as to fracture plaintiff's jaw bone; that defendant also subsequent to said last mentioned occurrence did not use due and proper care or skill in ascertaining the extent of such fracture or to treat same properly, so that in consequence thereof and solely by reason of the defendant's lack of care and skill and by his negligence, plaintiff was obliged to and did submit to a number of surgical operations, as a result of which a large portion of plaintiff's jaw bone had to be and was removed, permanently injuring, defacing and crippling the plaintiff for all time. 10 20

VI. By reason of defendant's said negligence, plaintiff was greatly injured in his health and constitution, was made sick and sore, suffered great and exconciating pain, was weakened in body and permanently injured, and has been and still is under medical and surgical treatment in attempting to be cured of the sickness and injury caused by the said unskillful, improper and negligent conduct of the defendant. 30

VII. Plaintiff demands Ten thousand Dollars damages.

WILLIAM HAUSER.

Attorney of Plaintiff,

73 Berkeley Avenue

Bloomfield, N. J. 40

Answer*(Filed, June 17, 1914)*

NEW JERSEY SUPREME COURT

10

ESSEX COUNTY

FRANK A. KLITCH, an Infant, by George W. Klitch, his next friend, Plaintiff, against EDWIN BETTS, Defendant.	}
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20

The defendant, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint filed in the above stated cause, says that:

1. He has no knowledge of the contents of Paragraph 1 and leaves the plaintiff to his proof thereof.
2. He has no knowledge of the contents of Paragraph 2 and leaves the plaintiff to his proof thereof.
3. He admits Paragraph 3.
4. He admits Paragraph 4.
5. He denies each and every allegation of Paragraph 5.
6. He denies each and every allegation of Paragraph 6.

40

KALISCH & KALISCH,
Attorneys of Defendant.

Amended Answer*(Filed, March 15, 1915)*

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

FRANK A. KLITCH, an Infant, by
by George W. Klitch, his
next friend,

Plaintiff,

vs.

EDWIN BETTS,

Defendant.

20

Paragraph 4 of the Defendant's answer in this
cause filed is hereby amended to read as follows:

4. Defendant admits that he is a regularly li-
censed practicing dentist and that he maintains an
office for the practice of his profession, but he de-
nies that on January 29, 1914 he undertook, by his
servants, agents and employees, to perform ser-
vices for plaintiff, or that he was employed by
plaintiff to treat him.

30

W. HOWARD DEMAREST,
Attorney of Defendant.

Judgment*(Entered March 26, 1915)*

NEW JERSEY SUPREME COURT

10

 FRANK A. KLITCH, an Infant, by
 George W. Klitch, his
 next friend,
 vs.
 EDWIN BETTS.

This case was tried before Judge Nelson Y. Dungan, holding the Circuit Court, to whom it had been referred by the Supreme Court Justice,
 20 with a jury, at the Essex County Circuit on March 15th and 16th, 1915.

The jury rendered a general verdict against the defendant, and in favor of the plaintiff, for Three thousand (\$3000) dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant, the sum of Three thousand dollars and his
 \$3,000.00 costs, which are taxed at the sum of
 30 71.99 Seventy-one dollars and Ninety-nine cents, making in the whole the sum of
 \$3071.99 Three thousand and Seventy-one dollars and Ninety-nine cents.

WM S. GUMMERE, C. J

Testimony

NEW JERSEY SUPREME COURT

FRANK A. KLITCH, by friend, vs. EDWIN BETTS.	}	Action at Law.	10
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Transcript of shorthand notes of testimony stated in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., March 15, 1915.

Before HON. NELSON Y. DUNGAN, Judge, and a Jury. 20

William Hauser for plaintiff.

W. Howard Demarest for defendant.

Jury drawn and sworn.

Mr. Hauser opened for plaintiff.

Mr. Demarest opened for defendant.

GEORGE W. KLITCH, sworn for the plaintiff: 30

Direct-examination by Mr. Hauser:

Q. Mr. Klitch, where do you live? A. 530 North Fifth Street.

Q. City of Newark? A. Yes, sir.

Q. What is your occupation? A. Butcher.

Q. In the City of Newark? A. No, sir.

Q. You are married? A. Yes, sir.

Q. How large a family have you? A. Four children. 40

George W. Klitch—Direct

Q. You are the father of the plaintiff in this suit, Frank A. Klitch? A. Yes, sir.

Q. Do you know the defendant, Dr. Edwin Betts? A. No, sir.

Q. You mean you do not know him personally?

10 A. No, sir.

Q. Do you know Dr. Betts has an office in the City of Newark? A. Yes, sir.

Q. Where? A. Broad Street, right across from Orange.

Q. What kind of office, what is it called? A. Dentistry.

Q. Have you observed any sign there? A. Yes, sir, I have seen a sign there.

Q. What sort of sign? A. Well, "Dr. Betts."

20 Q. What else? A. Dentistry; Dr. Betts.

Q. Were you on or about January 20, 1914, in the office conducted at that address? A. On when?

Q. January 20, 1914? A. Yes, sir.

Q. With whom? A. With my son.

Q. And what did you go there for? A. Why, to have a tooth extracted.

Q. Whose tooth? A. The boy's.

Q. What time of day were you there? A. It was in the evening.

30 Q. After 6 o'clock? A. Yes, sir.

Q. Who did you see? A. Mr. Snibely.

Q. Do you see him here in Court? A. I think that is the gentleman over there (indicating); I am not sure; it is pretty near a year since I saw him.

Q. For whom did you ask when you entered the office? A. I don't remember asking for anyone.

40 Q. Just tell us what took place. A. I took the boy in there to have a tooth extracted, and Mr.

George W. Klitch—Direct

Snibely looked at it, took something and mixed it up, put it in a kind of instrument, put it in the boy's jaw, and he extracted it and walked out of the room.

Q. Is that the 20th? A. No, sir, that is not the 20th.

Q. I am speaking of the 20th. A. He just pulled the tooth; put something on it and pulled the tooth. 10

Q. Did anything else happen on that occasion?
A. No, sir, the boy was all right.

Q. How much did you pay? A. Fifty cents.

Q. Whom did you pay? A. Mr. Snibely.

Q. When did you go subsequently to that visit?
A. On the 29th.

Q. Whom did you inquire for? A. The same gentleman. I did not inquire for anyone. 20

Q. And who attended to you? A. Mr. Snibely.

Q. Tell us exactly what happened then. A. Well, he looked at the boy's face, and he looked at the tooth, and got some kind—mixed up some kind of stuff and put it in an instrument and shoved it down the boy's jaw and extracted the tooth.

Q. Where did these extractions take place? A. In the back part of the office.

Q. And the boy was seated in a chair? A. Yes, sir. 30

Q. Did you see any other persons there in this office? A. No, sir, not in the office.

Q. Any other dentist or persons acting as such?
A. Not in the office, no, sir.

Q. Did you see any others there on that floor at all? A. Well, in the hall.

Q. Do you know any of the people whom you saw? A. No, sir.

George W. Klitch—Direct

Q. Now, tell us with respect to the extraction of this tooth on the second occasion, what transpired, what happened. A. Well, Mr. Snibely, took and mixed something and put it in an instrument and put it in the boy's jaw, and extracted the tooth, and walked out of the room. I asked
10 him to give the boy a glass of water; and a little while later Mr. Snibely came back, and I paid him, and took the boy out.

Q. Did you have any conversation with Dr. Snibely at that time? A. In the hall. Nothing about the boy's tooth.

Q. Well, was there anything said by you to him, or him to you? A. Yes. When he extracted the tooth I said to the doctor, "That tooth comes out
20 rather easy," he said, "It don't come out as easy as you think it does."

Q. What did you do with the tooth? A. We looked at it and he threw it aside.

Q. Was there any other conversation there in the room at that time? A. No, sir.

Q. What treatment, after extracting the tooth, did Dr. Snibely give the boy, if any? A. Not any; not while I was there.

Q. Didn't he give him anything to rinse his
30 mouth? A. No, sir. Then I took the boy downstairs; the boy kept on crying; I asked the boy, "What is the matter, Frank?" He said, "It hurts worse now than it did before." And I took the boy home.

Q. What time of the day was this second call? A. About the same time; after I got through work; it must have been around 8 o'clock; I could not say when.

Q. Did you go home immediately after that? A.
40 Yes, sir; I took the boy right home.

George W. Klitch—Cross

Q. Were you home all that night? A. That I could not say, whether I was or not.

Q. Did you sleep home that night? A. Yes, sir.

Q. Is your room close to that of the boy's? A. Yes, sir.

Q. Do you know whether he slept that night or not? A. No, sir, he did not, he cried all night. 10

Q. Were you up and attending to him? A. No, sir.

Q. Who was? A. My wife.

Q. Did you take him down to Dr. Bett's office after that at any time? A. No, sir.

Q. Did you see Dr. Snibely after that at any time? A. No, sir.

CROSS-EXAMINATION by Mr. Demarest: 20

Q. How old was the little boy on January 29, 1914? A. Going on ten years.

Q. When is his birthday? A. The 7th of April.

Q. On the 29th of January, when you brought the boy down to Dr. Bett's office, who was in the office when you first went in? A. There wasn't anybody there in the office when I first went in.

Q. Then Dr. Snibely came in after? A. Came in, yes, sir.

Q. Did he have his hat on when he came in? A. I could not say. 30

Q. Did he have his hat in his hand when he came in? A. I could not say, I don't think so.

Q. Well, you don't know? A. No, sir.

Q. The office was all alone when you went in there? A. Yes, sir.

Q. Were you standing in the doorway of the operating room when Dr. Snibely came in? A. Well, I was standing right there; we no more than got there when he came in. 40

George W. Klitch—Cross

Q. Do you know whether he came up the stairs or not? A. I don't know, sir; he came in from another room.

Q. What time of night was this on the 29th of January? A. Somewhere around 8 o'clock.

10 Q. Eight o'clock? A. I should not say eight; around there.

Q. Did Dr. Snibely represent to you that he was Dr. Betts? A. No, sir, he did not.

Q. Was any mention made of Dr. Betts at that time? A. Not that I know of.

Q. Did you make any mention of Dr. Betts? A. Not that I know of.

Q. You ought to know whether you did or not. A. Why—well, I don't know.

20 Q. Do you know which tooth was extracted on the 29th day of January? A. Well, I think it was the third from the back.

Q. Upper or lower? A. Lower.

Q. Left or right? A. Left.

Q. Did the boy have toothache? A. Yes, sir.

Q. Were the teeth decayed? A. Well, I think there was a little hole in the tooth; yes, there was.

Q. You saw the tooth afterwards, didn't you? A. Yes, sir.

30 Q. He had had toothache for how long before you went to the dentist? A. He only had toothache that day; that tooth ached him.

Q. On the 29th? A. Yes, sir.

Q. You say you also went there on the 20th, nine days before that, did he have toothache then? A. Yes, sir, he had toothache in another tooth.

Q. And that tooth was extracted? A. Yes, sir.

40 Q. How long before the 20th did he have the toothache? A. Well, I don't know.

George W. Klitch—Cross

Q. Do you know he had one before the 20th? A. That I could not say; when I came home the boy said, "Dad, I have got toothache."

Q. Had the boy been attending school regularly? A. Well, the boy had been kept out of school, but he had just went to school that day.

Q. Had he been sick? A. No, sir—well, he had a little nervous trouble. 10

Q. Nervousness was the only thing the matter with him at that time? A. That is all, yes, sir.

Q. Had he been suffering from any other sickness? A. No, sir, never was sick.

Q. The boy is what you call a normal, healthy boy? A. Well, outside of a little nervous; we had to keep him home from overstudy, and the boy was just started to go to school again.

Q. Always well fed and nourished? A. As far as I know. 20

Q. Take around the 29th, was he at that time? A. Yes, sir.

Q. And after the 29th? A. What do you mean "after"?

Q. Was he able to eat his meals? A. No, he could not eat his meals very well.

Q. Oh, he could not? A. No.

Q. After the 20th was he able to eat his meals? A. Yes, sir. 30

Q. And after the 29th how long was he able to eat his meals? A. That I could not say, because I did not take care of the boy.

Q. Did he eat his meals with the family at the table? A. Yes, sir.

Q. Was he at the table at the regular time? A. I suppose he was.

Q. You don't know? A. Always at the table 40

George W. Klitch—Cross

when I was home. Of course, the boy only eat one meal a day with me and that was at the evening, and half the time he had his meals before I came home.

Q. He was always able to eat his meals? A. Not after the operation he wasn't.

10 Q. I am not speaking of after the operation; I am speaking of after the 29th of January, immediately after that date. A. No, I don't think he did; he ate soft food.

Q. After the 29th of January you went back to Dr. Bett's office again, did you not? A. I could not say; not with me.

Q. Did Dr. Betts ever extract a tooth from this boy's mouth himself? A. Not with me.

20 Q. Do you know whether or not anyone else took the boy to Dr. Betts's office? A. Yes, sir.

Q. Who did? A. My wife.

Q. Do you know what date that was? A. No, sir.

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

Q. Do you know which tooth Dr. Snibely extracted on the first visit? A. Well, I think it was the fourth one from the back, the fourth tooth, right next to the one that done the damage.

30 Q. You don't know that it was that tooth, though; you are not sure it was the fourth one from the back? A. I am not sure of it, no, sir.

Q. These were all first teeth that were extracted, were not they, Mr. Klitch? A. Well, that is what I thought, they were the first tooth.

Q. Baby teeth, they call them. A. Well, this didn't look just like a baby tooth.

Q. Which one? A. The one Snibely pulled.

40 Q. Would you recognize the tooth if you saw it? A. No, sir, I would not, no.

George W. Klitch—Re-direct

Q. You know it had a cavity in it? A. Yes.

Q. What we call double tooth, one of the back teeth? A. I could not say.

By the Court: Q. How old did you say the boy was? A. Nine years old, going on ten.

By Mr. Demarest: Q. You were present when Mr. Snibely took the tooth out on the 20th of January, weren't you? A. Yes, sir. 10

Q. Did it seem to come out hard or easy? A. I thought it came out rather easy; the doctor said, "It don't come out as easy as you think it does."

Q. You thought it came out easy? A. I thought it did, the way it cracked right away; I said, "Why, that comes out easy;" he said, "It don't come out as easy as you think it does."

RE-DIRECT-EXAMINATION: 20

Q. What time do you leave your home to go to work? A. In the morning?

Q. Yes. A. Generally quarter to six.

Q. And prior to these extractions was your boy accustomed to be up before you went away? A. No, sir, he was not.

Q. Do you get your lunch at home in the middle of the day? A. No, sir.

Q. You were asked before if you had been down to Dr. Betts after January 29th, and I understood you to say you did not know. A. No, sir, I wasn't there. 30

Q. You were not there? A. No, sir.

Q. If I understood you correctly, the sum total of your visits to Dr Bett's office were January 20th and January 29th? A. That is all, yes, sir.

Q. Not since? A. No, sir. 40

Frank A. Klitch—Direct

FRANK A. KLITCH, called:

By Mr. Hauser: Q. What is your name? A. Frank Klitch.

Q. How old are you? A. Going on eleven; be
10 eleven in April.

Q. Do you know what it means to tell the truth?
A. Yes, sir.

Q. Do you know what happens to you if you do
not tell the truth? A. Yes, sir.

Q. What? A. Be punished.

Mr. Hauser: Have you any objection to
his testifying?

Mr. Demarest: No, sir.

By the Court: Do you know what it is to take
20 an oath? A. No, sir.

Q. Ever been in Court before? A. No, sir.

Q. Well, the oath which is given to witnesses in
Court is that they should tell the truth, the whole
truth, and nothing but the truth; after taking such
an oath as that what are you to tell? A. The
truth.

Q. And you will do that? A. Yes, sir.

The Court: You may administer the
oath.

30

FRANK A. KLITCH, sworn for the plaintiff:

Direct-examination by Mr. Hauser:

Q. Now, Frank, I want you to talk up, don't be
afraid, just imagine you are reciting to your
teacher in school. Where do you live? A. 530
40 North Fifth Street.

Frank A. Klitch—Direct

Q. That is in Newark? A. Yes, sir.

The Court (to the witness): Do you feel well and strong?

Witness: Yes, sir.

The Court: Then just stand up in front where we can hear you.

Q. Do you remember January, a year ago? A. Yes, sir. 10

Q. Do you remember having toothache any time in that month? A. Yes, sir.

Q. Can you tell me what part of the month it was, whether it was early in the month or the middle of the month or toward the end of the month?

A. I couldn't tell you.

Q. You do remember you had toothache? A. Yes, sir.

Q. Can you tell his Honor and the gentlemen exactly what you did with respect to your toothache? A. I went down and had the tooth pulled, and I came right home. 20

Q. Who went down with you? A. My father.

Q. Do you remember whether that was during the day or whether after supper? A. After supper.

Q. Do you remember what time? A. No, sir.

Q. Can you tell these gentlemen where your father took you? A. He took me on the car, and we got off at Broad Street and we went in and had the tooth pulled and after we was talking in the hall with Mr. Snibely and then we went home. 30

Q. What car did you take from your house? What line of cars? A. Bloomfield line.

Q. And where did you get off, do you remember? A. At Broad Street.

Q. And what other street? A. Orange. 40

Frank A. Klitch—Direct

Q. Did you have far to walk from that corner to the dentist's office? A. No, sir, right across the street.

10 Q. On which side of Broad Street was it as you come down from Bloomfield, the left-hand side or right-hand side? A. It was on the right-hand side.

Q. As you come down this way? A. Yes, sir.

Q. Now, just stop and think for a moment. A. I can't remember.

Q. Did you cross the car tracks to get to the dentist's office? A. Yes, sir.

Q. Then it was on this side, wasn't it? A. Yes, sir.

20 Q. Did you see Dr. Snibely in Court? A. Yes, sir.

Q. Point him out, will you? A. There (indicating).

Q. Doctor, will you kindly stand up. Is that the gentleman who attended you? A. Yes, sir.

Q. What did he do the first time you went down there? A. He pulled my tooth and walked out of the room.

Q. Did it hurt? A. Yes, sir.

Q. Very much? A. Yes, sir.

30 Q. And who gave you any water to rinse your mouth? A. My father.

Q. What happened after that? A. We went home, and I had the toothache all the time.

Q. Wait a moment; I am speaking of the first time you went down there. A. The first time it was all right.

Q. Did you have any pain the next day? A. No, sir.

40 Q. Any that week? A. No, sir.

Frank A. Klitch—Direct

Q. After that you got toothache again, didn't you? A. Yes, sir.

Q. How long after that? A. About nine days.

Q. And what did you do then? A. Went down and had the tooth out.

Q. And who went with you? A. My father.

Q. And do you remember what time of day that was? A. At night. 10

Q. At night after your father came home from work? A. Yes, sir.

Q. Whom did you see at that time? A. Dr. Snibely.

Q. Did you ever see anybody else there in the office? A. No, sir.

Q. Did that hurt? A. Yes, sir.

Q. Very much? A. Yes, sir.

Q. And what did Dr. Snibely do to you after the tooth was pulled? A. He walked straight out. 20

Q. Didn't he give you any water or anything? A. No, sir.

Q. Who did? A. My father.

Q. How long did you stay there at that office, if you remember? A. I can't remember; I went right out.

Q. Did you hear any talk between your father and Dr. Snibely on that second time? A. Was talking about something in the hall; I don't know. 30

Q. Where did you go after that tooth was pulled, the second tooth? A. Went home.

Q. And did you sleep that night? A. No, sir.

Q. Why? A. Well, it pained so.

Q. Where did it pain? A. In there (indicating).

Q. And how was it the next morning? A. Pained worse.

Q. Did you eat any breakfast? A. No, sir. 40

Frank A. Klitch—Direct

Q. Had you slept any that night? A. No, sir.

Q. What did you do the next day? A. I stayed home; it was raining that day.

Q. And when did you next go down to Dr. Bett's office, if you remember? A. I can't remember.

10 Q. Was it more than a day or two, afterwards?
A. Yes, sir.

Q. How many days? A. About three or four.

Q. Who took you down there? A. My mother.

Q. And whom did you see when you went down there? A. Dr. Snibely.

Q. Anybody else? A. No, sir.

Q. What did Dr. Snibely do to you then? A. He washed it out; he said there was a little something in there, it wouldn't hurt, though, it would be all right in a day or so.

20 Q. And he just washed your mouth? A. Yes, sir.

Q. With some liquid? A. Yes, sir.

Q. What did you do then? A. Went home.

Q. Did it get any better? A. No, sir.

Q. Did you go down there again? A. Yes, sir.

Q. With whom? A. My mother.

Q. And whom did you see then? A. Dr. Snibely.

Q. Anybody else? A. No, sir.

30 Q. What did Dr. Snibely do then? A. I can't remember what he done.

Q. Well, did he look at your mouth? A. No, sir.

Q. Put any instrument in there? A. No, sir.

Q. Wash it at all with anything? A. No, sir.

Q. Give you any salve or anything? A. No, sir.

Q. Don't you remember what he said? A. No, sir.

Q. Was it any better at that time? A. No, sir.

40 Q. Did the pain keep up? A. Yes, sir.

Frank A. Klitch—Direct

- Q. Were you able to sleep? A. No, sir.
- Q. Were you able to eat? A. No, sir.
- Q. When did you see Dr. Snibely after that? A. I can't remember.
- Q. But you did see him again? A. I think so.
- Q. And who went with you? A. My mother. 10
- Q. Do you remember what Dr. Snibely did to you on that occasion? A. No, sir.
- Q. How long did this pain keep up, Frank? A. I don't remember.
- Q. Well, was it more than a week? A. I guess it was.
- Q. Was your face swollen? A. Yes, sir.
- Q. Much? A. Well, quite a little.
- Q. What doctor saw you after that? A. Dr. Povey.
- Q. And what other doctor? A. Dr. Sherman. 20
- Q. And what other doctor? A. Dr. Epstein.
- Q. And any other? A. I don't know him.
- Q. Do you know Dr. Barry? A. Yes, sir.
- Q. Frank, just turn your face one side; just come down here, if you will, please. Did you have that (indicating) after that second tooth was drawn? A. No, sir.
- Q. Were you in the hospital, Frank? A. Yes, sir.
- Q. How long a time? A. A week. 30
- Q. Did you go back again afterwards? A. Yes, sir.
- Q. How long did you stay there the second time? A. Four days.
- Q. And did you go back again? A. Yes, sir.
- Q. How long did you stay the third time? A. Four days.
- Q. Do you know what they did to you when you 40

Frank A. Klitch—Cross

were in the hospital? A. The first time they scraped the bone.

Q. Did they put you under ether? A. Yes, sir.

Q. You didn't know what was going on? A. No, sir.

10 Q. And did they do the same thing when you were there the second time? A. Yes, sir.

Q. And the third time, also? A. Yes, sir.

CROSS-EXAMINATION by Mr. Demarest:

Q. After you had been to Dr. Snibely's three times you went to Dr. Povey, didn't you? A. Yes, sir.

Q. What did Dr. Povey do to you? A. He looked at me, gave me some salve and mouth wash.

20 Q. How many times did you see Dr. Povey? A. Once.

Q. Then you saw Dr. Sherman? A. Yes, sir.

Q. What did he do to you? A. Rinsed it like, inside.

Q. He cut it with a knife, did he? A. Just stuck it like and squeezed it a little.

Q. And did he put anything in there? A. No, sir.

30 Q. Did Dr. Povey do anything like that to you? A. No, sir.

Q. Did Dr. Povey say that you had a broken jaw bone? A. No, sir.

Q. Did Dr. Sherman say that? A. No, sir.

Q. When did you first find out that you had that? A. After the operation.

Q. After the first one or second one? A. After the first one.

40 Q. Do you remember having three teeth pulled out in that lower jaw? A. Yes, sir.

Frank A. Klitch—Cross

Q. Dr. Snibely pulled out two of them? A. Yes, sir.

Q. In the dentist's office? A. Yes, sir.

Q. Who pulled out the other one? A. Dr. Betts.

Q. That was on a different date, was it? A. 10
Yes, sir.

Q. Do you remember what day that was on? A.
No, sir.

Q. Was it after Dr. Snibely had pulled out the tooth that Dr. Betts pulled one out? A. Yes, sir.

Q. Which one did Dr. Betts pull out? A. Right over the last one.

Q. The first one? A. The fourth one.

Q. The fourth one from the back. That was a baby tooth, too, wasn't it? A. Yes, sir. 20

Q. All the teeth were baby teeth that were pulled out?

Mr. Hauser: I object. The witness cannot testify whether they were baby teeth or not.

The Court: If he knows, if he does not know he can say so.

Q. Do you know whether these were your first or second teeth? A. No, sir.

Q. Have you got teeth in there now? A. Only 30
one.

Q. Dr. Betts did take out a tooth, though? A. Yes, sir.

Q. Were you troubled with toothache before he took the tooth out? A. No, sir, only the jaw.

Q. Why was that taken out, if it didn't hurt you? A. I don't know.

Q. Your mother took you down then? A. Yes, sir. 40

Frank A. Klitch—Re-direct

Q. Have you another tooth in the place of the one that Dr. Betts took out? A. No, sir.

Q. What hospital were you in, Frank? A. The Newark Private Hospital.

Q. Up on Roseville Avenue? A. Yes, sir.

10 By the Court: Q. Dr. Epstein's hospital? A. Yes, sir.

By Mr. Demarest: Q. What did Dr. Barry do to you? A. I don't know.

Q. Do you remember ever seeing Dr. Barry? A. Yes, sir.

Q. Did he treat you for anything? A. No, sir.

Q. He just looked at you? A. Yes, sir.

RE-DIRECT-EXAMINATION:

20 Q. Where did you see Dr. Barry? A. In his office.

Q. Did you see him at the hospital? A. No, sir.

Q. Now, Mr. Demarest has asked you about the third tooth that was pulled out by Dr. Betts; did you have toothache in that tooth? A. No, sir.

Q. Did your mother go down with you to have that tooth pulled? A. No, sir.

30 Q. Who took you to have it pulled? A. Dr. Betts just came out and pulled it, that is all.

Q. It didn't hurt you? A. No, sir.

Q. Do you know whether Dr. Betts was paid for pulling that tooth? A. Yes, sir.

Q. Do you know how much? A. Fifty cents.

Q. You saw him paid? A. Yes, sir.

Q. And this was after the second tooth that Dr. Snibely had pulled? A. Yes, sir.

40 Q. And while your jaw hurt you? A. Yes, sir.

Margaret Klitch—Direct

MARGARET KLITCH, sworn for the plaintiff:

Direct-examination by Mr. Hauser:

Q. Mrs. Klitch, are you the wife of George W. Klitch? A. Yes, sir.

Q. Are you the mother of Frank who was just on the stand? A. Yes, sir. 10

Q. How long are you married? A. Eighteen years.

Q. How large is your family? A. Four children.

Q. What is the age of the oldest? A. The oldest boy is twelve.

Q. And what is the youngest? A. The youngest is four.

Q. Is Frank the second child? A. The second child. 20

Q. Mrs. Klitch, prior to January 29, 1914, what was the condition of health of Frank? A. Normally healthy.

Q. Outside of the ordinary children sicknesses had he had any sickness? A. Never in bed a day, had never been sick in bed a day.

Q. Had he been attending school prior to January 29th? A. No, just attended one day.

Q. Now, do you recall his complaining of toothache on January 20, 1914? A. Yes, sir. 30

Q. And what happened as a result of that? A. Well, his father took him down after we had our supper, and had the tooth extracted, and that ended that trouble.

Q. You didn't go along? A. No, sir.

Q. Was there any complaint immediately after the extraction of that tooth on the part of Frank, 40

Margaret Klitch—Direct

I mean, as to pain, or anything, on the first occasion? A. No, sir, not a particle.

Q. Do you remember when the second tooth was extracted? A. The 29th.

Q. And who took him to the dentist then? A. His father.

10 Q. Do you remember his coming home that evening? A. Yes, sir.

Q. What did the boy do that evening? A. Why, he came in and took his hat and coat off and threw himself on the couch and screamed with pain.

Q. Did he sleep that night? A. No, sir.

Q. Were you up with him that night? A. All night.

Q. Was he any better in the morning? A. No, sir.

20 Q. What did you do? A. I tried all home remedies, tried everything I could to relieve him; nothing relieved him.

Q. After that what did you do? A. So then I 'phoned down to Betts' office, and I could not say who answered the 'phone, but they told me to use warm ~~with~~ witch hazel and cotton.

Mr. Demarest: I object to the conversation unless the witness identifies somebody.

30 Q. You don't know to whom you spoke? A. No, sir.

Mr. Hauser: The question is withdrawn, and I consent that the answer shall be stricken out.

The Court: The answer will be stricken out.

Q. After that what did you do? A. It rained very hard, and I could not take the boy out; I tried hot water bottles, and salt bags, and differ-
40 ent things. Nothing relieved him.

Margaret Klitch—Direct

- Q. Did he sleep any better the second night?
 A. Not a bit.
- Q. Was his condition any better the second day?
 A. Not a particle.
- Q. What did you do then? A. I 'phoned down again, and told whoever answered the 'phone. 10
- Q. And after that what did you do? A. I went down to the office to see if they could give me anything, and the office was closed.
- Q. What day of the week was that, if you remember? A. Saturday.
- Q. Was he any better the third night? A. No, sir.
- Q. Had he been able to sleep either the second or third night? A. No, sir.
- Q. Following that what did you do? A. The next morning I 'phoned down again, and the gentleman told me to bring him down. 20
- Q. And you took him down? A. I took him down.
- Q. That was Sunday morning? A. Sunday morning.
- Q. Whom did you see? A. Mr. Snibely.
- Q. Anyone else? A. Another gentleman.
- Q. Do you know who that was? A. The other assistant in the office. 30
- Q. How do you know he was an assistant in the office? A. Because I saw him working on patients.
- Q. Do you know who he was? A. No, I don't know his name.
- Q. Do you see him in Court? A. No, I don't think I do.
- Q. What did Dr. Snibely do on that occasion?
 A. He took some sort of instrument, put it in his 40

Margaret Klitch—Direct

mouth, opened it, or something, and washed it out. He said there was a little infection in the gum.

Q. Prior to seeing Dr. Snibely and his doing what you testify to, had any other doctor seen Frank? A. No, sir.

10 Q. What else happened in Dr. Betts's office that morning? A. That was all.

Q. Did he give you any prescription or anything? A. No, sir.

Q. Did he tell you to bring him again? A. If he didn't get better, bring him again.

Q. Did the boy get any better? A. No, sir.

Q. Did you bring him back to Dr. Betts's office? A. Yes, sir.

Q. When? A. The next day.

20 Q. In the morning? A. Afternoon.

Q. And whom did you see then? A. I saw Dr. Snibely first and Dr. Betts.

Q. Do you see Dr. Betts in the Court? A. No, sir. I haven't looked. No, sir.

Q. What transpired on that call when Dr. Betts was present? A. Dr. Betts took charge of him then, and treated him.

Q. What did he do? A. He looked in his mouth and washed it out. I don't know what he saw.

30 Q. What did he say? A. Well, he didn't seem to say anything, only bring him in again the next day.

Q. Did Dr. Betts pull any teeth on that occasion? A. No, sir.

Q. Was the boy any better that night? A. Not a bit.

Q. During those first four days was he able to eat anything? A. No, sir, very little just liquid
40 food.

Margaret Klitch—Direct

Q. What was the condition of his face at that time? A. All swollen.

Q. Now, did you go down to Dr. Betts's office the following day? A. Yes, sir.

Q. And who did you see? A. Dr. Betts.

Q. Anyone else? A. Mr. Snibely.

Q. Both present at the same time? A. Not in the room together; I passed Mr. Snibely in the hall. 10

Q. What did Dr. Betts do on that occasion? A. Well, he treated him the same way he had the day before.

Q. Did he lance the gum? A. I could not tell you what he did; he just washed it out with something.

Q. What conversation did you have with Dr. Betts at that time, if any? A. I asked what he thought was the matter with the boy; he said he couldn't just say, "But I know if I had been here and seen the boy I never would have given him cocaine." 20

Q. What other conversation was there between you? A. He told me to use witch hazel and keep it warm, and he thought that would relieve it, and it would stop in a short time, the pain.

Q. Did he ask you to come back again? A. Yes, sir. 30

Q. Was the boy any better at that time? A. He had a little sleep that night, about two hours.

Q. Was he able to eat his meals any more than he had? A. Just a little liquid food.

Q. Did you take him down to Dr. Betts the following day? A. Not the following day; two days after.

Q. Who did you see? A. Dr. Betts. 40

Margaret Klitch—Direct

Q. And anyone else? A. Well, Dr. Snibely.

Q. Did they both look at the tooth? A. No, sir, not that day.

Q. Who did? A. Dr. Betts.

Q. What did he do on that occasion? A.
10 Treated him the same way.

Q. Did he ever, up to this time, make any examination of the boy's jaw in your presence? A. Only just to look in his mouth.

Q. Nothing beyond that? A. No, sir.

Q. Was the boy out of your presence while in Dr. Betts's office at all? A. No, sir.

Q. What conversation did you have with Dr. Betts on this occasion? A. Well, he said it was
20 funny the boy was suffering so much pain, he said, well, he thought there was a little infection of the gum, and he was quite worried about the boy, he thought he would have to have an operation.

Q. Dr. Betts said that? A. Yes, sir.

Q. Did he say why he thought it was necessary to have an operation? A. He said he thought the bone would have to be scraped.

Q. Did he say anything why he thought that was necessary? A. No, sir.

Q. What answer did you make to him? A. I
30 said, "Would you do it?" He said, "No, I couldn't do it, I haven't instruments and haven't the place to do such work."

Q. What else? A. So then I said, "Well, I will keep on with the witch hazel and see how that will relieve him." So, the boy didn't get any better, so I hunted up another doctor.

Q. There has been some talk about this third or fourth tooth, rather, being extracted, when was that, and how did that come about? A. The third
40 tooth that was extracted?

Margaret Klitch—Direct

Q. Extracted by Dr. Betts. A. Well, about the 3d of February the tooth ached him a little, and I was downtown, was going to Dr. Betts's office, and I could not get the boy to go in the office to have the tooth extracted; he just cried and went on so I couldn't do anything with him, and I couldn't carry him upstairs; so I went into Dr. Voorhees just below, and he looked at the mouth, and wouldn't pull the tooth, said he wouldn't touch it; he said, "I won't pull the tooth tonight, wait until tomorrow, and go to Dr. Betts again." So the tooth ached steady, and the next day I went to Dr. Betts's office, he called me one side and said, "I would like to pull that baby tooth out and have it out of the way so I can clean the other two gums out."

10

Q. Did he then extract that tooth? A. Yes, sir. 20

Q. Was Dr. Snibely present at that time? A. No, sir.

Q. Did he ask you to pay for it or did you pay for it? A. I asked him what the charge was and he said fifty cents, and I paid him.

Q. What else on that occasion did he do to the boy with respect to the jaw, anything? A. That was all.

Q. When did you next go back to Dr. Betts after this last tooth was extracted? A. Well, the day after, two days after. 30

Q. And did he do anything on that occasion? A. Well, the same treatment, he just looked at it, that is about all.

Q. What conversation did you have with him at that time? A. Well, we decided that the boy would have to have an operation; but I told him I couldn't get any doctor to treat him; and he said, 40

Margaret Klitch—Direct

“Well, if you can't get a doctor let me know and I will get you one.”

Q. What did you do after that? A. Well, Dr. Povey saw him.

10 Q. Did he come to your house or did you go to his? A. I went to his office and he came to the house.

Q. What did he do? A. The first treatment he gave was a salve and mouth wash; he said it would relieve him, maybe.

Q. Is Dr. Povey your family physician? A. Yes, sir.

Q. Is he a dentist? A. No, sir.

20 Q. How many times did he see the boy? A. Well, he saw him from the first of February up until the 16th.

Q. Did he give him any other treatment than what you just mentioned? A. No, sir.

Q. And between the 1st and 16th did you see Dr. Betts again? A. Yes, sir.

Q. When, if you can recall? A. Well, every other day, nearly.

30 Q. And what transpired on these various calls between Dr. Betts and yourself with respect to the boy? A. Well, I tell you, we decided on the operation, the last time I went in I consented to have the boy have an operation.

Q. Did Dr. Betts tell you he would arrange for it? A. He then told me if I could not get anybody to treat him he would get a doctor for me.

Q. Beyond that was there anything said about the operation? A. No, sir.

40 Q. Now, then, did you see any other doctor after you saw Dr. Povey? A. I went to the hospital on Central Avenue with him.

Margaret Klitch—Direct

Q. Did they give you any treatment there? A. No, sir.

Q. Did they give you any reason why? A. They didn't treat such cases there.

Q. What was the condition of the boy's face at that time when you went to the hospital? A. The first operation it was swollen up. 10

Q. No, when he went to this hospital where they refused to give any treatment? A. It was swollen.

Q. Much? A. Yes.

Q. After they refused at that hospital whom did you next see? A. I saw Dr. Sherman.

Q. Is Dr. Sherman a medical man or dentist? A. He is a medical man.

Q. And did he give the boy any treatment? A. Yes, sir.

Q. What character? A. Well, he opened the— put something inside and opened it and cleaned it out. 20

Q. Were you present when Dr. Sherman did that? A. Yes, sir.

Q. Where is Dr. Sherman's office? A. In the Wiss Building.

Q. How many times did you see Dr. Sherman? A. About four times all together.

Q. Did he give him any other treatment than the kind you have just testified to? A. No, sir. 30

Q. And after that who did you see? A. Dr. Epstein.

Q. In the meantime and before you had seen Dr. Epstein, had you seen Dr. Betts again? A. I saw him the same day that I saw Dr. Sherman, the 16th.

Q. After, or before, you had seen Dr. Sherman? A. After I saw Dr. Sherman. 40

Margaret Klitch—Direct

Q. Did you have any talk with Dr. Betts about it? A. Yes, sir.

Q. What was your talk? A. I told him what Dr. Sherman had done to him.

10 Q. What did you tell him Dr. Sherman did to him? A. I told him he had cleaned it out.

Mr. Demarest: That is objected to.

The Court: The objection is overruled.

A (Continued.) I told him he cleaned the inside of his mouth, and said he would have to have an operation; he said Dr. Sherman was a good doctor, but he knew he would have to have an operation, that was sure.

Q. Dr. Betts said he knew he would have to have an operation? A. Yes, sir.

20 Q. What else did you say to Dr. Betts? A. That is about all I think.

Q. Did you say anything to him as to whom you were going to consult? A. No, sir.

Q. Had you at that time made up your mind whom you were going to consult? A. No, sir.

Q. After that you saw Dr. Epstein? A. Yes, sir.

Q. When did you first see Dr. Epstein, if you can remember? A. The 22d of February.

30 Q. Where? A. At his office.

Q. Tell us exactly what was done with respect to the boy by Dr. Epstein at that time. A. Well, at his office there was no treatment, he just examined the boy.

Q. Did he examine him on that occasion? A. Yes, sir.

Q. Thoroughly? A. Yes, sir.

40 Q. How long did it take? A. Oh, about half an hour.

Margaret Klitch—Direct

Q. And as a result of that examination what was done? A. Took him to the hospital.

Q. Which one? A. Private hospital.

Q. Where? A. Roseville Avenue.

By the Court: Q. Dr. Epstein's? A. Dr. Epstein's yes, sir.

By Mr. Hauser: Q. How long did the boy stay there? A. Stayed five days, I believe, the first one. 10

Q. At the time the boy was taken to the hospital what was the condition of his face? A. The first operation, it was very much swollen.

Q. When you say "very much swollen" let us know, if you can indicate in any way? A. Well, it hung down here (indicating) on his chest quite a good deal; the first operation it was quite swollen. 20

Q. And you had the boy under your constant observation before you took him to the hospital? A. Yes, sir.

Q. And did you attend to him yourself at home? A. Yes, sir.

Q. Tell us whether any discharge of pus came from the mouth? A. Not until he was operated on the first time, his mouth was full of pus all the time, inside, but not outside.

Q. I am speaking of the inside. A. Inside, yes, sir. 30

Q. When did you first observe that condition? A. Well, two days after the tooth was extracted he handed me a little splinter that he had taken out of his mouth.

Q. Who did? A. The boy; and I had to wash his mouth out, of course, and then I noticed the third place where the tooth had been extracted 40

Margaret Klitch—Direct

was full of pus, so, of course, it filled up with pus all the time as fast as it was cleaned out.

Q. That kept on up to the first operation, did it? A. Yes, sir.

10 Q. How long did that continue? A. Up until he was operated on.

Q. Were you present during the operation? A. Not in the operating room.

Q. Prior to the operation being performed did Dr. Epstein tell you what they were going to do? A. Said they would scrape the bone; didn't know what else he would have to do.

Q. Now after that was the boy's condition any better? A. No, it didn't improve very much.

20 Q. How about this condition of pus? A. It was still there.

Q. And did it evidence itself anywhere except in the jaw, the mouth? A. It would come out of his eye at times.

Q. And how long did that condition continue? A. Right along until the second operation.

Q. And in the meantime who had been looking after the boy? A. Dr. Epstein.

Q. At home or at his office? A. At his office.

30 Q. This was after he had come out of the hospital? A. Yes, sir.

Q. And was this second operation performed as the result of Dr. Epstein's advice? A. Yes, sir.

Q. Do you know who performed the operation? A. Dr. Epstein and Dr. Barry.

Q. Where? A. At the private hospital.

Q. Were you present during the operation? A. In the hospital.

Q. But not at the operation? A. No, sir.

40 Q. Do you know what was done? A. They re-moved a tooth—

Margaret Klitch—Direct

Mr. Demarest: I object to that. She was not present.

Question withdrawn.

Q. How long did he stay in the hospital at that time, after the second operation? A. Four or five days; I think four days.

Q. And did you take him home after that? A. Yes, sir. 10

Q. Now, just prior to the second operation what was the condition of his face? A. Well, it hung way down here on his chest, and his head was stiff, drawn to one side, and had a spot here in the center as big as a ten cent piece, you could see the pus moving around, you would think it would break any minute.

Q. Were you present when that condition was relieved, if it was relieved? A. Yes, sir. 20

Q. Where was that? A. At home, when he suffered like that.

Q. Who did that, who lanced that? A. What do you say?

Q. I am asking you if you were present when the situation was relieved? A. Yes, I was present when he was operated on.

Q. Oh, then that was not done at your house? A. No, sir. 30

Q. I thought you misunderstood my question. How did the boy's condition at that time affect his person and his clothing? A. Well, I had to take everything off of him and burn it up just as I took the clothes off.

Q. And did it affect the bed clothing also? A. Yes, sir.

Q. What was the third operation for, and when did it take place? A. The third operation was when they removed the tooth. The third opera- 40

Margaret Klitch—Direct

tion took place in the hospital when they removed the third tooth.

Q. And when was that, if you remember? A. The 12th of May.

10 Q. I think you told me the first operation was in February? A. The first was in February.

Q. And the second? A. In March.

Q. And the last one in May? A. In May.

Q. How long was he in the hospital at that time? A. Probably four or five days.

Q. Did you give him your personal attention in the hospital? A. No, sir; they had a nurse there.

Q. Mrs. Klitch, did you see Dr. Betts after any of these operations? A. Yes, sir.

20 Q. When and where? A. I saw him at his office after he had the first operation.

Q. Did you have any talk with Dr. Betts at that time? A. Yes, sir.

Q. Who was present besides you and he? A. Mr. Snibely.

Q. Did he hear the talk? A. I believe he did.

Q. He was close enough to have heard it? A. In the same room.

30 Q. Tell us exactly what you said to Dr. Betts on this occasion, and what he said to you. A. I had an appointment to take the boy in. I took him in and told him he had had an operation, and told him what had been done to the boy, and I told him, "I think he will have to have another operation," he said, "No, I don't think so." I said, "Dr. Betts, what do you intend to do about this? You have injured my boy, and I think it is right, and you are better able to stand it than I am;" he said, "We can't do anything until we see how the
40 boy gets along; bring him in again."

Margaret Klitch—Direct

Q. Was that all the conversation at that time?

A. Yes, sir.

Q. Did Dr. Betts on that occasion look the boy over at all? A. I told him he could look at the boy's face if he wished to; he did.

Q. Was the boy's face bandaged at that time? 10

A. Yes, sir.

Q. How long after he came from the hospital was the boy's face bandaged? A. It was bandaged right along until he had the second operation.

Q. How long did you see Dr. Betts between those operations? A. About every other day for five weeks.

Q. After the second operation was performed did you see Dr. Betts again? A. Yes, sir.

Q. Can you tell about when? A. About a 20
week after we had the second operation.

Q. And who was present besides Dr. Betts and yourself? A. When we first went in the office Dr. Betts was busy; I saw Mr. Snibely, and then I waited for Dr. Betts to get finished with his patient.

Q. Did you have any conversation with Dr. Snibely before Dr. Betts came? A. No, sir; Dr. Snibely didn't recognize me.

Q. What did you say to Dr. Betts? A. I explained he had had another operation, and I told 30
him we thought maybe he would like to see him. He said he would like to see him again, so I took him in, and he looked at him, and I told him he had had the jaw bone removed, and two teeth removed.

Q. You do not mean he had had all his jaw bone removed? A. I told him he had a portion of it removed. 40

Margaret Klitch—Direct

Q. What did Dr. Betts say? A. He doubted it. I told him he might look the boy over. He did. He doubted whether the bone had to be removed, or the teeth removed.

10 Q. What did he say when he looked the boy over? A. He didn't say anything. I said, "He has had the second operation, and it has made a lot of expense for us." I said, "What do you think you can do?" He said, "I would like to, but I am a poor man, and I cannot, just at present, I am ashamed to say, I am financially embarrassed." I said, "Very well," and walked out, and I have not seen him since.

Q. Was Dr. Snibely present during this conversation? A. Yes, sir.

20 Q. Did you tell Dr. Betts on this occasion who performed the operation? A. Yes, sir.

Q. Do you know whether Dr. Betts had any talk— A. He said that was the doctor he wanted to recommend to me, that he had operated on his own son.

Q. Meaning Dr. Epstein? A. Yes, sir.

30 Q. Did you tell Dr. Betts at that time that he might call Dr. Epstein about it? A. I told him he could talk to Dr. Epstein about it, and he would explain it to him.

Q. Did he call him up then in your presence? A. No, sir, I went to Dr. Epstein's office a few days after, and Dr. Epstein called him up.

Q. While you were present in the office? A. I was present, yes, sir.

Q. You don't know, of course, who was at the other end of the wire? A. No, sir.

40 Q. Mrs. Klitch, do you recall the general condition of your boy on January 29th, 1914? A. Yes, sir.

Margaret Klitch—Direct

Q. What was it prior to that time? A. He was a healthy child, outside of being nervous; he got nervous when he went to school, that is all.

Q. Has his condition since January 29, 1914, up to the present time, been practically the same as it was prior to the extraction of that second tooth? A. No, sir, it has not. 10

Q. You have had him under your constant observation? A. Yes, sir.

Q. Has he gone to school since that time? A. No, sir.

Q. In what respect does his physical condition differ today from what it was January 29, 1914, prior to that second tooth being extracted? A. In the first place he has gotten very thin, his appetite has fallen away to nothing; he is irritable, and you cannot cross him. 20

Q. Do you know whether he has lost weight or not? A. Yes, sir.

Q. Do you know how much? A. I could not just say.

Q. Has he been under any medical attendance or supervision since then? A. Dr. Epstein.

Q. Is he still being treated by Dr. Epstein? A. Yes, sir.

Q. After the third operation, Mrs. Klitch, how often did you take the boy to Dr. Epstein? A. Every day. 30

Q. For how long? A. Up until July; from May until July, every day.

Q. And after that? A. Every other day.

Q. For how long? A. About two weeks.

Q. And following that how long did you take him to Dr. Epstein? A. Once a month up until the present time. 40

Margaret Klitch—Cross

CROSS-EXAMINATION by Mr. Demarest:

Q. Do I understand correctly that the boy only went to school one day prior to January 29th? A. Yes, sir.

Q. Had not been to school prior to that time?

10 A. No, sir.

Q. Because of his nervous condition? A. Yes, on account of his nervous condition.

Q. You say, Dr. Betts did not examine this boy the first time he saw him; can you tell us what Dr. Betts did do? A. I told you what he did; he looked at him, looked in his mouth, washed it out.

Q. What is your idea of an examination? A. Why, look at the condition of a person that is sick or injured.

20 Q. Well, he treated his mouth, did he not? A. Yes, sir.

Q. Before he treated it he looked at it? A. Yes, sir.

Q. In your estimation would that be an examination? A. I should think so, of that part of his body.

Q. Didn't you testify he did not examine him? A. I don't think I did; if I did, it was an error.

30 Q. Did Dr. Betts assign any reason why the bone would have to be scraped? A. I don't know that he did; said he had an infection in it.

Q. Did Dr. Povey and Dr. Sherman treat the boy in your presence? A. Yes, sir.

Q. And they just washed out the gums? A. Yes, sir.

Q. And Dr. Sherman made an incision, did he? A. Yes, sir.

40 Q. Did he advise an operation would thereafter be necessary? A. Yes, sir.

Margaret Klitch—Cross

Q. Both of them? A. Yes, sir.

Q. What was the operation to be for? A. In order to clean out the bone, and get the pus out.

Q. When Dr. Epstein first treated the boy do you know for that disease, if any, he treated him?

A. He could not tell until he operated on him.

Q. He did not diagnose the case until an operation? A. He said he thought it was a case of necrosis, but did not know until he operated.

Q. The first time you heard of a fractured jaw bone was when? A. When he was operated on.

Q. After the operation? A. Yes, sir.

Q. Not before? A. No, sir, they could not tell.

Q. Had Dr. Epstein thoroughly examined this boy? A. Yes, sir.

Q. He had not reported any fractured jaw bone to you before the operation? A. He could not tell.

Q. After Dr. Epstein first examined the boy did he have him bandaged up in a cast, or anything? A. Not until he was operated on.

Q. You just saw Dr. Epstein once prior to the operation? A. Yes, sir.

Q. On the 22d of February? A. Yes, sir.

Q. And he told you to report to the hospital for operation? A. Yes, sir.

Q. On the 24th? A. Yes, sir.

By the Court: Q. Was there any X-ray taken? A. Not until after.

By Mr. Demarest: Q. How long did this operation take? Were you in the hospital while it was being performed? A. Yes, sir.

Q. It took how long? A. The boy was on the table about one hour and forty-five minutes.

Q. And when Dr. Epstein came out he reported to you there was a fractured jaw bone, did he? A. Yes, sir.

Margaret Klitch—Cross

Q. Did he say anything about dentist at that time? A. Yes, sir, he asked me who my dentist was, and I told him, and he said the jaw bone was fractured.

10 Q. Did he ask if any other physicians had treated him in the meantime? A. I had told him.

Q. Dr. Betts said the jaw would probably have to be scraped? A. Yes, sir.

Q. Did he mention the disease necrosis? A. I don't remember.

Q. To the best of your knowledge when is the first time you heard of that condition? A. What condition?

20 Q. Of necrosis. A. Well, Dr. Sherman thought it might be; he wasn't positive at all; he couldn't tell me positive; he didn't know.

Q. After the first operation how was the boy's face, or jaw, bandaged? A. All around.

Q. Hard or soft bandage? A. I don't know what the doctor had underneath; he had the regular bandage that comes for that purpose on his face.

Q. Do you know whether or not there was any plaster paris at all? A. No, there was no plaster paris.

30 Q. After the second operation was it the same way? A. Yes, sir.

Q. And the third? A. Yes, sir.

Q. Do you remember being with your boy at the Newark Theatre about 4 o'clock one afternoon after the first operation? A. No, sir, I do not. How long after the first operation?

40 Q. Do you remember being there with him at any time in the afternoon? A. I probably might have been after the boy was better, yes, sir.

Margaret Klitch—Re-direct

Q. Have you paid Dr. Epstein?
 Objected to as immaterial.
 Objection sustained.

RE-DIRECT-EXAMINATION:

Q. Mrs. Klitch, do you know whether any X-ray
 pictures were taken of the boy's face? A. Yes, 10
 sir.

Q. By whom? A. Two were taken by Dr. Baker
 and one by Dr. Stroudsburg.

By the Court: Q. When were they taken with
 reference to the different operations? A. They
 were taken between the first and second operation
 with a view of finding out what the trouble was be-
 fore they did any more cutting.

Q. By Mr. Hauser. Q. Were you present on the 20
 taking of those pictures? A. Yes, sir.

Q. Were you furnished with the plate after-
 ward? A. Yes, sir.

Q. Is that a photo of one of them (handing wit-
 ness a photo)? A. Yes, sir.

By the Court: Q. I understood you, in answer
 to Mr. Demarest's question, to say that your son
 had gone to school only one day; do you mean by
 that he had never gone to school? A. Oh, yes, he
 had went to school, only he got nervous, and the 30
 doctor thought maybe we had better keep him out
 and let him play in the air, he would get better.

Q. How long had he gone to school? A. He
 started when he was five years old, and went until
 he was about eight.

The said photograph is marked P-1 for
 identification.

By Mr. Hauser: Q. I show you a plate and ask 40

Dr. Harry C. Povey—Direct

you if that is the one you refer to as having been made by Dr. Baker? A. Yes, sir.

Same marked P-1 for identification.

Q. Are these the ones made by Dr. Stroudsburg? A. Yes, sir.

10 Same marked P-3 and P-4 for identification.

DR. HARRY C. POVEY, sworn for the plaintiff:

Direct-examination by Mr. Hauser:

20 Q. Are you a practicing physician in the State of New Jersey? A. Yes, sir.

Q. Where is your office? A. 39 Mott Street.

Q. How long have you been a practicing physician in this state? A. Ten years.

Q. Are you a graduate of any college? A. Baltimore Medical School.

Q. Are you acquainted with the family of Mr. George W. Klitch? A. Yes, sir.

Q. How long have you known them? A. About two years.

30 Q. And have you rendered them any services as physician? A. I have.

Q. During that time? A. Yes, sir.

Q. In any particular capacity, or generally? A. Generally.

Q. Prior to January 29th, 1914, had you been called upon to treat the boy, Frank Klitch, for anything? A. To the best of my knowledge I saw the boy on February 1, 1914.

40 By the Court: Q. The question was before that

Dr. Harry C. Povey—Direct

time had you treated him? A. I treated him for nervous condition, yes.

By Mr. Hauser: Q. On or about February 1st, where did you see him, at your office or his home?

A. At his home.

Q. What condition did you find him in then, Doctor? A. I found his nervous condition aggravated, and a small swelling, I believe, on the left side of the jaw. That is practically all I seen on the first visit. 10

Q. Did you make any examination to ascertain the cause of his condition? A. Yes, I did make a superficial examination and I had a history of the pulling of the tooth by Dr. Betts.

Q. Did you make an examination of him? A. I did.

Q. Of what character? A. Well, a digital examination of the swelling; that is, by the fingers. 20

Q. What did you find? A. I did not find much to convince me of anything except there was an inflammation there at the time.

Q. And what treatment did you give him? A. I suggested a mouth wash, and a healing ointment to the exterior.

Q. Did you make any examination for a possible fracture? A. I did not.

Q. Was there anything in the history of the case as you had it at that time to make you believe there might possibly be a fracture there? A. Not on that first visit, no, sir. 30

Q. Did you subsequently examine him? A. I did.

Q. How long after? A. Well, I seen him on the following day, I seen him two or three visits between that and the 15th. Then I came to the con- 40

Dr. Harry C. Povey—Direct

clusion there might possibly be a necrosis of the bone, and suggested a specialist.

Q. You did not attempt to operate on him, or suggest your operating on him? A. No, sir.

10 Q. Is that the kind of cases that an ordinary physician would operate on? A. The general practitioner does not care much about going into that work.

By the Court: Q. What do you mean by necrosis? A. Necrosis is death of bone; death of one part of the bone.

Q. Decay of the bone? A. Yes, sir.

By Mr. Hauser: Q. Are you familiar with necrosis? A. Yes, sir.

20 Q. Have you come across a great many cases in your experience? A. A great many of them.

Q. Are you at all familiar with the producing causes in the jaw? A. I have not had many cases of jaw bone necrosis, but it is similar to other portions of the body, due to some irritant.

Q. Is it or not true that necrosis of the bone may follow fracture of the jaw bone? A. Oh, yes.

By the Court: Q. Without infection? A. Yes, necrosis could occur without infection?

30 By Mr. Hauser: Q. Answer this question, yes or no; are you able to tell from your professional experience whether the force used in the extraction of teeth might produce fracture of the jaw bone?

Mr. Demarest: I object to that question; it ought to state how much force was used; different kinds of teeth require different amounts of force.

40 The Court: If he knows whether the force

Dr. Harry C. Povey—Direct

applied to remove a tooth might cause fracture of the jaw bone he may answer it.

A. That might cause fracture.

Q. Referring to the swelling you observed on the left side of the jaw on your first visit, did that give readily to the touch, or was it hard? A. It was hard. 10

Q. And did it continue that way for some length of time after your first visit? A. It did for a few days, and then softened.

Q. Did you find any gathering of pus in the mouth, or jaw, on any of those occasions? A. Not in the mouth, but found pus—that is, I knew there was pus present on account of the breaking down of this swelling.

Q. How many days in all did you treat him after January 29th? A. From the 1st to the 15th about four or five visits, I am not quite sure. 20

Q. And did you then give up the case? A. Yes, sir.

Q. Voluntarily, or because of their taking in somebody else? A. I advised them to seek a specialist.

Q. Then there was somebody else at your suggestion? A. Yes, sir.

Q. Did you at any time apply any probe or instrument to the boy's jaw while he was under your care? A. I believe I did on the third or fourth day; a pimple on the skin showed, and I opened it and evacuated a little pus; just practically broke the skin. 30

Q. That was on the outside of the face? A. Yes, sir.

Q. I am speaking of the inside of the mouth.

A. No, sir; I did not touch that at all. 40

Dr. Harry C. Povey—Direct

Q. When have you seen the boy since you advised taking him to a specialist? A. Why, I could not just say; I have seen the boy several times since.

10 Q. Prior to this morning? A. Prior to this morning.

Q. Do you remember his general condition prior to January 29, 1914—prior to February 1, 1914?

A. Yes, sir; I do.

Q. What was it? A. I was treating him, of course, for a nervous condition, but it was fair; he was fairly—what we call almost the average child.

Q. Normal? A. Normal.

20 Q. Except for this nervous condition you speak of? A. Except the nervous condition.

Q. Did you ever examine him for any other trouble than the nervous condition you speak of?

A. I did examine him for a little heart murmur, but I attributed that to his nervous condition.

Q. That was something he might outgrow with years? A. Yes, sir.

30 Q. Assuming the existence of that nervous condition you testified to are you able to say, as a physician, that such a condition could or did, in this case, lead to a diseased condition of the jaw bone? A. No, sir, I don't think so.

Q. Are you able to state positively that it did not?

The Court: Won't you repeat that former question?

(Previous question read.)

(The last question is withdrawn.)

40 Q. With respect to the condition you found the boy in prior to February 1, 1914, and his condition

Dr. Harry C. Povey—Cross

today, do you find him the same? A. I do not think so. I have not examined the boy just recently, but I know shortly after the operation that the boy was, of course, thinner, run down; that would be only natural, however, following the operation that I heard he underwent.

Q. Is his condition today, as you see him in Court this morning, as good as you found him in when you saw him prior to February 1, 1914? A. Well, I don't know, now, that is—the boy looks the same to me, but I could not tell that except by examination. 10

Q. You don't know whether he has lost weight or lost flesh? A. I don't know.

Q. You have not made an examination for that purpose? A. No, sir.

Q. Nor have not been requested to? A. I have not been requested to. 20

CROSS-EXAMINATION by Mr. Demarest:

Q. As to the amount of force necessary to break or fracture a jaw bone, would you say that in extracting a first tooth of the molar variety from a boy ten years old, that the force necessary to extract that tooth would be sufficient to fracture a jaw bone? A. It is possible, but not probable. 30

Q. Applying the same question to either first molar would you say that the force necessary to extract that tooth would be sufficient to fracture or break a jaw bone?

Mr. Hauser: That is objected to. There is no testimony that the first extraction caused any damage; and there is no proof here of the character of the extraction in 40

Dr. Harry C. Povey—Cross

both instances. He may have been careful in one instance, and negligent in another.

The Court: The objection will be overruled. An objection to this ruling is noted by the plaintiff as ground of appeal.

10 A. It is possible to fracture, but as I say, it is improbable.

Q. Referring to the extraction of the fourth tooth from the back of the lower left jaw, which would be, I believe, the lower left canine of the first tooth variety, would you say that the force necessary to extract that tooth might be sufficient to fracture or break a jawbone?

Same objection.

Objection overruled.

20 An objection to this ruling is noted by the plaintiff as ground of appeal.

A. It is possible to fracture the bone; it is according to the condition of the bone.

Q. You make those answers all with reference to a boy of the age of ten years, do you not? A. Yes, sir.

Q. Taking the second molar tooth and what they call the stomach tooth, I believe, or canine. A. Canine.

30 Q. That is called the stomach tooth, isn't it? A. Yes.

Q. Which would you say was harder to extract? A. The molar.

Q. The molar harder than the canine? A. I should imagine so; I never extracted a tooth.

Q. Have you enough experience in that line to pass an opinion on? A. Really, I have never extracted a tooth.

40 Q. A physician generally leaves that part of it to the dentist? A. To the dentist.

Dr. Harry C. Povey—Cross

Q. Can pus come from any other cause than necrosis, Dr. Povey, in a jaw bone, I mean, or in a gum? A. Pus is necrosis in itself; it is necrosis of some tissue.

Q. Then an abscess would be some kind of necrosed condition? A. Yes, sir.

Q. Would you say, in general language, that this boy had an abscess? A. Yes, sir. 10

Q. And would you say that an abscess might be caused by decayed teeth? A. Yes, sir.

Q. Assuming there were two teeth together, both of them decayed, would you be inclined to attribute a condition of abscess to these two teeth, other conditions being normal? A. I do not get that very well.

Q. Supposing there were two teeth alongside of each other in a lower jaw, both teeth were decayed, that there was a condition of abscess in that immediate vicinity, would you attribute that condition of abscess to these two teeth, other conditions being normal? 20

Mr. Hauser: I object to that, the witness has not qualified as an expert dentist. I think this question is based on facts that have not been established, and the witness is not qualified as an expert dentist. 30

The Court: The latter part of the objection I am impressed with, and that is that there are no proven facts yet in the case which are embodied in the question.

Mr. Demarest: I will withdraw the question.

Q. How long, Dr. Povey, have you treated this boy for nervous condition? A. I do not just know; a month or two, possibly, before that. 40

Dr. Harry C. Povey—Cross

Q. What is usually the most frequent cause of necrosis?

The Court: Of the jaw bone, or generally?

Q. Of the jaw bone.

10

Mr. Hauser: I object to that, the witness is not qualified.

The Court: The objection is overruled.

A. An injury, or irritant, is the primary cause.

Q. Could it be caused by a blow from the outside? A. Yes, sir.

Q. Would that necessarily have to be a violent blow? A. It would have to be sufficient to cause a severe inflammation, or at least a break, fracture.

20 Q. By a fracture do you mean a blow in order to cause necrosis would have to be such as to break the bone through? A. Or injure the bone. You can get necrosis from an injury, or a fracture; just from an injury to the bone. Periosteitis will sometimes cause necrosis.

Q. In other words, it is not necessary to have a fracture in order to have necrosis? A. It is not necessary to have a fracture, in order to have necrosis.

30 Q. Did you discover anything in the nature of a fracture in this case? A. No, sir.

40 Q. Do you think you would have discovered it had it been there? A. Now, in regard to a fracture, I cannot answer yes or no, to that, for the simple reason if the jaw was fractured through I would undoubtedly have found crepitus, and found the fracture, but there might only have been a little splintering of bone, and that would be a fracture also, and would not be discovered unless you made an incision and you discovered it.

Dr. Harry C. Povey—Re-direct

Q. It would also be a fracture? A. Yes, sir.

Q. And would be only a chipping off of the bone? A. Yes, sir, it is a fracture, nevertheless.

Q. And you did not discover any fracture here?
A. No, sir; I just suspected necrosis of the bone following abscess.

10

RE-DIRECT-EXAMINATION:

Q. I understood you to say you made no examination for fracture? A. No, I did not go looking for a fracture.

Q. There might have been a fracture of the character stated by Mr. Demarest, a partial fracture, which you would not have discovered by the examination you made? A. Exactly.

Q. And unless there was a complete break there, that is in which the jaw bone was separated, you would not have discovered it unless you made an incision? A. Yes, sir.

20

Q. Therefore you would not have known it? A. No, sir.

Q. How soon, if you know, after a severe blow, or an injury caused as this injury is claimed to have been caused, would necrosis evidence itself?

A. That varies; it might show up immediately, that is, the pain. It is according to the extent of the fracture, according to the extent of the pressure involved. And then again it might not show up for a month.

30

Q. But after the necrosis had developed to some extent would not the pain in the surrounding territory decrease? A. The pain decrease?

Q. Yes. A. Providing the pus has an outlet. If the pus has no outlet, of course it would become more severe.

40

Charles L. Snibely—Direct

Q. Doctor, on your visits to the Klitch family you always found that boy around, did you not?

A. Yes, sir.

Q. Outside or in the house, according to the weather? A. Yes, according to the weather. I
10 believe it was my advice for the boy to stay outside as much as possible.

Q. That was your advice? A. Yes, sir.

Q. That was only to help relieve that nervousness? A. Exactly.

Q. You never found him in bed at any time on your visits for that condition, did you? A. No, sir.

20 CHARLES L. SNIBELY, sworn for the plaintiff:

Direct-examination by Mr. Hauser:

Q. Doctor, where do you live? A. Three hundred thirty-two Belleville Avenue, Newark.

Q. What is your occupation? A. Dentist.

Q. With whom? A. Dr. Betts.

Q. Have you ever received a license from the State of New Jersey to practice dentistry? A. No,
30 sir.

Q. Had you had one on January 20, 1914, or on January 29, 1914? A. Not from the State of New Jersey, no.

Q. Have you ever received a certificate of registry from the State Board? A. I never received any correspondence or anything from the State Board, except letters I have written to them, and answers from them.

Q. What has been the character of your work
40 in Dr. Betts's office? A. I am an assistant.

Charles L. Snibely—Cross

Q. And treat teeth? A. Yes, sir.

Q. And extract teeth? A. Yes, sir.

CROSS-EXAMINATION by Mr. Demarest:

Q. Your duties in Dr. Betts's office are supposed to be performed under the direct personal supervision of Dr. Betts, are they? 10

Mr. Hauser: I object to what they are supposed to be.

The Court: I sustain the objection.

Q. Do you extract teeth independent from Dr. Betts?

Mr. Hauser: I object to what he does independent.

The Court: I overrule the objection.

A. I have, yes.

Q. What are your hours of employment with Dr. Betts? A. Nine to six. 20

Q. Where did you study dentistry? A. University of Maryland, Baltimore.

Q. Did you graduate from that university? A. Yes, sir.

Q. Received a degree? A. Yes, sir.

Q. What degree? A. Doctor of dental surgery.

Q. Have you been admitted to practice in any state or territory of dentistry? A. Yes, sir, Maryland and Missouri. 30

Q. Have you now an application for registry in the State of New Jersey?

Mr. Hauser: Do not answer, please.

Witness: Yes, sir.

Mr. Hauser: Why do you answer when I ask you not to? I move the answer be stricken out.

The Court: It will be stricken out. 40

Charles L. Snibely—Re-direct

RE-DIRECT-EXAMINATION:

Q. What do you say your office hours are? A. Nine to six.

Q. With Dr. Betts? A. Yes, sir.

Q. Ever there any later? A. Yes, sir.

10 Q. You have been? A. Yes, sir.

Q. You do not want this jury to believe that your hours cease at six o'clock in the evening? A. That is my hours; Dr. Betts employs me from nine to six.

Q. Did you ever see this plaintiff, this young man here, before? A. Yes, sir.

Q. At that office? A. Yes, sir.

Q. Extract any teeth for him? A. Yes, sir.

20 Q. After six o'clock in the evening? A. Yes, sir.

Mr. Hauser: I ask the privilege of resting my case with the exception of introducing the testimony of Dr. Epstein who is now actually engaged in an operation at the hospital, and Dr. Sherman who promised to be here.

The Court: Is there any objection to that?

30 Mr. Demarest: I will abide by whatever your Honor says.

The Court: You may proceed with that understanding, that that testimony may be put in.

40 Mr. Demarest: I want to move for non-suit on several grounds. It seems to me the burden of proof which is cast upon the plaintiff has not been sustained in several important particulars. In the first place, the existence of the relation of master and

Motion for Non-suit

servant at the time of this actual operation on the 29th of January, 1914, has not been proved. It has been proved that the operation took place at eight o'clock on a certain day, and it has been proved by the plaintiff's own case that the hours for which Dr. Snibely was employed ended at six o'clock, and any operations that are performed after office hours by this man on his own responsibility, entirely free from any control of Dr. Betts, and without his knowledge or consent, without any proof of ratification by Dr. Betts, it seems to me is lacking. 10

The Court: The difficulty with that point is there is some proof of ratification on Dr. Betts's part by his subsequent admission of the treatment of this boy. 20

Mr. Demarest: I do not think that ratification can be assumed by that. I will move further on the ground that the act complained of has not been proved to be the direct, natural cause of the injury alleged to have been sustained. And, further, that the act of the defendant's servant, supposed to be, Dr. Snibely, was not the proximate cause of the injury. There has been no proof that there was a fractured jaw bone on any date prior to the time when the first operation was completed, which was on the 24th of February, 1914; that was almost a month after the original operation by Dr. Snibely. There has been no testimony to the effect that that was the proximate cause. Furthermore, there is no testimony that 30 40

Motion for Non-suit

10 there was any negligence on the part of the assistant, Dr. Snibely, in the performance of this operation. The only question of negligence, or the only point of negligence, that is brought up, or attempted to be brought up, is the violation of the statute, and that, I believe, is governed by the recent case of Evers vs. Davis, in 90 Atlantic. It seems to me there has been no evidence of negligence. Furthermore, it will be impossible for the jury in this case to decide on the measure of damages to be attributed to the defendant's servant, and what measure of damages can be attributed, and what degree of suffering was caused

20 by the operation by either Dr. Povey, Dr. Sherman or Dr. Epstein. So, in my estimation, if the jury should bring in a verdict for the plaintiff in this case, the Court would be obliged to set it aside; so for that reason I respectfully ask for a nonsuit.

30 The Court: I will hear you on the one subject of the proof of negligence. The matter of agency, I think, is sufficiently shown to make it a question for the jury, or call for a denial on the part of Dr. Betis; but the point about which I have some doubt is whether or not the mere extraction of a tooth which results in necrosis, results in fracture, even if performed with reasonable care, is of itself negligence, and I would be glad to hear you upon that point.

(Mr. Hauser replies.)

40 The Court: I am inclined to think that I cannot rule upon this question intelligently

Dr. Elbert S. Sherman—Direct

without the testimony of your other witnesses.

DR. ELBERT S. SHERMAN, sworn for the 10
plaintiff:

Direct-examination by Mr. Hauser:

Q. Dr. Sherman, you are a practicing dentist in the City of Newark? A. No, sir.

Q. You are a medical practitioner? A. Yes, sir.

Q. Where is your office? A. Six hundred seventy-one Broad Street; Wiss building.

Q. Do you know Mr. Klitch? A. Yes, sir.

Q. And his son, the young man sitting here? 20
A. Yes, sir.

Q. How long have you known him? A. Well, I have known Mr. Klitch, I think, fifteen years. I think I have known the boy since he was born.

Q. Have you been their family physician at any time? A. I was at one time.

Q. Have you seen the boy since January 29, 1914? A. Yes.

Q. Can you tell us about when? A. I saw him on the 16th, 17th and 18th of February, 1914. 30

Q. At your office or— A. At my office.

Q. And what was his condition at that time?

A. He came to me suffering with an abscess of the lower left jaw.

Q. And did you treat him? A. Yes.

Q. Did you make any examination? A. I examined the boy and found that he had some trouble about the—I have forgotten now whether he still had a tooth there, or whether it had been extracted. 40

Dr. Elbert S. Sherman—Direct

I think the tooth had been extracted and he had an acute inflammation, with an abscess at the site of this former tooth.

Q. And what was the condition of his face? A. His face was swollen.

10 Q. Very much? A. Yes, considerably swollen.

Q. Was his face distorted? A. It was somewhat distorted; it was noticeably swollen, but not tremendously swollen.

Q. Was the swelling hard? A. It was hard and painful.

Q. What examination did you make? A. I opened his mouth and excavated this diseased place in his jaw, and I think I inserted this probe down in the place where the tooth had been, looking for
20 diseased bone, and my recollection is that I made an incision with a knife into the soft parts of the jaw with an idea of letting any pus that was there escape.

Q. Any other examination? A. No, I think not.

Q. Were there any symptoms at that time which indicated to you the possibility of a fracture of the bone? A. No, I didn't think he had a fractured jaw.

Q. Did you make an examination to find out
30 whether he had or not? A. Nothing further than I have indicated.

Q. You did not examine for any crepitus? A. There was no crepitus.

Q. I didn't ask you—did you examine for any?
A. Yes.

Q. What was the character of the examination?

A. Simply the moving of the jaw.

Q. Taking hold where? A. I do not remember
40 the details now, I cannot say exactly.

Dr. Elbert S. Sherman—Direct

Q. Did you take hold of the joint? A. I probably did.

Q. You did not take hold of the rear of the jaw bone, did you? A. I don't remember.

Q. Your recollection generally of the examination you made as to whether there was crepitus, or not, is not very vivid, is it, at the moment? A. 10
No, sir, it is not.

Q. What treatment did you give? A. That is all I recall; I possibly used a mouth wash.

Q. Did you say anything to Mrs. Klitch at the time respecting an operation? A. I don't remember what I said.

Q. Did you not advise an operation would be the proper thing? A. I don't recall that I did.

Q. You won't say that you did not? A. I won't 20
say that I did not.

Q. You did not suggest operating on that jaw, did you, yourself? A. No further than the slight operation I did.

Q. You did not suggest to Mrs. Klitch that you would operate on the jaw further? A. I am most sure I did not.

Q. Did not you suggest to her it was a case for a dental surgeon? A. I think I did; I think I said something of that kind. 30

Q. Did you say anything to Mrs. Klitch about taking the boy to St. Mary's Hospital, in Orange? A. Well, if I did I have entirely forgotten it.

Q. And you did not offer to operate on him up there? A. I have no recollection of it—

Q. When did you see him after that occasion? A. After those three calls?

Q. Yes. A. I don't think I saw him again until this morning. 40

Dr. Elbert S. Sherman—Direct

Q. Did you know that the case had been placed with Dr. Epstein? A. Yes.

Q. Are you at all familiar with what operations were performed? A. No.

Q. You were not present at any of them? A. No.

Q. Doctor, are you familiar with the condition called necrosis of the bone? A. Yes.

Q. Had some experience in that line? A. Yes.

Q. Have you ever had any cases of necrosis of the jaw bone? A. Yes.

Q. Will you tell us, please, what some of the producing causes of necrosis of the jaw bone might be? A. Well, Mr. Hauser, I—unless I am here as an expert witness, I would rather not answer this question, unless the Court directs I must. I understand I am not here for that purpose.

Q. Have you any particular reason for not giving testimony in this case? A. No, except I was not employed, except as an ordinary witness.

Q. Are you on good terms with the plaintiff's family? A. Yes.

Q. Do I take it, then, that you prefer not to give any testimony on the matter of necrosis, because you have not been paid as an expert? A. That is the principal reason.

Q. Just one more question, please. Doctor, you were rather pleased that this case was taken out of your hands, weren't you? A. No, I was not; on the contrary I was rather pleased it was.

Q. That is what I said. A. Oh, I misunderstood you.

Q. You were pleased the case was taken out of your hands? A. Yes.

Q. You were paid for your services, were you? A. Yes.

Dr. Charles L. Snibley—Direct

Q. Have you had any talk with Dr. Snibely?

Mr. Demarest: That is objected to.

The Court: I sustain the objection.

Not cross-examined.

Recess.

10

DR. CHARLES L. SNIBELY, re-called for the plaintiff:

Mr. Demarest: I object to the witness being recalled.

The Court: You certainly cannot call other witnesses, except by permission of the Court, having rested your case, reserving the right to call Dr. Epstein, without some special reason being shown for doing so. 20

Mr. Hauser: I admit that; on the question of negligence, which your Honor raised this morning, and having a hostile witness on the stand, I did not go in the question with Dr. Snibely when on the stand, and I ask the permission to recall him, taking the risk of calling him. 30

The Court: You mean, now, that after having rested your case, and having heard the argument, and what is urged against you, you were going to take advantage of that situation, and call back other witnesses to meet that situation which has developed upon the argument by counsel, is that the situation? 40

Dr. Harry B. Epstein—Direct

Mr. Hauser: I do not wish to make any such broad admission as that; I suppose that is a fair deduction.

The Court: I should say that that is very unfair.

10 Mr. Hauser: I will not press it.

DR. HARRY B. EPSTEIN, sworn for the plaintiff:

Direct-examination by Mr. Hauser:

Q. Dr. Epstein, you are a practicing physician and surgeon in the City of Newark? A. Yes, sir.

20 Q. Where is your office? A. On High Street.

Q. How long have you been practicing in this city? A. Very nearly nineteen years.

Q. Of what college are you a graduate? A. I took my medical degree at the medical department of the New York University; I have a degree in pharmacy from the Columbia University.

Q. And has surgical work played any great part in your practice? A. Yes, my work is mostly surgical.

30 Q. Are you connected with any hospitals at the present time? A. I just own my own hospital, Newark private hospital.

Q. Where is that, please? A. On Roseville Avenue.

Q. Doctor, do you know Frank Klitch, the plaintiff in this case, this young man here? A. Yes, sir.

Q. When did he first come under your observation? A. He came under my observation early
40 in February.

Dr. Harry B. Epstein—Direct

Q. Of which year? A. 1914.

Q. Did you make an examination of him at that time? A. I did.

Q. Tell us exactly what you found, please? A. I found the boy suffering with a wound on the left side of his face, with an opening discharging underneath his jaw, the boy complained of a great deal of pain, he had some temperature, and he was unable to chew his food, he had a pus discharge from this sinus, as we call it, that is from this wound, from this jaw—do you want me to tell what I did? 10

Q. Exactly, if you will. A. I examined this boy with an instrument through this sinus, and I found a roughening there which showed that the boy had some dead bone, necrosis of the bone, as we call it, which is the common name for dead bone. So, after a careful examination of the boy's heart and urine, and finding the heart normal, and the urine normal, I advised an operation, making an opening, enlarging the opening below the jaw, and scraping out the dead bone, then packing it, washing out the cavity very carefully, and finding that this communicated with the mouth, I drained it, and dressed it every day until the wound healed down to the sinus, but that sinus resisted, so I advised the mother that it would be necessary to operate on him again. We operated again in March of 1914, and we were obliged to sacrifice some of the jaw bone. The first operation was done for the purpose of scraping away the dead bone, but it was impossible to cure it without cutting away into the healthy tissue. I then packed him, and drained him, and the wound healed up. But it seems that in the process of bone there was cut 20 30 40

Dr. Harry B. Epstein—Direct

off owing to the age of the child, the root of a bicuspid tooth, one of the teeth, the root of it grew just at the portion that was sawed off, and as the root grew it started to give a little trouble, this operation having been done just before this root
 10 commenced to erupt, and as the tooth commenced to grow and develop in the substance of the bone, we had to go in and dig that out of the jaw bone, which was a very hard and tedious piece of work. After that the wound healed up.

Q. How many teeth in all, did you remove during these three operations, Doctor? A. Well, three, I believe, as near as I can remember.

Q. Two on the second operation and one on the last? A. Well, one on the last, and I think
 20 there was two others.

Q. Now, Doctor, prior to making the first operation what examination of the jaw bone proper, if any, did you make? A. Well, we made an X-ray examination, and then we used the mode of examination as usually made, that is palpating the jaw bone within and externally, and with probing the wound.

Q. Did you examine for any crepitus? A. Yes.

Q. Did you find any? A. Yes

30 Q. When? A. When I first saw him.

Q. That was early in February? A. Yes.

Q. Did you have X-ray pictures made, Doctor?

A. I did.

Q. Can you identify them? A. Yes.

Q. Will you kindly look over these and tell us which was the first one (handing witness photographs)? A. Yes, those are the pictures.

Q. Which one was taken first? A. This one.

By the Court: Q. The large plate? A. The
 40 large plate, yes, sir.

Dr. Harry B. Epstein—Direct

By Mr. Hauser: Q. Can you tell us about when that was taken, the one you have in your hand? A. I don't remember the exact date; I think it was somewhere in March.

Q. What did the X-ray picture disclose to you, Doctor? A. Necrosis. 10

Q. With respect to the jaw. A. That is, there was some separation of the jaw bone after the first operation, and there was some necrosis there, dead bone.

Q. Did you find, prior to removing any of that jaw bone, any evidence of fracture? A. Prior to the operation?

Q. Yes. A. That is what the operation was performed for, the fracture; in fact, they were both done, the first was a palliating operation; we did not want to sacrifice the bone. The second was done to remove all the dead bone down into the healthy tissue. 20

Q. I understand you to say these operations were necessary in order to bring about a healthy condition of the jaw? A. Yes, sir.

By the Court: Q. Where, and to what extent was the jaw bone fractured, Doctor? A. It was fractured on the left side, that is, there was a break through the jaw bone, and this fracture communicated with the mouth; the mouth being a dirty cavity infected the ends of the bone, and it interfered, not alone with the union of the fracture, but it also made it a compound fracture, on account of the mouth being a dirty cavity, and germ laden, naturally infection takes place at the broken end of the bone. If the membrane of the mouth had been open, very likely it would not have had to have more than one operation. 30 40

Dr. Harry B. Epstein—Direct

Q. Just at what point did you find the fracture?

A. Just about the point of the second bicuspid tooth; right about here (indicating).

By Mr. Hauser: Q. When you speak of the mouth being a dirty cavity you do not mean with
10 reference to any one individual in particular? A. Everybody's mouth.

Q. It is a place where germs will gather? A. Yes.

Q. There wasn't anything special in this case to create germs specially? A. Oh, no.

Q. Doctor, have you had any cases of this kind before, prior to this one? A. Yes.

Q. You are pretty familiar with the history of this case A. Oh, yes.

20 Q. Can you tell us, Doctor, what producing causes bring about the condition such as you found in this boy's jaw? A. As a rule they come from injury, from blow, from manipulation.

Q. What do you mean by manipulation? A. Well, naturally, manipulation to the jaw is done by friction, or, where, in a case of injury due to a blow, like a blow to the side of the jaw, crushing injury.

30 Q. Doctor, assuming that the second and third tooth from the rear on the left lower jaw of this boy had been extracted prior to your seeing him, the one nearest the end on January 20, 1914, from which no result of pain or discomfort followed, and the second extraction of the third tooth on January 29, 1914, followed by incessant pain and suffering on the part of the patient, are you able to say whether such condition can be brought about through a fractured jaw? A. I should cer-
40 tainly say so, yes, sir.

Dr. Harry B. Epstein—Direct

Q. And, in your opinion, Doctor, could the conditions as you found them to exist in the boy's jaw have been produced by the extraction of a tooth on January 29th? A. I do think that could happen.

Q. Now, Doctor, are you at all familiar with dentistry? A. Well, I do not pretend to know anything about dentistry. 10

Q. Do you know, Doctor, with respect to the first teeth, at about what age the roots begin to be absorbed?

Mr. Demarest: I object to the question, the witness has testified he does not know anything about dentistry.

Witness: Yes, I did not pretend to know—

The Court: The Doctor says he is a graduate of a medical college, and if his medical knowledge and surgical knowledge will enable him to answer the question he may do so. If it is a matter which relates to dentistry alone, which he says he is not familiar, he should not answer. 20

A. I would not like to make a statement other than I can substantiate. I do not remember that particular branch of the art.

Q. Doctor, if the operator using forceps in the extraction of a tooth of a boy ten years of age were to grab that tooth down over the head of the new tooth underneath, and extract it, using force, would that be likely to produce the condition such as you found in examining the boy? 30

Mr. Demarest: Objected to.

The Court: I sustain the objection on the ground that it contains facts not shown in the case; that is, that he did grab the tooth. 40

Dr. Harry B. Epstein—Direct

Q. Have you had injuries to jaw occasioned by extraction of teeth? A. I have.

Q. Could an injury of that kind be induced by the use of ordinary skill in extracting a tooth?

Mr. Demarest: I object to that question.

10

The Court: If the Doctor can answer that question from his own knowledge of the subject, if that is a matter which comes within his knowledge as a medical and surgical practitioner, he may answer it.

A. The thing is this, your Honor, all I can say of this particular case, or in the usual case, we see a dentist applies the forceps, he must use a certain amount of force. Now, if much force be used the bone can break. You see the pull is applied to
20 a certain part of the jaw bone, and if much force is used the jaw can be broken. Every part of the body has its own tensile strength, you might say, that is, it has a certain amount of resistance, if you go beyond that point of resistance you have a fracture.

Q. You, of course, Doctor, do not know—

(At this point one of the jurors being taken ill, the witness was excused to attend upon the juror. After an interval, by agreement of counsel and with the consent of the Court, the case was continued with eleven jurors.)
30

Q. You might continue, Doctor. A. I tried to explain that every bone in the body has a normal amount of resistance. A person may puncture a bone, and not harm it; or they may use a blunt weapon, and strike with force, and go beyond the normal resistance of the bone, and fracture it.
40 In this instance there must have been some vio-

Dr. Harry B. Epstein—Direct

lence which caused this fracture, and injured the floor of the mouth. We call that violence, or trauma or injury.

By the Court: Q. Was there any way to tell whether this violence which caused this break was applied from within, or without? A. There is no way for me to tell, only that there was no external mark of violence. As a rule there is contusion or discoloration, or swelling on the outside. The swelling was all on the alveolar process of the jaw. 10

By Mr. Hauser: Q. In the extraction of a tooth there would be no visible outward evidence of the use of force or violence, would there? A. No.

Q. What other causes might bring about necrosed condition of the bone, Doctor? A. Well, disease of the root of the tooth, chronic abscesses at the root of the tooth. Then some cases are predisposed to necrosis where there is a history of syphilis, or softening of the bone. 20

Q. In your examination, both as to the boy and as to the history of his case, and his family, did you find any evidence of any of those things you have just mentioned? A. I inquired particularly as to tuberculosis and syphilis. I meant to state before that tuberculosis is also a predisposing factor to necrosis. There was no history of tuberculosis or syphilis, from what the parents told me. 30

Q. As to possible abscesses, or diseased roots, did you find any evidence in the surrounding tissue of anything of that kind? A. No, I did not.

Q. And if you assume the possibility of necrosed condition arising out of any of these causes, how long would it take for the bone itself to be affected? A. How long? 40

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Q. From abscesses, or diseased root of the teeth? A. Well, as a rule, they have pain before, which goes on and on for a long time.

10 Q. Would that necrosed condition arising from any of these causes exhibit itself in the jaw proper by a fracture such as you say you found here? A. No.

Q. So that in your opinion this fracture which you ascertained was not caused by any of the diseases which you have mentioned? A. No.

Q. And, in your opinion, are you able to state whether that was caused by force, or violence? A. Violence, I would say by violence.

Q. You have no doubt about it? A. No.

20 Q. Did you make any inquiry as to whether the boy had received a blow from anybody, or had fallen? A. Yes, I took a full history of the boy's case.

Q. You found nothing of that sort? A. No.

Q. With respect to the boy's condition today can you say that he is practically cured? A. As far as I can see, yes.

30 Q. Can you say with any reasonable certainty whether it will or will not be necessary to operate on him again? A. I could not say but what such a condition might arise again.

Q. And, in your opinion, are the injuries which he has suffered, and which have existed, and still exist, permanent, or not? A. You mean the deformity there?

Q. Yes. A. That will be permanent.

40 Q. What is the contour of the face with respect to the opposite sides, the left and right, speaking of the lower jaw? A. At the side where the part of the bone was removed there is some retraction,

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that is, the face is flatter on that side, drawn in, and some scar tissue there.

Q. Doctor, do you remember the swelling of the boy's face when he came to you? A. Yes.

Q. How extensive was that? A. Well, it was very large; it was quite swollen; I made no measurement; it was simply what concerned me most was the opening, and the extent of it, and the dead bone. 10

Q. Now, with respect to this opening, do you know whether that came about naturally, or was it caused in your opinion, by any kind of operation on him? A. The idea is this, that the opening is the result of the fracture, involving the mouth, and that becomes infected; then the discharge from the infected region must have its vent and naturally, it was opened below, before I saw it, and it did not heal, because this infection was keeping on constantly, and was traced from below. 20

Q. Did that infection spread any at all beyond the jaw and the boy's mouth? A. No.

Q. How? A. No, only the jaw bones; no other structure, but just the soft parts, and the jaw bone.

Q. Were there any evidences of pus elsewhere than through the mouth? A. No, not that I remember. 30

Q. You saw none, either from the nose or from the eyes? A. No.

Q. And it is a fact, is it not, that that swelling extended down practically on the shoulder for some distance at that time? A. I don't remember that exactly, but he had swelling about the jaw bone, about the seat of the trouble. 40

Dr. Harry B. Epstein—Cross

10 Q. Doctor, can you tell us whether it would be possible for infection to start in the jaw bone either through the use of improper instruments, or through the injection of anything into the jaw bone prior to the extraction? A. Infection may take place if one is not guarded in doing these things, that is, without knowledge of strict asepsis, that is, surgically clean. If one does not boil their instruments, or boil the hypodermic needle, in making injection, it will naturally bring about infection.

Q. And could that be the producing cause of necrosis of the jaw bone? A. Not, as a rule. It does not cause a fracture.

20 CROSS-EXAMINATION by Mr. Demarest:

Q. Necrosis is caused generally as the result of a condition of disease? A. Necrosis has what is known as a predisposing cause, and an exciting cause; that is, if the vitality of the bone is impaired as the result of disease we speak of that as the predisposing cause; the exciting cause is either, as I said, a blow, some violence, or injury to the bone.

30 Q. Would you say that, assuming there were decayed teeth in a jaw that had been allowed to remain in there for an undue length of time, that that might cause disease, and lead to necrosis?

Mr. Hauser: I object to that as not based upon any proof in the case; there is no proof as to how long the tooth remained in the boy's jaw in a decayed condition.

40 Mr. Demarest: I propose to control that situation by evidence.

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The Court: The question may be answered.

An objection to this ruling is noted by the plaintiff as ground of appeal.

Q. (Question read.) A. It might lead to necrosis, but it would not cause a fracture. 10

Q. Assuming that those two teeth were the first teeth, or molars, that were in this boy's mouth, would you say the teeth in that condition might cause an abscess?

Mr. Hauser: I object to that on the same ground.

The Court: The objection is overruled.

An objection to this ruling is noted by the plaintiff as ground of appeal.

A. Of course, I really do not like to base an opinion upon a dental matter. 20

By the Court: Q. You mean to say you do not feel qualified to answer that question? A. No, I do not; I do not know anything about dentistry other than it relates to our profession.

By Mr. Demarest: Q. Would you say, as a general proposition—you have said that decayed teeth would cause an abscess? A. Yes.

Q. Did you find a partial, or complete fracture? A. Complete. 30

Q. And under what tooth of the permanent set would the fracture be which you found? A. Well, as nearly as I can remember, it was the second bicuspid tooth; that is, I think so.

By the Court: Q. For the information of us all, suppose you demonstrate with your own mouth where the second bicuspid tooth is? A. About here, that is my impression (indicating). 40

Dr. Harry B. Epstein—Cross

By Mr. Demarest: Q. That is the tooth next to the small tooth, or canine? A. Yes.

Q. That is quite close to the front of the mouth?

A. Well, it is about an inch or three-quarters, or two inches.

10 Q. With reference to the center of the mouth, and back. A. With reference to the center of the mouth; about here (indicating).

Q. About half-way back from the center? A. Almost half-way back.

Q. You say you found a wound on the outside of this boy's face when you first examined him? A. Yes.

Q. And you examined him on the 22d of February? A. I think it was. I know I operated on
20 him on the 24th of February.

Q. Now, at the time you scraped this bone was there a complete fracture before you started scraping? A. Yes.

Q. Where, in relation to the part that you scraped was the complete fracture? A. That is this sinus at the site of the boy's present scar; it extended right straight through the jaw bone.

Q. Well, did you scrape above, or below, or to the back, or front of that? A. I scraped the
30 margin of the fracture. That is, I scraped the two edges of the fracture. That is, the bone being fractured here, I scraped the edges of the bone.

By the Court: Q. Freshening. A. Freshened it, yes.

By Mr. Demarest: Q. Did you have to cut some of that bone away to give you room to scrape? A. No, it was not necessary.

40 Q. What would you say of apposition in a case

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like that? Was it good or bad? A. The apposition was fair. In fact, it was good. That is, he could bring it together.

Q. By apposition you mean that the bones met very easily? A. Yes. Outside of the part that is removed, you know, curetted away. 10

Q. If the apposition was good why was it necessary to scrape that? A. The apposition has nothing to do in dealing with the bone; apposition, or no apposition, you cannot get union of diseased structure. Apposition counts very little, because of the normal muscular attachment to the bone, there is not any displacement to speak of. The thing to consider is the diseased bone, apposition, or no apposition; we cannot permit that boy to go around draining pus through the lower jaw, or from a wound. It saps his vitality. 20
The primary consideration is the removal of the necrosed bone.

Q. What instrument would you use in order to control, or make a wound on the outside of the face such as you say this boy had when you first saw him? A. When we probe such a wound we use what is known as a probe; sometimes we use a *probe*, which is a straight fine instrument, rounded at the top, and we insert this through a canal to find whether there is any roughening in the edges of the bone. 30

Q. Did you find any evidence of an incision being made on the inside of this boy's mouth? A. No.

Q. You removed certain teeth from this boy's jaw bone, did you not, in the course of your operation? A. In the last operation I remember Dr. Barry who was associated with me in this 40

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case removed this one tooth from the substance of the jaw bone. I have an indistinct recollection of the tooth part of the operation; what concerned me was the bone operation which I was to treat.

10 By the Court: Q. I do not think you have told us yet how much of the jaw bone was removed.
A. Well, I should say, counting the two sides, I should say about from one-half to three-quarters of an inch of bone.

Q. Entirely taken out? A. Yes, sir.

Q. And then the two ends brought together?
A. Yes.

Q. And there has been perfect union? A. Oh, yes.

20 Q. Of those two— A. As near as we could get it, your Honor.

By Mr. Demarest: Q. Did you apply soft or hard bandages to the boy's face? A. Soft.

Q. Is it usual to apply soft bandages in case of fracture? A. In an uncomplicated fracture it is, but not in compound fracture, or infected fracture. The more pressure the more necrosis.

Q. Would you call this an infected fracture?

A. Yes, because it communicated with the mouth cavity.

30 Q. Assuming such teeth as I have recently shown you were in this boy's mouth, would you say that they were more likely to cause infection, or an abscess, after the extraction of one of them, than would ordinarily occur? A. Well, again, I am not an authority upon teeth.

Q. You have testified, Dr. Epstein, that if the mouth be a dirty cavity it would be more likely to be infected as I understood your testimony?

40 The Court: He said the mouth was a dirty cavity, always.

Dr. Harry B. Epstein—Cross

A. Every mouth is a dirty cavity.

Q. Would you say that probing, such as was done, and such as was evidenced by the scar, or wound, in this boy, could have, by any possibility, have caused a fracture? A. Oh, no. In the first place we never use a probe in an infected cavity, unless we make a wound under the conditions of the strictest surgical cleanliness, and having the tissues clean. We use a clean probe, because we are fearful of introducing germs, or foreign particles in the wound that we probe. 10

Q. I am speaking whether or not, with a probe, it would be possible to injure a bone? A. Oh, I don't think so. I never have seen it.

Q. You don't think so. I am asking if it is possible to do it? A. Well, I don't see how it could be. 20.

Q. Now, on the second operation what did you do? You testified on the first one you scraped the bone. A. At the second operation we removed the necrotic bone.

Q. And on the third one you did what? A. The third one we were obliged to extract this unerupted root. It seems that at the bottom of this tooth or this root—I just cannot remember the term the dentists use—there is a part which communicated with the point of the fracture, where the fracture had been, and it was necessary to get that unerupted tooth out, and it was after that that the wound healed. 30

Q. Did you have a dentist with you in consultation on this operation? A. Yes, sir.

Q. What dentist? A. Dr. Barry, of Orange.

Q. Is Dr. Barry in Court? A. I think he expects to come here. 40

Dr. Harry B. Epstein—Cross

Q. Do you remember having called up Dr. Betts on the telephone about this case? A. Yes.

Q. Do you remember having said to Dr. Betts that the apposition in this case was very good, and you did not think it necessary to put on a hard bandage? A. My conversation with Dr. Betts—

Q. I am just asking you if you remember having said that? A. Oh, I did not say that.

Q. Did you tell Dr. Betts you thought he had better settle this case, when you talked with him over the 'phone? A. Yes, I did, I wished to save him trouble if it were possible.

Q. Did you, or did you not, tell him if he saw that you were paid it would be all right? A. No, sir, I did not say that.

Q. You did not tell Mrs. Klitch about this fracture until after the first operation had been performed, did you, Dr. Epstein? A. I told her the boy had this bone there, and that I would attempt to cure him by simple measures first, that is, by curetting out the dead bone, and if such a measure were not sufficient it might be necessary to saw out into healthy tissue in order to get the wound to heal.

Q. The first time you told anybody the jaw bone was fractured was after the first operation, is that correct? A. I don't remember when I told Mrs. Klitch that; I know I told her the boy had a fracture.

Q. Was there any evidence on the inside of the mouth of a laceration of the gum? Was the gum torn in any way? A. Yes.

Q. A short time ago I asked you if there was any evidence of an incision having been made on

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the inside of the mouth? A. An incision is not a laceration; an incision is a sharp cut wound.

Q. Was there any evidence of any operation having been performed on the inside of the mouth?

A. There was a lacerated wound there; I don't know whether it was due to an operation, or not. 10

Q. Do you remember in this conversation you had with Dr. Betts over the telephone, saying to him that the injury of that boy could not have been caused by extracting a deciduous molar, or, in other words, a baby tooth? A. I never said any such thing to Dr. Betts. I would like to state what I did say to Dr. Betts, if I would be permitted to, the matter having been brought up.

Q. Is it the general practice to cut down fractures; that is, to make an incision? A. Depend- 20
ing upon the nature of the fracture. If we have a simple fracture with a good apposition, that is, not compound fracture, why we do not cut down on a fracture of that kind.

RE-DIRECT-EXAMINATION:

Q. Doctor, have you had any talk with Dr. Betts since this case came into your hands? A. Yes, sir.

Q. Can you tell us when? A. Why it was very 30
shortly after the case came in my hands.

Q. Did you talk to him personally? A. I did.

Q. Did you meet him, or was it through the telephone? A. Over the telephone.

Q. You knew his voice? A. Well, I never met Dr. Betts personally, but he—

Q. Did you call him up personally? A. I did.

Q. How did you know with whom you were talking? A. Well, I asked if this was Dr. Betts, the dentist, and he said yes. 40

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Q. And what was your conversation with him?

A. I called him up to tell him, at Mrs. Klitch's solicitation, she being present at the time I spoke to him over the 'phone, I told him that Mrs. Klitch had her boy with this condition, and she
 10 felt that this must have been due to the extraction, and I said "Doctor, I do not like to see a professional gentleman get in trouble, but Mrs. Klitch feels that she should have some redress for this trouble; I am very much opposed to going in-
 to a case where I am obliged to testify against a professional man, and Mrs. Klitch told me she simply wanted her expenses paid at the hospital"—

Q. You told that to Dr. Betts? A. I did tell
 20 him that, and Dr. Betts viciously answered me and told me that we could go as far as we liked. Now, I did not want to be placed in a position where I should incur any such thing as this; that is why I wanted to explain my conduct in this case.

Q. Have you had any further conversation with Dr. Betts since then? A. No.

Q. Outside of your interest as a physician and surgeon are you interested at all in the outcome
 30 of this case? A. No. I have been paid for my services.

Q. Did you say you have, or have not? A. As near as I know I have been paid for my services; possibly the last few calls the boy made to my office, as near as I can remember.

Q. Will you try to recall particularly to your memory all the details of the conversation gone
 40 over a moment ago with Dr. Betts. Was there anything further said with respect to his not be-

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ing concerned about any suit? A. I would not want to quote the answer he made, but he practically told me—that is, he simply answered me that a proposed suit, he was insured, and he did not care what the folks did. I said, “I feel I have done my whole duty,” and I hung up the receiver. 10

Q. Had you any personal object in discussing that case with Dr. Betts along the lines you have testified? A. Only as I have mentioned, I did not like to see a professional man have any notoriety, or have his case aired outside of his office.

Q. And did you communicate with him to the extent you have testified on your own account, voluntarily? A. Well, I asked Mrs. Klitch if she would permit me to do this, and in her presence I called him up. 20

Q. So the suggestion was yours, and not hers?
A. Yes.

Q. Now, Doctor, to get back again with respect to the space between these two ends of the jaw bone; tissue has formed there, I take it; nature has provided for that? A. Yes.

Q. Is it, in time, a bone tissue, or soft tissue?
A. No, it is scar tissue in which there is a deposit of very solid, fibrous, tissue, making it a firm union. 30

Q. In your opinion will that jaw become as sound as the one on the other side?

Mr. Demarest: I do not think that is proper re-direct-examination.

By the Court: Q. There is such a thing as fibrous union, isn't there? A. Yes.

Q. Is that what you mean this is? A. Well, it is better than fibrous union.

(Question read as follows: “In your opinion will 40

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that jaw ever become as sound as the one on the other side?")

The Court: It is not strictly re-direct.

The question may be answered.

10 A. Well, a jaw having a part of the substance removed, as much as one-half to three-quarters of an inch, with the nerve structures, and blood vessels cut across, is never as strong as the opposite side.

By Mr. Hauser: Q. To what extent is the function of the jaw interfered with? A. The function of the jaw is fairly good, but in cutting through the nutrition part of the bone is interfered with.

20 Q. Of course, there is no possibility of nature supplying teeth to take the place of those removed? A. No.

Q. And if any teeth are supplied there it will necessarily have to be artificial teeth? A. Yes, sir.

Q. Is there any necessity of an appliance to hold those two pieces together? A. No.

Q. Do you think there will be any necessity of it?

Objected to as not re-direct-examination.
(Question withdrawn.)

30 Plaintiff's counsel calls another doctor.

The Court: Oh, no.

Plaintiff also calls Dr. Barry.

Mr. Demarest: I understood the Court to say that no further testimony would be permitted.

The Court: You understood correctly.

Mr. Hauser: Your Honor stated you would permit me to recall Dr. Snibely.

40

The Court: Yes.

Dr. Charles L. Snibely—Direct

DR. CHARLES L. SNIBELY, re-called for the plaintiff:

Direct-examination by Mr. Hauser:

Q. Dr. Snibely, do you recall the extracting of the tooth of this boy on January 29, 1914? A. I do. 10

Q. What examination, if any, did you make before you extracted that tooth? A. His father brought him in the office—rather, when I came in the office his father was standing in the door, the boy was seated in the chair, and I asked him what the trouble was, and he said the boy had toothache, and asked me to extract the tooth, and I examined the mouth, and didn't see anything but an ordinary extraction of a baby tooth; I just pushed it right out, I might say; just sticking in the gum. 20

Q. What kind of forceps did you use? A. I think I used ordinary molar forceps.

Q. What make? A. S. S. White.

Q. What number? A. I don't know.

Q. You don't know? A. No, sir; I don't know forceps by their numbers.

Q. Is it the same forcep you use to extract the tooth of a grown person? A. On some teeth of a grown person I would use the same forceps. 30

Q. What kind of tooth was this? A. The second deciduous molar.

By the Court: Q. You are speaking of the first tooth you extracted. A. Yes, sir.

By Mr. Hauser: Q. I am speaking of the tooth on January 29th. A. I only extracted a tooth for the boy once. 40

Dr. Charles L. Snibley—Direct

Q. You testified it was on January 29th you pulled the boy's tooth? A. I did, I extracted the tooth.

10 Q. What was the condition of the boy's jaw, a boy of ten years old, normal condition, at his age, ten years of age? A. Well, a boy ten years of age, he should, if he is an average boy his deciduous teeth would be out of the process, and just sticking in the gum, and possibly loose, because at that age he should have first and second bicuspid teeth, they should be in position.

Q. Did you try to find out whether the tooth was loose, or not? A. I certainly did.

Q. How? A. With my finger.

Q. What did you do then? A. What did I do?

20 Q. Yes. A. I extracted the tooth, took the forceps and extracted the tooth.

Q. Did you apply anything first? A. No, sir.

Q. How? A. No, sir.

Q. You heard Mr. Klitch say and the boy say, that you put something in the gum? A. I heard them say that. I never use anything in extracting the teeth of children, never.

30 Q. When did you use the forceps that you used on the boy last? A. Those forceps are sterilized—

Q. I didn't ask you that. When did you use those forceps last before using them on the boy? A. I could not say that; it may have been a month since I used them.

Q. And they were in your cabinet constantly? A. With the exceptions of when being sterilized, yes.

40 Q. Those forceps were on your cabinet constantly up to the time you used them on the boy?

Dr. Charles L. Snibley—Direct

A. I answered the question. They were there when I went to use them.

Q. Do you know whether anybody used those forceps between the time you last used them, and the time you used them on the boy? A. No, sir.

Q. Do you lock your cabinet up? A. No, sir. 10

Q. How do you know those forceps were sterilized? A. They were in a bottle of alcohol.

Q. You had not boiled them, had you? A. No, sir.

Q. Do you ever boil them? A. Yes, sir, after using them on every patient.

Q. What was the condition of the surrounding tissues of that tooth? A. Very slightly inflamed.

Q. You did not find any abscess? A. No, sir.

Q. At what depth did you grab that tooth? A. 20
It wasn't necessary to grab it at all; the tooth did not have any roots, and easily came out; nothing there but skin. In fact, I could take it out with my finger.

Q. Why didn't you? A. That is my reason?

Q. I want an answer, if you please. A. Well, the reason is if a person brings the patient in the office and you push it out with the finger, they would not feel as if they wanted to give you a fee.

Q. Is that the only reason you can give? A. I 30
think that is sufficient answer.

Q. You were paid a fee in this case? A. Yes, sir.

Q. What did you do immediately after pulling the boy's tooth? A. I gave him a glass and told him to rinse out his mouth.

Q. You did not give him water? A. I gave him a glass and told him to get the water.

Q. Is it customary to treat a patient that way?

A. Yes, sir. 40

Dr. Charles L. Snibley—Direct

Q. You walked out of the room then? A. I walked in the adjoining room to a desk.

Q. What did you do with the tooth you extracted? A. Put it on the cabinet.

Q. Are you positive of that? A. Positive.

10 Q. Do you keep all teeth of patients you extract? A. Yes, sir.

Q. Where did you keep it? A. I had a box and put them in.

Q. And this was put in the same box with the others? A. Yes, sir.

Q. Are these two teeth Mr. Demarest showed this morning some of the teeth that came out of that box? A. Yes, sir.

20 Q. You do not want this jury to understand that the two teeth introduced this morning were the two teeth extracted from the boy's mouth? A. I did not say they were.

Q. I know you did not, but I am asking you? A. I did not say they were.

Q. How did you stand when you pulled that boy's tooth? A. I don't know. That is a question I could not answer, what position I was in.

30 Q. Did you stand at his side, back, or in front of him? A. I think I generally stand in back of him.

Q. I don't ask you what you generally do, what did you do in this instance? A. I don't know.

Q. And you don't know the number of the forceps that you used? A. No, sir.

Q. Doctor, did you examine any of the teeth on the other side of the jaw? A. No, sir.

40 Q. You did not try to find out whether any of the other teeth were solid, or loose, did you? A. I extracted the tooth the boy's father asked me to extract, and that is all I did.

Dr. Charles L. Snibley—Direct

Q. You did not try to find out whether the other teeth were solid or not? A. I did not, I simply did what I was asked to do.

Q. Doctor, have you ever taken any examination permitting you to practice dentistry in this state?

10

The Court: He answered that this morning.

Mr. Hauser: He stated he had no diploma and no certificate of registration; I did not go into the other.

A. No, sir.

Q. Are you familiar with the requirements of the State Board of Registration in dentistry? A. Yes, sir, I am.

Q. What evidence of your skill and competency as a dentist have you ever given to the State Board? A. I have never given any.

20

Mr. Demarest: He has stated he never had any examination.

The Court: Yes.

Q. Doctor, what kind of roots were there of that tooth you extracted? A. Wasn't any roots at all.

Q. Were not any roots at all? A. No, sir.

Q. Came out very easy, did it? A. Yes, sir.

30

Q. Did you hear Mr. Klitch's testimony this morning? A. I did.

Q. Did you have any such conversation with him? A. I beg pardon!

Q. Did you have any conversation with him after the tooth was extracted?

The Court: You must remember this is your own witness, Mr. Hauser.

Question withdrawn.

40

Dr. Charles L. Snibley—Direct

Q. Doctor, I don't know whether I asked you this question before or not. How deep did you grab that tooth?

The Court: He said he did not grab it at all. That was his answer before, as I remember it.

10

Witness: Yes, sir.

By the Court: Q. How did you pull it if you did not grab it at all? A. Just put the forceps on the neck of the tooth, on the crown, what we call the neck, and just squeezed it, and it jumped right out. Those deciduous teeth are out of the process, and just held in the gum.

By Mr. Hauser: Q. Is that so in every case? A. In a normal child, yes, sir.

20 Q. Did you see anything which indicated that this boy was not a normal boy? A. He looked normal to me.

Q. How did he act after you extracted the tooth? A. I don't recall his saying anything to me.

Q. And you do not remember anything afterwards until you came back and got paid for extracting that tooth? A. I was there. The door was open. I just went into the next room.

30 Q. And you subsequently came back and got your fee? A. No, I did not; when the father came out with the boy he paid me.

Q. Did you follow him out in the hall when he was leaving? A. No, sir.

Q. Did you have any further conversation with the father? A. Not that I recall.

Q. At any time? A. Not that I know of.

40 Q. When did you see the boy after that, Doctor? A. Sunday.

Dr. Charles L. Snibley—Cross

Q. What did you give him? A. I didn't give him anything.

Q. What did you do for him? A. I just washed out his mouth with mouth wash.

Q. What was that mouth wash? A. I think it was hydronaphthol. 10

Q. When did you see him again? A. I don't recall when he was in again.

Q. He was in there a number of times, wasn't he? A. Yes, sir.

Q. Do you remember being present when Dr. Betts looked him over with you? A. Yes, sir.

Q. Dr. Snibely, during the month of January who paid your wages? A. Dr. Betts.

Q. During the entire month? A. Yes.

Q. And during the time this boy's tooth was 20 extracted?

Mr. Demarest: I object to the further continuance of this line of examination, because Dr. Snibely was on the stand this morning and was examined as to where he worked, and all that.

The Court: Yes, I have no doubt from the showing that has already been made, on the question of agency, so far as that being a question for the jury is concerned. 30

Mr. Hauser: I won't press it any further.

CROSS-EXAMINATION by Mr. Demarest:

Q. When you extracted this tooth on the 29th of January, 1914, did you use the ordinary method employed in the extraction of such a tooth? A. An deciduous tooth, yes. 40

Dr. Charles L. Snibley—Cross

Q. Did you use care in the extraction of it?

Mr. Hauser: Objected to as calling for a conclusion.

The Court: He said he used the ordinary and usual method.

10 Q. How long have you been practicing dentistry as an assistant, or in your own behalf?

Mr. Hauser: That is objected to.

The Court: The objection is overruled.

A. Ten years.

Q. Where have you been practicing? A. Maryland, and New Jersey.

Q. Were you admitted to practice in any other state than Maryland? A. Missouri?

20 Q. Can you state how many teeth you have extracted in the course of your experience?

Objected to as irrelevant.

The Court: It is cross-examination.

A. Thousands; extracted fifty or sixty a day at times.

By the Court: Q. Is the principal part of your work extraction? A. No, sir, but I extract a great many teeth.

Plaintiff rests.

30

Mr. Demarest: I want to renew my motion and want to add to it the additional ground that there is a variance between the pleadings and proof, because there seems to be more proof that there was a condition of necrosis, than a fracture; it seems that necrosis can be explained by other means, and can be caused by other

40

Dr. Charles L. Snibely—Direct

things than negligence on the part of the dentist or the assistant.

The Court: But the witness, Dr. Snibely himself, says those conditions were not present. There were certain causes for necrosis given by Dr. Epstein, all of which he excluded, except the possible one of abscess, and now Dr. Snibely excludes that by saying there was no abscess he discovered at the time he extracted this tooth. So that seems to have excluded all of the causes for necrosis which have been enumerated by the different witnesses. 10

Mr. Demarest: And my previous motion sets up the ground that the complaint does not set up that there is a violation of the statute here. 20

The Court: It will be understood that all the grounds urged for a nonsuit before the adjournment are now urged on the part of the defendant, and the Court will deny the motion for nonsuit, and will direct that an exception be noted to that ruling as ground of appeal.

An exception to this ruling is noted by the defendant as ground of appeal. 30

DR. CHARLES L. SNIBELY, re-called for the defendant:

Direct-examination by Mr. Demarest:

Q. Dr. Snibely, you have studied the jaw bone 40

Dr. Charles L. Snibley—Direct-

and its different phases, in your course of study, have you not? A. Yes, sir.

Q. And there are how many sets of teeth that a person has? A. Two sets.

10 Q. The first set are called what? A. Deciduous, or baby teeth.

Q. And there are among those deciduous or baby teeth, two teeth that are called molars? A. Yes, sir.

Q. Are they in the front, or rear, of the mouth? A. The rear.

20 Q. Can you name the order of teeth, beginning with the front of the mouth in the center, and going along the lower left jaw to the rear, as they would appear in a child of ten years old? A. left central, left lateral, left canine, the first molar and the second molar.

Q. These teeth all come out, do they, in usual course? A. Yes, sir.

Q. When, under ordinary circumstances, would the first teeth come out, or when would it be necessary to remove them? A. The first bicuspid teeth, permanent teeth, erupts when the boy is about the age of nine, if he is normal, between nine and ten.

30 Q. That would be underneath what tooth? A. Under the first molar.

Q. By erupting you mean it springs out of or grows out of the jaw bone proper? A. I do not.

Q. What do you mean? A. The process which is over the bicuspid tooth is absorbed away, and the jaw bone below grows to allow room for the roots formed.

40 Q. What do you mean by the process? A. The process absorbing away?

Dr. Charles L. Snibley—Direct

Q. Yes, what is the process? A. Why, it is a covering of bone laid around the deciduous teeth right over the permanent teeth.

Q. Then the the process is a bony substance?
A. Yes, bony substance.

Q. Between the two sets of teeth as they develop? A. Not between them, as you might say, on each side of them. 10

Q. Then when the second, or permanent teeth are ready to come in, what happens to the first tooth which is above the second, the second tooth is on the bottom of the first tooth, is that right?
A. You mean the baby teeth?

Q. Yes. A. It comes out, sometimes fall out themselves, easily pushed up.

Q. That is so of both of the molars? A. Yes, sir. 20

Q. What happens to this, what you call the process? A. It is absorbed away by nature.

Q. Have the first or baby teeth, roots? A. They have when they—

Q. What are they originally attached to? A. In the socket, in the jaw bone.

Q. And what subsequently occurs? A. As the child gets older and the second teeth start to form the roots are absorbed away.

Q. By absorbed, you mean it is sort of eaten away? A. Wastes away. 30

Q. Disappears? A. Yes.

Q. What condition, so far as absorption is concerned, existed in this boy's mouth at the time you extracted this tooth on January 29, 1914?
A. The roots were absorbed entirely away.

Q. And what was the tooth attached to at that time? A. Just sticking in the gum, held in entirely by the gum.

Dr. Charles L. Snibley—Cross

Q. Was it fastened to the process? A. No, sir.

Q. Did it come out, in your estimation, easy or hard? A. Very easy.

By the Court: Q. Is there any ache in a tooth
10 in that condition? A. They will ache, yes, sir,
your Honor, they will ache.

CROSS-EXAMINATION by Mr. Hauser:

Q. What did you find in this particular tooth that you say you drew on January 29th? A. Found a cavity in it.

Q. What portion of the tooth? A. That I
could not exactly say now, it is some time ago;
I remember there was a cavity in it; just where,
20 I don't know.

Q. Small or large? A. Large.

Q. You remember it was large? A. Yes, I
remember it was large.

Q. How big was that tooth? A. Just the
average size, deciduous molar.

Q. The jury do not know that, Doctor. About
what size was it? A. It wasn't as big as your
molar or mine, was it? A. Certainly not.

Q. About how big was it? A. I have no way
30 of telling just how large it was.

Q. Cannot you form some judgment, or estimate? A. I would not know what to compare it to.

By the Court: Q. Well, possibly a certain
fraction of an inch in length and width? A. I
could not say how large it was; if I did I would
be purely making a guess.

By Mr. Hauser: Q. Do I understand you to
40

Dr. Charles L. Snibley—Cross

say that the roots of that tooth were entirely absorbed? A. Entirely absorbed away.

Q. You cannot be mistaken about that? A. No, sir, I cannot.

Q. And the tooth was so loose that you could pick it out with your fingers? A. If I had tried, 10
yes, sir, I could.

Q. What kind of roots ordinarily are attached to a first tooth of that kind, Doctor, are they very deep? A. When they are fully formed, yes.

Q. Well, in this particular instance, what kind of roots were there? A. A child of this age?

Q. Yes. A. There wasn't any roots, I said.

Q. Did you make any examination of the cavity in the tooth before you pulled it? A. I 20
looked at the tooth and the father asked me to extract the tooth, and I did.

Q. Yes, you told us that several times. Now, what examination of the cavity did you make before you pulled it? A. I did not make any examination of the cavity.

Q. You went right straight ahead without making any examination, the same as you do in ordinary cases? A. I don't consider an ordin- 30
ary case of extraction of a deciduous tooth.

Q. Is it, or not, a fact that if the roots of that tooth were entirely absorbed at the time, there was nothing left of it except a shell, and there was no sense of feeling in it, is that so, is it not a fact? A. I could not tell you. There would be feeling in it. Yes.

Q. What is that? A. Surely, there would be feeling in it.

Dr. Charles L. Snibley—Cross

Q. What transmits the feeling of pain from a tooth to the consciousness? A. The nerves, as a rule.

Q. And how do the nerves reach the connecting link to the brain, or sense of feeling? Don't they go through the roots? A. Yes, sir.

Q. And there were no roots on this tooth? A. No, sir.

Q. Isn't it, as a psychological matter, utterly impossible, under those conditions, to have had pain in that tooth? A. No, sir, it is not.

Q. Please tell us how, if there were no roots, and no nerves communicating sense of pain to his consciousness, he could have pain? A. The constant irritation of the gum could cause trouble.

Q. But you thought it was due to the decayed condition, did you not, Doctor? A. No, I did not; I did not think that.

Q. Now, about this process, or this bony covering that you speak of, you say that was wasted away? A. Absorbed.

Q. What distinction do you make, if any, between wasting away and absorption? A. Well, I do not make any—yes, I do make a distinction between wasting and absorption; might waste away from disease; nature might take care of it, absorb it away.

Q. You did not mean that, when you said before that the bony portion wasted away? A. I said it was absorbed.

Q. I know what you said, but you used the word "wasted away"? A. I said absorbed.

Q. You want to correct what you said before in that respect? A. Absorbed away.

Dr. Charles L. Snibley—Cross

Q. Now, doctor, what is the necessity, if you know, for this bony structure over the second teeth, between the first and second teeth? What was the purpose of it? What was the object of it, this process which you say is absorbed? A. That holds the deciduous teeth in position.

Q. Has it any other purpose? A. If there is, I don't know it. 10

Q. You don't know it? A. Don't recall it.

Q. And you are a graduate of a college of dentistry? A. Yes.

Q. Don't you know, as a fact, that the bony process is there for the purpose of preventing the second teeth from adhering to the first? A. I said I don't know.

Q. I ask you now if you know that? A. I said I didn't know. 20

Q. And this tooth was not fastened to that process, or any part of it, at the time you extracted it? A. No, sir.

Q. Did the boy's jaw bleed very much after drawing the tooth? A. Not a great deal, no.

Q. How? A. Not a great deal, no.

Q. You don't know? A. I said not a great deal.

Q. You did not stay to ascertain whether there was any hemorrhage, or not, did you? A. There was no hemorrhage. 30

Q. I didn't ask you that. Did you stay to see if there was any hemorrhage? A. If there had been I would have known it.

Q. Doctor, won't you please answer my question. Did you stay to ascertain whether there was any hemorrhage or not? A. I said there was no hemorrhage.

Q. Doctor, did you show that tooth to Mr. 40

Dr. Edwin Betts—Direct

Klitch before you threw it on the shelf? A. I don't know.

Q. If Mr. Klitch says that you and he looked over that tooth together will you say it is not the fact? A. I could not say it was not a fact; I don't remember.

Q. You do remember that you went into the next room after pulling this tooth? A. I didn't say I went; I just stepped out of the room.

Q. Then you do remember stepping out of the room? A. Yes, I remember stepping out of the room.

Q. Isn't it a fact you and Mr. Klitch looked at that tooth after extracting it, and there were two roots to it? A. I don't know anything about two roots.

RE-DIRECT-EXAMINATION:

Q. Do you know whether or not there were two roots on that tooth? A. There were no roots.

Q. Can there be pain suffered by any person notwithstanding there were no roots to the tooth? A. Certainly.

The Court: He has answered that. He said they irritated the gum.

30

DR. EDWIN BETTS sworn for the defendant:

Direct-examination by Mr. Demarest:

Q. Dr. Betts, you are a practicing dentist in this city? A. Yes, sir.

Q. For how long have you been practicing? A. Twenty-seven years.

40

Dr. Edwin Betts—Direct

Q. Where do you maintain your office? A. 482 Broad Street.

Q. What are your office hours? A. Eight until about half-past five, quarter to six.

Q. You employ Dr. Snibely? A. Yes, sir.

Q. What are his hours? A. Nine to six. 10

Q. What school, or college, are you a graduate of? A. New York College of Dentistry.

Q. Have you made any kind of specialty of extraction? A. Yes, sir.

Q. Have you extracted molar teeth from children often? A. Yes, sir.

Q. Do you find that they have or have not roots at the age of ten years? A. The roots are absorbed at the age of ten years.

Q. How is that absorption accomplished? A. 20 Through the system, by natural process of absorption, through the blood.

Q. I show you several envelopes containing a card with a tooth affixed to it by sealing wax, and with a name, and other particulars on it, and ask you if you pulled that tooth? A. Yes, sir.

Q. I show you all these, and ask you the same question, if you pulled those teeth?

Mr. Hauser: I wish to enter a general objection to this line of examination as immaterial and irrelevant. 30

The Court: If it is shown that this is the condition of teeth, similar teeth, from a number of children of similar age, it might be corroborative of the statement that molars in children of that age have not roots.

Mr. Demarest: That is the object of it.

The Court: If that situation be shown then I think it is proper, but until that sit- 40

Dr. Edwin Betts—Direct

uation is shown it is not. It must be shown that those teeth are teeth of children substantially of this same age.

Mr. Demarest: I purpose to do that.

10 Q. Now, Dr. Betts, you have examined these envelopes and the teeth contained? A. I know that this is my work, and that I fixed them up, and saved them for the past year, ever since this case came to my mind, made a special study of it, children from ten to eleven years old.

Q. Will you refer to these and tell the name and age, if you care to, of the persons from whom those teeth were extracted. A. James Brown, age, ten years, lower deciduous canine, March 5, 1915.

20 Mr. Hauser: I object; it is subsequent to this particular occurrence, more than a year.

The Court: What difference does that make, for the purpose of illustration.

A. (Continued.) John Smith, age ten, March 10, 1915, a molar. I tabulated these, picked them out myself. Age eleven, deciduous molar. Age nine, deciduous molar, have not the name, two of them. Miss Ettlin, 344 John Street, East Newark, going on eleven years, July 3, 1914. Elizabeth 30 Myer, Clark Street, eleven years, deciduous molar. Herbert Suplee, 29 Weaver Street, Bloomfield, N. J., age eleven. William Jones, age ten years, second deciduous left molar. Fred Bastilo, age eleven, deciduous molar.

Q. You say you extracted these teeth personally? A. Yes, sir.

Q. And you made up the records you have just read? A. Yes.

40 Mr. Demarest: Any objection to these?

Dr. Edwin Betts—Direct

Mr. Hauser: Yes, I object to them as immaterial and irrelevant.

The Court: Do I understand you offer them?

Mr. Demarest: Yes, sir.

The Court: They will be received.

An objection to this ruling is noted by the plaintiff as ground of appeal. 10

Same marked Exhibits D-1 to D-9 inclusive.

Q. Will you explain to us the position of the permanent teeth underneath the alveolar process, and the method in which the deciduous teeth are disposed of by natural causes? A. Well, according to Gray, they are—

Q. According to Gray, what is that? A. Gray is the leading authority on anatomy of 1913. 20

The Court: You are not asked to state authorities, you are asked to give the result of experience.

Q. From your personal knowledge? A. There is a complete absorption of bone from the age of ten to eleven years in those particular teeth.

Q. At what age does this absorption start? A. Of the molars from the ninth year.

Q. And the absorption is complete in what length of time? A. Well, nine to eleven years, because the bicuspidæ are well up, and come out. 30

Q. The bicuspidæ are the teeth that come up underneath where the first molars are? A. Yes.

Q. And they are a permanent tooth, are they? A. Permanent teeth.

Q. Did you ever extract a tooth from this boy? A. Yes, sir.

Q. Do you know the date on which you did it? A. No, sir. 40

Dr. Edwin Betts—Direct

Q. What tooth did you extract? A. A deciduous left molar canine.

Q. That is the tooth ordinarily called the stomach tooth? A. Stomach tooth, or eye tooth.

10 Q. Comparing the two teeth, I mean the molar and the canine, which is the harder to extract?
A. Well, the canine is supposed to absorb later than the molar.

Q. How much later? A. Well, fully a year. There is a marked difference; the canine stays in the mouth longer than any other tooth as a rule, of the deciduous teeth.

Q. Then would you say a canine is harder to extract than a molar? A. Yes, sir.

20 Q. That is, we are speaking now of the first set, or baby teeth? A. Yes, sir, at that age.

Q. Do you remember having seen a tooth that was said to have been extracted by Dr. Snibely from this boy on January 29, 1914? A. No, sir.

Q. You did not see it? A. No, sir.

Q. Would you say that at the age of ten deciduous molars would be without roots caused by absorption? A. Not in every case, no, sir.

Q. In a normal case would they? A. Generally speaking they would be.

30 Q. Is there any sign, or any indication, that leads you to know whether or not the roots are absorbed? A. Yes.

Q. What? A. Well, there would be a natural soreness and natural looseness, an indication of inflammation there, generally pick it right out.

Q. That indicates the tooth should be drawn? A. Yes, sir, removed.

40 Q. In the pulling of any tooth that is attached either to the process or to the jaw bone proper,

Dr. Edwin Betts—Direct

is a fracture an ordinary thing? A. It is quite common to destroy some of the process, especially in permanent teeth, but not in the baby teeth at that age.

Q. In the pulling of the permanent teeth it would necessarily break part of the process? A. 10
Most always.

Q. And suppose in the case of a baby tooth there was a root attached to the process, what would you say with reference to breaking the process then? A. In the natural course of events you would probably get some process, if it was a very young child, a child six years old, if the roots were there you would naturally get process in extracting them.

Q. Can teeth be extracted without taking part 20
of the process when the tooth is attached by a root to it? A. Not when it is fully formed; you would surely get process.

Q. Then it cannot be avoided to get part of the process, that is, break it off? A. No, sir, I do it every day.

By the Court: Q. You do not call that part of the jaw bone? A. Well, it is all attached to it, it is part of the tooth. A good extractor gets part of it every time. It hurts the patient less to go 30
over it than it does to go up. It absorbs anyway, if you do not take it away, as soon as the tooth is gone the process goes.

By Mr. Demarest: Q. Do you remember having a conversation with Dr. Epstein on the telephone? A. Yes, sir.

Q. Will you tell us what Dr. Epstein said to you on that occasion? A. Why, I called Dr. Epstein and asked him what he found in the Klitch 40

Dr. Edwin Betts—Direct

boy, and he said he found a small fracture. I said, "Doctor, you know we could not do that extracting a deciduous tooth," he said "Yes, that is so."

10 Q. When was this that you talked to him, before or after the first operation? A. It was a few days after the first operation, as soon as I knew it. The boy was brought into the office with a soft bandage on his face, and I said, "Well, doctor, you did not treat him for a fracture," he said, "Well, I found the apposition was good, and I only put on a soft bandage."

Q. Did he say anything to you about settling the case? A. Not at that time.

20 Q. Did he on any subsequent time? A. He called me up.

Q. And said what? A. He said Mrs. Klitch was there, and that case could probably be settled for \$100 or a couple of hundred, something to that effect, could be settled for a small amount of money. I said that would be blackmail. Mrs. Klitch was there at the time, he said so; I presume he was telling the truth.

30 Q. In the work that Dr. Snibely has done for you have you found him ordinarily careful and prudent?

The Court: There is no charge of employing unskilled servants; that is not the charge.

Q. You have, in the course of your dental work, studied anatomy, have you not? A. Yes, sir.

40 Q. I show you a plate on page 1216 of Gray's Anatomy, in the American edition, and ask you if that shows the part of the jaw which you call the process, and the jaw bone? A. Yes, sir.

Dr. Edwin Betts—Cross

Q. Does it show the eruption of permanent teeth? A. Yes, sir.

Q. Does it show the position of the deciduous, or first teeth? A. Yes, sir.

Mr. Demarest: Have you any objection to that going before the Court and jury?

10

Q. Do you know what edition it is? A. 1913, the last edition, I think, I am quite positive it is.

Mr. Demarest: I will offer that in evidence.

Mr. Hauser: I object to it on the ground that the plate shown in that book appears to be a child four years of age, and does not affect any of the facts in this case.

By the Court: Q. Does this cut illustrate the principle of which you have testified in a child of older years? A. Except the absorption is not there; those roots would be absorbed in a child seven years old, or ten years old. That shows the way they are at that age. In eleven years old those roots would be all off, just lying in that gum.

20

The Court: For the purpose of illustration it may be used; it need not be marked; it has been identified by the number of the page.

Witness: Page 1216 of the edition of 1913.

30

By Mr. Demarest: Q. In your experience in extracting teeth would you say it was possible, or not, to fracture a boy's jaw bone, in the extracting of a first molar, the boy being at the age of ten years? A. Be impossible.

CROSS-EXAMINATION by Mr. Hauser:

Q. Doctor, do you mean to say that under any and all circumstances whatever is it impossible to

Dr. Edwin Betts—Cross

produce a fracture by the extraction of a tooth from a boy's jaw above the age of ten? A. Yes,

~~Q. And you permitted that to continue?~~
sir, that is, a deciduous molar.

10 Q. No matter how deeply you may grasp that tooth with the forcep? A. Well, you are supposed to use ordinary skill.

Q. Now, I assume that the forceps have gone down a considerable depth; under such circumstances is it not possible to fracture the jaw bone by the use of the forceps? A. You might kill a child if you go down deep enough.

Q. Don't let us go that far; answer my question, please. A. Not by a dentist, no.

20 Q. Well, by one assuming to act as a dentist, doctor? A. Well, one acting as a dentist might do most anything.

Q. You knew that Dr. Snibely was not a regular practitioner in this city, didn't you, doctor? A. Yes.

Q. And you permitted that to continue?
Mr. Demarest: Objected to as immaterial.

Objection overruled.

A. Yes, sir.

30 Q. You did know it, and you knew it also after making inquiry of the State Dental Board, didn't you? A. I never made inquiries at the time, before this time.

Q. Is Dr. Snibely in your employ? A. Yes, sir.

Q. Does he still extract teeth? A. At times, yes, sir.

Q. And fix teeth? A. Yes, sir.

Q. And you know that is in violation of law?

A. Yes, sir.

40 Q. And since this occurrence to the plaintiff,

Dr. Edwin Betts—Cross

and prior to today, you have obtained a copy of the law, haven't you? A. Yes, sir.

Q. And you still permit him to practice dentistry without a license? A. Yes, sir.

Q. Does he come within the category when you said a moment ago that a man who was not a dentist might fracture a boy's jaw? A. Yes, sir. 10

Q. I think on direct-examination you said that the roots of the teeth generally are absorbed at ten years, did you not? A. Yes, sir.

Q. Does that apply to each and every case? A. Most all cases.

Q. But there are some where the roots are not absorbed? A. Yes, sir.

Q. Did I understand you to say it is usual in the extraction of first teeth to fracture the process? A. Yes, at the age of a child six years it would be, that is, of an age prior to nine years. 20

Q. Would you say it was proper practice in a boy not quite ten? A. Very rare.

Q. I ask you again, do you think it would be proper practice, in a boy about ten years of age, to fracture the process of the tooth? A. Depends on the case.

Q. Well, would you say, as a general practice, in each and every case that came to your attention, that it was skill and proper practice on your part? A. No, sir. 30

Q. When do you say that the absorption of a molar begins, doctor? A. About nine years.

Q. Is not the tooth loose prior to that time? A. What, a molar?

Q. Yes, I mean the temporary one. A. No, sir.

Q. Sure about that? A. Yes, sir.

Q. Isn't it a fact that absorption begins between 40

Dr. Edwin Betts—Cross

five and six years? A. Well, it may begin, but it is not marked, it is a very slow process.

Q. But it does exist? A. Oh, it must begin very early, and slow; but I am speaking, giving an idea, they are pretty well absorbed up to nine
10 years.

Q. But in some cases that is not so; there are exceptions to that rule? A. There must be exceptions to all rules.

Q. I think you said in answer to Mr. Demarest that indications of absorption are natural soreness and natural looseness, am I right? A. Yes, sir.

Q. What do you mean by those terms? A. We find in baby teeth of that age that the teeth are
20 generally loose, and mothers bring them in to have those teeth removed because they commence to annoy them.

Q. Do you differentiate at all between natural soreness and looseness, and any other kind? A. Well, a person might have a diseased condition which would indicate a looseness of the teeth.

Q. You refer now, I presume, to Rigg's disease, don't you? A. No, sir.

Q. Something of that kind? A. No, sir; might
30 be necrotic.

Q. That is not a usual occurrence, however? A. Common with children—not uncommon with children.

Q. Of what age? A. Well, with children of any particular age.

Q. You did not see this boy on January 29th when that tooth was extracted, did you? A. No, sir.

40 Q. You did see the tooth extracted? A. No, sir.

Dr. Edwin Betts—Cross

Q. Did you see the tooth after it was extracted?

A. I may have, but I don't remember that, time has passed, and I would not remember.

Q. Do you remember having a talk with Mrs. Klitch about the way in which that tooth was extracted? A. Yes, sir.

Q. What did you say to her about using cocaine with that boy, if anything? A. I don't remember saying anything. 10

Q. Do you say positively you did not say to her that if you had had the case you would not have used cocaine on it? A. No, sir.

Q. You understand my question? A. Yes, sir; I could not be mistaken, because we do not use cocaine.

Q. (Previous question read as follows: "Do you say positively you did not say to her that if you had had the case you would not have used cocaine on it?") Did you or did you not say that? A. I did not. 20

Q. So that when she testifies to anything of that kind you think she is mistaken, do you? A. Must be.

Q. When did you first have a talk with Mrs. Klitch? A. I think about five or six days after Dr. Snibely extracted the first tooth.

Q. How do you know that? A. I have remembered that right along, it wasn't more than five or six days, I think. 30

Q. Was there anything peculiar in the early history of the case to make you remember it? A. Yes, sir; we had a history of a good deal of pain.

Q. You don't know how many times she was in the office before that? A. I am under the impression she was in there twice. 40

Dr. Edwin Betts—Cross

Q. It was the mother who came to your office?

A. Yes, sir.

Q. What conversation did you have with Mrs. Klitch? A. I examined the boy carefully to see what the trouble was; washed it out—

10 Q. With what? A. I think I used glyco-thymoline.

Q. Don't you know what you used? A. No, sir.

Q. Well, what was the conversation, doctor? A. Well, I washed it out and told her to come back and let me see the boy again; I said it looked like necrosis to me.

Q. Who said that? A. I said that.

20 Q. What examination did you make, doctor, besides looking in the boy's mouth? A. I made a very careful examination; took my hands and put them on the jaw to see if the jaw was fractured.

Q. Did you suspect there was a fracture? A. I wondered if there could be anything wrong with the jaw, and to make sure I examined it very carefully, and I made up my mind at once that the boy was suffering with necrosis.

Q. What indications were there, five days after the tooth was pulled, of necrosis? A. Pain, swelling and inflammation.

30 Q. Was not that an indication of something more than necrosis? A. No, sir. It would have been if he had been an older person, but the age eliminated anything else.

Q. Did you find any swelling of the face at that time? A. Slight swelling.

40 Q. Did you look for any crepitus of the jaw? A. Yes, sir; got my hand like that (illustrating) and manipulated the jaw pretty good, and he never made a sound.

Dr. Edwin Betts—Cross

Q. Who was present during that? A. I don't think anybody was present; the mother may have been there.

Q. What treatment did you give him for that? A. I had him come in again, and syringed him again, and removed the deciduous canine.

10

Q. What did you use in the mouth then? A. I think I used glyco-thymoline; that is my best recollection.

Q. Can you tell us what the properties of glyco-thymoline are? A. It is a general mouth wash, it is a local preparation, well known.

Q. Has it any antiseptic properties? A. Slightly antiseptic.

Q. You found pus at that time? A. Yes, sir.

Q. And you thought the mouth wash you gave him was going to cure him, did you? A. No, sir.

20

Q. What did you do after that? A. I asked her about her family physician, she said she had one, and I told her to go see her family physician; I told her that was a case for the hospital, not a case for the dentist, and that the child should be operated.

Q. You said that? A. Yes, sir.

Q. What did you draw that deduction from after five days? A. It was not five days after, that was the second time she came there.

30

Q. Well, it is seven days after; what did you base your deduction on? A. That is the only way to cure a necrotic condition.

Q. You were certain there was necrosis there? A. I am as sure as a man could be from anything he could tell from past experience, and seeing similar cases.

Q. Did you hear Dr. Snibely testify this afternoon? A. No, sir.

40

Dr. Edwin Betts—Cross

Q. He testified that when he extracted that tooth he found no evidence of abscess there; what would have caused the necrosis you say existed if there were no abscesses? A. Why, injury.

10 Q. Yes, what kind? A. Well, that is hard to tell, a boy can do a hundred and one things and be injured in the jaw.

Q. It would be due to force and violence, wouldn't it, as the producing cause? A. Not necessarily.

Q. But ordinarily? A. Ordinarily be caused by injury.

Q. And you do not doubt at all that a severe blow on the jaw would bring about the condition which would result in necrosis, do you? A. Well,
20 would naturally infer in a child that it would.

Q. With anybody? A. No, not with anybody.

Q. I say it might; not necessarily would? A. It might follow, yes.

Q. And likewise an unskilled dentist extracting a tooth might cause injury to the jaw so that necrosis might follow as a consequence, might it not?
A. Yes.

Q. Now, doctor, do I understand you to say on
30 your twenty-seven years' experience as practicing dentist that it is not possible for a skilled dentist to extract a first tooth with roots attached without breaking the process? A. Oh, you might get some of them in baby teeth, but the teeth are such a shape, they are like that (illustrating), and you could not get them to save your life without taking process, some of them; some come very easily; especially a baby tooth; you are liable to get
40 process, but not at the age of ten years, not that age.

Dr. Edwin Betts—Cross

Q. You think it good practice cutting through the process that you testified about? A. Yes.

Q. You think it is to be approved of, and such work as a skilled competent dentist would perform? A. The only way to get them.

Q. You don't know any other way? A. You could not get them. 10

Q. When did you first find out there was a fracture of that jaw? A. I never knew there was a fracture of the jaw.

By the Court: Q. Would that cause laceration of the gum in cutting through that way? A. Yes, sir, have to cut right through the gum and all.

By Mr. Hauser: Q. If the roots of this boy, the tooth alleged to have caused the injuries through extraction, had been absorbed, would it have been necessary to break the process? A. At the age of eleven there would not be any process there to break. I saw the case shortly after it was drawn and it was so smooth, there wasn't a blur on there, and the canine was in there. 20

Q. Who suggested the extraction of that canine? A. I suggested it.

Q. Why? A. Because, after my twenty-two years' experience, I decided it should come out.

Q. You knew the boy was suffering badly; you had seen him several times? A. Yes. 30

Q. Did you think the pulling of that tooth would relieve him any? A. If we had not pulled it he might have swallowed it.

Q. He might also have dropped it out of the mouth, mightn't he? A. Well, if he had waited long enough it might have dropped.

Q. It was not diseased, was not decayed? A. No; there was complete absorption; perfectly normal. 40

Dr. Edwin Betts—Cross

Q. How many roots are there to a molar, doctor? A. The lower molar has two; that is, the deciduous molars.

Q. How many? A. Two roots; in rare cases, three.

10 Q. And how many roots has the canine? A. A single root; I have seen them with two, though.

Q. But the ordinary canine has one? A. A single root.

Q. And in the temporary teeth do you want this jury to understand that it is more difficult to pull a canine with one root than a molar with two? A. At the age of eleven years.

Q. Ten? A. Well, ten years old, the canine is harder to pull.

20 Q. Notwithstanding the fact that you have testified that at the age of ten the roots of the first teeth practically are absorbed? A. Those first canines are the last to absorb.

Q. But didn't you tell me a few moments ago that the roots of molars are practically absorbed at nine years old? A. They begin at nine years; they begin earlier; they are pretty well absorbed at nine years.

30 Q. And the canine is pretty well absorbed at nine years, isn't it? A. Not as much as the molars; the canine would not be as much as the molars.

Q. And yet in this particular instance that canine was completely absorbed, and hung on by a thread? A. Almost so.

Q. Did you have to use forceps to draw that tooth? A. Didn't have to, but I did.

40 Q. And you went right through the process, right through the gum? A. There wasn't any process.

Dr. Edwin Betts—Cross

Q. Now, tell me, please, what conversation this was you had with Dr. Epstein, and when? A. I called him up on the 'phone to find out what he found.

Q. When was this? A. That was about three or four days, as near as I can place; it was as soon as Mrs. Klitch brought the boy in to see me, which I asked her to do and she did; and I asked him what he found, and he said he found a slight fracture, and he said the apposition was so good he did not have to use a splint; I came right back and said, "You did not treat him for a fracture," and he said the apposition was good, and he did not have to use a splint. 10

Q. You said nothing on your direct-examination of apposition? A. Yes, I did. 20

The Court: You are mistaken about it, Mr. Hauser.

Q. When did you speak with him again? A. He called me up.

Q. How long after? A. My head is not good on dates, but it was a reasonable time, possibly two or three weeks after, and he said that Klitch case was there, and he said he could settle that for a hundred or a couple of hundred, something like that; I said "That would be blackmail, we are not responsible for that case." 30

Q. Do you know Dr. Epstein very well? A. I know of him.

Q. You know he is a reputable physician and surgeon in this city? A. Yes, I understand he operates most everything that comes his way.

Q. Dr. Epstein has treated your son, hasn't he, doctor? A. Yes, sir, and he has a crooked nose from the effect of it, too; we always lay it to him. 40

Dr. Edwin Betts—Cross

Mr. Hauser: I move that that part of the answer be stricken out.

The Court: It may be stricken out.

Q. Doctor, you recommended Dr. Epstein to Mrs. Klitch, didn't you? A. I tried to; I said,
10 "There is a man would operate him," but I could not think of his name.

Q. Why did you recommend Dr. Epstein? A. Because I understand he will operate anything that comes his way; that is his general reputation among the profession.

Q. You did not recommend Mrs. Klitch to go to Dr. Epstein because he was a doctor able and skillful to give her child the treatment he needed?
A. Not particular. I knew he needed to be oper-
20 ated, and I knew he would operate, that he operated anything that comes his way.

Q. You don't know that of your own experience? A. Only from the reputation; it is a general rumor.

Q. I ask you now what you know yourself? A. I tell you what I know, and I don't know anything about him except as a general rumor.

Q. Were you here when Dr. Epstein testified?
A. No, sir.

30 Q. You were in the court room when he went on the stand? A. I was in, and went out; I didn't see Dr. Epstein; I don't think I would know him if I saw him.

Q. You know Dr. Barry? A. Yes, I do; that is, I know of him.

Q. Now, doctor, what conversation did you have with Mrs. Klitch subsequent to the operation, at
40 your office? A. She came in and wanted me to give

Dr. Edwin Betts—Cross

her some money to help pay the doctor, something like that.

Q. Are you quite sure she did that? A. Yes.

Q. What did she ask you for? A. She didn't make a stated amount; it was simply to help; she said they were poor, had been up against it, and thought the most I could do was to help pay up the expense. 10

Q. You want this jury to understand she mentioned the word money in that conversation to you? A. Well, I would not say it was money, but it was simply to help them, and help pay the doctor's bill. I don't know what you would pay them with if you didn't use money.

By the Court: Q. Doctor, I understood you to say that it is impossible to fracture a jaw bone in the extraction of a deciduous molar in a child of ten years of age if reasonable care is exercised? A. Yes, sir. 20

Q. If, in the extraction of a deciduous molar in a child, a fracture resulted, would you say the dentist had exercised reasonable care? A. Yes, I would.

Q. Even though in extracting a deciduous molar a fracture had resulted you would say he had exercised reasonable care? A. It would depend on the tooth. 30

Q. You said it was impossible to fracture a jaw bone in the extraction of a deciduous molar in a child ten years of age if reasonable care was used? A. Yes, sir.

Q. My question is if in the extraction of a deciduous molar in a child of ten years of age a fracture resulted would you say the dentist had exercised reasonable care? A. No, I would say he had not used reasonable care. 40

Dr. Edwin Betts—Re-direct

By Mr. Hauser: Q. Doctor, what course do you pursue when you take an assistant into your employ as to inquiring as to his qualification?

Objected to.

The Court: The objection is sustained.

10 Q. To go back a moment, doctor, to a question I put before; how do you remember the particular occasion that Mrs. Klitch came to see you with respect, as you say, to get something towards paying the doctor's bill? A. Well, I was busy, I remember her coming in, and I talked to her a few minutes.

Q. Exactly. What did she say to you, doctor? A. Well, I could not tell you exactly what she said, but the inference was that I should help them pay
20 the doctor's bill; that was the sum and substance; they had been put to a lot of expense and trouble; I realized that; and that was her views in the matter.

Q. What did you tell her? A. I told her I had trouble, too, times were hard, something to that effect, and I did not have the money; I would be glad to help her, I was liberal, and would be glad to help others, and would be glad to help her.

30 Q. Did you tell Dr. Epstein, in your conversation with him, that you were insured, and these people could go just as far as they liked? A. I might have made that reply.

RE-DIRECT-EXAMINATION:

Q. Are you, as a matter of fact, insured?

Objected to. Objection overruled.

Q. Are you insured against any damages for a case of this nature? A. Well, I am not now, no, sir; I was, and I was not.

40 Q. The insurance company is not defending it?

Dr. Edwin Betts—Re-cross

A. No, sir, the insurance company is not defending it; I am paying the money out of my own pocket.

Q. Dr. Betts, I am inclined to believe you misunderstood a question, and I would like to put it to you again. Did you know that in employing Dr. Snibely you were violating the statute? 10

Mr. Hauser: I object to that; knowledge of the law is presumed in everybody.

The Court: The objection is sustained.

Q. What were Dr. Snibely's duties in your office? A. General practice of dentistry.

Q. Was he known as an assistant? A. Known as an assistant.

Q. Was he authorized to extract teeth without your immediate supervision? 20

Mr. Hauser: Objected to.

A. No, sir.

The Court: The objection is overruled.

Q. You may answer the question? A. No, sir, he was not.

Q. He was only supposed to extract teeth when you were present? A. Yes, sir.

Q. The answer you gave to plaintiff's counsel could seem to indicate that you knew that he was doing otherwise; did you mean to carry any such inference? 30

Objected to. Objection sustained.

Q. When did you first know that Dr. Snibely extracted a tooth from this Klitch boy on January 29th? A. Three or four days after.

RE-CROSS-EXAMINATION:

Q. Doctor, did you receive the money which was paid over for the service to young Klitch? A. I don't remember. 40

Dr. Edwin Betts—Re-cross

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

Q. Doctor, how long has Dr. Snibely been in your employ? A. Over two years, I think.

Q. Have you ever issued a certificate for Dr. Snibely in order to help him get a license? A. I don't understand your question.

10 Q. Did you ever write a certificate for Dr. Snibely for the purpose of assisting him in obtaining a license? A. Yes, sir, simply as to his character.

Q. And was that before, or after, the extraction of the tooth on January 29th? A. I think that was after.

Q. And he had been in your employ prior to January 29th, 1914? A. Yes, sir.

20 Q. And to your knowledge had extracted teeth? A. Yes, sir.

Q. You want us to understand that every time he extracted a tooth it was under your personal supervision? A. Well, I was generally on the job looking after things.

Q. You have quite a busy office, haven't you, there? A. Yes, sir.

Q. And you treat a great number of patients? A. Yes, sir.

30 Q. People come in and out there constantly? A. Yes, sir.

By the Court: Q. How many assistants have you? A. I have a mechanical man and Dr. Snibely, and a young lady.

By Mr. Hauser: Q. You have a young lady? A. Yes, sir.

Q. What does she do? A. Assists me.

40 Q. In what way? A. Why, in many ways, around the chair, any time I want her.

Dr. Edwin Betts—Re-cross

Q. She treats teeth, too, doesn't she? A. No, sir.

Q. Are you sure about that? A. Yes, sir—not that I know of; she might do things when I am not there.

Mr. Demarest: I would like to have an objection to any evidence as to any other assistant to Dr. Snibely as immaterial. 10

The Court: Perhaps not.

Q. Doctor, when did Dr. Snibely first enter your employ? A. I could not tell you.

Q. Well, about? A. It is over two years ago.

Q. When did you first endeavor to have him obtain a license? A. Oh, soon after he was there we made application.

The Court: I think this is hardly cross-examination on re-direct. 20

Q. Doctor, you said something to Mr. Demarest about not having any insurance now; did you have, on January 29th?

Mr. Demarest: I object to any further testimony on that point.

The Court: You are both examined upon it, we might as well hear the conclusion of it. You may answer the question, Doctor. 30

A. Yes, sir.

Q. It is not now in force? A. No, sir.

Q. When was it cancelled? A. I should judge about five or six months after the Klitch case.

Q. Right after this suit was begun, wasn't it? A. Well, I don't remember dates, but it has been cancelled since this suit was begun.

Q. Did you request it to be cancelled? A. No, sir. 40

Dr. Julius Minez—Direct

Q. Or did the company request it? A. The company cancelled it.

Q. Why? A. On the point that I employed an illegal practitioner.

10

DR. JULIUS MINEZ, sworn for the defendant:

Direct-examination by Mr. Demarest:

Q. You are a dentist, are you? A. Yes, sir.

Q. From what college, if any, did you graduate?

A. Denver University.

Q. With what degree? A. D.D.S.

Q. Where did you practice? A. In Newark.

20 Q. Where? A. 9 Fulton Street.

Q. How long have you practiced? A. The fourth year.

Q. What is the nature of your practice? A. Regulating deformities of the jaw, and straightening teeth.

By the Court: Q. Correcting malformation? A. Malformation.

By Mr. Demarest: Q. What are the ages of the people that you treat? A. The majority of my

30 Q. Do you have special reason to know the condition of the first, or baby teeth? A. I do.

Q. At the age of ten years what would be the normal conditions of the first molars? A. You mean the first permanent molars, or first temporary molars?

Q. Temporary molars. A. The roots are pretty well absorbed at that age, but the teeth are still in

40 their normal position.

Dr. Julius Minez—Direct

Q. Will you say that they were or were not, attached to the process? A. Not at the age of ten or eleven.

Q. Not at that age? A. No, sir.

Q. What would you say as to the difficulty of extracting one of those temporary, or first molars? A. My experience at the age of ten or eleven, temporary molars are removed quite easily; in fact I quite frequently remove them with my fingers. 10

Q. Do the permanent teeth grow underneath the original, or first set? A. Yes, the permanent teeth are the ones that cause the absorption of the roots of the temporary teeth.

Q. They cause the absorption? A. Yes, sir.

Q. Is there anything between the top of the permanent tooth and the bottoms of the root of the temporary teeth? A. The pulp of the temporary teeth. 20

Q. That is a soft substance? A. A soft substance.

Q. In order to fracture a jawbone in pulling a deciduous or first molar how would a dentist be obliged to go about pulling that tooth?

Mr. Hauser: I object. As I understand, this witness is not a dentist. His work consists of straightening and correcting malformations in the lines of the teeth. I do not understand that he is practicing dentistry as such. 30

The Court: There is a little uncertainty in my mind whether he is.

Q. You have had occasion to remove first teeth, have you not, doctor? A. Quite often remove them. I can claim that I remove more temporary 40

Dr. Julius Minez—Direct

teeth from children—of course, I have no facts to prove it—than any other dentist, because my patients are children only, as a rule.

Q. You have often occasion to remove first teeth? A. Yes, sir.

10 The Court: Now, the question may be repeated.

Q. (Question read as follows: "In order to fracture a jaw bone in pulling a deciduous, or first molar, how would a dentist be obliged to go about pulling that tooth?")

Mr. Hauser: I object to the form of the question; it is rather indefinite in form.

The Court: Yes, I think the form is objectionable.

20 Q. What portion of the tooth process, or jaw bone, would it be necessary for a dentist to take hold of with forceps in order to break a jaw bone, provided he was looking for the extraction of a first, or deciduous molar? A. Pardon me, I do not quite understand the question.

Q. In order to break a jawbone, taking out a first molar of the deciduous set, would a dentist have to get beyond the process, or pulp, as you call it? A. Positively.

30 Q. Now, what difficulty would a dentist have in getting beyond the process? A. He would have to go down, I should judge, a third of an inch, or half an inch, of the soft tissue before he could reach the jaw proper.

Q. Is the process wider than the deciduous tooth would be? A. No, sir.

40 Q. Same width? A. Why, not quite as wide; it depends on the tooth; in the molar it is wider than in other teeth.

Dr. Julius Minez—Cross

By the Court: Q. That would result in laceration of the soft parts, would it? A. Yes, sir.

CROSS-EXAMINATION by Mr. Hauser:

Q. Doctor, do you make a specialty of correcting malformation? A. Yes, sir.

Q. Your general practice is not that of extracting, or pulling teeth, is it? A. No, sir.

Q. And I understand you have been four years in practice? A. Four years.

Q. Now, doctor, just tell us exactly what the position of the permanent tooth is with respect to the first tooth, before the first one is absorbed, or removed? A. The position of the permanent tooth is close to the gum line, where the gum line ends. That is about where the permanent tooth is at the time the temporary tooth is absorbed.

Q. Just prior to the beginning of that absorption, and before the permanent tooth forces its way up, so as to erupt the first tooth, the first tooth fits practically over the permanent tooth, doesn't it? A. Yes.

Q. And between that permanent tooth and the first tooth there is this process, or tissue, as you have defined it, is that right? A. The process comes out on the outside of the root, and between the roots.

Q. That is, nature provides that, does it not, for the protection of the permanent tooth, until it comes through? A. (Not answered).

The Court: You mean there is a process between the deciduous teeth and the permanent teeth?

Mr. Hauser: Yes, your Honor.

By the Court: Q. Is there a process between

Dr. Julius Minez—Cross

the deciduous teeth and the permanent teeth? A. No, sir.

By Mr. Hauser: Q. There is something around the permanent teeth, is there not? A. Yes, sir.

10 Q. Which acts as a protection to the permanent teeth? A. To hold the teeth, yes.

Q. In place, until nature provides for it being thrown out? A. Yes.

Q. That is correct, isn't it? A. Now, you speak about the temporary or permanent teeth?

Q. I am speaking of both. A. The process is only around the permanent teeth at that time.

Q. That is covered, in turn, by the roots of the first teeth and the crown of the first teeth, isn't it?

A. What age do you speak?

20 Q. We are speaking now of ten years. A. At that time there is no process around the roots of the temporary teeth at all, only soft tissue.

Q. And that is there for the protection of the permanent teeth, isn't it? A. The process is for the protection, to hold, to support, the permanent teeth.

30 Q. Assuming the first teeth had roots at that time, how far down below the top of the permanent tooth would those roots extend in a child of ten years of age? A. There are no roots; the roots are practically gone at the age of ten.

Q. That is not so in every case, is it? A. In every normal case.

Q. Is it so in every case? A. There are exceptions to—

Q. Yes. Now, take the case of an exception; how far down below the top of the permanent tooth does the root of that first tooth extend? A.

40 You mean where the permanent tooth is present?

Dr. Julius Minez—Cross

Q. Yes. A. If the permanent tooth is present it is a normal case, and there are no roots at that age.

Q. You do not mean to say that it is so in each and every instance without exception, do you? A. Why, I speak of the rule. 10

Q. But there are exceptions to every rule, as you know? A. I suppose there are.

Q. Now, do you want me to understand that it is an impossibility to fracture the jawbone of a boy ten years of age without getting the forceps down a half an inch or more below the gum? A. No, sir, not at the age of ten, because—

Q. If you assume the teeth to be extracted have both roots for a molar in a boy ten years of age, do you want us to understand that the jaw cannot be fractured in the extraction of that tooth, without getting the forceps down more than half an inch below the surface of the gum? A. No, because if you bring any force on the tooth in any direction that tooth will come directly out. The only way you can fracture a jaw is by applying the force so that it will bend the jaw in a different direction entirely. 20

Q. Do you admit, then, doctor, that the force used in extracting the tooth may fracture the jaw? A. Not at the age of ten. I conceive it is impossible to fracture the jaw. 30

Q. Would you say it was absolutely and physically impossible to fracture a jaw in the extraction of the first teeth? A. I imagine a blacksmith might do anything of that sort, but a dentist could not.

Q. I ask you again, do you think it physically impossible— A. It is impossible. 40

Dr. Julius Minez—Cross

Q. Without exception? A. I would not say that.

Q. Then you do not mean it is physically impossible? A. If a man has had any experience in the teaching in college, I am pretty certain he
10 would not fracture a jaw by the extraction of a tooth at the age of ten.

Q. Now, doctor, assume that a person attempted to extract the tooth of a boy ten years of age, a first molar, and a fracture resulted in consequence of that extraction, would you say that the man who extracted that tooth had ordinary competence and skill? A. Pardon me, I did not quite understand it.

Q. Assuming that a boy ten years of age has a
20 tooth extracted by a man operating as a dentist, and as the result of which the left-lower jaw is fractured, would you say that the man who did the operation employed a sufficient amount of competence and skill? A. I should judge that man has never—

The Court: That is not what you are asked.

A. Why, yes.

Q. You understand my question, doctor? A.
30 Yes, sir, I do.

Q. You say a man who fractured a boy's jaw in extracting a tooth had used sufficient amount of competence and skill, do you mean that? A. The man would have to be entirely incompetent to fracture a jaw.

Q. I am not fencing on that. But, assuming that an assistant in your employ operates upon a patient in the extraction of a first molar, the pa-
40 tient being ten years of age, and as a result of the

Dr. Julius Minez—Cross

operation the patient's lower jaw is fractured, do you think that your assistant had employed a sufficient amount of competence and skill in the extraction of that tooth to bring about a fracture? A. No, he has not.

By the Court: Q. Doctor, if I understand your testimony, the exercise of reasonable skill in the extraction of a deciduous molar in a child ten years of age would not require any laceration of the soft tissues? A. There is always a little soft tissue hanging on the tooth, it makes no difference how loose the tooth is, there is always the gum line—what we call—slightly attached to the temporary tooth. 10

Q. So that even though the root of the deciduous molar is practically absorbed, there will still be some laceration of the gum in extracting it? A. Some laceration in extracting, yes. 20

By Mr. Hauser: Q. Are you at all familiar with necrosis? A. Yes, sir.

Q. Would you say that the extraction of a deciduous molar, with roots totally absorbed, could have brought about a condition of necrosis in the jawbone? A. By infection.

Q. Any other way? A. Not through the extraction of the tooth.

Q. And what would be the evidence to you of there being infection there which would bring about necrosis? A. Infection? 30

Q. Yes. A. There would be pain, there would be also the—in necrosis there is a general fetid odor, and pus, swelling.

Q. When would that begin to evidence itself? A. Why, as soon as the necrosis. 40

Dr. Julius Minez—Cross

Q. When would that be? How many days after the extraction of a tooth of that kind? A. Possibly a week, two weeks, it might vary in different cases.

10 Q. Assuming that the patient was a normal individual, that there was a total absence of any abscessed tooth at the time of this extraction, when, in your judgment, would there be any evidence of necrosis following an extraction of a tooth not having any root? A. Why, it depends how rapidly the infection takes place; now, sometimes it may extend over a couple of months.

20 Q. How do you think an infection of that kind might be transmitted to the patient? A. By having the instrument not sterilized, the hands not clean, or using any other substance that is not thoroughly clean.

Q. In what other way can necrosis come about? A. Through an abscess.

Q. Outside of the abscess, what else? A. By striking the jaw a blow; or simply by rupturing the blood vessels.

Q. That might come about through excessive laceration, might it not? A. Why, it may.

30 Q. You never saw the boy in this case, did you? A. No, sir.

Q. Never examined him, of course? A. Never.

Adjourned to March 16, 1915.

Dr. Joseph Knef—Direct

Second Day.

Newark, N. J., March 16, 1915.

Continued pursuant to adjournment.

Appearances as before.

10

DR. JOSEPH KNEF, sworn for the defendant:

Direct-examination by Mr. Demarest:

Q. Dr. Knef, you are a dentist? A. Yes, sir.

Q. How long have you been practicing? A. Since 1903.

Q. Where do you practice? A. Newark, New Jersey.

Q. What school or college are you a graduate of? A. University of Maryland. 20

Q. What, if any, degree have you? A. Doctor of Dental Surgery.

Q. Do you have occasion in your practice to treat children around the age of ten years? A. Yes, sir.

Q. What is the condition of the first teeth of a child of the age of ten years as regards the development of the second or permanent set? A. As the second, or permanent, set erupt, the roots of the temporary teeth are absorbed, and the teeth are naturally loosened. In certain cases they are more absorbed than others; really, around the age of ten and eleven years, the roots of the temporary teeth are practically all absorbed. 30

Q. What can you say with regard to the condition of the cap, or crown, of the tooth, is that generally decayed, or not? A. Sometimes decayed, and sometimes not. 40

Dr. Joseph Knef—Direct

Q. In cases where there are decayed teeth of that variety in the mouth, would you say that that decay might tend to create, or aggravate, a condition of necrosis by infection? A. It can.

10 By the Court: Q. If it has no root? A. There is an infection, and the tooth is decayed, that temporary tooth is decayed, and the germs can get underneath and cause necrosis, yes, sir.

By Mr. Demarest: Q. What usually follows the neglect of a decayed tooth?

Mr. Hauser: That is objected to as being rather too broad and too general; it is not taking into consideration the surrounding conditions at all.

20 The Court: There is no testimony of the neglect of a decayed tooth; there is testimony of a decayed tooth.

Question withdrawn.

Q. Can a decayed tooth cause an abscess or ulcer? A. Cause an abscess, yes, sir.

Q. Does an abscess ever lead to necrosis?

Mr. Hauser: That is objected to; it is general and speculative in its character.

30 The Court: Generally I should think that question was admissible, but the uncertainty arises from the fact that it seems to be admitted here that there was no abscess in this particular case; that is Dr. Snibely says that he found no abscess, and there appears to be no proof in the case on either side that there was an abscess.

Question withdrawn.

40 Q. Dr. Knef, is it possible for an abscess to exist and be only visible to the extent of some slight irritation? A. Yes, it can exist and not be visible to any irritation at all.

Dr. Joseph Knef—Cross

Q. Now, I will repeat that former question, as to whether or not an abscess can lead to necrosis.

Mr. Hauser: It is objected to.

The Court: I will permit the question.

A. It can.

CROSS-EXAMINATION by Mr. Hauser:

10

Q. Doctor, are you in business for yourself? A. Yes, sir.

Q. And I take it for granted you are licensed by the State of New Jersey? A. I am.

Q. Do you know the plaintiff in this case, this young man here? A. Never seen him to my knowledge.

Q. You don't know anything about the condition existing at the time of the extraction of the tooth on January 29th? A. I didn't know anything about it until a day or two ago. 20

Q. Now, doctor, is it an invariable rule that the roots of teeth of children ten years of age are absorbed? A. Not an invariable rule, no, there are exceptions.

Q. Have you, in your experience, had occasion to extract the first teeth of children of that age, and found those teeth had roots? A. I have.

Q. What, to your knowledge, is the proper and necessary amount of skill to be applied in the extraction of a first tooth of a child of ten years of age where you find roots are attached? 30

Mr. Demarest: I object to that question because that is the province of the Court and jury to state.

Objection overruled.

A. Why, the skill that is used to extract the deciduous tooth is, to my mind, in a whole lot of 40

Dr. Joseph Knef—Cross

10 cases, nil; and other cases, perhaps, you must use a little bit of judgment. The practice, naturally, that a dentist gets in the extraction of teeth, he starts in at college, and, as a rule they start in on temporary teeth, for the simple reason, the big majority the roots of temporary teeth are absorbed, and it gives the student, the prospective dentist, his technique; and after getting it theoretically he has a chance to put that in practice. The teeth, to my mind, come out so easily that it seems an impossibility to do any damage to a jaw, or gum, if a little care is taken.

20 Q. But you do admit, do you not, that where roots are attached to first teeth, that some skill and care are required, more than where there are no roots? A. Where there are roots, yes, sir, but how do you know that?

Q. Isn't it possible to ascertain before extracting the teeth? A. The only way is by X-ray.

Q. Isn't it possible by taking hold of the tooth, and finding out whether it resists the sideways pressure? A. It would not determine the amount of absorption.

30 Q. But it would determine whether there was roots present or not, wouldn't it? A. Not necessarily.

Q. Is a case where roots are entirely absorbed as tight in the gum as deciduous teeth that have roots? A. It is natural roots would be implanted in the jawbone a little bit tighter than where there are no roots.

40 Q. And you can tell by pressing the tooth with the fingers whether the grip of it went below the surface of the gum or not, couldn't you? A. Not necessarily, no.

Dr. Joseph Knef—Cross

Q. Do you mean to tell the jury you could not determine that except by the use of an X-ray?

A. It is the only possible procedure to my mind.

Q. How would you extract a first tooth having roots, a molar? A. I would use a pair of forceps naturally fitted to the tooth; we have forceps for each tooth. 10

Q. What forceps would you use for the extraction of a molar, left-lower jaw, temporary tooth?

A. It depends upon the condition of the tooth whether I would use what we call a molar, or a root forceps. In a whole lot of cases I would use my thumb. We all know that a whole lot of temporary teeth are extracted by the father or mother at home.

Q. Now, doctor, where you found the roots of the teeth had been fully absorbed, and it easily gave to the fingers, would not you extract that with your fingers, or use a forcep? A. It depends upon the condition of the patient. 20

Q. Take it to be a wholly normal patient, ten years of age, nothing wrong with him, and he had previously had another molar extracted, just about nine days prior to this extraction? A. Temporarily molar?

Q. Yes, immediately adjoining this one, and you found this quite loose, with the root absent, what method would you employ to remove that? 30

A. I would use different methods. I might use a forcep; I might use a regular molar forcep; might use the root forcep.

Q. And you might pull it out with your fingers?

A. I might force it out with my fingers.

Q. How much laceration would there occur to the gums in removing a tooth without any roots?

A. The temporary tooth? 40

Dr. Joseph Knef—Cross

Q. Yes, we are only speaking of temporary teeth. A. There should not be much laceration.

Q. Would there be, in your extraction of the tooth by an ordinarily skilled operator, such an amount of laceration as might lead to necrosis? A. I hardly think so, but—

10 Q. Doctor, is it possible that a condition of necrosis might come about through the use of unclean instruments in the extraction of that tooth?

A. That may be, that is certain.

Q. And might it also come about by the use of a probe thereafter in the cavity left after the extraction of the tooth? A. Yes, that could come about in two ways.

20 Q. How else could necrosis be brought about, doctor, in the left-lower jaw? A. Necrosis can be brought about through infection naturally of an abscess there.

Q. What other ways? A. The tooth extracted, perhaps necrosis might form there by the patient himself going in there with his finger nails, as children, or old men do, often, to see how big the hole is.

30 Q. What other way? A. It may also be produced by unclean instruments, as you say. There is oftentimes, in that condition, when the wound is open, the person will not keep his mouth clean; his own dirty mouth can affect the tissues through neglect on the part of the patient, or the mother, if it is a minor child; it can go further and further in in the jaw, and perhaps start in some remote place, where you would never think of.

40 Q. How else can necrosis be brought about, doctor? A. Well, if you should injure any fragment of the alveolar process, or fracture the jaw, you can have necrosis there, if the case is neglected.

Dr. Joseph Knef—Cross

Q. You haven't any doubt about that being so, have you? A. No.

Q. It might be brought about through violence, or a blow, might it not? Necrosis, I am speaking about. A. A blow from the outside, you mean?

Q. Yes. A. Yes.

Q. An improper, or careless, extraction of the tooth? A. Well, that can happen, too. 10

Q. Doctor, what can you tell us about the so-called process underneath the temporary teeth, between that and the permanent teeth; what is its character? A. Why, it is very cancellous in a very young child, gets harder as the patient gets older. The process naturally is spread apart at the time of the eruption of the second tooth, if everything is going naturally and normally. The process around each tooth has got its natural thickness. That process is not as thick as in a full-grown child, because the jaw itself is not as large, it stands to reason it cannot be. In the temporary teeth the roots are absorbed, the tooth underneath forces it up, the constant eruption of the permanent molar coming through is what causes the absorption of the temporary root. 20

Q. Now, is this process of a bony character, or is it soft tissue? A. Bony. 30

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

Q. In the case of a first tooth? A. Unless you mean the gum on the outside of the process. You have your gum, and your periodontal membrane, and your process, and that is attached to the jawbone.

Q. And the process is attached by nature as a means of protection for permanent teeth prior to the loss of the first teeth, am I right? A. Just repeat that, please. 40

Dr. Joseph Knef—Cross

Q. This bony process is intended by nature as a means of protection for the temporary teeth until the permanent teeth are formed; it is inside, between the roots of the first teeth and the structure of the permanent teeth, is it not? A. No; you
10 have a membranous tissue there.

Q. Will you be kind enough to indicate with your finger, if you can, the exact position of the first teeth with respect to the permanent teeth immediately under it? How are they superimposed?

A. Take a molar, for instance, there are two roots, and the permanent tooth will come up between the two, underneath, that way (illustrating). As it comes up the pressure causes the absorption of these roots.

20 Q. Now, in the matter of your extracting teeth, first teeth, where the roots have not been absorbed, do you cut through the process? A. Partly.

Q. Do you consider it good practice to break through or cut through, the entire process? A. I would not consider it myself, no. That would depend on conditions, though, whether you would have a method of procedure.

30 Q. How would you ascertain the necessity of that, other than by X-ray? A. Well, the X-ray, naturally, will only show the condition. The procedure there would be, in my opinion, to get at it, if the roots were separated from the crown, perhaps little slivers of roots were left in there, I would use the smallest instrument I could to get under them, and get it out. I have also, at times, in case of emergency, used my forceps, and in using them, perhaps, you would lacerate the gum a little more than if you used a smaller and more
40 delicate instrument.

Dr. Joseph Knep—Cross

Q. As a general proposition do I understand it to be your aim and intention, and that of all competent and skilled operators, to do as little damage to the process as possible? A. We all should, and I try to.

Q. And that is good practice, is it not? A. It is good practice where you can do it. 10

Q. It is possible to be done in every case, isn't it? A. In practically every instance. Sometimes I have to destroy the process to get at it.

Q. That is not usual? A. No.

Q. Assume a child ten years of age, in good normal condition, and in good health, except for a slight nervous condition to which he has been subject for some time, and having no visible evidence of any abscess, or visible evidence of disease, except as to the tooth which is about being extracted, what would be the natural result in the extraction of a first molar? 20

Mr. Demarest: I object to the question because it is based upon the supposition that there was only a slight nervous tendency, when the evidence shows the boy was out of school for two years.

The Court: Strike out the word "slight."

Q. Yes, suffering from nervousness. A. Put that question again for me, please. 30

Q. (Question read as follows: "Assuming a child ten years of age in good normal condition, and in good health, except for suffering from nervousness, to which he has been subject for some time, and having no visible evidence of any abscess or visible evidence of disease, except as to the tooth which is about being extracted, what 40

Dr. Joseph Knef—Cross

would be the natural result in the extraction of a first molar?") Let me add, when I speak of disease of the tooth, I mean decay of the tooth about to be extracted. A. Well, as you say "no visible" do you mean just from the eye, that you observe?

10 Q. No, to the operating dentist. A. Yes, I mean to his eye. He says no abscessed condition, or other diseased condition of the jaw.

Q. My question is based upon the statement made by the operator, that he found no abscessed condition there at the time of the extraction of the tooth. With that information can you answer? A. I do not quite get the gist of that. You will have to ask that question again.

20 Question withdrawn.

Q. Doctor, assume these facts: a boy ten years of age, in perfectly normal condition, except for being nervous, is brought to an operating dentist to have a tooth extracted which is at the time partially decayed. The dentist operating found no abscessed condition existing; what, in the use of their ordinary amount of competency and skill would be the natural and proximate result of the extraction of a first tooth under those circumstances.

30 Mr. Demarest: Objected to as not stating the means of extraction.

The Court: The objection is overruled.

An objection to this ruling is noted by the defendant as ground of appeal.

A. Why, I should think, under such condition, with ordinary care that tooth could be taken out.

40 Q. Without any bad results thereafter? A. Well, now, any bad after results, that is a broad

Dr. Joseph Knef—Cross

question. I might take out a tooth and have it come out very cleanly, we will say a permanent tooth; which, I think would be more liable to cause necrosis, take it out and be as clean a job as you could expect, absolutely no laceration, breaking of any bony process; wash that out, keep it in good condition; it seems to me the patient after that had been reasonably sure that all danger of infection had passed, and still that patient can come back a short time after presenting a necrosed condition. 10

Q. But, in the ordinary run of patients of the kind I have described to you, and the condition as then existed, would you say that any other than normal results would be anticipated by you? A. I would expect a normal result to follow, yes. 20

Q. Doctor, if you assume that proper instruments were used in that operation, and the condition existed as I have already described to you, and it subsequently developed that the jaw was fractured, can you tell from your knowledge of the facts as I have laid them before you, how that fracture might have been caused? A. I cannot see how the fracture of a jaw can be caused by pulling a temporary tooth, if proper procedure has been taken, and proper instruments used. Because the force exerted to fracture a jaw, complete fracture—do you mean of the jaw, or process? 30

Q. The lower-left jaw, a complete fracture? A. I do not believe you can completely fracture a lower jaw by extracting a temporary tooth.

Q. You are not, however, prepared to say that such a thing is physically impossible, are you? A. I think it is impossible, yes. 40

Dr. Joseph Knef—Cross

Q. Doctor, cannot a jaw of a child of ten years of age be more readily fractured than that of an older person in the extraction of a tooth? A. Extraction of temporary tooth?

Q. Yes, with roots. A. I don't think so, no.

10 Q. It is possible, isn't it? A. Why, I cannot conceive why it should be possible, no.

Q. You mean it is not probable; you do not mean it is impossible, do you? A. If I cannot conceive of the idea how it can be done, I could not see how it could be possible.

Q. You do not want to be understood as being an authority on the question, as against other testimony that has been produced here that such a thing might have happened? A. I do not think it
20 could be produced, that you could fracture the true jaw bone by extracting a deciduous tooth at the age of eleven years, because there is a certain amount of absorption there.

Q. That is your personal opinion? A. That is my personal opinion.

Q. And you do not set that against anybody else's on the same point, do you? A. No, because their opinion is their own.

Q. And it is based upon a little more intimate
30 knowledge of the facts and circumstances of the case than you have had at present?

Objected to.

Objection sustained.

Q. Doctor, what do you give a patient to wash the mouth with after the extraction of a tooth? A. I prescribe my own formula.

Q. Do you use glyco-thymoline? A. For myself, never for a patient.

Q. Ever give it to a patient for antiseptic, or
40 disenfectant? A. I do not, no.

Dr. Joseph Knef—Cross

Q. Do you think it is a good one to give for an abscessed condition of the gums? A. It might be, but I have never used it, because I consider it a proprietary preparation, and I think dentists should be able to prescribe their own formula, although it is used by other very prominent men of the medical and dental profession. 10

Q. It has considerable alcohol in it, hasn't it? A. I don't know just what per cent, perhaps ten per cent, perhaps more.

Q. Doctor, assuming that the dentist in operating on this child, ten per years of age, found, as I have said, no abscessed condition, and extracted this tooth, how long thereafter would necrosis evidence itself if it were present?

The Court: How soon, do you mean? 20

Q. Yes, sir, how soon after the extraction of the tooth? A. If the necrosis was there?

Q. No. A. Oh, if it left a necrosis?

Q. Yes. A. Why, that could happen, within, I should say, ten days.

Q. And how would it make itself known to you? What would be the outward indication? A. Why, in some conditions of necrosis, there is a certain amount of swelling, inflammation, there is pain, chills and fever, irritability of the patient, loss of appetite and sleep. Then, again, another patient, there is necrosis going on for a considerable length of time that, perhaps, would annoy him, give him an uneasiness, and until it manifested itself to such a degree that it caused some constitutional disturbance, or, perhaps, burst out through the softer tissues, producing a lesion, why, it is not known. In a number of cases we know that conditions of necrosis exist in the jaw 40 30

Dr. Joseph Knef—Cross

bone, perhaps, for a year, two years—I am speaking now of permanent teeth—of course, it is in the jaw bone—

10 Q. Pardon my interruption, I want you to confine yourself, if you will, to children ten years of age, because that is what we are dealing with, not with grown-ups. A. I do not see why it should make any difference in children, outside of, perhaps, it would manifest itself a little more rapidly.

Q. If the jaw bone were fractured in the extraction of that tooth how soon would the evidence of that be visible to you? A. It should be visible at once.

20 Q. And if the patient, after leaving your office, suffered continual pain so that he was unable to sleep for four days and nights, and unable to eat, except liquid food, what would that indicate to you? A. It would indicate—it could indicate different conditions.

Q. Could it indicate a fracture to you? A. Well, it could, but the indication should be there long before he lost those four sleepless nights.

30 Q. Doctor, assuming that the day following the extraction of this tooth the child's mother got in touch with the dentist over the telephone, and applied home remedies, and the day following that brought the child to the dentist, and for several days thereafter, and this condition of pain and suffering, and loss of sleep, and inability to eat, continued, what would you then say with regard to a fracture? A. I would first of all ascertain whether there was really a fracture there before I would treat a fracture, we must diagnose the case, and know it was there.

40 By the Court: Q. You are asked by this ques-

Dr. Joseph Knef—Cross

tion to diagnose the case; that is the effect of the question; diagnose the case with those given facts. A. Well, I would make a procedure to diagnose whether the jaw was fractured.

By Mr. Hauser: Q. Would not those symptoms indicate something to you? A. They would indicate that there is something, some constitutional disturbance there, yes. 10

Q. And would you include fracture of the jaw bone in the term "constitutional disturbance"? A. Why, no, I—you do not quite understand me. To bring about really a fractured jaw at the time that tooth was extracted, I would suppose that the jaw had been fractured then. If he had had a fracture, a true fracture of that jaw, there would be symptoms there that would show themselves immediately; he could not close his teeth right, he would have a certain amount of swelling there; he would have, perhaps, an angina on the bottom of the jaw. He would have a whole lot of pain; and even to close his teeth—you must understand, the lower jaw is mobile that is, moving, while the upper jaw is stationary. When you have got a fracture of the lower jaw, if the fracture was on the left side, we will say here (indicating) you have got from your process up to here (indicating); that part is loose; you have got from the line of the fracture, from here to here, is loose; if you bite on that side you are going to tilt it, and push that side up; if you bite on this side, you are going to hold this down; you are going to have the scraping motion, or rubbing motion there, which, with a fractured jaw, would show itself immediately. I think, if I would fracture a jaw in the extraction of a 20 30 40

Dr. Joseph Knef—Cross

tooth—I never did, but I have a patient, he would show on himself, because the average man—I have set a number of fractured jaws, and every one that comes in, until you put them in apposition, there is a strain on the muscles, and inflammation that—

10 The Court: Oh, now, Doctor, we are interested in lectures, but we have not time for them here.

Q. Now, come back to my original question, and tell me from those symptoms as laid down to you, what would you deduce prior to making a physical examination? A. Why after having extracted his tooth, and he came in with these conditions, that he could not sleep nights, the first thing I would do naturally, would be to look in the mouth.

20 Q. Prior to that, Doctor, would not those symptoms indicate to you anything, what I have already described to you, would not those symptoms indicate to you the possibility of a fracture, just from those statements, without an examination? A. Yes, he could have a fracture by those symptoms.

30 By the Court: Q. Doctor, I understood you to say that if a little care be taken with the extraction of a deciduous molar in a child ten years of age, that there would be no injury to the jaw, is that correct? A. Yes.

Q. Assuming that, as a matter of fact there was a fracture, would you say that ordinary care had been used in the transaction of a deciduous molar in a child ten years of age? A. Yes, you could have taken ordinary care.

Q. And yet fracture the jaw? A. I do not believe it possible to fracture a jaw—

40 Q. That is not my question. I asked you to as-

Dr. Joseph Knef—Re-direct

sume that the jaw was fractured, taking the facts as I have stated them, and assuming, as a matter of fact, that the jaw was fractured, would you say that ordinary and reasonable care had been used by the dentist? A. No, I could not say that.

Q. Well, what would you say, that ordinary care had not been used? A. I must say that, if I do not think that ordinary care was used. 10

RE-DIRECT-EXAMINATION:

Q. Assuming the facts to have been as Mr. Hauser stated them, and, in addition to those facts, assuming there was some irritation, would that change your opinion as to what might be the condition of the jaw? A. I do not quite get that.

Q. Mr. Hauser put a question to you asking you to assume certain facts, do you remember that question? A. Yes. 20

Q. There was nothing in that question that indicated that there was any irritation present, I want you to take the same question, and assume there was irritation.

Mr. Hauser: I object on the ground the facts which have been put in evidence show there was no irritation.

The Court: No, Dr. Snibely said there was some irritation. 30

Mr. Hauser: I will withdraw the objection.

A. Irritation of what, the jaw bone?

Q. The gum? A. Why, the irritation might indicate, perhaps, an abscessed condition, it might indicate that there might be pus there.

Dr. Morris Eckler—Direct

RE-CROSS-EXAMINATION:

Q. Just one more question, Doctor, could that irritated condition exist without there being any abscess present? A. Well, you could have an irritated condition.

10 Q. And that would not necessarily alone, and without junction with some other causes, produce necrosis? A. Not irritation alone.

Q. Doctor, in addition to what I have already asked you, if you were informed that subsequent to the operation the boy dug out splinters of bone from that jaw, would that be any additional indication to you that there had been a fracture?

20 Mr. Demarest: Objected to on the ground it is not proper re-cross-examination.

The Court: It does not seem to be.

Mr. Hauser: I will not press it.

DR. MORRIS ECKLER, sworn for the defendant:

Direct-examination by Mr. Demarest:

30 Q. Dr. Ecker, you are a dentist? A. Yes, sir.

Q. How long have you been practicing as such?
A. 1911.

Q. Where do you practice? A. 147 Fourth Avenue, New York City.

Q. Are you licensed to practice in that State?
A. Yes, sir.

Q. And in New Jersey? A. Yes, sir.

40 Q. What school or college have you graduated from? A. New York College of Dentistry.

Dr. Morris Eckler—Direct

Q. With a degree? A. Yes, sir.

Q. What? A. D. D. S.

Q. Do you specialize in your practice at all?
A. Yes, sir.

Q. What is the line of your specialty? A. Ex-
traction of teeth and oral operations. 10

Q. Do you have occasion to treat conditions of
necrosis from time to time? A. Yes, sir.

Q. Have you treated such conditions? A. Yes,
sir.

Q. What do you find as causes for a condition
of necrosis? A. Usually traumatic conditions,
injury.

Q. By traumatic you mean just what? A.
Traumatic means injury.

Q. Force of some kind? A. Force. 20

Q. Well, name over some of the conditions that
might cause necrosis? A. A blow, a fall, a
foreign substance; that is all there is, force and
injury, traumatic conditions in every sense.

Q. Can it be caused by infection from a decayed
tooth? A. Necrosis, yes.

Q. Notwithstanding the fact that that decayed
tooth has its roots absorbed to a greater or less
extent? A. Why, you might have necrosis whether
the roots are absorbed, or not. 30

Q. Has an abscess anything to do with ne-
crosis? A. Yes, sir.

Q. What? A. Leads on to it, breaks down the
healthy tissues, causes weakening of the bone
cells.

Q. Would you say that extracting a tooth where
there is a condition of irritation might tend to
increase pain theretofore suffered to any extent?

Mr. Hauser: I object on the ground the 40

Dr. Morris Eckler—Direct

question is too general in form, it does not state the amount of irritation.

The Court: The question is very leading, Mr. Demarest.

Question withdrawn.

10 Q. If a tooth is extracted, I am speaking now of deciduous molar, or first teeth, and there is a condition of irritation present, what results are likely to follow?

Mr. Hauser: I renew my objection on the similar ground, that there are no sufficient facts as to the amount of irritation upon which the question may be based.

The Court: The objection is overruled.

A. May I hear that again?

20 Q. (Question read.) A. Usually a healthy condition.

Q. In other cases an abnormal condition?

Objected to.

The Court: That is leading.

Q. Have you ever had occasion to scrape a necrosed bone? A. Yes, sir.

Q. Does the scraping of necrosed bone require, in your opinion, more force than the extraction of a deciduous molar from a boy of ten years of

30 age?

Mr. Hauser: I object to that; there is no evidence here how much force, if any, was applied in the scraping of the bone of the plaintiff.

The Court: The objection will be overruled.

A. It does not require very much force to scrape a bone, a necrosed area.

40 Q. Comparing it with the force necessary to re-

Dr. Morris Eckler—Cross

move a tooth such as I have described, which requires the greater amount of force? A. All depends on what condition this temporary tooth is in; as a rule it would require very little force to extract the temporary teeth, the child being ten years of age, the roots are largely absorbed, and require very little force to displace those temporary teeth. 10

Q. Is it possible, in your opinion, to injure a jaw bone so as to cause necrosis by probing? A. No, sir.

Q. Is it possible to make that injury by making an incision? A. No, sir.

Q. Notwithstanding due care is not used.

Mr. Hauser: I object to that. That is absolutely improper. There is no evidence of that kind here. 20

The Court: I sustain the objection.

CROSS-EXAMINATION by Mr. Hauser:

Q. Doctor, do I understand you to say that the cases of necrosis which you have treated have been generally due to some traumatic cause? A. They are usually due to traumatic causes.

Q. And in the main by reason of an injury received through a blow or fall, or something of that kind? A. Usually necrosis will follow. Necrosis may follow both constitutional and local disturbance, usually caused by local, and then followed by constitutional. 30

Q. Will you be kind enough to distinguish between the local and constitutional causes? A. A necrosis is always followed—that is to say, a necrosis is a result of a local or external cause, followed by a constitutional disturbance, such as the breaking down of tissues. 40

Dr. Morris Eckler—Cross

Q. And it would ordinarily, under your explanation, follow a fractured jaw, would it not?

A. Why, you may have a fractured jaw first, and then necrosis.

10 Q. Yes, that is what I mean, that could naturally follow? A. Necrosis could follow a fractured jaw, yes, sir.

Q. Did I understand you to say that it is physically impossible to fracture a child's jaw ten years of age in the extraction of a first molar?

A. Absolutely impossible.

Q. Do you mean to be quoted as an authority on the point that no such thing ever did happen?

20 A. Not if there was no infection, or breaking down of tissue by virtue of a necrotic jaw bone present, it would be impossible.

Q. And that irrespective of the skill used by the operator? A. Irrespective of skill.

Q. Doctor, you do know, don't you, that a jaw can be fractured through the extraction of teeth?

A. Not unless there is a carious, or infectious condition prevailing.

Q. You are positive of that? A. I have been with a specialist for twenty-five years.

30 Q. Even specialists are sometimes mistaken? A. I have never seen a fracture from an extraction unless there has been a necrotic condition prevailing, because nature has provided teeth with process and only two things can happen, the teeth can fracture, or the process can fracture, and, if the Court will permit me, I have a specimen in my pocket that I extracted yesterday.

The Court: As I stated to the other witness, the Court has not time to listen to lectures.

40 Q. What is your practice in extracting the first

Dr. Morris Eckler—Cross

molar after the roots have been absorbed, and you find the tooth loose? A. Simply remove it. I use a pair of forceps, and use the force necessary to remove the tooth, all depending on the condition of the crown, and leaning over toward the outside of the mouth, and the outside is firmer, you extract your tooth toward the part which is firmer. 10

Q. What position do you assume in extracting a tooth? A. The position has nothing to do with it; a man's habit, a man's way.

Q. Is it possible in the lack of skill of the operator, in the method of holding the jaw with one hand, while extracting the tooth with the other, to bring about a fracture? A. Apt to bring about dislocation, but not fracture. 20

Q. No matter what force is applied? A. Not unless he went through the jaw bone down to the bottom of the mouth.

Q. How deep do you put your forceps when you extract a molar having roots? A. That I cannot tell you. To extract the tooth requires no force to be applied except a little below the crown of the tooth, to remove it.

Q. Can you tell me how far below the first tooth is? A. Starts at the gum line. 30

Q. Is it as much as half an inch, or more, below the first tooth? A. The jaw bone?

Q. Yes? A. The jaw bone starts right at the neck of the tooth; the crown is perhaps three-eighths of an inch in length, a temporary tooth.

Q. I am speaking of a ten-year-old boy? A. A temporary tooth.

Q. Do you consider it good practice to cut through, or break the process surrounding the 40

Dr. Morris Eckler—Cross

tooth? A. It does not make any difference whether you remove the process or not.

Q. Do you consider it good practice to fracture, or break, or cut through the process in removing a first tooth? A. No, certainly not.

10 Q. Doctor, assuming that after the extraction of the first tooth, having roots, it was ascertained that the jaw bone had been fractured, would that be any evidence to you that proper skill, or reasonable care had been used by the operator?

Mr. Demarest: I object to that because the question fails to include when this fracture was discovered.

Q. Well, within ten days after the extraction?

20 Mr. Demarest: I object to it now; it does not properly state the facts.

(Question read.)

The Court: The objection to that question will be overruled.

An objection to this ruling is noted by the defendant as ground of appeal.

Q. You may answer, Doctor? A. I do not quite get the trend of that.

Q. (Question read.) A. I do not quite get that.

30 By the Court: Q. If as a matter of fact there was a fracture after the extraction of a tooth such as has been described to you, would that indicate to you that the operator had used, or had not used, proper skill or care? A. It would not indicate that he did not use proper method of procedure; there would not be enough to show that the fracture was caused by the extraction of this tooth.

40 By Mr. Hauser: Q. You mean it would not be any evidence to you that he had not been skill-

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ful or careful? A. There would not be evidence enough to show that the jaw had been fractured by the extraction.

Q. Now, let me put the question to you, then. Assuming this boy to have had a tooth extracted at about eight o'clock in the evening, that he suffered pain continually thereafter, did not sleep one night in four, was unable to eat, that pieces of bone came through the gum into his mouth, that the only treatment given to him by the dentist who operated on him was washing his mouth out with glycothymoline, and that the condition existed for a considerable length of time, would that be any indication to you that proper skill and reasonable care had not been used in the extraction of that tooth? A. Certainly not. 10 20

Q. Doctor, what would be the outward evidences of a fracture of the jaw bone, and how soon would they make themselves known? A. How soon does a fracture make itself known?

Q. Yes, after the extraction of a tooth? A. At the very moment of the extraction, or the moment following the extraction.

Q. In what way? A. There is a click when the two parts sever, that way (indicating by snapping the fingers). 30

Q. And if the operator after the extraction of the tooth walked into the next room, and gave the patient no attention, would you say he would know whether there was a fracture, or not? A. He would know, because the child would be unable to close his mouth, if a fracture existed.

Q. Even though the ends of the fracture were in apposition? A. The moment he would close his mouth they would part. 40

Dr. Morris Eckler—Cross

Q. It is possible, isn't it, for that condition to exist, without closing his mouth? A. Once a fracture it would be impossible to set the fracture without a great amount of skill being used, to set the fracture.

10 Q. I am speaking now of the fracture existing with the two ends in apposition, isn't that possible to exist? A. It must break first.

Q. True. A. Then how could it go back into position when once displaced?

Q. You do not think that is impossible? A. I think it is impossible, if once fractured.

Q. And if an expert physician testified that he found the jaw bone in direct apposition, would you still say that the jaw bone could not have been fractured in the way I have described? A.
20 It would be impossible.

Q. Notwithstanding the proofs? A. Notwithstanding the proof, yes, sir.

Q. Assuming that the operator found no abscessed condition of the boy's mouth at the time of the extraction of the tooth, by what other means than violence or force, could the necrosed condition be received? A. By the infectious condition that may be going on irrespective of visible signs of abscess prevailing.
30

Q. It might also come from dirty instruments, might it not? A. Very seldom, regarding this case as being a temporary tooth with the roots partly absorbed.

Q. Do you mean that, on your standing and reputation as a practicing dentist and surgeon?
A. Absolutely.

Q. You do not have any faith in the matter of sterilizing instruments, then? A. I certainly do.
40

Dr. Morris Eckler—Cross

Q. Do you mean to tell this Court if these instruments were not sterilized this might not have happened? A. It might happen even from sterilized instruments.

Q. It is more likely to happen from unsterilized instruments? A. It might happen with sterilized instruments. 10

Q. As a practicing dentist in New York City do you consider it good practice, and in accordance with the obligations of your profession, to operate on patients with instruments that have not been sterilized? A. Certainly not.

Q. And you would not think that good practice on the part of any other dentist, would you? A. Certainly not.

Q. Doctor, eliminating from consideration the matter of fracture of the jaw, how soon after the extraction of a tooth would necrosis evidence itself, if, at the time of the operation, there was no abscessed condition found, and proper instruments had been used, assuming necrosis subsequently followed? A. Necrosis may be there, irrespective of any evidence— 20

By the Court: Q. You are asked to assume it subsequently developed, that it was not there? A. Why, it might occur at any time, it may be a week, ten days, may be months. 30

By Mr. Hauser: Q. But, taking the condition of a normal person, who suffers from nothing but a nervous condition, and who a week or ten days previously had had an adjoining tooth drawn by the same operator, from which no ill effect resulted, how soon after the extraction, in your opinion, would necrosis evidence itself if not present at the time of the operation? A. Why, you 40

Dr. Harry W. Doremus—Direct

could not really tell, unless you had taken an X-ray right away, and it might occur a week or ten days; it can be dormant; may be there for months after.

10 Q. Do I understand you to say positively that necrosis cannot come from a fractured jaw bone unless there be infection present? A. Why, no, not necessarily; you may have necrosis follow a fracture.

Q. Doctor, will pus naturally follow and collect as the result of a fractured jaw bone? A. Yes, sir, pus will follow a necrotic condition.

By the Court: Q. Doctor, is necrosis very likely to follow a simple fracture where there is no infection, or no constitutional disorder? A.
20 There must be an infectious condition.

RE-DIRECT-EXAMINATION:

Q. Is necrosis a common condition among children? A. More prevalent among children.

Mr. Hauser: I move to strike the answer out as not being responsive.

The Court: I think the answer may remain.

30 Defendant rests.

DR. HARRY W. DOREMUS, sworn for the plaintiff in rebuttal:

Direct-examination by Mr. Hauser:

40 Q. Doctor, what is your profession, please? A. Practice of dentistry.

Dr. Harry W. Doremus—Direct

- Q. In the City of Newark? A. Yes, sir.
- Q. Are you licensed by the State of New Jersey? A. Yes, sir.
- Q. How long have you been practicing? A. About a year and six months, seven months.
- Q. For yourself? A. Yes, sir. 10
- Q. And prior to that with whom were you connected? A. Dr. J. B. Davidson.
- Q. Are you a graduate of any dental college? A. Yes, sir.
- Q. Which? A. Baltimore College of Dental Surgery.
- Q. What degree have you? A. The degree of dental surgery. Licensed in Massachusetts and Maryland.
- Q. Have you made a specialty of any character of work? A. I have made a practice of extracting. 20
- Q. You were present yesterday during the course of this case? A. Yes, sir.
- Q. And you heard the testimony of Dr. Snibely? A. Yes.
- Q. And of Dr. Betts? A. Yes, sir.
- Q. And of Dr. Minez? A. Yes, sir.
- Q. Have you heard Dr. Ecker this morning? A. A few words. 30
- Q. Will you kindly tell us the proper method of extracting a first tooth? A. Extracting a first tooth the first method is to use great skill unless you extract with it a permanent tooth.
- Q. Take the case of a first tooth having no roots, the roots being absorbed? A. You can take that out very easily by using the proper forceps.
- Q. Is there any distinction in the class of forceps you use in the extraction of first teeth where 40

Dr. Harry W. Doremus—Direct

the roots, are absorbed, and where they have not been absorbed? A. Yes, sir.

Q. Will you tell us the difference? A. I can show the difference.

Q. If you will? A. (Producing forceps.)

10 These are the forceps I use in the extraction of a permanent molar in an adult, or in a temporary molar that has roots, that is, of the first set. Any temporary tooth whose roots have been absorbed can easily be taken out, I use these forceps that are made for the purpose. You don't get but very little strain on it, simply take hold with that; you don't have to put your fingers in the patient's mouth to take it out; just keep everything absolutely sterilized; you can't get much
20 pressure with these.

Q. In the use of the second set of forceps you have just shown, how far below the top of the crown do you grasp the tooth? A. You don't go at all below the crown; just below the gum margin.

Q. Doctor, is it good practice to break through, or cut through, the process? A. No, sir.

30 Q. Would you consider an operator who did that character of work, cutting through, or breaking through the process, a careful and skilled operator? A. I would not.

Q. In the extraction of first teeth having roots, Doctor, how deep below the gums would you go with the first set of forceps you showed? A. These large ones?

Q. Yes? A. I would not go below at all; I would simply get hold of the crown, and gently loosen it, and lift it out.

40 Q. Is it possible in the extraction of first teeth,

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having roots, to extract it without damaging the process underneath? A. You can extract a first tooth without breaking the process; you will spring it a little where it joins the solid portion of the bone, but that readily heals again.

Q. Is there any practice known to you, generally, among the profession, to avoid the breaking or cutting through of the process? A. There are a great many practitioners who cut through the process, and do not care, they say it is absorbed anyway; but I have had had a great many extractions where the process stands, it is not absorbed. 10

Q. I understand you were formerly connected with Dr. Davidson? A. Yes, sir.

Q. Does he do extracting? A. He has extractions which are sent to him by a great many dentists practicing in the city who refuse to do the work themselves. 20

Q. How long were you with Dr. Davidson? A. I had Dr. Davidson's office about seven weeks while he was in Europe, doing all the extracting that came in.

Q. And I understood you made a study and specialty of extraction work? A. Yes, sir.

Q. Doctor, assuming that a child ten years of age has applied to have a first molar, with the roots attached, extracted, there being present some decayed portion of the tooth; that there was no abscessed condition found by the operator, and following the extraction of that tooth it was ascertained that the jaw bone was fractured, would you say that the operator had used a reasonable amount of care and skill in the extraction of that first tooth? A. No, sir. 30 40

Dr. Harry W. Doremus—Direct

10 Mr. Demarest: I would like to renew my objection. I believe this is the same question that was asked of the other doctor, and I would like to enter an objection to it, because the time the fracture was discovered is not contained in the question.

The Court: Of course, the question being put to the plaintiff's own witness it is objectionable as leading, and the objection will be sustained and the answer stricken out.

20 Q. Assuming that a child ten years old had applied to a dentist to have a first tooth extracted, the father being present, and there being some decay in the tooth, but there being no abscessed, or other diseased condition, found by the operator, and that subsequent to the extraction of this tooth it was found that the jaw bone was fractured, what is your opinion respecting the character of the operation? A. It had not been properly done.

Q. Doctor, can you say whether it is or is not, physically possible, in the extraction of a first tooth, first molar, of a child ten years of age, to fracture the jaw bone? A. It is possible.

30 Q. Can you tell us in what way that is likely to happen? A. The temporary tooth has roots on it; the permanent tooth which is beneath it is imbedded between the roots of the temporary tooth; if you do not gently loosen that tooth in the extraction, you get possibly half an inch of leverage which, at the end of that half inch is greatly multiplied, correspondingly with the power which is placed on the end that is not in the mouth, and
40 thereby you could fracture the jaw.

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Q. In other words, then, pressure is exerted against the temporary tooth and the permanent as well? A. The permanent as well, and through that tooth against the jaw.

Q. Is there any more than the one method of position to be taken by the operator in extracting a first molar having roots? A. A great many operators have different methods of standing. 10

Q. Have attending circumstances anything to do with that, I mean with respect to the particular location of the tooth, or the location of the disease in the tooth, the decay, rather? A. No; that would depend upon the operator, wherever he chose to stand.

Q. Would pressure upon the jaw with the one hand, while extracting the tooth with the other, be likely to produce a fracture of the kind I have described? Could it, in other words, produce fracture? A. The pressure of one hand upon the jaw while doing the extraction with the other? 20

Q. Yes. A. Putting the left hand upon the jaw while extracting with the right will lessen the possibility of fracture of the jaw.

Q. And if that be not done is there more likelihood of fracture? A. There is more possibility of fracture. 30

CROSS-EXAMINATION by Mr. Demarest:

Q. I suppose, Doctor, dentists use the same forceps, don't they? A. Every dentists do not use the same make of forceps.

Q. The makes vary in what way? A. The makes only vary in the different handle, and the beaks, generally averaging the same size.

Q. How much is there to a forcep besides the 40

Dr. Harry W. Doremus—Cross

handle and the beak? A. I can show you here; the difference is right in here, that is all (showing forceps).

Q. Just the pivot part? A. The pivot part.

10 Q. You say you have been specializing in extracting work? A. I don't say I have been specializing; I have made it a specialty.

Q. For about how long? A. About one year.

Q. In your experience gained in this one year of practice would you say that a broken jaw bone could ensue from taking out a first deciduous molar? A. It could ensue if there had not been due care.

Q. You worked for Dr. Davidson, did you not? A. Yes, sir.

20 Q. For how long? A. About seven weeks.

Q. How long ago was that? A. 1914, during July and August.

Q. You were admitted as a dental practitioner when? A. I passed my examination in July.

Q. Went to work for him after you passed it? A. Yes, sir.

Q. Where did you work before that? A. No place, except in college.

30 Q. Your total experience consists of a year and six months? A. It will be a year and six months of my own practice, but you can count from July, 1914.

40 Q. Assuming that a small portion of the process is broken in the extraction of a tooth, you say that will readily heal? A. Yes, sir. Not broken. If it is fractured away from the body of the bone it will be thrown out from the jaw; if it is not fractured away, and has some attachment, it will be healed again.

Dr. Harry W. Doremus—Cross

Q. Under certain circumstances, however, that will not heal, will it, assuming that there was an abscess, or ulcerated condition, or necrosis of the bone present, that would not heal, would it?

Mr. Hauser: I object to that. The testimony does not show there were any such conditions at the time. 10

(Question read.)

The Court: The objection will be overruled.

A. If there was any abscessed condition present, and the process had not been broken away from the body of the bone, and an antiseptic solution had been used, and washed, it would heal again.

Q. Notwithstanding the infection? A. Notwithstanding the infection. 20

Q. In every case? A. In about ninety per cent of the cases I should judge.

Q. How long would the roots of a deciduous molar be of a child ten years of age, in normal health? A. Anywhere from a quarter of an inch to three-eighths.

Q. Is that so in all cases? A. Not in every case, no.

Q. Is it possible the roots would be entirely absorbed at that age? A. It is possible they would be. 30

Q. Is it frequently so? A. It is frequently so, and infrequently so.

Q. I want to know whether it is frequently so or not? A. Well, it is about half and half.

Q. You can answer that yes or no, can't you? A. If I answer "Yes," it is not right; if you say a thing is frequently so, it is more so than if it 40

Motion for direction of Verdict

is not frequently so; but it can be so in one case, and the next case will not be so.

Q. In your experience do you find that it is so—

A. I find a great number of cases where the root has not been absorbed.

10 Q. And a great many where they are? A. And a great many where they are.

Q. About how many deciduous teeth do you presume you have extracted while you have been practicing? A. Well, I do not keep them; I do not count them; I could not say. I have extracted a number of them; enough to tell whether—

Q. Well, can you give us any idea how many you have taken out? I am speaking of deciduous molars. A. Four hundred or five hundred, six
20 hundred.

Q. In a year? A. Oh, no.

Q. In how long? A. Four years.

Q. That includes your college? A. Yes, sir.

Plaintiff rests.

Testimony closed.

30 Mr. Demarest: I would like to make a motion for the direction of a verdict on the ground, first, that there is affirmative evidence from the plaintiff's case that there was no negligence. On the second ground because there is evidence on both sides of the case, the plaintiff and defendant's, that without the use of excessive force no fracture of the jaw bone could have been accomplished, and there is no evidence of any kind that excessive force was used. And, in the third place,
40 cause it is impossible to discriminate between the

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injuries caused, or the damage occasioned, by the extraction on January 29th, and the incisions and probing accomplished by Doctors Povey, Sherman and Epstein.

The Court: The motion will be denied, and an exception to that ruling will be noted if you desire it. 10

Mr. Demarest: Yes, if the Court please.

An objection to this ruling is noted by the defendant as ground of appeal.

Counsel summed up.

The Court charged the jury as follows:

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DUNGAN, J.: Gentlemen: I shall first speak of a matter which is purely incidental to this case, and that is the motion which was made by the defendant's attorney at the close of the plaintiff's case for a nonsuit, and at the close of the entire case for the direction of a verdict, both of which motions were denied by the Court. The denial of those motions is no indication of the views of the Court upon the merits of the case. As has been suggested in the argument, you are the judges of the facts, the Court is simply the judge of the law. The denial of those motions is simply a decision by the Court that this case presents questions of fact which it is the peculiar province of the jury to judge, and not for the Court to determine. Consequently, the denial of those motions by the Court should have absolutely no 40

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weight in your consideration and determination of this case.

10 This case arises out of injuries alleged to have been sustained by the plaintiff, who is a little boy, now almost eleven years of age, through the negligent conduct of Dr. Snibely, who, at that time, was the assistant of Dr. Betts, the defendant. Under the circumstances of a case such as this, the dentist who employs an assistant is responsible for that assistant; and if you find that Dr. Snibely was negligent in his professional duties with respect to the plaintiff in the extraction of this tooth, and that his negligence resulted in the subsequent operations, and subsequent pain and suffering of this little boy, then the defendant in this case, Dr. Betts, would be guilty of negligence, being, as I have said, responsible for the acts of his assistant.

20 The fifth paragraph of the complaint states the case well, or, perhaps, better, than can be done by the Court. It is as follows:

30 "The defendant, Dr. Betts, by his assistant, Dr. Snibely, did not use due and proper care or skill in endeavoring to extract one of plaintiff's teeth, but so negligently and unskillfully conducted himself, and permitted his associates, agents and employees to conduct themselves, as to fracture plaintiff's jawbone. That defendant also, subsequent to such last mentioned occurrence, did not use due and proper care and skill in ascertaining the extent of such fracture, or to treat the same properly, so that in consequence thereof, and solely by reason of defendant's lack of care and skill, and

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by his negligence, plaintiff was obliged to, and did, submit to a number of surgical operations, as the result of which a large portion of plaintiff's jaw bone had to be and was removed, permanently injuring the patient, and crippling the plaintiff for all time." 10

You will observe in this paragraph of the complaint the word "negligence" is used many times, and this suit is founded upon negligence; consequently, before the plaintiff can recover, it is necessary for you to find that Dr. Snibely acted negligently; that is, that he did something which an ordinarily careful and prudent practitioner would not have done, or that he omitted to do something which an ordinarily prudent and careful practitioner should have done. 20

It appears in this case that Dr. Snibely, although a graduate dentist, and admitted to practice in other states, has failed to present himself to the State Board of Dentistry of the State of New Jersey for examination and registration, and that he is not a regularly authorized practitioner in this state. Not only does that appear, but it also appears that Dr. Betts, the defendant, knowingly permitted him to practice his profession of dentistry while in his employ, without such license as is required by the laws of the State of New Jersey. But, however reprehensible that may be, the statute provides its own penalty for violation. This may be, and, I have no doubt, will be taken care of by an entirely different proceeding; and, therefore, under the pleadings in this case, which do not charge the defendant to have been negligent by the employment of an unskillful as- 40

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sistant, you are not to consider that fact in determining the question whether or not Dr. Snibely exercised that degree of care and skill which was incumbent upon him as a practicing dentist. A dentist is not an insurer of results; he is not answerable for infection, or results which follow the extraction of teeth, provided he has used due skill and care in the extraction, and subsequent treatment. A dentist, offering his services to the public as such, impliedly contracts that he possesses and will use in the treatment of his patients a reasonable degree of skill and learning, and that he will exercise reasonable care, and exert his best judgment, to bring about good results. That is, he does not insure results, but he contracts that he will use his best skill, care and judgment in bringing about good results. A failure to perform this duty renders him liable for injuries caused to the patient thereby—that is, through such failure. The standard of the degree of care, skill and diligence required of dentists, is not the highest order of qualification obtainable, but is that degree of care, skill and diligence, which are ordinarily possessed by the average of the members of the profession in good standing. The important question in this case is whether or not Dr. Snibely measured up to these requirements. He says, in effect, that he did. He says this tooth which he pulled was a deciduous tooth, a baby tooth, the first tooth, which is expelled by the permanent teeth, and that he could have dug it out with his fingers; that it had no roots; that the roots had been absorbed by natural processes, and by the growth of the permanent teeth. However, he did not take it out with

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his fingers; he used forceps; and when asked why, if the tooth came out so easily, he did not use his fingers instead of forceps, he said that he thought the father would not want to pay him if it came out so easy. That is the reason he gave for using forceps. And he says that there was no exercise of excessive force; in fact, he says there was none at all, that he just lifted it right out; and that it appeared to the father that it came out easily is evidenced by his own remark to the dentist "Why, that came out very easily," but to which the dentist replied "It did not come out as easy as you think it did," provided you find that remark to have been made. 10

In addition to the testimony of Dr. Snibely a number of dentists have been produced who say that, in their opinion, a deciduous molar—which it is admitted it was—in a boy ten years of age, would have no roots; and that, even though the roots have not been entirely absorbed, some of them say it would have been impossible for the dentist to have used such force in its extraction as to cause a fracture. But the fact remains, if you believe the testimony of Dr. Epstein, that this boy had a broken jaw. How was that condition produced? Of course, if Dr. Snibely was not the cause of it, it is not incumbent upon the defendant to demonstrate who was; it is sufficient if it appear that he was not. 20 30

The testimony on the part of the father—and the boy, too, I think, although you will remember the testimony and if the Court should unintentionally misquote evidence you, of course, will disregard any such misquotation—however, the testimony of the father is that on the 20th day of 40

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January he took the boy to the defendant's office, Dr. Betts' office, and that Dr. Snibely upon that occasion pulled a tooth which was next to the one which was pulled later; he says it was the one in front, while the boy says it was the one in the back, as I recollect; however, that is not important. The father also says that on the 29th of January he went again to Dr. Betts' office with the boy to have a tooth pulled, and that the boy had not complained of toothache until that day, this bearing, perhaps, upon whether or not there was any previous abnormal condition of the jaw; although you will remember that Dr. Snibely says he only pulled one tooth for the boy. But he did pull a tooth, and he says that he pulled the tooth that the father told him to pull; that he pulled the tooth, handed the boy a glass, and went into the next room. The father says that the doctor pulled out the tooth, and walked into the other room, without providing a glass to rinse the mouth out, or doing anything but receiving the fifty cents which he says he paid him. The father says that instead of the drawing of this tooth relieving the boy, he continued to cry, and complained of great pain, after they had gone out of the doctor's office; that he did not sleep that night, cried through the night, and for several nights he did not sleep, and that the boy continued in great pain during part of the time, and in pain during a great deal of the time, of such severity that he was taken frequently to Dr. Betts' office, and to various physicians, until it was decided to perform the operation of scraping the bone for a condition of necrosis, which Dr. Betts himself

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says he thought was present. When that operation of scraping the bone was done by Dr. Epstein, the doctor says that he then discovered that the boy's jaw was fractured. Previous to that time he says he had found crepitus, which is the sound of scraping of one fragment of bone against another. The testimony on the part of the boy is that he had no other injury around that time which might have caused the fracture of this bone. 10

If you believe that the boy had a fracture, and that it was not caused by other injury, it will be for you to say whether or not the inferences to be drawn from the facts lead to a conclusion that the fracture was caused by the extraction of the tooth. As I have before indicated, the facts, and the reasonable inferences to be drawn from the facts, are for the jury, not for the Court. It is the duty of the Court to instruct the jury as to the law applicable to the case, but the jury are the judges of the facts. 20

If you find that the inferences to be drawn from the testimony do not lead to the conclusion that this fracture was caused by the drawing of the tooth, then, since it is the theory of the plaintiff's case that the necrosis resulted from the fracture, or the infection of the fracture, your verdict must be in favor of the defendant, Dr. Betts. But, on the other hand—bearing in mind that the burden of proof is on the plaintiff to establish such facts as will entitle him to recover by the preponderance of the evidence, that is, by the greater weight of the evidence—if you find that the inferences to be drawn from the testimony lead you to the conclusion that this fracture was caused by 30 40

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the drawing of this tooth, then it is admitted by almost all of the dentists, including the defendant himself, that if sufficient force was used by the dentist at the time of the extraction of this tooth to cause a fracture, he did not act with reasonable skill—with ordinary skill and care—in the extraction of this tooth, and if he did not act with reasonable and ordinary skill and care in the extraction and treatment of the tooth, then he was negligent; and if, as I have before stated to you, Dr. Snibely was negligent, Dr. Betts is responsible in this suit for his negligence.

If you find it to be established by the preponderance of the evidence—that is, by the greater weight of the evidence—that Dr. Snibely did not exercise that degree of care and skill which I have mentioned, and that by reason of that failure this boy's jaw was fractured, and, therefore, that he was negligent, then you may consider the question of damages; what money damage this boy has sustained.

It is not an easy thing to measure in money pain and suffering; and yet that is just what juries in this class of cases are constantly being called upon to do. It is very easy, where a suit is brought upon a book account or a note, to figure up and say so much is due from the plaintiff to the defendant. But since compensation is the limit of the plaintiff's right to recover in a case of this kind—or may be the limit—it is incumbent upon you twelve gentlemen, as reasonable men, to determine what will be a money return to him for the injury which he has sustained, and for the pain and suffering which he has undergone, and which he will undergo in the future, for the inconvenience in eating, and for the deformity, if

Charge

any, which this boy has suffered as the result of the negligent act of Dr. Snibely, if you find it to have been negligent.

The testimony is that this boy suffered intense pain after this tooth was pulled for some days and weeks; that necrosis of the bone resulted, it is insisted, by the plaintiff—of course, any condition which you find to have resulted from some other cause than the fracture of this bone, if you find it to have been fractured, you cannot assess against the defendant in this suit. The damages which you assess against the defendant in this suit must be those which resulted from the negligent act of Dr. Snibely, if you find it was negligent. This boy then went to the hospital, and underwent an operation for curettage, or scraping of the bone. At that time he was some days in the hospital, five days, I think. It was discovered upon that operation that there was a fracture, as I have already stated. This curettage, or scraping of the bone, did not result in a healing of the fracture, so it was necessary for the boy again to go to the hospital and have a subsequent operation, which was the removal of from one-half to three-quarters of an inch of the jaw bone, Dr. Epstein says. This boy was then some days in the hospital, returned home, and by reason of the growth of a tooth becoming involved in the remaining part of the jaw, it was necessary to have a third operation, and there was performed a third operation upon this boy. Three operations, with the consequent pain and suffering and discomfort; and the testimony on the part of the plaintiff is that this boy's jaw will always be deformed. You have seen him on the stand, and you can judge as well as anyone else the extent of the deformity, externally. Dr.

Charge

Epstein says the function of the jaw is about restored. What I mean by that, is the ability to use it to eat with.

10 Taking all these things into consideration, the pain and suffering which the boy has undergone, the injury itself, the deformity to the extent you observe it on the outside, and the inconvenience he has suffered from inability to eat, and such inconvenience as he will suffer in the future, it will be your duty to compensate him, provided you find Dr. Snibely was guilty of negligence as I have indicated.

20 There is another class of damages which has been suggested in this case, and that is exemplary, or punitive damages, which are sometimes assessed as punishment for the illegal act, the negligent act, where the act was, as is stated, grossly negligent, or, in gross disregard of the feelings of the plaintiff, and his bodily condition. I think there is nothing in this case to warrant the award of punitive, or exemplary damages; therefore, your verdict should be limited to compensatory damages, as I have indicated.

30 Certain requests to charge were handed to me just as I was about to commence my charge which I have not had the opportunity to examine. I am not inclined to examine all of them at this time. If there is any particular one, or two, that counsel thinks I have not covered, I will—

Mr. Demarest: I think your Honor's charge has covered the points I intended to raise.

The Court: So they are withdrawn?

Mr. Demarest: Yes, sir.

The Court: The jury may retire.

40 The jury withdraws.

Court of Errors and Appeals.

FRANK A. KLITCH, by next
friend,
Plaintiff-appellee,

vs.

EDWIN BETTS,
Defendant-appellant.

10

Notice of Appeal.

To WILLIAM HAUSER, Esquire,
Attorney of Plaintiff-appellee.

20

TAKE NOTICE that the defendant appeals from the whole of the judgment in this cause on the following grounds

1. Because the Court erroneously and improperly refused to grant defendant's motion for non-suit made upon the following grounds and for the following reasons:

- A. Plaintiff did not sustain his burden of proof. 30
- B. No negligence on the part of defendant was proved.
- C. The existence of the relation of master and servant at the time of the operation on January 29, 1914 was not proved.
- D. The act complained of was not proved to be the direct natural cause of the alleged injury.
- E. The operation by the alleged servant of defendant on January 29, 1914 was not proved to be the proximate cause of the injury. 40

F. It is impossible to ascertain the measure of damages to be attributed to defendant or his alleged servant and what measure of damage should be attributed to treatments of plaintiff by Doctors Betts, Povey, Sherman or Epstein.

G. There was no proof of a fracture.

H. The pleadings were based upon negligence which caused a fracture, and the proofs showed the condition to be one of necrosis and further showed that necrosis could lead to fracture in case of violence or by ordinary progress of disease.

10 I. The complaint does not set up violation of the statute as negligence and no other negligence is proved.

2. The following question was admitted over defendant's objection: "Doctor, assume these facts, a boy of ten years in perfectly normal condition, except for being nervous, is brought to an operating dentist to have a tooth extracted, which at the time is partially decayed. The dentist operating
20 found no abscess condition existing; what in the use of the ordinary amount of competency and skill would be the natural and proximate result of the extraction of a first tooth under those circumstances?"

3. Because the trial court erroneously and improperly refused to grant a motion for the direction of a verdict in favor of the defendant based upon the following grounds:

30 A. There is affirmative evidence from the plaintiff's case there was no negligence.

B. Because there was no proof of the use of excessive force, the evidence showing that no fracture could have otherwise been accomplished.

W. HOWARD DEMAREST,
Defendant's Attorney.

