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Notice of Appeal.

(Filed August 9th, 1930.)

New Jersey Supreme Court

PASSAIC COUNTY.

MARTHA GRIFFIN and MABEL BERNI, Plaintiffs, *vs.* JAMES BUTLER GROCERY COMPANY, a corporation of New Jersey, Defendant.	Action at Law. Notice of Appeal.

To NATHAN RABINOWITZ, Esq.,
Attorney of Plaintiff, Martha Griffin.

Sir:

TAKE NOTICE that the defendant, James Butler Grocery Company, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in favor of the said Martha Griffin and against the said James Butler Grocery Company, in the above-entitled cause.

Very truly yours,

ALEXANDER M. MACLEOD,
Attorney of Defendant.

Dated: August 8th, 1930.

Service of a copy of the within notice is hereby acknowledged this 8th day of August, 1930.

NATHAN RABINOWITZ,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed August 9th, 1930.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

MARTHA GRIFFIN and MABEL BERNI,
Plaintiffs,

vs.

JAMES BUTLER GROCERY COMPANY,
a corporation of New Jersey,
Defendant.

Action at Law.
Grounds of Appeal.

To NATHAN RABINOWITZ, Esq.,
Attorney of Plaintiff, Martha Griffin.

TAKE NOTICE that the following are the grounds for appeal taken to the Court of Errors and Appeals from the said Supreme Court in the above entitled cause:

1. The Trial Judge committed error in refusing to direct a judgment of Non-Suit in favor of the defendant, James Butler Grocery Company and against the plaintiff, Martha Griffin, upon the reasons urged by the defendant, James Butler Grocery Company on said motion.

2. The Trial Judge committed error in refusing to direct a verdict in favor of the defendant, James Butler Grocery Company and against the plaintiff, Martha Griffin upon the reasons urged by the defendant, James Butler Grocery Company on said motion.

Grounds of Appeal.

3. The Trial Judge committed error in permitting the said case of the defendant, James Butler Grocery Company to go to the jury, the question presented for determination being a question of law and not of fact.

4. The Trial Judge committed error in concluding as he did that it was a question of fact for the jury and not a question of law for the Court.

5. The Trial Judge committed error in his charge to the jury, as follows:

"The plaintiff in this case alleges in her complaint regarding this sale of the can of peaches to her by the salesman of the defendant that there was an implied warranty as to the quality and fitness of the peaches for the purpose for which she used them, that is, for eating."

Under Section 15 of the Sale of Goods Act, which is found in our Compiled Statutes, 4 Compiled Statutes of 1910, that section provides as follows:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that

description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality."

Subdivision 3 of Section 15 relates to examination by the purchaser, and subdivision 4 relates to sale under patent or trade name, and subdivision 5 relates to usage of trade. But with these three subdivisions, 3, 4, and 5, we are not now concerned in this case.

Subdivision 6 provides: "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Now, in this case Mrs. Griffin, the plaintiff, originally claimed there was an express warranty. I have decided as a matter of law that there is no evidence of an express warranty, so you dismiss the thought of an express warranty from your minds. Counsel for the plaintiff was under the impression that the salesman who sold the goods had expressly warranted the good quality of the peaches, but there was no evidence to that effect, so that you do not take into consideration in determining this case.

The question before you is solely on the implied warranty, and I have read you the statutes in that connection."

ALEXANDER M. MACLEOD,
Attorney of Defendant, James Butler
Grocery Company.

Dated August 8, 1930.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 8th day of August, 1930.

NATHAN RABINOWITZ,
Attorney for Plaintiff.

Summons.

The State of New Jersey to:

JAMES BUTLER GROCERY COMPANY,
A Corporation of New Jersey:

YOU ARE SUMMONED to answer the annexed complaint of MARTHA GRIFFIN and MABEL BERNI in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton within Twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the said Court, at Trenton this sixth day of September, nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

NATHAN RABINOWITZ,
Attorney.

Complaint.

Judgment Record

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

MARTHA GRIFFIN and MABEL BERNI, Plaintiffs, *vs.* JAMES BUTLER GROCERY COMPANY, a Corporation of New Jersey, Defendant.	Complaint. Action at Law.

Plaintiffs, Martha Griffin and Mabel Berni, both residing in the City of Paterson, County of Passaic, and State of New Jersey, say that:

FIRST COUNT:

1. At the times herein stated, defendant was and still is a corporation engaged in the retail grocery business on the premises, among many others, at No. 428 Main Street, in the City of Paterson aforesaid.

2. On June 20, 1928, or thereabout, plaintiff, Martha Griffin, both for herself and as agent of Mabel Berni, her daughter, bought of defendant

on the premises aforesaid, a certain can of canned peaches.

3. Said can of canned peaches was purchased, as aforesaid, for immediate use and consumption as food by plaintiffs and other members of their household whereof defendant then had notice.

4. Defendant then warranted said peaches to be wholesome and fit for food.

5. In making said purchase of defendant, plaintiff, Martha Griffin, both for herself and as agent of plaintiff, Mabel Berni, as aforesaid, relied upon defendant's knowledge and skill in choosing and supplying food fit and wholesome for use and upon its said warranty that the said peaches were wholesome and fit for consumption.

6. Said peaches so purchased, as aforesaid, were immediately eaten by plaintiffs and other members of their household.

7. Said peaches were not wholesome or fit for food, but were poisonous, unwholesome and utterly unfit for human consumption.

8. In consequence of said breach of warranty by defendant, plaintiff, Martha Griffin, became violently and dangerously sick and so remained for a long time and underwent great physical pain and mental anxiety and incurred large expense in medical attendance, hospital treatment and in medicines in the endeavor to be cured of her said sickness, and suffered permanent impairment of health and has ever since been incapaci-

tated from attending to her ordinary occupation and performing her usual duties and thereby lost great gains which she otherwise would have made and will in the future be disabled from following her ordinary occupation and will thereby be deprived of great gains and will in the future be obliged to incur additional expense for medical treatment.

SECOND COUNT:

1. Paragraph 1 of the first count is repeated.

2. On June 20, 1928, or thereabout, plaintiff, Mabel Berni, by the said Martha Griffin, her then agent in that behalf, purchased of defendant on the premises aforesaid a certain can of canned peaches.

3. Paragraphs 3, 4, 5, 6 and 7 of the First Count are repeated.

4. In consequence of said breach of warranty by defendant, plaintiff, Mabel Berni, became violently and dangerously sick and so remained for a long time and underwent great physical pain and mental anxiety and incurred large expense in medical attendance, hospital treatment and in medicines in the endeavor to be cured of her said sickness and suffered permanent impairment of health and has ever since been incapacitated from attending to her ordinary occupation and performing her usual duties and thereby lost great gains which she otherwise would have made and will in the future be disabled from following her

ordinary occupation and will thereby be deprived of great gains and will in the future be obliged to incur additional expense for medical treatment.

Plaintiff, Martha Griffin, demands Twenty-five Thousand ($25,000) Dollars on the First Count, and Plaintiff, Mabel Berni, demands Twenty-five Thousand ($25,000) Dollars on the Second Count as damages.

NATHAN RABINOWITZ,
Attorney of Plaintiffs.

Answer.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

MARTHA GRIFFIN and MABEL BERNI, Plaintiffs, *vs.* JAMES BUTLER GROCERY COMPANY, a Corporation of New Jersey, Defendant.		Action at Law. Answer.

Defendant, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, answering the complaint, says that:

ANSWER TO FIRST COUNT.

1. Defendant denies paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the First Count.

ANSWER TO SECOND COUNT.

1. Defendant denies paragraph 1.
2. Defendant denies paragraph 2.
3. Defendant denies paragraph 3.
4. Defendant denies paragraph 4.

ALEXANDER M. MACLEOD,
Attorney for Defendant.

Dated: October 14, 1929.

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

MARTHA GRIFFIN and
MABEL BERNI,
Plaintiffs,

vs.

JAMES BUTLER GROCERY COMPANY,
a Corporation of New Jersey,
Defendant.

Postea.

This case was tried before Judge William B. Mackay with a jury in the Passaic County Circuit Court on the fifth, sixth, and seventh days of May, Nineteen Hundred and Thirty.

The jury returned a general verdict against the defendant and in favor of the plaintiff, Martha Griffin, for Three Thousand ($3,000.00) Dollars.

WM. B. MACKAY,
Judge.

Filed May 10, 1930.

Clerk's Certificate.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this 12th day of August, A. D. nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

MARTHA GRIFFIN and
MABEL BERNI,
Plaintiffs,

vs.

JAMES BUTLER GROCERY COMPANY,
a Corporation of New Jersey,
Defendant.

Action at Law.

Paterson, N. J., May 5, 1930, 2:00 P. M.

Tried before:

Hon. WILLIAM B. MACKAY, Judge, and a Jury.

Appearances:

NATHAN RABINOWITZ, Esq., for plaintiffs;

BREED, ABBOTT & MORGAN, Esqs., (ALEX. M. MACLEOD, Esq., and WILLIAM L. HANAWAY, Esq., of Counsel), for defendant.

A jury was duly empaneled and sworn.

Mr. Rabinowitz opened the case to the jury on behalf of the plaintiffs.

Mr. MacLeod opened the case to the jury on behalf of the defendant.

PLAINTIFF'S CASE.

MRS. MARTHA GRIFFIN, sworn.

Direct examination by Mr. Rabinowitz:

Q. Do you hear all right, Mrs. Griffin? A. Yes.

Q. Do you hear me? A. Yes, sir.

Q. What is your full name? A. Martha Griffin.

Q. Where do you live? A. Well, I have moved to where I am now.

Q. Where do you live now? A. I don't know——

Q. Is it 234 East 24th Street? A. Yes.

Q. Paterson? Will you speak up, Mrs. Griffin? A. Paterson, yes.

Q. Paterson? Where did you live previously, Mrs. Griffin? A. 35 Mercer Street.

Q. 35 Spring Street? A. Or, Spring Street.

Q. How long had you lived at 35 Spring Street, before you moved away? A. About seven years.

Q. About seven years? A. Yes, sir.

Q. You lived with your daughter, Mabel Berni. Did you live at that time with your daughter, Mabel Berni? A. Yes.

Q. Also with Mabel Berni's two children? A. With Mabel's two children.

Q. Do you remember the two children of Mabel, their names? A. Yes.

Q. What was it? A. James and Alfred.

Q. How old was James? A. He was—about four years and a half.

Q. Alfred was how old? A. Five years.

Mr. MacLeod: I object to this question. I do not see that it is material. Of course, I will withdraw my objection, now that counsel has elicited it.

Q. You were all living together—— A. Yes, sir.

Q. —you and your daughter and the two children? A. Yes, sir.

Q. Was your daughter working at the time while you were living in Spring Street? A. Yes, sir.

Q. Where was she working, Mrs. Berni? A. In Meyer Brothers.

Q. You kept house, did you? A. Yes, sir.

Q. From whom did you buy your groceries? A. From Butlers.

Q. James Butler Grocery Company? A. James Butler Grocery Company.

Q. Where was their place of business located? A. On the corner of Slater and Main.

Q. Slater and Main Street? A. Yes, sir.

Q. How long had you dealt with them, Mrs. Griffin? A. Why, I had dealt with them for years.

Q. For years? A. Yes, sir.

Q. Will you tell the Court and jury what happened on June 20, 1928? Did you make any purchase at the store? A. Yes, I went in for five pounds of sugar and a pound of butter——

Q. Yes? A. —and I was going about out, and the young man said—he said, "Won't you try our peaches?"

Mr. MacLeod: I object to what anybody said there now, your Honor, please.

Q. Young man behind the counter? A. Yes, he wanted to try out our peaches.

Q. Was he——

Mr. MacLeod: Now, wait a minute; I would like to enter an objection. This young man—any agent, making any state-

ment binding on the company, within the scope of his authority—statement made by counsel, and counsel has opened on other statements—in other words, I understand, it should have been implied warranty; he now makes the expressed statement.

The Court: Are you alleging express warranty?

Mr. Rabinowitz: Yes, I allege express warranty.

The Court: In your pleadings?

Mr. Rabinowitz: Yes, sir.

Mr. MacLeod: He does allege express warranty, but, I submit, a statement made by an employe is not binding on this defendant, unless they show he was an agent and within the scope of his authority the statement was made.

The Court: I think you had better show some authority.

Mr. Rabinowitz: I will try to.

Q. Is that the man with whom you had been doing business there? A. As long as he has been there.

Q. Where was he standing when you made your purchase of sugar and butter? A. Behind the counter.

Q. Is that the man whom you say, as you were walking out, called you back, asked you to buy the peaches? A. Yes.

Q. Is that the same man you have always been buying groceries from? A. Yes.

Mr. MacLeod: Yes?

The Court: Don't lead her.

A. (Continuing) For a couple of years.

Mr. Rabinowitz: Yes.

Mr. MacLeod: I have no objection to the fact that he asked her to buy the peaches, but this further statement that counsel opened the case on, whether there was any authority for any man there, trying to sell canned goods, to make such remarks as he opened to the jury—that is the point.

The Court: Well, I do not know.

Mr. MacLeod: Here is something that is sealed—counsel admits, not sealed by us, but by another packer, resting upon that Section 15, and says we handle cans supposed to be fit for consumption, that is the implied warranty. Now, to go into the point of making statements by a salesman there as to its contents—that is something he asks her about—whether he has the authority, whether your Honor could say, under the law, that that is implied, and in trying to go into her mind with respect to that, they are going outside of the implied authority, under the law, which counsel has opened on—but as to this salesman was my point, your Honor, this man using such words as counsel opened to the jury, and a statement made by him would not be binding upon us.

The Court: Excepting that he may have opened three or four cans in the same lot and had some knowledge of what the other cans contained, and he would assume they were all the same, and made that statement in the course of his employment.

Mr. MacLeod: That this man opened cans, your Honor, please?

The Court: Well——

Mr. MacLeod: You mean, this salesman opened cans, your Honor?

The Court: I suppose it could be, that they test the contents of a can; they do not buy just one can, a separate can, but I suppose they buy them by the box.

Mr. MacLeod: I can see, where, if he were a tester of peaches, fruit in cans, it was a part of his duty to have done that, but there is no proof of that in this case. There is no proof he had been opening these goods as a tester, or that he had any authority to do that, or that he had any knowledge of their contents in that way, and no proof of any such implied warranty from the company, and then, further, there is no proof of any warranty or authority to the salesman to say, or warranting him to say, that they are fit for consumption. It is not for him to say what is in them or what is not in them, except what is on the outside of the can, that is as far as he can go. There is nothing here to show that he opened these cans, or tested all of the cans or a few of a lot, or anything of that kind. Whatever your Honor has in mind—I do not dispute he was in the store, for the purpose of conducting the sale of goods.

The Court: You do not dispute the fact that he may have made the remark. What you contend is, if he did make the remark, it is not binding on the employer; isn't that it?

Mr. MacLeod: Yes.

The Court: You do not claim that it is not binding, because the can was sealed?

Mr. MacLeod: Oh, no, your Honor, we do not claim that, but we contend he had

no authority to make any remarks beyond what it said on the can. In other words, the scope of his authority was to sell that can. His duty was to sell those goods and not go beyond that, no authority for it. He may have made it, I do not know.

The Court: It was the scope of his authority to use good salesmanship——

Mr. MacLeod: That is true.

The Court: —if he wanted to sell these cans, to say this can was very good, or any can was very good, any of the canned goods. He may say to her, "The canned beans"—he wouldn't say, "Well, they are no good"

——

Mr. MacLeod: No.

The Court: —yet he might have authority to say it, if it was in the scope of his employment.

Mr. MacLeod: What he would say would be more or less hearsay.

The Court: Find out how often this salesman waited on her.

Q. How often did the salesman wait on you, Mrs. Griffin? A. About two or three times a week.

Q. Two or three times a week? A. Yes, I would go in for something; sometimes I was in most every morning in the week.

Q. That was the same salesman that waited on you? A. Yes.

Mr. Rabinowitz: Does your Honor make the ruling on that, permit the question?

The Court: Yes, I will permit it.

Mr. MacLeod: Your Honor, allow me an exception.

Q. Now, you say you had purchased your sugar— A. Yes.

Q. —and you had purchased the butter— A. Yes.

Q. —and you were ready to leave the store. What did the salesman do then? A. Well, he said, "Don't you want to try a can of our peaches?" He says, "We have got them on sale", he said, "a large can", he says, "for seventeen cents", he says, "and they are a good, large can", and I says, "Well, all right, and then I will take one can, and if we find we like them, I will get some more."

Q. If the family likes them, you will get some more? A. "I will get some more."

Q. Now, you took your groceries and the can of peaches— A. Yes.

Q. Did you pay him for them? A. Yes, I paid him.

Q. Did you pay him? A. I paid him.

Q. And you went home, and then what happened, Mrs. Griffin? A. I opened the peaches.

Q. When you opened the peaches, who was there? A. Mrs. Berni——

Q. Your daughter? A. —and my son.

Q. And your son? A. Yes.

Q. What is your son's name? A. William.

Q. William Griffin? A. William Griffin.

Q. Is he in court? A. Yes.

Q. Who else was at the table? A. That is all.

Q. But, were the children there? A. Oh, the children.

Q. Yes; what were the children's names? A. James and Albert.

Q. Albert? You say you opened the can? A. Yes.

Q. When did you open the can? A. I opened the can just before this——

Q. Just before this? A. —and I poured them in a glass dish, and then I served them in little glass dishes.

Q. Were the dishes perfectly clean you served them from? A. I served them to Mrs. Berni and my two grand-children and myself, and I asked my son to have some, and he wouldn't have any.

Q. What else did the meal consist of, Mrs. Griffin? A. A little toast and tea, and my son, I think, had an egg.

Q. But you say your son had no peaches? A. And he was not sick; he did not take sick.

Q. Now, about what time was the meal over, would you say? A. About half past six.

Q. About half past six? A. Yes.

Q. Now, will you tell us what happened, so far as yourself is concerned? When did you first begin to feel sick? A. Well, I felt sick the next morning, but I went all day to the bath room, and the little boy was sick at the same time, so the little boy, he died before six o'clock.

Q. He died before six o'clock that night? A. Yes.

Mr. MacLeod: I object, and move to strike it out.

The Court: Strike it out.

A. (Continuing) On this death, I went to bed.

Mr. MacLeod: I ask that part of the testimony, the boy's death, be stricken out.

Q. Now, you went to bed sick, Mrs. Griffin? A. Same night that he—next night that we had the peaches.

Q. I see. A. I was sick all day.

Q. You were sick all day. Were you in bed all

day? A. No, I was up and down, because the little boy was sick——

Q. I see. A. —and I was waiting on the little boy——

Q. Yes? A. —and then I sent for a doctor for him.

Q. Do you remember the doctor you sent for? A. Dr. O'Grady.

Q. Did he come? A. Yes, he came; he said——

Mr. MacLeod: I object—just a moment.

Q. You cannot testify as to what he said. Did he examine you? A. No, I did not have him for me.

Q. You did not have him for you? A. No.

Q. Now, did Dr. O'Grady prescribe for him? A. For the boy?

Q. For the boy. A. Yes.

Mr. MacLeod: I object, and ask that it be stricken out, if your Honor please.

The Court: Strike it out.

Q. If you know, do you know what he prescribed?

Mr. MacLeod: Now, wait, just a moment.

Mr. Rabinowitz: All right; I will withdraw it.

Q. You say you went to bed when? A. That night.

Q. That night? A. Yes, the night the boy died, that night.

Q. Night the boy died you went to bed? A. Yes.

Mr. MacLeod: I object——

The Court: Let her testify, Mr. Rabinowitz.

Q. Go on, tell us. A. I went to bed that night, and when my daughter came home she went to bed, and at six o'clock the little boy was dead.

Mr. MacLeod: I ask that be stricken out, your Honor please.

The Court: Strike it out.

A. (Continuing) And we didn't get up any more.

Q. Yes? A. They stayed in bed.

The Court: Strike it out.

Q. You say you did not get up any more; how long did you remain in bed? A. Three months.

Q. What was your condition of health, Mrs. Griffin, before this illness? A. Well, my condition of health was fine, I worked; I worked in the Y. M. C. A., in the kitchen there, every day.

Q. Worked every day in the Y. M. C. A.? A. Every day, in the Y. M. C. A., in the kitchen; I had to work because my health wasn't bad, and I was the sole support.

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

The Court: Strike it out.

Mr. Rabinowitz: All right.

Q. Now, Mrs. Griffin, were you treated by a physician? A. Yes.

Q. Who was your doctor? A. Dr. Levine.

Q. Dr. Levine? A. Yes.

Q. Where is his office located? A. On Broadway.

Q. On Broadway? A. Yes.

Mr. Rabinowitz: Is Dr. Levine in court?

A Voice: Yes.

Q. How long were you treated by Dr. Levine? A. Three months.

Q. After—you say you were in about three months; after that, did you receive any further treatment by Dr. Levine? A. Well, once in a while, I would go to him.

Q. Did you go to him? A. Once in a while.

Q. Now, will you tell the court and jury, Mrs. Griffin, just what effect this illness produced on you? A. Well, it affected me in my stomach, my back, my legs, and I can hardly walk.

Q. And you were able to get around, were you, before this? A. I never was sick.

Q. Never was sick. How old are you, Mrs. Griffin? A. Sixty-two.

Q. Have you ever worked since this? A. Never a day.

Q. This occasion. A. Never a day.

Q. How much were you earning while you were working for the Y. M. C. A.? A. Well, I was only earning twelve dollars a week there, but when I went out to work, I made three dollars a day.

Q. Never have been earning or working since? A. (No audible response).

Q. You have never worked since? A. No.

Q. Now, Mrs. Griffin, did any representative of the James Butler Grocery Company ever come to see you while you were ill? A. Yes.

Q. Who was it— A. Manager of all the stores came.

Q. —came to see you? A. Yes.

Q. Do you remember how soon after you were taken ill that he came to see you? A. I don't just remember.

Q. Was it shortly thereafter? A. It was about, maybe, six months after.

Q. Oh, I see. You do not know his name? A. No.

Mr. MacLeod: Six months?

Q. You said, it was about six months afterwards? A. Yes.

Q. Do you recall what you had for breakfast that morning? A. I don't; I was too sick to remember, all of that.

Q. Now, for breakfast the morning you purchased the can of peaches, do you remember what you had for breakfast? A. Nothing, only a cup of tea and a piece of toast.

Q. Were you working in the Y. M. C. A. that day, the day you bought your groceries? A. No, I wasn't working that day.

Q. You were not working that day? A. No.

Q. Do you recall why you were not working? A. Well, I stayed home to try to get the children in the nursery.

Q. You were what? A. Staying home to try to get the children in the nursery,——

Q. In the nursery? A. —but I didn't go with them; something happened, I didn't go.

Q. What can you say, Mrs. Griffin, about the good health of your daughter, Mabel Berni, before these peaches were eaten?

Mr. MacLeod: Just a moment. I object to that, unless she tells what she observed.

Q. Of your own observation, what can you say about her good health?

Mr. MacLeod: I object to the form of the question. I have none, to just what she observed, what she saw, to tell us.

The Court: I think you can call the daughter for that.

Mr. Rabinowitz: Yes. All right, take the witness.

Cross-examination by Mr. MacLeod:

Q. You were not working on that day, were you, Mrs. Griffin? A. No.

Q. Had you been—you had worked the day before? A. Yes.

Q. Did you take the children to the nursery that day? A. No; I didn't; I had been to New York in the nursery.

Q. I see— A. I had been to New York in the—

Q. You stayed home for that purpose? A. Yes?

Q. That was to take them, to leave them there? A. Yes, but we had to get permission to leave them.

Q. But the children came from Brooklyn, didn't they, these children you were going to take— A. Yes, they were born in Brooklyn.

Q. How long had they been living with you in Paterson? A. All summer with me.

Q. Now, do you remember what you had noon-hour before that day to eat? A. No, I don't.

Q. Huh? A. I don't.

Q. Do you remember, you had lamb stew? A. No.

Q. Hadn't you had lamb stew the previous night? A. No.

Q. Didn't you have any meat before, night before? A. No.

Q. Huh? A. No.

Q. Are you sure of that? A. (No answer.)

Q. Do you know Dr. Hecht? A. I know Dr. Hecht.

Q. You know him? A. Well, I know, I think the man came to the house.

Q. He asked you what you had, didn't he? A. He asked me, but I didn't tell him.

Q. Didn't you tell him? A. No.

Mr. Rabinowitz: Who was that?

Q. Do you remember he was there? A. (No answer.)

Q. This happened—when did you get these peaches, what month and date was it? A. I couldn't tell you.

Q. Don't you remember when you bought them? A. I think I bought them in June.

Q. I didn't hear you. A. First of June.

Q. First of June? A. Yes.

Q. Do you remember that Dr. Hecht was there the 12th of July, that same year?

Mr. Rabinowitz: Doctor who?

A. I don't remember the——

Mr. Rabinowitz: I did not get the name, Your Honor please.

Mr. MacLeod: Dr. Hecht.

Q. Was it the first of June you bought these peaches? Did you say, the first of June? A. Yes.

Q. You are sure of that? A. (No answer.)

Mr. Rabinowitz: Your Honor, there ought to be some allowance made for Mrs. Griffin. We are going to get the correct date through Mrs. Berni. He had the death certificate, which is June.

The Court: It is proper cross-examination.

Mr. MacLeod: But Mrs. Berni did not buy the goods.

Q. You bought the goods, didn't you, Mrs. Griffin?

Mr. MacLeod: Mrs. Berni, would you mind stop moving your head, please?

Mr. Rabinowitz: She is not moving her head.

Mr. MacLeod: She did. She distinctly went like that (illustrating); that is the reason I asked her to stop.

Q. Did you buy the goods? A. I bought the goods; yes, sir.

Q. Can you tell us when it was you bought them? A. I tried to remember, but I have forgotten.

Q. Cannot remember? Do you remember the day? A. First of June.

Q. I beg pardon: I did not hear you, Mrs. Griffin.

The Court: What day of the month?

A. I think it was the first of June.

Q. First of June? A. (No answer.)

The Court: Are you sure of that?

A. (No audible response.)

Q. Are you sure of that? Or, you are not sure of that, are you? A. No, sir.

Q. If you do not remember, it is all right; do not tell us; if you are not sure of it, say you are not sure of it. You are not sure of it? A. No.

Mr. MacLeod: "No", Judge.

Mr. Rabinowitz: Don't you feel well, Mrs. Griffin?

Mr. MacLeod: I object to that, Your Honor please. She was perfectly all right when you asked the questions, she went along beautifully; as soon as I start to ask questions, you say, "Don't you feel all right"?

Mr. Rabinowitz: You do not seem to show any courtesy to the witness.

Mr. MacLeod: I think, Your Honor, I have shown her every courtesy, and I intend to. I do not think it is fair for counsel to say that.

The Court: Would you like a glass of water, Madam?

The Witness: Yes, please.

The Court: Very well.

(Glass of water given to the witness by a court attendant.)

The Court: All right, proceed.

Q. Is that the only thing you bought that day, Mrs. Griffin,—sugar— A. Yes.

Q. —butter and the peaches? A. And the peaches.

Q. And the peaches? A. One can.

Q. Did you go to the hospital at the time one of the boys went to the hospital? A. No.

Q. Were you there? A. I was in bed, I couldn't walk.

Q. Did you go to the hospital at any time during this trouble? A. No, I never went at the time.

Q. Do you know whether your daughter went to the hospital? A. I don't know; I was so sick that I can't tell you.

Q. Who was your family physician at that time? A. Dr. Levine.

Q. He was your family physician? A. He doctored my husband, too.

Q. Did he doctor you? A. Yes.

Q. Before that? A. Not before that, I wasn't —sick, I didn't need it.

Q. Never was sick before that? A. I didn't need him.

Q. No time sick before that? A. No.

Q. Never? A. No.

Q. How old are you? A. Sixty-two.

Q. Sixty-two. How long was it, after this happened, if you don't remember the date, about how long after, was it that Dr. Hecht came to see you? Do you remember the date? A. No, I don't.

Q. You do remember him coming, but you do not— A. I remember him coming, but I don't remember him taking any statement.

Q. Do you remember— A. I don't remember giving him any statement.

Q. Do you remember putting your "X" down here? A. No, I put no "X" down, I put nothing down; I told him I wouldn't,—I give him no statement.

Q. You didn't make your "X" there? A. No, I did not.

Q. Do you know Mrs. Mary Morrison? Do you know her? A. Yes.

Q. Where does she live? A. In Heaven, I hope; she is dead.

Q. She is the one that witnessed it, wasn't she? A. I don't know—I don't remember her being in——

Q. Don't you remember that Mary Morrison was there at the time you put your "X"— A. No.

Q. You do remember that? You say she was not there? A. I didn't say she wasn't but I don't remember.

Q. She was a friend of yours, wasn't she? A. (No audible response.)

Q. I mean, she was a neighbor? A. Neighbor.

Q. She has since died, hasn't she? A. (No audible response.)

Q. Do you recall, at any time, when Mary Morrison was there that Dr. Hecht came to your house? Do you remember any time you were all there together? A. No.

Q. Don't you remember that——

Mr. MacLeod: Dr. Hecht, stand up, please.

Q. Do you recall that gentleman, Dr. Hecht? A. No, I don't.

Q. Do you remember seeing him, even? A. No.

Q. Do not remember that either; all right. Now, did you at that time, tell Dr. Hecht that for lunch on the 19th of July you had lamb stew, bread and butter and tea; did you tell him that? A. No, I did not.

Q. You did not. Did you tell him that for breakfast on that day, you had tea and a bun? A. No, I did not; I never eat buns.

Q. Did you have tea and buns for breakfast? A. No.

Q. What did you have? A. Toast and tea.

Q. Tea and toast. Did you tell him at the supper time that you had meat pie and tea? Did you tell him that? A. No, I did not.

Q. You did not tell him that? A. No, I did not.

Q. All right. You cannot recall what you did have those meals, though, can you, Mrs. Griffin? A. I didn't have none of them——

Q. Can you recall what you did have? A. —because I am not a meat eater, and I didn't have none of them.

Q. Did you have it at the table for the rest of the folks? A. No, I didn't—rest of the folks only

concerns my daughter and the two children, and I am sure I wouldn't make it for them.

Q. How about your son? A. The son don't live with me.

Q. He was there? Well, he was there that night, wasn't he? A. No.

Q. Oh, wasn't he? A. No.

Q. He was not there? A. No.

Q. Your son was not present when you served the meal? A. He was present when I served the peaches.

Q. Was he there for supper that night? A. Yes, when I served the peaches.

Q. How old is your son? A. Thirty-two—four——

Q. You had peaches and tea and toast? A. And toast.

Q. Is that all? A. That is all, and I think he had an egg, boiled.

Q. He had an egg, boiled; he had his tea, egg—just one egg, toast and tea? A. And tea.

Q. He did not eat any peaches? A. No; he wasn't sick either.

Q. I say, he did not eat any of the peaches? A. He didn't eat any of them, and he wasn't sick.

Q. Was that the first time your son had been there——

Mr. MacLeod: I will withdraw that.

Q. Now, let's see, Mrs. Griffin, I don't want to hurry you, and I don't want you to be worried. You brought the can home and you opened it with your can opener— A. Yes.

Q. —yourself? A. Yes.

Q. It was a large can, wasn't it? A. Yes.

Q. You poured them into a large glass dish? A. I did, yes.

Q. Then brought in the glass dish, and you set it on the center of the table, in the large glass dish; is that right? A. And I served it in little glass dishes, around the table.

Q. In little dishes? A. Yes.

Q. How long was it from the time you put the peaches into the glass dishes in the center of the table until you served them? About how long? I don't mean accurately. A. About fifteen minutes.

Q. Just before you sat, for supper? A. Yes.

Q. You didn't put the peaches on ice, or anything like that, did you? A. No.

Q. This was in June? A. In June.

Q. Pretty hot month, wasn't it? Huh? It was a hot— A. Yes.

Q. —June? A. Yes.

Q. Did you tell Dr. Hecht that that was the only thing you had that night were peaches, nothing else? A. Nothing else.

Mr. Rabinowitz: Pardon; will you repeat your question?

Q. Did you tell Dr. Hecht that the only thing you had on that night was peaches, nothing else? A. Peaches and a little toast.

Q. Didn't you say peaches only, nothing else? A. I can't make a meal on the peaches only.

Q. I know that; that is not my point. A. No.

Q. Didn't you say that is all "we had"? A. No, I didn't.

Q. You did not say it; that is my point. Do you remember Dr. Hecht asking you these questions that time: "Where was the can and contents kept after the opening?" and you said, "In an ice box"? A. I don't remember him coming to the house at all.

Q. Oh, you do not remember him. How do you know him then? How do you recall him? A. I don't know him.

Q. I asked you, if you knew Dr. Hecht; you said "Yes". A. I said, "No".

Q. I understood you to say "yes". A. I said, "No".

Q. Oh, you do not know him; I thought you said, "Yes". I beg pardon. So, therefore, he never came to your house—let's get that right—he never came, as far as you know; he never called at your house? A. I don't remember him.

Q. You do not remember? A. Not if I remember.

Q. He may have been there, and you may have forgotten about it, do you think, Mrs. Griffin? A. He may have been there, but not——

Q. I don't mean that he got there when nobody was home. A. Well, I didn't see him.

Q. That is right, did you see him there? A. I did not see him.

Q. Have you ever talked to him at any time? A. I never talked to him.

Q. Therefore, he couldn't ask you these questions, therefore you couldn't tell him they were put in the ice box? A. They never was in the ice box, anyhow.

Q. They never were in the ice box? A. (No answer.)

Q. Your daughter lived with you at that time, did she not,— A. Yes.

Q. —with her two children? A. (No answer.)

Q. Did you have an ice box, Mrs. Griffin, at that time? A. Why, of course, I had an ice box.

Q. All right. So there were four people then partook of the peaches that night,—that is, your daughter, your two children, and yourself, and

your son who was there and didn't eat any peaches? A. He didn't eat any peaches.

Q. Now, the next morning,—you went to bed and you slept all night, and the next morning, you went about? A. I didn't sleep all night.

Q. You didn't sleep all night? A. No, I was up and I was down.

Q. You were awake—up the next morning? A. I was up and down all night.

Q. You were up and down all night? A. Yes.

Q. You did not call the doctor that night? A. No, I didn't call the doctor that night.

Q. Next day— A. Next day, I was sick all day, but I had to stay up.

Q. You were up and down all day the next day? A. I was waiting on the little boy.

Q. I mean, you were up and down, out of bed, you mean? A. Yes.

Q. This next day, you did not call the doctor for yourself that day, either, did you? A. No.

Q. When did you first call the doctor for yourself? A. Next day.

Q. Next day? A. Next morning.

Q. Next morning, so that that would be about—the papers allege that this happened on the 20th of June— A. They do?

Q. —not the first of June, so that would be about three days after, wouldn't it,—about the 23rd, wouldn't it? Suppose I put it this way: I don't want to get you mixed up, or anything else. About, from the time you ate the peaches, you called the doctor about three days after, is that right? A. No, no, the doctor came the same night, next night.

Q. I mean, for you. A. No, the night that we ate the peaches, the doctor came that day—next day.

Q. I mean, for you. A. Well, for me, at five o'clock that night.

Q. I think you said before, that you didn't have him yourself until the next day after that. A. No, sir.

Q. That was for the boy,—oh, I see. Did the doctor treat the boy? A. No.

Q. He went to the hospital, didn't he? A. No, that boy died.

Q. I mean the one— A. He was dead when I sent for Dr. Levine.

Q. I see, but what I am talking about, the other boy, he went to the hospital some time after— A. No.

Q. —or the next day? A. Next day, I think it was he went.

Q. Next day? A. He was taken to the hospital.

Q. I see, all right, I see, the doctor sent him to the hospital? A. Because his mother and me was too sick to wait on him.

Q. I see, too sick to wait on him, so he sent him to the hospital? A. Yes.

Q. And he was taken care of at the hospital? A. Yes.

Q. Now, the doctor that you had first was Dr. O'Grady? A. Yes.

Q. Did you go to the hospital yourself? A. No.

Q. Did Mrs. Berni go to the hospital? A. No.

Q. At no time, were you at the hospital for treatment then, were you—you nor Mrs. Berni? A. No.

Mr. MacLeod: That is all.

Re-direct examination by Mr. Rabinowitz:

Q. Now, do you remember the name of the doctor that came in, sent the boy, second boy, to the hospital? Do you recall him? A. No, I was in

bed; I don't remember that doctor. I didn't see the boy, nor I didn't see the doctor——

Q. Didn't see the boy? A. —I didn't see the boy then, when he was dead.

Mr. Rabinowitz: That is all.

Re-cross-examination by Mr. MacLeod:

Q. You didn't see the boy, did you say?

Mr. Rabinowitz: She didn't see the boy, when he was dead, she said.

Q. Just a moment, just one question. Did I understand you to say, you were not there when the boy went to the hospital? A. I was in bed, sick.

Q. Oh, I see, you were in bed. How many days after was it when the boy went to the hospital, the one that did go to the hospital? A. I don't know, I was too sick abed to remember that.

Q. I see; you do not remember whether it was two or three days? A. (No answer.)

Mr. MacLeod: That is all.

Re-direct examination by Mr. Rabinowitz:

Q. Was there any pineapple eaten— A. No—

Mr. MacLeod: I object to that. Just a moment——

Mr. Rabinowitz: You brought it out on cross-examination.

Mr. MacLeod: I didn't say a word on cross-examination. In my opening to the jury I spoke about pineapple, but I never spoke to this witness about pineapple; I think that is a very leading question. * * * I said, the record will show, that they recorded—I said the records at the hospital,

the history, that showed they had eaten pineapple; I did not say that this woman said it, nor did I cross-examine on it. Counsel can ask what they did eat, but the way he put the question, I think it is leading.

The Court: I will permit it, in view of what you told the jury.

Mr. MacLeod: Allow me an exception.

The Court: Yes.

Q. Did you eat any pineapple? A. No.

Q. Was there any pineapple ever served? A. No.

The Court: When?

Q. At this particular night, when peaches were opened? A. No.

Q. At any other time? A. No.

Re-cross-examination by Mr. MacLeod:

Q. Do you know the hospital record shows that there was pineapple——

Mr. Rabinowitz: The hospital records do not show that, Mr. MacLeod. Now, I object to that statement.

Q. Do you know whether the hospital record shows there was pineapple, or not? A. No, they couldn't, because I didn't have any pineapple.

Q. Now, I didn't ask you that. I am only asking you, whether you knew the hospital records show there was pineapple, or not? A. I do not know, no.

Q. Did you ever hear it? A. I never heard it.

Q. Never knew it alleged that—do say that? A. No.

ISRAEL LEVINE, M.D., sworn.

Direct examination by Mr. Rabinowitz:

Q. Doctor, what is the full name? A. Israel Levine.

Q. Are you a practicing physician and surgeon of the State of New Jersey? A. I am.

Q. For how long have you been engaged in the practice of medicine? A. A little over twenty-five years.

Q. Are you associated with any hospital? A. I am.

Q. What hospital, doctor? A. Barnert Hospital of Paterson and the Beth-Israel of Passaic.

Q. Doctor, were you the family physician of Martha Griffin and Mabel Berni and the children on this occasion mentioned, June 20, 1928? A. I have been the family physician of the Griffins for a long time.

Q. How many years, would you say, doctor? A. Oh, probably six or seven.

Q. Were you called in, doctor, on June 20th, or thereabouts, by the family of Martha Griffin? A. I was.

Q. Have you here the records for the purpose of refreshing your memory as to the exact date, or the approximate date, when you were brought in? A. I have, on June 21, 1928.

Q. June 21, 1928. Now, doctor, for the purpose of refreshing your memory, will you refer to that record, and state to the court and jury the object of your visit?

> Mr. MacLeod: Now, I object to that, unless counsel lays the foundation, for the purpose of refreshing his recollection. There has not been any such foundation laid for it, to make that statement, to ask

him to read that—counsel assumes that he himself needs to refresh his recollection.

The Court: Unless he absolutely needs it.

Q. Do you need the record, doctor, for the purpose of refreshing your memory? A. I do not think so. I know the case pretty well without.

Q. Well, if you do need it, doctor, why, there is no objection.

The Court: Go ahead; he said he did not.

Q. Will you state to the court and jury the object of your visit, doctor, and the circumstances surrounding your treatment, etc., of the family? A. On the evening of June 21st I was called in to see Mrs. Griffin, when I found a lot of excitement in the house, and they told me that the little girl——

Mr. MacLeod: I object to what they told you.

Q. What did they tell you? Who spoke to you, Dr. Levine? A. Some people in the house, not the family,—some of the people.

Mr. MacLeod: I object to what was said.

The Court: Cannot say what was said, doctor.

Q. What was the statement, doctor, that you obtained from Mrs. Griffin? A. At the very first, in Mrs. Griffin's room—Mrs. Griffin had been in bed——

Q. Yes? A. —some vomitus and a great deal of pain in the abdomen—I obtained history——

Q. Did you ask her to give you a record, or some statement, as to what transpired?

Mr. MacLeod: I object to that, your Honor, please—self-serving statement by this——

Mr. Rabinowitz: Lambert *v.* Consolidated Traction Company, sir.

Q. You were the attending physician? A. I was.

Q. All right, doctor, will you state what she stated?

The Court: As to what, her condition?

Q. As to the history of the case?

Mr. MacLeod: As to the condition—I have no objection to the condition, where she has pains, or anything like that.

The Court: What are you trying to ask?

Mr. Rabinowitz: I am laying the foundation of the history upon which a hypothetical question can be—would be based, and I rely upon the case of Lambert *v.* Consolidated Traction Company.

The Court: Are you trying to get the history?

Mr. Rabinowitz: Yes, sir.

The Court: What is your question?

Mr. Rabinowitz: All right.

Q. What was the statement given to you, Dr. Levine, by Mrs. Griffin as to the cause of her illness? A. Following——

Mr. MacLeod: Of course, I object to that, your Honor, please.

The Court: Not as to the cause, she could not tell the cause.

Q. What did she state to you, doctor, in connection with the history—what history did she give you? A. On my questioning her, she gave me a history that the night prior to my visit, that she had eaten some canned peaches, and on examining the condition I made a diagnosis of ptomaine poisoning; then I asked——

Mr. MacLeod: I ask that that be stricken out, your Honor, please, that is—further, I object to the conclusion by counsel that someone said that condition came about by some canned peaches—I don't want to be technical in this thing, but I think we ought to have some concrete connections.

Mr. Rabinowitz: I will promise to connect it up.

Mr. MacLeod: I object to it, and ask that it be stricken out, at this time.

The Court: Pretty broad statement.

Q. She gave you a history, doctor, of having eaten canned peaches?

Mr. MacLeod: I object to that.

The Court: He has already said that.

Q. What other facts did you obtain, doctor, in connection with the history? A. I wanted to see the vomit, the material that came from her stomach; that was shown to me.

Q. Did you look at the vomit, doctor? A. I did.

Q. What did the vomit disclose? A. It disclosed some undigested food, which appeared yellowish in appearance and soft in character, and with the history and my observation, both together, I thought of the peaches—

Mr. MacLeod: I object to that.

Q. You thought what, doctor? A. Probably peaches.

Q. Probably canned peaches? A. (No answer.)

Q. Now, doctor, what other facts were given to you in connection with the history, so far as the food that was eaten at that particular meal? A. At that meal, well, the food, outside of what she had eaten, she said she had some toast and some tea, but nothing else.

Q. Did you examine her, then, after the history was obtained? A. I did.

Q. What were the objective symptoms, doctor? A. Objective symptoms?

Q. Yes, sir. A. There were no objective symptoms—only that the——

Q. What were the subjective symptoms, doctor?

Mr. MacLeod: I object to the subjective symptoms, your Honor, at this time; I do not see how that——

The Court: He has already had the subjective.

Mr. Rabinowitz: No, the objective, sir; this is the subjective. He said there were no objective.

The Court: He said there were no objective, and he has already had the subjective—vomit from the stomach, pains.

Q. Doctor, how long did you treat her? A. I treated her between two and a half, or three months, is it?—even after that, I treated her several times.

Q. How long was she in bed, to your knowledge? A. She was actually in bed about four weeks.

Q. Actually in bed, to your knowledge, about four weeks? A. Yes, sir.

Q. Did you know Mrs. Griffin before? A. I have seen her at the home, yes.

Q. Do you know her condition of health to be good, doctor? A. Yes, as far as I have known her.

Q. Now, on obtaining your history, doctor, examining the patient, Mrs. Griffin, what conclusions did you come to, as the cause of her illness? A. Ptomaine poisoning.

Q. Ptomaine poisoning. Now, doctor, how is ptomaine poisoning brought about? A. By some food eaten and undigested probably, some germs into it, which caused the condition.

Q. Now, doctor, would you say, from a history of the case, of the plaintiff, Mrs. Griffin, who testified that she was in good health before having eaten these peaches; that after eating these peaches, in the course of twenty-four hours, she began to have some digestive disorder, that she vomited, that she was prostrated; that she had eaten for the evening meal, June 20, 1928, some canned peaches, some toast and tea, that prior to that time she was in good health, would you say, doctor, from your examination and the history of the case, and the testimony given by this plaintiff while on the witness stand, Martha Griffin, that the cause of her illness——

Mr. Rabinowitz: I will withdraw that latter portion.

Q. —and including in the hypothetical question this feature of it, that her daughter became ill, as given to us on her testimony; that two children died of having eaten out of the same can of peaches; that a brother who was present at the same meal but who did not partake of the peaches and he did not become sick—would you say, doc-

tor, that, from this history and these facts, that the cause of the illness of Martha Griffin was due, in all probability, in your opinion, to the canned peaches that were eaten on this occasion?

Mr. MacLeod: I object to the question, your Honor, please—does not eliminate all of the causes—does not show that anything, so far as these peaches are concerned, was the cause of it directly or indirectly.

The Court: I sustain the objection.

Q. Would you say, doctor, adding to the question that I have already given you, assuming that there were no foods eaten by Mrs. Griffin prior to that time which were deleterious in character, and under those circumstances, and that history, and the testimony of the plaintiff that, in your opinion, the food poisoning of Mrs. Griffin was due to the canned peaches?

Mr. MacLeod: I object to that, your Honor, please.

The Court: I sustain the objection.

Mr. Rabinowitz: Admitted, your Honor?

The Court: I sustain the objection.

Mr. Rabinowitz: I would like to ask Mr. MacLeod in what particulars the objection is directed to, sir. I had expected that the entire—all of the facts were incorporated in the hypothetical question. If there is any feature of it that should be included, I will do so, or I can reframe my question.

Q. Doctor, from a history of the case, as obtained by you from Mrs. Griffin, to the effect that on the evening of June 20, 1928, she purchased a can of peaches at the James Butler Grocery

Store, that those peaches were eaten on that evening, on June 20, 1928, and served within fifteen minutes to her daughter, Mabel Berni, and to her two children—and the two grandchildren; that her son was present at the time but did not partake of the peaches, that her son did not become ill; that her daughter became ill; and that from your examination of Mrs. Griffin, the symptoms disclosed disturbance of the digestive tract, that she was prostrated, that the vomit indicated a substance which, to your mind, contained peaches, that she was in good health before the eating of these canned peaches, and that your diagnosis was ptomaine poisoning, would you say, doctor, that from a history of the case and the circumstances related by the plaintiff on her direct case, that the condition of ptomaine poisoning which Mrs. Griffin was suffering from during the course of your treatment as attending physician was, in your opinion, due to the eating of canned peaches?

Mr. MacLeod: I object to that, your Honor, please.

The Court: I sustain it.

Q. Eliminating, doctor, any other cause——

Mr. MacLeod: Is that a question?

Mr. Rabinowitz: Yes.

Mr. MacLeod: I object to it.

Q. Including the other, in the hypothetical question?

Mr. MacLeod: I object to that.

The Court: I sustain it.

Mr. Rabinowitz: Your Honor sustains that?

The Court: Yes, I sustain the objection.

Mr. Rabinowitz: I ask your Honor for an exception.

The Court: Yes.

Q. Doctor, what is your diagnosis of the case? A. Ptomaine poisoning.

Q. Ptomaine poisoning from what, doctor? A. From——

Mr. MacLeod: Now, I object to——

The Court: He has already given you that. He has already testified that ptomaine poisoning was due to eating the canned peaches.

Mr. Rabinowitz: That is the doctor's testimony.

The Court: That is the way I have it written down.

Mr. Rabinowitz: Take the witness——

Q. Oh, I wanted to ask you, doctor—what effect, doctor, did this food poisoning have upon the system, or the general physical effect, of Mrs. Griffin? Do you recall just how it affected her? A. At the time?

Q. Yes, so far as the progress of the case is concerned. A. This was after the cramps and the vomit, two or three days afterwards, or a day probably,—probably a day and a half,—this was followed by diarrhea; this diarrhea kept up for probably a week without being able to check, which was followed by dysentery,—that mean bloody, etc.,—which kept up for three weeks, or a little bit over, and then that was checked. During that time she lost considerable weight. She has never been able to regain her former physical condition.

Q. Do you know how much weight she lost, doctor? A. I cannot say.

Q. Upon reference to your card, doctor, would you say,—would it be necessary——

Mr. Rabinowitz: Withdraw that.

Q. Would it be necessary to refer to your card to determine the number of visits that were made upon Mrs. Griffin? Would you have to refer to that for the purpose, to refresh your memory? A. No, this card is only to keep as my history card; visit is kept in a different book, but I have the month, which indicated how many visits I made during the month.

Q. Will you refer to that, doctor, if it is necessary, and state to the jury the number of visits? A. Well, the amount of money I have got, that I have charged for the case, during the month of June, thirty-five dollars, July fifty dollars, August thirty dollars,—that means about twelve or thirteen in the month of June——

Q. Is that visits, doctor? A. Yes—about seventeen or eighteen during the month of July and about ten in the month of August.

Q. Ten during the month of August, you say you saw her, or taking out the office—— A. Yes.

Q. Would you say there was pain, doctor, during this period of time? A. Always, due to the stomach disturbance.

Q. And loss of weight, doctor? A. She was less weight, never regained again.

Q. Was her strength impaired, as a result of this condition? A. When you lose weight, always lose strength.

Q. Did you know she worked before, in the Y. M. C. A.? A. I did not know where she worked, but I knew she worked.

Q. Do you know whether she has worked ever since that time? A. I do not.

Q. Would you say, doctor, that the condition from which she has suffered, as the result of this ptomaine poisoning, has become permanent? A. In her particular case, yes.

Q. "In her particular case, yes." In what respect, doctor? A. She has never regained the former vitality; she is always going down hill.

Mr. Rabinowitz: Take the witness.

The Court: Did the doctor have a bill for services?

Mr. Rabinowitz: Yes, sir.

The Witness: $115.00.

Q. That is exclusive, doctor, of the visits— A. She has paid me at the office, at the office visits she has paid me.

Q. Doctor, there is of the bodily health in the future? A. No, there is not.

Q. One more question, doctor: Would it be necessary, doctor, under the conditions of which Mrs. Griffin was suffering, whether an X-ray was necessary to be taken? A. It was not.

Q. While you were there, doctor, did you examine Mabel Berni, the mother of the children? A. I did.

Q. Did you observe any similarity in the diagnosis of Mrs. Griffin to Mrs. Berni? A. Same diagnosis.

Q. What did you observe about Mrs. Berni. A. She did not have the dysentery; she had diarrhea, vomiting and pain.

Q. "Diarrhea, vomiting and pain". Did you obtain from her, doctor, a history to the same effect, as Martha Griffin? A. Exactly.

Q. Was it, in your opinion, doctor, from the history that you obtained, that it was due to these poisoned peaches? A. I did.

Q. What can you say about her condition, doctor? A. Her condition, I think, is very good—is good.

Q. When did she show improvement, do you recall? A. She showed improvement about two months after onset of the disease.

Q. Two months afterward? A. Yes.

Q. Do you recall whether Mrs. Berni had lost any weight? A. I couldn't tell you; I don't know Mrs. Berni as well as I did Mrs. Griffin, so I don't know.

Q. When you were there, were the children there? A. No, the first time I called, I found one dead, and the second day I called, I found the second child had been sent to the hospital.

Q. Do you recall it was Dr. Veenstra that sent that child— A. That was the history.

Q. So you had nothing to do with the treatment of the children? A. No, I had not.

The Court: How long was Mrs. Berni sick? Two months?

The Witness: About two months. Of course, Judge, to make the examination,— she was sick two months.

The Court: Since that time, she has recovered?

The Witness: She has recovered enough to go to work.

Q. Doctor, may ptomaine poisoning be obtained through canned fruit? A. That is the only thing that occurs to me; again, it could be possible that it had been a toxic condition in the can, which could be done.

Mr. MacLeod: I ask that be stricken out, your Honor please,—possibilities.

The Court: I do not think you can speculate on an answer.

Mr. MacLeod: No, the question, I thought, was all right, but it was the possibility that came in the answer.

The Court: I think the answer was responsive to the question. The question was: "Could it come from canned fruit," wasn't it, "or peaches"?

Mr. Rabinowitz: Canned fruit.

Mr. MacLeod: I think, probably, the question might be all right, but the objection was the answer, that it could be possible.

Mr. Rabinowitz: I think, if the question was put in proper form——

Mr. MacLeod: I had no objection to the question. That was the reason I did not object to it, on that proposition.

The Court: I will let it stand.

Mr. MacLeod: I will withdraw my objection, your Honor.

Q. Now, doctor, have you had experience of ptomaine poisoning, doctor, being acquired through canned goods, canned fruits?

Mr. MacLeod: I object to that, your Honor, please.

The Court: Why?

Mr. MacLeod: On the ground that he does not show the kind of fruit he is referring to; in this case, I think, it is peaches—if he wants to say all fruit——

Q. Well, say, "canned peaches", then, have you, doctor? A. Canned peaches, I doubt, I don't remember having a case of canned peaches.

Q. What case do you recall? A. I recall one had slight ptomaine poisoning from fruits.

Mr. MacLeod: I object to that. Ptomaine poisoning may come from other sources—I do not think it should appear in this case.

Mr. Rabinowitz: Canned fruit.

The Court: Canned peaches probably.

Mr. Rabinowitz: I assume that the defense is going to have a line of experts here on ptomaine poisoning, and I am just anticipating, so that I can be prepared.

The Court: Well, they will all have to be limited to canned peaches, because counsel is now objecting to anything beyond that, so if I am going to hold you to that, I will hold them down, too, to that issue.

Q. Well, may ptomaine poisoning, doctor, come through canned goods?

Mr. MacLeod: I object to that, your Honor, please. You are through—I beg pardon?

The Court: He has already said it could come through canned peaches.

Mr. Rabinowitz: Yes.

The Court: In effect, he has already testified that the ptomaine poisoning that this woman had and that the daughter had was due to eating these canned peaches.

Mr. Rabinowitz: All right; that is all.

Cross-examination by Mr. MacLeod:

Q. Now, doctor, did you ever see these peaches? A. I never seen them; I seen the vomit, not the peaches themselves, but the vomit.

Q. Did you see any peaches in the vomit? A. The material which remained.

Q. Did you see any peaches in the vomit, too? A. No, only the resemblance of peaches.

Q. Did you see any peaches in the vomit?

The Court: How could he? He said he saw the resemblance of it.

Mr. MacLeod: I did not get the last words.

Q. What did you see in the vomit? A. Some composition, which was of a yellowish character, which resembled the contents of a peach.

Q. Did you see that in the vomit? A. In the vomit.

Q. With your naked eye? A. With my naked eye.

Q. Where was this vomit? A. It was brought to me in the bedroom, by some lady that was there; I can't even think of her name.

Q. Where was the vomit? A. In some kind of a dish that she had vomited in it and brought to me.

Q. Was that the first time you went there? A. Yes, that was the first time.

Q. She called your attention to it, did she? A. I asked for it.

Q. What did you do with that vomit? A. I just observed it, told them to throw it away.

Q. Didn't take it out to any laboratory to test it? A. No, I didn't.

Q. Would that have been a certainty, to find out whether or not, what you thought it was,

whether or not it had ptomaine in it, bacteria in it or not? A. Everything has bacteria.

Q. Would that be a certainty, to find out what was in it, what it was composed of, whether there was any ptomaine poison in it, or not, if you had it taken to a laboratory and had it tested? A. I doubt that—ptomaine poison—I couldn't say that would be positively found out, but the peach contents could be found out.

Q. Peach contents could be found out? A. Yes.

Q. But you couldn't say it was ptomaine poison, could you? A. It could have been, yes.

Q. Can't you have taken, or if you had taken that vomit off to a laboratory to be tested, if not by you, by someone who knows how to test, to find ptomaine poison, couldn't they have found it in the vomit, if it were there? A. They would have found some germs, yes.

Q. They would have been able to have diagnosed this from a laboratory examination, if there was ptomaine poison there, couldn't they? A. They could tell what germ was there, but they couldn't tell it was ptomaine poison.

Q. As you looked at it, you saw the woman had ptomaine poison? A. The symptoms were ptomaine poison, to see, and what I looked was the condition of the vomit.

Q. What was your diagnosis, as you looked at the vomit? A. Peaches.

Q. Peaches? Was there anything else in there? A. Some marks, some other substances.

Q. Was there any protein in there? A. Protein? I didn't examine for protein.

Q. Do you know whether there was any protein in there? A. I couldn't tell protein from my naked eye.

Q. Doesn't ptomaine poison come from protein? A. Protein does cause——

Q. Acid cannot, can it? A. I did not examine it——

Q. I am asking you: Acid cannot, can it? A. No.

Q. Is it not a fact that acid cannot cause ptomaine poison? A. No.

Q. You talked to Dr. Hecht, too, didn't you? A. I talked to Dr. Hecht?

Q. Yes. A. No, sir; I did not.

Q. You never talked to Dr. Hecht? A. I did not.

Mr. MacLeod: Stand up, Dr. Hecht.

Q. Did you ever talk to Dr. Hecht? A. I have seen the gentleman.

Q. Never saw him before? A. I didn't know it was the doctor.

Q. Is your name, "I. Levine"? A. Yes.

Q. Did you sign this paper? A. Yes.

Q. Was Dr. Hecht there when you signed it? A. Not this doctor; some other gentleman may have been there.

Q. Look at him good. A. I don't remember his face.

Q. You don't remember; it might have been he? A. It might have been.

Q. Maybe he didn't have his mustache. The man that you saw, did he have a mustache on, or not? A. I cannot remember that.

Q. Was he plain shaven, or not? A. I cannot remember that.

Q. You remember signing your name on there, don't you? A. Yes.

Q. Do you remember him asking you this question—Dr. Hecht or the man that came to see you? A. The man that had that——

Q. —"If food poisoning, what food caused the illness?" You answered, "Not know"? "Canned

peaches, according to the family," but according to your statement, you did not know; is that right? A. No, sir.

Q. Never said that, did you? A. I told him——

Q. You never said that, did you? A. Not for the family, no.

Q. You never said, "Cause not known, did you"? Never said that? A. Yes, I did say that.

Q. You did say that ? A. I did say that.

Q. That was on July—when was that, doctor? A. I don't know.

Q. Why did you say the cause wasn't known, if you did know the cause was ptomaine poison, and the peaches were the cause of it? A. I said, "as far as the family was concerned".

Q. "As far as the family were concerned"? What do you mean by, "as far as the family was concerned"? A. He says to me——

Q. Now, wait— A. He said to me, if I remember correctly, as it is coming back to my mind——

Q. As it comes back to you? A. It is coming back to my mind a little bit, more clearly now, when he came over to question me, he said to me, how did I get this history; I said, from the family, of course, but not from Mrs. Griffin nor from the other one.

Q. You got the history from the family of eating peaches? A. What was that?

Q. You got from the family that they had eaten—— A. Yes.

Q. That is what you told him? A. Yes.

Q. According to the family, they claim it was peaches; is that what you mean? A. No, he didn't ask me, I mean, whether I had seen the peaches. I had taken the history, I said, from the family.

Q. I am not talking about the history; I am talking about the case. A. That is where I got the history of the case.

Q. You signed this paper, and you said on here in answer to the question, "If food poisoning, what food caused the illness?" "Not—" "—what food caused the illness?" you answered, "Not known" n-o-t k-n-o-w-n? A. Well, he misunderstood me then.

Q. You signed this paper? A. I did, but he must have misunderstood me, when he said there, "Not known"; he misunderstood me.

Q. I see. You added no parenthesis, do you remember? A. I didn't add anything.

Q. You were there, weren't you? A. I don't know what you did.

Q. You read it, didn't you? A. I didn't read it.

Q. Did you sign something you didn't read, doctor? A. I did sign that time.

Q. Would you sign a paper without reading the paper? A. After questions were answered, yes.

Q. You were the doctor for this woman? A. Yes.

Q. You were, at no time, asked by this doctor, "If food poison, what food caused the illness?" A. No.

Q. (Continuing) And you told him, you didn't know the cause of it, didn't you? A. No, I did not.

Q. Didn't you tell him that the peaches caused it? A. In my opinion, yes.

Q. Did you tell this doctor that the peaches caused it? A. Absolutely; yes, sir.

Q. Why didn't you put that here? Why didn't you scratch that out, and put that on? A. I didn't put anything on.

Q. When you read it, you saw it, didn't you? A. I didn't read it.

Q. You signed it without reading it, didn't you? A. Yes.

Q. You are careful what you sign, aren't you? A. I am.

Q. (Continuing) What you put your name too, aren't you? A. I don't know what he done, after I signed it; he might have put something in there after that.

Q. You think he did? A. I don't know what is in there, after I signed it.

Q. What did you mean, when you said, "he might have put something in there after that"? A. I don't know, that was the first time I have seen it since that time, which was quite some time ago.

Q. So you say, doctor, that was not there, when you signed it; is that right? A. I didn't see nothing of the kind; I didn't see the paper.

Q. Do you remember this question, doctor, being asked you at that time, by Dr. Hecht: "Was any bacteriological or chemical examination made of the blood, vomitus or excreta"? A. I said, "No".

Q. (Continuing) You said, "No"? But you did make an examination of the vomit, didn't you? A. Looked at it, yes, that is all.

Q. Is there a difference between bacteriological or chemical examination—is that different from the examination you made? A. Yes, sir.

Q. Oh, I see; all right. Would bacteriological or chemical examination of the vomitus, doctor, have—would that examination reveal the cause of the ptomaine poisoning, if the ptomaine poison was there?

The Court: You have been all through that.

Mr. MacLeod: I do not think I asked him in that same form; I want to get that chemical point.

The Court: No, you have been all through it.

Mr. MacLeod: Your Honor, allow me an exception?

The Court: You have cross-examined him very fully on it.

Mr. MacLeod: Allow me an exception.

The Court: Yes.

Q. Do you remember the date when this doctor saw you? A. I do not.

Q. Can you tell us the date when he came to see you, whether you were still treating these people or not, or whether you were there? A. I don't believe so, I think it was after that; I don't remember he came to my office thereafter a short time, I don't remember.

Q. How long would you say you treated these people? A. She was real sick for about two months, then, afterwards, off and on, for three months, I would say, close to two months.

Q. Don't you remember, he came July 12th? A. In July twenty——

Q. I don't mean him, doctor; I mean——

The Court: He is speaking now of this—

A. I don't remember.

The Court: —Dr. Hecht.

A. No, I don't remember, even, seeing Dr. Hecht.

The Court: Do not remember seeing him?

The Witness: No.

The Court: Is that all?

Mr. MacLeod: No.

Q. Don't you know the doctor was there to see you within a month after this? A. I don't know when he was to see me; I don't remember when he was to see me.

Q. Did you examine the blood, at all, in any way? A. No chemical or any other examination was made, excepting by vision.

Q. Did you, at any time, examine the excreta in any way? A. No, I did not; it was not necessary to.

Q. How did you arrive at the cause of their ptomaine poisoning, then? A. Symptoms.

Q. What symptoms? A. The symptoms of the woman lying in bed, with severe pain, prostration, which was then followed by a slight distension of her abdomen; then followed, a few days afterwards, diarrhea occurred, which was very, very pronounced; then it was followed by dysentery; all during this time, the rise in temperature was so slight that no other illness but ptomaine poisoning was the cause of these symptoms, which are the symptoms of ptomaine poison.

Q. If they had told you they had pineapple, would you have said it was caused by pineapple? A. Not unless I had seen it.

Q. Then those symptoms you have told us about, you saw pineapple in the vomiting later, would you say it was pineapple? A. Yes, sir, if I seen it was pineapple, I would have said it was pineapple; if I had seen it was any other food, I would say.

Q. I am talking about fruit? A. Any food?

Q. I am. A. It makes no difference, whatever I had seen, I would have made that as the cause.

Q. Whatever had been in the vomit, you would? A. I would have, if that was the cause of it.

Q. Was the cause of it? A. Exactly, in my mind.

Q. In your mind? A. Certainly.

Q. So that if a person gets pains in the stomach, and in their intestinal tract, and they vomit, you see vomit, you say the article that is vomited, then, that was the ptomaine poison caused by that article? A. That was the cause of the vomit, and they would cause—ptomaine poison was that condition, by the symptoms.

Q. Even though that peach, or peaches, or fruit, was good, when they ate it, you would still say that was the cause of it? A. I would say that, to my mind, yes.

Q. You would still say that was the cause? A. That was the cause of it, whatever I found in the vomit.

Q. It could be that way, even though the food was good; is that right? A. I do not say that.

Q. I am asking you? A. I do not say that.

Q. You don't know whether these peaches were good, or not—— A. If the food was good, in my opinion, naturally, the woman would have digested the food, however, without vomiting, or without poisoning.

Q. But you do not know whether those peaches were good or bad, do you? A. I don't know.

Q. You do not know? You do not say, now, that they were, do you? A. Huh?

Q. You do not say, now, that they were, do you? A. I couldn't say that.

The Court: But you did say, "If they were good, she would have digested them"?

The Witness: Certainly, that is what I said.

The Court: And the fact that she vomited it, and you found it in there, because of what you found subsequently lead you to that conclusion; is that it?

The Witness: Yes.

Q. Doctor, would you say that everything that is good would have digested? A. I should think so.

Q. Aren't there a lot of things— A. (Interrupting) Unless they took an excessive amount of it.

Q. Yes, over-indulgence? A. Yes.

Q. That is, an over induglence of fruit or anything? A. Yes.

Q. Even though it was an over-indulgence of peaches? A. That I don't know.

Q. If they did, doctor, it would back up on them, they would throw it up, and get sick? A. If they were bad, I don't know.

Q. Yet the peaches would be good? A. It may have, but it wouldn't cause ptomaine poison; if the peaches were right, a person would be normal again, would be well again, after throwing them up.

Q. What is ptomaine poisoning? A. Ptomaine poisoning is a poison produced by some germ or another; whether it is due to a toxic condition or an albumen, it may be toxic albumen.

Q. Do you distinguish, doctor, between ptomaine poisoning and food infection? A. I think they both have the same symptoms, almost about the same thing.

Q. You think they are the same thing? A. Yes, sir; the same symptoms.

Q. Are they the same thing? A. Only thing that can be differentiated is that the laboratory will differentiate the two, but the poison symptoms are exactly the same.

Mr. MacLeod: That is all.

Re-direct examination by Mr. Rabinowitz:

Q. Doctor, there is recognized, of course, canning poison, due to cans from a store, is it not, doctor?

Mr. MacLeod: I object to that, your Honor please.

Q. That may produce poisoning, may it not, doctor?

Mr. MacLeod: I object to that, what may happen, or what possibility.

The Court: Probability?

Q. Probabilities, doctor, may they produce poison, solder or the cans, doctor, or the method of manufacture of the cans, may that produce ptomaine poisoning?

Mr. McLeod: I object to that. This suit is not on negligence, that we had any defective cans, guilty of negligence, doesn't enter in dispute at all here.

The Court: I will sustain the objection.

Q. That is all, doctor.

William Veenstra, M. D., sworn.

Direct examination by Mr. Rabinowitz:

Q. Dr. Veenstra, where do you practice medicine? A. Paterson, N. J.

Q. How long have you been engaged in the practice of medicine? A. Twenty years.

Q. Are you affiliated with any hospital? A. Paterson General Hospital.

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Q. What capacity, doctor? A. Associate surgeon.

Q. Associate surgeon? A. One of the associate surgeons.

Q. Doctor, did you—or were you called in, doctor, by Mrs. Berni or Mrs. Griffin, in connection with the illness of her child, James—illness of the family? A. Yes.

Q. Do you recall the approximate date, doctor? A. Well, I cannot recall the exact date, except that it was in the latter part of June, two years ago, as it was just before my vacation, and I always go on my vacation the first of July, that is the way I recall it; otherwise, I would not be able to.

Q. Whom did you speak to when you came there, doctor? A. To the mother of the child.

Q. Mrs. Berni? A. Yes.

Q. What history did you obtain from her, doctor?

Mr. MacLeod: I object to that, your Honor please, any statement made by the mother as to these children.

The Court: What is that?

Mr. MacLeod: As to these children, I object to any history which he got from the mother of the children.

Mr. Rabinowitz: How else——

The Witness: The child was only three years old, couldn't give me a history.

Mr. MacLeod: Just a moment, there is no suit here for any children.

The Court: I will permit it.

Mr. MacLeod: Allow me an exception.

Q. What history did you obtain from Mrs. Berni? A. She explained the history, that the

child had been indulging in canned peaches, and as a result had become ill.

Q. Did you examine the child, doctor? A. I did.

Q. Do you know the name, was it "John"?

A Voice: James.

Q. James Berni? A. I don't know what the child's name was.

Q. Do you recall the approximate age of the child? A. I presume it was around three or four years old.

Q. Was the child in bed when you came there? A. Yes.

Q. What were the symptoms, doctor, that you observed on examination? A. The child was in the state of collapse; it had a temperature of very high, I think it was around 104 or 105; abdomen was actually distended, and the child was in a condition of profound shock. That is all.

Q. Did you examine any of the other members of the family then, doctor? Did you observe any of the other members of the family then? A. Yes. I observed the child's mother, who stated that she was not feeling well and had headache, but I cannot recall whether I prescribed for her, or not, I do not remember.

Q. Did you see Mrs. Griffin, the elderly woman? A. I do not know.

Q. Did you observe any vomit of the child? A. I did not. I had a history that the child had vomited.

Q. That the child had vomited? A. That the child had vomited, but I did not see it.

Q. What was your diagnosis, doctor, from the symptoms that you observed? A. Gastro enteritis, due to a food poisoning.

Q. Gastro enteritis, due to food? A. Due to a food poisoning, yes.

Q. What is that commonly caused by, doctor? A. It is, as I say, a food poisoning, there isn't anything else to it.

Q. You say you obtained a history of having eaten canned peaches, doctor?

Mr. MacLeod: I object to that,—leading question,—your Honor please.

Q. Now——

Mr. MacLeod: I object to that.

The Court: He has already said——

Q. Doctor, would you say that canned peaches might produce the symptoms that you observed upon examination of James?

Mr. MacLeod: I object to that question, as to what might happen.

The Court: Yes, sustain it.

Q. Doctor, what is food poisoning due to, in your opinion? A. Food poisoning is a poison that is generated in canned goods, and it is supposed to be due to some metallic substance in the solder that is used to solder the can; it may only occur in one can, perhaps, out of a thousand or ten thousand, it is impossible to tell, all of the other cans would be all right, and just this particular can may get it.

Q. That produces a germ, does it, doctor?

Mr. MacLeod: I object to counsel's leading.

A. (Interrupting objection) No.

The Court: He said, "no".
Mr. MacLeod: Just a moment——

Q. What, then, is the characteristic of the poison? A. It is entirely poison that is due to a chemical poison, which so weakens the gastro intestinal (?) tract, mucosa that they develop infection on top of it.

Q. May it be described as botulism, doctor? A. It may, yes.

Mr. MacLeod: I object to counsel leading.

Q. What does——

Mr. MacLeod: Withdraw my objection, go ahead.

Q. What is botulism, doctor? A. Why, it is a condition that is caused by ingestion of a food which contained a poison which is—which causes a chemical change in the intestinal mucosa, and will produce symptoms of intestinal distress.

Q. Now, doctor, what did you do for the child? What orders did you give in connection with him? A. I did nothing; the people were very poor, they couldn't adequately take care of the child, there were no available facilities for any intelligent treatment of him, and I sent the child immediately to the hospital, within an hour after I saw it.

Q. What hospital? A. Paterson General Hospital.

Q. Did you see the child at the Paterson General? A. Yes, I saw it the following day, and I think the day after; it was in the ward service, however.

Q. What happened to the child? A. The child died.

Q. Now, doctor, is food poisoning a blood poisoning? A. No.

Q. It is not? A. No.

Q. Do you recall, doctor, whether there was any laboratory examination made at the hospital while you were present, to your knowledge? A. Yes, there were several examinations made. There were several examinations of the stool made; there was a blood count made, and I am not sure whether there was a blood chemistry or not, but I distinctly remember the blood count and the stool examination, and, of course, urinalysis.

Q. Do you recall the examination of the stool? A. No, they were unable to find any bacteria in that,—that is, of the pus type, if I am right,—I don't know, this was so long ago, but I remember that the examination was very unsatisfactory as to the examination of the stool. The child really died of intestinal toxemia, that was due to poison, not from any bacterial infection.

Q. Not any bacteria? A. No.

Q. You say he died from what? A. Toxemia,—intestinal toxemia.

Q. Intestinal toxemia? A. Yes.

Q. Which would not be disclosed upon the examination of the stool? A. No,——

Q. All right. A. —except the chemical,—I will withdraw that.

Q. Except chemical? A. Yes, the chemical; it might be shown under bacteriological examination.

Q. (Partly inaudible) —so you believe that the child died of intestinal toxemia? A. Yes.

Q. Even though it was not disclosed in the stool? A. Yes.

Q. Why do you say that, doctor? A. Because these children died of an incipient poison, which

poison paralyses all of the various centers, that ends up by paralysing their respiratory and cardiac centers, and they die from acute , from acute cardiac failure.

Q. So that is consistent, is it, with the history that you obtained, doctor, that the death of this child was due to food poison, the fact that the examination of the stool only showed b. coli? A. Yes.

Q. While the child was at the hospital, doctor, did you administer any treatment? A. I did not; it was not in my department, it was a ward case.

Q. Did you consult with anybody about the case, doctor, while you were there? A. I cannot recall who the interne was upon sending him it. I immediately called up the interne, suggested that he have high colonic irrigations, and that he be given proper treatment for the shock, for his condition of general shock, but I cannot recall who the interne is now, who he was.

Q. Did you speak to Dr. Clements about it? A. No, I do not think I ever had, if Dr. Clements called,—his call wasn't on that,—I think I did speak to his chief, Dr. Hagan, about it.

Q. Dr. Hagan? A. Yes.

Q. Hagan? A. Yes, he is in the charge of that service.

Q. So that what you prescribed for treatment was given, as you best recollect, to the best of your recollection, was the interne? A. Yes.

Mr. Rabinowitz: Take the witness.

Cross-examination by Mr. MacLeod:

Q. The interne was Miss Blauvelt, doctor? A. Yes, she was; I remember that.

Q. You recall that? A. Yes.

Q. That was in Dr. Cremens' department? A. Yes, he is associated there.

Q. You didn't find any peaches, doctor? A. No, I did not find anything.

Q. Did you see the report? A. At the hospital?

Q. Yes. A. Only so far as the clinical records were, he had a great deal of temperature; I do not believe that his temperature ever came down under 104, if I am not mistaken; he had this intestinal toxemia; he had intense poisoning, chemical poison.

Q. How did they get the record of the boys, in the history? A. Sir?

Q. How did they get the boy's record, in the hospital? Do you know? A. I do not know. I did not give them anything, outside of the fact that he was suffering from food poison; that was my diagnosis.

Q. Did you take the boy to the hospital, doctor? A. No, but he was brought there by some relative, or somebody, and they took him right into the——

Q. Mrs. Berni? A. Yes. They took him right into the immediately, within ten minutes after I saw him.

Q. That was his mother? A. I do not know, whoever it was; it was some one.

Q. Did you ever see the history at the hospital? A. No, I never saw the history; I only saw the clinical finding which they are taking, with the history.

Q. This "b. coli"? A. Bacilli coli, you are talking about——

Q. Yes? A. —that is the normal inhabitant of the intestine; it doesn't mean anything.

Q. That is a normal condition? A. Absolutely.

Q. After he dies, you made that examination of the excreta, did you? A. I never made any.

Q. Huh? A. I never made any.

Q. One was made? A. I do not know whether it was, or not.

Q. I thought you said that yourself? A. I said that when he first was admitted, that they examined the stools; you said, after he died. I do not think——

Q. You knew about that? A. Yes.

Q. That was normal? A. That was negative, as to any bacteria.

Q. That did not indicate any ptomaine poison, did it? A. No, he did not die from ptomaine poison.

Q. He did not die from ptomaine poison— A. No.

Q. —did he? A. No.

Q. That is all. A. He died from poison, food poison.

Re-direct examination by Mr. Rabinowitz:

Q. He died from food poison? A. Yes.

Q. Food poison may not be indicated in a stool? A. No, it would not be, not from bacteria; it is just a chemical poison entirely; it is not a bacterial poison.

Q. It is chemical? A. Chemical.

Q. In your opinion, it was a food poison— A. Yes.

Q. —he died of? A. (No answer.)

Mr. Rabinowitz: All right.

Re-cross-examination by Mr. MacLeod:

Q. You do not know what food, do you, doctor? A. I do not know.

Q. You could not diagnose what food, could you, doctor? A. I could not, only from the history that

they gave me, and the fact that two or three—or three other members of the family were ill, and that a child had died the day before, and they had the same symptoms that that child had.

Q. Say, they had meat pie the day before that, maybe? A. Why, then, they would have had an entirely different line of symptoms, they would have ptomaine poison. You see, that was protein. The child didn't die from ptomaine poison; the child died from food poison.

Q. You only dealt with that one child? A. That is all.

Q. If there was any meat there, then there would have been protein in, wouldn't there, doctor? A. It would, yes.

Q. That is what causes ptomaine poison, doctor? A. Yes.

Q. If there is no protein present, ptomaine poisoning doesn't occur? A. No.

Mr. MacLeod: That is all.

By the Court:

Q. Do you call canned peaches a food? A. Yes.

Q. That is a food. A. Yes, any canned food—one is a chemical poison, the other is not; they are two entirely distinct things.

By Mr. Rabinowitz:

Q. You had obtained the history at that time that they had eaten canned peaches? A. I so testified, yes.

Mr. Rabinowitz: That is all.

By Mr. MacLeod:

Q. Just one question, doctor. I understood you to say, on direct examination, that they told you

that they had been indulging in canned peaches—that was the word you used? A. I don't know whether I said that, or not; it is possible I said——

Q. My recollection. A. It is possible I said it, perhaps I said it; it is only a matter of their food.

Q. Suppose they had, and they shouldn't have, would it cause their stomach to be distended? A. Absolutely, because it would make—they would get more of the poison.

Q. What poison? A. The poison that is generated in the can, as a cause of it, has an action of distension of the stomach.

Q. Did you find out? A. I did not, no, but from the symptoms.

Q. Did you make an autopsy afterward? A. No.

Q. Would you have found out, if you had made an autopsy? A. No.

Q. Are you sure? A. Yes.

Mr. MacLeod: That is all.

Mrs. Mabel Berni, sworn.

Direct examination by Mr. Rabinowitz:

Q. Mrs. Berni, you are one of the plaintiffs in this case? A. Yes.

Q. You are one of the plaintiffs; you are one of the parties, suing in this case? A. Yes.

Q. You were the mother of the two children that died? A. Yes.

Q. And the daughter of Mrs. Griffin? A. Yes.

Q. And you lived at that time— A. 54 Spring Street.

Q. Paterson? A. Paterson.

Q. Were you employed during that period of time? A. I was, by Meyer Brothers.

Q. What capacity did you work in? A. Saleslady.

Q. How much were you earning a week? A. Well, I get twelve dollars a week, and I had a bonus, too.

Q. Twelve dollars a week and bonus; what did your bonus amount, about? A. Well, sometimes ten dollars a month, sometimes more, according to my sales.

Q. What department were you in? A. Glassware.

Q. Glassware Department? You were living with you mother at Spring Street, and who took care of the children? A. My mother.

Q. How old were they? A. Alfred was three years, ten months——

Q. Yes? A. —and James was four years and a half.

Q. Four years and a half, and your only two children——

Mr. MacLeod: I object to that, Your Honor please. I have not objected, but—whatever the fact of the ages are, I have no objection, but no further than that.

Mr. Rabinowitz: I will bring out, I was getting down to the issue.

Q. Mrs. Berni, do you recall the 20th of June, 1928? A. Yes, sir.

Q. Were you working that day? A. I was working.

Q. At Meyer Brothers? A. (No audible response.)

Q. Do you recall—did you have any breakfast that morning? A. I never eat breakfast.

Q. Never eat breakfast? A. No.

Q. Did you go home for dinner? A. I went home for dinner.

Q. Went home for dinner? A. Went home for dinner.

Q. Children there with you, at the time? A. The children were there with me.

Q. And the mother? A. Yes.

Q. Do you recall what you had for dinner? A. I asked my mother to make me some toast, because I like toast.

By Mr. MacLeod:

Q. What is that? A. Some toast; I asked my mother to make me some toast.

By Mr. Rabinowitz:

Q. Is that what the meal consisted of? A. I had some tea.

Q. Yes, you had tea and toast; anything else, do you recall? A. No, that is all I had.

Q. That is all you had. Now, was your mother working at that time? A. No, not that time, not that day.

Q. Not that day? A. No.

Q. Had she been working right along? A. She had been working right along——

Q. In the where? A. In the—across the street, here, Y. M. C. A.

Q. In the Y. M. C. A. A. In the Y. M. C. A.

Q. What capacity did she work at? A. In the kitchen at the Y. M. C. A.

Q. Just you and your mother in this household? A. Yes, that is all, and the children.

Q. Now, Mrs. Berni, you came home that night about what time? A. About five after six.

Q. Five after six. And who usually prepared the evening meal? A. My mother.

Q. Your mother; she prepared the meal, usually, for the children, too? A. Yes.

Q. Will you state to the Court and jury just what you had for the meal? A. Well, I had a cup of tea and I had some dry toast and I had a dish of peaches; that is all.

Q. When were the peaches opened? A. Well, by mother purchased them about five o'clock in the evening, they were on the table, she had just opened them because I saw her throw the can away when I came in the house,——

Q. Yes? A. When I am coming in the house.

Q. Did you see her take the peaches out of the can? A. She had just taken them out of the can, put them in the glass dish, on the table.

Q. Who served the children? A. My mother served us all.

Q. Was your brother there? A. My brother was there.

Q. What is his name? A. William Griffin.

Q. Did he eat any of the peaches? A. He did not.

Q. What did he eat? A. He had a boiled egg and some toast and a cup of tea.

Q. Now, is that all that was had for the meal? A. That was all, because it was very hot and we did not care to eat much.

Q. Now, just tell us, Mrs. Berni, of the first sign of illness. A. Well, the next morning I went to business, and I——

Q. You went to business the next morning. How did you feel, when you went to business? A. Well, that night, my little boy had cramps in the night, and he started hollering, and I had to be, it was all night, with him; it was too late to get

a doctor, so we called Dr. O'Grady first thing in the morning, so I had to be at the store at ten minutes to nine, so I had to leave before the doctor got there, and the doctor came at nine o'clock, when I was already in the store, and he came for the little boy. I was sick all day, in the store,— I was running up and down, my bowels moving; I was vomiting all of the time; and I came home at noon hour, and the little boy, my mother said, the doctor was here, he came at nine o'clock, she said, the doctor was here, he said the stomach was distended and he was vomiting, and he gave him something to stop him from vomiting, and he gave him swet nitre to take down the vomit; and I went back—I didn't eat no dinner, because I was feeling very bad because of the little boy, and I went back to the store. When I got in, the boy had just died at six o'clock——

Q. Huh-huh? A. —and then I was taken ill myself that night, and I went to bed, and the other little boy, he became ill, too, and they called in Dr. Veenstra, and Dr. Veenstra ordered him to the hospital, so I don't know who took him to the hospital, but some one took him, and then the officer came to the house and said I had to go to the hospital right away, because they did not think the little boy would live, so they took me up to the hospital in the taxi. Of course, they asked me what was the matter with the little boy. I said, "Well, I have one little boy just died, he is home dead," and I said, "we had eaten canned peaches and the toast," and that is all I told them.

By Mr. MacLeod:

Q. Where was this? A. In the General Hospital.

By Mr. Rabinowitz:

Q. Go ahead. A. And he had eaten the peaches, and the nurse said she thought it was poison that the boy had——

Mr. MacLeod: I ask that be stricken out.
The Court: Yes, strike it out.

Q. Did you go—— A. And I went home again, in the cab, my brother-in-law, and I went to bed, and I didn't get up; I was sick eight weeks.

Q. Eight weeks? A. Eight weeks.

Q. What were you affected— A. Vomiting and the bowels moving, at the same time, very nervous condition.

Q. What was your weight before this occurred? A. I weighed 145 pounds.

Q. How much do you weigh now? A. Well, when I got up, I weighed 90 pounds, and I weigh a little more now, of course, this is two years ago.

Q. How many pounds did you lose, you say? A. I lost, when I got up, fifty pounds.

Q. Fifty pounds? A. Fifty pounds.

Q. How long were you in bed? A. Six weeks.

Q. Who treated you during this time? A. Dr. Levine.

Q. You returned to work, then, after two months? A. I returned to work.

Q. Back to Meyer Brothers? A. I went back to the store.

Q. Have you felt any after*ward* effects? A. I always feel it.

Q. In what respect? A. Well, sometimes, when I am in the store, I feel dizzy, and I go upstairs, well, sometimes, with vomiting; I have to be more careful what I eat, because if I eat just a little food that doesn't agree, I have to throw it all up.

Q. Did you observe your mother vomit at all? A. My mother vomited all of the time.

Q. Was your child that was brought to the hospital vomiting? A. He vomited all of the time, in the house; of course, I don't know what he did in the hospital.

Q. Can you tell the Court and jury what the color of the vomit was? Do you remember? A. It was green, like fruit——

Mr. MacLeod: Green?

The Witness: Green.

Mr. Rabinowitz: Same color——

Mr. MacLeod: She said, "green".

Q. Now, Mrs. Berni, were there any—was there any pineapple eaten? A. No.

Q. What can you say, Mrs. Berni, about the condition of your mother's health before? A. She was very, very active.

Q. Very active, worked regularly, did she? A. Worked all of the time, never lost a day work.

Q. Were you working every day? A. Working myself, every day.

Q. What can you say about the condition of the children? A. Very healthy children; there was nothing the matter with them.

Mr. Rabinowitz: Take the witness.

Cross-examination by Mr. MacLeod:

Q. Mrs. Berni, do you know Dr. Hecht? A. I do not.

Q. Never saw him before? A. No, I haven't; I never saw him.

Mr. MacLeod: Stand up, Dr. Hecht.

Q. Look at this gentleman. Now, Dr. Hecht, you say you never saw this gentleman before? A. (No audible response.)

Q. Don't shake your head. A. No.

Q. "No". Do you know Mrs. Mary Morrison? A. I do.

Q. She is dead now, isn't she? A. She has died.

Q. Do you remember her being present— A. I do not.

Q. —at your house at any time? A. No.

Q. Sure of that? A. Positively.

Q. You never signed the paper? A. I do not remember.

Q. Huh? A. I do not remember.

Q. Just look at this paper, see whether you remember having seen this. A. I don't remember having seen it.

Q. Take a look at that signature, and tell me whether that is your signature or not. A. That is my signature.

Q. Did you write it? A. But I do not remember signing it.

Q. You do not remember writing that? A. No.

Q. You must have written it. Remember that? A. Well, I don't remember.

Q. Look at it. A. This is my signature, but I don't remember writing it.

Q. I see, don't remember writing it. A. (No answer.)

Q. Do you remember Dr. Hecht coming— A. I do not.

Q. Wait until I finish the question. A. All right.

Q. Do you remember anybody coming, whether you recall it was Dr. Hecht— A. Yes, I remember someone coming to the store, to the manager; if he was the one, I don't remember when he was there.

Q. Do you remember any gentleman that looked like this gentleman here? A. No.

Q. Don't have any recollection of that at all? A. No.

Q. Did any one come and ask you any questions about these circumstances? A. Yes, your clerk came.

Q. I mean, another one besides. A. He was with the——

Q. Does this look like that gentleman? A. No, he was not that man at all.

Q. He wasn't a doctor? A. No, I don't know whether he was a doctor or not; he didn't tell me.

Q. Subsequent to this, at the time that you ate the peaches, say July 12, 1928, this was right after, about a month, you were asked this question: "What else was eaten at the four meals preceding the suspected meal?"

Mr. Rabinowitz: Your Honor please, I would like to see the paper, before Mr. MacLeod reads it. I do not know whether—

Mr. MacLeod: I will offer it in evidence, if counsel has no objection.

The Court: No, proceed with the question.

Q. "What else was eaten at the four meals preceding the suspected meal?" A. I do not remember.

Q. No; I am asking you—you do not remember being asked that question, do you? A. No.

Q. You answered: "On June 20th, we had for lunch, lamb stew, breakfast you had bread and coffee"? A. I don't remember that.

Q. Huh? A. I do not remember, because I do not eat lamb stew; I do not like it.

Q. I see; you do not like lamb stew? A. No.

Q. And the night before, didn't you have meat pie—on the 19th? A. I do not remember.

Q. You might have had, but you have forgotten? A. I do not remember.

Q. Do you remember eating meat pie? A. I do not remember.

Q. Do you remember eating meat pie? Don't keep saying, "I don't remember, I don't remember". Did you eat meat pie? A. I do not recall ever eating meat pie.

Q. I see; never eat meat at all, I suppose? A. Yes, I do.

Q. On this day——

Mr. MacLeod: I want this marked for identification, your Honor please.

(Marked Defendant's Exhibit D-1 for Identification.)

The Court: We will take a recess now until tomorrow morning. Do not discuss this case with any one; do not talk to any of the witnesses or anybody at all that may be connected directly or indirectly, or, in fact, with anyone, and be here tomorrow morning at ten o'clock.

(Evening Recess.)

Paterson, N. J., May 6, 1930.

(Trial of the Cause Continued.)

Mrs. Mabel Berni, resumed.

Cross-examination (continued) by Mr. MacLeod:

Q. I understood, Mrs. Berni, that you said that you went to the hospital when the little boy went

or were there while he was there? A. I didn't go with him there. He was there and I had to go later.

Q. You were there while he was there? A. Yes.

Q. Now, how long did you say—how long did you say that you were ill after this? A. I was ill after what?

Q. After this date? A. It happened on the 20th of June and I was sick the 21st.

Q. You were sick the 21st? A. The 21st of June.

Q. For how long a period after that, Mrs. Berni? A. Eight weeks.

Q. Eight weeks. You are sure about that? A. Eight weeks I was sick.

Q. Do you remember the date when you recovered? A. No, I don't remember the date.

Q. How do you know it was eight weeks, then? A. It was eight weeks. I just can't recall the date. It was eight weeks.

Q. You are sure it was eight weeks? A. It was eight weeks.

Q. Well, why do you say it was eight weeks? A. Two months when I got up out of bed.

Q. Well, you went to bed on the 21st? A. The 21st.

Q. What date did you get up? A. I don't know just the date.

Q. You don't remember the date. What makes you say it was eight weeks? A. It was just eight weeks that I got up out of bed.

Q. Do you remember the month that you got up? A. It was eight weeks; I don't remember the date.

Q. What month was it, then, if you don't remember the date? Do you remember that?

Mr. Rabinowitz: I object to that question.

A. It was after July.

Q. What was that? A. It was after July. It was in August.

Q. In August? A. Yes.

Q. Do you remember saying to this party whom you don't recall, Dr. Heck or whoever it was that you don't remember whether they came or not—do you remember being asked this question: "Question: How long did you"— A. I don't remember that. I don't remember him at all. I don't remember speaking to him at all.

Q. You didn't say two or three weeks, did you? A. I don't remember. I don't remember even seeing him.

Q. You don't remember anything about it? A. No.

Mr. MacLeod: That is all, no further questions.

WILLIAM GRIFFIN, sworn.

Direct examination by Mr. Rabinowitz:

Q. Mr. Griffin, are you the son of Martha Griffin? A. Yes, I am the son of Martha Griffin.

Q. And the brother of Mabel Berni? A. I am the brother of Mabel Berni.

Q. Where do you reside? A. 205 Hamilton Avenue.

Q. Married? A. Yes.

Q. How long have you resided in Paterson? A. I resided in Paterson forty-seven years.

Q. Born in Paterson? A. Born in Paterson.

Q. Mr. Griffin, did you visit your mother frequently while she lived at Spring Street? A. I did, yes, sir.

Q. How often did you visit her, Mr. Griffin? A. Well, I visit my mother mostly three or four times a week, and when my sister was there with my two little nephews I visited there every day.

Q. Every day? A. Yes, sir.

Q. And when you—withdraw that.

Q. When they lived in Spring Street where were you living at the time? A. 205 Hamilton Avenue.

Q. You say that you lived in Paterson all your life? A. Forty-seven years.

Q. Except for a period of time when you were over-seas? A. When I was over-seas, yes.

Q. In the War? A. Yes.

Mr. MacLeod: I object to that, if your Honor please. I don't see any purpose for that except to prejudice this defendant.

The Court: Well, he is not a plaintiff in the case.

Mr. MacLeod: I know, but counsel is using it to advance the credibility of the witness and make it more credible, but that came out of the mouth of counsel.

The Court: Oh, yes, the only object is to show his good record. It is not proper.

Q. Mr. Griffin, you lived where, did you say, while your mother lived on Spring Street? A. 205 Hamilton Avenue.

Q. Hamilton Avenue? A. Yes, sir.

Q. Now, during the week of June 20 or prior thereto, 1928, did you visit your mother daily? A. I did, sir.

Q. And what was the condition of your mother's health?

Mr. MacLeod: I object to that.
Mr. Rabinowitz: Just wait a minute.
Mr. MacLeod: Go ahead.

Q. And your sister's health, as you observed it, during the week of June 20, 1928?

Mr. MacLeod: I object to that, if your Honor please. It calls for his conclusion, unless he can tell us what he observed. I don't object to that, but the condition of health is a conclusion.
The Court: Yes, what he observed.

Q. As you observed. A. Well, my mother and sister was, on June 20, in the best of health.

Mr. MacLeod: I object to that and ask to have it stricken out.
The Court: Strike it out.

Q. From your observation? A. Yes, sir.

Mr. MacLeod: I object to that, your Honor. That is just the point I object to.
The Court: Strike it out.

Q. What was their appearance? A. June the 20th, 1928, very good.

Mr. MacLeod: I object to that and ask to have it stricken out.
The Court: Their appearance was very good; that is proper.

Q. Her appearance was very good? A. Yes.

Mr. MacLeod: Your Honor allows me an exception?

The Court: Yes.

Q. Now, Mr. Griffin, what fixes in your mind the fact that you came to your mother's home on June 20, 1928? A. June the 20th, 1928, it was around four o'clock in the afternoon on that day when we struck my mother's home. My two nephews was running around the house. My mother went out to get something for supper, expecting my sister home, the mother of the two children. And my mother fetched the stuff home what was got, and there was a can of peaches got, which the can of peaches was openly opened in front of my face and poured in a cut glass dish. Them peaches was served immediately.

Q. Did you eat the peaches? A. I did not, sir.

Q. What else did the meal consist of? A. Well, for me, what I ate was one soft boiled egg, a little toast, and a cup of tea.

Q. And did you see the rest of the family eat the peaches? A. I did, sir.

Q. When I speak of the rest of the family, who ate them? A. My mother, my sister, and my two nephews.

Q. And the two nephews were James and Alfred? A. Yes, James.

Q. Now, how long did you remain there that evening? A. I remained that evening there till about—well, I judge the time between eight and nine o'clock.

Q. Was there any visible appearance of any trouble at all? A. Not at that time.

Q. Not at that time? A. No, sir.

Q. And you left and went home? A. Yes, sir.

Q. And when was the next time that you came to the house? A. The next morning.

Q. The next morning? A. Yes, sir.

Q. What was the occasion of your coming there the next morning, Mr. Griffin? A. On account of my two nephews, because the only two nephews I have and I like to see them quite often.

Mr. MacLeod: Your Honor, please, I object to that and ask to have it stricken out.

The Court: Strike it out.

Q. All right, you came there the next morning? A. Yes.

Q. To see them? A. Yes, sir.

Q. Did you have anything with you? A. Yes, I did.

Q. What was that? A. A little cap gun for one of the children.

Q. A little what? A. A little cap gun.

Mr. MacLeod: I object to it as irrelevant, immaterial, and incompetent, what he had with him the next morning.

The Court: He has already finished. I am afraid your objection is too late.

Mr. MacLeod: I move to strike it out.

The Court: Strike it out.

Mr. Rabinowitz: If your Honor please, it only seems to be justified in moving to strike out an answer that is not—oh, withdraw that. But it seems to me the answer is in and the objection comes too late.

Mr. MacLeod: It went in while I was making my objection, really, and the witness was quicker than I was.

The Court: He kept on talking while he was objecting.

Mr. Rabinowitz: Will your Honor permit me just a moment to state my—I don't know what your Honor's ruling on the

proposition is. If your Honor please, the object of that question was to fix——

The Court: What was the question?

(The testimony was read by the reporter as follows):

"Q. Did you have anything with you? A. Yes, sir, I did.

"Q. What was that? A. A little cap gun for one of the children.

"Q. A little what? A. A little cap gun."

The Court: What has that got to do with it?

Mr. Rabinowitz: I want to show a little physical condition—the handling of the pistol by the child and how it couldn't hold it on account of its physical condition the next day.

The Court: You don't have to go into all that.

Mr. Rabinowitz: Pardon me?

The Court: You don't have to go into all that to ask that question.

Mr. Rabinowitz: No.

By Mr. Rabinowitz:

Q. Well, the next day, on the 21st of June, you came there to the home of your mother. What did you do with that cap pistol? A. I put it in my little nephew's hand.

Q. What one? A. The youngest nephew.

Q. The oldest. What was his name—or the youngest? A. The youngest.

Q. What was his name? A. Albert.

Q. James, wasn't it? A. James, rather.

Mr. MacLeod: Now, if your Honor please, I object to any further examination

about these two boys. There seems to be——

The Court: I will sustain the objection.

Mr. MacLeod:—an effort to bring in the children to influence the jury.

The Court: You don't need to take the time to argue.

Mr. MacLeod: I object to it.

The Court: I have sustained it.

Mr. MacLeod: Oh, I beg your pardon.

The Court: I say, don't waste time arguing it.

Q. What can you say, Mr. Griffin, as to the physical condition you found of the family when you came there that day?

Mr. MacLeod: I object to that, unless they——

The Court: You had better confine yourself to the parties in the suit.

Q. Yes, to your mother? How did you find your mother, Martha Griffin? A. The next day?

Q. Yes. A. They was both ill.

Q. Both ill? A. Yes.

Mr. MacLeod: I object to it and ask to have it stricken out.

Mr. Rabinowitz: Well, I will confine it to the——

Mr. MacLeod: It calls for a conclusion.

Q. They were both ill? A. Yes.

Q. When you speak of both ill, whom do you mean? A. My sister and my mother.

Q. Your sister and your mother? A. Yes.

Mr. MacLeod: May I ask to have it stricken out? It is assuming a condition

the next day which has already been testified to.

The Court: Is there any dispute about it?

Mr. MacLeod: There is a dispute as to the time, yes. There is some dispute, your Honor please, that there was any illness the next day. Of course, I am not going to quibble on that if counsel will confine himself to correct testimony instead of conclusions and hearsay. I don't want that.

The Court: It has very little weight, if any, but it is already in the case, anyway, and I don't know what counsel is asking it for.

Mr. MacLeod: I don't like to object. I will withdraw it for the purpose of seeing if we can get a more direct fact.

By Mr. Rabinowitz:

Q. Now, Mr. Griffin, did you become ill? A. No, sir, I did not.

Q. And you say that you did not partake of the peaches yourself? A. I did not touch the peaches.

Mr. MacLeod: We have been all over that.

Mr. Rabinowitz: Take the witness.

Cross-examination by Mr. MacLeod:

Q. You went there every day to eat, did you, Mr. Griffin? A. Yes, sir.

Q. You were there the night before? You were there the night before for the evening meal? A. The night before what?

Q. The night before the 20th? A. The night before what date?

Q. The night before this thing happened. A. The night before? No, this happened on the 20th; I wasn't there on the 19th.

Q. You were not there on the 19th? A. No.

Q. Were you there on the 18th? A. I was not there on the 18th.

Q. Were you there on the 17th? A. Yes, sir.

Q. You didn't go, then, every day, did you? A. I didn't state I did.

Q. Oh, I thought you said you went every day? A. No, sir, I did not.

Q. I understood you to say when the two children came to live there prior to that you saw the folks quite frequently? A. I did quite frequently. Yes, I did.

Q. And after the children came you went there every day; didn't you say that or not? A. No, sir, I did not.

Q. You didn't say that? A. No, sir.

Q. You are sure of that, aren't you? A. I am sure of that.

Q. Now, then, what time did you get there the next morning? A. The next morning of what? Just give me the date and I will tell you.

Q. I am talking about the date after you were there for supper on the 20th. You say you got there the next morning? A. Yes, I got there the next morning, after the 20th.

Q. What time, I asked you. A. Well, I judge about eleven o'clock.

Q. Eleven o'clock? A. Yes.

Q. You were working, were you? A. No, sir, I don't work. I ain't worked since the World War.

Q. You just walked over there? A. No, sir, I didn't walk over. I was taken over in the car.

Q. Is that the first morning you had been over there for some time? A. No, sir.

Q. When was the morning you were over there before? A. On the 20th, when the peaches was served.

Q. That wasn't in the morning, was it? A. What?

Q. That wasn't in the morning, was it? A. No, that wasn't in the morning.

Q. I asked you when you were there before in the morning. A. Around the 18th or 19th. That was before this trouble at all.

Q. This morning of the 21st you just happened to go over? A. No, I didn't happen; I just went over, that is all.

Q. Why did you go over? A. To see my two nephews.

Q. You didn't know anything was wrong, did you, on the 21st? A. No, I did not.

Q. No one had told you anything was wrong? A. No.

Q. When you got there you gave one of your nephews a pistol? A. Yes, sir.

Q. Where was he? A. In the kitchen.

Q. Walking around? A. Yes, sir.

Q. Nothing wrong with him then? A. Yes, sir.

Q. But he wasn't in bed? A. I seen him——

Q. Wait a minute.

Mr. Rabinowitz: Let him answer the question.

A. Let me answer your question.

Q. Just a minute. You have answered it.

Mr. Rabinowitz: Let him answer your question.

Mr. MacLeod: Your Honor, I submit he has answered the question.

A. I haven't answered the question.

The Court: What is the question?

(The question was read by the reporter as follows):

"Q. But he wasn't in bed?"

Mr. Rabinowitz: Mr. MacLeod interrupted at that time.

The Court: That is hardly an answer.

Mr. Rabinowitz: I insist that the answer be completed.

(The question and answer were read by the reporter as follows):

"Q. But he wasn't in bed? A. I seen him——"

By Mr. MacLeod:

Q. Will you answer that question? A. No, sir, he wasn't in bed.

Q. That is it. Did you play with him that morning, fool with him, I mean? A. About five minutes, only I seen he couldn't hold the gun in his hand. He just——

Q. Now, Mr. Griffin,——

Mr. Rabinowitz: Let him answer.

A. Let me answer the question.

Mr. Rabinowitz: Why do you interrupt him? Don't cut off an honest answer.

Mr. MacLeod: You ought to get a soap box.

Q. Will you just answer my question? A. I will answer your question the way it should be answered.

Q. Did you play with the boy that morning? A. I didn't play with him——

Q. Did you play with him that morning? Yes

or no. Yes or no. A. I played for a little while; he couldn't hold the gun in his hand, he shook.

Q. How long after you went in did you hand him the pistol and he started to shake? A. No more than two minutes.

Q. Two minutes? A. Yes.

Q. You were the first one to notice there was anything wrong with him, weren't you? A. Why, the other one was laid out in the other room.

Q. You were the first one to notice it? A. I don't know if I was the first one, but I noticed it, anyhow.

Q. I see. The other folks that night,—that is, the two children and the mother and your mother and your sister—I presume Mrs. Berni is your sister, is she? A. Yes.

Q. Your mother and your sister and the two children that night, all they had was toast and tea, that is all they ate? A. And canned peaches.

Q. And the peaches? A. Yes.

Q. The peaches were the dessert or did they eat those first? A. Yes.

Q. Did they eat them first or last? A. Last.

Q. Last? A. Yes.

Q. You had the tea first with the toast? A. Yes.

Q. That is right, isn't it? A. Had the peaches for dessert.

Q. And after you finished the tea and the toast they ate the peaches? A. Yes.

Q. Didn't eat any toast with the peaches? A. No.

Q. You are sure of that? A. Yes.

Q. And you had an egg? A. Yes.

Q. One egg? A. Yes.

Q. Toast and tea? A. Yes.

Q. You didn't eat any peaches? A. No, sir.

Q. You didn't have any dessert? A. No, sir.

Q. Did the children drink tea, these little children eat—drink tea? A. One of them drank tea and the other one——

Q. How old was that one? A. That was the oldest one.

Q. How old, I say? A. Well, Albert was four, I believe.

Q. A four-year-old child had tea at night? A. No, he was five.

Q. How old was the other one? A. The other one was four, going on four, something like that. I just don't know their ages.

Q. Did he have tea? A. Huh?

Q. Did he have tea? A. No, milk. One had tea and the other had milk.

Q. What? A. Yes.

Q. Then, there was milk, wasn't there? A. What?

Q. Can't you hear me? There was milk served, then? A. I can hear you, yes.

Q. What do you say "what" for? You know what milk is, don't you? A. Yes.

Q. There was milk served there that night, then, wasn't there? A. Yes, I believe there was. I don't know.

Q. What made you remember that? Huh? Can't you answer me? A. I answered the question, didn't I?

Q. What made you remember? Before you said there was only toast, tea, peaches, and an egg. A. Yes.

Q. Now you say that one of them got milk. How is it that you remember that? A. (No answer.)

Q. Can't you answer that? A. I am answering the question.

Q. Why didn't you tell us before that you had

milk there? A. Why didn't I tell you before? You didn't ask the question before.

Q. When your counsel asked you what you had for supper that night, why didn't you tell us? A. I told my counsel what we had.

Q. Why didn't you say there was milk there, too? A. Well, I just didn't give the thought for the youngest child having it, see?

Q. Yes. Is that the reason? A. That is the reason.

Q. Do you know that milk contains protein?

Mr. Rabinowitz: I object to that. How does this man——

Mr. MacLeod: I am asking him. I would like to cross-examine him on it.

Mr. Rabinowitz: I object to it.

The Court: Oh, if he knows.

Q. Do you know whether or not milk contains protein? A. I don't know what it contains.

Q. Did anybody tell you that it did? A. I never—no one ever told me nothing like that.

Q. Is that the reason you forgot that there was milk there for supper that night?

Mr. Rabinowitz: He didn't say there was milk there for supper. He made no such statement.

A. I made no such thing.

Mr. MacLeod: He just repeats what counsel says.

Q. Nobody told you what you were to say in this case; you are sure about that? A. I guess I am old enough to know what I am talking about.

Q. And you would be old enough to say what

somebody told you? A. No one is telling me nothing.

Q. Tell the jury.

The Court: No one told him anything.

Q. Tell the jury, Mr. Griffin, if you can, why you forgot to tell us there was milk served to one of the boys.

The Court: He has already answered that question.

Mr. Rabinowitz: He has already answered that.

Mr. MacLeod: What was the answer, your Honor?

The Court: Proceed with your examination.

Mr. MacLeod: I didn't hear him answer it why.

The Court: Proceed, now. We are not going to waste too much time on this.

By Mr. MacLeod:

Q. Was there milk served to the other child, too? A. No, sir.

Q. Just one child? A. Yes.

Q. Only to one child? A. Yes, sir.

Q. Now, was there anything else served that night besides that? A. No, sir.

Q. You are sure of that? A. Yes.

Mr. MacLeod: That is all.

Re-direct examination by Mr. Rabinowitz:

Q. Mr. Griffin, when you said that you visited every day at the house— A. Yes.

Q. (Continuing) —you did visit every day, but,

as I understand it, you say you did not eat every day? A. No.

Q. But you were a daily visitor at your mother's home while she was living with her daughter? A. Yes.

Q. And when you say that you were not there for the 17th or the 18th, that means that you were not eating every day, as I understand it? A. No.

Q. But you usually had your evening meal with the family, didn't you? A. Oh, yes.

Mr. MacLeod: I object to that as very leading by counsel.

The Court: He has already said he did not.

Mr. MacLeod: He testified directly that he didn't.

By the Court:

Q. You said you were not there on the 18th and 19th? A. Yes, your Honor.

Q. What do you say, you were or you were not there? Which? A. On the 18th I was there; I skipped the 19th and was there on the 20th.

By Mr. Rabinowitz:

Q. You skipped a night? A. Yes.

By the Court:

Q. The 19th you skipped? A. Yes.

By Mr. Rabinowitz:

Q. But you were there— A. On the 20th.

Q. And on the 21st. A. Right from then on, from the children was buried and everything else.

Q. There was no milk served to Mrs. Berni or

the mother or the oldest child? A. No, sir. No, sir.

Q. So your recollection is that there may have been milk served to the youngest child? A. Yes.

Mr. MacLeod: Just a minute. I object to that.

The Court: He said there was. He didn't say there may have been.

Mr. Rabinowitz: Oh, I see. All right.

Q. That is your best recollection, isn't it, Mr. Griffin? A. Yes, sir.

Q. You are not positive about that?

Mr. MacLeod: Now, I object to that.

A. No.

Mr. MacLeod: I object to counsel cross-examining his own witness.

The Court: Yes. Strike out the answer.

Mr. Rabinowitz: That is all.

Mr. MacLeod: No further questions.

Mr. Rabinowitz: If your Honor please, Dr. O'Grady was to come here this morning. He is very ill, and I understand he is so old he has almost given up all idea of leaving his office. That accounts for the fact that he is not here. I wanted your Honor to know that.

Mrs. Lillian Campana, sworn.

Direct examination by Mr. Rabinowitz:

Q. Mrs. Campana, what is your full name? A. Lillian Campana.

Q. Lillian Campana? A. Lillian Campana.

Q. And are you the sister of Mabel Berni? A. Right.

Q. The daughter of Martha Griffin? A. Yes.

Q. And did you visit them at their home on June 20, 1928? A. I did not.

Q. You were not there on June 20? A. I was not there.

Q. Did you visit the home on June 21, 1928? A. I was sent for that the oldest boy was very sick, and to come.

Q. Do you remember who sent for you? A. I don't know. It was a neighbor, because mother and sister were sick, they weren't able to.

Q. Well, you came to the house. Do you recall about what time? A. Well, I came there—I had to prepare lunch for Mr. Campana coming home, and I got there about six o'clock and the child was already dead. He had passed away. That was the oldest boy.

Q. I see. What was the—what was your reason for coming there—of course, you were a sister—did you do anything in connection with the household duties? A. I took care of the children while mother and sister worked.

Q. Oh, I see. Before they were taken ill? A. Before they were taken ill I took care of the two children.

Q. At your home? A. Yes. See, mother came home from her duties at four o'clock. She worked in the Y. M. C. A., and my husband is a barber and I had to be home to fix up his lunch. But the day that they were served the peaches I was packing to move, see, and I told mother she would have to try to get the children in the Day Nursery, because I was moving out in Fairlawn, too far away from this section to come back and forth, so she stayed home that day to try to get the children into the Dry Nursery. So I was sent for the 21st.

Q. And so the day before— A. I wasn't there on the 20th.

Q. No, but did you have charge of the children on the 19th? A. I had on the 19th while my sister was staying with my mother, and till the 19th I was with the children.

Q. How many times previous to the 19th were you with the children? A. I was there every day.

Q. And at their home? A. At their home.

Q. At Spring Street? A. Yes.

Q. And you took care of the children while the mother and daughter went to work, did you? A. While my sister and my mother was working.

Q. And what was the condition of the children's health? A. Very good. They were both two healthy children, and my mother and sister has pined away ever since, they are wasting away.

Mr. MacLeod: I object to that and ask to have it stricken out.

The Court: Strike it out.

Mr. Rabinowitz: I will consent to it as not responsive.

Q. Now, Mrs. Campana, you were moving to Fairlawn on the 20th of June? A. I was moving to Fairlawn.

Q. On the 21st of June you say you received a telephone call? A. No, one of the neighbors came for me, that one of the children was very sick and I should come immediately, so I came. When I got there the child was dead.

Q. And what condition did you find your sister and mother in? A. Well, my mother was in bed and my sister had went to work the day that the child had died, and she went to bed on the 21st herself.

Q. What time did you arrive there on the 21st? A. On the 21st? A. Well, I arrived there—I arrived there at six o'clock. I found that he was dead.

Q. Oh, you found he was dead that evening? A. He was dead, and I found him, the oldest youngster was dead.

Q. Yes, and you went—how many rooms has this place? A. Four rooms. Four rooms.

Q. Four rooms? A. Yes.

Q. Was your sister Mabel in bed? A. No, on the 21st she had attended business and come home and she found the youngster dead herself. She don't get through until six o'clock.

Q. Did she go to bed immediately then? A. She went to bed and stayed in bed and I took care of mother and sister and the funeral for the oldest one and I took care of the youngest one, and he was rushed to the hospital. My husband was there. There was nobody to send for a doctor and my husband called up Dr. Levine and Dr. Levine wasn't in his office, so he went for Dr. Veenstra, I understand, and drove back in Dr. Veenstra's car, so when Dr. Veenstra came he found mother in one bed and he found sister in another bed and the one laid out in the parlor, and the youngest one was no place to lay, so he says,——

Mr. MacLeod: I object to all this, if your Honor please.

A. He said, "In his condition"——

The Court: No, not what he said.

A. He said, "In his condition"——

The Court: No.

Q. No. But as a result of conversation had with Dr. Veenstra and yourself— A. Yes.

Q. —what was done with the other child? A. Well, when the doctor came in my husband went with Dr. Veenstra——

By the Court:

Q. What was done with the child? A. It was rushed to the hospital.

By Mr. Rabinowitz:

Q. Now, did you take care of your sister and mother? A. I took care of sister and mother, and sister recovered, and mother I am taking care of her, and I had to give up my business. I was working in the——

Mr. MacLeod: I object to that and ask to have it stricken out.

The Court: Strike it out.

Q. How long did you take care of your sister Mabel? A. How long? About two months. I took care of the two of them. They were both in bed.

Q. How long did your sister remain in bed? A. She remained in bed all that time.

Q. All that time? A. Yes.

Q. How long did your mother remain in bed? A. My mother? She has been in bed up and down. She was in bed for two months, and now most of the time she spends in bed.

Q. You acted as the nurse, did you? A. I do still.

Q. And gave them their medicines? A. I gave them their medicines and I seen that they got their medicine.

Q. And under whose orders did you receive these medicines? A. Dr. Levine.

Q. Did you observe, while you were taking care of your mother and sister, any vomiting? A. Well, sister and mother vomit and they passed both ways; they vomit and they had diarrhea.

Q. Did you observe the vomit particularly? A. Well, I noticed it was yellow and funny, because you know when you are taking care of a woman——

Q. Was there a vomit from the child that was sent to the hospital? A. Yes, and Dr. Veenstra seen that he was vomiting. He was vomiting till he came and they took him out of the house.

Mr. Rabinowitz: That is all.

Cross-examination by Mr. MacLeod:

Q. Now, then, you are a sister to Mrs. Berni, Mrs. Campana? A. Yes, I am.

Q. And the daughter of Mrs. Griffin? A. Yes, I am.

Q. Your sister came home that night about six o'clock; is that right? A. Yes, she did, the 21st.

Q. Yes. A. Yes.

Q. And nothing happened to anybody all during the 21st; that is, nobody died during that time? A. Well, she was sent home. The child died on the 21st.

Q. Who was sent home? A. My sister came home from work and I was sent for.

Q. What do you mean, she was sent home? A. I mean she came home from business at six o'clock.

Q. I thought you said she was sick? A. No, I was sent for. I made a mistake.

Q. You are sure she wasn't sent home? A. She was sent home at six o'clock; the store closes six o'clock.

Q. You got there yourself about six o'clock, did you? A. Me? Yes, I got there when the oldest youngster was dead, yes.

Q. Some neighbor had told you about it? A. A neighbor was sent for me.

Q. Who was the neighbor? A. I don't recall.

Q. Don't you remember the lady? A. No. In a case like that could you have a clear memory?

Q. I am asking you. A. I don't remember.

Q. What did she look like, do you know that? A. I don't remember.

Q. Did you ever know her? A. I know the neighbor, sure, I know the neighbors.

Q. Did you know the woman that told you? A. I knew the woman at that time that told me, yes, but I can't remember.

Q. You can't remember it now? A. No.

Q. Was she your neighbor or your mother's neighbor? A. She was my mother's neighbor.

Q. Your mother's neighbor? A. Yes.

Q. And, then, when your sister came in from work she went to bed? A. Well, of course, the shock and seeing the child——

Q. I didn't ask you that. A. She was sent to bed, yes—she went to bed, yes.

Q. And from that time on she stayed in bed for two months? A. She got up once after that when they came to tell her that the little boy was very, very sick, and she went to the hospital to see him, and she was taken there in a taxi and brought back, and didn't know her little fellow died, because I kept it from her, and he was buried from the undertaker's house.

Q. You said a little while ago she went to bed and stayed there continuously for two months. She didn't, did she? A. She was taken out in the machine. She was in bed for two months, yes.

Q. She got up after that night, did she, and went to the hospital? A. Once, yes, in her condition she went to the hospital, and you would if you was a father.

Q. When did she get up to go to the hospital, do you remember? A. Well, I think it was—let me see—well, it was two days after. Two days after. Two days after she went to the hospital.

Q. Did she ever go back to work again, do you know? A. Did she ever go back to work again? She is working now, but not in that two months.

Q. I mean, for that two months? A. No, not in that two months.

Q. Never worked anywhere? A. No, she did not.

Q. You are sure of that? A. I am positive.

Q. You were not there at the evening meal the night before? A. I was not.

Q. When did you mind the—did you mind the children every day? A. I mind the children every day.

Q. On the 19th did you mind the children? A. Yes. On the 19th? Yes, on the 19th.

Q. Did you feed them, too? A. Did I feed them?

Q. Yes. A. Well, surely, I fed them.

Q. Did you feed them on the 19th at noon hour? A. Did I feed them?

Q. Don't ask me. A. Sure, I fed them. Sure, I fed them.

Q. At noon hour on the 19th? A. On the 19th, yes.

Q. What did you feed them? A. Well, as a rule I gave them——

Q. What did you give them at that time, not as a rule? A. I don't remember. I can't remember from day to day what I eat.

Q. No, I mean what you fed the children on the 19th. A. Well, I can't remember.

Q. You don't remember that? A. No, sir. Mother used to bring a lot of stuff home.

Q. Did you give them any other meals than the noon meal? A. I gave them the noon meal, and at night I didn't feed them.

Q. You only fed them one meal? A. One meal a day.

Q. That was in the middle of the day? A. That was at lunch.

Q. Do you remember what you fed them on the 18th? A. I can't recall away back every day what I have to eat.

Q. No. I didn't think you could. Now, what time did you get there on the 18th? A. What time did I get there on the 18th? I got there every morning for mother to go——

Q. What time? A. Well, about nine o'clock.

Q. These children didn't go to school, did they? A. They weren't old enough to go to school, four and five.

Q. They stayed around home all day? A. Certainly.

Q. You stayed with them? A. I was with them. I told you I took care of them.

Q. You have a family yourself? A. I got one girl thirteen years old.

Q. She goes to school? A. Goes to school.

Q. So you came there every day nine o'clock? A. I did.

Q. And you were with them all day on the 18th? A. I was every day, not only the 18th, till the 20th.

Q. Why didn't you come on the morning of the 20th? A. Why didn't I? I had packed to move and I didn't straighten out my house.

Q. I thought you went there every day? A. I went there every day, but I didn't go on the 20th. How many times do you want me to tell you.

The Court: She has already said on direct examination that on the 20th she was not there. She stated as the reason why because she was moving to Fairlawn or somewhere.

Mr. MacLeod: I see.

The Court: Or near there.

Q. Was anyone else there on the 18th besides yourself and the two children? A. No, I was alone.

Q. You were alone? A. All alone.

Q. Didn't your brother come on the 18th? A. On the 18th he came—well, let me see—well, maybe about four o'clock.

Q. Wasn't he there in the morning of the 18th? A. I can't remember just what time he walked in.

Q. Why do you say you were there all alone, then, if you don't remember? A. You asked me if my brother came and I told you yes. I can't remember seeing if somebody was there every day.

Q. That is all, Mrs. Campana. A. It is a foolish question to ask.

Q. That is all. A. You have an awful poor memory.

Mr. Rabinowitz: We rest.

THE PLAINTIFF RESTED.

Mr. MacLeod: I would like to make a motion without the jury, if your Honor would permit us. May we have the jury excused to make the motion?

The Court: Suppose we go in chambers, then.

DEFENDANT'S MOTION FOR NON-SUIT.

Mr. Hanaway: My first motion, if your Honor please, is to dismiss the complaint as to both plaintiffs, first, on the ground that there has been no evidence directly connecting the canned peaches which are alleged to have caused this illness with the illness itself.

On the second ground that under the laws of the State of New Jersey there is no implied warranty which can be attached to the sale of food in a closed container. As counsel said yesterday, it is a rather unique question in the State of New Jersey.

(Discussion.)

Mr. Hanaway: It has not been shown by the evidence that the canned peaches were unfit for human consumption in any way. There has been absolutely no direct evidence. The only thing we have is a statement that the people ate canned peaches and later became sick. It is a pure inference which counsel and the plaintiffs have drawn from the fact that they ate the peaches and later became sick, they have not proven the peaches bad. There has been absolutely no evidence of a breach of an implied warranty, should one be implied.

(Discussion.)

The Court: I will deny the motions and allow you an exception.

Mr. Hanaway: Your Honor, I have another motion to make. I would like to move to dismiss the complaint as to the plaintiff Mabel Berni on the following grounds:

that this is a suit, as the complaint will show, for a breach of warranty, the second count, page two. Now, if this action is based upon an implied warranty it must be based on a contract which Mabel Berni was a party to and James Butler the other party, for without a contract you can certainly not have a breach of a warranty.

(Discussion.)

The Court: I will grant the motion for a non-suit in this case as to the plaintiff Mabel Berni and deny the motion for a non-suit as to the plaintiff Martha Griffin.

(Further discussion.)

The Court: I will allow you both exceptions so whoever goes up will have the case decided properly.

DEFENDANT'S TESTIMONY.

Mr. MacLeod: I would like to offer these statements in evidence.

Mr. Rabinowitz: I would like to see them. I object to them at this time. There is no basis for them.

The Court: They are not admissible yet. They will be when you have proved them property. When you prove what you have to prove they will be admissible.

Mr. MacLeod: I offer them as admissions——

The Court: 103 Law——

Mr. MacLeod: I offer them as admissions by——

The Court: (Continuing) —page 351 will give you the rule.

Mr. MacLeod: I appreciate the rule.

May I state my reasons for offering them now? I think as to the two parties—as to the witness perhaps your Honor may be right—as to the two parties to the suit I offer them now as admissions made against interest.

(Discussion.)

Mr. MacLeod: To save time may I proceed to read the deposition?

The Court: Yes.

Mr. MacLeod: (To the Jury) This is the testimony of Harry J. Denhart, a witness for the defendant, which was taken on March 10, 1930, before the Honorable William B. Mackay, Judge of this Court, without a jury being present, and in the presence of Nathan Rabinowitz, counsel for the plaintiffs, and Alexander M. MacLeod, counsel for the defendant. The testimony is as follows:

"HARRY J. DENHART, a witness for the defendant, sworn by the Court, testified as follows:

"*Direct examination by Mr. MacLeod:*

"Q. Mr. Denhart, you are employed by what company? A. Richmond-Chase Company.

"Q. What is their business? A. Canned fruits and vegetables. Canned fruits and vegetables and dried fruits.

"Q. Your company sells canned fruits to the James Butler Grocery Company, a corporation of New Jersey? A. Yes.

"Q. And how many factories do they have? A. Three.

"Q. Where are they located? A. The main plant is at San Jose, a plant at Mountainview, California, and one at Stockton.

"Q. Are they all in California? A. Yes.

"Q. San what? A. San Jose.

"Q. California? A. Yes.

"Q. You left California last Monday, did you not? A. Yes, Monday afternoon.

"Q. And arrived in New York when? A. Friday morning at nine o'clock.

"Q. Last Friday morning? A. Yes.

"Q. That will be the 7th of March; is that right, 1930? A. Yes.

"Q. And you came here especially for this case, did you not? A. I did.

"Q. In what capacity are you employed by the company? A. Superintendent of the factory at San Jose.

"Q. Do you know the working conditions in all the factories that you have mentioned? A. I do.

"Q. Are they all operated along similar lines? A. Identical lines, yes.

"Q. Will you tell us in detail the processes of canning fruits in the factory of the company for which you are employed from beginning to end, as briefly as you can, showing the manner in which these fruits are canned?

"Mr. Rabinowitz: I object to the form of the question.

"The Court: Why?

"Mr. Rabinowitz: The subject of litigation is canned peaches. I think the question is too general and should be specific to the issues set forth in the pleadings.

"The Court: Do you can peaches any different from any other fruits, or are they all canned alike?

"Mr. MacLeod: Confine it to canned peaches.

"A. The general scheme of canning is all the same.

"The Court: Well, then tell us about the canning of peaches, the method of procedure.

"A. The peaches are brought to us in lug boxes.

"Mr. Rabinowitz: In what?

"A. (Continuing) In lug boxes. We buy them from growers, practically all of them from growers, and they are delivered to receiving stations. These receiving stations are in charge of receivers who are employed by the Board of Health of the State of California, and they pass on the quality and general grading of these peaches. They are then either hauled by truck or shipped by train to our factory or factories. The peaches, when they arrive in the canneries, are taken in by the receiving department. They are weighed and are inspected by the special man in the receiving department, who makes a grading.

"Of course, all peaches are bought according to contract, size specifications, quality specifications, free from blemishes and imperfections and so on, and this inspection is for the purpose of seeing that we get good deliveries of peaches.

"Due to the fact that the industry in the State is so large the State has insisted on having charge of this receiving, both for the benefit of the cannery and for the benefit of the grower and producer.

"There are four main processes or operations in the cannery. The first one mentioned was receiving, and the next one is the preparation department, and the next is the canning depart-

ment, the cooking department, and warehouse department.

"The peaches are stacked one box on top of the other and trucked by the receiving department into the preparation department. The preparation department is in a large room with tables. The tables are arranged in groups so that there are not more than two hundred women workers to a group. The preparation department, so far as the women are concerned, is in charge of a foreman, and it is his job to take care of these women and to keep the place immaculately clean and sanitary, and also see that the pits, trimmings, are promptly hauled out of the plant and put in trucks, where it is hauled away.

"Q. What do they do in the preparation department? A. The operation that takes place in the preparation department is the circling of the peach with a knife, and then the use of a spoon for the purpose of releasing the two halves of the peach.

"Q. Do they remove the pit there? A. Yes, this is the removing of the pit operation.

"Q. Who does that work? A. Nothing but women workers.

"Q. How are they dressed? A. All women in the plant are dressed in uniforms and caps.

"Q. Different from the clothing in which they appear at the plant in? A. Yes.

"Q. Where do they put them on? At the plant or not? A. Yes, they put them on at the plant in our rest room and locker room.

"Q. From the preparation room where do they go? A. First the peaches are graded by these women who do the pitting, and then if there are any imperfections or scratches or bruises on any of the peaches they are trimmed, and all trimmed

peaches are put into a separate pan, and thus go into the—and are used for pie only. The good peaches are placed in a small box that has a trap bottom, and they remain in that box until the floor-lady—and there is a floor-lady on each table, who has from twelve to fourteen to watch, and she inspects this work, and it is absolutely necessary that she do it, because if in using this pitting spoon they turned too far they would spoil the symmetry of the peach or cut or mar it in some way so it would be unfit or unsatisfactory. After she examines this fruit, and if the workmanship is satisfactory and the peaches that are in there are all well handled and well graded, the peaches are then put on a conveyor.

"Q. Were does the conveyor go to? A. The peaches from this department then go to a washer machine and there they are dumped into a big washer, and from the washer they are conveyed onto a sorting belt. The sorting belt is about thirty inches wide and about forty feet long. It moves at the rate of about fifteen feet a minute.

"Q. Who sorts them? Women or men? A. We have from twelve to fifteen women.

"Q. In uniform? A. On both sides of this sorting belt. They are women employed in uniform.

"Q. What does it do from the belt? A. They sort out any peaches that show any imperfection or irregularity in size or any marked lack of general uniformity in peach shape, the idea being to check finally the workmanship of the preparation department and have peaches go forward that are perfect in every regard, perfect in color and workmanship and all.

"Then from this building they are conveyed or fed onto a mechanical grader, a shaker grader which has five screens on it, and each screen has

holes in it from two and a quarter to three-quarters inches in diameter, so that as this shakes the peaches they fall through and go down to the next sized screen.

"Those that do not fall through go down a chute and are directed to the canning tables. The peaches, therefore, are delivered to the canning tables from the grader and are then graded for size and are perfect for workmanship.

"The canning tables have from twelve to fourteen white enamel sinks, and the peaches are brought into these canning tables on a belt, a rubber belt, and the woman opens a gate, causing the fruit to dump into her sink, and when her sink is practically full of fruit she then closes the gate and it passes on to the next canner. The basins are full of fresh water and the peaches are thoroughly washed before she starts to make her grading and starts the canning process.

"There is a floor-lady on every canning table and she is responsible for the workmanship and the grading and the packing and the filling of the cans of these canners.

"Q. Where do they go from the sink? A. Well, each girl has a number, and that number is imprinted on every can she fills. The cans are then filled according to their general color and uniformity and size, and the minute they are filled they are put on a belt and conveyed to a bunch of inspectors—a group of inspectors, generally six. These inspectors take the cans off the conveyor and will examine, say, one in ten cans. They will examine an average of one in ten and dump them out in a pan and examine the workmanship of this particular canner. If there is any correction to be made in this workmanship they can look at

the can and see the number, take it back to the floor-lady; the floor-lady takes it to the girl and the correction is made.

"Now, every can of fruit has to be counted——

"Q. How many pieces of fruit go into each can? A. It varies from five to eighteen, but we allow a very small variation in count, do you see?

"Q. After the inspectors get through with their work, what happens then? A. The cans then go to the cooking department.

"Q. Are they sealed at that time or open? A. No, they are still open with the fruit in the can.

"Q. All right. A. The cans are then taken off this belt by men who feed them into syrupers. The syruper is an automatic machine which fills the can, which, of course, is full of fruit, with syrup. The syrup is made in the plant and it is made in enamel lined tanks out of pure granulated sugar and artesian water. That is, we take a vat of water, dump in the granulated sugar, boil it so as to thoroughly dissolve it and sterilize it, and then it is drained out of the tanks down to the syrupers. The cans are not touched from the time they are fed into the syrupers until the cooking process is finished.

"From the syruper they go directly into an exhaust box or a steam box. This is about six feet in width and about sixteen feet long. The purpose of this is to heat the fruit to approximately 195 degrees, expel any air that may be in there, swelling the contents. Out of this box—it comes out of the box on a conveyor—it goes to the capper and it is capped immediately.

"Q. A capper? A. An automatic capping machine.

"Q. From there where? A. From there it is taken by the conveyor into the cooker.

"Q. The can is sealed, then, before it goes into the cooker? A. Absolutely air-tight and sealed.

"Q. Then what happens? A. The can is conveyed into the cooker where it is cooked from thirty to thirty-five minutes at 212 degrees.

"Q. What is that? A. That is a large cylinder with pieces of angle iron on it which are wide enough to hold a can, and as this revolves it releases this can to another piece of angle iron, spiral in shape, and this little track made by the spiral fits the angle iron, thereby delivering it into the other end. This is inside of the cooker.

"Q. Delivering it out of the cooker? A. Out of the cooker.

"Q. And then? A. From the cooker it goes into a cooler, which is operated the same way, and it is cooled with cold fresh water. It is in there about five minutes. The purpose of that cool is to check the cook, the can having been thoroughly sterilized, and we stop the cook with this cold water bath.

"Q. Then what happens? A. The can is then put on a wooden tray and they are trucked to the cooling room.

"Q. How long is it in the cooling room? A. They are allowed to remain there from forty-eight to sixty hours.

"Q. Then where do they go? A. At the end of that time then every individual can is tested by an expert tester to make sure that they have a vacuum. The vacuum is made possible by this exhaust process before it was capped, and the vacuum is essential to the indefinite keeping of the quality.

"Q. Then where does it go? A. After they are thoroughly tested it is stacked in the warehouses, where it is held for at least two weeks, or until

such time as the goods are sold, and they are then ordered labeled and cased and shipped.

"Q. What is the quickest length of time that any of the canned fruits, particularly peach fruit —we will use the word peaches here——A. Yes?

"Q. (Continuing)—that the can from the factory after its completion would reach a consumer? A. Well, it would have to be at least six weeks.

"Q. At least six weeks. The peaches you are talking about and these processes are the peaches that finally reach cans and are sold in cans? Are they not? A. Yes.

"Mr. MacLeod: That is all. Cross-examine."

(Mr. Rabinowitz read the cross-examination of this witness, as follows:)

"*Cross-examination by Mr. Rabinowitz:*

"Q. Now, you say that after the goods are canned they are placed in a warehouse. Have you any agents that represent the Richmond-Chase Company in New Jersey or New York and distribute them? A. What do you mean by agents?

"Q. Do you have any representatives of your company that carry and handle the shipping from certain points to the purchaser, the ultimate purchaser?

"Mr. MacLeod: I don't want to object if there is any reason for that. I don't see any purpose in it.

"The Court: What is the purpose of it?

"Mr. Rabinowitz: The purpose of that is to show that they may remain in their representatives' hands for an indefinite length of time before it actually gets into the retailers' hands.

"The Court: I will admit it for that purpose.

"Mr. MacLeod: Withdraw the objection.

"Q. Are there any representatives of your company in New York? A. We have brokers in New York.

"Q. You have brokers in New York? A. Yes.

"Q. Not in New Jersey? A. No. The brokers are in New York handling that territory.

"Q. Who is the broker in New York? A. Dudley and Weisel.

"Q. Any others? A. No.

"Q. Where are they located?

"Mr. MacLeod: I don't see how that is material.

"The Court: You said you wanted to show that the brokers may hold it?

"Mr. Rabinowitz: Yes.

"The Court: All right.

"Q. Where are they located? A. 100 Hudson Street.

"Q. But you have no representatives of your own, either in New York or New Jersey, outside of these brokers that sell for you? A. No.

"Q. No. Have you any other office located besides San Jose, California? A. No.

"Q. Your only office is then located in California? A. Yes.

"Q. Now, Mr. Denhart, the fruit juices in connection with canned peaches contain acid, do they not? A. You mean by that syrup on the fruit?

"Q. Yes. A. Yes.

"Q. And you would place that acid and give it a term of aciduous character——

"Mr. MacLeod: If your Honor please, I don't want to object, of course, but I don't see how it is cross-examination of this witness. We didn't put him on to show that there is any acid or chemical test or anything like that.

"The Court: Yes, you showed the whole thing.

"Mr. MacLeod: We showed the process of its manufacture.

"The Court: This relates to the syrup.

"Q. So it does contain acid? Yes or no.

"The Court: He said, 'Yes'.

"Q. Yes. And do you know what the nature of the acid is that the syrup contains? A. No.

"Q. You are not familiar with the chemistry of the case or what its composition is from an element standpoint, are you? A. No.

"Q. Have you a laboratory in connection with the plant? A. We have what we call a cutting room in which we cut numerous samples.

"Q. Have you a laboratory and do you employ a chemist in connection with the laboratory for the purpose of making tests or microscopic examination of the contents of the cans? A. No.

"Q. Now, you say that you are the general manager of the plant? A. Superintendent.

"Q. Superintendent of the plant. Are you familiar with the fact that fruit juices are frequently contaminated with ptomaine?

"Mr. MacLeod: Of course, I don't think that is material.

"Q. To your knowledge, in your knowledge?

"Mr. MacLeod: I can't see how that is proper cross-examination.

"The Court: No, that is assuming a fact.

"Q. Well, do you know whether or not fruit juices do contain ptomaine?

"Mr. MacLeod: I object to that.

"The Court: If he knows.

"Q. Do you know?

"The Court: From his experience.

"Q. From your experience? A. No.

"Q. Now, the process of making that juice is independent of the process of the getting into shape the peaches, that is an entirely different process, is it not? A. Excuse me, in order that I understand you. You speak of juice. There is nothing used except syrup.

"Q. Yes, I will use that term. Syrup. That process, the making of the syrup, is independent of the making of the peaches ready for canning? A. Yes.

"Q. Now, you don't know what the composition of the fruit juice is, of the fruit syrup, chemically, or do you know? A. No.

"Q. The object, as I understand it on the questioning of counsel, of the heating process is for sterilization, is it not? A. Yes.

"Q. And do you know what the object of the sterilization is? A. To make the can so it is absolutely sterile.

"Q. I see. Now, how many employees do you have in the place? A. It varies from a thousand to twelve hundred.

"Q. Is there any sampling conducted by your

New Jersey State Library

company before the can is sealed? A. There are innumerable inspections, if that is what you mean.

"Q. No actual sampling? A. After it is sealed?

"Q. No, before it is sealed. A. I don't understand what you mean by sampling.

"Q. Actual tasting of the product? Is that done?

"The Court: Do you mean tasting the juice or the sugar?

"Mr. Rabinowitz: Of the fruit.

"The Court: They wouldn't eat the fruit, would they?

"Mr. Rabinowitz: Of the juice.

"A. The juice is not tasted.

"Q. No? A. It is measured by special instruments.

"Q. I see. But there is no actual tasting by any persons at all? A. No.

"Q. Then, you say that there is no laboratory in connection with the plant? A. No.

"Q. And you also say that these samples are sent to no laboratory for any inspection? A. We send innumerable samples to the laboratory in San Francisco, which is operated by the National Canners' Association.

"Q. I see. But you don't know whether or not this particular can that is the subject of litigation was actually sent to the laboratory for inspection?

"Mr. MacLeod: I object to that, because the can has never been identified.

"Mr. Rabinowitz: We will connect it up.

"The Court: Connect it up with him so he will know what it is. How does he know what you are speaking about?

"Mr. MacLeod: Do you withdraw the question?

"Mr. Rabinowitz: Yes.

"Q. Now, which has more danger of spoil, the juices or the peaches?

"Mr. MacLeod: That is assuming a fact.

"The Court: If he knows.

"Q. If you know?

"Mr. MacLeod: It is assuming the fact, your Honor, that there is a danger.

"The Court: Well, that, of course, would have to be based upon the assumption that some do spoil, I suppose.

"Mr. MacLeod: Yes, and then in addition to that, your Honor please, the word 'spoil' is not indicative in this case.

"The Court: No. I will sustain the objection in that form.

"Q. Was there at any time—withdraw that. How long has your plant been in operation? A. Eleven years.

"Q. Has there been any time when some of the finished product ever was withdrawn from the market?

"Mr. MacLeod: I object to that. It would be immaterial and irrelevant.

"The Court: I will sustain the objection.

"Mr. Rabinowitz: If your Honor will permit me to be heard on that point, the witness is trying to show the method of making these canned peaches, indicating that his methods employed were perfect, and we want to show that there has been

instances in the past wherein some of the finished product was actually withdrawn from the market.

"The Court: That wouldn't affect this can.

"Mr. Rabinowitz: Not particularly, but it might show that in the process of manufacture of the peaches that there have been instances where negligence has arisen in its manufacture which has resulted in some of the product being withdrawn.

"Mr. MacLeod: That is not this case, and besides, that wouldn't be the basis——

"Mr. Rabinowitz: It may counteract the argument that their system, which they claim perfect, has been proven in other instances imperfect.

"The Court: He has testified as to a particular system or method of preparing and canning and receiving and so forth, that it is away from any contamination of any kind. Now, I suppose he is really in the nature of an expert witness. I imagine he could testify as to whether or not in his experience in this particular line of work that he has mentioned it has occurred that any of the cans of peaches that have been sent out contained ptomaine poisoning.

"Mr. MacLeod: I don't object to that. It is not the question, though.

"The Court: I will permit that.

"Mr. MacLeod: He doesn't say that.

"Q. Have any of the peaches been returned at any time——

"Mr. MacLeod: I object to that.

"Q. (Continuing) —because of defect in quality?

"Mr. MacLeod: I object to that. That is my point.

"The Court: No.

"Mr. MacLeod: I have no objection, if your Honor please, to your Honor's question. I think your Honor is probably right, according to his testimony. It must be confined to the case now before the Court.

"Mr. Rabinowitz: I am referring to an authority on the proposition, the Decamp case, which I can quote your Honor to give you the situation of where the witness similar to the gentleman that is testifying here went into the whole system of the process of canning. That happened to be a case involving pork and beans, and the cross-examination of the witness attempted to break down the witness, showing that in the process which the witness had contended was an actually perfect method that there were instances where certain things occurred in the process of manufacture or canning, that experience indicated that some of the stuff was actually returned.

"The Court: All right, if you call his attention to anything specific.

"Q. Do you know of any instance at all where some of the canned goods were returned because of being in a defective condition?

"Mr. MacLeod: I object to that.

"The Court: What do you mean by defective? You had better explain that.

"Q. That they were unfit for food?

"Mr. MacLeod: I object to that.

"The Court: I will permit that.

"Mr. MacLeod: Your Honor will allow me an exception?

"The Court: Yes.

"By the Court:

"Q. Were there any instances where peaches have been returned when they were unfit for food? A. No, I don't know of any instances.

"By Mr. Rabinowitz:

"Q. But there may be?

"The Court: Oh, no.

"Mr. MacLeod: I object to that.

"Q. You know of no instances? A. That is right.

"Q. Is that true? A. Yes.

"Q. That is to the best of your knowledge?

"Mr. MacLeod: I object to counsel qualifying his questions.

"Mr. Rabinowitz: This is cross-examination.

"Mr. MacLeod: You went on a fishing expedition.

"Q. Now, the peaches, you stated on direct examination, come to you in lug boxes? A. Yes.

"Q. These boxes were obtained from whom? A. They are owned by the company.

"Q. Richmond-Chase Company? A. Yes.

"Q. Do I understand you, then, that the Richmond-Chase Company have their own farms where these peaches are raised? A. They have their own boxes in which, I stated in the beginning, they buy practically all the peaches from growers.

"Q. From growers? A. Yes.

"Q. These growers are independent of the Richmond-Chase Company? A. Yes, sir.

"Q. Now, who actually does the crating of these peaches? A. The grower.

"Q. The grower. And when you speak of lug boxes just what do you mean, Mr. Denhart? A. That is a box nine and a half inches high, fifteen inches wide, and twenty-four inches long, with a cleat on top of both ends, used for the purpose of handling as well as to make one box stand up above the other so the fruit will be clear in the box from the other box on top of it.

"Q. I see. And are there any slats or is it one solid piece of wood surrounding the peaches? A. There are no slats.

"Q. Or strips? A. It is solid.

"Q. Solid? A. Yes.

"Q. It is solid. Now, the process of washing the peaches, in knocking off the dirt of the peaches, who is that done by?

"Mr. MacLeod: Well, now, of course, I don't want to be too technical, but counsel puts in 'dirt off the peaches'.

"Q. Assuming——

"Mr. MacLeod: There is no evidence that there was dirt on them.

"Mr. Rabinowitz: Withdraw it.

"Q. Does the grower actually wash the peach before it reaches the cannery? A. No.

"Q. He does not? And who does the work of sorting the bad peaches from the good ones?

"The Court: He has been all over that, hasn't he?

"Mr. Rabinowitz: No, sir, he has not touched that, not that I recall.

"The Court: I thought we did.

"Mr. MacLeod: He did on direct, yes, but not on cross-examination.

"The Court: All right, tell us all over again what it was.

"A. We buy peaches with certain specifications, diameter, uniformity, color, size, and symmetry, and the grower delivers us such peaches.

"By the Court:

"Q. And if he doesn't what do you do? A. Reject them to be resorted.

"By Mr. Rabinowitz:

"Q. Now, this State Board of Health inspection that you spoke of on direct examination, is that conducted by the State or is it conducted by the city? A. It is conducted by the State Board of Health.

"Q. I see. And is that check-up every day or occasionally? A. It is checked continuously, because these representatives are located at the receiving stations.

"Q. You say that they are stationed there all the time? A. Yes.

"Q. Every day? A. Yes.

"Q. Is that after the can is sealed that they inspect these cans? A. Oh, this inspection that you mention there is an inspection of the raw product before it comes to the canning plant.

"Q. But the peach itself before it is actually cut, that is the inspection that is conducted? A. That is one inspection. There are others.

"Q. I see. Now, of course, you can't give us the history of this particular can of peaches that is the subject of litigation, can you, Mr. Denhart? A. If I could see the can I could tell you the date it was packed and the syrup and the number of pieces to the can and the variety of the peach and the grade and all about it.

"Q. Well, now, an examination occurred, do I understand you to say,——

> "The Court: Have you got the can? Have you got the can?
>
> "Mr. Rabinowitz: No, sir, I haven't.
>
> "The Court: Where is it?
>
> "Mr. Rabinowitz: The can was thrown away.

"Q. Do I understand you to say that the peaches are divided into grades? A. Peaches are packed in different grades in the finished product.

"Q. What do you mean by packed in different grades? A. Just explain that for the record. A. By the word packed I would say canned.

"Q. Do you mean to say that there is a better quality than— A. There are six different qualities.

"Q. Six different qualities? A. Yes, or grades or whatever you call them.

"Q. I see. Now, when you say the help you say you have several thousand people working for you? A. Yes.

> "The Court: Several thousand?
>
> "Mr. MacLeod: He said ten to twelve hundred.

"Q. Oh, yes, I see. And you change your help from time to time, don't you, occasionally? A. Yes.

"The Court: I suppose they do. They all do.

"A. There is some turn-over. It is very small.

"Q. Now, when the peaches are placed in the can are they handled with employes' hands? A. No, the employe wears rubber gloves.

"Q. Wears rubber gloves? Now, isn't the success of the method of canning, in your experience as general superintendent of that concern, dependent upon the care and skill or efficiency of the employes? A. Yes.

"Q. And it is possible, isn't it, Mr. Denhart, that the method employed is not applied at times with the highest skill?

"Mr. MacLeod: I object to that, if your Honor please.

"The Court: Sustain it.

"Q. Do you know of instances where the proper methods have been adopted and yet the products of the plant adopting them have not always been perfect?

"Mr. MacLeod: I object to that, your Honor please, on the same ground, as being too general and not specific. He can answer it——

"The Court: It depends upon what you mean by perfect.

"Mr. Rabinowitz: I repeat the question to have an opportunity to argue it.

"The Court: In view of the fact that the question is indefinite I will sustain the objection, since you can't explain it.

"Mr. Rabinowitz: Here is what I would like to read.

"The Court: Perfect means nothing, as far as I understand.

"Mr. Rabinowitz: Pardon me, I didn't say perfect.

"The Court: What did you say?

"Mr. Rabinowitz: I said perfect, yes.

"The Court: Don't say you didn't.

"Q. Have you known of instances where the proper methods have been adopted and yet the products of the plant adopting them have not always been perfect?

"Mr. MacLeod: That is the question I object to. It is the same question.

"The Court: Yes, I will sustain it.

"Mr. Rabinowitz: I ask your Honor for an exception.

"The Court: Yes.

"Q. Do you consider there is a difference between the adoption of a method in the process of canning and the practical carrying out of the method by a host of employes in the plant? A. No.

"Q. You don't think there is any difference? A. No.

"Q. Might the products of canning be harmful if the methods employed were not complied with?

"Mr. MacLeod: I object to that question, your Honor please; first, might; and second, harmful. Possibilities. All things are possible.

"The Court: I suppose if he said 'probable' instead of 'might'.

"Mr. MacLeod: Then I object to the question. What does he mean, harmful?

"The Court: Harmful to the extent of what?

"Q. Might the products be harmful as far as contamination, infection, or any other condition of toxin getting into the products if the methods were not complied with as described on the direct examination?

"Mr. MacLeod: Of course, that is such a broad question.

"The Court: Well, is it probable? Is it probable?

"Mr. MacLeod: If they don't follow this method that the food might not be fit for consumption, I have no objection to that.

"The Court: That is what it means.

"By the Court:

"Q. Does a toxin get into the can of fruit? A. I don't believe so.

"By Mr. Rabinowitz:

"Q. You don't believe so. So that if the methods of treatment and care which you have described on the direct examination were in any way——

"The Court: Deviated from.

"Q. —deviated from, you say that the product would still come out perfectly?

"Mr. MacLeod: I object to that.

"The Court: I will sustain the objection.

"Mr. Rabinowitz: I will ask your Honor for an exception.

"Q. Now, you spoke of the machine fastening down the lid. If that doesn't do a good job there might be danger of re-inoculation, may it not? What machine did you speak of? A. The capper.

"Q. A clamper? A. Capper, c-a-p-p-e-r.

"Q. If that doesn't do a good job of fastening, there might be danger of re-inoculation?

"Mr. MacLeod: I will have to object to that. What do you mean?

"The Court: What do you mean by re-inoculation?

"Mr. Rabinowitz: Inoculation.

"The Court: You mean danger of poison?

"Mr. Rabinowitz: Yes, and in that case decomposition might set in.

"The Court: Is there any danger of poison getting into it under those conditions?

"Mr. Rabinowitz: Yes, that is the point.

"By Mr. MacLeod:

"Q. Is there danger of any poison getting in the capper? A. No, I don't think so.

"By Mr. Rabinowitz:

"Q. You don't think so? A. No.

"Mr. MacLeod: He said poison. I assume he means ptomaine poison.

"The Court: I suppose so.

"Q. Is there danger, if the capper isn't properly put on the can, that there might be a possible effect of having bacteria get into the product?

"Mr. MacLeod: I also object to that, your Honor please.

"The Court: Possible, did you say?

"Mr. Rabinowitz: Probable.

"Mr. MacLeod: It is practically the same question that was asked before.

"The Court: I think so. I will sustain it.

"Mr. Rabinowitz: I ask your Honor for an exception.

"Q. So that you say there will be no danger of decomposition if the capper machine doesn't fasten down the lid securely?

"Mr. MacLeod: Now, I object to that.

"Mr. Rabinowitz: This is cross-examination.

"Mr. MacLeod: You are not going to show there was any decomposition in the food.

"Mr. Rabinowitz: I am trying to show here, if your Honor please, that the witness has testified that if the capper machine doesn't work properly that nothing can happen to this product.

"The Court: Then why do you ask him that again if he said it? Why ask him again?

"Mr. Rabinowitz: I don't know whether or not he said it.

"The Court: You just said he said so.

"Mr. Rabinowitz: Well, I ask your Honor to submit the question again.

"The Court: Not if it has been answered, no.

"Q. Now, in the shipping of the can it is possible, is it not, that a small air hole may exist in the top of the can?

"Mr. MacLeod: I object to that. I believe counsel means probable, and I suppose he will supply that.

"The Court: Yes.

"Mr. MacLeod: But there is no contention in this case that there was any air hole in the can. There will be no evidence that there was any air hole in the can, and I think a problematical question which would not be in the case is not a proper question. If counsel will say to me that he is going to prove there was an air hole in this can, and then if he wants to cross-examine to see whether that air hole would result in any condition of ptomaine poisoning, I have no objection, but I don't think we ought to have a lot of problematical suppositions based upon nothing.

"The Court: Yes, I think that is so.

"Q. Well, assuming that there was an air hole in the can, from your experience would you say that that might be a source of infection?

"Mr. MacLeod: I object to that, if your Honor please.

"Q. Yes or no.

"The Court: Sustain it.

"Mr. Rabinowitz: I ask your Honor for an exception.

"Q. Assuming that the fruit juices which were in the can attack the metal of the can, would you say that that might produce in turn a condition so as to have the product impure and unfit for food?

"Mr. MacLeod: I object, if your Honor please. There is no proof and there won't be any proof in the case.

"The Court: There is nothing to base that assumption on.

"Mr. MacLeod: Nothing to base the assumption on, that is my point.

"Q. Have you any experience in the——

"Mr. MacLeod: Do you withdraw the question, Mr. Rabinowitz?

"Q. Have you any experience in the process of manufacture—have you any knowledge of the effect of the fruit juices upon metallic substances? A. I don't understand what you mean by fruit juices.

"By the Court:

"Q. When the fruit is in the can with the syrup it is clamped and ready for delivery, as you have described it. That is what he wants to know. Does that fact, that the can is of a certain composition, the metal or whatever it might be, in any way affect the fruit and the fruit juices or syrup? Does it have any injurious effect on it? A. No.

"Q. None? A. No.

"By Mr. Rabinowitz:

"Q. You know of no instances, do you, of the acid in fruit juices attacking the metallic substances of the can?

"Mr. MacLeod: I object to that, if your Honor please.

"Q. So as to produce an impure condition of the product?

"Mr. MacLeod: I object to that.

"The Court: I think he answered that.

"Q. Yes or no.

"The Court: He did answer it, didn't he?

"Mr. MacLeod: You said, 'So that you know', and then you repeat all he said.

"Mr. Rabinowitz: I am asking him if he knows of any instance of where fruit juices, by virtue of its contents of acid, have in any way attacked the metallic substance of the can so as to produce an impure condition of the product, so as to render the product unfit for food.

"Mr. MacLeod: He answered that 'no', before.

"By the Court:

"Q. Do you know of any such case? A. The can would have to be opened; otherwise my answer would stand as no.

"Q. And if the can is opened the peaches and the syrup are left in there, then, of course, it would have some effect; is that it? A. Surely.

"Q. Otherwise it would not? A. No.

"By Mr. Rabinowitz:

"Q. In no instance would it ever attack the metallic substance of the can if the can was opened immediately and served; is that your answer?

"By the Court:

"Q. If the can is opened immediately and served does it make any difference? A. No.

"By Mr. Rabinowitz:

"Q. And you know of no instance where a can of fruit which was opened immediately in which the fruit juices attacked the can so as to render the food unfit for consumption?

"Mr. MacLeod: I object to that. That certainly would not be material in the case.

"The Court: I suppose the answer is the same.

"Q. What is the answer? A. Why, no, I know of no such instance.

"Q. Is that your answer, you know of no such instance?

"The Court: He has answered it.

"By the Court:

"Q. And if the can is opened and the fruit and the syrup is left in there, for how long a period do you suppose it would have to remain there or would you say it would have to remain there, if you know, to become impure? A. I can't answer that, your Honor, because it would depend upon the temperature and the circumstances.

"Q. I see. You couldn't approximate it? Suppose it was opened for a day, would that have any effect on it, do you think? A. It would show a little mark on the top of the tin where the level of the syrup was in the tin.

"By Mr. MacLeod:

"Q. The point is: Would it be impure food? A. It would not make it poisonous.

"By the Court:

"Q. It would not make it poisonous? A. No.

"By Mr. Rabinowitz:

"Q. Assuming that the proper temperature which you spoke of in connection with the sterilization of the canned peaches was not maintained, would that, in your opinion, have any effect upon proper sterilization?

"Mr. MacLeod: Of course—Oh, go ahead and answer it.

"Q. Yes or no. Answer it yes or no. A. Yes.
"Q. It would have. That is all."

(Mr. MacLeod read to the jury the re-direct examination and the re-cross-examination of this witness, as follows:)

"*Re-direct examination by Mr. MacLeod*:

"Q. The broker you referred to on cross-examination, in New York, had no connection with the company whatsoever, has he? Not employed by the company? A. He is not employed by the company. He operates on a commission. He has nothing to do with the handling of the product whatsoever.

"Q. You refer to acid being in the syrup. Does the company put any acid in the syrup? A. No.

"Q. What is the syrup made of? A. It is made of pure granulated sugar and artesian water.

"Q. What do you mean by saying there was acid in it? Counsel asked you a question whether acid was in this syrup and you said there was. Do you know whether there is any acid in the syrup or not? A. I supposed he meant fruit acid.

"Q. But there is no acid in the syrup itself, is there? A. No.

"Q. Is there any acid put in the syrup or in the can or any part of the can in which the fruit

is contained by the company at all? A. Absolutely not.

"Q. You spoke of various qualities. You said there were six. When you refer to quality or grade what is the difference in these various six grades? Just make it brief and as hurriedly as you can. A. The difference first is in the syrup put on the—or the water added to the contents of the can; secondly——

"Q. Some syrup is thicker than others? A. Some are very heavy, some are medium, some are light, and some are very light; there are four grades of syrup.

"Q. What is the other? A. The other would be a water pack, that is, fruit packed in water, and the other would be a solid pack. But the differentiation that marks the grades is syrup in addition to the degree of color and uniformity and workmanship and the symmetry of the halves of the peaches.

"Q. And the material itself is all the same in all the grades?

"Mr. Rabinowitz: I object to the question as very leading.

"Mr. MacLeod: Withdraw it.

"Q. Is the quality any different in any way, the material itself, outside of the workmanship and the color and the grade? Is the material the same excepting the size? A. The material is all the same.

"Mr. MacLeod: That is all.

"*Re-cross-examination by Mr. Rabinowitz*:

"Q. Now, you say there is no acid in fruit juice?

"The Court: I don't know that he said that.

"A. I didn't say that.

"Q. Is there any acid in peach fruit syrup? A. Before or after it is in the can?

"Q. I am asking you.

"The Court: Well, say after.

"Q. Either before or after.

"The Court: Say after.

"Mr. MacLeod: Of course, your Honor, he already answered that question.

"Mr. Rabinowitz: Well, this is cross-examination.

"Q. Yes or no.

"The Court: What is your answer?

"A. Fruit acid, yes.

"Q. There is fruit acid?

"By the Court:

"Q. And what is the fruit acid? What is that? A. It is the juice of the fruit.

"By Mr. Rabinowitz:

"Q. But do you know what its elemental composition is from the standpoint of what it contains? Do you know the nature of the acid? Could you give me its symbol? A. No.

"Mr. Rabinowitz: All right.

Mr. MacLeod: That is the end of the deposition.

The Court: We will take a recess for one hour. Do not discuss this case with anybody; do not let anyone talk to you at all. Just keep by yourselves until quarter of two.

(A recess was taken until 1:45 o'clock p. m.)

AFTERNOON SESSION. 2 P. M.

DR. GRACE B. BLAUVELT, sworn.

Direct examination by Mr. Hanaway:

Q. Dr. Blauvelt, you are a practicing physician? A. Yes.

Q. Duly licensed to practice in the State of New Jersey? A. Yes.

Q. How long have you been so practicing? A. Two years.

Q. Where did you go to medical college? A. Boston University.

Q. I beg your pardon? A. Boston University.

Q. Did you go to school prior to that time? A. Yes, Cornell University.

By the Court:

Q. What is the name? A. Dr. Blauvelt.

By Mr. Hanaway:

Q. Now, Dr. Blauvelt, will you raise your voice so the jurors here can hear your answers? Were you connected with the Paterson General Hospital in the year of 1928? A. Yes.

Q. Were you connected with the Paterson General Hospital in June of the year 1928? A. Yes.

Q. In what capacity? A. Interne.

Q. Were you on duty there all during the month of June? A. Yes.

Q. Now, I ask you, Dr. Blauvelt, whether or not you had occasion to examine a child by the name of Alfred Berni some time during the month of June, 1928? A. A boy, one of the Berni boys.

Q. Did you examine one of the Berni boys? A. Yes, yes.

Q. I think it is conceded that it was Alfred Berni, is it not?

Mr. Rabinowitz: No, James.

Q. Well, counsel concedes it was James Berni that was admitted to the hospital. A. Or John.

Q. On what date was that, do you recall? A. 22nd of June.

Q. 22nd of June, 1928? A. 1928.

Q. What did your examination disclose, Doctor? A. The child had an acute enteritis.

Q. The jury, I am afraid, don't quite understand the significance of that term. Will you explain to us what acute enteritis is, briefly? A. Yes, it is an inflammation of the lining of the intestines.

Q. What causes that disturbance? A. Well, poisoning.

By the Court:

Q. What? A. Poisoning.

Q. Poisoning? A. Yes.

By Mr. Hanaway:

Q. What type of poisoning? Is it confined to any particular type of poisoning? Would you say it would be——

Mr. Rabinowitz: Now, wait. Don't lead the witness.

A. Well, I think that food poisoning is the most commonly known.

Q. Well, would you say in this case that the acute enteritis was caused by food poisoning? A. I thought that it was.

Q. Upon what did you base your diagnosis that it was caused by food poisoning? A. In this case I thought it was due to a poisoning of food, from the history and from the symptoms the child exhibited.

Q. What were the symptoms? A. He had nausea and vomiting, diarrhea.

By Mr. Rabinowitz:

Q. What, Doctor? A. Nausea, vomiting, diarrhea. Those were the main things.

By Mr. Hanaway:

Q. Were they all the symptoms which you considered? A. Which I thought was a poisoning of the intestinal tract.

Q. You spoke of the history, too, as being one of the elements that you considered. What was the nature of the history and where did it come from? A. I felt the history pointed towards that, because of the child having a brother who had died a day or two previously from the same thing or from—or with the same symptoms.

Q. Well, now, Doctor, you have stated that in your opinion this acute enteritis might have been caused by a food poisoning? A. Yes.

Q. Did your examination of this child indicate to you any particular food which you might say was the cause of the illness? A. No, we didn't

find anything that would indicate any special food.

Q. Did you discuss this case with any of the family? A. Yes.

Q. With whom? A. With the mother and with the father.

Q. On what date did you discuss this? A. That was on the 22nd of June, and occasionally afterwards, that is, between the 22nd and three or four days later.

Q. On more than one occasion? A. Yes.

Q. Will you state your best recollection of the substance of the conversation had with either the father or mother of this child?

Mr. Rabinowitz: Wait a minute. The father is not a party to this suit. I object to any conversation with the father.

Mr. Hanaway: Well, your Honor, I submit a child three years old is wholly incapable of discussing his own ailments with the hospital doctors and the natural assumption is that his parents would be there to give the history of the case, rather than the child. I will withdraw my question as to the father, if counsel insists upon it.

Mr. Rabinowitz: Yes, I insist on it.

Q. Well, now, will you answer that question? A. Yes. The child had been perfectly well until eight o'clock on the 22nd of June. Then the mother noticed that he was very feverish and was vomiting, and I think she treated him locally with some alcohol rubs or local measures, called in a local family doctor, who advised the child's admission to the hospital.

Q. Now, you stated that the parents told you—it was Mrs. Berni——

Mr. Rabinowitz: She doesn't——

Mr. Hanaway: Well, I withdraw my part of the question dealing with the father. The testimony is what the mother said.

Q. Now, do you recollect at what time on the 22nd day of June you were told that the child was first taken ill? A. At eight o'clock that night.

Q. At eight o'clock on the evening of the 22nd? A. Yes, yes.

Q. Is there any question in your mind as to your recollection on that point? A. No.

Q. Now, when you talked to Mr.——

Mr. Rabinowitz: I didn't get the question.

(The last question and answer were read by the reporter.)

Q. When you discussed this matter with Mrs. Berni on the 22nd of June did you have occasion to observe her general condition? A. Yes.

Q. Well, will you tell the Court and jury what you observed as to her general condition physically? A. Her general condition?

Q. Yes. A. It was normal, I should say.

Q. Did she appear to be ill to you? A. No.

Q. Did you see her on a further occasion after the 22nd? A. I am not sure. I don't remember.

Q. Was there anyone with her when you saw her on the 22nd? A. Yes, the father of the child, her husband, was there.

Q. Is there any question in your mind as to your recollection as to Mrs. Berni's physical condition at the time? A. No, no. No, they both appeared to be very normal.

Q. You would certainly have noticed it if she appeared to be suffering from any violent illness, would you not?

Mr. Rabinowitz: I object to that.

The Court: What was the question?

Mr. Hanaway: You would certainly have been able to observe any violent physical illness if Mrs. Berni had been suffering at that time?

The Court: I suppose that goes without saying.

A. Yes.

Q. Now, Dr. Blauvelt, at the time you discussed the history of this case with Mrs. Berni did she tell you what in her opinion was the cause of the illness?

Mr. Rabinowitz: I object to that.

Mr. Hanaway: Well, I will withdraw that question and put it this way:

Q. Dr. Blauvelt, in discussing the history of this case with Mrs. Berni did she tell you what she in her opinion—withdraw that. Did she tell you what the child had been eating prior to being taken ill? A. Yes, she told me some things.

Q. Did she tell you what she thought was the cause of the illness? A. I don't remember whether she said what she thought or not, I don't know what she thought, but——

Q. Did she say what they had been eating? A. Yes.

Q. Well, what was it? A. The only thing that I remember particularly was canned pineapples.

Q. Did she say anything to you—I beg your pardon. A. That is the only thing that they suggested.

Q. In writing up the history of this child's illness, did you make a report? A. Yes.

Q. Of the canned pineapple which had been mentioned by Mrs. Berni? A. Yes, I think so.

Q. Well, is there any question in your mind——

Mr. Rabinowitz: Pardon me.

By Mr. Rabinowitz:

Q. Did you write the report up, Doctor? A. Yes.

Q. You wrote the record up yourself? A. Yes.

Q. In your own handwriting? A. Yes.

By Mr. Hanaway:

Q. Is there any question in your mind about putting that statement in the record? A. No, no.

Q. Have you got those records with you? A. I have the records here.

Q. Were you in charge of this division or department of the hospital at the time? A. Yes.

Q. You were yourself personally in charge of it? A. In that ward where children were admitted.

Q. Well, who had the general supervision of the whole children's department at that time? A. I don't remember exactly. I think it might have been Dr. Cremens. You mean some of the older doctors?

Q. Yes. A. Dr. Cremens or Dr. Hall. I don't remember which was on service at the time. The service changes every few months.

Q. But Dr. Cremens was connected with that department of the hospital at the time? A. I think so.

Q. Doctor, do the records contain the date which you have just testified about? A. Yes, I think so.

Q. What time on the 22nd of June, 1928, was this child admitted to the hospital? A. Nine o'clock.

Q. Nine o'clock in the evening? A. Yes.

Q. On the 22nd day of June? A. Yes.

Q. How long did the child stay there? A. About five days, four or five days.

Q. Did the child ever leave the hospital? A. No, not living.

Q. When did the child die? A. I think it was on the 26th.

Q. The 26th of June. Are you able to say from what the child died? A. Well, I am not sure what it was from, but I think that it was a poisoning of some sort, but I don't know what it was.

Q. There is more than one type of poisoning, isn't there, Doctor? A. Yes.

Q. Could you say within what category the poisoning came that caused the death of this child? A. No. I feel it was a food poisoning, but I don't know what food caused it.

Q. You couldn't tell just exactly what food caused it? A. No, I couldn't say what food caused it at all.

Q. Then, you couldn't say that canned peaches caused it, could you, Doctor?

Mr. Rabinowitz: I object to that.

A. I don't know.

Mr. Rabinowitz: What is the answer to that? Withdraw my objection.

A. I don't know that they did or anything about the peaches.

Q. Did the mother of this child tell you at any time that this child had been eating canned peaches? A. No.

Q. That is all, Doctor.

Cross-examination by Mr. Rabinowitz:

Q. Doctor, have you the records there? A. Yes, I have.

Q. May I just look at them?

Mr. MacLeod: I offer them in evidence, your Honor, please. Is there any objection to their going in evidence, Mr. Rabinowitz?

Mr. Rabinowitz: Yes.

Mr. MacLeod: I ask that they be marked in evidence, your Honor, please. They are called for by the plaintiff.

The Court: That doesn't make them admissible.

Mr. MacLeod: He is using them; he is going to use them. I just didn't want counsel later to say that he didn't mean to use them. I thought I had better make my objection now.

By Mr. Rabinowitz:

Q. Dr. Blauvelt, do you say that that entire page is in your handwriting? A. No.

Q. So that the entire first page of the personal history of John Berni is not in your handwriting? A. No.

Q. What portion of this page is in your handwriting? A. The name, the address, the age of the child, its social status, the chart number, things like that. The admission note wasn't in my handwriting.

Q. The admission note? A. Yes.

Q. Is not in your handwriting? A. No.

Q. Is this in your handwriting, final diagnosis? A. Final diagnosis is in my handwriting.

Mr. MacLeod: May I have it noted for identification?

The Court: Yes, as long as you are using it I suppose it will be admissible in evidence. I suppose you understood that.

Q. You describe, Doctor, that this injury that John Berni died of was acute enteritis from poisoned canned pineapple? A. It was a question of food.

Q. But you did indicate in your record that it was canned? A. Canned pineapple.

Mr. Hanaway: I object, your Honor. The record speaks for itself in that respect.

The Court: She said that is so.

Q. And then you indicated on that final diagnosis a question mark, didn't you, Doctor? A. Yes.

Q. Why was the question mark inserted on the record? A. The question of the food.

Q. A question of the food? A. Yes.

Q. Question of what food? A. That the child had eaten.

Q. But you did obtain from Mrs. Berni a statement that when she had brought the child to the hospital, that she had eaten some canned food, the child had eaten some canned food?

The Court: Canned pineapple.

A. Canned pineapple.

Q. That was your best recollection?

Mr. MacLeod: I object to that, your Honor, please.

A. Yes.

Q. But you were not certain about that, were you?

Mr. MacLeod: Just a minute. If the Court, please, I object. I object to counsel saying that that is her best recollection.

The Court: I will allow it.

Q. That is your best recollection, Doctor, isn't it? A. Yes.

Q. But you were not certain about that and that is why you inserted the interrogation mark? A. No, the question mark indicated that the type of food causing the poisoning was not determined.

Q. How long did Mrs. Berni stay there, do you recall? A. No, I don't recall. It was a few hours; I know she had been there for quite a few hours probably.

Q. How long did she engage in conversation with you? A. Oh, an hour, probably.

Q. One full hour? A. I imagine so. That is the average time that I take for an examination.

Q. Isn't it a fact, Doctor, that she was only there just a few moments? A. No, not to my knowledge.

Q. Not to your knowledge? A. No.

Q. Did you write these words, "Canned pineapple"? A. Yes.

Q. Now, just a moment. Did you write these words, "Canned pineapple," with the same pen that you wrote, "Acute enteritis from poisoned canned food"?

Mr. MacLeod: May we have this marked as D-1? I think it is the first exhibit that has been offered, so it can be indicated on the record, and what paper counsel is referring to when he reads words?

The Court: It may be marked, the hospital record. He is making use of it, I suppose.

Mr. MacLeod: I would like to have it referred to so the record will be right.

The Court: He is referring to the hospital record which is not yet an exhibit.

(Papers marked exhibit D-2 in evidence.)

By Mr. Rabinowitz:

Q. That question mark on the final diagnosis was a question in your mind as to what the diagnosis really was?

The Court: Referring to D-2.

Q. Referring to D-2. A. Yes, sir, I guess it was.

Q. But the symptoms, Doctor, that were present, the diarrhea and what else did you say? A. Vomiting, temperature.

Q. Vomiting and temperature. Do you recall the temperature? A. I know that it was up, but I don't remember exactly what it was.

Q. And what other symptoms? A. The child had convulsions, restlessness.

Q. You mentioned something on direct examination concerning a condition of the stomach that effected, as I remember, the mucous membrane? A. No, I said that the condition of acute enteritis was an infection or inflammation of the lining of the intestine.

Q. An infection of the lining of the intestine? A. Yes, and inflammation.

Q. And these symptoms, taken together, were your guide posts in determining that it was food poisoning, in connection with the history of the case? A. Yes.

Q. And the history of the case that was given to you indicated that the child had eaten canned goods of some kind?

Mr. Hanaway: I object to that. I don't think the testimony shows that at all, your Honor. There is no such testimony as that.

Q. Well, what was the history? A. The history was a sudden onset of illness, as I said, with the

vomiting, temperature, and diarrhea; that was the onset of the illness.

Q. But did the history given to you by Mrs. Berni state that the child had eaten canned goods? Yes or no. A. Yes.

Q. Now, Doctor, have you had any experience in connection with the canned poisoning cases, actually? A. Yes.

Q. You have had experience? A. Yes.

Q. At the Paterson General Hospital? A. Paterson General Hospital.

Q. Was it a typical case of canned poisoning?

Mr. Hanaway: Your Honor, I am going to object to that question on the ground that there has been no proper foundation laid as to what counsel means by a typical case of canned food poisoning.

Mr. Rabinowitz: Well, was it a case of canned food poisoning?

Mr. Hanaway: I object to that, your Honor, on the same ground. I object to that question, your Honor, on the same ground?

The Court: I will permit it.

Mr. Hanaway: Exception, please.

A. I don't know how to say it is an exact case of canned food. I don't know of anybody that has just lived on canned food to prove what the symptoms are going to be from a canned food——

Q. Well, have you had a case of ptomaine poisoning? A. So-called.

Q. Yes, from canned goods. Yes or no. A. I am just trying to think. I can't say. I can't decide.

Q. You are actually engaged in the practice of medicine? A. Yes. I just can't remember what the diagnoses were on cases that were poisoned.

Q. But you have never had in your actual experience as a practitioner of medicine an actual case of poisoning from canned goods?

Mr. Hanaway: I will have to object to that question on this ground: that he must confine the testimony of the witness to cases of poisoning from canned peaches.

The Court: Yes.

Mr. Hanaway: We certainly can't cover the whole realm of food.

Q. Canned peaches. A. No, I don't think that —I don't remember any special case that just had canned peaches.

Q. And is there any case that you recall of canned poisoning?

Mr. Hanaway: I object to that, your Honor. I don't want to appear to be obstructing this examination, but I am afraid I will have to ask counsel to confine his questions to the food in issue here.

Mr. Rabinowitz: Well, probably through her recollection she might be able to——

The Court: Well, I suppose he could go into that to test her knowledge of testimony she has already given as to what weight might be given to her testimony as to her experience had in poison cases.

Mr. Hanaway: Well, if that is the purpose I have no objection to it, but I simply don't want the jury to gain any false impression from the fact that there are known cases of food poisoning caused by any sort of food under the sun, because we are concerned here with canned foods, canned peaches.

The Court: I will permit it for the purpose of showing the extent of her knowledge of the subject and the weight to be given to the testimony.

(The last question was read by the reporter as follows:)

"Q. And is there any case that you recall of canned poisoning?"

Q. Canned food poisoning.

Mr. Hanaway: I would like to object to that on the further ground that counsel has not specified what he means by canned food poisoning. I submit the witness has nothing on which to base an opinion.

The Court: I thought she said she thought this was a food poison case.

Mr. Hanaway: Well, counsel has asked her a question about canned food poison.

The Court: Well, I suppose you had better find out what she knows about it.

Mr. Hanaway: Is there any difference between canned food poisoning and fresh food poisoning?

The Court: You had better find out what she knows about canned food poisoning.

By Mr. Rabinowitz:

Q. Have you any particular knowledge, Doctor, of canned food poisoning? A. Well, as I said before, I don't know of any case that had been proved to be canned food alone. I never attended any such case.

Q. But have you had an actual case in your experience? A. I have had cases where it has been suspected.

Q. Suspected? A. Suspected, but never proved.

Q. Suspected from what? A. History and symptoms.

Q. Have you read up on the subject of toxicology? A. Yes. Not today.

Q. But in your reading of the subject— A. I have studied it.

Q. (Continuing) —and the study of toxicology have you read the subject of the effect of poisons produced through canned goods? A. I suppose so.

Q. You don't know definitely or distinctly? A. No, I don't remember.

Q. You have no distinct recollection on that subject, but the subject of toxicology deals with that quite lengthily, doesn't it? A. Yes.

Q. And particularly of canned goods causing certain symptoms of poisoning, gastric enteritis? A. Probably.

Q. Yes. And gastric enteritis is a symptom of food poisoning, is it not? A. Yes.

Q. High temperature and diarrhea? A. Yes.

Q. And that is why you questioned your final diagnosis by placing a question mark after the final diagnosis; isn't that so, Doctor? A. Yes.

Q. Of course, your recollection concerning your conversation with Mrs. Berni, had with you at the Paterson General Hospital, was refreshed before you came to court? A. Yes, I had the records.

Q. And you read the records over? A. Yes.

Q. And in the absence of the records, you would have had no particular knowledge of the details of this— A. Oh, yes.

Q. You would have recalled definitely? A. Yes.

Q. Each detail? A. Not each detail, not the dates, and so forth, but I know it in general.

Q. Now, do you recall, Doctor, that this child was brought in on the service of Dr. Veenstra? A. No.

Q. Well, do you recall that Dr. Veenstra advised admission of the child to the hospital? A. Yes, yes.

Q. After the child was brought into the hospital, do you know whether or not Dr. Veenstra saw the child, after that? A. I think he did.

Q. You think he did? A. I think he did. In fact, I think I spoke to him about it on one——

Q. You think you spoke to Dr. Veenstra about it? A. I think so. I am not positive about it, because I spoke to him about other cases.

Q. Did you obtain the information from Dr. Veenstra as to the food that was eaten? A. I don't know. I think so. I might have.

Q. You knew the doctor? A. I knew him.

Q. Didn't you inquire of Dr. Veenstra, he being the attending physician and the physician that had sent the child to the hospital, what history he has obtained from the family? A. Yes.

Q. And do you recall what Dr. Veenstra stated was the canned food that was eaten?

Mr. Hanaway: I object to that, any statement that Dr. Veenstra might have made.

The Court: Yes, I will sustain it.

Q. But you did have a conversation with Dr. Veenstra? A. Yes.

Q. Now, in so far as the pathological examination was concerned, that was made by some other doctor in the hospital? A. Yes.

Q. So that your capacity in the Paterson General Hospital was limited to the admitting physician? A. General care while the child was in the ward.

Q. You were then an interne, were you not? A. Yes.

Q. Had you been admitted to practice medicine at that time? A. No.

Q. How long had you been—how long were you engaged there as an interne? A. A year short of six days.

Q. Before you took your final examination? A. No, I had taken my final examination before this happened.

Q. But you had not been admitted as yet? A. No.

Q. So the pathological examination that was taken was taken by some other physician? A. Yes.

Q. Do you recall his name? A. I don't know just at the time. I think it might have been Bush, but I am not sure.

Q. You are not sure? A. I think that is who was there at the time.

Q. Did you observe, Doctor, that in looking at the child there was—the child perspired freely, is involuntary in stools—do you recall that? A. Yes.

Q. And had very foul, putrid odor? A. Yes.

Q. Do you recall, Doctor, that when the child was touched the hands and arms had some tremor? A. Yes.

Q. The head was perspiring freely? A. Yes.

Q. Now, we know in medicine, do we not, Doctor, that there is such a thing as a chemical poisoning, food poisoning? A. Yes.

Q. Chemical poisoning? A. Yes.

Q. Which can't be evidenced in a bacteriological examination? A. Yes.

Q. So that if the feces of this child showed only the presence of B. coli—I presume that is the proper pronunciation— A. Yes.

Q. (Continuing) —that that child could still have chemical poisoning due to food poisoning?

Mr. Hanaway: I will have to object to that, your Honor. Certainly, it is possible that might happen; anything is possible. I don't think that question is in such form that the witness can testify that even though the bacteriological examination failed to prove one thing that it did not eliminate everything else.

The Court: A question based upon the possibility.

Mr. Rabinowitz: No, it is based upon knowledge, sir, of this witness in determining the final diagnosis of the case as food poisoning. There may be a contention in this case that it would be necessary, in order to show the characteristic of food poisoning, the presence of bacteria. The pathological report in this case, sir, may show that there was an absence of a bacteriological germ, because of the fact that the presence of B. coli, which is natural in any person—now, the question is directed to the same line of examination directed to Dr. Veenstra, in which the bacteriological germ may be present in the feces but nevertheless the patient may be suffering from chemical poisoning due to canned food. Your Honor will recall he said something about the solder or the lead or the tin which may be the producing cause of chemical poisoning, and yet show no evidence of a bacteriological content.

The Court: I will permit it.

Mr. Hanaway: Exception, please.

(The question was read by the reporter as follows:)

"Q. So that if the feces of this child showed only the presence of B. coli, that child could still have chemical poisoning due to food poisoning?"

Mr. Hanaway: I will object, your Honor, to the question—oh, your Honor has already ruled on it. Excuse me.

By Mr. Rabinowitz:

Q. Doctor, there could be food poisoning in this case in the absence of a bacteriological examination? A. Yes, without the examination showing.

Q. I mean, there could be an absence of bacteria in the feces and yet the child be suffering from food poisoning? A. Yes.

Q. From canned goods? A. Yes.

Q. The answer is "Yes", Doctor? A. Yes.

Q. Is that your answer? A. Yes.

Mr. Rabinowitz: That is all.

Re-direct examination by Mr. Hanaway:

Q. Doctor, isn't it also true that there might be an absence of bacteria in the feces and at the same time there might not be a chemical poisoning? A. Yes.

Q. Now, Doctor, what did the laboratory examination of the feces of this child show? A. I think it showed bacillus coli.

Mr. Rabinowitz: I object to that. Dr. Blauvelt has testified that the bacteriologic or pathologic examination was made, as she recalled, by Dr. Brush or Bush.

The Witness: Bush, Bush.

Mr. Rabinowitz: And I object to any evidence concerning a pathological examination that wasn't made by the witness.

Mr. Hanaway: Well, might I ask the witness if she recorded the results of this pathological examination in the history of this case? If so, she can tell us as to what is in the record, made by her own handwriting?

The Court: I don't think so.

Mr. Hanaway: I will withdraw the question.

By Mr. Hanaway:

Q. Now, Doctor, at any time during the illness of this child in the hospital did Dr. Levine come out there? A. Not that I know of.

Q. Do you know Dr. Levine? A. I don't think so.

Mr. MacLeod: I understand we may have this marked now, your Honor please? Counsel consents.

Mr. Hanaway: I would like to have this hospital record identified and introduced in evidence.

The Court: It is admitted by consent of counsel.

(D-2 for identification now becomes Exhibit D-2 in evidence.)

Mr. Hanaway: That is all, Doctor.

Edson B. Heck, sworn.

Direct examination by Mr. Hanaway:

Q. Doctor Heck, are you a licensed physician? A. Yes.

Q. Where are you practicing? A. New York City.

Q. How long have you been practicing in New York City? A. Ten years.

Q. You have a license to practice medicine in New York State? A. Yes.

Q. Are you connected with any hospitals or organizations in New York? A. Yes.

Q. Will you please name them? A. Bellevue Hospital, College of Physicians and Surgeons.

Q. In what capacity? A. I am assistant attending physician on medical service at Bellevue, and I am an instructor in medicine at the College of Physicians and Surgeons.

Q. Will you state to the Court and jury what experience, if any, you have had in the investigation or treatment of so-called food infection or food poisoning cases?

Mr. Rabinowitz: I object to the question, if your Honor please. I think there is a decision that a physician of foreign jurisdiction is not permitted to testify within our jurisdiction, in New Jersey, unless he first has a license to practice medicine in this State. Now, I speak to the best of my recollection. I may be in error, but as I recall, there is an authority somewhere on the premise.

The Court: Where is it?

Mr. Rabinowitz: I haven't the case on the point. It is on my finger tips. It is about ten years ago, and there is an authority somewhere in the Supreme Court on the proposition.

The Court: I don't see it on your finger tips.

Mr. Rabinowitz: I know the propositions of law come up so——

Mr. MacLeod: I think he means where a suit is brought——

The Court: I will permit the doctor to testify.

By Mr. Hanaway:

Q. Will you answer the question, please? A. Would you mind reading it?

(The question was read by the reporter as follows:)

"Q. Will you state to the Court and jury what experience, if any, you have had in the investigation or treatment of so-called food infection or food poisoning cases?"

A. In the past two years I have investigated perhaps fifty or sixty outbreaks of food poisoning in the vicinity of New York City.

Q. Were those cases concerned with food poisoning alleged to have been caused by canned food? A. Yes.

Q. Now, Doctor, I ask you whether or not on the 12th day of July, 1928, you came to Paterson, New Jersey, and had an interview with Martha Griffin, the plaintiff in this action, Mabel Berni, and Dr. Levine, regarding the illness which is the basis of this action? A. Yes, I did.

Q. Where did this interview take place? A. At Mrs. Griffin's home.

Q. Who was present?

Mr. Rabinowitz: What is that? July 12?

Mr. Hanaway: Yes.

Q. Who was present? A. Mrs. Griffin, Mrs. Berni, and a friend named Mary Morrison.

Q. Did you question Mrs. Griffin as to the cause of the illness? A. Yes.

Q. Do you recollect asking her questions? A. Yes.

Q. Did you record the answers? A. Yes.

Q. In your handwriting? A. In my own handwriting.

Q. As the witnesses gave you the answers? A. Yes.

Q. Were these statements signed by the witnesses? A. Yes, they were. Mrs. Griffin signed a mark; Mrs. Berni signed her signature.

Q. Doctor, would you say that the answers that you put down to the questions given were the answers as given by the witnesses? A. Oh, yes.

Q. I hand you this paper and ask you if you can identify it (handing a paper to the witness).

Mr. Rabinowitz: What statement is that, Mr. Hanaway?

Mr. Hanaway: Martha Griffin.

The Court: Three of them.

Mr. Hanaway: Well, I am doing it one at a time.

A. Yes, this is my own writing.

Q. I ask you, Doctor, if you were present at the time this mark was made by Martha Griffin? A. Oh, yes.

Q. And I ask you if you were present, Doctor, when Miss Mary Morrison signed the statement as a witness? A. Yes.

Mr. Hanaway: If your Honor please, I should like to offer this paper in evidence.

Mr. Rabinowitz: Let me look at it, please. Is this the whole thing?

Mr. Hanaway: That is all of that one, yes.

Mr. Rabinowitz: I suppose that is the proper way to prove it.

Mr. Hanaway: If your Honor please, has it been received in evidence?

The Court: Hand it to the stenographer.

(Paper marked exhibit D-3 in evidence.)

Q. Doctor, at that time did you also have a conversation with Mrs. Berni? A. Yes.

Q. Do you recognize Mrs. Berni as a person present in court? A. Yes.

Q. Will you please designate which person is Mrs. Berni? A. It is the lady next to the end.

Q. And, Doctor, do you recognize Mrs. Martha Griffin? A. Yes.

Q. Will you please designate which person she is? A. The lady at the end of the table.

Q. Doctor, in your conversation with Mrs. Berni did you ask her certain questions with regard to the illness which is the basis of this action? A. Yes, yes.

Q. In response to answers given by Mrs. Berni did you record those answers on a paper? A. Yes.

Q. And would you say, Doctor, that the answers recorded by you were the answers to you given by Mrs. Berni? A. Yes.

Q. Who was present at the time of your conversation, when you recorded these answers? A. On July 12, 1928, and those present were Mrs. Berni, Mrs. Griffin and Mary Morrison.

Q. I hand you this paper, Doctor, and ask you if you can identify it (handing a paper to the witness). A. Yes, sir.

Q. Doctor, were you present when Mrs. Alfred Berni signed her name to this paper? A. Yes.

Q. You saw her sign it? A. Yes.

Q. Were you present when Miss Mary Morri-

son signed her name to this and did you see her sign it? A. I saw her sign it.

(Paper marked D-1 for identification now becomes exhibit D-1 in evidence.)

By the Court:

Q. Is there another paper there, Doctor, you are familiar with? A. Yes.

Q. Is that in your handwriting? A. Yes, sir.

(Paper marked exhibit D-4 in evidence.)

By Mr. Hanaway:

Q. What is that name? A. Mrs. Martha Griffin, age——

(Mr. Hanaway read exhibits D-4, D-3 and D-1 to the jury.)

Q. Now, Doctor, assume that a normal family became ill, as this family did, or became nauseated and vomited, had diarrhea, pains in the stomach, could you state with reasonable certainty what, in your opinion, was the nature of the illness?

Mr. Rabinowitz: I object to that on the ground that it is not a proper foundation for the hypothetical question.

Mr. Hanaway: It is based upon the testimony.

The Court: What is missing?

Mr. Rabinowitz: Why, all the circumstances.

The Court: What? Don't say "all". You know better than that. What is missing?

Mr. Rabinowitz: The nature of the meal that was eaten on that night.

The Court: What?

Mr. Rabinowitz: The food that was eaten on that particular night.

Mr. Hanaway: I am not asking what food caused the trouble; I am asking him what was the nature of the illness.

The Court: It is the nature of the illness.

Mr. Rabinowitz: Would you please repeat that question?

(The last question was read by the reporter.)

Mr. Rabinowitz: All right, withdraw the objection.

A. I would describe it as an acute gastro-enteritis. I mean by that an inflammation of the stomach and intestines.

Q. Would that be a food poisoning or infection? A. It might be. The probabilities would be that it was a food infection. It might possibly be another type of poisoning, chemical poisoning.

Q. From that statement of fact could you say what it was caused the poisoning? A. Why, no.

Q. Now, Doctor, do the symptoms of food infection always follow immediately after the food is eaten? A. No, they may be delayed twenty-four hours, sometimes more.

Q. Would you say, Doctor, that two or three meals might intervene between the time that the suspected food was eaten—or, rather, the food which caused the illness was eaten and the onset of the symptoms? A. It is quite possible for two or three meals to intervene.

Q. Well, is it probable? A. I would say it is fairly probable.

Q. You think that could have happened in this case? A. I think it could have, yes.

Q. Now, Doctor, after the symptoms develop, if vomiting occurs, as was testified to by the witnesses in this case, what would you expect to find in the vomitus? A. Well, you usually find a certain amount of food, the food that has been eaten at the last meal before the vomiting, together with a certain amount of stomach juices.

Q. Well, then, Doctor, assume that the infected food was eaten at the noon-day meal on the 20th of June——

Mr. Rabinowitz: It wasn't eaten on the

——

Q. (Continuing)—and that the peaches were eaten at the evening meal and the symptoms and vomiting occurred soon after the evening meal: what would you expect to see in the vomitus? A. Well, I would certainly expect to find the constituents of the supper there.

Q. Why do you say that, Doctor? A. Well, because the vomiting has occurred soon after supper. The chances are the food would still have been left in the stomach, or some of it.

Q. Would you say, Doctor, that the mere presence of peaches or of any food that was eaten at the last meal in the vomitus would be indicative of the food which caused the illness? A. Oh, not at all.

Q. Why do you say that, Doctor? A. Well, as I said a moment ago, the poisoning could take place at a previous meal and there may have been two or three meals back.

Q. Well, Doctor, assume that a family ate peaches and tea and toast for dinner, that they became ill thereafter, and that canned peaches

were found in the vomitus: in your opinion, would the tea and toast also be contained in the vomitus? A. I should expect so, expect some of it.

Q. Well, Doctor, then, do you know of any reason why the diagnosis—the final diagnosis—should attribute the illness as caused by canned peaches simply because that alone could be identified in the vomitus? A. Oh, I don't think that means anything at all. I don't think you can tell from the vomitus at all.

Q. Then, it might have been caused by anything else that the family had eaten as far back as twenty-four hours before any onset of the symptoms, isn't that so? A. Yes, yes.

Q. Now, Doctor, is the fact that the canned peaches were not completely digested of any significance in your mind with respect to the positive agent of this illness? A. Oh, no, that doesn't give any intimation as to whether they were poisonous or not.

Q. Then, Doctor, what in your opinion would be the value of a diagnosis—I will withdraw that question. What, in your opinion, Doctor, would be the value of a casual examination of the vomitus of a person who had become ill, for the purpose of determining the causative agent of the illness? A. Oh, I consider it of no value at all, as far as determining the food that caused it.

Q. Then, the mere fact that you looked at the vomitus and saw particles of peaches in there would be of absolutely no value to you in your diagnosis; isn't that so? A. It doesn't tell you anything.

Q. Now, Doctor, I will ask you to listen to this question: Assume the illness of this child in this case was due to food infection, and no laboratory examination had been made of the suspected food;

and assume, further, that no laboratory examination had been made of the blood, of the vomitus, or of the excreta of the patient; no blood pressure had been taken; what, in your opinion, would be the value of a diagnosis that that illness was caused by the consumption of canned peaches? A. Why, it seems to me it would be just a matter of guesswork. I would not consider that we had any evidence that would prove that canned peaches had caused it.

Q. Then, Doctor, the diagnosis in this case that the illness was caused by canned peaches would be a sheer guess? A. Yes.

Q. Based on the evidence? A. Yes.

Mr. Hanaway: I think that is all.

Cross-examination by Mr. Rabinowitz:

Q. Doctor, you went to the house on July 12, 1928? A. Yes.

Q. Do you recall how many days that was after the peaches were purchased? A. I was told the peaches were purchased on June 20, the day of the illness, the first illness.

Q. Who told you that? A. Mrs. Berni and Mrs. Griffin.

Q. How did you get the information, Doctor? Where did you get the information to go to the home of Mrs. Griffin? A. I went as the result of newspaper reports at the request of the National Canners' Association.

Q. At the request of the National Canners' Association? A. Yes.

Q. From where? A. They sent me because according to newspaper reports canned food was suspected.

Q. And where is the National Canners' Association located? A. Washington.

Q. Their object is the protection of these——

Mr. Hanaway: I object to that.

Mr. Rabinowitz: Well, all right.

Q. Did you read the article yourself? A. The newspaper article?

Q. Yes.

Mr. Hanaway: I object to that, your Honor. I can't see what difference is makes whether he read the article or not.

Q. Well, was it at your own suggestion or was it at the suggestion of the National Canners' Association that you came to Paterson? A. It was at the suggestion of the National Canners' Association.

Q. You were then practicing in New York? A. Yes.

Q. How did they communicate with you? A. By letter.

Q. By letter? A. By letter, yes.

Q. Telling you to go in to see Mrs. Griffin and obtain statements? A. Yes.

Q. And do you do all the work in that respect? A. I do around New York.

Q. You do around New York. In any of these canned complaints it is your duty to go out and get the questionnaire signed, is that it?

Mr. Hanaway: I object to the form of the question. The doctor hasn't testified that it was his duty to do anything. He testified that he was requested by the National Canners' Association to come over here to Paterson to interview these people. There is no question of duty.

Mr. Rabinowitz: A question of interest.

Mr. Hanaway: It is not a question of interest at all.

The Court: I thought he said something about employment or engagement or he did the work for them.

Mr. Hanaway: He didn't say that, I don't think. He said he was requested to do it.

Mr. Rabinowitz: Does your Honor allow the question?

The Court: Yes.

(The last question was read by the reporter as follows:)

"Q. In any of these canned complaints it is your duty to go out and get the questionnaire signed; is that it?"

Mr. Hanaway: I object to that on the further ground that we are not concerned here with the examination of all these canned complaints, as counsel puts it. He investigated this complaint, I will concede that, but I can't possibly see what the purpose of the examination is, to show that this man has investigated every complaint, unless they are trying to qualify him as an expert.

The Court: If he wants to show he was employed by these people to do this work, why, I will permit that.

By Mr. Rabinowitz:

Q. Were you employed by the——

Mr. Hanaway: Now, we will concede that, if that is all he wants.

Mr. Rabinowitz: I want the witness to testify.

The Court: All right, then, don't bother; it is admitted that the doctor was employed

by the Canners' Association to investigate this case.

Mr. Hanaway: That is right.

Q. Are you on an annual salary, Doctor, on behalf of the National Canners' Association?

Mr. Hanaway: I object to that, your Honor.

Mr. Rabinowitz: Wait until I complete my question.

The Court: What difference does it make what he is paid for? What difference does it make?

Mr. MacLeod: We admit he has to be paid for that.

The Court: Whether he is paid five hundred dollars a year or five thousand, what difference does it make to this case or to you?

Mr. Rabinowitz: I haven't completed it, Judge.

Q. Are you being paid especially, Doctor, to come here to court today?

Mr. MacLeod: If your Honor please, I don't know what the purpose of this is. It won't help us to arrive at the merits of this case. We say that this man is employed by them. Every bit of his time will be paid for.

The Court: I suppose he wants to show an interest in the witness.

Mr. MacLeod: We admit he will be paid for his time, as far as that is concerned.

Q. Specially compensated, Doctor, for your time?

The Court: For testifying today?

Q. For today and yesterday, are you being specially compensated for your time, Doctor? A. What do you mean by special compensation?

Q. How much are you being paid for your appearance here?

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

The Court: I will sustain the objection as to the question of the amount. The question is, are you being paid today for your services?

A. Yes.

Q. Were you paid yesterday?

Mr. Hanaway: I object to that.

Q. Will you be paid for your attendance yesterday?

Mr. Hanaway: We will admit he will be paid for all his services, and to whatever extent he is being paid we admit he is interested to that extent. He will be paid for all the time he puts in for his medical services.

The Court: It is admitted, so why waste time on it?

Q. Now, Doctor, when you came to the home of Mrs. Berni and Mrs. Griffin were they in bed? A. Mrs. Berni was up and about; Mrs. Griffin was lying down, as I recall it.

Q. Lying down. You are sure of that? A. I seem to recollect she was lying on a couch or on a bed.

Q. You say that "she" was lying on a couch. Mrs. Berni was lying on a couch? A. No, Mrs. Berni was up.

Q. And Mrs. Griffin was lying down? A. Mrs. Griffin was lying down.

Q. Was the doctor there when you were there? A. No.

Q. He was not there. And this statement that you say that you got from the doctor was not obtained in the home, but was taken at his office? A. At his office.

Q. Did you investigate whether Dr. Veenstra was in the case? A. Yes.

Q. Did you take a statement? A. No, I didn't go to see Dr. Veenstra. They told me about it. I knew he was in the case.

Q. You took no statement from Dr. Veenstra? A. No.

Q. And your duties were, of course, to obtain a complete investigation in the case, were they not?

Mr. Hanaway: There has been no testimony here at all as to what his duties were.

Mr. Rabinowitz: All right.

Q. But you knew Dr. Veenstra, from the information you had obtained from the family, as you say, was the attending physician of the boy that was sent to the hospital? Yes or no. A. Yes, I knew that.

Q. But you made no effort to see him? A. I didn't think it necessary. I talked with another man in connection with the boy.

Q. Did you see Dr. Blauvelt about it? A. Dr. Blauvelt wasn't there at the time.

Q. Where? A. At the hospital.

Q. She was not there? A. She wasn't at the hospital.

Q. Well, did you find out whether Dr. Veenstra was in the hospital or had attended the boy in

the hospital? A. I was told that there was another doctor in charge of the case, a Dr. Hall, and I talked with him on the telephone the next day.

Q. I am asking you if Dr. Veenstra— A. I didn't know of Dr. Veenstra then.

Q. I see. Now, Doctor, food poisoning may be due to chemical poisoning as well, may it not? A. Not true food poisoning. When I say true food poisoning I mean food infection.

Q. But there may be chemical poisoning through canned goods; isn't that so, Doctor? A. I don't know of it.

Q. You don't know of any case of food poisoning or poisoning through canned goods canned— of the can itself? A. I have never heard of such.

Q. Never heard of it. Never heard of poisoning through tin? A. I never have.

Mr. Hanaway: I will have to object to that question.

The Court: He has already answered.

Q. Never heard of poisoning through solder, Doctor? Yes or no. A. No.

Q. Never heard of it. Did you ever have in your experience as a physician a case of canned goods poisoning? A. No.

Q. Never heard of it; is that right? A. I have never known a proved case of poisoning from the can.

Q. Proved case? A. Proved case.

Q. Well, don't you, in making your opinion up in relation to canned goods poisoning take the symptoms, the symptoms of the patient, so as to reach a conclusion in your diagnosis, that from the symptoms it would lead you to the conclusion that it was due to canned goods poisoning? A. Not at all.

Q. So that you take no consideration of the symptoms of the patient in determining whether or not it was due to canned poisoning? A. No, you can't distinguish poisoning from canned foods any more than you can tell the ones that come from fresh food. The symptoms simply give you the information as to whether or not it is food poisoning. As far as the can is concerned, the only way you can prove it is by finding bacteria organism or poison in the can.

Q. But if there is no affected organism, Doctor, can there be chemical poisoning without the organism? A. I know of no chemical poison from cans.

Q. Well, do you recall, Doctor—I am not asking you that question. I am asking you whether there can be chemical poisoning without the presence of bacteria. Yes or no.

Mr. Hanaway: I would like to ask counsel whether he is referring to possibilities.

Mr. Rabinowitz: I am asking the Doctor whether he considers——

A. Whether it is possible to have chemical poisoning, in other words, regardless of the source? Of course it is.

Q. Do you consider tin a chemical, or do you consider tin a metal, Doctor? A. Yes.

Q. And may the effect of solder on tin produce a chemical poisoning?

Mr. MacLeod: I object to that, if your Honor please. There is no evidence here that there was any solder on the tin, either inside or outside. There is no claim in this case that there was any poisoning in the peaches or any evidence that there was any

solder that caused it. There is no evidence of any solder on it one way or the other, as far as this case is concerned. It is simply an inference that there may be.

The Court: I want to know who I am dealing with. Are you trying the case or somebody else?

Mr. MacLeod: I don't want to be running over all the time, but I thought I might be permitted to make that objection.

The Court: I can't be hearing two counsel. I will hear one. Permit the question.

Mr. Hanaway: I will make the same objection. Exception to that.

(The question was read by the reporter as follows:)

"Q. And may the effect of solder on tin produce a chemical poisoning?"

Mr. Hanaway: I will object to that.

The Court: Why?

Mr. Hanaway: On the ground there has been no testimony in this case to show that there was any solder or any tin involved in the matter.

Mr. Rabinowitz: It is the same thing Mr. MacLeod said a minute ago.

The Court: I think it is. I will permit it.

Mr. Hanaway: I ask for an exception, please.

Q. Now, will you answer that? A. I know of no such cases of poisoning where solder had had any effect on tin.

Q. Well, whether you know of it or not personally, Doctor, is it—can it arise, Doctor, through—can chemical poisoning be due to the metallic substance of a can in itself?

Mr. Hanaway: I object to that, your Honor. He is going beyond the bounds of the witness's knowledge.

Mr. Rabinowitz: Oh, then, you insist that the witness has limited knowledge of this subject, do you, Mr. Hanaway?

Mr. Hanaway: I don't concede that at all.

The Court: I suppose every man has his limits.

Mr. Rabinowitz: Yes.

Q. Then you have no knowledge, Doctor, as to whether or not there is chemical poisoning as a result of a tin can containing food? A. I know of no such cases of tin poisoning from canned foods.

Q. You know of no such cases. Well, is it possible, Doctor?

Mr. Hanaway: I will object to that on the ground that we can't deal with possibilities here. Anything is possible.

Q. Did you, in your reading, Doctor, or study or experience, learn of canned poisoning through canned—through a can?

Mr. Hanaway: If your Honor please, if I may I would like to interpose this objection, that the witness has already testified to that question at least three times. He says he doesn't know, never heard of any such thing.

The Court: I will permit it if he has any knowledge of it, if there is any such study.

By the Court:

Q. Is there such a thing that you have studied? A. I have never heard of any chemical poisoning from the tin of a can or solder. As a matter of fact, I thought solder was on the outside of the can. I never saw solder inside of the can.

By Mr. Rabinowitz:

Q. Well, do you know, Doctor, whether or not chemical poisoning can be produced through the can itself? Yes or no.

Mr. Hanaway: Now, I object to that on the ground that the question certainly does not mean anything to me. I don't know whether it does to the witness or not. I will ask counsel to reframe his question.

The Court: I will permit it.

Mr. Hanaway: Exception, please.

A. The question is can a chemical poisoning arise from the inside of the metal?

Q. I am not asking you that.

(The question was read by the reporter as follows:)

"Q. Well, do you know, Doctor, whether or not chemical poisoning can be produced through the can itself? Yes or no."

By the Court:

Q. Through the can? A. Through the can itself?

Q. What do you mean, through it?

Mr. Rabinowitz: Well, within the can, the tin, the solder, the aciduous effect of the syrup of the peach on the can, can that produce a chemical poisoning?

A. I am under the impression that it cannot.

By Mr. Rabinowitz:

Q. You are under the— A. Well, I mean I consider tin comparatively non-toxic, except in very large doses.

Q. What do you mean, in very large doses, Doctor? A. Well, I mean the amount of tin that might come from the inside of a can would be so slight that it could not cause poisoning.

Q. So slight of what? So slight of what, Doctor? A. I mean if any tin could possibly come off the can, I can't imagine it would be there in large enough amounts to cause poisoning. I am assuming that fact that there would be some tin gotten in the canned food.

Q. Well, has that occurred, Doctor? A. I don't know whether that has occurred or not. I don't know.

Q. Well, may it occur through the acid contained in the syrup?

Mr. Hanaway: I am afraid I will have to object to that on the ground that it is beyond the scope of this expert's qualifications. That sort of a question would call for the opinion of a chemist, chemical reactions.

By the Court:

Q. You know what he is driving at, don't you, Doctor? A. Yes, I know what he is driving at, but——

Q. In other words, I suppose the syrup in the tin, the tin can that remains open,—what effect would it cause? Would it cause any poisoning to come into existence by being there? A. I don't think that syrup has any effect at all on the tin, and I don't think the acid has, in the weak concentration that is present in canned foods.

By Mr. Rabinowitz:

Q. You admit that there is acid in syrup, don't you? A. Oh, yes.

Q. Do you know what the nature of the acid is? A. It is the fruit acids, *malic* acid.

Q. Do you know what its contents are, its symbolic contents?

Mr. Hanaway: Well, I will object to that on the ground that it doesn't make any difference.

Q. If you know. If you know. A. You mean the formula of *malic* acid?

Q. Yes. A. No, I don't know that.

Q. You don't know whether it contains hydrochloric acid or sulphuric acid or any other acid? A. Yes, I know that. I know it does not.

Q. You can't tell us what the symbolic content of that acid is? A. It is a technical acid; I can't give you the formula. It is very long and complicated.

Q. May it be of sufficient strength, Doctor, to attack the tin? A. No.

Q. Never? A. No.

Q. Never known of a case, Doctor, of acids in the syrup ever attacking the can? A. I have never known of it.

Q. Never? How about the solder in the can?

Have you ever known of it to attack that? A. I didn't know that there was solder on the inside of a can.

Q. Well, if I told you there was would you say that the acid could attack the solder?

Mr. Hanaway: I will object to that.

The Court: Well, is there?

Mr. Hanaway: On the ground it is purely speculation.

The Court: I am asking you, Mr. Rabinowitz.

Mr. Rabinowitz: Well, that is the testimony of Dr. Veenstra.

Mr. MacLeod: No, sir, that is not the testimony—pardon me for interrupting.

Mr. Rabinowitz: I will withdraw it.

Mr. Hanaway: Well, now, I would like to have counsel specify what he means by food poisoning. There have been two or three things testified to here.

Q. What is food poisoning? I want to get this thing clarified, Doctor. A. Food poisoning is an infectious disease caused by a certain group of bacteria.

Q. A group of bacteria. And may that bacteria lie dormant while in the can? A. What do you mean by dormant?

Q. That is that it only begins to take effect as soon as the can is opened. A. No, no, if living bacteria are in a can it will grow there.

Q. Do you know what a spore is in bacteria? A. Yes.

Q. A spore is an inactive bacteria, isn't it, Doctor? A. Yes, a spore is a form of bacteria.

Q. May canned goods contain spores? A. Yes.

Q. And may those spores, upon the opening of

the can, then become active when thrown open so as to get the introduction of air into the can?

Mr. Hanaway: Now, your Honor, I will have to object to that on the ground that the can would then be opened and not in the condition in which it was purchased from this defendant. It would alter the situation, what happened after they opened the can, and it is beside the issue.

The Court: Well, as to that, I suppose they had to open the can to eat the peaches.

Mr. Hanaway: Yes, the testimony was that they dumped them right out.

The Court: And if the spore was something that was dormant and the can was opened and it became active, I suppose it is a part of the case, although it is rather—I will permit it.

Mr. Hanaway: Your Honor, may I make the further suggestion that I object to it on the ground that there has not been a proper foundation laid as to what a spore is?

The Court: He asked the witness what a spore is.

Mr. Hanaway: I will withdraw my objection.

The Court: He asked him what a spore is.

(The last question was read by the reporter.)

A. I would not expect any unusual activity of the spores on the opening. The opening would have little effect on them. As a matter of fact, a great many of these spores don't grow so well when they are exposed to air.

Q. Yes, but spores do, as soon as they are ex-

posed to air, show some activity, do they not, Doctor? A. Not at all, no. They remain just there.

Q. And they may not? Yes or no. Will you answer that question, please? Will you answer that? A. The question is, may they become?

Q. Why do you hesitate? A. May they become active?

Q. Yes. A. Yes, they may.

Q. And when they become active, sir, may they not be destructive to health? Yes or no. A. It depends on what spores you are talking about.

Q. The spore that becomes active, the bacteria that becomes active, Doctor, may not that be destructive to health?

Mr. Hanaway: I object to that.

The Court: In what? Active in what?

Mr. Rabinowitz: In eating the food contained in the can.

A. What spores are you referring to? What organisms?

Q. I am referring to the organisms, sir, the bacteria which you say is dormant while in the can and which upon liberation, by the opening of the can, become active. Would you say that in that instance the activity of the bacteria taken as food would be harmful or destructive to health? Yes or no.

Mr. Hanaway: I object to that, your Honor, on this ground: that there are many, many varieties of bacteria and spores, and I think this testimony ought to be confined to the type of bacteria which Mr. Rabinowitz seems to contend were present in this particular can.

The Court: Try to confine it.

Q. The spore, Doctor, is classified, is it not? as it a distinctive classification in the field of bacteriology? A. Yes, some form spores and some do not.

Q. Some bacteria form spores and some do not. Well, what bacteria, Doctor, is it that forms spores?

Mr. Hanaway: I object to that, your Honor.

Q. If you know. A. Well, there are a great many spore forming bacteria.

Q. Well, can you name me a single type of bacteria that forms a spore? A. Yes.

Q. Name it. A. Tetanus.

Q. Tetalus? A. Tetanus.

Q. Tetanus? A. Yes.

The Court: Tetanus.

Q. That is the cause of lockjaw. Is there any other form of bacteria, Doctor, that will form a spore? A. Yes, I think there are a few others. It is rather difficult for me to think of them off-hand.

Q. Well, would you say that a spore could be found in the group of—the Salmonella group? A. No.

Q. You are sure of that, Doctor? A. Yes.

Mr. MacLeod: Don't shake your head, Doctor. Say yes or no.

A. Yes.

Q. Would a spore—will a spore be found in a botulism?

Mr. Hanaway: I object to that, your Honor. There has been no testimony——

Q. Do you say yes, Doctor?

The Court: Just a moment.

Mr. Hanaway: There has been no testimony here. If your Honor recollects, there was some testimony yesterday by Dr. Veenstra that in his opinion this might be botulism, but he testified in his opinion it was a chemical poisoning caused by the condition of the food in the open can.

The Court: I suppose he is trying to find out about spores, inactive spores.

Mr. Hanaway: I think the witness has answered that question, your Honor, to the satisfaction of everybody.

Mr. Rabinowitz: This is cross-examination, and I think I ought to be able to go into the credibility.

The Court: You said he hadn't laid any foundation.

Mr. Hanaway: My whole purpose in objecting is to confine this examination.

The Court: I suppose there are types of spores, is that it?

Mr. Rabinowitz: Oh, yes.

By the Court:

Q. The botulinus is a spore, is it? A. It is a spore organism, yes.

Q. So we have now botulinus and tetanus; now, what is next?

By Mr. Rabinowitz:

Q. Now, Doctor, botulinus is a food poisoning, is it not? A. In a special form of food poisoning that we see very rarely.

Q. Everything, Doctor, concerning this spore,

so far as its activity is concerned, can really only be demonstrated upon the opening of the can, so far as its effect is concerned? A. Yes.

Q. Botulinus, which is due to food—which is a bacteria contained in food poisoning, may be in the form of a spore which is inactive; upon the opening of the can it may become so active, Doctor, as to produce a harmful effect upon the system, the human system? Yes or no. A. That is not the way the botulism organism acts.

Q. I am not asking you that, Doctor. I am asking you if botulisms, the type of bacteria which is in the nature of a spore which is inactive while in the can, becomes active upon the opening of the can—I am asking you, Doctor, if that form of bacteria becomes active it may, through its virulence or its activity, cause a harmful effect upon the human system?

Mr. Hanaway: I will have to object to that.

Q. I am asking you to answer that question yes or no.

Mr. Hanaway: On the ground that the doctor has not defined what he means by a harmful effect. It could mean all the way from Alpha to Omega, anything. If he wants to show that if botulinus happened to be present in this can it would have caused the illness suggested herein the testimony, I don't mind the question, but I think the witness ought to be allowed——

The Court: It is a question of harmful effect, as to what effect it might have in this case.

Q. Would it have a harmful effect, Doctor, we will say, if it was contained in these peaches, if there was a spore contained in these peaches, if these spores were contained in the peaches, Doctor, which were in the nature of botulism and upon opening the can they became active, would your say that they could produce a harmful effect upon the human system? Yes or no. I want you to answer that question. A. I can't answer that without getting your idea of the causes of botulism.

Mr. Hanaway: If your Honor please, we are now attempting to delve into the realm of scientific testimony, and I think that counsel ought to frame his questions in such a way——

The Court: The doctor said he can't answer unless he characterized his question.

Mr. Hanaway: That was my objection.

Q. How would you want me to ask my question, Doctor? A. Well, counsel assumes that when these spores which he says were dormant or exposed to air, they become active and show a certain very poisonous effect. The action of botulism is not directly through the spores, but from toxins that are liberated by the spores. If living spores should be canned and then not sterilized they could liberate toxins in the can.

Q. It could cause poison? A. It could cause poisoning.

Q. The toxins could? A. The toxins. The spores in themselves are not harmful. We eat them every day, I suppose, in fresh vegetables.

Q. How do the toxins come about? A. They are produced by spores under certain conditions.

Q. In the can? A. In the can, and in conditions where is a deficiency of oxygen the toxins are formed very readily.

Q. Where there is a sufficiency of oxygen? A. Insufficiency.

Q. And these toxins are produced, are they? What is the nature of the toxin itself? Is it a liquid? A. We don't know what the nature of it is. All we know is that it is a substance produced by the spores and thrown outside which intermingles with the food.

Q. Right into the food? A. It gets into the food.

Q. And those toxins— Toxin is really what, Doctor? A. A poison.

Q. A poison. And it is these spores that cause this condition, is it not, Doctor, bring about the poisons that are contained in the food? A. Yes, that is what happens in the case of botulism poisoning.

Q. I see. Now, may those spores also produce a chemical poisoning as well? A. Well, that is —you can call it a chemical poison. These toxins are chemicals of unknown nature.

Q. The field of it hasn't really been scientifically analyzed as yet?

The Court: Don't let us waste much time on that.

Q. Is that so, Doctor?

The Court: No, strike it out.
Mr. Rabinowitz: All right.
The Court: Let's get down to business.

Q. Now, Doctor, so you say that these spores can set up toxins in the can; is that right, Doctor?

The Court: That is what he said, I think. It has been answered. Strike out the question.

Mr. Rabinowitz: That is all.

Re-direct examination by Mr. Hanaway:

Q. Now, Doctor, I would like to ask you one or two questions: Doctor, you heard the testimony as read from the paper which was introduced in evidence in which—which you made at your conference with Mrs. Griffin and Mrs. Berni, did you not?

Mr. Rabinowitz: What was that question?

Q. I just read it to the jury. A. Which paper? you mean the papers that they made?

Q. Yes. A. Yes.

Q. Do you recollect, Doctor—I will read you this question and answer.

The Court: We have been through that.

Mr. Hanaway: I want to ask him one question on the statement made by these plaintiffs.

The Court: We have been all through that, haven't we?

Mr. Hanaway: Well, all right.

The Court: You have read it to the jury, haven't you?

Mr. Hanaway: I will withdraw that.

Q. Now, Doctor, assuming that bacteria were present in a can—assume that bacteria had been present in this can of peaches which is the subject of this action, prior to opening, what, in your opinion, would have been the condition of that can? A. The can would have swollen.

Q. What do you mean by swollen? A. I mean the ends would be bulging.

Q. Would you say, then, Doctor, that a can that was perfectly normal in appearance would be unlikely to contain active bacteria? A. It would be very unlikely, I think, yes.

Q. Now, Doctor, what is a spore?

Mr. Rabinowitz: I object to that. We have been all over that, if your Honor please.

Mr. Hanaway: I didn't hear that.

The Court: We have been all through it. Tell him, if he doesn't know.

Mr. Hanaway: I will withdraw the question. I am sorry. I will withdraw it.

Q. Now, Doctor, these spores that you testified about might be present in canned food, and upon opening, become active, what, in your opinion, is the time it would take for a spore to become an active bacteria? A. I can't answer that. I don't know how long it would take.

Q. Would you have to get some additional facts before you could answer the question? A. I have no knowledge as to how long it would take a spore to develop.

Q. Doctor, what are the symptoms of botulism poisoning?

Mr. Rabinowitz: I object to that.

A. The most striking symptom is the great muscular weakness and paralysis. Another striking symptom is constipation, disturbances of the vision.

Q. Were they the symptoms that were related to you by these people? A. Not at all.

Q. How do the symptoms as related by these plaintiffs compare with the symptoms as given, or the symptoms as you have testified to, which come from botulism poisoning? A. I think they are very dissimilar.

Q. Do you know anything, Doctor, about the possibility of the growth of spores in a sugar medium? A. I haven't any special knowledge about that.

Mr. Hanaway: That is all, Doctor.

Re-cross-examination by Mr. Rabinowitz:

Q. Doctor, do you say that the vomitus would not indicate anything to you at all? A. Not as to the cause of the food poisoning.

Q. But if it was greenish in color? A. That would mean nothing.

Q. That would mean nothing, the greenish color of the vomitus would mean nothing in your analysis of the case? A. Oh, it would mean that some bile had regurgitated into the stomach.

Q. Wouldn't it help you reach a conclusion? A. A conclusion about what?

Q. About the cause of the poisoning? A. No.

Q. It would not. Are you positive, Doctor, and do you say that you were at the home of Martha Griffin and Mabel Berni? A. Was I there?

Q. Yes. A. Yes.

The Court: He has already said so, hasn't he? Didn't you ask him that before?

Mr. Hanaway: I asked him that.

Mr. Rabinowitz: I don't recall.

The Court: Don't let us have too much repetition.

Mr. Rabinowitz: That is all.

By Mr. Hanaway:

Q. I would like to ask you whether or not you know whether food infected bacteria will grow in an acid medium? A. No.

Mr. Hanaway: That is all.

JOHN FRANCIS CREMENS, sworn.

Direct examination by Mr. MacLeod:

Q. Dr. Cremens, you are a practicing physician of the State of New Jersey, are you? A. Yes.

Q. How long have you been practicing medicine, Doctor? A. Fourteen years.

Q. Do you practice in the City of Paterson? A. Ten years.

Q. In 1927, I think it was—in June, 1928, were you connected with any institution? A. Pediatric department of the Paterson General Hospital.

Q. At that time was Dr. Blauvelt an interne there? A. Dr. Blauvelt was the interne.

Q. In your department? A. Yes.

Q. Do you remember Mrs. Berni or Mrs. Griffin or John Berni or James Berni or someone by the name of Berni? A. I remember these people being sent in by Dr. Veenstra, but Dr. Hogan in charge; that is, he is chief. I was his assistant. He asked me to go up to see the sick child that was admitted.

Q. Did you examine the child? A. I examined the child the day after admission.

Q. You don't remember the time when they were admitted except from the record; is that right? A. I just can't recall the exact date. I know the day after the child was admitted I examined the child.

Q. In the morning or afternoon? A. I think it was in the morning, before noon.

Q. What did you find the child suffering from? A. My diagnosis was acute gastro-enteritis.

Q. What is an acute gastro-enteritis? A. Acute inflammatory condition of the stomach and intestinal tract.

Q. Did you diagnose what caused it? A. No, I did not.

Q. Did you look at the history of the case? Do you know what the history of the case was? A. I got the history of the case from Doctor——

Mr. Rabinowitz: Wait. I object to the doctor testifying to a history unless it is obtained through the patient himself.

Q. How old was the patient? A. Three or four years old.

Mr. Rabinowitz: Yes, I understand, but the history Dr. Cremens is attempting to testify to is the history he has obtained from some physician, and under the case of Lambertson versus the Consolidated Traction Company the history, in order to be admissible, must come from the patient himself.

Q. Did you treat this child, Doctor, or take care of it? A. I was only called in by the request of Dr. Hogan. Dr. Veenstra sent the child in and he asked Dr. Hogan, who was in charge of that hospital that month, and he asked me to go up to see the child.

Mr. Rabinowitz: Wait a minute.

Q. What did you do for the child, if anything? A. I just went over to examine the child to get a diagnosis for Dr. Hogan.

Q. Did you prescribe anything at the time? A. No, the child had been prescribed for.

Q. And did you see the child again after that, do you know? A. I was called—the night the child died I was called, that night.

Q. This was under your hospital work, wasn't it, Doctor? A. Yes.

Q. In conjunction with the hospital? A. Yes.

Q. Your appearances up there were for the purpose of taking care of anybody in that department? A. I was assistant in that department at that time.

Q. In conjunction with your work did you examine the history to find out any history that was necessary in order to diagnose the case?

Mr. Rabinowitz: I object to that on the same ground that I just advanced, that the history, in order to be admissible, can only come from the lips of the patient himself, under the case of Consolidated Traction Company versus Lambertson.

The Court: What about that?

Mr. MacLeod: Well, of course, I think the doctor would be entitled to the history from the record at the hospital in order to arrive at his diagnosis, that is all. I think as the attending physician he had a right to take the history that was taken by the nurse who was under him or the interne, Dr. Blauvelt.

Q. You were in charge of the patients in there, weren't you, Doctor? A. That time, under the supervision of Dr. Hogan. I was his assistant.

Q. He was the head doctor and you were the assistant? A. He was the head man, yes.

Q. You attended there every morning? A. Yes, sir, every morning I went there.

Q. And the interne in charge there was Dr. Blauvelt? A. Dr. Blauvelt and Dr. Hall. He was the clinical interne there, too.

Q. So he was the——

The Court: I don't understand the rule to be that you can get the history from some other party.

Mr. MacLeod: I mean did he examine the record.

The Court: Yes, but I don't think that gives him the right to testify what was in the record.

Mr. MacLeod: Well, suppose I put it this way:

Q. Did you see the record, Doctor, concerning this boy? A. Oh, yes, I looked over the chart.

Q. You looked it over? A. Yes.

Q. You didn't talk to the mother, did you, at any time, or the father of this boy? A. No.

Q. You didn't see them at all? A. Neither, no.

Q. Now, may I be permitted to ask, then, your Honor, from the history that he got from the record, also from his examination of the boy and his observation and conditions with the patient there, what his diagnosis was?

Mr. Rabinowitz: It seems to me—I make the same objection. The history which is obtained from the record which is also through a third party—the rule laid down in the Lambertson case deviates from the general principle of law that only direct testimony is admissible, and the reason that the attending physician was permitted to testify is because it is only natural that a

person who is sick will tell the truth to his own physician.

(Discussion.)

The Court: I will permit that.

Mr. Rabinowitz: I ask your Honor for an exception.

A. My diagnosis in this case was acute gastro-enteritis.

Q. What are the causes of acute gastro-enteritis? A. Well, it could be due to excessive food; it could be due to the ingestion of coarse food, improperly prepared food. It could be due to food poisoning. Any of them causes could——

Q. Did you find any ptomaine poisoning, Doctor? A. I don't just know what you mean by ptomaine poisoning.

Q. Is there such a thing as ptomaine poisoning? A. What is that?

Q. Is there such a thing as ptomaine poisoning or is that just a name that laymen call it? A. Well, ptomaine poisoning is a term erroneously used to designate most intestinal derangements or most intestinal disturbances. It is not disease; it is not classified as any disease.

Q. Now, was there any poisoning that you found or determined in your diagnosis that would be the result of any peaches that had been eaten by this boy? A. I can't say that.

Q. Was it a poisoning that would be the result of consuming protein, do you know? A. I can't say that.

Q. Was there a laboratory examination? A. It could be due to any of the causes that I just mentioned.

Q. Was there a laboratory examination made, Doctor? A. There was a laboratory examination of the feces.

Q. What was the result of that.

Mr. Rabinowitz: I object to that unless the doctor made the laboratory test.

Q. Was it under your supervision, Doctor? A. It was made; yes, I requested it.

Q. A part of your work as a doctor? A. It was not made by me.

Q. I don't mean made by you, but it was made under your supervision? A. It was requested by me.

Q. Yes, for the purpose of— A. For diagnosis.

Q. —diagnosing? A. Of course, the laboratory is one of the biggest adjuncts to medicine, and it is your source of determining the cause in these cases.

Q. It was reported back to you? A. It was sent back to us.

Q. After the request was made for the laboratory examination? A. Yes.

Mr. MacLeod: I think it is part of his work, it is under his supervision; from the evidence these are things it would be necessary for him to do in order to arrive at his diagnosis.

The Court: I don't think he supervised it; I think he just ordered it.

The Witnes: Just ordered the examination to be made, requested it.

By the Court:

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

Q. You just requested it? A. I requested it and wrote the orders.

By Mr. MacLeod:

Q. The record shows what the result was? A. The hospital record does that.

Q. Or shows the result of the laboratory examination? A. It does.

Q. Now, you examined Mrs. Berni or Mrs. Griffin; which one? A. Yes, Mrs. Griffin.

Q. When, Doctor? A. Oh, several days ago.

Q. Recently? A. About five or six days ago.

Q. Did you find Mrs. Griffin suffering from any effects of any poisoning that she may have had in June, 1928? A. I could not say.

Q. What is she suffering from?

By Mr. Rabinowitz:

Q. What was that answer? A. I could not say that I found any symptoms of any poisoning.

By Mr. MacLeod:

Q. What do you mean, you did or did not? A. I did not find any symptoms. I found——

Q. What did you find, is what I want to know? A. Well, her chief complaint was headache, constipation, dizziness, ringing in the ears, shortness of breath, and general malaise, weakness.

Q. What are the causes of these things you found, Doctor, if you know? A. I took her blood pressure. Her blood pressure was 200. The arteries seemed to be markedly sclerosed. My diagnosis of her present condition is a general arteriosclerosis, that is, a hardening of the arteries.

Q. Is that the result of any poisoning of any kind that may come from canned peaches or any other canned goods? A. No, it is due to probably hard work and age. We get that condition frequently.

Q. Doctor, what is the—in cases of so-called ptomaine poisoning—I use "ptomaine" because it has been talked of here—in cases of this food or ptomaine poisoning, what is the usual duration of any effect upon the system of such a poisoning? A. Cases that I have seen generally clear up in two or three weeks.

Q. And if they don't what is the usual effect? A. Well, I have never seen any cases that didn't clear up.

Q. You have seen no cases where they died, have you? A. Well, you are using that word "ptomaine." If you used after that "infection"——

Q. I beg your pardon? A. Food infection, yes.

Q. Say food infection. A. Yes, they have died.

Q. There are cases where they died, aren't there? A. Yes.

Q. Do they die soon or linger a long while? A. Well, they sometimes die within eighteen to thirty-six hours.

Q. Or they clear up within two or three weeks? A. Or clear up within two or three weeks.

Mr. MacLeod: That is all.

Cross-examination by Mr. Rabinowitz:

Q. Doctor, when your examination was had of Mrs. Griffin I was present, was I not, Doctor? A. Yes, sir.

Q. And that took place in her home? A. Yes, sir.

Q. And you stated at that time that you had some recollection about the case, do you recall? A. About what?

Q. About the case, you recalled the case while you were on the service in the pediatric depart-

ment? A. Yes, when she mentioned the boy's name.

Q. And you recall that you stated that there was some conversation at the hospital while you were there about eating canned peaches, when the child was brought in? A. I didn't say anything about canned peaches.

Q. Didn't say that? A. I didn't say anything about canned peaches.

Q. Didn't you say, Doctor, do you recall, in my presence, that you recalled the case now; it was a case of where the child had eaten some canned peaches? A. Canned pineapple.

Q. Now, Doctor, don't you know it was— A. I told you canned pineapple.

Q. Don't you know you said in my presence and the presence of Mrs. Griffin, that it was canned peaches? A. I told you canned pineapple, that is what I told you.

The Court: How is that admissible? What you said?

Mr. Rabinowitz: Well, what the doctor said.

The Court: What you said to the doctor?

Mr. Rabinowitz: What the doctor had said.

The Court: In the absence of the defendant?

Mr. Rabinowitz: The doctor has testified——

The Court: In the absence of the parties to the suit, what you said?

Mr. Rabinowitz: Not what I said, sir.

The Court: Wasn't that your question?

Mr. Rabinowitz: No, my question, sir——

The Court: Conversation between you

and the doctor? What has that got to do with it, at an examination?

Mr. Rabinowitz: Well, as to an admission that he made. It is concerning the witness in this case.

The Court: Don't bring in any more conversations of your own. They are not relevant.

Mr. Rabinowitz: I am asking the doctor as to the conversation.

The Court: With you.

Mr. Rabinowitz: In my presence.

Q. Now, Doctor, how long did your examination take? A. About fifteen or twenty minutes.

Q. Fifteen or twenty minutes? A. Maybe a little bit longer.

Q. Your examination consisted of a blood pressure? A. Yes, sir.

Q. An examination of the heart? A. Yes, sir.

Q. And what else, Doctor? A. Examination of her arteries.

Q. An examination of her arteries? A. And the history of the case.

Q. And the history of the case. And did you obtain from her the history of the case? A. Yes, sir, that is, a history of her complaints, not of the case at all.

Q. And what were her complaints? A. She complained of constipation, headache, vertigo, dizziness, shortness of breath, weakness, general malaise.

Q. Could that be produced, Doctor, from food infection? A. Could it be produced from food infection?

Mr. MacLeod: I object to whether it could be. The point is, I think the proper

question would be whether it is probable under the circumstances of this case today.

The Court: Could it, I suppose, means probable.

A. No, because they are the cardinal symptoms of a hyper-tension; in other words, a high blood pressure, each and every symptom that she named.

Q. Did you learn from her, Doctor, that she had eaten canned peaches? A. Yes, she gave me that history.

Q. And canned goods, Doctor, may produce a chemical poisoning, may they not, Doctor? A. Canned goods may produce a food poisoning.

Mr. MacLeod: Just a moment. May I object to that, if your Honor please, what canned goods may produce?

The Court: It has been answered.

Mr. MacLeod: Anything may be produced. Does your Honor allow the question?

The Court: You can't come in at the last minute and speculate on an answer.

Mr. MacLeod: Do you think I was too late?

The Court: I know you were.

Mr. MacLeod: All right, I will withdraw my objection.

Q. It may, Doctor? It may be produced? A. Let me have that question over again, please.

Q. Yes.

(The question was read by the reporter as follows:)

"Q. And canned goods, Doctor, may produce a chemical poisoning, may they not,

Doctor? A. Canned goods may produce a food poisoning."

Mr. MacLeod: Was the question answered?

The Court: I don't think the answer hurts you.

Mr. MacLeod: I won't object, to save time.

Q. What is your answer, Doctor? A. May I have the question over again?

(The question and answer were again read by the reporter, as above.)

Q. What is your answer to that? A. They may produce a food poisoning.

Q. They may produce a food poisoning? A. Yes.

Q. Do you distinguish, Doctor, between a food poisoning and a chemical poisoning? A. Well, just what do you mean by chemical poisoning?

Q. I am asking you. I don't know anything about the field of medicine. A. Most food poisons are chemical. Some are chemical and some are not.

Q. Some are chemical poisoning; some are food poisoning. Now, if there is a spore in the can would it produce a toxin?

Mr. MacLeod: I assume counsel means peaches.

A. Well, now, just what canned goods do you refer to?

Mr. MacLeod: I have no objection if he confines it to canned peaches.

The Court: Yes.

Mr. MacLeod: Which he claims here, I have no objection to that.

The Court: Yes, let us keep to the issue.

Mr. Rabinowitz: Yes.

Q. If there is a spore, Doctor, in canned peaches may it become so virulent or active as to produce a toxin? A. My recollection of bacteriology was that spores in a sugar media become inactive, could not thrive.

Q. When they reached the air could they thrive? A. Well, they were already dead if they were in a sugar medium; they wouldn't thrive at all.

Q. Couldn't they lie dormant until the air got into them? A. I thought a sugar media simply killed all spores.

Q. You heard Dr. Heck testify a minute ago? A. Yes.

Mr. MacLeod: Just a minute. Just answer the question yes or no, whether you heard him.

Q. Did you hear him testify a moment ago? A. I heard him testify, yes, sir.

Q. You heard him testify that the spore might become active upon reaching the air?

Mr. MacLeod: Doctor, just a minute, please.

Q. You heard him say that?

Mr. MacLeod: I object to the question. It is a comparison of testimony of the witnesses.

The Court: I will sustain the objection.

Q. Now, you say you have known cases, Doctor, of food poisoning? A. Yes.

Q. Resulting in death? A. Yes, sir.

Q. In grown-ups, as well as young children? A. Yes, sir.

Q. And if the effect—that is, it is the result of toxin, isn't it, Doctor, or poison? A. Yes.

Q. And the effect of the toxin, Doctor, may be severe enough—if it is severe enough, Doctor, to cause death may it not be severe enough to produce a prolonged illness? A. My experience with cases of food poisoning, what cases I have treated, were cases I have seen. The duration was never over three, two or three weeks.

Q. Two to three weeks? A. That is my experience, personal experience with these cases.

Q. May it extend beyond that, Doctor? A. I know of no cases that have extended over that.

Q. Well, could it extend? A. What is that?

Q. Have you heard of cases which extend beyond that? A. No, I haven't heard of cases extending over.

Q. And yet you say the toxin may be sufficient to kill and yet not severe enough to prolong the case beyond two or three weeks? A. Yes.

The Court: That is his answer.

The Witness: That is my answer.

Q. Don't you consider general weakness, Doctor, an aftermath of food toxin or food poisoning? A. Yes, for a few weeks after the infection.

Q. You think it would be a general— A. I wouldn't say general weakness. The condition that Mrs. Griffin is in is due to her constitutional condition, is due to a general arterio-sclerosis.

Q. That is all you limit it to, Doctor? A. What is that?

Q. I say, you limit it to arterio-sclerosis? A. I am giving you a resume of my examination and my diagnosis of her present condition.

Q. I see. Did you inquire of her, Doctor, as to the course of treatment administered by her doctor during the period of three or four months? A. No, sir, I did not.

Q. You did not. Did she tell you that she had had a doctor treat her for that period of time? A. She told me that she was being under the care of Dr. Levine for about three or three and a half months, yes.

Q. Did you have any reason to question that, Doctor?

Mr. MacLeod: I object to that, if your Honor please.

The Court: Sustain it.

Mr. MacLeod: Whether he had reasons.

Q. Did she tell you that she had worked steadily up till the time? A. Yes.

Q. And that she had not worked since? A. Yes, sir.

Q. That she worked in the Y. M. C. A.? A. Yes.

Mr. MacLeod: Now, if your Honor please, I don't see how that has any materiality. She testified to all that herself.

The Court: Well, why don't you object in time?

Mr. Rabinowitz: All right, that is all.

The Court: We will take a recess until tomorrow morning at ten o'clock. Do not discuss the case with anyone.

(An adjournment was taken until Wednesday, May 7, 1930, at ten o'clock a. m.)

Wednesday, May 7th, 1930.

(Trial of Cause Continued.)

Dr. E. J. Cameron, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. Hanaway:

Q. Doctor, what is your occupation? A. I am a Pathologist.

Q. Will you please state your education?

Mr. Rabinowitz: The qualifications of the Doctor are admitted.

Mr. Hanaway: I would like to have the witness testify.

A. I graduated from the Massachusetts Institute of Technology in 1920, and obtained my Doctor of Philosophy Degree from George Washington University in 1923.

Q. Were you in both? A. Yes.

Q. Where are you employed at the present time? A. I am employed at the National Canners Association at Washington, D. C.

Q. What are your duties there? A. I am in charge of the bacterialogical research.

Q. Will you please state what you do? A. Well, my work involves general studies regarding research work,—spoilage of fruits, with especial reference to sterilization problems; it also involves technical research such as interpreting laboratory results you get in your canning practice.

Q. Does your work bring you in connection with fruit canneries? A. Yes, a great deal of it. In the summertime we conduct our investigations in the field, with field laboratory equipment, among

these different canneries as the different products are being packed.

Q. That is actually out in the canneries working, too? A. Yes.

Q. Are you familiar with the type of equipment used in peach canneries? A. Yes.

Q. That is, canneries that pack peaches such as in this accident? A. Yes.

Q. Are you familiar with the type of cans used by this particular manufacturer? A. Yes, sir.

Q. Will you please describe to the Court and Jury the cans used by this cannery with respect to the metals employed, and with——

Mr. Rabinowitz: I object,—there is no connection yet that I can see in the case that the can of peaches purchased by Mrs. Griffin came out of any particular cannery, and in view of the absence of that testimony or connecting proof, I object to the witness testifying to the type of cans that were used by a particular cannery.

Mr. Hanaway: In addition to the fact that the deposition of the witness from the California cannery having been read to the jury without any objection on the part of counsel, it is obvious that the can was packed by that Company; further, I think it is admissible, because counsel for the plaintiffs has introduced evidence as to the possible harmful effects of the fruit in the cans.

The Court: What counsel is objecting to is, that you have not shown that the Doctor knows who manufactured these cans,—that is, from his knowledge.

Q. Doctor, do you know who manufactured this particular can? A. Yes.

Q. Who was it? A. It is the American Can Company.

Q. The American Can Company? A. Yes.

By the Court:

Q. Where are they manufactured? A. I can't say as to the specific plant of the Company at which these cans were manufactured; they have plants all over the country.

By Mr. Rabinowitz:

Q. You don't know whether these cans are all manufactured by the American Can Company, do you? A. No, I can't say that all are.

Q. There are other canning factories in this country? A. Yes; there are other can companies. I know this to be a customer of the American Can Company.

Q. But it is possible that the cans may have come from another canning concern? A. I suppose it is possible.

Mr. Rabinowitz: Then I object to it.

Q. Do you know for a fact that this particular can——

The Court: No—he would not know this particular can. He is going into the general method, I presume, of examination and so forth of the can, which is perfectly proper. He knows who the manufacturer is, the American Can Company, and he knows they buy their cans from that company for canning peaches.

The Witness: Yes, and other things.

By Mr. Rabinowitz:

Q. Do you know if they buy all of their cans from the American Can Company? A. No, I can't say that for a certainty.

By the Court:

Q. Where else could they buy them? A. They could buy them from the Continental Can Company. There are two or three small can manufacturers, but the American Can and the Continental are the two largest outfits. I know this company to be a customer of the American Can Company, and whether they buy odd lots at times elsewhere, I don't know. It would be extremely unusual.

Q. The process of canning of each concern may be under different methods? A. No, the cans are the same, regardless of where they are made,—for peaches or vegetables.

Q. No matter where? A. Right.

Q. Proceed. A. The can which is now used for the purpose of canning vegetables or fruits is known as the sanitary can—that is the trade name for it. It is called the sanitary can in distinction to an old type can which was known as the hole and cap can—that was the can used years ago. In the sanitary can, we have the ends——

Mr. Rabinowitz: If the Court please, I desire to have noted on the record my objection to this line of testimony concerning the manufacture of cans because the witness is not qualified as a can-maker expert, —and he is attempting to describe the manufacture of these cans.

The Court: I will permit him to continue and finish his answer.

A. In the sanitary can, we have the ends clamped on to the cans so called. After the can is filled with the product which is to be canned and goes through the capping machine, this cover is clamped on—that is, the end of the cover comes over the edge of the can; there are two operations—first, the cover is rolled under the edge of the can, and the second operation is it is flattened out into what is known as a double seam. There is no solder on either end of the can; there is solder on the outside of the body of the can. In manufacturing the can at the can plant we have there a condition where one seam is lapped over the other and then soldered, or else there is a clamping along the side seam and solder applied. With this can as manufactured by the American Can Company, they use the condition where the sides are clamped and then soldered—the soldering is only on the outside of the can.

Q. Doctor, assuming a normal can of fruit, of peaches, is there any way in which the contents of the can can come in contact with the solder on the outside of the can? A. No, I would say not; I don't see how.

Q. Assuming further that the inside of a can of peaches did come into contact with the solder on the can, what would be the effect, if any, on the contents of the peaches? A. I don't know of any effect.

Q. Doctor, as to the question of spores that was discussed yesterday—assuming that this can of peaches did contain spores of the food poisoning variety, and assuming that the can was opened immediately after it was purchased, is it possible for these spores to become active? A. No.

Q. Will you explain why you say that? A. In the first place, we have a great numer of varieties of spores. There is only one organism which

produces spores and operates through the food cell. There are other spore forming organisms, two others to my knowledge which are detrimental to health, but they are never associated with fruit. One I refer to is the spore of botulinus. Regardless of what kind of spores are in peaches or any acid product, they would remain dormant indefinitely whether or not exposed to air, by reason of the acidity of the product.

Q. What do you mean by dormant? A. I mean, it is a quiet condition.

Q. Inactive you mean? A. Yes; inactive.

Q. In that inactive condition, it would be incapable of forming any harmful substance in the fruit,—is that correct? A. That's right.

Q. That is a botulinus? A. Yes; that is the only spore forming organism involved in fruit; that comes to us in fresh vegetables, and we eat them in uncooked vegetables every day; the spores themselves are not offensive.

Cross-examination by Mr. Rabinowitz:

Q. You are sent here by the National Canners Association? A. Yes.

Q. From Washington? A. Yes, sir; from Washington, D. C.

Q. Of course, you don't know, Doctor——

Mr. Rabinowitz: I'll withdraw that.

Q. Doctor, you have nothing to do with the making of the can itself? A. Oh, no; nothing to do with the making of the can.

Q. And your work is naturally in the field of bacteriology? A. Yes, and technical problems in which bacterial questions are involved.

Q. Do you conduct a laboratory? A. Yes.

Q. In Washington? A. Yes, in Washington.

Q. For the National Canners Association? A. Yes, I am in the employ of the National Canners Association.

Q. And various cans of fruits have been submitted to you for examination, have they not? A. Oh, yes.

Q. And cans of fruits in which there has been a question raised as to whether or not there is any product of a botulism?

Mr. Hanaway: Objected to, on the ground that it has absolutely no bearing on this particular can in question what the Doctor might have seen. Counsel should at least confine the question as to whether or not canned peaches have ever been submitted to the Doctor.

Mr. Rabinowitz: I may lead up to that.

Mr. Hanaway: I object further on the ground that we are not concerned with things on which suspicion has been cast.

The Court: I'll sustain the objection.

Q. You have recognized, of course, in the field of bacteria, food poisoning? A. Oh, yes.

Q. And you have recognized food poisoning in connection with canned goods, have you not? A. Oh, yes.

Q. Now, you say there are different types of canned food poisoning which produce injurious effects upon the system? A. I know of just one.

Q. You know of just one case? A. Yes, just one poison.

Q. One actual poison? A. Yes.

Q. And do you recall the type of germ or bacteria? A. Are you speaking of my experience?

Q. Have you in your own experience known of one case of food poisoning? A. I have never had anything to do with canned food poisoning.

Q. What are the specimens that are sent to you in connection with the pathological examination of these fruits,—where do they come from? A. We make no pathological examination. They come from cans. We are not confined entirely to canned fruits. We study the spoilage of foods generally in as much as I said before, our problems are involved on sterilization questions, and we must know the types of organisms which can spoil food, in order what we may know what comes in in the raw product.

Q. You also have the object of sterilization in mind when making your tests? A. Yes.

Q. With a view of counteracting bacteria? A. Yes.

Q. And that is how you are handling these problems from time to time as they arrive? A. That's right.

Q. One of the great problems, is it not, from the standpoint of bacteriology is toxin, is it not? A. Yes; that is one phase of bacteriology, known as botulism.

Q. Toxin is a poison? A. Yes, produced by an organism.

Q. And a toxin may be examined and yet there may be no evidence of the presence of a bacteria? A. You can't examine a toxin.

Q. And yet toxin, which I understand is the same as the word "poison" may be present? A. Yes.

Q. And yet you can't examine it under the microscope? A. Yes; you know only toxin by its physical test.

Q. And the guinea-pig is one of the means of determining whether toxin is present? A. Yes.

Q. And by the injection of toxin into the pig is the means of testing whether or not in fact toxin exists? A. Yes; right.

Q. And so there can be recognized and you do recognize, do you not, in the field of your work chemical food poisoning irrespective of the presence of bacteria? A. I have not said that.

Q. I am asking if that can be so? A. Yes, we can have chemical poisoning.

Q. Then you say there is a field of botulinus? A. Yes.

Q. And that is a distinct form or type of bacteria? A. Yes.

Q. Which may form into different classifications,—there are different forms of botulinus? A. There are two types.

Q. What is the botulinus "C. L."—do you know what that indicates? A. I think I know what you mean,—*Clostridinis* botulinus. You had it reversed. I have seen its activities, but I have not seen it in fruit.

Q. Is that a fruit poisoning? A. No; that is the name of the organism.

Q. What is the other form? A. You have them both; in "C. L.", you have type "a" and type "b" and some suspicion of a type "c".

Q. Which of course in poisoning may be discovered on microscopical examination? A. No. You can discover the organism. You have to do much more than examine it under the microscope.

Q. In the organism is a life *operation* (observation)? A. Yes, which may be either dormant or active.

Q. And when it is dormant, it is called what? A. It is called the spore.

Q. And when the spore reaches the air, may be become active? A. Absolutely not.

Q. The spore cannot become active? A. It cannot become active in the presence of air.

Q. Can it become active without the presence of air? A. Yes, when the other conditions are right.

Q. So that is, it can occur without the presence of air, and the fruit is eaten, it may have an injurious effect from the human system? A. No. That is established.

Q. So that you say a spore inactive being active in the can without the presence of air, a bacteria would have no effect upon the human system when eaten? A. I didn't say that. I was speaking of the spore when I said it would have no effect. If it is active it will have an effect on the can, if it can become active. It can't become active in an acid environment. We don't get spores in acid products.

Q. There is a type of bacteria known as *anaerobia,*—there is a type of bacteria that can only exist actively without the presence of air? A. That is an *anaerobe.*

Q. That is another type of bacteria? A. An *anaerobe* refers to the organism with its relation to oxygen,—an organism which will grow when there is no air and the anaerobe applies to a whole group.

Q. One of its outstanding features is, it exists and thrives without the presence of air? A. Yes.

Q. Would you consider that type of bacteria dangerous to the human system? A. The organism itself would not be injurious. Botulinus is not a disease.

Q. Would the organism in producing toxin cause an injurious effect? A. The toxin would produce an injurious effect.

Q. And that toxin could arise from the injurious effect of the anaerobe? A. From the growth of the anaerobe.

Q. Is that your answer? A. Yes.

Dr. E. J. Cameron, for Defendant—Re-direct—Re-cross.

Re-direct examination by Mr. Hanaway:

Q. Doctor, would you consider canned peaches an acid product? A. Yes.

Q. Could botulinus bacteria ever be active in canned peaches? A. No.

Q. Assuming that bacteria were active in a can of peaches, what would be the appearance of the can? A. That couldn't be. The can in appearance would be swelled. It is a so-called gas formation. It produces gas as a result of its growth.

Q. It would be obvious from the outside of the can that something was wrong? A. Yes.

Q. You say it would be swollen or bulged? A. Yes.

Re-cross-examination by Mr. Rabinowitz:

Q. But the swelling of the can, assuming that was really present, can be affected by pressing down the can or tin? A. Not a swell produced by botulinus,—you could not do it, not by the human hand.

Q. Of course, that all depends in so far as the swelling you speak of as to the amount of activity that the anaerobe would be in producing this toxin? A. The gas is produced independent of the toxin. He has asked me to assume this organism would grow in canned peaches, and I am assuming it would grow there as well as in a medium to which it was adapted. If it grew, the swelling would be so that you could not return the ends to the normal condition by pressing on it with the hands.

Q. The anaerobe would be just as active in peaches? A. No. I am just assuming.

Q. How long do you think, Doctor, it would take before there was any development or signs on the

can before the toxin had that effect on the can? A. Toxin would have what effect?

Q. I mean the swelling of the can? A. Assuming this to be a good medium for it, that would depend largely on the temperature,—in a temperature of ninety to a hundred degrees, it would occur in three or four or five days. In a lower temperature it would not occur so quickly.

Q. And in the meantime while the anaerobes are working away, this toxin would be produced, would it not, until it reached a point where it was actually strong enough to force a bulging in the can?

The Court: That is all academic. He is testifying now what would happen, but which he says is impossible and cannot happen. He says it cannot grow in peaches, but if it could, the can would swell. What good is that testimony to anybody?

Q. Acid in fruit juices may produce a toxin, may it not, by attack on the can? A. They cannot.

Q. Acids are produced however in the fruit juices? A. Yes.

Q. Can you give us the symbol of what the content of the acid is? A. No; I don't carry a lot of organic formula in my head.

Q. You are a chemist? A. Yes.

Q. And doing this type of work all the time? A. Yes.

Q. Yet you cannot tell us what the chemical symbol of this particular acid in fruit juices are? A. That wouldn't be necessary at all.

Q. Don't you think it would be necessary in order to determine whether or not the type of acid included in fruit juices would have any effect? A.

No. Such acids are regarded as weak acids. There is no one in the world who would attempt to carry such a lot of formula in the head.

(Defendant's Case Ends.)

(Plaintiffs' Rebuttal.)

Mrs. Mabel Berni, re-called.

Direct examination by Mr. Rabinowitz:

Q. Mrs. Berni, when you went to the Paterson General Hospital with your boy,—do you recall the date? A. I didn't go with him. They called me up to go over there afterwards when he was dying,—they sent for me when he wasn't going to live; an officer came to the house and asked me to go right over, and they took me in a taxi.

Q. Remember the date? A. No; I was very sick. I couldn't recall the date.

Q. You went up in the taxi with the officer? A. No, I went up with my brother-in-law.

Q. And who did you see when you got there with the child?

Mr MacLeod: Objected to.

The Court: Objection sustained.

Mr. Rabinowitz: Doctor Blauvelt said the conversation had was about an hour with Mrs. Berni on the day the child died.

Q. Did you have a conversation with Doctor Blauvelt? A. Yes.

Q. How long did that conversation take? A. Only a few minutes.

Q. Only a few minutes? A. Yes.

Q. Were there any notes taken by the Doctor at the time? A. No, nothing in my presence.

Q. No writing taken in your presence? A. No writing in my presence.

Q. Then you left for home immediately? A. I went to the taxi and got in and came right home.

Q. What did you tell Doctor Blauvelt? A. I told her I gave the child canned peaches.

Q. Now, Mrs. Berni, do you recall while you were home ill, whether anybody came to the house? A. Yes.

Q. Does your recollection actually serve you at this time as to who actually did come?

Mr. MacLeod: Objected to as not proper rebuttal examination, unless counsel wishes to change the statement she made on cross-examination when she was asked that question and stated she could not remember.

The Court: I don't remember it, but if she has not testified to it, and it was brought out on the defendant's case——

Mr. Rabinowitz: Yes, it was.

The Court: What statement do you wish to rebut or make?

Mr. Rabinowitz: Mrs. Berni never saw Doctor Heck.

The Court: She said that on direct examination as I recall. What other rebuttal is there?

Mr. Rabinowitz: There is another feature—that someone else came to the house.

The Court: Mrs. Morrison.

Q. Did someone else come to the house? A. Yes.

Q. Who? A. The fellow that sold my mother the peaches and the manager from that section of the Butler Stores.

Cross-examination by Mr. MacLeod:

Q. How old was this little child at the hospital? A. Four and a half years.

Q. Did you tell Doctor Blauvelt that the youngest child had milk, too? A. I did not; I didn't see the child have milk.

Q. It might have? A. I didn't see no milk.

Q. Sure of that? A. Yes, I am sure.

Q. You heard your mother testify? A. Yes; but I didn't see it.

Mr. Rabinowitz: Mrs. Griffin would testify and corroborate Mrs. Berni that the manager of the district stores was there. Aside from her, we rest.

DEFENDANT'S MOTION FOR DIRECTION OF VERDICT.

Mr. MacLeod: I wish at this time to renew the motion made for a direction of a verdict on the same grounds as stated in the motion for a nonsuit in so far as Mrs. Griffin is concerned, so that it may be on the record at this time. There is no evidence to show any breach of any implied warranty from any of the facts shown here.

The Court: I will deny your motion with respect to the implied warranty. What evidence is there of an express warranty, Mr. Rabinowitz?

Mr. Rabinowitz: The express warranty was the statement made by the salesman. He said, "Mrs. Griffin, would you like to buy some good peaches".

The Court: He said what?

Mr. Rabinowitz: As I recall it, "We have some good peaches for sale".

The Court: Did he say that?

Mr. Rabinowitz: Yes; it is right in the testimony.

The Court: I have got the testimony before me.

Mr. MacLeod: So have I, your Honor. He said no such thing.

The Court (Reading):

> "Q. Will you tell the Court and Jury what happened on June 20, 1928? Did you make any purchase at the store? A. Yes, I went in for five pounds of sugar and a pound of butter.
>
> Q. Yes? A. And I was going about out, and the young man said,—he said, 'won't you try our peaches?' "

Mr. Rabinowitz: I will say that the express statement is sufficient to indicate "good peaches".

The Court: No, I don't think so.

Mr. MacLeod: I move to strike out that count with regard to the express warranty.

The Court: Yes. And the case will go to the jury on the implied warranty.

Mr. Rabinowitz: I ask an exception.

Mr. MacLeod then summed up for the defendant.

Mr. Rabinowitz then summed up for the plaintiffs.

Recess taken at 12 o'clock until one.

Court's Charge to Jury.

MACKAY, J.

Members of the Jury:

This is an action brought by Martha Griffin and Mabel Berni, plaintiffs, against the James Butler Grocery Company, a corporation. Mabel Berni is now out of the case and Martha Griffin is now the only plaintiff. I granted a motion for a non-suit or dismissal as to Mabel Berni, as a matter of law. With that you have no concern. You do not pay any attention to the fact that there was a non-suit as to Mabel Berni; you simply consider the testimony, all of the testimony in the case, in which Martha Griffin is the plaintiff against the defendant I have just mentioned.

The plaintiff in this case alleges in her complaint regarding this sale of the can of peaches to her by the salesman of the defendant that there was an implied warranty as to the quality and fitness of the peaches for the purpose for which she used them, that is, for eating.

Under Section 15 of the Sale of Goods Act, which is found in our Compiled Statutes, 4 Compiled Statutes of 1910, that section provides as follows:

"Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that

the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality."

Subdivision 3 of Section 15 relates to examination by the purchaser, and subdivision 4 relates to sale under patent or trade name, and subdivision 5 relates to usage of trade. But with these three subdivisions, 3, 4 and 5, we are not now concerned in this case.

Subdivision 6 provides, "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Now, in this case Mrs. Griffin, the plaintiff, originally claimed there was an express warranty. I have decided as a matter of law that there is no evidence of an express warranty, so you dismiss the thought of an express warranty from your minds. Counsel for the plaintiff was under the impression that the salesman who sold the goods had expressly warranted the good quality of the peaches, but there was no evidence to that effect, so that you do not take into consideration in determining this case.

The question before you is solely on the implied warranty, and I have read you the statutes in that connection.

The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the material allegations of the complaint have been proven, and that means by the greater and weightier evidence; it means by the more convincing testimony.

If you find that the testimony is evenly balanced in this case or that it preponderates in favor of the defendant, your verdict must be in favor of the defendant and against the plaintiff, no cause of action.

In this case you must take all the testimony that is before you in order to reach a proper determination of the matters involved.

On this question of implied warranty the plaintiff relies upon this statute. Justice Swayze, speaking for the Court of Errors and Appeals of New Jersey in the case of Tomlinson vs Armour & Co., which was prior to the passage by the Legislature of the Sales Act, among other things, said, "It has not been overlooked that the commercial business of sealing up food products by the processes of 'packing' and 'canning' and the vending of such products were unknown when the common law rule was established."

Now, the common law was the rule of law which we had taken from England and was known as the unwritten or common law or decisions, so that when this country first had its being and established Courts, the law of England was taken as the common law. I give you that so you will understand what I mean by the common law.

Now, "The maxim *caveat emptor,* based as it is upon the mutuality of the opportunity of inspection by the vendor and vendee is inapplicable to the case of hermetically sealed goods. These considerations and others that might be added point strongly to the exception of this class of food products from the rule of *caveat emptor* as we have inherited that doctrine from the common law. Considerations of public health and comfort may even imperatively require such an alteration of the established law, but the fact never-

theless remains that alterations of established law based upon such considerations are essentially legislative in character."

In other words, it is up to the Legislature of the State to pass a law on the subject. That was a decision shortly before the Legislature did pass the law which I have read to you as Section 15 of the Compiled Statutes, Volume 4.

Caveat emptor means generally let the purchaser beware. In other words, you can see and view an article of food that is not packed and sealed, but you cannot see and view it if it is hermetically sealed, such as canned peaches. So that *caveat emptor* means that the purchaser is to beware, because he can see what he is buying and is taking that risk, but that could not apply to canned goods that the purchaser could not see and view because of the sealing.

Now, as you already know, the plaintiff Martha Griffin, says she went to the store of the defendant; that the salesman who was in the habit of waiting upon her sold her certain goods and then suggested the purchase of this can of peaches; that she took them home, opened them immediately, poured them in a glass dish and served them; that she and her daughter and the two children were taken sick; that the brother who did not eat them was not taken sick; that the two children died; that the daughter was ill for about two months; that she had eaten nothing else that would affect her condition of health as it was affected, and there is her testimony and other testimony whereby they claim that there was some poisonous substance or bacteria of some kind in the peaches or in the peach syrup that was in the can, which the plaintiff's doctors call ptomaine poisoning, and which they say caused her

to suffer a subsequent condition of ill health, and which she says she will still suffer, and which her doctor says she will still suffer in the future.

I think the doctor testified that that condition, her condition of ill health, was a permanent condition. Medical testimony was produced in an endeavor to show that the proximate cause or, we might say, the direct cause of her condition was due to having eaten part of the contents of this can of peaches. This is disputed by the defendant, who has produced evidence to show you how the peaches were grown, raised, purchased, sorted, prepared for canning, canned, and shipped.

There is also testimony to the effect that the symptoms which the plaintiff exhibited in her illness could not be caused from eating any of the contents of this can of peaches, so that it is for you to say from all of the evidence that is before you what inference you will draw from these facts as presented to you, and if you find it is a fact from the weight of the evidence that the plaintiff's condition was brought about by reason of some poison or bacteria or, as it is commoly called, ptomaine poisoning contained in this can, then your verdict would be for the plaintiff, but if you find that the plaintiff's condition of ill health was not caused by the eating of these peaches and that they were not the proximate or direct cause of her illness, but that her illness resulted from some other cause entirely disconnected from the canned peaches, then your verdict must be for the defendant, no cause of action.

The defendant has offered in evidence statements in writing which are intended to contradict the testimony of the plaintiff and some of the plaintiff's witnesses, and those statements are in evidence before you for your consideration in connection with all of the other evidence in the case.

Now, if you find that the plaintiff has sustained the burden of proof by a fair preponderance of the testimony, as I have already mentioned, and that these canned peaches, that is, the eating of these canned peaches, was the proximate cause of the plaintiff's illness, then you would come to the question of damages.

The plaintiff would be entitled to recover such sum as you believe to be fair and reasonable for the bodily injuries sustained; that is to say, the injury to her health. You may also take into consideration, if you find in her favor, whether or not those injuries are temporary or permanent, or, if not permanent, whether she is already cured of those injuries and has been or whether she may suffer therefrom in the future, and if so, to what extent.

She would also be entitled to recover such sum as you believe to be fair and reasonable for the pain and suffering endured from the time of the happening of the accident or from the time that she was taken ill, if you find in her favor, until such time as that pain and suffering ceased. In that regard you may also take into consideration whether or not it is a temporary or a permanent condition. You say whether or not the pain and suffering has ceased, whether there may be some pain and suffering in the future, and, if so, to what extent.

She would also be entitled to recover, if you find for her, such sum as you believe to be fair and reasonable for the wages lost. She says she was earning twelve dollars a week at the Y. M. C. A.; that she was out of work for a certain period of time. I don't know whether she mentioned any specific time, but I think she is still out of work. I think there was testimony to the effect that since she was taken ill she has not been able to work up to the present time. Of course, you

take into consideration the testimony in that regard, as to whether or not this condition of ill health is temporary or permanent.

There was testimony to the effect that she was actually in bed four weeks, was very sick for a period of three months; that prior to the accident she enjoyed good health. I think her age is sixty-eight years. I was under the impression that there was some testimony to the effect that she was seventy-two, but I am informed that she stated she is sixty-eight. So if you find any evidence to the effect that she is seventy-two years of age, you take that into consideration in this case.

You may also take into consideration in connection with the bodily injuries and the pain and suffering, if you find in her favor, all other evidence in the case on that point, which I believe is the medical testimony as to her future condition of ill health, and, of course, you take into consideration at the same time all of the other medical evidence and all other evidence which would be to the contrary.

She would also be entitled to recover such sum as is fair and reasonable for the medical expenses which she may have had or any other expenses incurred in an endeavor to cure herself of this illness. My recollection is that there was a doctor's bill of $115. It is for you to say whether that bill, under the evidence, is fair and reasonable, if you find for her. I do not recall any evidence of any other expense, but if there is any in the case you take it into consideration.

Now, if I have misstated any of the facts in this case you will disregard what I have said and be governed entirely by your own recollection of what the facts really are. There is considerable

testimony that I have not touched upon at all. You take all of the evidence, every bit of it, and take it into consideration in reaching a verdict in this case. You take the law as I have given it to you and you follow that law.

Now, in this case, which is simply an action by Martha Griffin against the Butler Grocery Company, evidence has gotten into the case of the death of the two boys, of the illness of the daughter, and you may be inclined under those circumstances to be sympathetic. But you must remember you are under oath. You have taken a solemn oath to decide this case honestly in accordance with the evidence, and sympathy must not enter into your deliberations in the juryroom. That is something that is entirely foreign under the solemn oath that you have taken in this case to determine it according to the evidence.

The burden of proof, as I told you, is upon the plaintiff. She must hold the affirmative by the fair preponderance of the testimony.

As to the Statute of the implied warranty, the implied warranty is there in the law. As I told you before, if you should find that this illness was caused by something entirely unconnected with this can of peaches, your verdict must be for the defendant. The illness of the plaintiff must have been by reason of the eating of these peaches or the peach juice or both and that must have been the direct and proximate cause of her condition; in other words, proximate cause means the natural and direct result, just the same as cause and effect.

You determine also in this case where the truth lies. You are the judges of the truthfulness of the witnesses. You take into consideration their demeanor on the witness-stand, their conduct, their actions, what you believe their capacity to

be for telling the truth. It makes no difference whether a witness talks loud or softly. That means nothing. It is a question of what you determine from their testimony, their entire testimony, and their manner of giving it, their actions, and everything that will lead you to the result which is desired in this case, that is, of finding where the truth lies, bearing in mind the rules of law as I have given them to you.

If you find for the plaintiff you take these various elements of damage that I have mentioned and put them all in one lump sum and render one lump sum verdict in her favor and against the defendant.

If you find in favor of the defendant, then your verdict is in favor of the defendant and against the plaintiff, no cause of action.

Take the case and give it your very thorough and careful attention——

(Counsel conferred with the Court at side bar.)

The Court: Counsel says that the rule of law that I read to you by Justice Swayze is not the situation. I think I already told you that Justice Swayze rendered that decision before the Sales of Goods Act was passed by the Legislature, so that you are governed now by the Sales of Goods Act as I gave it to you on the question of implied warranty.

Let the jury retire.

DEFENDANT'S EXCEPTION.

Mr. Hanaway: I would like to ask one exception; that is, I would like to take an exception to so much of your Honor's charge as deals with the application of the New Jersey Sales Act to food sold in sealed containers.

Exhibit D-1.

Form 1.

QUESTIONS FOR PERSONS CONCERNED IN FOOD POISONING CASES

1. What is the Name? Mrs. Alfred Berni. Age? 25.

2. Address? 54 Spring St., Paterson, N. J.

3. What is your occupation? Saleswoman—Meyers Brs. Dep't Store.

4. Married or single? Married.

5. How long after eating were you made ill? 12 hrs.

6. Were others made ill at the same time? If so, who? (Age of each) Mrs. Martha Griffin (mother) 74; James Berni, 4; Alfred Berni, Jr. 6, sons.

7. Did any person eat the same meal without becoming ill? No.

8. If so, who? (names and addresses) ——.

9. What was the first indication and nature of the illness? Vomiting.

10. Was there pain in the stomach or abdomen? Yes.

11. Was there vomiting? Yes. For how long? 7 days.

12. Was there diarrhoea? Yes.

13. Please tell everything else you can remember about your illness. At supper on June 20th she ate meal containing suspected food. Felt badly when she went to work the next day. Had mild diarrhoea all that day. Came home in evening to find one child dead. Started to vomit that eve-

ning. This kept up for 7 days. Diarrhoea lasted 9 days and was accompanied by crampy abdominal pains. Passed blood and mucus in stools. Had high fever for 5-6 days. Was confined to bed until July 8. Is over her symptoms now but feels very weak and is unable to work yet.

14. How long did the acute illness last? 2-3 wks.

15. What is name and address of the doctor who attended you during the illness? Dr. I. Levine, 215 Broadway, Paterson, N. J.

16. Is he your regular doctor? No. If not, who is? ——.

17. When were you last attended by a doctor before this illness, and for what cause? 4 yrs. ago—Confinement.

18. Have you ever undergone an operation, and if so for what? No.

19. Have you had stomach or digestive trouble in the past? No.

20. If so, of what nature? ——.

21. To what did the doctor attribute the illness? Ptomaine poisoning.

22. Do you attribute the sickness to the eating of any particular food? Yes.

23. If so, what food? Canned peaches.

24. Why? Ate nothing else that meal.

25. Of what did the suspected meal consist? Peaches only.

26. What else was eaten at the four meals preceding the suspected meal? (all foods eaten at each

meal, if possible, and also between meals) June 20 Lunch lamb stew; Bkfst: bread and coffee; June 21 Bkft: bread and coffee; Lunch: vegetable soup, milk.

27. Did the doctor take the container or any of the suspected food left after the meal? No.

28. Did you feed any of the suspected food to dogs, chickens, or other animals? No.

29. If so, were they made sick? ——.

30. Have you the container or any portion of the foods, which you believe caused the illness? No.

31. If not, what was done with them? Thrown away.

(The following questions to be answered only when canned food is stated in answer to #23)

32. From whom was canned food purchased? James Butler, cor. Main and Slater St.

33. Date of purchase. June 20.

34. Give name of brand and manufacturer. Frontline Peaches.

35. Did you ask for that particular brand? No.

36. Are you accustomed to buying that particular brand? No.

37. Where was can left before using? On kitchen table.

38. How long had the can been opened before preparing for meal? Can opened and contents poured into bowl. Put in ice-box for ½ hr.

Exhibit D-1.

39. Did the can appear to be in good condition before opening? Yes.

40. Where was the can and contents kept after opening? Contents kept in ice box for ½ hr.

41. State as exactly as possible how the food was prepared and served. Poured into dish and served. Nothing added.

42. By whom was the canned food purchased (include address of purchaser)? Mrs. Martha Griffin—54 Spring St.

43. Did the appearance, taste, or odor indicate anything unusual in the contents of the can on opening? No. If so, please give particulars. ——.

44. On what date and at what meal was the canned food eaten? Supper, June 20.

45. At the time of eating the canned food, did you notice any peculiarity in the taste or odor of it? Tasted "peculiar" but not really bad.

MRS. ALFRED BERNI.
(Signature)

Witness MISS MARY MORRISON

Date July 12, 1928.

Exhibit D-3.

Form 1.

QUESTIONS FOR PERSONS CONCERNED IN FOOD POISONING CASES

1. What is the Name? Mrs. Martha Griffin. Age? 74.

2. Address? 54 Spring St., Paterson, N. J.

3. What is your occupation? Housewife.

4. Married or single? Widow.

5. How long after eating were you made ill? 24 hours.

6. Were others made ill at the same time? If so, who? (Age of each) Mrs. Alfred Berni (daughter) 25, Alfred Berni, Jr. 6, James Berni, 4.

7. Did any person eat the same meal without becoming ill? No.

8. If so, who? (names and addresses) ——

9. What was the first indication and nature of illness? Diarrhea.

10. Was there pain in the stomach or abdomen? Yes.

11. Was there vomiting? No. For how long? ——

12. Was there diarrhoea? Yes.

13. Please tell everything else you can remember about your illness. Onset with diarrhea on night of June 21st. Doctor called that night. Gave cathartics and enemas. Violently ill. Given 12 hrs. to live. High fever. Diarrhea and pain has

lasted to present time. Still passing clots of blood. Is in bed most of time.

14. How long did the acute illness last? To date.

15. What is name and address of the doctor who attended you during the illness? Dr. I. Levine, 215 Broadway, Paterson, N. J.

16. Is he your regular doctor? Yes. If not, who is? ——

17. When were you last attended by a doctor before this illness, and for what cause? 3 years ago—pelvic operation.

18. Have you ever undergone an operation, and if so for what? See 17.

19. Have you had stomach or digestive trouble in the past? No.

20. If so, of what nature? ——

21. To what did the doctor attribute the illness? Ptomaine poisoning.

22. Do you attribute the sickness to the eating of any particular food? Yes.

23. If so, what food? Canned peaches.

24. Why? Not definitely known.

25. Of what did the suspected meal consist? Peaches only.

26. What else was eaten at the four meals preceding the suspected meal? (all foods eaten at each meal, if possible, and also between meals) Lunch: lamb stew, bread and butter, tea. Breakfast: tea, bun. June 19 Supper: meat pie, tea.

Exhibit D-3.

27. Did the doctor take the container or any of the suspected food left after the meal? No.

28. Did you feed any of the suspected food to dogs, chickens, or other animals? No.

29. If so, were they made sick? ——

30. Have you the container or any portion of the foods, which you believe caused the illness? No.

31. If not, what was done with them? Thrown away.

(The following questions to be answered only when canned food is stated in answer to ♯23.)

32. From whom was canned food purchased? James Butler, cor. Main and Slater Sts.

33. Date of purchase. June 20, 1928.

34. Give name of brand and manufacturer. Frontline Peaches.

35. Did you ask for that particular brand? No.

36. Are you accustomed to buying that particular brand? No.

37. Where was can left before using? On kitchen table.

38. How long had the can been opened before preparing for meal? Can emptied immediately but contents kept in ice ½ hour before serving.

39. Did the can appear to be in good condition before opening? Yes.

40. Where was the can and contents kept after opening? In ice box.

Exhibit D-3.

41. State as exactly as possible how the food was prepared and served? Contents poured into dishes and served. Nothing added.

42. By whom was the canned food purchased (include address of purchaser)? Myself.

43. Did the appearance, taste, or odor indicate anything unusual in the contents of the can on opening? No. If so, please give particulars. ——

44. On what date and at what meal was the canned food eaten? Supper, June 20.

45. At the time of eating the canned food, did you notice any peculiarity in the taste or odor of it? No.

MARTHA GRIFFIN
her + mark
(Signature)

Witness: MISS MARY MORRISON

Date: July 12, 1928

Exhibit D-4.

Form 2.

QUESTIONS FOR THE ATTENDING PHYSICIAN

1. Name and address of physician Dr. I Levine, 215 Broadway, Paterson, N. J.

2. Name of patient? Mrs. Martha Griffin, Mrs. Alfred Berni.

3. When did you call on this patient? June 21 to July 4, once or twice daily.

4. Have you attended this patient before? Yes. If so, for what illness or illnesses? Has treated Mrs. Griffin for rheumatism, grippe, etc.

5. How long had the patient been ill when you arrived? 12 hrs.

6. Was the onset of the disease sudden or had there been previous illness? Sudden.

7. How many persons were ill of the same type of disease and under your observation? 4. 2 treated. 1 other ill but not treated by me. 1 dead on arrival.

8. What were the general symptoms (appearance of patient, continuous or spasmodic pains—nervous excited or in coma—vomiting or diarrhoea?) Severe abdominal pain, dysentery.

9. What was the pulse rate? Rapid.

10. Regular? Regular.

11 Pulse tension? Normal.

12. Was the temperature persistently above normal? Yes.

13. What was the highest and lowest point reached? 103° maximum.

14. Was a temperature and pulse record kept? Yes.

15. What was the number of respirations per minute and character? Not increased.

Exhibit D-4.

16. Was there any disturbance of vision? Yes —in Mrs. Griffin.

17. What disturbance of the reflexes, if any were noted? Hyperactive.

18. How long did the attack continue? About 2 wks.

19. Was convalescence prompt? No.

20. Was any bacteriological or chemical examination made of the blood, vomitus or excreta? No.

21. What was the diagnosis? Ptomaine poisoning.

22. If food poisoning, what food caused the illness? Not known (canned peaches according to family).

23. Was a bacteriological or chemical examination made of any of the suspected foods? No.

24. If so, what was found? ——.

25. What treatment was followed or prescribed? Intestinal antiseptics, cathartics, opiates, rest.

26. Was any morphine or opiate used to alleviate pain? Yes.

27. Was any strychnine or other stimulant used? Yes for Mrs. Griffin.

28. How many times did you treat the patient for this illness? 15-20 calls.

29. Have you a detailed record of the case? No.

30. (In case of death) Was an autopsy performed or any post-mortem specimen examined? ——.

31. If so, by whom was such autopsy or examination made? ——.

I. Levine M. D.
(Signature)

Witness Edson B. Heck
Date July 12, 1928.

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New Jersey Court of Errors and Appeals

MARTHA W. GRIFFIN and MABEL BERNI, Plaintiffs-Appellees, *against* JAMES BUTLER GROCERY COMPANY, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT, JAMES BUTLER GROCERY COMPANY.

Statement of Facts.

This is an appeal from a verdict entered in favor of the plaintiff Martha W. Griffin. The Trial Court allowed a nonsuit as to the plaintiff Mabel Berni.

On June 20, 1929, Martha Griffin, plaintiff-appellee, hereinafter referred to as the "plaintiff", purchased a *sealed can* of peaches from James Butler Grocery Company, defendant-appellant, hereinafter referred to as "defendant". Defendant is a corporation owning and operating a chain of retail grocery stores throughout this state and elsewhere. It was not the packer or canner of the peaches; it was merely the distributor of the finished product. The testimony shows that the peaches were served to four members of the family, namely, Martha Griffin, Mabel Berni, and the latter's two infant children, after they had all eaten other food (S. C., p. 21, ll. 12-14). Sometime during the next day, June 21st, Martha

Griffin, Mabel Berni and one of the children were taken sick and a physician was called. The child died on the evening of June 21st, and the second child was taken sick the next day and was ordered to a hospital by a second physician, where it, too, died soon after.

Martha Griffin and Mabel Berni both claim to have been ill and incapacitated for some weeks, and on or about September 6, 1929, or more than a year later, suit was commenced against the James Butler Grocery Company by Martha Griffin, the purchaser of the can of peaches, and her daughter, Mabel Berni (S. C., p. 6, ll. 10-20).

Each asked for $25,000 damages for personal injuries and the basis for recovery as alleged in the complaint was a breach of warranty (S. C., p. 7, l. 30).

The answer was a denial of each and every allegation of the complaint, and the parties proceeded to trial on this issue. Plaintiff attempted to prove an express warranty, but the trial judge was of the opinion that the evidence did not establish such an express warranty and on motion of defendant ruled as a matter of law that there was no express warranty (S. C., p. 227, ll. 23-26).

At the close of plaintiff's case defendant made a motion for a non-suit as to both plaintiffs (S. C., p. 110, ll. 6-36) on the ground among others that there was no evidence that the peaches were unfit for human consumption and that it had not been proved that they caused the illness. Other grounds will be referred to later. This motion was denied but plaintiff, Mabel Berni, was non-suited on defendant's further motion (S. C., p. 110, ll. 37-40; p. 111, ll. 1-16) because she was not the purchaser of the peaches and there being no privity of contract between her and defendant, there was no warranty (Tomlinson *vs.* Armour, 75 N. J. L. 748; Chysky *vs.* Drake Bros., 235 N. Y. 468).

At the end of all the evidence defendant renewed its motion for a non-suit as to the remaining plaintiff, Martha Griffin, on the same grounds urged at the end of plaintiff's case (S. C., p. 226, ll. 24-32) but the motion was again denied, and the case was submitted to the jury on the question of a breach of an implied warranty. A verdict was rendered in favor of plaintiff, Martha Griffin, for $3,000.

Appellant's Principal Contentions.

It is contended by defendant that the trial court committed the following reversible errors:

1. The trial judge permitted the case to go to the jury when there were no proven facts to submit to the jury. Plaintiff Martha Griffin should have been non-suited as a matter of law (S. C., p. 3, ll. 5-12 and S. C., p. 110, ll. 5-36).

2. The trial judge refused to direct a verdict and to enter a judgment of non-suit in favor of defendant, James Butler Grocery Company (S. C., p. 2, ll. 29-40 and S. C., p. 110, ll. 5-36).

3. The trial judge refused to grant a non-suit on defendant's motion that there was no implied warranty (S. C., p. 110, ll. 13-16, ll. 35-36) and charged the jury that Section 15 of the Sale of Goods Act gave rise to such an implied warranty (S. C., p. 228, ll. 26-40; p. 229, ll. 1-2).

POINTS.

I.

There was no evidence that the peaches were defective or unfit for human consumption as alleged in the complaint and no proof that they caused the illness.

In order to recover in this case plaintiff had the burden of proving the peaches were unfit for human consumption, as alleged in her complaint. This is no mere matter of form but is a real burden. As the learned trial court charged the jury (S. C., p. 229, ll. 36-40).

> "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the material allegations of the complaint have been proved, and that means by the greater and weightier evidence; it means by the most convincing testimony."

The complaint alleges, paragraph seven (S. C., p. 7, ll. 26-28) that "said peaches were not wholesome or fit for food, but were poisonous, unwholesome and utterly unfit for human consumption."

Our search of the record fails to disclose a fair preponderance of the evidence or, in fact, any evidence or proof that the peaches were "poisonous or unwholesome and utterly unfit for human consumption." There is absolutely nothing in the record aside from the statements of plaintiff and her daughter from which the jury could determine the condition of the peaches when the can was opened. They both stated unequivocally that there was nothing in the appearance, taste or odor indicating anything unusual in the contents of the can on opening (S. C., p. 240, ll. 15-18; p. 244, ll. 10-12).

If these statements be given consideration, they furnish the only evidence on the question of the condition of the peaches and conclusively establish by plaintiff's own statements that there was nothing unusual in the appearance, taste, or odor of the peaches on opening the can.

Neither of the two doctors called by plaintiff ever saw the peaches (S. C., p. 53, ll. 6-8; p. 70, ll. 6-7). So, in the absence of any testimony other than that of plaintiff and her daughter as to the quality of the peaches, it might be fairly said on this point that plaintiff failed to sustain her burden of proof that the peaches were "poisonous, unwholesome and utterly unfit for human consumption."

Plaintiff Also Failed to Prove the Peaches Caused the Illness.

Plaintiff attempted to prove that the peaches caused the illness by the testimony of Dr. Levine and Dr. Veenstra, the two physicians who examined various members of the family at the time. The testimony of Dr. Veenstra can be dismissed with little or no comment. He did not treat or examine the plaintiff but he did examine one of the children about two days after the peaches were eaten. He did not see the peaches nor did he do anything other than examine the child, itself, and order it to the hospital (S. C., p. 67, ll. 29-35). He made no attempt to attribute the illness to the peaches and, as a matter of fact, testified on cross-examination that *he did not know what food caused the injury and death of the child he examined* (S. C., p. 71, ll. 37-40). Therefore, so far as his testimony is concerned it fully bears out defendant's contention that no one knows what food caused the illness.

The only other testimony on this point came from plaintiff's other physician, Dr. Levine. He called on the family for the first time on the evening of June 21 (S. C., p. 40, ll. 20-21), more than twenty-four hours after the peaches were eaten. He testified that *he had never seen or examined the peaches* (S. C., p. 53, ll. 7-8). His diagnosis was based entirely on the history as given by the family and on what he thought he observed in the vomit (S. C., p. 60, ll. 29-34).

It is easy to demonstrate from the record that Dr. Levine had no basis for his belief that the peaches caused the injury. His testimony had no reference to the condition or quality of the peaches, and *this is the only thing that this defendant is responsible for.* After taking plaintiff's history and viewing the "vomit" he concluded that the illness was caused by "probably peaches" (S. C., p. 43, ll. 4-5). That Dr. Levine was merely guessing that the peaches caused the illness is evident. For instance, he testified that *whatever he saw in the vomit would, in his opinion, be the cause of the illness,* no matter what it was (S. C., p. 60, ll. 36-40), and that "as he looked at the vomit" his diagnosis was "peaches" (S. C., p. 54, ll. 31-32). One would have to infer from this that Dr. Levine had positively identified peaches in the vomit, but the worthy doctor had already testified that *he could not identify peaches in the vomit* (S. C., p. 53, ll. 11-12), and that it contained other substances that he also could not identify (S. C., p. 54, ll. 33-34). In the light of such testimony it is axiomatic that it would be impossible for a jury to say what caused the illness.

Dr. Heck, who testified for defendant that he had investigated fifty or sixty of these so-called food poisoning cases (S. C., p. 166, ll. 20-25),

said that even though peaches could have been identified in the vomit this would be without significance because you would expect to find particles of the last meal there (S. C., p. 171, ll. 4-37).

Dr. Heck also testified, and *it was uncontradicted,* that assuming this family were suffering from a typical case of food poisoning, that the onset of the illness might be delayed twenty-four hours and sometimes more (S. C., p. 170, ll. 29-32), and that two or three meals might intervene between the time that the food which caused the illness was eaten and the onset of the illness (S. C., p. 170, ll. 33-40). In other words, Dr. Heck testified that the illness might have been caused by some food eaten as far back as twenty-four hours before the illness occurred. Without contradiction this testimony must stand as established. The peaches were eaten for supper on June 20th (S. C., p. 237, ll. 35-36). Plaintiff and her daughter, Mabel Berni, both signed statements in the presence of one of their neighbors, who acted as a witness (S. C., p. 240, ll. 27-30) and (S. C., p. 244, ll. 20-26) in which they declared that the family had eaten lamb stew, meat pie, milk and other foods for the four preceding meals (S. C., p. 242, ll. 35-40) and (S. C., p. 239, ll. 4-7).

Dr. Levine did not know whether the peaches were good or bad and admitted that he did not (S. C., p. 61, ll. 27-28) and that he did not know what caused the illness, also, cannot be seriously questioned. He testified that in all his experience he had never known of a case of ptomaine poisoning coming from canned peaches (S. C., p. 52, ll. 4-6).

On July 22, 1928, exactly 21 days after he treated this family, Dr. Levine signed a statement in the presence of a witness (S. C., p. 246, ll.

40-42) that the food that caused the illness was "not known" to him (S. C., p. 246, ll. 18-19), but that it was "canned peaches according to the family", and yet, two years after this statement was made, Dr. Levin testified that the peaches caused the illness and the basis for his opinion is that he *thought* he saw something in the vomit that resembled peaches. It is apparent that the doctor formed an opinion, not from scientific observation but from what the *family* had told him caused the illness. One need not be a doctor to form such conclusions.

II.

Plaintiff failing to show the peaches defective, there were no proven facts upon which the jury could infer that they caused the illness.

There was no direct evidence that the peaches were defective and it was left to the jury to infer, if it wished, that they were defective and caused the illness.

Plaintiff rests her case upon an inference drawn from circumstantial evidence and whether or not a verdict for plaintiff can be sustained depends entirely on whether the jury's inference or conclusion was "the only conclusion which can reasonably be drawn from the facts proved"; for, unless it is, it is the settled law of this State that plaintiff failed to sustain her burden of proof and there was no question to submit to the jury.

It is doubtful whether this Court has ever been asked to pass on this question where the facts are similar to those in this case; however, the above rule has long been recognized and frequently applied by this Court.

In *Price* v. *New York Central Railway,* 92 N. J. L. 429, a personal injury case, plaintiff was trying to prove negligence by circumstantial evidence, but the Court said:

> "It has been said mere theories and inferences do not authorize a verdict in a case of this nature unless they are *the only conclusions which can reasonably be drawn from the facts proven.*
>
> "For the plaintiff to succeed it was incumbent upon him, in the absence of direct evidence, to show not only the existence of such possible responsibility, but *the existence of such circumstances as will justify the inference* that Saunders' death was caused by the wrongful act of the defendant, and which would exclude the idea that it was a cause with which the defendant was unconnected."

To the same effect see:

> *Ross McCombe* v. *Public Service Railway,* 95 N. J. L. 187 (Court of Errors and Appeals);
>
> *John Maphet* v. *Hudson & Manhattan Railway,* 98 N. J. L. 369 (N. J. Supreme Court).

Where a plaintiff relies on circumstantial evidence, he at least must prove the agency producing the injury; for example, where it was alleged that a fire was caused by defendant's locomotive, *if it be proved* that fire caused the injury and that defendant's engine passed the place within a reasonable time before the fire, dropping sparks, an inference that it caused the injury may be drawn by the jury.

This is not such a case, for here the very agency is in doubt, the only material circumstances proved being that plaintiff ate peaches among other things, and that she later became ill. It is

like the case of *Bien* v. *Unger,* 64 N. J. L. 596-597, where the learned Court said:

> "With respect to this accident, nothing is proved excepting that it happened."

It cannot be doubted seriously that at the close of the testimony no one could say what caused the illness of this plaintiff. It was left to the jury to *infer,* however, from testimony, that at best can only be characterized as conjectural, and without any *proof first,* that the peaches were defective, and *second,* that they caused the injury. Such presumptions are not allowable. This Court has often said:

> "The only presumptions of fact which the law recognizes are immediate inferences *from facts proven.*"
>
> *Manning* v. *John Hancock Life Insurance Co.,* 100 U. S. 693;
> *U. S.* v. *Ross,* 92 U. S. 281-284;
> *McCombe* v. *Public Service Railway Co.,* 95 N. J. L. 187;
> *Price* v. *New York Central Railway,* 92 N. J. L. 429;
> *Jones* v. *Public Service Railway Co.,* 86 N. J. L. 646.

The Court Erroneously Assumed a Material Fact to Support Which There Was No Evidence in the Record.

We are reminded at this point of the rule that inference cannot be based upon inference and that, in order to prove a fact by circumstance, there should be positive proof of the facts from which the inference or conclusion is drawn.

As said by Mr. Justice Butler of the U. S. Supreme Court, in *Chicago M. & St. P. R. R.* v. *Coogan,* 271 U. S. 472-477:

"Whenever circumstantial evidence is relied on to prove a fact the circumstances *must be proved* and not, themselves, presumed."

See also:

Manning v. *The Insurance Company,* 100 U. S. 693-698;
U. S. v. *Ross,* 92 U. S. 281-284;
Lamb v. *Union Railway Co.,* 195 N. Y. 260;
Ruppert v. *Brooklyn Heights,* 154 N. Y. 90.

In the Manning case (*supra*) the Supreme Court, in commenting on this subject, said at page 698:

"The law requires an open and visible connection between the principal or evidentiary facts, and the deductions from them and does not permit a decision to be made on remote inferences. Best on Evid. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the facts sought to be established by the dependent presumption. Douglas *v.* Mitchell, 35 Pa. St. 440."

In order to give this case to the jury the poisonous nature of the peaches had to be "proved", and there was an entire absence of such proof. Thus, in refusing to grant the non-suit, the Court erroneously *assumed* that the peaches were defective, for there is no evidence in the record to support this assumption.

In 16 Cyc. 1051, it is said:

"No inference of fact should be drawn from premises which are uncertain. Facts

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> upon which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue. One presumption cannot be based upon another presumption."

In 22 Am. & Eng. Enc. of Law, 2nd ed. 1236, the rule is thus stated:

> "A presumption can arise only from facts actually proven by direct evidence; one presumption cannot form the basis for a second presumption."

In 1 Moore on Facts, Sect. 599, the author says:

> "Since circumstantial evidence consists in reasoning from facts which are *known or proved* to establish such as are conjectured to exist, the process is fatally vicious and defective if the circumstances from which it is sought to deduce the conclusion depend also upon conjecture and speculation." Quoting from opinion of Brown, J., in Swinson *v.* Elandson, 86 Minn. 263; 90 N. W. 534.

See also

> Ruppert *vs.* Brooklyn Ry., 154 N. Y. 90, 94.

That is our case exactly. Plaintiff rests her case upon the testimony of two doctors, neither of whom examined the peaches. One of them did not know what food caused the illness (S. C., p. 71, ll. 37-40), and the other testified that he did not know whether the peaches were good or bad (S. C., p. 61, ll. 27-28). And there was no other evidence to fill these gaps. Whichever way the evidence is regarded there were no "proven facts" from which the jury could find against this defendant. The peaches were not "proved" poisonous, and therefore it could not be inferred that they caused the illness. On the other hand,

the illness was not "proved" to have been caused by the peaches and therefore the jury could not infer that the peaches were defective. Suffice to say it was error to submit the case to the jury on any theory and the Court should have granted a non-suit as a matter of law.

III.

The Trial Court erred in charging the jury that there was an implied warranty in the sale of this can of peaches.

In charging the jury, the learned Trial Court read Section 15 of the New Jersey Sale of Goods Act, 4 Compiled Statutes of 1910, particularly sub-div. 1, which follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

The Court then instructed the jury that the question before it was "solely on the implied warranty" (S. C., p. 229, ll. 32-35) as outlined to them in the statute.

It is true that the statute quoted generally does apply to the sale of personal property under the conditions outlined in the statute. This does not differ from the rule as it existed before the enactment of the statute but is merely declaratory of the common law. (Ward *v.* The Great Atlantic & Pacific Tea Company, 231 Mass. 90, 120 N. E. 225). It is defendant's contention, however, that where food is sold in *a hermetically sealed con-*

tainer, as in the case at bar, the Legislature never intended the statute to apply.

We believe that this exact question has never been squarely before this Court. The application of the statute, or the common law rule which preceded the statute, has been considered by other courts with conflicting results and while none of these decisions is binding on this Court a review of the cases might assist this court in arriving at a just determination of this appeal. One of the earliest cases deciding that there was no implied warranty in the sale of food in sealed containers is *Julian* v. *Laubenberger,* 16 Misc. Rep. N. Y. 646, decided in 1896. Plaintiff ate salmon purchased from defendant in tins and later sued for breach of warranty. The trial took place before the passage of the New York Sales Act and the case was submitted to the jury upon an instruction that there was an implied warranty on the part of defendant that the salmon was wholesome and fit to be eaten. The Court held the instruction to the jury was erroneous and stated, on page 649:

> "The law cannot be so unreasonable as to inject into a contract what neither party had, or could have had, in mind at the time the contract was made. * * * In the progress of affairs, the manner of preparing and sealing food has come to that condition that everybody purchasing ought to be presumed to know that the retail merchant who sells to the consumer food sealed in cans and with which he has no connection other than as a conduit between the packer and the consumer, has no superior means of knowing the contents of the can than the purchaser has."

In 1912 the case of *Bigelow* v. *Maine Central Railroad,* 110 Me. 105, 85 Atl. 396, was decided by the Supreme Judicial Court of Maine. In this

case defendant served canned asparagus on one of its dining cars. Plaintiff became ill and sued the company on an implied warranty. The Court held the defendant not liable and gave the following reasons:

> "The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were accordingly charged with knowledge of their imperfections. *Winsor* v. *Lombard,* 18 Pick. 57; *Bishop* v. *Weber,* 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154. But, upon the state of facts in the case at bar, a situation arises that cannot, in the practical conduct of the canning business, fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the practical use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just."

And in 11 Ruling Case Law 1124, the learned author, discussing the precise question before us, said:

> "While there is authority to the contrary, it comports better with justice to hold that where a dealer sells to his customer an article in the original package in which it is put up by the manufacturer, and the customer knows as much about the article as the dealer and buys it without any representation from the dealer or reliance upon his judgment, knowing that there has been no inspection of it by the dealer, there is no implied warranty, although the dealer knows that the customer buys it for food. No rule of law should imply

> a warranty of that which it is impossible for a defendant to know by the exercise of any skill, industry or investigation, however great. In other words, *neither law nor reason should require impossibilities.*''

There is a long line of decisions by the New York courts involving the sale of food that can be readily inspected by both buyer and seller, such as ice cream, meat or cake. In addition to *Julian* v. *Laubenberger, supra,* there is the case of *Rinaldi* v. *Mohican,* 225 N. Y. 70. In that case the question of whether the New York Personal Property Law applied to the sale of food in cans was raised, although not decided. Here plaintiff sued a retail dealer for breach of warranty, claiming an illness was caused by the consumption of portions of a loin of pork purchased from defendant. (§96 of the New York Personal Property Law is identical with §15 of the Sale of Goods Act of New Jersey), and in writing the opinion for the Court of Appeals, which is the highest court of the State of New York, Mr. Justice Andrews reviewed the application of the law generally to the sale of food products.

Public policy sometimes has been suggested as a basis for holding a seller to an implied warranty and the theory seems to be that, for some mysterious reason, because a person is in the grocery business he should be able to determine the quality of food, even if he did not manufacture it and the food is contained in a can. Whatever unfavorable ''inference'' that can be drawn against a defendant seller because he is in the food vending business Judge Andrews in the Rinaldi case specifically limited to sales of food open for inspection and sold for immediate consumption. For instance, on page 73 of the opinion the following statement will be found:

> "We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inferences. In this we agree with the courts of Massachusetts. (*Farrell* v. *Manhattan Market Company,* 198 Mass. 271-279). But we think further that such a purchase, where the buyer may assume that the seller has the opportunity to examine the article sold, unexplained, is also conclusive evidence of reliance on the seller's skill or judgment. *We here limit the rule.* We do not pass upon the question as to whether it applies to a sale in the original package bought by the vendor from others. In such circumstances it is possible that the inference of reliance should not be properly deduced from the purchase alone."

Aronowitz v. *Woolworth Company,* 134 Misc. Rep. N. Y. 272, was decided in 1929 and involved the sale of canned tuna fish by a retailer. Mr. Justice Lewis decided there was no implied warranty in the sale of food in a tin can although plaintiff relied on the provisions of the New York Sales Act. The Court cited *Rinaldi* v. *Mohican, supra,* and also *Julian* v. *Laubenberger, supra,* and concluded his opinion with the following statement:

> "Mindful of the reservation made by the Court in *Rinaldi* v. *Mohican, supra,* the logic of *Julian* v. *Laubenberger,* 16 Misc. 646, still seems to prevail."

Cohen v. *Dugan Brothers,* 132 Misc. Rep. N. Y. 896, involved a nail in a wrapped loaf of bread. The trial court allowed plaintiff to recover from the retailer for injuries sustained on the theory

of breach of warranty. In denying defendant's motion for a directed verdict on the warranty issue the trial court relied on *Aron* v. *Sills,* 211 App. Div. (N. Y.) 21, and *Cooke* v. *Peoples Milk Corporation,* 90 Misc. Rep. N. Y. 34. The Court was apparently in error as to the holdings of these two cases, because they are clearly not in point. The first was an action by a dealer against the manufacturer of condensed milk. Of one thousand cases sold the dealer by the manufacturer over three-fourths were bulged or bursted and the court held there was a breach of an implied warranty. Obviously the principle of that case does not apply here. The other case was an action for negligence. The question of a warranty was not in issue and it is apparent, therefore, that *Cohen* v. *Dugan Brothers, supra,* is no aid in determining the question presented here.

Other cases with holding similar to those in the above cases could be cited, for instance, *Pevnick, et al.* v. *Kroger Grocery & Baking Company* (see appendix), decided by the Federal District Court for the Eastern District of Missouri, held there was no implied warranty in the sale of canned food by a retailer. The case is unreported but the lengthy opinion, while not citing it, followed the logic of the dissenting opinion in *Ward* v. *The Great Atlantic & Pacific Tea Company,* 231 Mass. 90, 120 N. E. 225, a discussion of which will appear later on in this brief.

There appears to be only one case of importance decided by a higher court holding that the provisions of the Sales Act apply to the sale of canned food and that is the case of *Ward* v. *The Great Atlantic & Pacific Tea Co., supra.* Here plaintiff purchased a can of beans from defendant, a retail dealer, who was not the packer. A stone in the

can injured plaintiff and he sued for breach of an implied warranty. He was allowed to recover.

Chief Justice Rugg, in writing the majority opinion, admitted the situation to be "quite different" from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, "*where there is an opportunity for the exercise of an independent judgment by both buyer and seller*". But at the same time he cited the old Massachusetts case of *Farrell* v. *Manhattan Market Co.,* 198 Mass. 271, 84 N. E. 481, to support his decision. The Farrell case itself involved the sale of a fowl by a butcher and, as Justice Rugg said, that situation is "quite different" from the sale of food in a tin can.

It is only where there is an opportunity to inspect that the rule imposes a just liability on the seller. Where both parties are suffering from the same lack of opportunity to inspect and both parties are aware of this, such a rule becomes an unconscionable hardship on the seller that was never contemplated by either party. It makes one party to the contract the absolute insurer of that which he does not know and has no way of finding out.

In *Race* v. *Krum,* 222 N. Y. 410, a leading N. Y. case, the retailer was sued on an implied warranty for selling poisonous ice cream. The very reason given by the Court in allowing recovery would negative recovery in the case at bar. It was said, at p. 415:

> "The seller has an opportunity which the purchaser does not of determining whether the article is in the proper condition to be immediately consumed."

In *Ward* v. *The Great Atlantic & Pacific Tea Co., supra,* there is a well considered dissenting

opinion by Crosby, J., in which he takes the view contended for in this appeal by defendant. No better reasons for the opinion can be found than those given by the learned Justice himself, which follow:

> "The fact that the cans were sealed made inspection of their contents before the sale impossible. It may fairly be inferred that it was necessary, in order to preserve the contents, that the cans should be sealed. There was no way in which the defendant as a seller could inspect or analyze or otherwise determine the quality or fitness of the contents of the cans before they were sold by him.
>
> "It was his duty to furnish to his customers goods of a reputable brand, properly inspected and prepared in accordance with approved methods, and purchased of a reputable manufacturer. It is agreed that in all respects the defendant fully complied with these requirements. While the plaintiff could make no intelligent selection based upon an observation of the can containing the beans, his situation was the same as that of the defendant. The position of a purchaser and that of a seller in selecting a particular can so as to be able to judge of the quality, wholesomeness and fitness for food of its contents, are identical. Under such a sale of canned goods, it seems plain that the buyer does not rely on the seller's skill or judgment; the buyer knows that the article he purchases is in a sealed can; he knows that it is impossible for the seller to have any more knowledge of the contents of the can than he (the buyer) has. They are in precisely the same situation; they are upon an equal footing. How, then, can it be said that the buyer relies upon the skill or judgment of the seller? How can it reasonably and fairly be inferred from the agreed facts in this case that the plaintiff relied upon the skill or judgment of the defendant in selecting the can sold to him (the

> plaintiff) when the latter was fully aware of the fact that the defendant could not possibly have any knowledge of its contents? In my opinion, upon the facts stated, to infer that the plaintiff relied on the defendant's skill or judgment would be wholly unwarranted. The reasoning of the able opinion in *Bigelow* v. *Maine Central Railroad,* 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627, seems to me to apply with equal force to this case."

Justice Crosby thought the Farrell case which the majority opinion rested upon, was clearly distinguishable and cited *Winsor* v. *Lombard,* 18 Pick. (Mass.) 57, a previous Massachusetts case, in which Chief Justice Shaw pointed out the distinction between the sale of provisions which are open for inspection and those which are sold in sealed packages or closed cans.

Chief Justice Shaw outlined the grounds for holding the vendor of ordinary articles of food to an implied warranty. He thought it might be "reasonably presumed" that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome or unsound or not, but then hastened to say:

> "But these reasons do not apply to the case of provisions packed, inspected and prepared for exportation in large quantities as merchandise."

Thus it appears that the majority opinion in the Ward case was merely an extension of the *general rule* as laid down in the Farrell case, *supra.* It cannot be considered as authority, however, because the Farrell case specifically excepted merchandise of the type involved in *Ward* v. *The Great Atlantic & Pacific Tea Company.* The dissenting opinion was developed around the exception to the general rule as set forth in the

above quotation from *Winsor* v. *Lombard, supra,* and peculiarly enough, the logic of Chief Justice Shaw, in the Lombard case has often been followed by other Courts and writers, although we can find very little well reasoned authority in support of Justice Rugg, who gave the majority opinion.

As far as this State is concerned the question is an open one. The courts of New Jersey have never been called upon to pass upon it, however, there is ample authority for defendant's contention in the well considered opinions of other courts and writers and it is respectfully and earnestly urged that the better rule applicable to the sale of food in its original container is that laid down by the courts in *Julian* v. *Laubenberger, Aronowitz* v. *Woolworth Company, Bigelow* v. *Maine Central Railroad, supra,* and in the dissenting opinion of Judge Crosby in *Ward* v. *The Great Atlantic & Pacific Tea Company, supra.*

CONCLUSION.

Because of the aforesaid errors it is respectfully urged that the judgment be reversed and the complaint be dismissed.

Respectfully submitted,

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WILLIAM L. HANAWAY,
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of Counsel.

Appendix.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE
EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

GERTRUDE PEVNICK, etc., Plaintiff, *vs.* KROGER GROCERY AND BAKING COMPANY, Defendant.	No. 8675 At Law.

FARIS, J.

MEMORANDUM OF ORAL OPINION OF THE COURT.

This matter comes before the Court upon a general demurrer to plaintiff's petition. Such a demurrer, of course, involves the necessity of some slight consideration of the facts relied on by plaintiff to make out her case.

Plaintiff is an infant of the age of thirteen years. She sues defendant, through her next friend, for the alleged breach of an implied warranty, for that certain sealed can of peas, sold by defendant to plaintiff, was found to contain a certain green worm, which plaintiff bit into and a part of which she swallowed, and thus, thereby and therefrom plaintiff became ill, sick and sore, to her damage in the sum of fifteen thousand dollars.

As said, defendant demurs generally, for that the petition of plaintiff fails to state facts sufficient to constitute a cause of action, or warrant recovery of any sort.

The briefs and the argument on both sides put the field of contention upon the single point as to whether there exists an actionable implication of warranty when canned goods are sold in the original package by a retailer, who did not pack the peas, but bought them from the packer, to a consumer, who buys in the usual and ordinary course of business.

True, the petition alleges the existence of a warranty "implied and otherwise", but nowhere sets out how the warranty "otherwise" came about, or how it was made or of what it consisted. I assume, therefore, that such allegation of a warranty "otherwise" was put into the petition by inadvertence, and not for the mere purpose of staying in court a little while, anyway, and I thus assume, because of the directness and candor of the briefs and arguments. Notwithstanding, therefore, that it has been my lot to consider cases in which allegations utterly incapable of proof were made, in order that the case might stay in court for a while, I am assuming that this case is not of that character, and I am taking it as presented by the briefs and arguments, and not at all considering the effect, if any, of the use in the petition of the word "otherwise". This word "otherwise" would, of course, not save the petition from demurrer, because it means so little, if anything.

My attention has not been directed to any applicable local statute, and, since I know of no such statute, I assume that decision of the point up for judgment is to be relegated to the general law, which the federal courts interpret for themselves, unhampered by local decisions. However, no Missouri case is urged, which in my opinion rules the point involved.

The case of Fontroy v. Schirmer, 296 S. W., 235, which was a Missouri case, held a dealer liable for hurts accruing to a purchaser of a bottle of milk containing formaldehyde. But there is a special Missouri statute prescribing the quality of milk and forbidding adulteration (Section 11986, Revised Statutes of Missouri, 1919) which statute has no application to the question presently before the Court.

The case of Smith *v.* Carlos, 215 Mo. App., 488, holds that the keeper of a restaurant, who serves spoiled or putrid fish, is liable to a guest who becomes ill from ingesting such fish.

But these cases are easily to be distinguished from the case at bar, wherein the food dealt with was in the original package, which was a sealed container, bearing, so far as pleaded, no external or observable indications whatever of its unfitness. It is true, that in the case of Smith *v.* Carlos, *supra,* the statement occurs that in effect the restaurant-keeper is held liable on the same theory which renders the seller of other foods liable. Obviously, so far as there is comfort therein for the plaintiff here, in the above statement of the Court, it arises from pure *obiter dictum,* for the latter question was not before the Court, and seemingly the *dictum* occurred *arguendo* merely. I have no present quarrel, however, with either of these Missouri cases, so far as the actual case up for judgment in them was ruled; for, in my view, they are each easily distinguishable, upon the recited facts, from the case at bar.

Plaintiff calls attention to the cases from Illinois and Massachusetts, which upon the facts are on all-fours with the facts here, and on their faces authorities in favor of her contention. (Ward *v.* Great Atlantic, etc., Company, 231 Mass., 90, 120 N. E. 225; Chapman *v.* Roggencamp, 182 Ill. App., 117.) But both of the above cases, and others from Illinois and Massachusetts, rode off on state policies, reflected by certain local statutes, which statutes are not involved in the instant case.

I have found no federal court case squarely dealing with the precise point here involved; that is to say, no case in which the food product sold or dealt with, was sold by a retailer to the consumer, in a sealed container. But the cases of Nichols *v.* Baking Company, 34 Fed. (2d) 141, and Horn, etc., Baking Company *v.* Lieber, 25 Fed. (2d) 449, seem to be controlling in principle. In the Nichols case, *supra,* plaintiff therein purchased from a manufacturer (not from the retailer, as here) a loaf of bread, which containing a cockroach made the purchaser who ate it ill. It was held, absent evidence of negligence, that plaintiff could not recover.

The facts in the Lieber case were that plaintiff was injured by a tack in a dish of strawberries served to plaintiff by the keeper of a restaurant; held, absent a showing of negligence, no recovery could be had.

It is scarcely necessary to say that both of the above cases were stronger in favor of the plaintiff's right to recover than is the case at bar.

In the Lieber case, it seems that both negligence and implied warranty of fitness were relied on as grounds of recovery; yet, it was held that, absent evidence of negligence, no recovery could be had.

I am wholly unable to see any basis for the application of the doctrine of implied warranty among the facts of the case before me. It would seem that in a case where the condition of the article sold was at the time of the sale just as apparent to the buyer as it was to the seller, there is no basis for the doctrine of implied warranty. Obviously, such a situation existed here. The container was a tin can; it could not be examined unless it were opened. To have opened it at the time of sale would have been uneconomical in time, inconvenient in practice, and would have caused deterioration of its contents. And the point is considered as of the situation of the parties, equally to see and observe the condition of the goods at the instant of sale, and not when the article was being prepared for eating. At the latter time, clearly, full and ample opportunity was afforded the plaintiff to examine the contents and condition of the food, an opportunity never afforded to the dealer at any time.

I can not be brought to the view that an implied warranty may arise when the seller knows no more and can see no more than the buyer knows and sees. Of course, the case is not one of an express warranty, which rests on express contract, and which perhaps would bind the warrantor, whether he was ignorant or advised of the condition of that which he warranted; nor is the case one governed by any apt statute or state policy. In such a situation, I am impressed with what is said upon a similar situation, by the learned author of Ruling Case Law, where, discussing the precise situation now before me, it is said:

> "While there is authority to the contrary, it comports better with justice to hold that where a dealer sells to his customer an article in the original package in which it is put up by the manufacturer, and the customer knows as much about the article as the dealer, and buys it without any representation from the dealer or reliance upon his judgment, knowing there has been no inspection of it by the dealer, there is no implied warranty, although the dealer knows the customer buys it for food. No rule of law should imply warranty of that which it is impossible for a defendant to know by the exercise of any skill, industry or investigation, however great."

So, I conclude that not only is the weight of authority against the plaintiff, but the reason of the thing likewise opposes her contention. Especially is this so, in the federal courts, where the cases are well-nigh unanimous in forbidding recovery in such a case as this. Perhaps in the state courts authority is about equal, for and against the view I am constrained to take here. But even there, for the most part, the cases which eke out an implied warranty in such a sale are bottomed on local statutes, or based on a so-called state policy, which, in turn, was based on safeguards for public safety. While I subscribe to the view that the dollar should not in law be put above the public health, life or limb, I yet have the view, on the other hand, that a dollar should not be taken from one person and given to another, when under the facts existing he who is mulcted of the dollar, has been guilty of no fault, either of omission or commission, and when such taking must be justified, if at all, by a mere attenuated fiction of the law. This fiction of the law is the implied warranty herein urged, which is a right law when either duty or opportunity to see, know and examine is afforded, but a wrong law when opportunity to examine is afforded to the buyer in using the article, but not to the seller in selling it.

I pass over other most obvious evils, which would follow fast on the heels of the view that a

retail seller of food, in a sealed, opaque and original container, is an absolute insurer of such food. These things are not pertinent here, perhaps, because they involve imagination, room for error in following the sequence of cause and effect, inducement to commit perjury, and disadvantages accruing to a defendant from a plaintiff's eating or drinking up the evidence in the case. I hardly think the occasional ingestion of a green worm would warrant the opening up of so fertile a field of doubtful litigation as is here sought. But this merely in passing.

The demurrer will be sustained.

February 26th, 1930.

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New Jersey Court of Errors and Appeals

MARTHA GRIFFIN and MABEL BERNI, Plaintiffs-Appellees, vs. JAMES BUTLER GROCERY COMPANY, Defendant-Appellant.	Action at Law. On Appeal

BRIEF FOR MARTHA GRIFFIN, PLAINTIFF-APPELLEE.

Statement of Facts.

The judgment of the Supreme Court, from which defendant appeals, resulted from a trial before Judge William B. Mackay with a jury in the Passaic Circuit on May 5, 6 and 7, 1930 (Case, page 11).

Plaintiff, Martha Griffin, bought on June 20, 1928, of defendant a tin can of peaches. Carrying the can to her home, she opened it just before supper of the same day, and poured its contents—peaches and juice—into a clean glass dish and served them, in individual glass dishes (Case, page 33, lines 1-6), to *four* only of the *five* persons who sat around her table. An adult daughter (plaintiff, Mabel Berni) and her two children, aged three and four years, and plaintiff, Martha Griffin, herself ate of the peaches and a few hours later became violently sick, one of the children dying on June 21, 1928, and the other child about the 26th of that month. *William Griffin,* an adult son of plaintiff,

Martha Griffin—the *fifth* at the supper table—*who did not eat of the peaches or juice, remained well* (Case, page 33, lines 17-28).

The meal was simple,—in addition to the peaches, "a little toast and tea" and for William Griffin who declined the peaches, an egg besides (Case, page 21, lines 11-13, and page 95, lines 20-40, and page 32, lines 19-25).

On the trial of this action brought by Mrs. Griffin and her daughter for the recovery of damages for their suffering, impairment of health, medical expenses, and loss of earnings (Case, pages 6-9), the daughter, Mabel Berni, was non-suited on the ground of the want of privity of contract between her and defendant (Case, page 110, last 4 lines, and page 111, lines 1-20), and the cause submitted to the jury as to plaintiff, Martha Griffin, on the question of a breach by defendant of an implied warranty (Case, page 226, lines 20-40, and page page 227, lines 1-27, and pages 228-236) of the wholesomeness and fitness of the peaches for human consumption. The jury returned a verdict for $3000 for this plaintiff, and a judgment for her against defendant for that sum, with costs, was duly entered.

With the testimony of the three attending physicians we will deal under another caption.

Before addressing ourselves to the argument, we direct attention to the fact that the *2nd, 3rd and 4th "Grounds of Appeal"* (Case, pages 2 and 3) —all of which touch the refusal of the trial court to direct a verdict in favor of defendant—*are not available to defendant,* because no exception to that action of the court was asked or granted (Case, page 226, lines 20-40 and page 227, lines 1-30). The only exception then taken was taken by counsel for plaintiff to the action of the trial court in limiting his client's case to an implied

warranty. (The complaint is so phrased as to admit of a recovery, whether the warranty is express or implied: Case, pages 6-9.)

In the circumstances the only "Grounds of Appeal" with a basis in the record are the 1st (complaining of the refusal to non-suit) and the 5th (objecting to so much of the charge as applies the Sale of Goods Act to the facts of the case).

ARGUMENT.

I.

There was no error in the refusal of the trial court to non-suit plaintiff, Martha Griffin.

The evidence is that the five persons, whose ages ranged from 62 (Case, page 30, line 12) to 3 years (Case, page 74, lines 20-21), who sat at supper in Mrs. Griffin's home on June 20, 1928, were then all in good health. Mrs. Griffin testified that she was then in good health (Case, page 30, lines 1-10) and in fact "I never was sick" before (Case, page 24, lines 15-16). Dr. Levine, the family physician (Case, page 29, last 4 lines), confirms her testimony (Case, page 44, lines 1-8), as far as his knowledge went. Her daughter, who with the children made her home with her mother, said of Mrs. Griffin that she "was very, very active"—"Worked all the time, never lost a day work" (Case, page 79, lines 21-25). The two children "were very healthy children; there was nothing the matter with them" (Case, page 79, lines 28-30). Their aunt, Mrs. Campana, who took care of them while their grandmother and mother worked (Case, page 102, lines 1-16), testified "They were both two

healthy children" (Case, page 102, lines 26-27). Mrs. Berni, the mother of the children, said that she worked "every day" (Case, page 79, lines 26-27). William Griffin swore that the appearance both of Mrs. Griffin and Mrs. Berni was on "June 20, 1928, very good" (Case, page 86, lines 1-40).

While we are not concerned in this form of review with the weight of the proofs, there can be no impropriety in observing that this testimony was unchallenged.

It is undisputed also that only four of the five persons at supper became ill and that the only one of the five whose health remained unaffected and undisturbed was he who had declined the peaches. William Griffin—and his testimony accords with all the proof on this head—said that he found both his mother and sister to be sick on the following day (Case, page 90, lines 17-38); that he himself was not sick and had not "partaken" of the peaches (Case, page 91, lines 22-29); and that both children were then sick (Case, page 95, lines 1-13).

We have stated in our "Statement of Facts" precisely of what articles the plain evening meal of June 20th consisted, and do not recur to that subject on that account. The facts are not controverted.

Mrs. Berni, who on June 20th, 1928, worked as a saleslady in a department store, ate lightly all that day; in accordance with her custom, she had no breakfast (Case, page 74); returning home for lunch, she had nothing but toast and tea (Case, page 75, lines 1-25). Mrs. Griffin, who was then employed in the kitchen of the Paterson Y. M. C. A. (Case, page 23, lines 22-25), testified that she had nothing but tea and toast for breakfast on the morning of the day in question (Case, page 25, lines 14-17); did not recall what she ate at noon, but denied that she had "lamb stew" either then or

the preceding evening (Case, page 26, lines 27-36), or any kind of meat (Case, page 31, lines 18-40), "I am not a meat eater, and I didn't have none of them" either for herself or her household (Case, page 32, first 2 lines).

The evidence is that between the time she opened the can of peaches, poured its contents into a large glass dish and served it, "about fifteen minutes" elapsed (Case, page 33, lines 1-13).

For the nature of the disorder of the stricken members of this household, we turn to the testimony of the attending physicians.

Dr. Israel Levine, a physician of some 25 years' practice, associated with a Paterson and also a Passaic hospital, and for many years the Griffin family doctor, said that he visited the plaintiff, Mrs. Griffin, on June 21, 1928 (Case, pages 39-40). (Another physician, Dr. O'Grady, seems to have been then already called in to prescribe for the children or one of them: Case, pages 22 and 77) He got a history of the case which ran to the effect that Mrs. Griffin had been in bed, had vomited, had "a great deal of pain in the abdomen", had eaten "some canned peaches" and only toast and tea besides on the "night prior to my visit"; he was shown, at his request, "the vomit"; "it disclosed some undigested food, which appeared yellowish in appearance and soft in character, and with the history and my observation, both together, I thought of the peaches" (Case, pages 40-42), and ascribed her disorder to them, and diagnosed her malady as "Ptomaine poisoning" (Case, page 44, lines 9-12). He continued to treat her "between two and a half or three months" and even later (Case, page 43, lines 31-35), and she was confined to her bed for "about four weeks".

He described her subsequent symptoms:

> "After the cramps and the vomit, two or three days afterwards, or a day probably—probably a day and a half—this was followed by diarrhea; this diarrhea kept up for probably a week without being able to check, which was followed by dysentery * * * which kept up for three weeks or a little bit over, and then that was checked. During that time she lost considerable weight. She has never been able to regain her former physical condition."

He said of Mrs. Berni that he made the same diagnosis and obtained from her the like history; her symptoms were similar; she "had diarrhea, vomiting and pain", but not dysentery (Case, page 49, lines 28-40), "she showed improvement about two months after the onset of the disease (Case, page 50, lines 10-14).

With the treatment of the children he had nothing to do; "the first time I called, I found one dead, and the second day I called, I found the second child had been sent to the hospital" on the advice of Dr. Veenstra (Case, page 50, lines 18-26.)

Finally he was asked and answered:

> Q. Doctor, may ptomaine poisoning be obtained through canned fruit? A. That is the only thing that occurs to me; again, it could be possible that it had been a toxic condition in the can, which could be done. (Case, page 50, last 5 lines).

Under cross-examination he said that he saw in the vomit "the resemblance of peaches", * * * * "some composition, which was of a yellowish character, which resembled the contents of a peach", and that no chemical test was made of it (Case, page 53). "The symptoms were ptomaine poisoning, to see, and what I looked was the condition of

the vomit." Pressed about Mrs. Griffin's symptoms by counsel for defendant, he justifies his conclusion that she was suffering from ptomaine poisoning:

> The symptoms of the woman lying in bed, with severe pain, prostration, which was then followed by a slight distension of her abdomen; then followed a few days afterwards, diarrhea occurred, which was very, very pronounced; then it was followed by dysentery; *all during this time, the rise in temperature was so slight that no other illness but ptomaine poisoning was the cause of these symptoms, which are the symptoms of ptomaine poison.* (Case, page 60, lines 16-26)

If the food had been good, she would have digested it, he said, without vomiting or without poisoning" (Case, page 61, lines 23-26). Over-indulgence might bring about vomiting, he admits, "but it wouldn't cause ptomaine poisoning; *if the peaches were right, a person would be normal again, would be well again, after throwing them up* (Case, page 62, lines 1-23).

He concluded with the statement that the symptoms of ptomaine poison and food infection are "almost the same thing", and that only a laboratory examination can distinguish them (Case, page 62).

Dr. William Veenstra, who had practiced medicine for twenty years, an associate surgeon of Paterson General Hospital, saw the child, James, "the latter part of June", 1928, and learned from his mother that he had eaten "canned peaches"; he examined the boy; "The child was in the state of collapse; it had a temperature of very high, I think it was around 104 or 105; abdomen was actually distended, and the child was in a condition of profound shock", the history was that the child "had vomited" (Case, pages 63-65).

> Q. What was your diagnosis, doctor, from the symptoms that you observed? A. Gastro enteritis, due to a food poisoning. (Case, page 65, last three lines)

Asked what food poisoning is due to, he replied that it is *a poison generated in canned goods,* and it is supposed to be due to some metallic substance in the solder that is used to solder the can (Case, page 66, lines 26-34). It is a chemical poison "which cause a chemical change in the intestinal mucosa, and will produce symptoms of intestinal distress" (Case, page 67, lines 1-25).

On account of the poverty of the family, he sent the boy to the hospital where he died (Case, page 67, lines 27-40), and "died of intestinal toxemia, that was due to poison, not from any bacterial infection" (Case, page 68).

He repeats on cross-examination that the boy's death was due, not to ptomaine poison, but food poison (Case, page 71). What food caused his death, Dr. Veenstra did not know and could not tell except "*only from the history that they gave me, and the fact that two or three—or three other members of the family were ill, and that a child had died the day before, and they had the same symptoms that that child had*"; and answering a further question, he adds that if the family had had "meat pie" the day before, "why, then, they would have had an entirely different line of symptoms, they would have ptomaine poison. You see, that was protein. The child did not die from ptomaine poisoning; the child died from food poison" (Case, page 71, last 4 lines and page 72).

He adds that if the family had been "*indulging*" in canned peaches, their stomachs would be distended because "they would get *more* of the poison" (Case, page 73).

Mrs. Berni had symptoms similar to the other sickened members of the family. All day following the night of the supper she vomited, had running bowels, became so ill that she went to bed in the evening (Case, page 77), where she remained "six weeks" and fell in weight from 145 to 90 pounds. (Case, page 78).

Dr. Grady, who treated the child who died first, was not called because of illness and age (Case, page 100).

With the testimony which we have either quoted or summarized, what prima facie case had plaintiff made? Five persons in sound health, ranging in years from advanced middle-life to early childhood, sat at supper. The meal consisted of toast, tea and canned peaches. The youngest child had milk to drink (Case, pages 96-97), and an adult a "boiled egg" (Case, page 87, lines 22-24). All ate canned peaches save one, and within a few hours all, young and old alike, save the one who shunned the canned fruit, fell violently—and half the number fatally—ill. All who fell exhibited the like symptoms—vomiting, intestinal pain, diarrhea, distension of the stomach, extreme prostration. The attending physicians agree that the common illness was caused by something eaten. They agree that the history of the cases and the symptoms observed in the patients point to the canned peaches as the cause of the illness. One doctor attributes the illness to ptomaine poison or "again, it could be possible that it had been a toxic condition in the can" (Case, page 50, last 5 lines); the other uncompromisingly asserts his professional opinion to be that a chemical poison in the contents of the can was the direct source of the illness.

What other source of poison to the human system was disclosed by the proof which could have af-

fected this family? Or which could have left them with these symptoms?

There is no attempt here to build a presumption upon presumption. The physicians say—one of them flatly—that the disease which these persons developed originated from chemical poison and that that chemical poison came out of the fruit which was contained in the can, that the facts point to that and to nothing else. What counsel for defendant overlook is the fact found by these physicians —the fact that the illness resulted from a chemical poison in food lately eaten and the utter absence of proof that any food lately eaten was likely to have contained that kind of poison except the canned peaches. Dr. Veenstra said that if the sickness had been produced by bacteria in the food consumed, the symptoms of illness would have been markedly dissimilar from those observed.

If, on the other hand, the diagnosis of Dr. Levine was correct, and this family were suffering from ptomaine poisoning, there is still evidence to support the inference by the jury that the canned peaches occasioned their illness, and this is so because those who ate of the peaches all fell sick with symptoms all in common, and the guest who refused the peaches remained in health. These facts alone required the submission of the case to the jury.

In *Chapman* vs. *Roggenkamp,* 182 Ill. App. 117, plaintiff purchased a can of peas of a retail grocer. Three days later, she opened the can, rinsed the peas, put them in a saucepan with some milk, a little flour and some butter and salt, and cooked them. When the can was opened, the peas appeared to be good. The lunch served to her and to her three children consisted of the peas with other articles of food. The peas were consumed by these four except a few which a servant "tasted". Short-

ly afterwards plaintiff's husband, his brother and a guest ate luncheon, having the same articles of food as plaintiff and her children had eaten, *with the exception of the peas.* Shortly after plaintiff and her three children had eaten, all became extremely ill, feeling dizzy and vomiting. The household servant became ill but to a lesser degree than plaintiff and her children. *None of the men became ill.* One of the physicians who attended the plaintiff and her children in their illness testified that he found them suffering from "violent vomiting and purging"; that plaintiff was "extremely prostrated, very weak and almost pulseless" and that from what he personally observed at the time and from the history of the case he formed the opinion that plaintiff "at that time was suffering from ptomaine poisoning." The court said:

> It is contended by counsel for defendant that the evidence does not establish that plaintiff's illness and sufferings were caused by the peas. *This was the question for the jury under all the facts and circumstances in evidence.* From the verdict it is evident that the jury believed that plaintiff's illness was caused by her eating the peas in question, and, in our opinion, the verdict is amply supported by the evidence.

In *Davis* vs. *Van Camp Packing Co. (Iowa)*, 176 N. W. 382, 17 A. L. R., 649, the second head note reads:

> The jury must determine whether or not illness of one after eating canned beans was caused by them, where the evidence shows that all who partook of them were ill, and no others partaking of the same meal were so, where no other adequate cause of illness is shown.

The contention of the Packing Company there,

as of the defendant here, was that "the evidence is not sufficient to show that the eating of the pork and beans caused, or was the approximate cause of, plaintiff's sickness." The facts were that the family consisted of the father and mother and seven children. Three of the children were not at home for the meal at which the beans were eaten, and did not partake of any of the beans, nor did the father or mother. One of the younger children ate nothing but beans for that meal, and afterwards died of ptomaine poisoning, and the other three children who ate the beans were taken sick soon after, some remaining seriously ill for several weeks. All who ate of the beans were sick after eating. The father and mother and the three other children who did not eat the beans were not sick. The physician said that ptomaine and metallic poisoning would be caused by contaminated pork and beans, and that the usual cause of ptomaine poisoning is food contamination. The court said: "Without restating the evidence we are of the opinion that the jury could have properly found therefrom that the eating of the beans by plaintiff was approximate cause of his illness * * * * the circumstance that all those who ate the beans were made sick, while those who did not partake were not ill, is, to our mind, significant. * * * As to this feature of the case, we think there was a jury question?"

So in the instant case, the fact that of the five persons at the table, the four who ate the canned peaches soon afterwards fell gravely ill, while the one who abstained from eating them stayed well, raised a jury question, as to whether the canned peaches was not the proximate cause of plaintiff's illness, and the trial court rightly submitted the case for their determination.

II.

The trial court committed no error in charging the jury that defendant impliedly warranted the canned peaches to be wholesome and fit for human consumption.

The charge to the jury, quoting from the opinion of this court (Case, page 230), contains these words:

> Considerations of public health and common comfort may even imperatively require such an alteration of the established law, but the fact nevertheless remains that alterations of established law based upon such considerations are essentially legislative in character.

The question is, not what the law ought to be, but what it is.

The Sale of Goods Act, 4 Comp. Stat., page makes no exception in favor of the seller by retail of sealed goods manufactured by a third party. It runs:

> Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment, *whether he be the grower or manufacturer or not*, there is an implied warranty that the goods shall be reasonably fit for such purpose.

In this case, the plaintiff went to defendant's store at which she had been accustomed for two years to trade, and bought of the clerk of whom she was accustomed to buy (Case, page 16, lines 25-40) five pounds of sugar and a pound of butter, and as she was about to depart, he said, "Won't

you try our peaches" (Case, page 15, lines 25-30) * * * "We have got them on sale," he said, "a large can," he says, "for seventeen cents," he says, "and they are a good large can" (Case, page 20). She accepted and paid for them.

We think defendant's brief correctly says that the Sale of Goods Act is declaratory merely of the common law.

The English cases seem to hold that the retail dealer of canned goods impliedly warrants the wholesomeness of the article. These cases are cited in 24 R. C. L., page 196, Note 16.

In the jurisdiction which is second in point of weight, prestige and authority to none in this country, it is held that a retailer of canned goods impliedly warrants that it is wholesome and fit for food. Ward vs. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242.

In Chapman vs. Roggenkamp, 182 Ill. App. 117, hereinbefore cited under a former caption, it was held:

> "In the sale of all provisions by a retail dealer for immediate domestic use there is an implied warranty of the fitness and wholesomeness of such provisions for consumption."

The decision rested upon the authority and reasoning of an earlier case in that jurisdiction—Wiedeman vs. Keller, 171 Ill. 93, in which a retail dealer in meats sold plaintiff pork to be used in her family, which turned out to be unfit for food, although the seller was not aware that it was diseased. The court held that where articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that

there should be an implied warranty on the part of the vendor that the article sold is sound and fit for use for which it was purchased.

In Williston on Sales, Section 242, page 481, the author observes:

> The imposition of absolute liability on the dealer who sells canned goods of a reputable manufacturer has been denied by the Supreme Court of Maine on the ground that the seller cannot possibly discover that a particular can is defective and that it is therefore unjust to subject him to liability.

This, it may be noted, is precisely the ground taken by those courts which hold that a retail vendor of sealed goods for human consumption does not impliedly warrant their fitness for such use. The argument is met by this author:

> *The same argument, however, may be made to any implied warranty not only of food but of other articles where the seller could not discover the defect.* Accordingly if canned goods are to be made an exception to the general rule governing sales of food, the whole law of implied warranty should be revised and placed on the basis of negligence. But the general principle of the common law is opposed to this, and certainly if a dealer is to be made liable for injuries caused by defective goods where he has been guilty of no fault, the reasons are stronger for holding him liable for selling defective food than in any other kind of sale. According to the weight of authority presumably for these reasons, a dealer is liable for selling such food even though in cans of a reputable brand.

In Liberman vs. Sheffield-Farms-Slawson-Decker Co., 191 N. Y. S. 593, plaintiff was injured by worms in a bottle of milk sold by the defendant but bottled and sealed by a third party. The de-

fendant was merely the distributor. The court held that a warranty of fitness was implied.

In Sloan vs. F. W. Woolworth Co., 193 Ill. 620, a purchaser from a retail dealer was poisoned by the contents of a can of herring. The can bore a label indicating that it was packed in Norway. Plaintiff recovered on the theory of a breach of an implied warranty.

In Ward vs. Great Atlantic & Pacific Co. *supra,* the court said:

> There appears to us to be no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. * * * it places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer.

In those jurisdictions in which the courts have decided that an exception to the general rule exists in favor of a retail dealer of canned goods, they have "ingrafted" the exception. As Justice Swayze said in the case quoted by the trial court in the present action, that is in the province of the Legislature and not of the judicial branch of the Government.

Respectfully submitted,

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with Martha Griffin,
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