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Writ of Certiorari

(Filed Nov. 13, 1934)

New Jersey, ss. The State of New Jersey

To: Honorable Albert H. Holland, (L. S.) Judge of the Court of Common Pleas in and for the County of Morris; and E. Bertram Mott, Clerk of said Court.

Greeting:

We being willing, for certain reasons to be certified of and concerning a certain order, determination and judgment made by Honorable Albert H. Holland of the said Court of Common Pleas, in and for the said County of Morris, filed October 8th, 1934, in a certain proceeding brought on behalf of Lottie A. Miller, petitioner, against Minnisink Oil Co., Inc., a corporation, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, do command you, that the said order, determination, proceedings, and judgment, together with a transcript of the evidence and all proceedings for the making of the same and all things touching and concerning the same, as fully

and entirely as before you they remain, or are in your custody and control, you do certify and send together with this writ, to our Justices of our Supreme Court of Judicature at Trenton, on the 1st day of December, 1934, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, THOMAS J. BROGAN, Chief Justice of our said Supreme Court, at Trenton, this 12th day of November, 1934.

FRED S. BLOODGOOD,
Clerk.

COLLINS & CORBIN,
Attorneys.

I allow this writ. Let it be sealed.

J. E. BODINE,
Justice of Supreme Court.

Dated Nov. 12, 1934.

Return to Writ of Certiorari

(Filed Dec. 1, 1934)

State of New Jersey, }
County of Morris, } ss.:

We, Albert H. Holland, Judge of the Common Pleas Court in and for Morris County, New Jersey, and E. Bertram Mott, Clerk of the Court of Common Pleas in and for Morris County, New Jersey, do hereby certify and return to the Supreme Court of judicature of the State of New Jersey, the judgment of the Court of Common Pleas for the County of Morris, and the determination and award of all proceedings made and given by the Workmen's Compensation Bureau of the New Jersey Department of Labor, in the Compensation proceedings of Lottie A. Miller, petitioner, vs. Minnisink Oil Co., Inc., a corporation, respondent, together with all things touching and concerning the same, as by the within writ to us directed and as commanded.

In witness whereof, we have hereunto set our hands and the official seal of said Court, this 28th day of November, A. D. 1934.

Albert H. Holland,
Judge of the Court of Common Pleas,
Morris County, New Jersey.

E. Bertram Mott,
Clerk of the Court of Common Pleas
Morris County, New Jersey.

Petition for Compensation

(Filed Jan. 9, 1932)

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Trenton, N. J.

DEPENDENT'S CLAIM FOR COMPENSATION

LOTTIE A. MILLER,
Petitioner,

v.

MINNISINK OIL CO., INC., a corporation of New Jersey,
Respondent.

Date of Accident November 4, 1931

Attorney for Petitioner, Irving Youngelson, 14 W. Blackwell St., Dover, N. J.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent?—George B. Miller

2. Where did decedent live?—7 East McFarlan Street, Dover, New Jersey

3. Sex of decedent—Male 4. Date of birth of decedent—September 18, 1894

5. Give below, in reference to each person

claimed to be dependent upon the deceased at the time of accident or death:

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Lottie A. Miller	36	Feb. 11, 1895	Wife
George Wm. Miller	13	Jan. 9, 1918	Son
Joseph B. Miller	6	Jan. 14, 1925	Son
Alice N. Miller	5	Apr. 10, 1926	Daughter

6. By whom was decedent employed at the time of accident? (Give name and business address)—Minnisink Oil Co. Mt. Pleasant Turnpike, Whippany, New Jersey.

7. What was the business of the employer?—Sale of gasoline and oil, operated a gasoline station.

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him?—No

9. Did he receive such notice from the employer?—No

10. Did the employer have knowledge of this accident?—Yes

11. Did you notify the employer of this accident?—Yes

12. If so, on what date—November 5th, 1931

13. Have you made claim to the employer for compensation?—Yes

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident?—Manager of gasoline station and greasing automobile at the time of the accident.

15. When did the accident happen?—November 4th, 1931 at about 5 o'clock P. M.

16. Where did the accident happen?—Sunoco Gas Station, 24 E. McFarlan St. Dover, N. J.

17. What was the nature of the accident, and how did it happen?—Deceased was working in the pit and greasing a customer's automobile. While doing so, his head received a terrific blow on the car resulting in cerebral hemorrhage from which he died on November 7th, 1931.

18. Did deceased work any after the accident?—Yes, about 5 hours

19. If so, give date he was compelled to stop work—November 5th, 1931

20. Give date of death—November 7th, 1931

21. Were his wages fixed by piece work?—No

22. If so, what was his average weekly wage?——

23. If wages were fixed by the hour, state rate per hour——

24. Give number of hours in an ordinary working day—11 hours

25. Give number of days in an ordinary working week—7 days

26. State the amount of weekly wages—$37.50 plus commissions averaging $72.00 per month.

27. How much money have you received from the employer as compensation (not medical aid) since the accident?—None

28. Has the employer promised to pay you any compensation?—No

29. If so, how much?——

30. Was medical aid required?—Yes

31. If so, was this service furnished by the employer?—No

32. What other sum did you expend for medi-

cal, surgical or hospital service?—$57.00 Funeral expenses $500.00

33. Give name and address of physician and hospital—Dr. J. L. Hegner, 60 Park Place, Morristown, N. J.; All Soul's Hospital, Morristown, N. J.; Dr. H. E. Gilland, 16 E. Blackwell Street, Dover, N. J.

34. What other facts are there which you believe important?——

35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing?—Yes.

36. Respondent is insured with Standard Accident Insurance Company, 47 Clinton Street, Newark, New Jersey.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

Lottie A. Miller (Petitioner)
7 E. McFarlen St. Dover N. J.

Petition for Compensation

State of New Jersey }
County of Morris } ss.

Lottie A. Miller of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

Lottie A. Miller
(Petitioner)

Subscribed and sworn to before me this 8th day of January 1932 at Dover, N. J.

Margaret C. McCullough
Notary Public of N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

To the Respondent

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within ten days from the receipt of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

Workmen's Compensation Bureau,
W. E. Combbs,
Secretary.

Answer to Petition

(Filed Jan. 19, 1932)

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Trenton, N. J.

RESPONDENT'S ANSWER TO DEPENDENT'S CLAIM PETITION

LOTTIE A. MILLER, *Petitioner,* *v.* MINNISINK OIL CO. INC., a corporation of New Jersey, *Respondent.*	Claim Petition No. 19962

Attorney for Respondent, Wm. B. McMichael, 9 Clinton Street, Newark, N. J.

In answer to Claim Petition filed in this case:

1. What was decedent's name?—George B. Miller

2. Where did decedent reside?—7 East McFarland St., Dover, N. J.

5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify—Respondent does not admit dependency

6. Was the decedent in your employ at the time of the accident?—There was no accident

7. State your business—Distributors of petroleum products

8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him?—no

9. Did you give such notice to him?—no

10. When did you first have knowledge of this accident?—there was no accident

11. Did you receive notice of this accident from the Petitioner?—no

12. If so, on what date?——

13. Has any claim for compensation been made?—a claim has been filed

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident?—there was no accident

15. When did the accident happen?—there was no accident

16. Where did the accident happen?—there was no accident

17. What was the nature of the accident, and how did it happen?—there was no accident

18. Did the decedent work after the accident?—there was no accident

19. If so, give date he stopped work——

20. Give date of death—the claim petition states Nov. 7, 1931

21. Were his wages fixed by piece-work?——

22. If so, what was his average weekly wage?——

23. If wages were fixed by the hour, state rate per hour——

24. Give number of hours in an ordinary working day——

25. Give number of days in an ordinary working week——

26. State the amount of weekly wages—$37.50

27. How much have you paid as compensation (not medical aid) since the accident?—none

28. Have you promised to pay compensation?—no

29. If so, how much?——

30. Was medical aid required?——

31. If so, did you furnish all the medical, surgical, or hospital services, or other expenses of last sickness?——

32. Between what dates was service rendered?——

33. Give name and address of physician and hospital rendering service at your direction——

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your reason for this conclusion—Respondent will controvert this case on the ground that petitioner is not entitled to compensation benefits inasmuch as decedent did not meet with an accident nor was his death in any wise causally related to a trauma

MINNISINK OIL COMPANY (Respondent)
Mt. Pleasant Turnpike, Whippany, N. J.
By: /s/ WM. B. MCMICHAEL
Attorney for Respondent

Case

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Morristown, Morris County District

LOTTIE A. MILLER,
Petitioner,
v.
MINNESINK OIL COMPANY,
a corporation,
Respondent.

February 19, 1932.

Before—Honorable JOHN C. WEGNER, *Referee.*

APPEARANCES:

FRANK C. SCERBO, Esq., for the Petitioner.
WM. B. MCMICHAEL, Esq., for the Respondent.

LOTTIE A. MILLER, the petitioner, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. You are the petitioner in this case, Mrs.—you are the wife of George Miller? A. Yes.

Q. You are the widow, I should say? A. Yes.

Q. And you are bringing this action in court for compensation for his death? A. Yes.

The Court: I will adjourn the case at this point.

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically before me at the time, place and date hereinbefore set forth.

JOHN C. WEGNER,
Referee.

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by me at the time, place and date hereinbefore set forth.

R. BUCHMAN,
Court Reporter.

Case

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Morristown, Morris County District

LOTTIE A. MILLER,
Petitioner,
v.
MINNESINK OIL COMPANY,
Respondent.

March 18, 1932.

Before—Honorable JOHN C. WEGNER, *Referee.*

APPEARANCES:

FRANK C. SCERBO, Esq., for the Petitioner.
W. B. MCMICHAEL, Esq., for the Respondent.

Mr. Scerbo: If your Honor please, I would like to see if Mr. McMichael will agree on certain questions of dependency, so as to limit the case down as much as we possibly can. I notice in the answer filed by the respondent, there was no dependency admitted. Do you seriously contest that claim?

Mr. McMichael: This case is entirely controverted throughout. Everything is controverted.

Mr. Scerbo: I understand the actual meat of the case is controverted—the actual cause of death possibly.

Mr. McMichael: I never admit dependency. You have to prove it, particularly in this case; we deny everything.

Mr. Scerbo: I have the certified record of the birth of two of the children. The third certificate of birth, which I have here, upon showing that to the widow, she says that that is the certificate of a boy that is already dead, so that I will have to supply the third certificate to your Honor at a later date or probably a little later today. I made a call to the clerk of the township and he is not looking it up. However, I have the birth certificate of two of the children and the third one I will file later.

The Court: In your petition, you state Joseph B. I suppose that is Joseph Benjamin?

Mr. Scerbo: That is right.

The Court: Then you also have the certificate of Alice M.

Mr. Scerbo: Yes.

The Court: Now, how about the other child that you claim is dependent.

Mr. Scerbo: I have not that birth certificate at this time, your Honor, but I shall produce it later.

The Court: Are you willing to admit those?

Mr. McMichael: Which birth certificates are they, your Honor?

The Court: The birth certificates of Alice M. and Joseph B. I understand that the birth certificate of George is not available at this time.

Mr. Scerbo: I will supply that later, your Honor.

Mr. McMichael: All right.

(The birth certificates referred to were received in evidence and marked as follows: the birth certificate of Alice M. Miller was received in evidence and marked "P-1," dated March 18, 1932, and the birth certificate of Joseph Benjamin Miller was received in evidence and marked "P-2," dated March 18, 1932.)

MRS. LOTTIE A. MILLER, the petitioner, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. What is your name? A. Lottie A. Miller.

Q. What was your age at your last birthday? A. Thirty-seven.

Q. Thirty-seven? A. Yes.

Q. Where do you live? A. Dover, 7 McFarland Street.

Q. Are you married? A. Yes.

Q. You are married now? A. Not now.

Q. You were married? A. Yes.

Q. What is the name of your husband? A. George Benjamin Miller.

Q. George Benjamin Miller? A. Yes.

Q. And what happened to him?

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Is he now dead? A. He is now dead.

Q. You have not remarried since? A. No.

Q. I wish to show you two birth certificates, marked "P-1," and "P-2," the first one, "P-1," is the birth certificate of Alice M. Miller, calling your attention to the mother's name therein, is that you? A. Yes.

Q. You are the mother of Alice M. Miller? A. Yes.

Q. Who was the father? A. George Miller.

Q. Is that the same George Miller that is named in this certificate? A. That is right.

Q. The same George Miller whom you said is your husband? A. Yes.

Q. The same George Miller whom you now say is dead? A. Yes.

Q. I also show you a birth certificate, "P-2," being the birth certificate of Joseph Benjamin Miller, and call your attention to the mother's name therein. Is that you? A. Yes.

Q. The father's name is George Miller? A. Yes.

Q. Is that the same George Miller whom you mentioned before as being your husband? A. Yes, sir.

Q. Is that the same George Miller who is the father of Joseph Benjamin Miller? A. Yes, sir.

Q. Is that the same George Miller whom you said is your husband? A. Yes.

Q. Is that the same George Miller whom you now say is dead? A. Yes.

Q. Now, what other child or children have you, besides the two that I have mentioned? A. George William Miller.

Q. Now, when was George William Miller born? A. January 9.

Q. January 9, when? A. 1918.

Q. 1918? A. Yes.

Q. Where was he born? A. Littleton, New Jersey.

Q. Littleton, New Jersey? A. Yes.

Q. Who was the doctor who attended at the birth——

The Court: You are going to have the birth certificate here, I don't think that is necessary.

Mr. Scerbo: May I offer a certified copy of the report of death of George Miller? Is there any objection?

Mr. McMichael: Well, I could not consent to that.

Mr. Scerbo: I offer it for identification.

The Court: All right.

(The paper referred to was received and marked "P-3 for Identification," dated March 18, 1932.)

By Mr. Scerbo:

Q. Mrs. Miller, when did you marry this George Miller whom you said was your husband and whom you said is now dead? A. November 1, 1914.

Q. Since the time of marriage until his death did you live with him? A. Yes.

Q. Always together? A. Always.

Q. And he always provided the support of you?

Mr. McMichael: I object. Now, counsel is leading. I think part of the household,—that is enough, anyhow.

Lottie A. Miller, direct

By Mr. Scerbo:

Q. Mrs. Miller, what means of support had you since the time of your marriage? A. Just my husband.

Q. Just your husband? A. Yes.

Mr. Scerbo: Speak a little louder, please.

The Court: You are not contesting that point, are you?

Mr. McMichael: She is part of the household.

Mr. Scerbo: He tells me that he is contesting everything.

Mr. McMichael: She testified that she was part of the deceased's household. Under the law, that is all she has to say.

Mr. Scerbo: Well, what is the point of the objection?

Mr. McMichael: I am objecting because it is cumulative.

The Court: You are willing to stipulate that she was the wife?

Mr. McMichael: I am willing to stipulate that she resided with him as part of the household.

The Court: And that the children were dependents?

Mr. McMichael: Yes, the law says so.

The Court: The only thing that has to be proven is the age of one child, whose birth certificate will be produced later.

Mr. Scerbo: We have that in evidence, the age of the other child.

The Court: But it has to be substantiated by the birth certificate.

Mr. Scerbo: I am going to do that.

By Mr. Scerbo:

Q. What nature of work did your husband do?

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Where did your husband work, if you know? A. The Minnesink Oil Company.

Q. For how long did he work for the Minnesink Oil Company?

Mr. McMichael: I object unless she knows.

By Mr. Scerbo:

Q. Mrs. Miller, how long had your husband been working for the Minnesink Oil Company? A. A year and a half.

Q. Now, exactly, where was your husband working, if you know?

Mr. McMichael: I object.

By Mr. Scerbo:

Q. Where was he working?

Mr. McMichael: I object to the question.

The Court: I overrule the objection.

By Mr. Scerbo:

Q. Where was he working? A. The Minnesink Oil Company.

Q. Where? A. The big gas station, 24 McFarland Street.

Q. The gas station at 24 McFarland Street? A. Yes.

Q. What did he do there, if you know?

Mr. McMichael: Now, this is absolutely irregular, Mr. Referee, unless the woman has been down there and saw him work.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Have you ever been down to the gas station? A. Yes.

Q. How many times have you been down to that gas station? A. A good many times.

Q. You really know what your husband did, didn't you?

Mr. McMichael: That is leading, is it not?

The Court: You are leading.

By Mr. Scerbo:

Q. Mrs. Miller, now what did your husband do for the Minnesink Oil Company, if you know? A. Sell gasoline and grease cars.

Q. Do you know what his position was that he held with the Minnesink Oil Company? A. I don't kow how to answer that.

Q. Tell us what he was with the Minnesink Oil Company? A. Yes, he was a manager.

Q. Manager of what? A. Of the gas station.

Q. Of the gas station at 24 McFarland Street, Dover, New Jersey? A. Yes.

Q. Do you know what wages he received from the Minnesink Oil Company in performance of

those duties? A. Thirty-seven dollars and fifty cents and commissions.

Q. Thirty-seven dollars and fifty cents a week? A. Yes.

Q. What else? A. Commissions.

Q. Will you please explain to the Court what these commissions were, if you know?

Mr. McMichael: I object to that on the ground that bonuses and commissions are not a part of the wage in this case.

The Court: Is there any question on the thirty-seven dollar and fifty-cent figure?

Mr. McMichael: I wish to object to the question on the ground that bonuses or commissions are not part of the wage scale.

The Court: I sustain the objection. It is not the proper way to prove it.

Mr. Scerbo: My question contained the clause, if you know.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Mrs. Miller, when would your husband leave for work, if you know, on this job? A. At eleven at night.

Q. Give us his regular working hours, Mrs. Miller, if you know. A. From six-thirty.

Q. Six-thirty what? A. Until eleven at night.

Q. Six-thirty in the morning until when? A. Until eleven at night.

Q. And would he return home anytime in between? A. Yes.

Q. Give us the hours. A. About a quarter to one for his dinner.

Q. And leave when? A. About four-thirty.

Q. About four-thirty? A. Yes, in the afternoon.

Q. He would come back about a quarter to one and go back at about four-thirty in the afternoon and work until eleven at night, is that right? A. That is right.

Q. Were those his regular working hours with the Minnesink Oil Company? A. They were.

Q. Now, were there afternoons that he had off, various afternoons that he had off during the week? A. All Saturday, Sunday and Monday, three days.

Q. Just a minute, I don't get that. A. Saturday, Sunday and Monday he didn't have off.

Q. The afternoons? A. No.

Q. Now, on November 4, 1931, did your husband go to work for the Minnesink Oil Company? A. Yes.

Q. Did he go to work that day? A. Yes.

Q. What time did he leave in the morning? A. Six-thirty.

Q. In the morning? A. Yes.

Q. Did he return? A. At noon, a quarter to one.

Q. Pardon? A. A quarter to one.

Q. And then again when did he go back, if you know? A. Four-thirty.

Q. And then when did he come back home after starting at four-thirty that day? A. At six o'clock for supper.

Q. All right. When he came home at six for supper, did you notice anything unusual with respect to your husband?

Mr. Michael: I object to that.

The Court: I overrule the objection.

The Witness: Yes, he did not act the same. He did not eat his supper like he usually does.

By Mr. Scerbo:

Q. Did he, however, return to work? A. Yes.

Q. Then, what time did he come home again? A. Eleven at night.

Q. Did you see him at that time? A. Yes.

Q. Did you at that time notice anything unusual or peculiar with reference to his actions or conduct? A. Yes.

Q. Will you explain them? A. He always ate at that time and had his coffee, and he did not drink the coffee, just ate a little piece of pie. He usually sat and talked but he went to bed instead of talking.

Q. Did he say anything?

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Were there any further actions or conduct of his that were unusual or peculiar that you noticed? A. No.

Q. Now, did you go to bed with him, Mrs. Miller? A. Yes.

Q. Now, at any time during that night did anything happen after that? A. At two o'clock in the morning.

Q. About two o'clock in the morning? A. Yes.

Q. What happened? A. He got up and said—he woke me and he said——

Mr. McMichael: I object to anything that he said.

The Court: I sustain the objection.

Mr. Scerbo: Don't tell us what he said. Just tell us what he did.

The Witness: He put his hands to his head and he shivered and I helped him back to the bed.

By Mr. Scerbo:

Q. When he put his hands to his head, did he complain of pain? A. I——

Mr. McMichael: I object.

The Court: Objection sustained.

By Mr. Scerbo:

Q. Do you know why he put his hands to his head?

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. What happened afterward? What happened after that? A. He laid down again.

Q. He laid down again after that? A. Yes.

Q. When he got up what did he do before he laid down again? What did he do when he got up? A. He didn't do anything, he just shook that way; he was shaking.

Q. Can you show us how he shook, Mrs. Miller? A. Yes, he shivered like that (indicating).

Q. Will you put your hands exactly where he held his hands?

Mr. McMichael: I object. This is leading, entirely, Mr. Referee.

The Court: I sustain the objectiin.

Mr. McMichael: The attorney for the petitioner is coaching this widow right from the very beginning of the case. Now, he might as well understand right now that I am going to object to every leading question.

By Mr. Scerbo:

Q. Now, Mrs. Miller, you tell us now, please, what happened after that. Tell us in your own words just what you observed with reference to the conduct of your husband on that night. A. Why, he started to vomit then and he asked me what time——

Mr. McMichael: I object to anything he asked her.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Don't tell us what he said. Tell us the things that happened, everything that he did, but not what he said. A. Well, he went unconscious after that.

Mr. McMichael: I object to that; that is a medical term.

By Mr. Scerbo:

Q. What do you mean by unconscious? What did you mean when you said that he became unconscious? A. He don't answer.

Mr. McMichael: I object.

The Court: I overrule the objection.

Lottie A. Miller, direct

By Mr. Scerbo:

Q. Did you try to talk to him? A. Yes, I did.

Q. What did you do then, when you found that he did not answer you? A. I went out and called the doctor.

Q. What doctor did you call? A. Dr. Gillen.

Q. And did he come? A. Yes.

Q. And what happened then? A. The doctor tried to talk to him and to get him to answer. He did not answer.

Q. He did not answer? A. No.

Q. Then what happened? A. The doctor went home and came back again.

Q. When did he come back? A. About nine o'clock.

Q. About nine o'clock when? In the morning? A. In the morning.

Q. What was the condition of your husband then? A. Just the same.

Mr. McMichael: I object to that. It calls for a conclusion.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Was he able to talk to you in the morning? A. No.

Mr. McMichael: I object.

The Court: I overrule the objection.

By Mr. Scerbo:

Q. From that time on were you ever again able to talk to your husband? A. No.

Q. Did you try? A. Yes.

Q. Did you see him in the hospital? A. Yes.

Q. Were you able to talk to him there? A. No.

Q. When did your husband leave for the hospital? A. About four-thirty Thursday afternoon.

Q. That would be what time in relation to the day that you spoke of that he came home and complained of his head? A. That was the next day.

Q. The next day? A. Yes.

Q. What hospital did he go to? A. It was the same day on a Thursday.

Q. Thursday? A. Yes.

Q. Who took him there? A. Dr. Hegner.

Q. What hospital was it? A. All Souls Hospital.

Q. How did he go to the hospital? A. In the ambulance.

Q. In the ambulance? A. Yes.

Q. Did he walk to the ambulance? A. No.

Q. How was he taken to the ambulance? A. On a stretcher.

Q. On a stretcher? A. Yes.

Q. Who ordered him taken to the hospital, if you know? A. Dr. McElroy, Dr. McElroy from Rockaway.

Q. Dr. McElroy? A. Yes.

Q. Did you go with him to the hospital? A. Yes.

Q. Did you see Dr. Hegner there? A. Yes.

Q. When did you last see your husband alive? A. Saturday night.

Q. About what time? A. Twelve o'clock.

Q. At that time were you able to talk to him? A. No.

Q. Since the time when you say you first tried to talk to him and he could not answer, were you able to talk to him any time after that? A. No.

Q. Did you try at all times? A. Yes.

Q. Many times? A. Yes.

Q. At the time that this happened to your husband, had your husband been ill at any time prior to that? A. No.

Q. What was his condition of health? What was his general health condition?

Mr. McMichael: I object.

Mr. Scerbo: If you know.

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Had your husband required any medical attention?

Mr. McMichael: Now, I object to that, Mr. Referee. That calls for a conclusion. Lots of people don't have doctors when they ought to have them.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. About how much did your husband weigh, if you know?

Mr. McMichael: I object to that.

The Court: I overrule the objection.

By Mr. Scerbo:

Q. Do you know about how much he weighed? A. One hundred and seventy-six.

Q. About one hundred and seventy-six pounds? A. Yes.

Q. About how tall was he? A. About five foot.

Mr. McMichael: Mr. Referee, do I understand that my objection applies to this line of questioning? This is a physical description, and is certainly hearsay on the part of this witness unless she weighed the man herself.

Mr. Scerbo: Don't you imagine that this witness may have some capability of forming an opinion?

Mr. McMichael: I have stated my objection, sir.

The Court: I overrule the objection.

By Mr. Scerbo:

Q. About how tall was he? A. Five feet, something like that, I don't just exactly know.

Q. Was he taller than I am? A. No.

Q. About my size? A. Yes.

Q. Did he eat his meals regularly? A. Yes.

Q. Did he ever lose any time from his work for any reason? A. No.

Q. He was a steady worker? A. Yes.

Q. Was he a strong man or a weak man?

Mr. McMichael: I object to that.

The Court: I overrule the objection.

Mr. Scerbo: You may answer.

The Witness: Yes.

Q. I asked you, Mrs. Miller, was he a strong man or a weak man? A. A strong man.

Mr. Scerbo: Cross examine.

Cross examination by Mr. McMichael:

Q. You say you called Dr. Gillen? A. Yes.

Q. Who was the next doctor you called in? A. Dr. McElroy.

Q. And who was the next doctor? A. Dr. Hegmer.

Q. How do you spell that? A. H-e-g-m-e-r.

Q. Any other doctors? A. That is all.

Q. That is all that you know of? A. Yes.

Mr. McMichael: That is all. No further cross examination.

GEORGE MAYS, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. How old are you, Mr. Mays? A. I am twenty-four.

Q. Where do you live? A. 205 Mount Hope Avenue.

Q. And what is your occupation? A. A knitter in the hosiery mill.

Q. Were you acquainted with and did you know George Miller that we are speaking of? A. Yes, I knew him well.

Q. A friend of yours? A. Yes.

Q. On the day of November 4, 1931, did you see him that day? A. I did.

Q. When? A. Well, I seen him about—I should judge about twelve-thirty or one o'clock.

Q. That would be noontime? A. Noontime.

Q. What did he do if anything? A. Well, George went home to lunch and said he will be back about three o'clock and came back about five minutes to three.

Q. What did he do from that time on? A. George and I took a ride to Hackettstown to look at a car.

Q. George and you took a ride to Hackettstown to look at a car? A. About three o'clock we started off.

Q. Who was driving the car? A. George.

Q. George was driving the car? A. Yes.

Q. You were riding with him? A. I was.

Q. Did you talk with him? A. I did.

Q. Was there anything unusual about him at that time? A. Not a thing.

Q. How long had you known George? A. How long had I known him?

Q. Yes. A. Well, I knew him for over a year.

Q. During that year how often would you see him? A. Throughout, I didn't see him—I did not—I was connected with him.

Q. Every day or every week? A. Not every day, up until the last six months I seen him every day.

Q. Every day? A. Yes.

Q. Now, during the last six months how often did you see him? A. Every day.

Q. Now, on this day that you were riding in the automobile with him, was he any different then than he was at any other time? A. Not that I noticed.

Q. Was he able to go on in the conversation with you? A. He was.

Q. Then, tell us what happened. A. Well, we went to this automobile place and we looked at the car and we came back, ate dinner at Hackettstown—had a cup of coffee and a sandwich, and then we came back to Dover at about four-thirty, I should judge.

Q. Where did you go? A. We came to George Miller's house.

Q. You went to George Miller's house? A. Yes.

Q. From there where did you go? A. He put his car away and went in the house and I came over to the station.

Q. Did you see him again? A. Five minutes to five when he came back.

Q. How was he then? A. All right as far as I can tell.

Q. Any different than he was? A. Not a thing.

Q. What place was it that you were at? A. The Minnesink Oil Company.

Q. The Minnesink Oil Company? A. Yes.

Q. What was George doing there? A. He was manager of the gas station.

Q. What were you doing there? A. Well, I was just a friend of his, hanging around, passing the time.

Q. Now, during the time that you were hanging around, did anything happen at all? A. Before Mr. Miller came back?

Q. No, he has already come back. I say, while you were there. A. He came back and helped the boy grease the car. He went down to the pit.

Q. Who did he help? A. Walter Waer, the helper.

Q. Now, do you know whose car he was greasing? A. Mr. Stowe from Morristown.

Q. Tell us about that. A. He went down in the pit.

Q. Who do you mean by he? A. George Miller. He went down to look at the transmission in the rear end of the car.

Q. Tell us what a pit is just like? A. Well,

a pit is where they change the oil in the automobile and grease it.

Q. What does a pit look like? A. Well, it is about six feet long—no, I should judge about twelve feet long and about six feet deep.

Q. Is it a hole in the ground? A. It is a hole in the ground.

Q. That you drive an automobile over? A. That is right.

Q. Tell us what happened in that hole in the ground? A. George went down to check the transmission in the rear end. When he came out he hit himself. I don't know just where in the car, but he said he hit himself.

Mr. McMichael: Now, I object to that and ask that it entirely be stricken out. I object and I ask that that answer be stricken out entirely.

The Court: Strike it out.

Mr. Scerbo: This man is not a party in the action here. The man is dead. I am going to show now just exactly what happened. I got to show in this indirect way exactly what happened at the actual time. That is part of the res gestae. I am certainly entitled to show that, and if your Honor will look up the rules of evidence you will see that this is certainly competent. I can produce to your Honor case after case to show that under the rule this evidence is entirely proper. A statement made by a party in a general way can be used either for or against the respondent or either the petitioner. I bring it here under the theory of the res gestae. It happened exactly the same

way and I think that I am entitled to show it, particularly, as this man is now dead. Here is a witness, distinterested third party witness who comes in here and tells us what happened. Under the theory of res gestae I am entitled to show exactly what happened and what explanation was made.

The Court: It is not the proper way to bring it out.

By Mr. Scerbo:

Q. What did he do in that hole in the ground? A. Checked the transmission in the rear end of the car.

The Court: Now, after he said that he started to go into something else.

Mr. Scerbo: It is not responsive, do you mean?

By Mr. Scerbo:

Q. As he was doing that, did anything happen, do you know? A. Well, not until he came out of the pit, until he started to come out of the pit.

Q. When did he come out of the pit? When he came out of the pit what happened? A. Well, I just didn't see it, but he says he hit himself.

Mr. McMichael: I object.

Mr. Scerbo: That is exactly the point.

By Mr. Scerbo:

Q. This man hit his head in the pit? A. He came up——

Q. Just show us. Stand up.—I will withdraw the question.

Mr. McMichael: I ask that counsel's statement for the record that he hit himself be stricken out.

The Court: Strike it out.

By Mr. Scerbo:

Q. Will you demonstrate to us exactly how and in what manner and in what position or posture George Miller came out from underneath that car? A. Well——

Q. No, demonstrate it. A. Well, say this is the pit here (indicating), and he stepped over on the right, and he comes up the steps holding his head. He said he gave himself an awful bang on the head.

Q. Now, did anything happen after that? Did you do anything? A. I didn't do anything, no, but he held his head for quite some time.

Q. Show us exactly how he held his head. A. He held his head like this (indicating).

Mr. McMichael: Mr. Referee, will you kindly state for the record how the witness describes the alleged gesture?

The Witness: He held his head like this (indicating) for quite some time after he came out of the pit.

By Mr. Scerbo:

Q. Putting the right hand up to the right side of the head? A. Yes.

Q. Can you give us some idea of just exactly what facial grimaces he made, if any? A. No, I could not.

Q. Did you observe any? A. Well——

George Mays, cross

Mr. McMichael: Mr. Referee, this is certainly leading. The witness says he can't tell. Now, if he can't, he can't.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Did he look as if he was in pain?

Mr. McMichael: I object. That is leading in the first place and in the second place it is calling for a conclusion, and in the third place it is an improper question.

Mr. Scerbo: I will withdraw it. Cross examine.

Cross examination by Mr. McMichael:

Q. You are a great friend of Mr. Miller's, are you not, or at least you were a great friend of his, weren't you? A. I was.

Q. A friend of his for a long time? A. Well, for the last six months at least.

Q. You volunteered to help out Mrs. Miller in this case, too, didn't you?

Mr. Scerbo: I object. That is absolutely improper. It is characterizing.

Mr. McMichael: I propose to break down the credibility of this witness. Now, I am asking for a ruling.

The Court: I overrule the objection.

By Mr. McMichael:

Q. You volunteered to help Mrs. Miller, did you not? A. I am only doing what I thought was right.

Q. Did you or did you not? A. I did.

Q. And you went up to her house, didn't you? A. No, I did not.

Q. How did you happen to talk to her about this case? A. I came—I got in connection with her through a lawyer.

Q. Through her lawyer? A. Yes.

Q. Who is the lawyer? A. Irving Yungelson.

Q. How did you get in touch with her through her lawyer? A. He sent for me.

Q. He sent for you? A. Yes.

Q. What did he say to you? A. Well, he just asked me what I knew about the case.

Mr. Scerbo: I object.

Mr. McMichael: I am testing this witness' credibility. I want to know how much preparation this witness has given to the case.

Mr. Yungelson: That is all right, but any conversation between an attorney and a client is privileged.

The Court: He is a witness. I overrule the objection.

By Mr. McMichael:

Q. You had a talk with Mr. Yungelson about the case? A. Yes.

Q. How did he happen to know that you were in the matter and knew anything about it? A. Well, there was—right after George Miller's death.

Q. What is that? A. Right after George Miller's death, Mrs. Miller heard that I knew something about George hitting his head, so she came over.

Q. How did she hear that, do you know? A. I couldn't say.

Q. What? A. I just couldn't say.

Q. You told somebody about it, didn't you? A. Yes, I did, the fellow around the station, I told him and his son got hold of me.

Q. Who did you talk at the station about that? A. A fellow who works there, Waer.

Q. You told Mr. Waer up there that you knew something about it? A. I didn't say I knew anything about it. I told him he hit his head.

Q. And you told Waer that? A. Yes.

Q. You don't know how Mrs. Miller knew that? A. I suppose her boy. He was up there and he told her about it and she sent for me.

Q. You never went to Mrs. Miller's house after Mr. Miller died? A. No, I did not.

Q. You did not go to his funeral? A. No, I did not.

Q. You were a pal of his for a long while, were you not? A. Yes.

Q. You never went near Mrs. Miller after he died? A. No, I did not.

Q. The only person you talked to was Mr. Waer about this case? A. Before I got called, yes.

Q. The only fellow you mentioned about that you talked that he hit his head or saw him holding his hand up to his head or something or other, was to Mr. Waer. You are sure of that? A. Yes, I am sure of that.

Q. You don't know how Mrs. Miller knew about that? A. I could not say.

Q. You have no way of knowing? A. Well, her boy hangs around there quite a bit.

Q. Whose boy? A. Mrs. Miller.

Q. Did you know him? A. No.

Q. Did you speak to him about it? A. I told him Sunday morning, yes, when he came over and asked me. I told him about it.

Q. What Sunday morning? A. The Sunday morning it was right after his death.

Q. The Sunday after his death? A. Right.

Q. Mrs. Miller's boy came over to see you? A. He did.

Q. Is that right? A. Yes.

Q. And what was the conversation? A. Well, he just said that his mother wanted to see me.

Q. And you went over to see her? A. I could not see her. She was sick. I went—she was in a neighbor's house and I was talking to the neighbor and the neighbor asked me if I had seen George hit his head. I told her I did, and then—

Q. Who was the neighbor?

Mr. Scerbo: Let him finish the answer, please.

Mr. McMichael: I want to know what the name of the neighbor was.

The Witness: I am not sure, but I think it was Mrs. Valenton.

By Mr. McMichael:

Q. Go ahead. A. And she asked me if I seen George hit his head and I said I didn't see him, but he complained to me when he came out that he gave himself an awful bang to the head.

Q. You told this neighbor that? A. Yes.

Q. Who else did you talk about it? A. Nobody except Waer.

Q. I thought you said Waer was the only fellow you mentioned this thing to? A. Well, I did at the station.

Q. Didn't you say on the stand a few minutes ago that Waer was the only man that you ever

mentioned this occurrence to? A. The only man, yes.

Q. The only person, I said? A. That day, yes.

Q. So you wish to get a little technical with me, eh, when you made that answer, that he was the only person?

The Court: Please do not argue.

By Mr. McMichael:

Q. Do you want to take it back that Waer was not the only one that you talked to about this case?

Mr. Scerbo: I object. That is improper cross examination.

Mr. McMichael: I am testing his credibility.

Mr. Scerbo: That is not one of the ways.

By Mr. McMichael:

Q. Whom else did you talk to? A. They were the only two persons outside of her son. I told the son that Sunday morning.

Q. Now, didn't you just state a few minutes ago that you never said anything to her son about it? A. Well, I did not, until that Sunday morning, no. I mentioned it before, the following day when George was taken sick. Then, after Mrs. Miller found out that I knew about it she sent her son over and naturally I told him that I seen him hit his head.

Q. Were you subpoenaed down here today? A. I was not.

Q. You came down of your own accord? A. I did.

Q. Did you talk these things over with the attorney for Mrs. Miller? A. I did.

Q. How many times? A. I was to his office twice, I think.

Q. Twice in his office? A. Yes.

Q. And you went over what you were going to say here? A. Well——

Q. Yes or no? A. Yes.

Q. And you talked about it in the courtroom today before the trial went on, as to what you were going to say, did you not? A. I did not, but I read the slip of paper that had just what I told him on it, how it happened.

Q. Did you go over it again today before the trial started or didn't you, yes or no?

Mr. Scerbo: Do you mean that he talked to me?

By Mr. McMichael:

Q. Did you talk to your attorney? A. I did not.

Q. Or the attorney for Mrs. Miller? A. I did not.

Q. Didn't you say a word to him before the Court opened? A. Not in that case, no.

Q. What case were you talking about? A. George Miller's case.

Q. Listen, do you understand English, Mays? A. I do.

Q. I asked you a simple question, whether you talked over Mr. Miller's case? A. I did not, but I read it over. I did not talk to him. He handed it to me, I read it and I handed it back to him.

Q. Then, you did talk over what you were

going to say on the stand? A. I read about it. I didn't talk about it.

Q. Did you go over it today before this trial began here in the courtroom? A. Yes, I read it.

Q. So that it is now twice in the attorney's office and once here today, is that right? A. That is right.

Q. Did you ever make a statement about this case, Mays, and sign your name to it? A. I did.

Q. Do you remember where you made it? A. I did.

Q. Do you remember who took it? A. I don't recall the fellow's name.

Q. Would you know him if you saw him? A. I do.

Q. Now, how did you happen to be down there at that gas station on that particular day? A. Well, I didn't have any work that day. As a rule, I always went down there to pass the time away.

Q. Hanging around? A. Hanging around.

Q. Did you talk with George? A. I did.

Q. You did not see anything happen, did you? A. I did not, no.

Q. You do not know whether anything happened, do you, as far as you know? A. As far as I know, I don't, only from what I heard, from what I saw.

Q. The only thing you know is that he was holding his hand to his head, is that right? A. That is right.

Q. That is all you know? A. Yes.

Q. Did you see him coming up holding his hand to his head? A. And what he told me. He told me "I gave myself an awful bang in the head."

Q. What words did he use? How did he say it? A. He came out of the pit and says, holding his head, "I gave myself a hell of a bang on the head."

Mr. McMichael: Repeat that, Mr. Stenographer, please.

(The Court Reporter read the last answer as follows: "He came out of the pit and says, holding his head, 'I give myself a hell of a bang on the head.' ")

By Mr. McMichael:

Q. At what time exactly was that? A. Well, between 4:45 and 5:00 o'clock.

Q. Are you sure of that? A. Positively.

Q. Between four-forty-five—— A. And five o'clock.

Q. And five o'clock of what day? A. November—Wednesday afternoon, November 4th.

Q. Wednesday afternoon, November 4th, between 4:45 and 5:00 o'clock, that is the thing that you remember? A. Yes.

Q. You are sure of that? A. Right.

Q. You are just as sure of that as everything else that you said here today, is that right? A. Right.

Q. Who else was there at the time besides yourself? A. Well, his helper, Waer, and Paul Stowe.

Q. Waer? A. Waer.

Q. Waer and Paul Stowe? A. Yes.

Q. How near were they to you at the time? A. Well, Mr. Stowe was on the left-hand side of the car and I was on the right. He was wiping his car off.

Q. What? A. Mr. Stowe was wiping his car off, cleaning it.

Q. Was he the nearest to you? A. Well, I should judge about five foot.

Q. About five foot away? A. About.

Q. How near was Paul Stowe and Waer at the time that you say George made this remark to you? A. Well, I think they were pretty close.

Q. Close enough to hear him? A. Yes.

Q. You are pretty sure that they heard him say that? A. They could have heard him easily.

Q. You are sure of that? A. Positively.

Q. You are just as sure of that as everything else that you have testified to here today? A. They could have heard it just as clearly as I did, just as clear as I did.

Q. You are sure of it? A. Yes.

Q. Positive? A. I am.

Q. That both of them heard this? A. Right.

Q. Both Waer and Stowe? A. Yes.

Q. What kind of car was Mr. Stowe's car? A. A Chevrolet.

Q. A Chevrolet? A. A Chevrolet Six.

Q. Did I understand you to say that when counsel for the other side asked you, that George was holding both hands to his head? A. I only remember him holding one hand to his head.

Q. Which hand was it? A. I wouldn't say for sure, but I am pretty sure it was the right.

Q. You are sure it was not his left? A. I wouldn't say for sure, no.

Q. You don't know? A. I don't know. I just couldn't—I don't recall. It quite a while ago. I didn't take particular notice.

Q. It might have been the left, might it not? A. It might have been.

Q. You are not sure, though? A. I am not sure.

Q. George didn't show you anything on his head where he had been hit? A. No, he did not.

Q. What? A. He did not.

Q. Did he take his hand down after a while? A. Well, I just couldn't say.

Q. Did he or did he not? A. After a while, yes, he held his head for quite some time, I just don't know how long.

Q. Did he take his hand down in your presence? A. He did.

Q. Did you see any blood there? A. No.

Q. Any marks there? A. I did not look close enough.

Q. What? A. I didn't look close enough.

Q. You didn't look at his head? A. I did not.

Q. You are sure you did not? A. I did not.

Q. Positive about it? A. Positive about it.

WILLIAM T. STOWE, a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. Where do you live, Mr. Stowe? A. 129 South Street, Morristown.

Q. What was that address again? A. 129 South Street.

Q. Where? A. Morristown.

Q. What is your occupation, Mr. Stowe? A. Salesman.

Q. For whom are you employed, Mr. Stowe? A. Whist Brothers in Dover.

Q. On November 4, 1931, do you recall having your car greased at the Minnesink Oil Company Station?

Mr. McMichael: I object to counsel's putting the date. It is leading. He can state the date it was and what he saw.

Mr. Scerbo: I am trying to save time.

Mr. McMichael: I do not want you to save time that way.

By Mr. Scerbo:

Q. Do you own an automobile? A. I do.

Q. What make and type of automobile do you own? A. A Chevrolet.

Q. A Chevrolet? A. Coach.

Q. Did you have it greased in November of 1931? A. Yes.

Q. Did you ever have it greased on November 4, 1931?

Mr. McMichael: I object.

Mr. Scerbo: Now I am leading up to it, question by question.

Mr. McMichael: I object, Mr. Referee.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Did you ever have your car greased? A. Yes.

Q. Will you tell us where you had your car greased in November, 1931? A. The Minnesink Oil Company.

Q. Where? A. McFarland Street, Dover.

Q. Dover? A. Dover.

Q. Do you remember who greased the car that

day? A. Yes, a boy who was working there and the manager.

Q. Do you know who that manager was? A. George Miller.

Q. Did you learn subsequently that George Miller died? A. Yes.

Q. Is that the same George Miller who greased your car? A. Yes.

Q. Now, will you kindly explain to this Court how your car was greased, giving its position, location and your location, where you were when the car was being greased? A. It was greased over a pit.

Q. Yes, go on. A. And a part of the time I was outside of the car and the rest of the time I was in the car.

Q. Who was under the car? A. Both under the car.

Q. Both under the car? A. Yes.

Q. Now, from that point on did you see George Miller afterwards? A. I saw him.

Q. When he came out of the car, what did you notice about him? A. In coming out of the pit?

Q. Yes, in coming out of the pit, I mean. A. In coming out he was rubbing his head as he came out and said, "I got a crack on the head."

Mr. McMichael: I ask that that be stricken out.

The Court: Strike it out.

Mr. Scerbo: I don't see how your Honor can strike that out.

The Court: I have ruled. You can have an exception.

By Mr. Scerbo:

Q. At the time he came out from under the

car, will you kindly demonstrate actually and distinctly the actions and the conduct of Mr. Miller as he came out from under the car in the pit, demonstrate that for us, Mr. Stowe? A. He came up——

Q. No, demonstrate with your hands; demonstrate it with your arm or with your body or whatever way you can. A. He came walking up the ladder around the front of the car, and at the side of the car he was rubbing his head and said, "I got a crack on the head."

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

Mr. Scerbo: I again argue that under the rules of the res gestae, being part of the accident itself and being a disinterested party to this suit, that he has a right to show the conduct and the words of the decedent at the time of the accident.

The Court: It is not the proper way.

Mr. McMichael: May that be stricken out?

The Court: I will sustain the objection. Strike it out.

Mr. Scerbo: My question was to demonstrate exactly what he did. He did that and he added the words. Now, I ask that only the words be stricken out, but what he demonstrated I ask that that be left in the record.

By Mr. Scerbo:

Q. Will you kindly demonstrate again exactly what Mr. Miller did as he came up from the pit?

The Court: But not what he said.

Mr. Scerbo: Demonstrate what he did, the actions.

(The witness indicates.)

Mr. McMichael: Will you kindly note that for the record, Mr. Referee?

The Court: Put his hand against the right side of his head.

By Mr. Scerbo:

Q. Now, did he say anything at that time? A. Yes.

Q. What did he say? A. "I got a crack on the head."

Mr. McMichael: Will you kindly ask the man to demonstrate it again?

The Court: Demonstrate it again.

By Mr. Scerbo:

Q. Just exactly how did he have his hand on his head? A. Right there (indicating).

The Court: The witness indicates a brushing movement.

Mr. Scerbo: Just a minute, here. Maybe his hair was not parted right. Now, let us have it exactly as you would re-enact it again.

Mr. McMichael: I object.

The Court: I overrule the objection.

Mr. Scerbo: Exactly how he held his hand on his head.

Mr. McMichael: I object to that. That is leading. Counsel is not attempting to have the witness demonstrate a different movement than he has previously given,

and which your Honor has already noted for the record.

The Court: I will allow it.

By Mr. Scerbo:

Q. Now, I say how did he place his hand on his head?

Mr. McMichael: I object.

The Court: I will overrule the objection.

By Mr. Scerbo:

Q. Now, show us how he had his hand on his head. A. He had his hand on the side of his head and said, "I got a crack on the head."

Q. Are you in any way related to Mr. Miller or anyone connected with his family? A. No.

Q. Were you a friend of his in any way? A. No.

Q. You came here under subpoena, didn't you? A. I did.

Mr. Scerbo: Cross examine.

Cross examination by Mr. McMichael:

Q. Will you kindly demonstrate the motion he made again, please, the one that you first made, Mr. Stowe, before counsel interrupted?

Mr. Scerbo: I object to the one he first made. He can only demonstrate the motion that was made by Mr. Miller.

Mr. McMichael: I am asking him to do it now. That is what I am trying to do.

The Court: I sustain the objection.

Mr. McMichael: What is this?

Mr. Scerbo: I have made an objection, the objection has been sustained.

Mr. McMichael: I do not understand, your Honor.

Mr. Scerbo: I objected to the question, because the only motion that he can make is the motion that Mr. Miller made.

Mr. McMichael: I am asking him on cross examination what motion he did make, and I am asking him to demonstrate it to the Court, what motion he made with his hand.

The Court: All right, let him demonstrate it again.

(The witness demonstrated.)

By Mr. McMichael:

Q. Just like that, putting his hand up to his head, just as if he was brushing his hair back, and letting it drop? A. No. He held his hand there.

Q. He held his hand there? A. Yes.

Q. All right, why didn't you testify to that first when you were asked? A. Am I supposed to sit here and hold my hand all afternoon?

Q. Now, sir, you listen. You are not there to argue with me. You are going to answer the question. Why didn't you show that motion to the Court when you were first asked that question? A. You asked me what I saw, didn't you?

Mr. Scerbo: I submit, if your Honor please, that that is not proper cross examination.

Mr. McMichael: Mr. Referee, when this witness first sat down and was asked to

demonstrate the motion that the decedent made, he deliberately brushed his hand across his head and let his hand drop. Now, I am asking him why he now changes his testimony and says that he held it there, and I have a right to do that on cross examination.

Mr. Scerbo: I object to the question on the further ground that what he is now asking calls for a conclusion and it is argumentative.

The Court: I sustain the objection.

Mr. McMichael: Exception, please.

By Mr. McMichael:

Q. Where were you at this time when this thing happened? A. I was waiting for my car, getting it greased.

Q. What? A. I was waiting for my car, getting it greased.

Q. Where were you standing? A. Around the car.

Q. Standing around the car? A. Yes.

Q. Who else was standing around the car? A. Two men, working on the car.

Q. Do you know their names? A. No.

Q. You don't know them at all? A. George Miller was there and his helper was there.

Q. Would you know him if you looked at him in this courtroom? A. Yes, he is here.

Q. This man here one of them (indicating)? A. Yes.

Q. How close was he to you? A. He was working under the car.

Q. He was working under the car? A. Yes.

Q. With the other man, with Miller? A. Yes.

Q. You are sure of that? A. Yes.

Q. Positive of it? A. Yes.

Q. What part of the car were you standing near? A. I didn't stand any particular place. I walked around.

Q. What? A. I walked around.

Q. Walking around the car? A. Yes, in a circle, right around the car.

Q. You were not standing? A. Yes, when I felt like it.

Q. Now, listen, Mr. Witness, I am asking you a question under oath, and I expect you to give me an answer, and I am going to ask the Court to admonish you if you try it again. I am asking you where you were standing.

Mr. Scerbo: Just a moment——

Mr. McMichael: I am going to continue with this question.

The Court: Go ahead.

By Mr. McMichael:

Q. Where were you when you saw this man make this motion with his hand? A. I was sitting in the car at that time.

Q. What? A. I was sitting in the car at that time.

Q. Then, you were not standing by the car? A. Not at that moment, no.

Q. Why did you say a few moments ago that you were standing by the car? A. You didn't specify.

Mr. Scerbo: I object to that. That is argumentative and it calls for a conclusion, that type of question, why did you say this, or why did you say that. He has

already told him where he was when it happened.

Mr. McMichael: Mr. Referee, I am entitled to follow my line of cross examination to break down the credibility of this witness, and I object to counsel's continually interrupting my cross examination. It is a proper question.

The Court: I overrule the objection.

By Mr. McMichael:

Q. Then, you were sitting in the car, that is what you say now? A. At that moment, yes.

Q. The moment when you saw the man make the motion with his hand? A. Yes.

Q. What seat were you sitting in? A. The driver's seat.

Q. What? A. The driver's seat.

Q. How was the car facing? A. Over a pit.

Q. You don't mean that, Mr. Witness. It was not facing over a pit. How was it facing? Towards the street or towards the building, or how was the car facing, you know what I mean? A. It was driven over a pit.

Q. Well, where were you looking? Out towards the street when you were sitting in the car? A. No.

Q. Which way were you looking? A. Nothing to look at there.

Mr. McMichael: Mr. Referee, now, I feel that this has gone far enough.

The Court: Can you answer the question?

The Witness: It is a pit built in the ground. You drive in from the street.

William T. Stowe, cross

By Mr. McMichael:

Q. Were you facing the street? A. The rear of it, like.

Q. You were facing the rear of it, like? A. Yes.

Q. Where is the ladder on that pit in relation to the front seat? A. In front of the front seat.

Q. What? A. In front of the car.

Q. In front of the car? A. Yes.

Q. So that when somebody comes down to the pit, they come right out to the front of the car? A. To the front end of the car, yes.

Q. You are sure of that? A. Yes.

Q. Positive of it? A. Yes.

Q. How do you know that this was November 4th, Mr. Stowe? How do you fix the day that you had your car greased? A. (No answer.)

Mr. McMichael: Mr. Referee, I ask you to admonish the witness to answer.

By the Court:

Q. How do you know it was November 4th? A. I didn't say it was November 4th.

By Mr. McMichael:

Q. What day was it, then? A. I didn't say what day it was.

Q. You don't know, do you, as a matter of fact? A. It was the early part of November, yes.

Q. You don't know the date? A. The exact date?

Q. Yes. A. Yes.

Mr. McMichael: Mr. Referee, I have cross examined witnesses, but I never found one like this.

Mr. Scerbo: I don't think that these remarks should be made to this witness. He is under subpoena.

The Court: That is all well and good, but he should answer the questions. He is assuming a very arbitrary attitude.

Mr. McMichael: And very defiant towards the Court, not towards me.

The Court: I will state right now that he is not going to gain anything from that.

The Witness: It has been brought out, the 4th of November.

Mr. McMichael: Mr. Referee, I ask the Court to take notice of that remark.

By Mr. McMichael:

Q. What was that? A. The 4th of November.

Q. How did you fix the date? A. It was the first Wednesday in November.

Q. How do you know it was? A. How do I know that it was?

Q. Yes. A. I remember it.

Q. I am asking you——

Mr. Scerbo: I object.

By Mr. McMichael:

Q. I am asking you. That is what I am trying to find out.

Mr. Scerbo: I object, if your Honor please, that calls for a conclusion. He remembers. He remembers by the mental processes of his mind, if your Honor please.

Mr. McMichael: I wish you would please stop helping the witness. He has been doing it all morning, your Honor, and he might as well stop right here.

The Witness: It was the first Wednesday in November.

Mr. Scerbo: I object to the question on the ground that it is argumentative and on the further ground that it has been answered by the words "I remember it," and remembering is a mental process of the mind, and the Court will take judicial notice of the fact that a man can remember if he wants to.

The Court: I overrule the objection.

Mr. Scerbo: Exception, if your Honor please.

Q. I am asking you now how do you know that it was the first Wednesday in November, Mr. Stowe? A. The car that I had greased at that time I had purchased on the 23rd of October, and right after I got it I went away for a few days —a week or so, and I was back the first of November.

Q. What? A. And I returned around the first of November and the day that I had the car greased was a Wednesday. I remember that.

Q. What time of the day was this that this event occurred? A. Late in the afternoon.

Q. What time of the day? Can you fix the time? A. Around five o'clock, I should say.

Q. How do you fix that time? A. What?

Q. How do you fix that time? A. It was just before dusk.

Q. Outside of that, you have no other way of fixing it? A. No.

Q. Did you ever talk with this boy here (indicating)? A. Beg pardon?

Q. You say you don't know his name, so I say this boy here, and you say you remember him. Did you ever talk to him about this case? A. No, I never did.

Q. Never had any conversation with him at any time in your life?

Mr. Scerbo: The witness shakes his head no.

The Witness: Not about this particular accident. I have talked with him many times, yes.

By Mr. McMichael:

Q. I am asking you, Mr. Stowe, whether or not you can say under oath that you have never discussed this particular affair with this boy sitting next to me? A. No, I have never discussed it with him.

Q. Now, don't you remember, Mr. Stowe, that you did have a talk with him and that you told him——

Mr. Scerbo: I object.

Mr. McMichael: I am cross examining him, Mr. Referee.

Mr. Scerbo: It doesn't make any difference.

Mr. McMichael: I will follow it up later.

Mr. Scerbo: I still have a right to object.

The Court: I will allow it.

William T. Stowe, cross

By Mr. McMichael:

Q. Is it not a fact that you did have a conversation with Mr. Waer, this boy here (indicating) whose name is Waer—you say you do not remember his name—you did have a talk with him and you told him that you did not know anything about this thing at all, that you didn't see anything or hear anything whatsoever? A. No, it is not.

Q. It is not true? A. No, it is not.

Q. You were called here under subpoena today? A. Yes.

Q. Did you ever have any discussion about this case with anybody? A. No person.

Q. You never discussed this case with anybody today?

The Court: Answer yes or no.

By Mr. McMichael:

Q. Do you understand my question, Mr. Stowe? A. Yes.

Q. You have never mentioned this case to a single soul before today and before your testifying now? A. I have not talked about this case, no.

Q. With anybody? A. No.

Q. You are positive? A. Yes.

Q. You never talked to the attorney? A. No.

Q. Never talked to Mrs. Miller? A. No.

Q. Nor you never talked with anybody in the gas station? A. No.

Q. Nor to this boy (indicating)? A. No.

Q. You are positive of that? A. Yes.

Mr. McMichael: No further cross examination.

Mr. Scerbo: I have the marriage certificate here now, your Honor; may I offer it?

Mr. McMichael: What is this?

The Court: The marriage certificate.

Mr. McMichael: All right.

(The paper referred to was received in evidence and marked "P-4," dated March 18, 1932.)

MRS. LOTTIE MILLER, recalled by the petitioner.

By Mr. Scerbo:

Q. Mrs. Miller, I show you a bill in the amount of five hundred dollars, from Orion Hughson, the funeral expenses for the burial of your husband, George. Is that the bill? A. Yes.

Mr. Scerbo: I offer the bill in evidence.

(The paper referred to was received in evidence and marked "P-5," dated March 18, 1932.)

By Mr. Scerbo:

Q. I show you a hospital bill, Mrs. Miller, and I ask you what is the amount of that bill?

Mr. McMichael: I object to that.

The Court: What is the purpose of this bill?

Mr. Scerbo: I think I am entitled to his hospital expenses.

Mr. McMichael: Now, I am not going to admit that.

Mr. Scerbo: May I have it marked for identification?

The Court: Yes.

By Mr. Scerbo:

Q. Did you receive this bill from the hospital? A. Yes.

Q. For services to your husband? A. Yes.

Q. At the time of the accident? A. Yes.

Mr. Scerbo: I ask that it be marked for identification.

(The paper referred to was marked "P-6 for Identification," dated March 18, 1932.)

(Witness excused.)

HERMAN L. HEGNER, a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. What is your name? A. Herman L. Hegner.

Q. Dr. Hegner, are you associated with the All Souls' Hospital? A. I am.

Q. What is your status with that hospital? A. Resident interne.

Q. Sir? A. A resident interne.

Q. Will you kindly give your schooling and practice with reference to medicine and surgery?

Mr. McMichael: I object on the ground that he is not qualified to testify if he is

not admitted to practice in the State of New Jersey.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Will you kindly give your qualifications? Where did you study and where did you practice? A. I put in the first two years at the University of Pennsylvania Medical College. It is a two-year school, and I transferred from the last two years to Bellevue Institute—Bellevue Medical College in New York. I received my medical degree from there last June.

Q. Last June? A. Yes.

Q. And you are now the resident interne of All Souls' Hospital? A. Yes.

Q. You are active there in your work? A. Yes.

Q. In your usual duties of interne, was the case of George Miller brought to your attention in the hospital? A. It was.

Q. Did you submit to me this memorandum under date of November 23, 1931 (handing paper to witness)? A. I did.

Q. Using that——

Mr. McMichael: May I see it there?

Mr. Scerbo: Yes.

By Mr. Scerbo:

Q. When was your attention first called to this particular case? A. When I went with the doctor on the ambulance to remove the patient from his home.

Q. Do you remember when that was? A. Yes.

Q. Will you tell us? A. November 5th.

Q. What year? A. 1931.

Q. What time of the day, do you remember? A. Approximately—it was somewhere around one o'clock in the afternoon.

Q. Who sent for you, do you know, or how did you happen to go? A. The call came in for the ambulance and it was my duty to go out on the ambulance.

Q. Did you go directly to the man's home? A. I did.

Q. Where was that? A. In Dover.

Q. In Dover? A. Dover, yes.

Q. When you got to the man's home, what did you find exactly? A. I found the patient in a coma.

Q. How? A. In a coma, unconscious.

Q. Where did you find the patient? A. Lying in bed, in his bedroom.

Q. Did you determine his condition? A. I did.

Q. And then what did you do? A. Removed him to the hospital.

Q. In what manner and in what way? A. The driver and the orderly of the case on the ambulance had a stretcher and placed him on the stretcher, carried him down to the ambulance and transferred him to the hospital.

Q. When you got to the hospital, did you make an examination of him? A. I did.

Q. What did that examination disclose?

Mr. McMichael: I object.

The Court: I overrule the objection.

Mr. McMichael: I object on the ground that this witness is not duly licensed to practice in this State. He is not a duly

licensed practicing physician of the State of New Jersey.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

Mr. Scerbo: Proceed.

The Witness: I discovered, on determination, that the man was in a coma, unconscious.

By Mr. Scerbo:

Q. Did you proceed to make a diagnosis, Doctor? A. I did.

Mr. McMichael: I object again, Mr. Referee.

The Court: I overrule the objection.

Mr. McMichael: Exception.

By Mr. Scerbo:

Q. What did you do? A. From examination, I determined that the man had a cerebral hemorrhage.

Q. What tests did you make?

Mr. McMichael: Do I understand, of course, your Honor, that I am to have a blanket objection and exception all the way through, to this entire line of questioning?

The Court: A blanket exception.

The Witness: I examined him and in appearance he presented a typical appearance of a person that suffered a cerebral accident, cerebral hemorrhage.

The Court: Not accident.

The Witness: A cerebral hemorrhage.

The Court: Strike out the words "Cerebral accident."

The Witness: Cerebral hemorrhage. He had left side markings; his left eye was partially closed. He had a drooping of the same side of the face and he had—he had loss of motion. He was paralyzed from his waist down and on his right side his reflexes were diminished.

By Mr. Scerbo:

Q. In the course of your diagnosis, did you get a history that——

Mr. McMichael: I object.

Mr. Scerbo: Did you get a history of this particular case?

Mr. McMichael: I object.

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Did you base your diagnosis upon the history that you obtained in this case?

Mr. McMichael: I object to the question.

Mr. Scerbo (continuing): —for the purpose of treatment?

Mr. McMichael: I object again, Mr. Referee.

The Court: I sustain the objection.

Mr. McMichael: This witness is not a doctor as yet. We hope he will be right away. There is no personal reflection.

By Mr. Scerbo:

Q. You are on the staff of the All Souls' Hos-

pital, are you not, as an active interne, taking and attending to patients as they come in? A. Yes, sir.

Q. You do? A. Yes.

Q. This patient was attended by you to give him treatment and to take care of him? A. Yes.

Mr. McMichael: Now, your Honor, I object. The witness is not a physician until he is licensed to practice in this State.

Mr. Scerbo: I say that here is a distinction. If he did it of his own accord, perhaps there may be a different situation, but here the patient comes to him directly. Here he is associated with the All Souls' Hospital, and part of his duties is to treat this patient as he came in. Furthermore, I will connect all this testimony up.

By the Court:

Q. You have no license to practice in any State? A. I am not eligible for a license.

Q. You have not taken the examination in any other State? A. No, I just finished last year.

The Court: I sustain the objection.

Mr. Scerbo: The same exception, if your Honor please.

By Mr. Scerbo:

Q. Do you treat patients at the All Souls' Hospital? A. I do.

Q. How long have you been treating them? A. Since July 1st.

Q. July 1st? A. Yes.

Q. What year? A. 1931.

Q. What is the nature of your treatments?

What do you do there? A. Any manner of treatment that the patient may need, investigate, our duty is to be in active attendance to take care of the patients.

Q. And do you keep a record? A. We do.

Q. Have you that record with you? A. I have.

Q. Is that the record in your hand? A. It is.

Mr. McMichael: Now, Mr. Referee, I can't see the witness here. I don't think that is quite fair if he is holding something in his hand.

By Mr. Scerbo:

Q. What happened to this man?

Mr. McMichael: Now, I object to that. I will stipulate that he is dead.

By Mr. Scerbo:

Q. The man died? A. Yes, he did.

Q. From the time that you went to get him at his home, did he ever regain consciousness before he died? A. He did not.

Q. He did not? A. No.

Q. After his death, did you do anything to him? A. A post-mortem was done, a post-mortem examination.

Q. Did you yourself perform the post-mortem? A. I was present, performing it with another party.

Q. Did you see the tissues that were exposed? A. I did.

Q. What did the brain show on autopsy?

Mr. McMichael: I object.

The Court: I sustain the objection.

Mr. Scerbo: If your Honor please, he was there.

The Court: He is not sufficiently licensed to practice as yet. He is a medical student.

By Mr. Scerbo:

Q. Did you sign the death certificate in this case? A. I did.

Q. I show you a certified copy of the death certificate, is that the death certificate you signed in this particular case? A. It is.

Q. Doctor, you are allowed to practice medicine in the All Souls' Hospital, are you not? A. Yes.

Q. You are authorized to do that properly? A. Yes.

Q. But you cannot practice medicine on the outside, outside of the jurisdiction of the hospital, is that so? A. That is right.

Q. Now, I ask you again, in the course of your treatment of this particular patient, did you obtain a history in order to aid you in your diagnosis and treatment?

Mr. McMichael: I object again, Mr. Referee, because the cases clearly hold that a history may be given provided it is to a physician for the purpose of treatment, and not to an interne.

The Court: Objection sustained.

Mr. Scerbo: Exception.

By Mr. Scerbo:

Q. You were the actual attending physician as-

signed by the hospital to take care of this case? A. I did all that was done for him.

Mr. Scerbo: If your Honor please, I must argue the point in this fashion. In All Souls' Hospital, as we have in all other hospitals, there are men who are not medical students, but are in that class where, under the jurisdiction of the hospital staff itself, they are authorized to practice medicine, and under that right, naturally, I can produce this man in court because of his status at that time. I produce him as an active interne resident, an interne of All Souls' Hospital, acting under the authorization of the staff itself, and, therefore, I have a right to show that he practiced medicine in the hospital. He naturally has the right to come here on the stand and testify as to that course of treatment, because otherwise how could all these people who are treated by resident internes in the hospitals, how could they ever bring before any court the actual facts of a case; how could they ever be produced before the court and give testimony as to the treatment which they have given? I admit that it should go in for what it is worth, and no further, but I have five doctors here who will substantiate and prove before your Honor any reasonable doubt that may exist in your Honor's mind as to just exactly what the injury involved is, but these doctors who I shall produce later are doctors who were not present at that time. The only man who was present was

the resident, active interne assigned by the staff doctors of All Souls' Hospital, to treat and to take care of these patients. He was authorized by the staff. He was authorized by them to diagnose. He was authorized by them to assist in the post-mortem, and if he had this authority, I say that this man never acted beyond the scope of his authority, but always acted by virtue of the authority vested in him because of his status as a resident, active interne in the All Souls' Hospital, where, your Honor will certainly take judicial notice of the fact that it is a regularly constituted hospital of this community, and I say to you—I submit to your Honor that because of his status in that hospital, that this man, because of the authority vested in him to treat and to practice in the hospital, that he certainly has a right to come into this court and testify, not as an expert, but as the actual physician who at that time treated, diagnosed, and submitted a signed death certificate, and I can prove by the County Physician that he is designated and authorized and has signed many and many death certificates.

The Court: I sustain the objection.

Mr. Scerbo: Exception. May I submit for evidence the death certificate in this case?

Mr. McMichael: Once again I object on the ground that the doctor is not a licensed physician.

Mr. Scerbo: Do you contend that the man was not legally buried?

Mr. McMichael: I don't know anything about it. I am a very technical man.

By the Court:

Q. Were those your conclusions as to the cause of death? A. Yes.

Q. Your own personal conclusions or were they those of another doctor, any other doctor? A. No, sir.

Q. Those are your own conclusions? A. Yes, sir.

The Court: The death certificate is signed by a resident interne of All Souls' Hospital and are his own conclusions, and I will admit it for what it is worth.

Mr. Scerbo: The death certificate, I understand, is admitted for what it is worth, is that right?

The Court: Yes.

Mr. Scerbo: Well, I object to that. I withdraw the death certificate if that is the purpose under which it is going in. Is is withdrawn.

By Mr. Scerbo:

Q. Are you authorized, if a person dies within the hospital, and acting under the rights given by you under the statute, authorized by the State of New Jersey, when a person dies in the hospital, do you sign the death certificate? A. I do.

Mr. Scerbo: I offer the certificate.

Mr. McMichael: Now, your Honor, I object to the form of that question.

The Court: Well, I am admitting it

with a notation to the effect that the conclusions therein contained are the conclusions of the resident interne of the All Souls' Hospital. Also the fact that the doctor is not licensed to practice in the State of New Jersey, he is not a licensed physician in this State.

Mr. Scerbo: I wish to interpose an objection to your Honor's notation on the record, because it characterizes the death record, which is legally filed by the Register of the State of New Jersey, and, furthermore, I am offering merely a certified copy of the death certificate, of which your Honor must take judicial notice. In other words, I am entitled and I have a right to produce a certified copy of the death certificate and it must go into the record for its full value. If it can be in any way characterized, it must be characterized not by your Honor's notation and not by your Honor's specification, because, with all due respect to your Honor, it must be characterized by rebuttal evidence on the part of the respondent, to disclose and show that the findings therein contained are not proper.

(The paper referred to was received in evidence and marked "P-7," dated March 18, 1932.)

Mr. Scerbo: If your Honor please, at this point I am going to withdraw Dr. Hegner and produce before your Honor the physician and prove to your Honor that he is authorized to practice medicine in the hospital.

The Court: I have not questioned that.

Mr. Scerbo: Well, if that is true and you do not question it, why am I not permitted to disclose this man's findings if he is authorized to treat a patient? If he is authorized to treat, he certainly has got to find something to treat, and if he finds something to treat, he is certainly authorized to come before this Court and tell what he found and what he treated.

The Court: There has not been any question as to what he found. Your question was as to the history, and I sustained the objection. There has not been any question as to what the doctor found.

Mr. Scerbo: If your Honor please, you conclude, of course, that the history obtained in this case was hearsay. Your Honor is reaching that conclusion without any right to reach that conclusion, because nothing has been said along that line. Now, if a man comes into the hospital unconscious, if your Honor please, the history must be obtained, and he treats that man according to that history. Why am I not allowed to ask this doctor what history did you use in the course of treatment of this particular case? Why?

The Court: When did he obtain the history from him?

Mr. Scerbo: It is immaterial, if your Honor please, as to where he obtained the history.

The Court: It is absolutely material. The rules of evidence will convince you of that. It is positively hearsay evidence.

Mr. Scerbo: Allow me an exception.

By Mr. Scerbo:

Q. You treated this man up to the time of his death, did you not? A. Yes.

Q. As a result of your treatment——

Mr. McMichael: Oh, that is objected to.

The Court: I overrule the objection.

Mr. McMichael: Mr. Referee, he did not make the autopsy.

The Witness: Yes, the two of us did the autopsy.

The Court: I understand that he made the autopsy.

Mr. McMichael: He did not state so. He said that he was present.

By Mr. Scerbo:

Q. Doctor, who made the autopsy? A. What?

Q. Who made the autopsy? A. The pathologist and myself.

Q. And yourself? A. Yes, I can't think of the name right now.

Mr. McMichael: Wait a minute. I object to that, Mr. Referee. The doctor just said some other doctor, and that he forgot the name.

The Witness: The pathologist and myself. We did it together.

By Mr. Scerbo:

Q. You did it together? A. Yes.

Mr. McMichael: Then, the question is objected to as to what he concluded, the witness not being a physician duly licensed to practice in this State, and therefore not eligible to testify.

The Court: I overrule the objection.
Mr. McMichael: Exception.

By Mr. Scerbo:

Q. As the result of your treatments and the autopsy findings, what were your conclusions as to the cause of his death? A. The conclusions were that the patient died from the result of a cerebral hemorrhage due to accident.

Mr. McMichael: Due to what?
The Witness: Accident, trauma.
Mr. Scerbo: Cross examine.

Cross examination by Mr. McMichael:

Q. Doctor, you say that an autopsy was performed on Mr. Miller? A. Yes, sir.

Q. And who performed the autopsy? A. Dr. Dresel, the pathologist, and myself.

Q. Dr. Dresel, that is a lady doctor? A. She is a pathologist, yes.

Q. You were there at the time? A. Yes, sir.

Q. Doctor, do you want to say on the stand that the conclusions in the autopsy performed by Dr. Dresel were to the effect that this death was caused by a cerebral hemorrhage due to trauma? A. The autopsy was not done by Dr. Dresel. It was done by Dr. Dresel and myself.

Q. I say, do you want to say that the autopsy findings state that death was due to a cerebral hemorrhage caused or activated by a trauma? A. You don't state what it was due to.

Q. You stated a moment ago that the conclusions—that your conclusions after the autopsy were to the effect that the man's death was due to a cerebral hemorrhage, either caused or exascerbated—I forgot just the words you used—

by trauma, did you not? A. Yes, sir, and I still maintain that.

Q. And you maintain that that is what the autopsy report shows? A. No, the report does not show that.

Q. The report does not show that? A. No, sir.

Q. What does it show? A. Cerebral hemorrhage.

Q. It does not say anything about trauma, does it? A. No, but——

Q. Well, does it or does it not? A. (No answer.)

Q. Does it or does it not? A. Do you wish to find out how the conclusions were drawn that it was due to an accident?

Q. Doctor, I asked you a simple question, whether or not in connection with the autopsy of Dr. Dresel, at which you say you were present at the time the autopsy was performed, does that autopsy show that the death was caused by a cerebral hemorrhage, exascerbated, activated, or caused and related to trauma? That is what you said on direct examination. A. I stated that is so.

Q. And do you want to go on record that the autopsy report shows that? A. No, it does not.

Q. It does not? A. It shows that the cause of death, as any autopsy report will, the cause only, the cause of death, which in this case was cerebral hemorrhage.

Q. It does not say one word about trauma? A. There is not any spot——

Q. I say it does not say one word about trauma? A. No, it does not.

Q. Where did you get the idea—why did you state a moment ago in connection with the autopsy findings that you concluded that there was

cerebral hemorrhage and trauma. Where did this trauma come in? A. As the exciting cause of the cerebral hemorrhage.

Q. Yet, it is not on the autopsy report. A. That is right.

Q. How do you account for that? A. It is not necessary.

Q. It is not necessary? A. No.

Q. Do you mean to say, Doctor, that you make an autopsy on a dead man and you do not think it is necessary to fill out the fact that there was a trauma in the autopsy report? A. There was no gross evidence of trauma.

Q. No? A. No.

Q. There was not any evidence of trauma, was there? A. No.

Q. No evidence whatever of trauma, was there? A. Not externally.

Q. Nor internally? A. Yes, sir.

Q. Where? A. Diffused hemorrhages.

Q. Where? A. All over the brain substance.

Q. And do you want to say that the autopsy report shows that that was due to trauma? A. The report does not say so.

Q. Then, it is your own thought of it? A. I worked up the case.

Q. You worked up the case? A. That is my opinion, yes, sir.

Mr. McMichael: I guess you did.

Redirect examination by Mr. Scerbo:

Q. Doctor, are these the hospital records of the case? A. They are.

Q. Were they prepared and maintained under your supervision? A. Yes, sir.

Mr. Scerbo: May I offer the records?

Mr. McMichael: I object to the records unless the person is here who made them.

By Mr. Scerbo:

Q. Did you make this report yourself? A. Yes, not all the nurses' notes, but it was all done——

Q. Are any of them in your writing? A. Yes, sir.

Q. Those that are not in your writing, did you directly supervise? A. Yes.

Q. You did? A. Yes, sir.

Mr. Scerbo: I offer the hospital records in evidence.

Mr. McMichael: I don't believe this witness supervised these records at all.

The Witness: It is not possible for a doctor or an interne or anybody else to take the very words that go into the hospital record. It is done by members of the staff whose duty it is to scatter statements under your direction.

Mr. McMichael: I object to any part of the record going in unless it is in the handwriting of this doctor.

Mr. Scerbo: If this is the record which the doctor says was made under his supervision, some parts of which were made by him, I certainly am entitled to offer this record in evidence. This is his record, the hospitalization record, and I would like to know why it cannot be offered. Of course, I can call the file clerk up here and have the file clerk identify the case and identify Dr. Hegner's connection with it, but why should all that be necessary?

The Court: They work under your supervision?

The Witness: Yes, who ever happens to be attendant at the time.

The Court: I sustain the objection.

Mr. Scerbo: May I have an exception, if your Honor please.

By Mr. Scerbo:

Q. What attending surgeon had any supervision over these records? A. Dr. McMurthrie.

Q. Does his name appear in this record? A. Yes, sir.

Q. Are the records made under his supervision or under your supervision? A. Under my supervision. I am in residence at the hospital.

Q. In other words, Dr. McMurtrie is the doctor in charge of all of them, all the internes? A. He was at the time the attending surgeon.

Q. But the records as contained within the folder, as being part of this hospital record, were all made under your direct personal supervision, were they not, irrespective of Dr.——

Mr. McMichael: Mr. Referee, I object.

The Court: Let him finish the question.

By Mr. Scerbo:

Q. Doctor, this particular record that I show you, the hospital record and the complete history as contained therein, was this record made under your direct personal supervision irrespective of the fact that Dr. McMurthrie was in charge over the ward?

Mr. McMichael: I object to the question, Mr. Referee. You have already ruled

on this matter and I object to this continuous repetition.

The Court: I sustain the objection.

Mr. Scerbo: I don't know who to produce, if your Honor please. Dr. McMurthrie had nothing to do with it.

Mr. McMichael: I will bring three or four doctors in here and I am going to produce them, too. You will have plenty of time to hear them talk.

By Mr McMichael:

Q. One more question on recross examination. Have you ever discussed this case with anybody, Doctor?

Mr. Scerbo: Objected to as absolutely immaterial, and not proper recross examination.

The Court: I sustain the objection.

(Witness excused.)

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony taken in the above matter, stenographically by me at the time, place and date hereinbefore set forth.

M. D. FLYNN,
Court Reporter.

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the testimony in the above matter, as taken before me at the time, place and date hereinbefore set forth.

JOHN C. WEGNER,
Referee.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Morristown, Morris County District

LOTTIE A. MILLER,
Petitioner,
v.
MINNISINK OIL COMPANY INCORPORATED,
Respondent.

March 25, 1933.

Before—Honorable JOHN C. WEGNER, *Referee.*

APPEARANCES:

IRVING YOUNGELSON, Esq., by FRANK C. SCERBO, Esq., for the Petitioner.

WILLIAM B. MCMICHAEL, Esq., for the Respondent.

LOTTIE A. MILLER, the petitioner, recalled, having been previously duly sworn, testified further as follows:

Direct examination by Mr. Scerbo:

Q. Mrs. Miller, what time did Mr. Miller come home from work on the day of November 4, 1931?

Mr. McMichael: I object on the ground

that it is improper redirect. It has already been gone into.

Mr. Scerbo: Let me go into this.

Mr. McMichael: I am objecting, Mr. Commissioner, and I am addressing my remarks to the Bench.

Mr. Scerbo: Let us see if we can be kind to each other.

Mr. McMichael: I am objecting, Mr. Commissioner. I ask for a ruling.

Mr. Scerbo: The reason I am recalling Mrs. Miller is in view of the recent decision of Friese *v.* Nagle Packing Company. I intend to ask her the history of the case as she procured it from her husband. I think I have a perfect right to do that because at the time that she was on the stand last the decision was to the contrary; now the decision is changed and I think I have that right.

Mr. McMichael: I renew my objection on the ground that it is improper redirect examination.

The Court: I will overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. What time did he come home? A. About a quarter to six.

Q. About a quarter to six. What did he come home for?

Mr. McMichael: I object to that. It is a conclusion. Mr. Commissioner, when I

make an objection, counsel should at least wait for the ruling.

Mr. Scerbo: I didn't say anything.

The Court: Objection overruled.

Mr. McMichael: Exception, please.

The Witness: For his supper.

By Mr. Scerbo:

Q. For his supper? A. For his supper.

Q. What time did he come back again, or rather did Mr. Miller say anything to you during that supper time concerning anything that had happened to him?

Mr. McMichael: I object to that on the ground it is improper redirect examination.

Mr. Scerbo: May Mr. McMichael have a blanket objection to this?

Mr. McMichael: But the Court has already gone into that when this case was tried.

The Court: We have this new ruling by the Supreme Court, the decision in the Friese *v.* Nagle Packing Company case.

Mr. McMichael: Yes, but Mr. Commissioner, in this particular case the evidence is already in, I contend respectfully.

Mr. Scerbo: I haven't rested yet, your Honor.

Mr. McMichael: We must look at the trial already conducted. We might have lots of new rulings but the evidence has already been put in, and that is why I am making these objections.

The Court: Overrule the objection.

Mr. McMichael: Exception, please.

The Witness: Yes, he said that he had hit his head.

Mr. McMichael: Will you speak up?

The Witness: He said that he had hit his head and his head hurt.

By Mr. Scerbo:

Q. Did he say anything further, where and how he hit his head?

Mr. McMichael: I object to that as leading. Of course, a blanket objection for all of these questions is all right, but this is improper redirect. I also object because it is leading.

The Court: I sustain the objection. Reframe your question.

By Mr. Scerbo:

Q. Did he say anything further to you, Mrs. Meller? A. He said that he was working on a car in the pit and he hit his head.

Q. Now, did he say when?

Mr. McMichael: I object to that. That is leading.

Mr. Scerbo: All right. We withdraw that.

By Mr. Scerbo:

Q. What did Mr. Miller do after he had his supper? A. He went back to work.

Q. When did he come back again? A. Eleven o'clock.

Q. Eleven o'clock. Now, will you describe Mr.

Miller's actions from then on? Tell the Court just what Mr. Miller did from then on, in your house, that you yourself observed.

Mr. McMichael: Now, Mr. Commissioner, you have ruled, of course over my objection, that statements concerning admissions—alleged statements by the deceased to the wife are admissible on the ground of the recent decision. I don't believe that the Court now intends to further that ruling by permitting this woman to hash over again the whole long line of testimony already adduced, and perhaps some little slips might be corrected by counsel to make the record look better. I don't think that the purpose of allowing all this testimony should be permitted again on the ground of the recent ruling.

The Court: Wasn't that testified to before?

Mr. Scerbo: No. This witness was absolutely prohibited from saying anything that her husband had said and from giving any of her observations on his actions.

Mr. McMichael: Now, Mr. Commissioner,——

The Court: On page thirteen of the transcript: "Question: Did you at that time notice anything unusual or peculiar with reference to his actions or conduct? Answer: Yes." "Will you explain them?"

Mr. Scerbo: I am talking from eleven o'clock on, eleven o'clock at night.

Mr. McMichael: Now, Mr. Commissioner, you have allowed the question as to what the deceased said to his wife, and I am respectfully urging and insisting that any further questions directed to this witness not be permitted on the ground that it would be improper redirect examination. Certainly this woman can't come in today and think of all the things she might have said before. She said on the stand her husband told her he hit his head on an automobile. That evidence was put in over my objection to you, but you permitted it to go in on the ground of this recent ruling. Now, I insist it has to stop there.

Mr. Scerbo: I think, your Honor, under the circumstances——

Mr. McMichael: There are no circumstances about it.

The Court: Off the record.

(Further discussion between Court and counsel off the record.)

The Court: I overrule the objection on the ground of the Friese *v.* Nagle Packing Company case.

Mr. Scerbo (to the reporter): Will you read the question to Mrs. Miller again?

(The reporter read the last question as follows: "Q. Eleven o'clock. Now, will you describe Mr. Miller's actions from then on? Tell the Court just what Mr. Miller did from then on, in your house, that you yourself observed?")

The Witness: Well, he ate a piece of pie.

By Mr. Scerbo:

Q. From eleven o'clock on. A. When he was taken sick——

Q. From eleven o'clock on, what he did, Mrs. Miller. A. He went to bed——

Mr. McMichael: Wait a minute. I distinctly remember that Mrs. Miller was allowed to testify and did testify that he woke up at two o'clock. I think you have that right in there (indicating).

The Court: Yes.

Mr. McMichael: That has all been gone into.

The Witness: I wasn't allowed to say.

Mr. Scerbo: This was when he came home at eleven o'clock. I want Mrs. Miller to tell me what he did and said. I wasn't permitted to bring that out and there are a lot of questions I would have asked.

Mr. McMichael: If that is the case, at eleven o'clock it is too remote, even under the doctrine of res gestae.

Mr. Scerbo: That is ridiculous.

Mr. Michael: May I be permitted to make a statement to the Court without interruption?

The Court: Go ahead.

Mr. McMichael: I object on the ground that any conversation made or had at eleven o'clock in the eevning, would not be even a normal part of the res gestae, under any decision. It is too remote, self serving declaration.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Do you understand the question? A. Yes.

Q. Now, tell the Court. A. He didn't say anything until two o'clock.

Q. All right. What did he say? A. Two o'clock he got up and said that his head hurt him terribly; he put his hands to his head.

Q. All right. Go ahead. A. Ten after two he asked me for a cigarette, and then he said, "I guess I don't want it."

Q. All right. A. Twenty minutes after two he asked me what time it was; that was the last time he spoke.

Q. Did he say anything about what happened to his head?

Mr. McMichael: Now, I object, Mr. Commissioner. That is clearly leading and it certainly stands right out like a sore thumb.

The Court: It is leading. I sustain the objection.

By Mr. Scerbo:

Q. Except for what you told me, Mrs. Miller, did Mr. Miller say anything further concerning the blow to his head?

Mr. McMichael: Now, Mr. Commissioner, the witness has answered and said that is all he said. I think that question is highly improper.

The Court: She said, "That was the last time he spoke." That is all he said.

Mr. Scerbo: One must consider that there is a lawyer with a legal mind. I am

trying to get something out of this witness, your Honor.

Mr. McMichael: It is a good thing there is a lawyer on the other side.

Mr. Scerbo: Here is a witness that is nervous and I think she should be given at least a courteous opportunity to bring out all her testimony. I persist that I have a perfect right to ask my question.

Mr. McMichael: I made an objection. Is there a ruling? You sustained it, I think.

The Court: Yes.

By Mr. Scerbo:

Q. Did Mr. Miller say anything further——

Mr. McMichael: I object to the question.

Mr. Scerbo: I haven't finished my question, Mr. McMichael.

The Court: Wait until Mr. Scerbo finishes his question.

Mr. McMichael: All right.

By Mr. Scerbo:

Q. From eleven o'clock on, did Mr. Miller say anything further concerning the blow to his head?

Mr. McMichael: I object to the question on the same ground. Now it is a matter of pumping, trying to pump the well dry.

The Court: I sustain the objection.

Mr. Scerbo: May I have an exception, your Honor, please.

Cross examine.

Lottie A. Miller, cross

Cross examination by Mr. McMichael:

Q. Mrs. Miller, do you know this gentleman (indicating)? A. Yes.

Q. Who is he? A. He came to my house for a statement.

Q. You made a statement to him, didn't you?

Mr. Scerbo: I object, your Honor, please, as not being cross examination.

Mr. McMichael: For the purpose of attacking her credibility, Mr. Commissioner, I have a right to ask that question, by any known ruling of the Court.

Mr. Scerbo: If any statement was taken kindly produce it; that is the proper way.

The Court: I overrule the objection.

(The reporter read the last question as follows: "Q. You made a statement to him, didn't you?")

The Witness: Yes.

By Mr. McMichael:

Q. And you told him all about this alleged occurrence, too, didn't you, Mrs. Miller? You told him all about this alleged occurrence? A. Yes.

Q. When did you tell him that your husband said he hit his head, what time?

Mr. Scerbo: I object, your Honor, please. The statement speaks for itself.

Mr. McMichael: Mr. Commissioner——

Mr. Scerbo: I object to it. It is not proper cross examination. If he proposes to speak concerning a statement he has got to present the statement. Furthermore, it speaks for itself.

The Court: I sustain the objection. Do you have the statement?

Mr. McMichael: I withdraw the question.

The Court: The objection was sustained.

Mr. Scerbo: The objection was sustained, Mr. McMichael.

By Mr McMichael:

Q. You told your counsel on direct examination that your husband hit his head on the car. You told him your husband said he hit his head on the car. Did he tell you what time he hit his head? A. He didn't say what time.

Q. What? A. He didn't say what time.

Q. He didn't tell you the time? A. No.

Q. What? A. No.

Q. You are quite sure that he never told you the time of the day that he hit his head? A. No.

Q. You are very sure you never told Mr. Brune what time of the day he hit his head? A. No.

Q. Absolutely sure of that, is that right? A. Yes.

Q. Do you know Dr. Gilliand, the osteopath? A. Yes.

Q. Yes or no? A. Yes.

Q. A chiropractor? Isn't that so? A. Yes.

Q. Mrs. Miller, did you tell Dr. Gilliand that Mr. Miller never had an accident when he asked you if there was any accident? A. I did not.

Mr. Scerbo: I object. Just a minute. It is not proper cross examination.

Mr. McMichael: It is for the purpose of testing her credibility.

Mr. Scerbo: Your Honor please, I called her for a specific purpose. Her credibility was tested throughout her original testimony. I called her now for a specific purpose, and the only way they can offset this is to produce in their case this Doctor Gilliand.

Mr. McMichael: Mr. Commissioner, this woman is brought for a purpose all right, to build up her own case.

Mr. Scerbo: I think we have heard enough of that.

The Court: Strike that out.

Mr. McMichael: I have the right to test her credibility on the witness stand. She said her husband told her he was hit on the head by an automobile, and I have a right to test her credibility in any proper way that I want to do it. I am asking her now if it isn't a fact that she told the chiropractor, when he asked her, that she told him that Mr. Miller, as far as she knew had never had an accident.

Mr. Scerbo: May I say this to the Court; there was a specific purpose of bringing this witness to the stand and he should limit himself to that purpose. We can't go far afield of that purpose.

The Court: I overrule the objection.

Mr. Scerbo: May I have an exception.

Mr. McMichael: I will reframe the question.

By Mr. McMichael:

Q. Isn't it a fact that the chiropractor, Dr.

Gilliand, asked you distinctly whether or not your husband had hurt himself? A. No.

Q. He never asked you that? A. No.

Mr. Scerbo: Just a minute, just a minute. The time, please. I think he should fix the time. He may have asked her a year after he died.

Mr. McMichael: She said he never did.

Mr. Scerbo: Mrs. Miller, you should not answer a question when I object. I say the question should have a time limit.

By Mr. McMichael:

Q. You never talked to him at any time about Mr. Miller? Don't look at your counsel; look at me.

Mr. McMichael: I think the witness should be admonished, Mr. Commissioner. The woman is looking at her counsel, and I will state that for the record.

Mr. Scerbo: I am five feet tall, Mr. McMichael, and don't you forget that.

The Court: What is your next question, Mr. McMichael?

By Mr. McMichael:

Q. You never talked to Dr. Gilliand about your husband at any time? A. No.

Q. You are sure of that? A. Yes.

Mr. McMichael: That is all.

Mr. Scerbo: That is all, Mrs. Miller.

(Witness excused.)

DR. ANDREW C. RUOFF, called as a witness, on behalf of the petitioner, being first duly sworn, testified as follows:

Mr. Scerbo: At this moment, before I begin the examination of Dr. Ruoff, there is a doubt in my mind with respect to the death certificate. I find, according to the record, that the death certificate was admitted as P-7.

Mr. McMichael: It was withdrawn by counsel himself.

The Court: No, it was entered again.

Mr. Scerbo: I just wanted to clear the doubt so I would not have to battle the point over again.

Mr. McMichael: I haven't battled anything. If it is in the record, it is in the record.

The Court: It is in the record.

Direct examination by Mr. Scerbo:

Q. Dr. Ruoff, you are a practicing physician in this State? A. I am, sir.

Q. Will you kindly state your qualifications as briefly as possible? A. I graduated from Fordham Medical College in 1917. I have been practicing medicine since 1918. I interned at Christ Hospital, Jersey City, and at the Medical Center in Jersey City, then known as the Jersey City Hospital. From 1918, up to and including 1927, I was the associate medical director of an insurance company in charge of the rehabilitation clinic of the company. I have devoted all of my time to the examination, diagnosis and treatment of traumatic injuries.

Q. Doctor, assuming a man thirty-six years of age, in apparently good health, working at a service station; while underneath a car in what is known as the greasing pit, he bumped his head on the automobile and gave himself quite a blow; this happened in the afternoon of November 4, 1931; about midnight of that same day he began to show dizziness and vomitting; doctors were called a little while after that, and the next day he was removed in an unconscious state to the All Souls Hospital in Morristown; he was unconscious from the time that the doctor was called, about two o'clock in the morning following his accident, and he remained unconscious during the time when he arrived at the hospital and up to the time he died; he died within ten hours from the time, or rather he died on November 7, about ten hours after he was admitted in the hospital, without having regained consciousness; the death certificate showed that the cause of death was cerebral hemorrhage, with a contributory secondary cause of pachymeningitis; the autopsy revealed that the death was caused by cerebral hemorrhage. What, in your opinion, Doctor, was the relationship that the blow—of the blow to the head and the cause of death?

Mr. McMichael: Now, Mr. Commissioner, that question is absolutely objected to. In the first place, there is no evidence in the case that the man was in apparently good health prior to this alleged date of this alleged trauma. In the second place, there is no direct evidence in this case that this man while underneath the car gave himself quite a blow on the head. There is

evidence here that somebody heard him say, "I give myself a hell of a bang on the head." They are the words used right in that record, and there is evidence that two people saw him come out brushing his hand on his head, but there is no direct evidence, by any eye witness in this case, that he gave himself quite a blow on the head while underneath the car. It is all hearsay.

Mr. Scerbo: I will change it to——

Mr. McMichael: Just a moment, Mr. Scerbo.

Mr. Scerbo: To save time I will change it.

Mr. McMichael: I am not worried about saving time; I am giving all this for my record. Further, there is no evidence in this case that from the time he gave himself a blow on the head, as so cunningly put in this hypothetical question so-called, that he was suffering from dizziness and nausea, and had to vomit. If that is in the record, I can't find it, and I have read it all through; I just read it through again last night.

Further than that, in the so-called hypothetical question, the autopsy revealed cerebral hemorrhage; the autopsy has not been permitted in evidence in this case, and so, on those grounds, I object to the hypothetical question.

Mr. Scerbo: Let us both agree, Mr. McMichael, if you can calm down, let us agree on a question. I am willing to agree on any proper question.

Mr. McMichael: Another objection is

that counsel for the petitioner says ten hours.

Mr. Scerbo: I will correct that.

Mr. McMichael: It was twenty-four hours, and it was given in this book (indicating), right here.

Mr. Scerbo: Is it twenty-four? If that is so, we will change it to twenty-four.

The Court: I will have the stenographer read the question sentence by sentence, and in that way you may correct the question. Make your objections as he reads.

(The reporter reads as follows: "Q. Doctor, assuming a man thirty-six years of age in apparently good health,——")

Mr. Scerbo: Now, Mrs. Miller testified to that, if you recall. By referring to the testimony she testified that her husband was in good health, or words to that effect.

Mr. McMichael: That would not be competent evidence, Mr. Commissioner, the fact that he was in good health. How can this woman say he was in good health?

Mr. Scerbo: That is a decided point. It is in evidence.

Mr. McMichael: It is not evidence, Mr. Commissioner. That is the ground we take when we object to the hypothetical question. Where is the probative evidence when she says that he was in good health?

Mr. Scerbo: I think it is in evidence. She said he had never been sick a day.

The Court: By referring to the record, page twenty-two: "Question: I asked

you, Mrs. Miller, was he a strong man or a weak man? Answer: A strong man."

"Question: Did he ever lose time from his work for any reason? Answer: No."

"Question: He was a steady worker? Answer: Yes."

There should be no objection to that, according to the testimony.

Mr. McMichael: I mean, it should be taken for what it is worth.

The Court: Yes.

Mr. McMichael: The wife says he was in good health, but does that mean that he was? Has it any probative value?

The Court: I overrule the objection.

Mr. McMichael: Exception.

(The reporter reads as follows: "— Working at a service station; while underneath a car in what is known as the greasing pit, he bumped his head on the automobile,——")

Mr. McMichael: Now, I insist that should be properly framed, to say that certain witnesses heard him say——

Mr. Scerbo: Oh, no. This is my question to the doctor.

Mr. McMichael: It is not evidential. It is a fact that they heard him say that he bumped his head.

Mr. Scerbo: I object to that. I don't think it is proper.

Mr. McMichael: Hearsay evidence is not the best evidence, even though it falls under the rules of res gestae. It is not evidence he bumped his head, except that certain witnesses heard him say that.

Mr. Scerbo: Your Honor permitted that testimony under the rules of res gestae.

Mr. McMichael: I further wish included in there—right at this point—that there was no evidence of any abrasion, cuts, bleeding or marks on the head; that is in there, too, brought out by cross examination.

Mr. Scerbo: I object. This is my question. Is it mine or yours?

Mr. McMichael: I am making a further objection. That is brought out by cross examination of the witness Stowe, page forty-four direct.

The Court: I overrule the objection.

Mr. McMichael: May I have added that there was no blood on the head? It is in the evidence.

Mr. Scerbo: I object to Mr. McMichael adding anything. If my question meets the legal requirements of this court I will stand by my question. You have a right under cross examination to ask your own question.

The Court: I overrule the objection.

(The reporter read as follows: "—and gave himself quite a blow: this happened in the afternoon of November 4, 1931; about midnight of that same day he began to show dizziness and vomiting; doctors were called——"

Mr. McMichael: Right there. Right there that vomiting and nausea be stricken out about midnight—particularly occurring around midnight. I didn't hear anything like that.

Mr. Scerbo: She just said that.

The Court: It is in there that he vomited.

Mr. McMichael: At what time?

The Court: Midnight.

Mr. McMichael: At midnight? What page is that? May I have that? I thought it was around two o'clock.

The Court: Maybe it was two o'clock.

Mr. Scerbo: We will change the question to say about two o'clock he vomited.

Mr. McMichael: I would like to find that vomiting. On page sixteen she said he started to vomit and there was nothing about dizziness. The answer was—on page sixteen—"Why, he started to vomit then, and he asked me what time ——" I then said I object to anything he asked her, and you sustained the objection.

That occurrence took place at two o'clock, she said; she told me that today and she told counsel that today.

The Court: She said, "He put his hand to his head and he shivered." She said he was shivering and shaking. There is nothing in here about dizziness.

Mr. Scerbo: Well, we will take the dizziness part out and put in there that he shivered and shook.

Mr. McMichael: Two A. M. the next morning; that is what she said.

The Court: About two o'clock in the morning.

Mr. Scerbo: What were the words, so we can get it right. He shivered and shook?

The Court: Shivered and shook.

Mr. Scerbo: He shivered and shook instead of the word dizziness.

The Court: And he started to vomit.

Mr. Scerbo: He started to vomit.

(The reporter read as follows: "—Doctors were called a little while after that, and the next day he was removed in an unconscious state to the All Souls Hospital, in Morristown;——)

Mr. Scerbo: At that time he became unconscious and doctors were called immediately thereafter; he remained unconscious and was removed to All Souls Hospital the next day, the next afternoon; he remained unconscious at the hospital until the time of his death, on November 7, 1931. Is that all right?

The Court: That is right.

(The reporter read as follows: "He was unconscious from the time that the doctor was called, about two o'clock in the morning following his accident, and he remained unconscious during the time when he arrived at hospital and up to the time he died.")

Mr. Scerbo: At that time I said in the question that he died ten hours after; strike that out and make that: he died thirty-four hours after that.

(The reporter read as follows: "—he died within ten hours from the time, or rather he died on November 7, about ten hours after he was admitted in the hospital,——)

Mr. Scerbo: That should be about thirty-four hours after.

(The reporter read as follows: "— without having regained consciousness; the death certificate showed that the cause of death was cerebral hemorrhage, with a contributory secondary cause of pachymeningitis; the autopsy revealed that the death was caused by cerebral hemorrhage. What, in your opinion, Doctor was the relationship that the blow—of the blow to the head and the cause of death?")

The Witness: I think there was a direct relationship between the happening described in the hypothetical question and the man's cause of death.

By Mr. Scerbo:

Q. Doctor, is cerebral hemorrhage in itself a cause of death, a positive cause of death? A. Oh, yes, sure.

Q. It is. Would a blow on the head cause a cerebral hemorrhage? A. Oh, yes.

Q. Is it necessary—to produce cerebral hemorrhage is it necessary that any exterior indications be shown on the exterior portion of the head? A. It is not, sir.

Q. In this case, if it is shown that this decedent had no blood, had no exterior signs of trauma, would that in itself mean that a cerebral hemorrhage as occurred to him would not occur?

Mr. McMichael: If that is not a beautiful leading question, Mr. Commissioner, I never heard one before.

Mr. Scerbo: It is a hypothetical question; if it is used all the way through.

Mr. McMichael: And the answer would be "No, of course not."

Mr. Scerbo: Your Honor please, if you can't lead an expert and give him the correct——

Mr. McMichael: You won't lead him, Mr. Scerbo, not if I am here.

(The reporter read the previous question as follows: "Q. In this case, if it is shown that this decedent had no blood, had no exterior signs of trauma, would that in itself mean that a cerebral hemorrhage as occurred to him would not occur?")

Mr. McMichael: I object. It is a leading question.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

The Witness: The evidence of external manifestations of injury would be proof positive that there was an injury; the absence of it is not proof positive that there was no injury.

By Mr. Scerbo:

Q. Doctor, what is a subdural hemorrhage? A. You have the dura of the brain. Now, depending upon the portion of the dura that shows manifestations of the hemorrhage, one speaks of that as intradural, extra dural or subdural.

Q. What is pachymeningitis, Doctor? A. It is engorgement or inflammation of the blood into the portion of the brain known as the dura.

Q. Doctor, are both subdural hemorrhages and pachymeningitis combined causes of death? A. What is that question?

(The reporter read the last question as follows: "Q. Doctor, are both subdural

hemorrhages and pachymeningitis combined causes of death?'')

The Witness: Either one or——

Mr. McMichael: There is no evidence of that in this case.

Mr. Scerbo: I didn't say there was.

Mr. McMichael: He can ask him all the questions he wants but he has to confine his examination to the evidence.

Mr. Scerbo: I just asked him if they were causes of death.

Mr. McMichael: That is very, very beautiful, but we are not here for that.

Mr. Scerbo: It is a cerebral case, and I think I am entitled to ask Dr. Ruoff questions concerning cerebral hemorrhage.

The Court: Does not the death certificate show cerebral hemorrhage?

Mr. Scerbo: The death certificate shows that he died from cerebral hemorrhages. It shows pachymeningitis, and I am asking him what is pachymeningitis; I am asking him if it is the cause of death.

Mr. McMichael: He has gone into all kinds of things. If he wants to confine himself to cerebral hemorrhage——

Mr. Scerbo: I am waiting until Mr. McMichael's doctors get on; then we will see what they go into.

The Court: Don't argue. I overrule the objection.

The Witness: My conception is that the death certificate in this case shows cerebral hemorrhage with pachymeningitis as contributory; that is a normal sequence of patients; that is the cause of death.

Mr. Scerbo: Cross examine.

Dr. Andrew C. Ruoff, cross

Cross examination by Mr. McMichael:

Q. Dr. Ruoff, where do you practice? A. Union City, New Jersey, and points north.

Q. And points north?

Mr. Scerbo: And points south.

By Mr. McMichael:

Q. You didn't treat this man, did you, Doctor? A. I beg your pardon?

Q. You didn't treat this man, did you, Doctor? A. I did not, no.

Q. You never saw him in your life, did you? A. That is right.

Q. How is it you are interested in this case——

Mr. Scerbo: I object, your Honor please.

The Witness: I can answer that adequately.

Mr. Scerbo: All right, Doctor.

The Witness: I was called in by Mr. Scerbo. He sent me a letter. He gave me a hypothesis based practically on the facts included in his hypothetical question. He says: "Dear Doctor, Do you believe from these facts that there is any relationship between the alleged happening and the man's cause of death?" I answered Mr. Scerbo by letter that it was, in my judgment.

By Mr. McMichael:

Q. You have assisted Mr. Scerbo somewhat in preparing this case? A. I have assisted you and I have assisted other lawyers.

Q. I mean in this particular case? A. Certainly, yes.

Q. For quite some time? A. I have been in this case, and I have been in this court room three times—three days. From the very outset I have been in the case.

Q. Right from the beginning? A. Right from the beginning.

The Court: The doctor has advised the Court many times and on many cases.

The Witness: Thank you, Judge.

By Mr. McMichael:

Q. Doctor, you don't specialize in diseases of the brain, do you? A. No, sir. My work is general traumatic injuries and involves every part of the anatomy.

Q. You don't specialize in cranial injuries? A. No.

Q. Or in diseases of the brain? A. No. In the course of my practice since 1918, I have seen many thousands of head traumas; some of them resulted in death, and some of them did not; some of them resulted in neurosis per se and then some of them resulted in organic changes.

Q. Doctor, do you know—withdraw that. What classification does pachymeningitis fall under, how many? A. I don't understand your question.

Q. How many classifications? A. Of course, you have the traumatic and non traumatic.

Q. Did you ever hear of pachymeningitis interna? A. Oh, yes, I have said so. In treating of your meninges, you have your subdural meningitis, or intra and extra dural; I have already said so.

Q. Then, there are three classes, aren't there; externa pachymeningitis, pachymeningitis intrasimplex, pachymentigitis interna hemorrhagica, is that true? A. Yes, sir. You can go a step further and have another classification, if you want to take classifications.

Q. What is that? A. Acute, sub-acute, and chronic, simple, tubercular and syphilitic.

Q. All right; so we have another classification? A. If you want to follow from classifications.

Q. Which classification of pachymeningitis did this case fall under? A. I believe that this case was the type that came under the classification of a traumatic pachymeningitis that was diffuse.

Q. Why do you say that? A. Because of the cause of death as described, and the factors included in the hypothetical question and the subsequent history.

Q. Suppose, Doctor, that the classification of pachymeningitis in this case turns out to be pachymeningitis interna hemorrhagica; what would you say then? A. It would not alter my opinion one bit. That would simply be a relative description.

Q. It would not change your opinion one bit? A. Not one bit, not one iota.

Q. According to medical science, what about the text books, Doctor? A. As for instance which?

Q. Well, we will take, for instance—do you consider Jelliffe and White an authority? A. Jelliffe and White are both very excellent men. Yes, I studied their book.

Q. You consider that—do you consider them authorities? A. I studied their book. I don't

know. They are authorities on traumatic injuries to the brain.

Q. Would you say this, Doctor; would you say that according to your knowledge and your studies of this particular branch of medicine, that pachymeningitis interna hemorrhagica is probably caused—that the probable cause of that condition would be trauma? A. Would you read that to me again?

Q. I will reframe it. I think maybe it was a little confusing. I will withdraw the question. Doctor, according to your best knowledge, your study and familiarity with medical treatise and your own studies in connection with diseases of the brain, would you say that trauma is the probable cause of pachymeningitis interna hemorrhagica? A. Oh, yes.

Q. It is? A. Absolutely.

Q. You say that the text books and the authorities do agree on that point? A. Oh, I don't. When you asked me about text-books and authorities and whether they all agree with me, I am giving you my experience based on many years——

Q. On your own experience. A. (Continuing.) On experience in this particular branch.

Q. Did you ever hear of a case of pachymeningitis interna hemorrhagica caused by trauma? A. Yes.

Q. Do you remember when and where? A. No, I don't. I don't classify them as to where, when and how. When you deal with thousands of traumatic injuries it is practically impossible; I mean you can't try to classify them as to time, place and hour; that is perfectly ridiculous. You don't even mean that question.

Q. Doctor, where in cases of trauma or traumatic cerebral hemorrhage—we will put it this way: the cerebral hemorrhage, where is that cerebral hemorrhage located? Where do you find it? A. Where do you find it, cerebral hemorrhage in a trauma, in a traumatic case?

Q. Yes. A. You can find it in any part.

Q. In any part of the brain? A. Oh, absolutely.

Q. You say that that is your opinion or the opinion of—— A. That is my best judgment, based on my experience and reading.

Q. It would not make any difference; in any part you could find that hemorrhage? A. That is right.

Q. If it is caused by trauma? A. Certainly. If you are confronted with an individual who has a luetic disturbance—I testified to that—according to that within the last week, and I was on the defense.

Q. You say it could be in any part of the brain? A. No matter what portion of the brain you pick out for yourself, the trauma must have been the provocative cause.

Q. Doctor, if the cerebral hemorrhage is found underneath the dura—— A. You mean subdural?

Q. Yes, subdural hemorrhage? A. Yes.

Q. Would you say then that this cerebral hemorrhage was caused by trauma? A. Yes.

Q. You would? A. Yes. You don't want to—I mean in that question you don't say is that the only cause, is that correct? You say that if it was found that he had a subdural hemorrhage and there was a history of trauma with unconsciousness ten or twelve hours, the unconsciousness continued——

Q. Doctor, what would be another cause to pro-

duce a condition of that type, if it was a subdural hemorrhage? A. There are many factors; arterio sclerosis may be a very potent factor.

Q. What else? A. Any form of infectitious disease with undermining of systemic reaction.

Q. How about chronic alcoholism? A. That is one, also opium; opium poisoning can result in coma, the end result which may be just this kind of a picture.

Q. Chronic alcoholism is a very probable cause of subdural? A. Not very probable. It is one of the definite causes.

Q. It is a usual cause? A. It is one of the recognized causes.

Q. It is not—I mean to say there is nothing about it that is unusual? A. I didn't say it was. It is one of the recognized causes. If you eliminated trauma from this picture it might be any of the other things.

Q. Now, Doctor, is a traumatic cerebral hemorrhage, in the sense that we know it, a common occurrence or is it an uncommon occurrence? A. I say it is so common that in approximately one of every head trauma there is a claim of headaches and dizziness in every injury to the head when they come to litigation.

Q. I know that, Doctor, to my sorrow. A. But I should say that in one of every ten that come under our attention, we find subsequent manifestations that result in disability; they don't result in death, as the general cross section.

Q. You say it is quite common, then, for medical science to run across traumatic cerebral hemorrhage? A. Yes. Dr. Michael Osnato, who was a very dear friend of mine, and yours, too, wrote extensively on that subject.

Q. So that you say our mutual friend, Dr. Michael Osnato, found an awful lot of traumatic cerebral hemorrhage? A. Yes. It is too bad he is not here today; I think he might qualify and clarify the situation for your edification.

Q. Doctor, would you call or classify pachymeningitis interna hemorrhagica a chronic inflammation of the brain? A. It may be acute or chronic.

Q. You don't know which it was in this case? A. Well, if you give me a supposedly normal healthy individual, who within ten or twelve hours following head trauma becomes unconscious and dies in a comatose status, I would not say he had chronic pachymeningitis.

Q. All right. Doctor, would you not want to know a little bit more in this case to answer that question propounded to you by my worthy opponent to the effect that his man died as the result of the alleged blow that somebody heard him say, would you want to know a little bit more about the extent of that blow in order to say that he died of that blow in that hospital? A. Not if you tell me that unconsciousness ensued within a reasonable time, and I regard ten or twelve hours a reasonable time.

Q. Suppose, Doctor, I tell you that somebody heard him say that he bumped his head; he resumed his work, his regular work, he went home to supper, and he went back to work again and did his regular work, and he came home at night at the regular time; what have you got to say about that? A. Perfectly competent picture.

Q. It would not change your testimony a bit? A. A perfectly competent picture.

Q. A perfectly competent picture? A. That is right.

Q. In other words, I can go out now, bump my head, keep on working all day, tonight at two o'clock in the morning I become unconscious, go to the hospital, and if I have just bumped my head against that wall, not enough to even raise a bump. If I die, you would be willing to come to court and say for the benefit of my widow: that I died as the result of that trauma? A. I think you forget one factor. You say you go to the hospital; you have forgotten entirely the most important thing, the fact of becoming unconscious within ten or twelve hours.

Q. Do you want to say on the stand—— A. I am under oath, and I have said so.

Q. Do you want to say that if I bumped my head now, I think nothing more of it, I keep on working all day, doing my regular work, become unconscious tonight, or rather tomorrow morning, two o'clock in the morning, and I die, that that little bump against the head caused traumatic hemorrhage? A. And not only that, but I would certify to a life insurance company that you were entitled to double indemnity for accidental death.

Q. So then, Doctor, according to your theory, it does not make any difference how slight the blow is? A. As a general picture, as a general thing, it does——

Q. As a general thing—— A. But where unconsciousness is concerned, yes, and——

Q. Would you expect to find—— A. One moment, please. Give me a chance to finish my answer. You are not giving me a chance to answer a question. Where unconsciousness ensues in a comparatively short time, say ten or twelve hours, and the unconsciousness persists,

and death ensues, then I have no other answer, just one answer.

Q. Doctor, is it a reasonably probable thing, according to your best knowledge of medical science, to expect that a man can bump his head and do his regular work until two o'clock in the morning and die as the result of that bump? A. That is right. I have——

Q. Is it more probable that if he had a severe enough trauma to cause death from cerebral hemorrhage, that unconsciousness would have developed immediately? A. No; that is the ordinary rule, that unconsciousness should develop at once; but if unconsciousness develops within three days or seventy-two hours, or within a week, I would still say that it was within the reasonable probability.

Q. Doctor, will you kindly define pachymeningitis interna hemorrhagica? A. Yes. It is an inflammatory reaction, either acute or chronic.

Q. Either acute—— A. Or chronic; either simple, tubercular or luetic.

Q. That is the standard recognized definition according to medical science? A. That is right.

Q. That definition describes with all the—does that definition coincide with all the authorities? A. It does not. My God, I am telling you; every man that writes a book on any one subject has this one pet way of giving you a differential form of the so-called classifications; that is characteristic of the man. He is happy to have himself classified as having the particular way of calling a thing by a particular name; that does not make medicine or surgery.

Q. I don't want a speech, Doctor. I just

asked you whether it was or was not. I don't want a speech. A. That is not a speech.

Q. Doctor, will you just kindly give us the name of one recognized medical authority who agrees with that definition, that it is either acute or chronic? A. Yes. Dr. Michael Osnato.

Q. Any text books? A. He has written short sections on it. He was very zealous in sending them to me.

Q. So then there is Dr. Osnato. Is there anybody else who agrees with that definition? A. I think that Dr. Osnato knew as much about traumatic injuries of the head as any man I have met or read of, because I came in contact with him, and because of his coming in contact with me.

Q. Doctor, may I ask you to refer to other texts, or somebody else? A. No, because I am in a particular field, and in this particular field the questions go to the man or men who know.

Q. Do the standard books say it is acute or chronic? A. What do you mean by standard books?

Q. Standard text books that they use in medical colleges. A. You know what Dr. Arlitz once said about text books.

Q. They are not worth anything? A. That wise men read them. I read text books—; I don't write them.

Q. So outside of Dr. Osnato you don't know anybody who says it can be either acute or chronic? A. I am not interested. I am giving you a man in whose ability I had the utmost confidence, a man under whom I worked and with whom I worked.

Q. Doctor, of course, you might be wrong? A. It is only human to err, they say.

Q. Only God is infallible? A. I am giving you my best opinion, based upon my experience.

Q. Doctor, isn't it perhaps a bit speculative on your part, when you say this man you have never seen, didn't know, never treated, died as the result of something which nobody saw except heard; isn't that a bit speculative? A. I will tell you how sure I am; first, I am under oath; secondly, if that same hypothesis was presented to me by you, I would say there was a causal relation. I am saying here, to the best of my ability, based upon my experience, there is.

Q. Without knowing the extent of the injury, without knowing what the hospital records disclosed upon the autopsy, without knowing anything you are willing to say that? A. You say without knowing anything. I have a death certificate before me. I have a history of trauma; I have unconsciousness within twelve hours; I have a continued unconsciousness, and I have death ensuing; there is my picture.

Q. Would you be normally and logically interested in knowing what the autopsy disclosed to help you along? A. If it will help you any, I saw the autopsy findings, but I am not competent to testify to that. I say aside from that, with that picture, unless you showed me something affirmatively to the contrary, I would stick to my conclusions.

Q. In other words, Doctor, you raised your hypothesis and you rest your answer entirely on the fact that this man became unconscious at two o'clock in the morning? A. Or whether you told me two, or three or four; within a reasonable length of time.

Q. Plus the fact that somebody said to you that somebody else had heard him say he bumped

his head? A. Perfectly ridiculous. I am basing it on a hypothetical question. I don't care where that came or where that was taken from. I am basing it on a hypothesis, which I presume to be a fair portrayal of the facts.

Q. You would not even be interested in his past history, Doctor? A. I would, only to the extent as to a possible underlying condition. For instance, if I am confronted here with an individual who had a chronic disturbance, that would lead me more conclusively, still more conclusively to my conclusion.

Q. In other words, driving up old man exacerbation to the rescue. A. Yes, very definitely so.

Q. He always comes up on his horse, doesn't he, Doctor? A. Yes, very definitely so, which, of course, would not help you any.

Mr. McMichael: That is all.
(Witness excused.)

DR. OTTO LOWY, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. Dr. Lowy, you are a practicing physician in this state? A. Yes, sir.

Q. What is your specialty, Doctor? A. Pathology and diagnosis.

Q. Will you give your qualifications and experience, Doctor, as briefly as you can? A. I graduated in 1901. From 1901 to 1902 I spent at the various hospitals; at a number of hospitals in Vienna, in Prague, in Berlin. I came

back to the United States and resumed practice, in general practice. I remained in general practice until 1910. In 1910 I gave up general practice and took up pathology, and worked at the Mt. Sinai Hospital, Cornell University, at the old German Hospital, at Post Graduate Hospital. I did some cancer research work. I devoted my time to clinical pathology, and pathology and diagnosis. In 1918 and 1919, I perfected a method of putting arsphenamine or salversan 606 into a permanent solution, something that hadn't been done before; I was connected with the Newark Beth Israel Hospital until 1922 or 1923, as Director of the Pathological Department. I don't know—I have done a lot of other things. I have done some animal experimentation within the last year on the effects of coal tars on animals and also on the effects of coal tars on humans. I have—why, I don't know, but I can't give you any more. I can't think of any more.

Q. Doctor, assuming a man thirty-six years of age, in apparently good health, worked at a gasoline service station; while underneath an automobile in a greasing pit, he bumped his head and gave his head quite a blow; this happened in the—— A. How old was this man?

Q. Thirty-six years of age; this happened late in the afternoon, about a quarter to five; he went home to supper, and then returned again to work; came home about eleven o'clock; he soon complained he wasn't feeling well, and between twelve and two o'clock he started to vomit and shiver and shook; about two o'clock he lapsed into unconsciousness, and doctors were called immediately; he didn't regain consciousness and in the afternoon of the next day he was brought

to the All Souls Hospital, in Morristown; he came into the hospital unconscious and he remained unconscious and died on the seventh of November, two days later. The death certificate showed that the cause of the death was as follows: Cerebral hemorrhage, secondary contributory cause pachymeningitis. A. Pardon me for interrupting, but does the death certificate state the location of the hemorrhage?

Q. Cerebral hemorrhage is all it says. A. That is a big order.

Q. What? A. It is a big order.

Mr. McMichael: Thank you, Doctor.

By Mr. Scerbo:

Q. Doctor, with those facts before you, in your opinion, was the relationship—is there any relationship between the blow to the head and the cause of death? A. Yes, there is a direct relationship.

Q. Doctor, is cerebral hemorrhage a positive cause of death? A. No.

Q. Well, can it cause death? A. It can, yes.

Mr. McMichael: I object, unless there is the word probable there; anything is possible. I object, Mr. Commissioner, unless the word probable is used.

By Mr. Scerbo:

Q. All right, is it probable; in what way is the cerebral hemorrhage the cause of death? A. Well, cerebral hemorrhage causes death by reason of the pressure upon the vital parts in the brain. A cerebral hemorrhage in one part of the brain may be rather extensive and not cause

death, whereas, a very minute hemorrhage in another part of the brain may cause death, so that the location of the hemorrhage would be an important thing in determining whether immediate death would occur or whether the death would be delayed. In cerebral hemorrhage, where death does occur at a delayed interval, it is due to the fact that extravasation of blood takes place and pressure on the brain is exerted; when this pressure is communicated then to the parts that are vital—let us say to respiration and to the heart, when that pressure is so severe then as to inhibit the heart or respiratory action or any of the other vital functions, death takes place, but if this pressure is not so severe that individual may live.

Q. That extravasation that you speak of results in pachymeningitis? A. No. Extravasation does not result in pachymeningitis. Pachymeningitis is a generic term indicating inflammaton of all the membranes surrounding or covering the brain. This pachymeningitis, it is a generic term indicating an inflammatory reaction of the brain—of the membranes of the brain, and it is a condition which is almost invariably seen in trauma of the head.

Q. How would you classify pachymeningitis, Doctor? A. Well, now, as I said, pachymeningitis is a generic term. It may be caused by syphilis; it may be caused by tuberculosis; it may be caused by infections; it may be caused by poisoning; it may be caused by trauma. Now, I have seen a number of cases of pachymeningitis that were caused by the administration of arsphenamine salversan; I have seen a large number of these cases.

Q. Doctor, then if a person having received a blow on the head and continuing with his work lapsed into unconsciousness about ten or twelve hours later, is that consistent with—— A. Oh, yes. That is one of the types I have described of hemorrhage which is slow, which is a small hemorrhage. There was no large blood vessel ruptured. It must have been one of the capillaries or a number of capillaries and the blood continued simply to extravasate or ooze out of these small vessels until it occupied a space and caused pressure. Now, it must be remembered that the brain is enclosed in a bony—you might call it a closure, a capsule. Two objects cannot occupy the same space at the same time, so that when this blood continued to continue—if the hemorrhage had stopped at one time prior to this man's lapsing into unconsciousness, he would not have died; but the hemorrhage would have been there, but the oozing continued until the point was reached where pressure was exerted upon vital parts in the brain and the man became unconscious and died. That is a natural and absolute sequence of this happening. I want to say this: during my hospital service, even as far back as ten years ago, twelve years ago, I insisted that every individual who received a head injury had to remain in the hospital under observation for at least three days.

Mr. McMichael: Pardon me, Doctor, just a moment.

Mr. Commissioner, Dr. Lowy is a very personal friend of mine; I like him a lot, but I don't think I am obliged to sit here and listen to a long medical lecture in answer to a question. I am going to

object and this is no reflection upon Dr. Lowy.

Mr. Scerbo: Everything the doctor has said is pertinent to the issue, because he saves me a lot of questions.

Mr. McMichael: We are concerned here with the case of George Miller *v.* the Minnesink Oil Company, and we are not concerned with the doctor's experience in other cases and I——

The Court: Is the Doctor finished?

Go ahead, Doctor.

The Witness: The idea, your Honor, is this: I wasn't permitted to look at the autopsy report; I merely generalized, and I am generalizing on the question of trauma. Here is a man that died as a result of a head injury. I think it is very important that this Court have an idea as to the real reason why a man dies when he receives a head injury; I say, why is it that they don't die immediately.

By Mr. Scerbo:

Q. Now, Doctor, is it absolutely necessary that the head injury resulting in cerebral hemorrhage shall definitely show external signs of that trauma? A. No, indeed.

Q. Doctor, what kind of brain is more prone to damage by an accident, a well brain or one that may be diseased by alcoholism, or——

Mr. McMichael: Object to the question.

By Mr. Scerbo:

Q. —(continuing.)—or lues?

Mr. McMichael: I object to the question. There is no evidence here of alcoholism or lues. Counsel was very—he was very and unusually too violent in establishing that the man was in apparent good health; he wanted that established.

The Court: I sustain the objection.

Mr. Scerbo: Your Honor please, the hour is getting late, and I know very well that I cannot recall Dr. Lowy again in rebuttal. On the question of Dr. Lowy——

Mr. McMichael: You are going to anticipate everything I am going to do; you are anticipating everything.

Mr. Scerbo: Under cross examination of Dr. Ruoff, Mr. McMichael asked Dr. Ruoff concerning the effect of alcoholism on the brain. I think that I can now ask him, in view of the fact that this is an expert on the stand and he is qualified as such, I am now asking him all questions affecting the brain; I am asking him what brain can be affected, which is more prone to damage; one that is well or one that has probably been diseased by alcoholism or lues. I think my question is perfectly proper——

Mr. McMichael: Mr. Scerbo, perhaps I am going to establish——

Mr. Scerbo (continuing): ——on the direct examination.

Mr. McMichael: Wait a minute, Mr. Scerbo. How does counsel know? Maybe I am going to show he never touched wine or drink.

The Court: I sustained the objection.

Mr. McMichael: Why anticipate all these things?

Mr. Scerbo: May I have an exception, your Honor please.

By Mr. Scerbo:

Q. Doctor, assuming any case, not particularly pachymeningitis due to alcoholism or lues, he got a head trauma as described in this case——

Mr. McMichael: Object. Are you through.

By Mr. Scerbo:

Q. (Continuing.) —is it probable from the subsequent history that death was accidental or precipitated by the trauma?

Mr. McMichael: I object to the question, Mr. Commissioner, on the ground——

The Court: Let me hear the question, first.

(The court reporter read the last question as follows: "Q. Doctor, assuming any case, not particularly pachymeningitis due to alcoholism or lues, he got a head trauma as described in this case, is it probable from the subsequent history that death was accidental or precipitated by the trauma?")

Mr. McMichael: That is just the same horse with another saddle on it.

The Court: I sustain the objection.

Mr. Scerbo: May I have an exception, your Honor please.

Cross examine.

Cross examination by Mr. McMichael:

Q. Dr. Lowy, you practice in Newark, don't you? A. In Newark, yes.

Q. You practice medicine in Newark? A. Yes.

Q. Of course, you never saw the man in his lifetime? A. No, I did not.

Q. In fact you never heard of him until—— A. I say right now that I never heard of him, I never kenw he was in existence, never knew he was born, didn't know he died until I was told today here.

Q. The first time you knew about this case was when my worthy opponent and his medical battery approached you about the case, is that right? A. Yes, sir.

Q. You aren't a brain specialist, are you, Doctor? A. No, I am not.

Q. A pathologist? A. Pathologist, right; and diagnostician, don't forget that.

Q. And diagnostician? A. Yes.

Q. Dr. Lowy, when you said some time back while counsel for the petitioner was framing his hypothetical question, you used the expression, "that is pretty broad." What did you mean by that? A. Well, you see the brain is a rather large organ containing a large number of very—let us say, a large number of nerve cells, neclei, ganglia cells, controlling various different functions in the body, and it would be of interest to know just what particular locality in that brain was involved, just if it could be done.

Q. I see. A. So as to formulate, really, a better opinion and better picture of it. You might as well say there was a revolution in Germany; it would be of great interest to know

whether that revolution was in Hamburg or in Berlin.

Q. Well, then, Doctor, you mean by that—I think you and I agree very amicably on this point—in order to answer that question, in order for you to give a good answer to that hypothetical question in the affirmative, you would need to know a little bit more of where the location of the trauma was? A. No, no. I think you are wrong on that.

Q. What was—— A. Pardon me a moment. The answer would be the same with the picture that I received. It would be cleared up in my mind, however possible in your mind the reason for the delay in this individual's death. It would have cleared it in your mind—I say it would have cleared up in my mind, but the fact of the matter is it was clear. The end result is what caused me to get the thing clear.

Q. Then, Doctor, you will agree with me: that it would be of real interest to you, would it not, to know what part of the head he was struck? A. No, it would not make any difference to what part of the head was struck. I want to see that autopsy report because I wanted to know where that blood clot was located; I wanted to know what particular blood vessel had ruptured, and I wanted to know a number of things in reference to it. It would have helped me considerably, but since I wasn't permitted to look at it——

Q. You are going to answer yes anyway? A. No. I have to take the hypothetical question, and my answer——

Q. Well, Doctor—— A. Pardon me. I say when a man dies and the report is cerebral hemorrhage, and there is a history of trauma, there is only one conclusion to come to and that

is that the hemorrhage was caused by trauma. Now, there are no two ways out of it. The fact that the man is dead is evident; you will not dispute that. Whether you are disputing——

Q. Dr. Lowy, in your opinion, the fact that the man dies, the fact that somebody said he had a blow on the head—— A. Oh, no, no, not what somebody else said. Somebody said there was a cerebral hemorrhage. Now, I remember that there are three things—there are three things here you have to consider; first, the blow on the head; secondly cerebral hemorrhage; third death. Those things go together.

Q. Well, then, Doctor, why do you say it would be interesting to know all about the autopsy, that is their findings there, if that is all you need, that the man had a blow, and then he died; why do you need all that? A. I will assume now——

Q. You opened the door and I am asking you, Doctor. A. I am perfectly willing to answer your question.

Q. You opened the door and I am walking in. A. Assuming that this man had died and the autopsy showed that there was a hemorrhage of one of the large branches, there was a hemorrhage of—say in the circle of Willis. If there had been a hemorrhage in the circle of Willis he could not have lived for twelve hours after the blow.

Q. Let us get that again, Doctor; that is important. A. It is important.

Q. Doctor, may I get that once more so I get that firmly fixed in my brain. If there had been a hemorrhage in the circle of Willis—— A. Yes.

Q. What did you say? A. May I draw this for you?

Q. Yes, give it to me. A. This (indicating) is not really artistic. The blood supply in the brain is supplied by four main arteries, two carotid and the two vertebral arteries. They form together a circle somewhat like this (indicating), at the base of the brain, in the base of the brain. Now, if the hemorrhage had been anywhere around here (indicating), that man would have died possibly within fifteen or twenty minutes after the blow.

Q. So then, Doctor—— A. It makes a difference if I know, as far as your case is concerned —as far as our case is concerned, because if this is found, then, of course, I realize that it could not have happened twelve hours before. That is why I wanted to see your autopsy report before. I am not trying to build up a case, Mr. McMichael.

Q. That is clear, isn't it? A. Is it clear to you?

Q. Yes. A. All right.

Q. Doctor, do you know what classification of pachymeningitis this case fell under? A. I beg your pardon?

Q. Do you know what classification of pachymeningitis this deceased's case fell under? A. Why, pardon me? I didn't even know the deceased had pachymeningitis. You would not let me see the report.

Q. Oh, no? Counsel included that in his hypothetical question. A. He asked me about pachymeningitis, and I clearly said that that is a generic term for inflammation of the membranes surrounding the brain.

Dr. Otto Lowy, cross

Q. How many classifications does that condition fall under? A. Pardon me. Of course, you have acute and chronic. Those inflammatory conditions in the brain which are sudden in onset, those are the acute; where you have a condition which is of long standing, for instance in syphilis, you have chronic pachymeningitis.

Q. In other words, traumatic—let us use the word—— A. Yes. Traumatic, he had acute.

Q. That would fall under the acute classification? A. I say it should be.

Q. Under the rules of medical science, Doctor,—— A. Please let me see the autopsy report.

Q. Doctor, I don't want to show it to you. I don't feel like doing it. A. Why spar with me?

Q. Doctor, I am asking you a question. A. Do you wish me to give you a lecture on pachymeningitis?

Q. No, I don't want it; I am asking you a simple question. Does or does not pachymeningitis interna mean acute pachymeningitis? A. I don't know what you are talking about, sir.

Q. All right. A. I told you that pachymeningitis——

Q. I will withdraw the question. A. (Continuing.) —was a generic term.

Q. Doctor, does acute—you say there are two kinds of pachymeningitis, acute and chronic? A. Yes.

Q. Does the acute classification fall under the classification caused by trauma? A. When was the acute or rather the pachymeningitis observed? What were the symptoms; what was the subsequent cause of the condition?

Q. Now, I am not on the stand. I am asking you medically, under the—— A. Oh. no, in

order to answer your question intelligently I must be given those things as I told you.

Q. You don't understand my question? A. If you don't understand, let us clear it up.

Q. Wait a minute, Doctor. A. Pardon me, Mr. McMichael.

Mr. McMichael: Mr. Commissioner, it seems to me that this is not a lecture or a class. I am asking the witness a question and he is trying to give me a question.

The Witness: It will be, if you continue.

Mr. McMichael: I am asking the Doctor a very simple question, according to medical standards.

The Witness: You aren't asking a simple question.

Mr. McMichael: Wait a minute, Dr. Lowy. I can't think of the words now. I am all upset.

The Witness: So am I.

By Mr. McMichael:

Q. I am trying to ask you, according to medical science, whether or not acute pachymeningitis is caused by trauma, whether when you say acute pachymeningitis that means—— A. Acute inflammation of the membranes.

Q. That is trauma would cause—— A. Acute inflammation of the membranes.

Q. What? A. Inflammation of the membranes, whether that could be caused by trauma, yes.

Q. When a man has traumatic pachymeninigitis, do you suffer acute pachymeningitis or did he suffer chronic; which is it? A. He didn't suffer either one.

Q. What did he suffer? A. He got a trauma to the head with possible hemorrhage. As the result of this blow there had been an injury to the meninges; then he may have had some minute hemorrhages in the meninges; he may develop or he may have acute pachymeningitis with the acute symptoms in the brain; he may have all those things, and he may not, he need not necessarily have meningitis as a result of trauma. Usually you do, but you don't know.

Q. Dr. Lowy, is chronic pachymeningitis ever caused by trauma, according to medical knowledge? A. Yes, yes, indeed. If an injury is received and this individual receives an injury to the head, and as a result of that injury gets acute inflammation of the meninges—let us call it acute pachymeningitis, if that individual has syphilis or if that individual has tuberculosis, it is very apt to terminate in a chronic form of meningitis, because infections of that type usually follow in the course of time.

Q. Doctor, we are getting this record all cluttered up.

Mr. Scerbo: Please let the Doctor finish the answer.

The Witness: You asked me about chronic pachymeningitis and I am answering it.

By Mr. McMichael:

Q. We won't worry about the lues or anything else. We will talk about George Miller, who is dead. A. All right. Tell me what was found.

Q. Suppose he was a happy, healthy, normal man—that is what they say—— A. Why worry

about the chronic pachymeningitis if he was healthy?

Q. Well, supposing a healthy man—— A. What?

Q. Suppose he were a healthy man? A. Why worry about it?

Q. What classification of pachymeningitis would you expect to find on his death if he were a healthy man? A. Well, I can't understand your question.

Q. Would there have been a normal—— A. Pardon me. If he had pachymeningitis he would not be a healthy man.

Q. Suppose he had a subdural cerebral hemorrhage; suppose that were found. We will talk about the autopsy now. A. Now, you know the subdural is also an awful big order, because the dura covers the entire brain.

Q. All right, Doctor, go ahead. A. I cannot answer that, either. You must remember——

Q. Is it probable, according to medical science, that you find a subdural cerebral hemorrhage in cases of trauma? A. Is it probable?

Q. Yes. A. Yes, indeed.

Q. Probable? A. Yes.

Q. What authority, Doctor, do you use for that? A. My own experience.

Q. Your own experience; Dr. Osnato, too? A. Pardon me. I was unfortunate in not knowing Dr. Osnato as well as Dr. Ruoff, but I have read some things of Dr. Osnato and I have had my own experience. I am interested in authorities when——

Q. Doctor, do you recognize diseases of the nervous system by Jelliffe and White? A. I don't recognize——

Q. Anything? A. Any authority when I am on the witness stand. I am my own authority when I am on the witness stand.

Mr. McMichael: All right, Doctor. That is all.

(Witness excused.)

(A short recess was taken at this time.)

DR. ALDO COULTAS, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. Scerbo:

Q. Doctor, you heard the hypothetical question that I asked these doctors, did you not? A. Yes, I did.

Mr. Scerbo: Do you believe we can stipulate that he heard it, in order to save time?

The Court: Is there any question about that?

Mr. Scerbo: He heard it twice; he heard the whole argument, and in order to save time he can answer the question.

Mr. McMichael: All right.

By Mr. Scerbo:

Q. You have the history of the case well in mind? A. Yes.

Q. From the questions as they have been asked? A. Yes.

Q. In your opinion, Doctor, was the relationship between the blow to the head the cause of—

is there a relationship between the blow and the cause of death? A. I think there was a relationship.

Mr. Scerbo: I forgot to qualify the doctor.

By Mr. Scerbo:

Q. Doctor, you are a licensed physician in this State? A. I am.

Q. For how many years? A. Twenty-nine years.

Q. Will you give us your qualifications, Doctor, as briefly as possible? A. Well, I been working in the various hospitals throughout New York. Interned in the Paterson General Hospital, practicing in Madison since 1904, and connected with All Souls Hospital as attending surgeon. Have been connected with other hospitals, but not at present.

Q. Now, Doctor, bearing in mind the history of the case as you heard it and the hypothetical question propounded to the other two doctors, Dr. Ruoff and Dr. Lowy, I ask you, in your opinion, is there a relationship between the blow and the cause of death? A. I think there was.

Q. There is no doubt in your mind, Doctor, that in all probability, due to the nature of this blow and the cerebral hemorrhage that followed it, that the blow was the cause of death?

Mr. McMichael: I object. Now, Mr. Commissioner, why don't Mr. Scerbo take the stand? He gave him the answer, only he put the question mark on it.

Mr. Scerbo: I am speaking to the Doctor, your Honor please.

(Discussion between Court and counsel.)

The Court: I overrule the objection.

By Mr. Scerbo:

Q. All right, Doctor.

Mr. McMichael: May I have an exception, on the ground that it is a leading question?

(The reporter read the last question as follows: "Q. There is no doubt in your mind, Doctor, that in all probability, due to the nature of this blow and the cerebral hemorrhage that followed it, that the blow was the cause of death?")

The Witness: I think it was.

Mr. Scerbo: Cross examine.

The Witness: It was the cause of his death. It was the exciting cause of his death.

Mr. Scerbo: Cross examine.

Cross examination by Mr. McMichael:

Q. Doctor, did you know this man? A. No.

Q. Ever treat him? A. No.

Q. When did you first hear about this case? A. About a month ago I was called to testify here.

Q. In what way? A. Mr. Scerbo asked me to testify.

Q. So that is all, of your all personal knowledge of the case, that you know. You were called in by Dr.—Mr. Scerbo to testify? A. That is correct.

Q. Right? A. Right.

Q. Never attended the man? A. Never did.

Q. Never saw him? A. Never saw him.

Q. Are you a specialist in brain diseases, Doctor? A. No, I am not.

Q. Just a general practitioner? A. And surgeon.

Q. And surgery. Doctor, with these meager facts in mind which were propounded in the hypothetical question, that is to say, no particular—no evidence as to where the blow occurred, —nor the extent of the blow, with the fact in mind that he continued to do his regular work until his regular quitting time, you are still willing to say that there is no doubt whatsoever that this man died of that alleged blow that somebody spoke about?

Mr. Scerbo: I object to the question. It is argumentative.

Mr. McMichael: It is cross examination.

Mr. Scerbo: It is argumentative. He is arguing with the witness.

Mr. McMichael: I am asking him whether he still wants to say that there is positively no doubt; I am asking him whether he believes there is no doubt, with certain facts that I gave him.

The Court: I overrule the objection.

The Witness: The death occurring so suddenly after the injury, with the pathological findings as told to me, would make me conclude that this man died as the result of the injury.

By Mr. McMichael:

Q. How long after this alleged happening

which somebody spoke about did death occur, Doctor?

Mr. Scerbo: I object, your Honor please. Now, he can't characterize it in that way. He should limit himself to the actual testimony adduced on the stand.

Mr. McMichael: I am limiting myself to the hypothetical question which he heard propounded.

Mr. Scerbo: There should not be any characterization or minimization.

Mr. Michael: I am only asking him about the hypothetical question which he says he heard.

The Court: I overrule the objection.

The Witness: What was the question?

(The reporter read the last question as follows: "Q. How long after this alleged happening which somebody spoke about did death occur, Doctor?")

Mr. Scerbo: If your Honor please, I don't think that is a proper question; it is not proper cross examination in the first place; in the second place, the records speaks for itself. That is the hypothetical question.

Mr. McMichael: I will reframe the question.

Mr. Scerbo: Is the question withdrawn?

By Mr. McMichael:

Q. How long did death occur after this alleged happening? A. I understand thirty-six hours.

Q. Do you call that sudden death, Doctor? A. Yes.

Q. You call that sudden death? A. I call that sudden death.

Mr. McMichael: No further questions.

Mr. Scerbo: That is all, Doctor.

(Witness excused.)

Mr. Scerbo: Dr. Larkin was to be here at eleven, but I will make one more effort to get him here. If he does come here I will be obliged to put him on the stand, and if he does not come it is perfectly all right.

With that one exception, I will rest the petitioner's case.

Mr. McMichael: Are you going to rest?

Mr. Scerbo: You heard me.

Mr. McMichael: I will not put on my case until you have finished yours.

The Court: Can you put your lay witnesses on?

Mr. McMichael: No.

(Discussion between Court and counsel.)

(Whereupon an adjournment was taken to 2:00 P. M.)

AFTERNOON SESSION

Mr. Scerbo: We rest.

Mr. McMichael: Does the petitioner rest?

The Court: Yes.

Mr. McMichael: The respondent at this time, moves to dismiss the claim petition filed herein, on the ground that the peti-

tioner has not made out a prima facie case. In this connection, may I say this: that the very recent decision, the permitting of statements made by a deceased, a decision which practically overrides our old ideas of the doctrine res gestae, it stated a little something more than that. This decision permitted statements made by a deceased, but it also said this: that those statements, while admissible, must be taken in connection with other probative evidence.

In this case, I certainly stand on the record when I say where is that other probative evidence with which we can connect or take these alleged statements made by the deceased? We have had adduced no evidence by any attending physician. We have had, on the other hand, evidence by three other physicians, all of whom say that they never saw the man in his life. In fact, they just recently learned there was such a case.

It seems to me that in this case if probative evidence were adduced on the part of the petitioner, by the attending physician or physicians, then a statement of the deceased's within this recent decision should be allowed, in connection with that evidence; but we just haven't got it. We have nothing here except three opinions based upon practically nothing but hearsay; no evidence by anyone who actually attended the man, but just three arbitrary statements that the man died of an accident.

It is perfectly possible for anybody to testify to that effect. It seems to me that the purpose of the law is that when an employer is brought before the Compensation Bureau on a question as to whether or not he owes the dependents of the deceased compensation under the Statute, surely there must be real probative evidence adduced in order for the petitioner to make out a prima facie case.

I respectfully contend that such has not been adduced and that there has not been even sufficient evidence which would warrant the necessity for rebuttal on such evidence by the respondent.

The Court: I will deny the motion.

Mr. McMichael: Exception, please.

(Discussion between Court and counsel.)

DR. WILLIAM A. McMURTRIE, called as a witness on behalf of the respondent, being first duly sworn, testified as follows.

Direct examination by Mr. McMichael:

Q. Dr. McMurtrie, you are a duly licensed practicing physician of the State of New Jersey? A. I am.

Q. When were you licensed to practice, Doctor? A. 1906.

Q. Will you kindly state, for the benefit of the presiding Deputy Commissioner, your various qualifications? A. I graduated from Lafayette College in 1901, Cornell College in 1905; I

served an interneship for one year, and general medicine ever since.

Q. What institutions are you connected with, Doctor? A. All Souls Hospital.

Q. All Souls Hospital? A. Yes.

Q. Doctor, have you the hospital records with you? A. Yes.

Q. Relating to the case of George Miller, deceased? A. I have.

Q. Are those the original records of the hospital? A. Yes.

Q. Were you in charge of his case? A. I was.

Q. Were the records made under your supervision? A. Yes, sir, except the first.

Q. Will you kindly produce the records?

Mr. Scerbo: Except what, Doctor?

The Witness: The very first order when he came in.

By Mr. McMichael:

Q. Except what? A. The first order—when first admitted to the hospital.

Mr. Scerbo: With the exception of the first order, the rest of the records are—were made under your supervision?

The Witness: Yes.

By Mr. McMichael:

Q. Will you kindly open them up so the Court may see them, and Mr. Scerbo?

Mr. Scerbo: May I cross examine on the records?

Mr. McMichael: I have asked him to open them up.

Dr. William A. McMurtrie, cross

By Mr. Scerbo:

Q. Doctor, are the records in your writing? A. Some of it is; some is the nurse's and some is the interne's and some is typewritten.

Mr. McMichael: I think, Mr. Commissioner, that the Courts have held that as far as records which were made under the supervision of the attending physician or surgeon, that they are admissible in evidence.

Mr. Scerbo: I object, your Honor please, because hospital records are not part of a case. They can be referred to by doctors if they want to, but they cannot be produced in evidence. There is a fundamental rule with respect to that, and in all cases the hospital records are not evidential. They may be used for the purpose of reference, but they may not be produced as part of the evidence.

The Court: What part are you objecting to?

Mr. Scerbo: I know nothing about them, your Honor please.

Mr. McMichael: Well, then, Mr. Commissioner, we have all been making a lot of mistakes in the Bureau recently.

Mr. Scerbo: Of course, such parts as in his own handwriting I am willing to admit.

Mr. McMichael: I will stand on the Court's decision.

The Court: I will sustain the objection as far as anything not in the doctor's handwriting.

Mr. McMichael: Then do I understand the ruling to be that if the records are made under the supervision of the doctor, that they aren't admissible?

The Court: Only those parts in his own handwriting.

By Mr. Scerbo:

Q. Doctor, what is that first day thing you talk about? A. I said the first order; I didn't say the first day.

Q. What do you mean by that? A. The order was given when he was first admitted to the hospital.

Q. Did that contain the history? A. I didn't take the history; the interne takes the history of the patients in the hospital.

Q. Did you rely on the interne's history? A. Not entirely. We quiz the patient if possible; we get the history from the patient's family if we can. Most of our histories are all hearsay.

Mr. McMichael: I am not seeking to offer anything which wasn't made under the supervision of the witness. I am seeking to introduce just that part which was made under his supervision.

By Mr. Scerbo:

Q. Doctor, have you the history which you are relying on in this case before you? Have you the history in which you relied upon in this case? A. Some of it. Here is the chart (indicating).

Mr. McMichael: Mr. Commissioner, if that is the case the Bureau would compel

every nurse, every clerk, every person to be brought in, because I myself have objected, made the same objection——

The Court: And you have been sustained.

Mr. McMichael: No, I was not.

Mr. Scerbo: All our circuit court judges will not allow hospital records to be admitted in evidence.

Mr. McMichael: But the Bureau is allowing records to be admitted in evidence if they were made under his supervision.

The Court: Do you know of any cases?

Mr. McMichael: It has been the ruling always given me.

The Court: I have never ruled on it.

Mr. McMichael: Do you require each person who made a part of the record to be brought in? We can do that if you wish.

The Court: Will it be necessary in this case?

Mr. McMichael: Mr. Scerbo is going to insist on it, and I will bring in every person who made part of the record.

(Discussion between Court and counsel.)

Mr. Scerbo: Well, we leave it in subject to being connected up.

Mr. McMichael: Right at that point, Mr. Commissioner, I think counsel for the petitioner should state just what he wants connected up, in fairness to me, so I will know what to do.

Mr. Scerbo: He is going to testify in this case, so I understand, and therefore

he has got to rely on the history. I want the history connected up that he relied upon to give his testimony here today.

Mr. McMichael: I certainly would not think of departing from this case without doing it; it would be fatal to me if I didn't do it.

The Court: That is going to be connected up?

Mr. McMichael: Certainly will. Then, I offer the hospital record in evidence, subject to being conected, with the distinct understanding that the only thing you wish me to connect up is what I am going to do anyhow.

(The hospital record referred to was received in evidence and marked R-1, March 25, 1933.)

Mr. Scerbo: I am not objecting, of course, to the nurse's charts and nurse's reports, but I am objecting to anything in there that is in connection with this case that is not in the doctor's handwriting, with the exclusion of the charts and the nurse's notations.

Mr. McMichael: In fairness to the respondent, Mr. Commissioner, I want Mr. Scerbo to point out what he wants me to connect up.

Mr. Scerbo: If you will give me the opportunity to look at it, all right.

Mr. McMichael: Here it is; look it over (handing to Mr. Scerbo).

Mr. Scerbo: Here is the autopsy sheet here (indicating). I don't think that should go in.

Mr. McMichael: There sits the person right there (indicating) who will testify to that.

Mr. Scerbo: How was I going to know you were going to call her? You are going about this case backwards.

The Court: The autopsy will be connected up.

Mr. McMichael: I certainly hope so.

Mr. Scerbo: The autopsy has got to be connected up; I am not particularly interested about the nurse's charts at all, but the admission sheet and the history have got to be tied up.

The Court: Dr. Stage took the history sheet, as I understand it.

By Mr. McMichael:

Q. Who took the admission sheet? A. Dr. Stage, I think.

Q. Do you want to make sure, so we can get it right?

Mr. Scerbo: Didn't Dr. Hegner take it?

Mr. McMichael: I think you will find that Dr. Hegner wasn't as much in the picture as you thought he was.

The Witness: Dr. Stage signed his name as interne. I don't know who took the history. Dr. Stage was there when I examined the patient the first time.

By Mr. Scerbo:

Q. How about Dr. Hegner, isn't his signature there? A. They were both internes; Dr. Heg-

ner was the second interne; he wrote there under my supervision and signed it (indicating).

Q. Dr. Hegner was in this case, was he not? A. He was an interne at the hospital.

Q. He was associated with this case, was he not? A. I don't know.

Mr. McMichael: Wait a minute. What is this, direct examination or are we talking about the hospital records? I would like the records straightened out. Mr. Commissioner, will you clear that up?

The Court: The only thing is the history which has got to be connected up and the autopsy.

Mr. McMichael: The history of Dr. Stage and the autopsy of Dr. Dresel.

Mr. Scerbo: And the admission sheet. Of course, you said you considered that part of the history.

Mr. McMichael: Yes. That was signed by Dr. McMurtrie here.

The Witness: I signed all the charts.

By Mr. McMichael:

Q. In fact, they are all made under your supervision? A. Yes.

Q. You were the attending surgeon in charge? A. Yes.

Q. Now, Doctor, will you turn to R-1 in evidence and give the Court a complete summation, leaving nothing out of the case?

Mr. Scerbo: I object to the question as being entirely too general and too broad. It leaves me no opportunity to cross examine.

Mr. McMichael: I didn't do any leading. I asked him to do it in his own way.

Mr. Scerbo: The Doctor could talk all afternoon and I wouldn't have any room to object at all.

The Court: I sustain the objection.

By Mr. McMichael:

Q. All right, Doctor. A. May I refer to the chart?

Q. All right, Doctor. If counsel will point—I am not used to leading, I don't know how. I just want the Doctor to tell us in his own way.

Mr. Scerbo: Did you say that you are not used to leading?

Mr. McMichael: Yes.

The Witness: May I refer to the chart?

The Court: I will sustain the objection.

By Mr. McMichael:

Q. Did you have under your care and treatment, Doctor McMurtrie, one George Miller, deceased? A. Yes.

Q. At All Souls Hospital, at Morristown? A. I did.

Q. When did you first—when was the first time he came under your care? A. May I refer to that chart?

The Court: Yes.

The Witness: Fifth day of November, 1931, at about eleven P. M.

By Mr. McMichael:

Q. What history was obtained? A. You mean what history was I told?

Q. Well, it is going to be connected up.

Mr. Scerbo: I object, your Honor please, to his putting it in in this way.

Mr. McMichael: Mr. Commissioner, he just a minute ago said he would permit it providing I would connect it up.

Mr. Scerbo: He says: "What history was I told?" I don't think it is proper unless he tells us who told it to him.

Mr. McMichael: I ask for a ruling.

Mr. Scerbo: How do I know whether that is the history he is going to connect up?

The Court: I sustain the objection. You may ask the witness if he got the history and whom he got it from.

Mr. McMichael: All right.

By Mr. McMichael:

Q. Was a history obtained? A. I beg your pardon?

Q. Was a history obtained? A. Yes, sir.

Q. Who obtained it? A. Dr. Stage and Dr. Dresel.

Q. I beg your pardon? A. Dr. Stage and Dr. Dresel gave me some information.

Q. Was that history obtained under your supervision? A. Before I seen the patient.

Q. Pardon me? A. Before I seen the patient.

Q. What was the history?

Mr. Scerbo: I object, your Honor please.

Mr. McMichael: To be connected up, Mr. Commissioner. Every time I move to

do it he objects after I have told him I will connect it up.

Mr. Scerbo: How does this doctor come into a history obtained by Dr. Stage and Dr. Dresel?

The Court: Is Dr. Dresel going to be here?

Mr. McMichael: She is here in the courtroom now.

The Court: I overrule the objection.

By Mr. McMichael:

Q. Answer the question, Doctor.

Mr. Scerbo: May I have an exception, your Honor please.

The Witness: That this man—his immediate history was that the evening before—that was on the day before he was admitted to the hospital, patient complained of pain and numbness of the lower extremities, as well as dimness of vision. At about two A. M. that night—that would be on the fifth of November—he became semi-conscious and almost into a coma, with twitchings and that the coma increased; that previously to that—I am going into the past history——

By Mr. McMichael:

Q. Go ahead. A. Previously to that he had had frequent headaches, severe headaches for years, with some——

Q. For years, you say, Doctor? A. For years frequent headaches, for which he drank as many as ten to fifteen cups of coffee——

Mr. Scerbo: For what?

The Witness: For which he drank as many as ten to fifteen cups of coffee a day for his headache; that he had trouble with one eye, left eye, drooping for seventeen years, I think it was.

By Mr. McMichael:

Q. Will you give the medical term, Doctor? A. Ptosis.

Q. For how long a time, Doctor, did you say? A. What is that?

Q. For how long a time, did you say? A. I think that was seventeen years.

Q. Go ahead. A. I have forgotten the figures. That he was a fairly moderately alcohol drinker for years, and that he used tobacco moderately.

Mr. Scerbo: Doctor, are you testifying from that record or not?

The Witness: I beg your pardon?

By Mr. Scerbo:

Q. Are you testifying from that record? A. Some from this record, some from the things told me. My history is made up from hearsay always.

Q. By whom was it told you? A. By Dr. Stage.

Mr. McMichael: The respondent will now be perfectly frank about it, and I want the doctor to exclude hearsay.

The Court: Some of it is hearsay.

By Mr. McMichael:

Q. What were the things that were told you

that you mentioned there? A. Well, in taking the history we always take hearsay, what people tell us. The only thing that is not on here is the headaches.

Q. Who told you that? A. Dr. Dresel got that; she told me that. She had seen the patient before I did, got the family to tell her.

Q. What was it then, Doctor, that you were told that is not in the history? A. That he had headaches.

Mr. Scerbo: Just a minute, please.

Mr. McMichael: I am trying to help counsel.

Mr. Scerbo: I don't need your help, Mr. McMichael.

By Mr. Scerbo:

Q. This man came into the hospital in an absolute comatose condition? A. No, he did not.

Q. You mean to say he spoke after he got in there? A. He complained of pain, he made noises.

Q. Was he erudite? A. No.

Q. He didn't give you a history? A. He didn't give me a history.

Mr. McMichael: What is this, Mr. Commissioner, is this cross examination?

Mr. Scerbo: I am trying to make the Court understand that this is not proper and regular mode of bringing the history into the record. If it was given to Dr. Dresel and some other doctor, Dr. Stage, it should come from them after they have established the source from which it was

procured. I think this is decidedly improper.

Mr. McMichael: I will withdraw the witness and ask Dr. Dresel to take the stand.

(Witness excused.)

DR. IRMGARD DRESEL, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Mr. McMichael: Now, at this time, Mr. Commissioner, I am just going to call Dr. Dresel for one purpose and that is the history. I will recall her later for her autopsy findings.

Direct examination by Mr. McMichael:

Q. Dr. Dresel, are you a duly licensed practicing physician? A. No.

Q. What is that? A. I am a pathologist.

Mr. Scerbo: You are a pathologist?

By Mr. McMichael:

Q. You are connected as a pathologist with what institution? A. Just now?

Q. Yes. A. At the present with All Souls Hospital.

Q. Where before? A. Previously I was assistant and instructor of pathology and bacteriology at John Hopkins from twenty-five to twenty-nine.

Q. Assistant? A. Assistant instructor of pathology and bacteriology.

Q. At John Hopkins? A. John Hopkins, yes.

Q. Now, were you connected with All Souls Hospital, Dr. Dresel, when Mr. Mioller was admitted? A. Yes, I was.

Q. Did you talk to his wife? A. Yes, I did.

Q. Did you ask his wife about his condition? A. Yes, I did.

Q. Just tell the Court what Mrs. Miller told you about his condition. A. Mrs. Miller told me that her husband had been suffering from severe headaches over years, and that he used to take cups of coffee, very—quite many. I don't remember exactly how many, but every evening she would make him very strong and many cups of coffee in order to give him relief.

Q. Did you notice any peculiarity about his face when you saw him? A. No, I didn't.

Q. Did you notice his eyes? A. No, I didn't.

Q. You didn't make any observation of that? A. No.

Q. Was anything else said by Mrs. Miller to you about his past history? A. No, only that he was suffering from headaches.

Q. For how long a time? A. For years.

Q. For years. Now, did you ask Mrs. Miller whether or not this man had been hit on the head or hurt in any way? A. I cannot recall for sure. I was under the impression that she told me he had no injury.

Mr. Scerbo: I ask that that be stricken out from the record, your Honor please, on the ground that it is not responsive.

The Court: Objection sustained. Strike it out.

Mr. McMichael: To your best recollec-

tion now—just answer the question, Doctor—did you have any conversation with Mrs. Miller relative to whether or he had been hurt?

Mr. Scerbo: Now, your Honor please, the question has been answered. It is merely begging—Mr. McMichael is begging himself out of the situation.

Mr. McMichael: I am not doing any begging; I have a right to bring it out in another way.

The Court: I sustain the objection.

By Mr. McMichael:

Q. Did Mrs. Miller mention an injury to you?

Mr. Scerbo: I object to leading questions, your Honor please.

The Court: Objection sustained.

By Mr. McMichael:

Q. Did you have any conversation with Mrs. Miller about Mr. Miller? A. Yes, I did.

Mr. Scerbo: I object, your Honor please. That question has been asked and has been answered.

Mr. McMichael: What is there objected to in that?

Mr. Scerbo: It has been answered. The question was answered and the conversation was given. After Dr. Dresel tells us for ten minutes of a conversation between the two, Mr. McMichael says: "Did you have a conversation?"

By Mr. McMichael:

Q. To the best of your recollection, knowledge and belief, what was the entire conversation as told to you by Mrs. Miller?

Mr. Scerbo: I object. That question has been fully and completely answered.

Mr. McMichael: It has not been fully answered. This witness has a right to bring it out, and it is not leading.

Mr. Scerbo: It is a very important matter, and by referring to the record your Honor will see that that question was answered.

The Court: It was answered by her. Objection sustained.

Mr. McMichael: Exception, please.

All right, Doctor, you may step down.

Mr. Scerbo: How about my right of cross examination?

Mr. McMichael: I beg your pardon. I am sorry.

Cross examination by Mr. Scerbo:

Q. Dr. Dresel, did you make a record of your conversation with Mrs. Miller? A. No, I did not.

Q. You did not?

Mr. Scerbo: That is all.

(Witness excused.)

Mr. McMichael: Now, at this point, I don't know whether or not the respondent has any particular ground for an objection, but I think it being the usual courtroom procedure, it is not customary for attorneys and doctors to sit together and

coach each other on questions. I don't do it and I have never done it, so I don't see why—of course, it is entirely up to the Court whether Dr. Ruoff can keep on assisting from a medical legal point; I am just making a little, slight objection to it at this time; I think counsel ought to be able to try his own case.

Mr. Scerbo: How slight is it?

Mr. McMichael: I think counsel should be able to try his case without the aid of the doctor. I haven't got Dr. McMurtrie talking to me.

Mr. Scerbo: With all due respect to the Court, I think it is even beyond your power to tell me whether Dr. Ruoff can suggest anything to me in a case of this kind. Dr. Ruoff is here for a specific purpose and he is fulfilling that admirably.

The Court: And he is causing no disturbance whatsoever.

Mr. McMichael: No. I am just making a notation on the record, that is all. An observation, if you call it such.

DR. WILLIAM A. McMURTRIE, resumed the stand and testified further as follows:

Direct examination (continued) by Mr. McMichael:

Q. Now, Doctor, did you make a physical examination of the deceased? A. I did.

Q. Or rather the man that is now deceased. What did you find? A. Well, on admission, when I saw him about eleven o'clock that night,

he was semi-conscious. He could be aroused a little bit when you examined him. He had a ptosis of the left eyelid—I think the left—can I refer to it again? This is a year and a half ago.

The Court: Yes.

The Witness: Yes. He seemed to have a partial paralysis of his legs. He had a spastic condition in his arm—I have forgotten which one. His reflexes were exaggerated, and some were gone; they changed from time to time. His heart and lungs were normal, as near as I could ascertain and I think that is all at the time.

By Mr. McMichael:

Q. Did you find any external manifestations of trauma, Doctor? A. None.

Q. When did he die? A. He died at eleven fifty-five P. M., November 7.

Q. What did you diagnose as the attending surgeon's cause of death? A. He had a cerebral hemorrhage cause of death.

Q. Due to what? A. Now due to pachymeningitis hemorrhagica interna.

Q. Just tell the Court what that is. A. That is chronic inflammatory condition of the meninges covering the brain, usually coming on for years, gradual formation of new blood vessels from thinning of the blood vessels, new connective tissue and always little spots of old hemorrhages—spots of former hemorrhages.

Q. Was an autopsy performed, Doctor? A. It was.

Q. Under your supervision? A. I was there.

Q. The autopsy confirmed your findings or

diagnosis? A. We had diagnosed pachymeningitis—we just diagnosed it cerebral hemorrhage.

Q. You diagnosed it cerebral hemorrhage, and the autopsy—— A. Proved hemorrhage, plus.

Q. Proved it? A. Disclosed it and the pachymeningitis hemorrhagica interna.

Q. Now, Doctor, you had him under your observation and care and attendance for how long a time? A. From eleven P. M. on the fifth, when he died at eleven fifty-five P. M. on the seventh.

Q. At the start you were in attendance on him? A. Yes.

Q. You were there when the autopsy was performed, you say? A. Yes.

Q. You made your diagnosis? You made your diagnosis? A. Yes, sir.

Q. And you were present when the autopsy was made and that confirmed it? A. Yes, sir.

Q. Now, Doctor, I am asking you whether or not, in your opinion, as the attending surgeon, whether or not his death was caused by trauma? A. No, I don't think so.

Mr. McMichael: Take the witness.

Cross examination by Mr. Scerbo:

Q. Doctor, there is such a thing as traumatic cerebral hemorrhage due to trauma? A. Yes, sir.

Q. Isn't there? A. Yes.

Q. There is such a thing as traumatic cerebral hemorrhage with no external manifestations of it, is that so? A. I don't think so, not plus the autopsy findings.

Q. Doctor, don't you think it is possible for a man to bump his head, not leave any external

manifestations and yet give a sufficient jar to cause some trouble, cause some damage to him?

Mr. McMichael: I object to the word possible, Mr. Commissioner, because it is not proper. Probable is the word.

Mr. Scerbo: Well, I will use the word probable instead.

By Mr. Scerbo:

Q. Is that so, Doctor? A. I don't think so.

Q. You have never seen such a case? A. I have never seen such a case, no.

Q. Have you ever read any? A. I don't remember hearing a case.

Q. What are the causes of pachymeningitis interna? A. Well, there are several causes. One is any infection over a long period of time—tuberculosis does it; an old anemia would do it. It is in senile patients. It is in—alcohol will do it; syphilis will do it; poisonings will do it, and following an accident will do it, a long continued accident, an old accident.

Q. Doctor, he wasn't syphilitic, was he? A. No.

Q. He wasn't poisoned, was he? A. No.

Q. You didn't find any extreme alcoholism about him, did you? A. A history of alcoholism.

Q. Yes, but you said it was moderate, did you not? A. That is what the chart says.

Q. Let us look at the record, Doctor. You referred to it on that question of alcoholism. Where did you find it? What is the word used next to alcohol? A. Moderate.

Q. What did you say for the record? A. I said moderate.

Q. Did you say fairly moderate? A. I don't remember.

Q. What? A. I don't remember.

Q. You don't remember whether you did or not? A. No.

Q. What really is it? A. It says moderate.

Q. Moderate? A. Yes

Q. You were giving your diagnosis in this case—you contemplated as far as alcoholism is concerned, the status moderate, is that right? A. Yes. I mean that is what it says on there (indicating).

Q. What are the symptoms of pachymeningitis interna hemorrhagica? A. All of them?

Q. Do you know them? A. No, I don't know them all. If I had a book I could read them like you have there, but I guess——

Q. Doctor, you have attempted to exclude trauma in this case? A. I haven't attempted to prove anything. I have given you the facts of the case; I am not trying to prove anything.

Q. Did you definitely intend to exclude trauma in this case? A. I didn't. I didn't think there was a trauma when I saw the patient.

Q. Do you now exclude trauma? A. I don't think there was a trauma.

Q. I didn't ask you that, Doctor, did I? Did you exclude trauma? Do you now exclude trauma? Do you exclude it? A. Yes.

Q. Yet you admit you don't know all the symptoms? A. I don't know all the symptoms of hemorrhagica.

Q. You don't know them? A. No.

Q. Well, how do you account for these symptoms then coming on as they did, the symptoms all being as clear as they were? A. That is a common occurrence in pachymeningitis interna hemorrhagica.

Q. Now, Doctor, I will give you a history of a

man thirty-six years of age, in apparently good health, a man working steadily, and this man while working on an automobile strikes his head on the crank case underneath the automobile, and strikes his head quite a blow; within ten hours he immediately goes into a semi-conscious state; thereafter becomes unconscious and never regains consciousness until he dies several days later. Could you eliminate positively trauma in a case of that kind? A. With the autopsy findings, yes.

Q. And no symptoms before the trauma at all? A. Are you talking about your case or my patient?

Q. I am talking about this case; you are familiar with it. A. He had a history before.

Q. Well, all right; let us have it. Let us have your history. A. You forget the severe headaches.

Q. Severe headaches? A. Yes. It is a common symptom of pachymeningitis.

Q. Where is the record which says severe headaches? A. I don't know. I mean the history is hearsay and——

Q. Just a moment, Doctor. I know you pretty well, Doctor. You are probably one of the most respected and reputable doctors we have in Morristown, and I know you don't intend to prejudice this case. Doctor, was it ever told you that these headaches were serious when Dr. Dresel herself on the stand didn't even use the word serious? A. I don't know what you mean by serious.

Q. I mean severe.

Mr. McMichael: Wait a minute, wait a minute. Let me make an objection, will

you? I object to any part of the cross examination wherein he asks the witness to characterize what Dr. Dresel says.

Mr. Scerbo: No, no.

By Mr. Scerbo:

Q. Doctor, do you recall back in the recesses of your mind whether the word severe really was there or whether you used it haphazardly? A. I was under the impression the headaches were severe.

Q. You were under the impression the headaches were severe? A. Yes.

Q. But of that you are not positive? A. I don't remember the details, no. This is eighteen months ago.

Q. That is a very important part of the symptoms in this case, Doctor, is it not? I mean, you are relying very strongly upon these serious, severe headaches? A. No, I am not relying upon them.

Q. In your opinion, they are not very important as a symptom in this case, if you aren't relying upon them, is that so, Doctor? A. I am giving you the history of the case as I got it, the conclusions I drew from my history.

Q. Doctor, is the symptom of severe headaches an important one or an unimportant one? A. Headaches are very frequent with pachymeningitis; patients complain of headaches.

Q. Do you find any reference in the record of severe headaches at all? A. No. That is one thing not on the record.

Q. Where did you get that information? A. Dr. Dresel told me about the headaches.

Q. Dr. Dresel told you about the headaches? A. Dr. Dresel, yes.

Mr Scerbo: Now, at this point, your Honor please. I want to make a motion to strike out Dr. McMurtrie's testimony on this ground: I admitted the record on the ground that it would be tied up. Now, Dr. McMurtrie tells me that he made his findings upon hearsay evidence which Dr. Dresel gave him. Now, Dr. Dresel has preceded him on the stand, and if you will have the stenographer read her testimony back you will fail to find any reference to severe headaches.

Mr. McMichael: That sounds clever when you listen to it. You certainly have been listening to the evidence, and this witness didn't testify he made a diagnosis that he didn't die of trauma because Dr. Dresel says she heard he had headaches. It is very suave and cleverly put, but I don't think you have heard the witness say that. He said he diagnosed the death as cerebral hemorrhage, not due to injury. There is no reason why such a motion should be made.

The Court: I overrule the objection.

Mr. McMichael: You mean you deny the motion?

The Court: I deny the motion.

By Mr. Scerbo:

Q. Now, Dr. McMurtrie, this man was either in coma or semi-coma, or whatever your technical medical term may be, during the entire

time that he was under your supervision, is that not so? A. Yes.

Q. The history you obtained from him you obtained either through Dr. Stage or Dr. Dresel. You admit, of course, that whatever history either Dr. Stage or Dr. Dresel obtained, they didn't obtain from the decedent himself, George Miller?

(The witness did not answer.)

Q. Now, you haven't a vivid or clear memory, recollection of the history as it was given to you, have you, Doctor? Yes or no, why do you hesitate? A. I can't say yes or no. I remember this man; I say I remember all the details—I can't say I remember all the details; I can't say that. I remember this man.

Q. That wasn't my question. A. If I remember every detail I would not say.

Q. You understand what I mean, Doctor. There are important points in a history that a doctor must know before he diagnoses his case properly. A. I didn't diagnose pachymeningitis before he died.

Q. You didn't diagnose pachymenigitis before he died? A. No, before he died.

Q. Just what did you do in this case, if anything at all? A. Stimulate him, ordered the lumbar puncture and gave him supporting treatments.

Q. You didn't attend the autopsy, did you? A. I did.

Q. You did? A. Yes, sir.

Q. You did or did not? A. I did.

Mr. McMichael: He said he did on direct examination, Mr. Commissioner.

Dr. William A. McMurtrie, cross

By Mr. Scerbo:

Q. Now, Doctor, let me read to you again—you will admit that this is very important, Doctor: I gave you a history of a man thirty-six years of age in apparently good health; this man, while working under an automobile strikes his head a good blow, within ten or twelve hours he goes into a semi-unconscious or coma; within a few hours later to a coma and then within thirty-four or thirty-six hours he is dead. I say, under a case of that kind, can you positively rule out trauma?

Mr. McMichael: Object to the question on the ground that has already been answered, and it is repetition. It is the same question that was asked before.

Mr. Scerbo: I didn't get a direct answer if I recall, your Honor.

The Court: The Doctor answered it before.

Mr. Scerbo: I think I ought——

The Court: I sustain the objection.

By Mr. Scerbo:

Q. Did you answer the question?

Mr. McMichael: Mr. Commissioner, why should counsel ask him that question. You just said you sustained the objection.

Mr. Scerbo: Did he answer it now?

Mr. McMichael: I am objecting to it.

The Court: Objection sustained. He has already answered it.

Mr. Scerbo: May I have an exception, please.

Dr. William A. McMurtrie, cross

By Mr. Scerbo:

Q. All right. Your answer to that question, as I gave it to you previously, was that trauma was ruled out, is that so?

Mr. McMichael: Mr. Commissioner, four times he has already said that, and why should all that go on the record?

Mr. Scerbo: I thought he kind of hedged on that question.

Mr. McMichael: That is not right. I will say he did not hedge.

The Court: Strike that all out.

By Mr. Scerbo:

Q. Now, Doctor, is chronic dementia one of the manifestations of pachymenigitis? A. Of what?

Q. Of pachymenigitis? A. It develops into chronic dementia at times and senile dementia.

Q. How about general paralysis? A. General paralysis?

Q. Is general paralysis one of the symptoms or manifestations of pachymeningitis? A. Does it develop—is that a symptom of pachymeningitis?

Q. Yes. A. I don't know which is the cart and which is the horse.

Q. Pardon me? A. I don't know which is the cart and which is the horse. You get pachymeningitis in general paralysis.

Q. One may come first and one may come later? A. Could I see that book? Let me read it.

Q. How about chronic melancholia? A. What is that?

Q. How about chronic melancholia? A. I don't know.

Q. You don't know. How about chronic mania? A. Chronic mania?

Q. Yes. A. I imagine that is the cause of chronic mania at times. I don't know; I am not a psychiatrist.

Mr. McMichael: Wait a minute. Mr. Commissioner if counsel is going to use a text book, let him bring it out in the regular way. I cross examined myself this morning, but I certainly did it in the regular way; I asked the witness whether he agreed with Jelliffe & White, and this is certainly not the way to cross examine on a text book.

Mr. Scerbo: This is cross examination, if your Honor please, and I certainly can ask the doctor if he knows about diseases. If I were sitting there in that witness stand you can ask me if I know about torts, contracts or agreements.

Mr. McMichael: I object to the use of the book. If he wants to cross examine him, let him cross examine him in the proper way.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Did you tell me about acute mania, Doctor? A. Did I what?

Q. Did you tell me about acute mania, whether that is a manifestation or symptom of pachymeningitis? A. Some of these patients, I think, develop into acute mania.

Q. Have you ever had one? A. I have seen pachymeningitis before.

Q. Have you ever had one yourself? A. You mean go into mania?

Q. Yes. A. No, not that I remember.

Q. Have you ever had a case of pachymeningitis due to trauma? A. No, not that I know of.

Q. Do you know of such cases? A. It is mentioned as one of the causes, an old accident may cause pachymeningitis.

Q. Do you recognize Osler's Modern Medicine? A. I have seen it.

Q. Do you consider it an authority? A. I don't consider any authority; I read it.

Q. You read it? A. I read it.

Q. It is a recognized book on the subject? A. It is a good subject.

Q. Now, I refer to volume 7 of Osler and I will read from page 166——

Mr. McMichael: Suppose he lets the witness see the book.

Mr. Scerbo: I will do this in my own way, whether you like it or not.

Mr. McMichael: If you cross examine on a text book you are supposed to let the witness read it over your shoulder; that is the proper way.

Mr. Scerbo: Show me the case, please.

Mr. McMichael: I certainly know that.

Mr. Scerbo: I certainly don't know it.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Under the caption pachymeningitis interna hemorrhagica; "This rare condition is sometimes

known as hematoma of the dura matter. It is customary to describe it with inflammatory diseases of the meninges, although it is not unlikely that the initial change is a hemorrhage from the inner surface of the dura," do you agree with that?

Mr. McMichael: Now, I object. Mr. Commissioner, I ask that every word read by Mr. Scerbo be stricken out, if your Honor please, from the record. The witness has just said that the book from which he is reading he does not consider an authority.

Mr. Scerbo: Oh, no; he didn't say that.

Mr. McMichael: He just said that.

Mr. Scerbo: I don't think he would say that.

Mr. McMichael: You can't use the book unless the witness considers it an authority. That is one rule of law you can't get away from.

By Mr. Scerbo:

Q. Do you know what I read you, Doctor? A. Somewhat.

Mr. McMichael: I object, Mr. Commissioner, and ask for a ruling.

The Court: Just a minute. What is your question now?

Mr. Scerbo: My question is—there is a lot of confusion—I want the doctor to be sure that he knows what I read, that's all.

The Witness: No, I don't. You better read it over again.

Mr. Scerbo: I will read it over again.

Mr. McMichael: Just a moment.

The Court: Does the doctor consider Osler an authority?

Mr. McMichael: If he does not consider it an authority——

Mr. Scerbo: Oh, yes——

Mr. McMichael: Wait a minute; let me finish.

Mr. Scerbo: I don't care whether it is an authority or not.

Mr. McMichael: Mr. Commissioner, I object.

Mr. Scerbo: I am asking him to listen to what I am reading.

Mr. McMichael: I am addressing my remarks to you, Mr. Commissioner, to the bench. I won't engage in any arguments at all with Mr. Scerbo. Now, the respondent objects to the reading of any text books unless the witness, under cross examination, considers it an authority. It is a very simple objection.

The Court: Do you consider that an authority.

The Witness: No, I don't, I read Osler; I don't consider him an authority.

By Mr. Scerbo:

Q. I asked you if it was a recognized book on the subject and you said yes. A. I said it is a good medical book.

Q. All right. Now——

Mr. McMichael: I ask for a ruling, Mr. Commissioner.

Mr. Scerbo: I have a right to cross examine the witness, your Honor please.

By the Court:

Q. It is a recognized book, isn't it, Dr. Osler? A. What is that?

Q. Is Dr. Osler a recognized authority? A. It is a recognized good medical book.

By Mr. McMichael:

Q. Do you recognize it, Doctor? A. I have it in my library; I refer to it at times.

The Court: I overrule the objection.

By Mr. McMichael:

Q. You recognize it as an authority? A. I don't.

Mr. McMichael: I stand on my exception.

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Do you want me to read it again, Doctor? A. Yes.

Q. Under the caption pachymeningitis interna hemorrhagica: "This rare condition is sometimes known as hematoma of the dura. It is customary to describe it with inflammatory diseases of the meninges, although it is not unlikely that the initial change is a hemorrhage from the inner surface of the dura," is that your conception? A. Not entirely.

Q. Of pachymeningitis? A. Not entirely, no.

Q. No. What is missing from here? A. This may be due to irritation of the meninges; it is a productive inflammatory condition.

Q. Now, Doctor, what is the cause of hematoma? A. Hematoma?

Q. Yes. A. It is bleeding, hematoma.

Q. What causes the bleeding? A. Productive tissue, it is new productive tissue with very many thin blood vessels; one of them breaks and that is what forms bleeding.

Q. In other words, they are about ready to pop if something disturbs them? A. I don't know that.

Q. How about a blow, Doctor? A. What?

Q. It would not do him any good? A. What?

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

Q. Those tissues in the condition you have just described—— A. You described them.

Q. You described them? A. No.

Q. Doctor—— A. Blood vessels break.

Q. Yes. What disturbs them, Doctor? A. I don't know.

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

Q. Will a blow do it, Doctor? A. I don't know.

Q. Well, your answer is you don't know? A. I don't know. I have never seen one.

Q. They may break through a blow? A. I don't know. I never read of it.

Q. Well, I refer to page 167, the next page of this book, which says that——

Mr. McMichael: Just a minute, Doctor.

By Mr. Scerbo:

Q. (Continuing)—under the same caption——

Mr. McMichael: Wait a minute please. Can I object to the use of the book? Mr. Commissioner, I again object to the use of the book.

The Court: Objection overruled.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. "Traumatism is sometimes a determining factor," and then in parenthesis it says, "Schneider seventeen out of seventy-four cases." A. What is that traumatism? What does traumatism mean?

Q. Don't you know what traumatism means? A. You said determining factor of what?

Q. Of pachymeningitis interna hemorrhagica. A. That is right. It is one of the causes of pachymeningitis hemorrhagic interna.

Q. Then you finally admit it is one of the causes? A. But it is an old trauma that causes this case of pachymeningitis. This man had pachymeningitis hemorrhagica, and trauma is one of the causes——

Q. But it does not have to be an old trauma? A. To cause pachymeningitis hemorrhagica interna, it does, yes.

Q. Haven't you ever heard of an acute condition? A. Pachymeningitis acute——

Q. But you——

Mr. McMichael: Will Counsel let the witness answer the question? I notice these interruptions that is an old trick.

Mr. Scerbo: I think he is doing very nicely with me.

Mr. McMichael: Mr. Commissioner, I ask that the Court permit the witness to

answer the question and not permit Mr. Scerbo to interrupt.

The Court: I believe the Doctor has answered the question.

Mr. Scerbo: Now, if there is a question on the record, I withdraw it.

By Mr. Scerbo:

Q. I want you to differentiate for me, Doctor, the difference between acute and chronic pachymeningitis interna hemorrhagica. A. I don't know of any acute pachymeningitis interna hemorrhagica.

Q. Then do you mean to say that there is not any? A. I never heard of acute pachymeningitis interna hemorrhagica.

Q. Do you say, Doctor that there is not such a thing as acute pachymeningitis? A. Yes.

Q. You say there is not? A. The description, that is chronic productive tissue, new productive tissue.

Q. Doctor, if a man receives a blow on the head, dies from pachymeningitis, would he die from—he died from pachymeningitis, what did he die from? A. He died from a hemorrhage.

Q. All right, but what caused the hemorrhage? A. Pachymeningitis hemorrhagica interna.

Q. Where does the blow come in? A. I don't know.

Mr. Scerbo: All right, Doctor, that is all.

The Witness: It is a natural sequence of pachymeningitis as hemorrhage.

By Mr. Scerbo:

Q. You don't know—you don't deny the blow

would cause it? A. I do deny it. There was no indication of a blow in this case.

Mr. Scerbo: That is all.

Redirect examination by Mr. McMichael:

Q. Doctor, you were at the autopsy? A. Yes, sir.

Q. You told me that. Did you watch each thing that was done? A. I did.

Q. Now, tell us where you found the cerebral hemorrhage, Doctor.

Mr. Scerbo: I object that that, your Honor please. The autopsy speaks for itself.

Mr. McMichael: Just a moment. Mr. Commissioner——

Mr. Scerbo: No, no.

Mr. McMichael: Will you kindly let me continue with my argument?

Mr. Scerbo: Then I object because it is not proper redirect.

Mr. McMichael: Mr. Commissioner, after he has been on here all this time, and he has taken up a lot of time on a lot of idle questions, does he mean to say I can't come back on redirect to straighten some things out?

Mr. Scerbo: If Mr. McMichael likes to do things backwards all right. Let us have the autopsy and then let him testify concerning it.

Mr. McMichael: Mr. Commissioner——

Mr. Scerbo: I don't think it is fair to us.

Mr. McMichael: When Mr. Scerbo gets

through, Mr. Commissioner, then I will talk.

The Court: Have you finished, Mr. Scerbo?

Mr. Scerbo: Yes.

Mr. McMichael: Mr. Commissioner, I purposely asked Counsel—and I learned this in my first year in law school—that if a witness says he was there and he did something and he actually watched something, then I have laid the foundation to ask the question.

The Court: I overrule the objection.

Mr. Scerbo: May I have an objection on the ground that it is not proper redirect.

(The reporter read the last question as follows "Q. Now, tell us where you found the cerebral hemorrhage, Doctor?")

The Witness: It covered the surface of the brain, complete external surface of the brain, extended between the two hemispheres of the brain.

By Mr. McMichael:

Q. What classification of cerebral hemorrhage did it fall under, Doctor? What was the term? A. I said before it was subdural, under the meninges.

Q. What is the subdural hemorrhage caused by? A. Subdural hemorrhage is caused by rupture of some blood vessels in the meninges.

Q. Caused by what? A. Usually caused by disease.

Q. By disease? A. Yes.

Dr. William A. McMurtrie, recross

Q. Is such a cerebral hemorrhage caused by accident? A. No, sir.

Mr. McMichael: That is all.

Recross examination by Mr. Scerbo:

Q. Your answer there is that such cerebral hemorrhage, as you term it, subdural, cannot be caused by trauma? A. I never seen one caused by trauma.

Q. You never saw one caused by trauma, Doctor? A. No.

Q. But do you know positively? A. I never heard of one being caused by trauma.

Q. You never heard of one being caused by trauma? Do you know whether or not it does? A. What more can I say; I haven't seen or heard.

Q. Is there any authority for the claim that there is no such—— A. I don't know.

Q. You don't know? A. No.

Q. If I showed you an authority, not knowing anything about it and not knowing of an authority, if I showed you an authority, would you change your mind?

Mr. McMichael: That is objected to, Mr. Commissioner.

Mr. Scerbo: I don't think it is an objectionable part of cross examination.

Mr. McMichael: Mr. Scerbo will have all the opportunity to cross examine the brain specialist, because I intend to have the best I can get here. You can face him with all the books in the world. I am not producing Dr. McMurtrie as a brain

specialist, Mr. Commissioner. Mr. Commissioner, he is not——

Mr. Scerbo: He made a statement, your Honor please.

Mr. McMichael: He is not a brain specialist. He said that he has never heard of such a case. He has answered the question truthfully and to the best of his belief; he has said he has never seen such a case. Now, he is not qualified as a brain specialist, and I suppose the whole afternoon could be taken up by Counsel in an endeavor to break down the value of his testimony. I can bring out fifty volumes but we will never get anywheres.

(Discussion between Court and Counsel.)

The Court: I overrule the objection.

Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. Do you remember the question, Doctor? A. No, I don't.

(The reporter read the last question as follows: "Q. If I showed you an authority, not knowing anything about it, not knowing of an authority, if I showed you an authority would you change your mind?")

The Witness: Who is to decide what the authority is?

By Mr. Scerbo:

Q. Well, is Osler an authority? A. No.

Q. Would you change your mind? A. Nothing would change my mind till I have seen it.

Q. Would Jelliffe and White change your mind? A. No.

Q. What? A. No. I have never seen one; I never heard of one, of what I know.

Q. Can you at least suggest one medical treatise, one that you will suggest? A. No.

Q. You won't suggest that even, Doctor? A. No.

Mr. McMichael: Mr. Commissioner, if I asked him that question I would have had one in mind.

By Mr. Scerbo:

Q. Doctor, are you familiar with the autopsy? A. I saw the autopsy.

Q. Now, I read you the portion under the caption of head, and I read as follows: "Upon separating the two hemispheres a big clot of coagulated blood covers the corpus callosum"? Where did that coagulated blood come from? A. That was the hemorrhage.

Q. Where did the hemorrhage come from? A. From the meninges.

Q. When did it start? A. I don't know.

Mr. Scerbo: All right, that is all.

(Witness excused.)

Dr. Irmgard Dresel, direct

DR. IRMGARD DRESEL, called as a witness on behalf of the respondent, having been previously duly sworn, testified as follows:

Mr. McMichael: I want to enlarge upon the qualifications.

Direct examination by Mr. McMichael:

Q. Doctor, just tell the Court what experience you have had in this field. A. I have particularly worked in Germany, at the Charity Hospital.

Mr. McMichael: Just a moment.

Mr. Scerbo: You will have to speak a little louder, please.

By Mr. McMichael:

Q. Doctor, I just think we ought to go back to the beginning and ask you what your qualifications are as a pathologist; where did you matriculate?

Mr. Scerbo: I think all this is on the record.

Mr. McMichael: No, it is not.

By Mr. McMichael:

Q. Doctor, where did you receive your education and your—you know, just give us—do you understand me all right? A. Yes, I understand. In 1920 I graduated in medicine from the University of Munich.

Mr. Scerbo: University of Munich?

The Witness: Yes. After that I was in various hospitals, in the Charity, of Berlin, some of the University hospitals, and until 1925—1925 to 1929, I was as-

sistant instructor in pathology and bacteriology at John Hopkins hospital.

By Mr. McMichael:

Q. At Baltimore? A. At Baltimore, yes. Then I was in Berlin, at the Charity Hospital again, in pathology. In 1931 I took the position as pathologist at All Souls Hospital, in this town.

Q. Now, Dr. Dresel, did you perform an autopsy on the body of George Miller, deceased? A. I did.

Q. Now, on what date was that made?

Mr. McMichael: She is referring to her own findings, Mr. Commissioner.

Mr. Scerbo: Just one moment. As one of the qualifications, I would like to have Dr. Dresel testify as to whether or not she is licensed to practice medicine.

Mr. McMichael: Mr. Commissioner, that is an idle objection. We all know what pathology is and what a pathologist does; otherwise, I would not have to put her on the stand. If she is not qualified to perform an autopsy for All Souls Hospital, All Souls Hospital is in a bad state right now.

Mr. Scerbo: She is not the attending physician, your Honor please.

The Court: She made the autopsy.

Mr. McMichael: Under the direction of the last witness.

What is Counsel trying to do now, keep out the autopsy after he wanted it in?

Mr. Scerbo: I want everything properly proven.

The Court: I overrule the objection.

Mr. Scerbo: May I have an exception, please.

By Mr. McMichael:

Q. Will you refer to the autopsy sheets, refer to it please and tell us what your autopsy was, fully and completely. A. Examination of the entire body showed——

Mr. Scerbo: Now, if this was prepared by the Doctor on the stand I am willing that she read it; if it is not prepared by her, she should tell us who prepared it.

The Witness: I don't understand.

The Court: Did you prepare that statement yourself?

Mr. McMichael: The doctor does not understand English——

The Witness: Oh, yes, I do. I understand.

Mr. Scerbo: She does very well.

The Witness: Thank you. I think I understand every word.

The Court: Who prepared that?

The Witness: Who prepared—this is my autopsy findings which I put down the same day on here (indicating) a couple of hours after. This is on the seventh of November, 1931.

Mr. McMichael: Is that all right?

The Witness: This is my own record.

Mr. McMichael: Is it permissible, Mr. Commissioner?

The Court: Yes.

By Mr. McMichael:

Q. Go ahead, Doctor. A. Would you like me to read it? It is rather technical.

Q. I want that entirely read.

Mr. Scerbo: All we need is the head.

The Court: Do you want the entire thing read?

Mr. McMichael: I want the entire thing read by Dr. Dresel, the entire thing, everything you have got, including the teeth.

The Witness: "General Description: Body is that of a very well nourished white male, thirty-seven years of age, measuring about 165 cm. in length and weighing about 185 pounds. There is a fair amount of blond hair on the head in normal situations. The skin of the head and neck and of the dependent parts of the body is rather bluish in color. There are no abrasions or signs of contusion on the skin of head, trunk and extremities. The chest is well developed. Extremities are negative. External genitals are normal. Post mortem rigidity has set in."

"Abdomen: On opening the abdomen there is no free fluid present. The peritoneal covering is smooth and glistening. There are no adhesions between liver and peritoneum. The appendix is not adherent. Pancreas is in normal position. Spleen is small. There are no masses palpable in the small pelvis."

"Thorax: Both pleural cavities do not have free fluid. The lungs are not adherent to the costal pleura."

Dr. Irmgard Dresel, direct

"Lungs: the left lung shows a dark bluish, reddish discoloration in the paravertebral parts and the posterior parts of the lower lobe. These areas have a firmer consistency, and on cut they show marked congestion. The other parts of the lungs are air containing and of grayish, whitish, black color. The right lung shows the same picture as the left, the middle lobe showing stasis in the posterior part and being air containing in the anterior part."

"Heart: The pericardial sac contains a small amount of clear straw colored fluid. The pericardial leaves are smooth and glistening. The size of the heart is somewhat larger than the fist of the body. The heart cavities are filled with coagulated blood. The endocard is delicate and smooth. The muscle is brownish. The valvular measurements are P.O. 7 cm., T.O. 13 cm. A.O. 6.5 cm., M. O. 9 cm. The coronary arteries show scattered creamish, whitish plaques of the intima."

"Aorta: There are no calcium deposits, and only a very occasional plaque of fatty degeneration throughout the intima of the thoracic and abdominal aorta."

"Spleen: is small, measuring 11-6-2cm., surface is even, the color brownish, purple. Consistence is soft but tough. On cut the Malpighian bodies are not distinct."

"Pancreas and Adrenals appear normal."

"Liver is enlarged, measuring 29x21x8 centimeters. Its color is dull yellow,

rather uniform. Lobular structure is very indistinct. Gall bladder is pear shaped, and on pressure it empties into the duedenum a brownish, greenish bile."

"Kidneys measure about 13x5.5x3 centimeters each. The capsules strip easily. The external surfaces are smooth. On cut the medulla and cortex are distinct. The kidney pelvis shows fine petechial hemorrhages."

"Gastro-intestinal tract: Stomach contains a small amount of light colored fluid. The mucosa is congested and of a pinkish, reddish color. The jejunum and ileum contain a light yellowish semi-fluid stool of brownish color. The mucosa of the small intestine shows a very occasional pinpoint sized hemorrhage, and is otherwise delicate and smooth. The mucosa of the large bowel is delicate and of creamish white color."

"Genital tract appears normal."

"Microscopical examination of the liver: The liver cells are enlarged and swollen, but the cell outlines are still distinct. The cytoplasm is cloudy and in many cells fine fatdroplets can be seen."

Now, the head: "Upon removal of the calvarium the dura is adherent to the convex surface of the brain. In places it must be loosened with instruments. Along its convex side the dura shows considerable thickening and areas of darker brownish color. The convex surface of the brain is covered with hemorrhages. Upon separating the two hemispheres a big clot of coagulated blood covers the corpus

caliosum, but the blood does not enter the third nor the laterial ventricles. After removal of the clot, the area of brain destruction comprises the upper layers of the corpus callosum, and the adjacent lower gyre of the median facies of both hemispheres. Various sections through the brain show that the central ganglia are intact and that the structure of the rest of the brain is retained. The vessels of the circle of Willis are delicate and their intimal lining does not show pathological changes. The skull does not present any evidence of fracture."

By Mr. McMichael:

Q. Doctor, did you examine the outward portion of the scalp? A. Yes, I did, and it is described in the general description. In the general description it says: "There is a fair amount of blond hair on the head in normal situations. The skin of the head and neck and of the dependent parts of the body is rather bluish in color. There are no abrasions or signs of contusions on the skin of the head, trunk or extremities."

Q. In other words, you found no marks on the head or—at all? A. No marks whatsoever.

Q. Doctor, at the last hearing Dr. Hegner testified that he performed this autopsy with you. Is that true? A. It is not.

Mr. McMichael: Take the witness.

Cross examination by Mr. Scerbo:

Q. He signed the death certificate, didn't he? A. I could not tell you.

Q. Where is that hospital record?

Mr. McMichael: Mr. Commissoner, it is not proper cross examination. The witness didn't say he didn't sign the death certificate, and I can't see why all these questions are being put in. This is improper cross examination. The witness didn't say he didn't sign the death certificate.

Mr. Scerbo: She said——

Mr. McMichael: She performed the autopsy.

Mr. Scerbo: Now, your Honor please, I am going to examine the record with her.

Mr. McMichael: I object on the ground it is not proper cross examination. I didn't ask her anything about the death certificate.

The Court: I overrule the objection.

Mr. McMichael: I ask for an exception.

By Mr. Scerbo:

Q. Dr. Hegner was associated with this case, was he not?

The Witness: Mr. Commissioner, do I have to answer those things, because I am really concerned with the post mortem examination, because I don't know anything about the business in the hospital.

By Mr. Scerbo:

Q. If you don't know, just say so.

The Witness: May I ask Mr. Commissioner about it, not you.

Mr. Commissioner——

The Court: Answer the question. If you don't know, say you don't know.

The Witness: Yes.

By Mr. Scerbo:

Q. Do you know whether or not Dr. Hegner was associated with this case in any way? A. I know Dr. Hegner was an interne in the hospital. I can't understand how you say he was associated with the case.

Q. I am asking you if you knew? A. I answered he was an interne in the hospital. I could not understand that he was associated—I would like—I do not understand the question.

Q. Probably I don't use the right kind of language. A. I understand English very well.

Q. I know you do. I complimented you upon it. A. Thank you.

Q. I asked you, Doctor, whether or not Dr. Hegner was in any way either associated or connected with the case of this deceased, Miller; now, do you know or don't you know? A. Dr. Hegner was an interne at the time. If you know what an interne is, then you know how much association he has. He was an interne in this hospital.

Q. All right. Therefore, he was taking care of Mr. Miller, Doctor, with Dr. Stage, was he not, under the supervision of Dr. McMurtrie? A. I don't know.

Q. You knew about this all the while, did you not? A. I don't know.

Q. What happened between you and Dr. Hegner——

Mr. McMichael: Now, Mr. Commissioner——

The Witness: Between me——

Mr. McMichael: Just a moment, Doctor. Is this proper cross examination?

The Court: Objection sustained.

Mr. Scerbo: All right.

By Mr. Scerbo:

Q. You found the cause of the death of this man in the head, did you not?

Mr. McMichael: I object, Mr. Commissioner, unless he wants to make her his own witness. This is not proper cross examination.

Mr. Scerbo: What is the purpose of the autopsy, your Honor please?

Mr. McMichael: I have put this pathologist on the stand, who is a pathologist and nothing else, and——

Mr. Scerbo: I will withdraw the question, Mr. McMichael, just to keep you quiet.

By Mr. Scerbo:

Q. What was the purpose of the autopsy? A. To ascertain the cause of death.

Q. Where did you find the cause of death, in the head? A. Yes.

Q. Doctor, you found no hemorrhage in the circle of Willis, did you? A. No.

Q. Doctor, what are the causes of hemorrhage into any portion of the dura of the brain?

Mr. McMichael: Just a moment. Mr. Commissioner, that is objected to because I haven't qualified this witness.

Mr. Scerbo: She is a pathologist, your Honor please.

The Court: She is qualified as a pathologist.

Mr. McMichael: Qualified as what?

The Court: Qualified as a pathologist.

Mr. Scerbo: As a pathologist.

Mr. McMichael: As long as you confine your questions to pathology, all right.

Mr. Scerbo: If that is not pathology, I don't know what pathology is.

The Court: I overrule the objection.

Mr. McMichael: I will withdraw the objection.

Mr. Scerbo: It is too late. It was overruled first, Mr. McMichael.

By Mr. Scerbo:

Q. Doctor, again I say what are the causes of hemorrhage into any part of the dura of the brain? A. Bleeding from the vessels.

Q. Yes. What causes the bleeding? A. Various causes.

Q. Various causes. Well, give us some. A. Breaking of the vessels, extravasation of blood from the vessels.

Q. Caused by what, Doctor? A. Caused by tear; caused by any inflamatory process.

Q. Yes. A. Caused by, as we know, toxic conditions of any type. I think——

Q. In your autopsy you referred to a big clot of coagulated blood in the brain. When did this arrive, if you know? A. During the time of his illness.

Q. How long was he sick, Doctor, if you know? A. I understand fifty-four hours.

Mr. Scerbo: That is all.

Mr. McMichael: All right, Doctor.

(Witness excused.)

DR. CLIFFORD MILLS, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Mr. Scerbo: I am willing to admit Dr. Mills' qualifications.

Mr. McMichael: Since counsel is so willing to do that, we will spread them on the record.

Mr. Scerbo: Perfectly all right, if you want to waste time.

Direct examination by Mr. McMichael:

Q. Doctor, will you state your qualifications? A. I graduated in medicine in 1897, and did general medicine for thirteen years, since which time I have confined my work to surgery and obstetrics.

Q. Are you connected with any institutions, Doctor? A. Yes. I am a member of the staff of All Souls Hospital, Chief of the surgical service there. I am Chief of the service of Dover General Hospital. I have my own hospital, and I am consulting surgeon to the New Jersey State Hospital at Morris Plains.

Q. Doctor, you didn't treat the deceased, did you? A. I did not.

Q. Doctor, assuming that a man thirty-six

years of age, on the fourth day of November, 1931, goes into a pit to do something to a car.

Mr. Scerbo: What was that? I didn't hear that. What was that?

By Mr. McMichael:

Q. Goes into a pit to do something to a car; that two witnesses so far have said the man came out of the pit—just a moment.

Mr. McMichael: Mr. Commissioner, I beg leave to withdraw the witness. I can't ask him the hypothetical question until I have called my other witnesses. I was under the impression that Dr. Mills was the attending physician. I have got to put in my own case in order to complete my hypothetical question. I will withdraw Dr. Mills, and he will be recalled later.

Strike out the testimony.

(Witness excused.)

(Discussion between Court and counsel.)

WILLARD LEWIS WAER, called as a witness on behalf of the respondent being first duly sworn, testified as follows:

Direct examination by Mr. McMichael:

Q. Willard, did you work for the Minnesink Oil Company in November, 1931? A. Yes.

Q. Do you remember the day that Mr. Miller worked there last? A. Wednesday.

Q. Now, do you remember the occurrence when

Mr. Stowe's care was being attended to by Mr. Miller? A. November 4.

Q. Who was there at the time? A. George Mays, Stowe, myself.

Q. Stowe? A. Stowe, yes.

Q. Mr. Stowe, George Mays, and yourself were there? A. And George.

Q. Mr. Miller was there? A. And Mr. Miller.

Q. What time of the day did this car come in to be fixed? Do you remember? A. About five o'clock.

Q. I see. Now, how close to you were Stowe and Mays? I mean, where were you? Just tell the Court how you were standing and where you were. A. They were standing right on the pit; I was standing alongside of them.

Q. What? A. They were standing right on the pit; I was standing alongside of them.

Q. You were alongside of them? A. I was alongside of them.

Q. They were standing around the pit? A. Yes.

Q. Were you all together or far apart? A. Well, I was about here (indicating) to that desk away over there (indicating).

Mr. McMichael: Will you indicate the distance, Mr. Commissioner?

The Court: About seven feet.

Mr. McMichael: Seven feet away?

The Court: Six or seven feet.

Mr. Scerbo: From him, where he is to the desk.

The Witness: Yes.

By Mr. McMichael:

Q. Were you there when Mr. Miller went down in the pit? A. Yes.

Q. Did you hear Mr. Miller——

Mr. Scerbo: I object.
Mr. McMichael: Just a moment.

By Mr. McMichael:

Q. Did you hear Mr. Miller—were you there when Mr. Miller came out of the pit? A. Yes.

Q. Did you hear Mr. Miller at that time or any other time state that he had bumped his head on the car? A. Well, not that day, no.

Q. Did you hear him, at that day, did you hear Mr. Miller say anything about bumping his head on that car? A. No.

Q. Did you see Mr. Miller holding his head? A. No.

Q. Did you see him putting his hand to his head? A. No.

Q. Did you hear him say, "I had a hell of a bang that time?" A. No.

Q. What time did you last see Mr. Miller on November 4? A. Nine o'clock.

Q. What? A. Nine o'clock.

Q. Nine o'clock at night? A. Yes, sir.

Q. Well, you saw him between five and nine; how did he act? A. He acted the same.

Q. What was he doing? A. Laughing and joking with us.

Q. Laughing and joking with you? A. Yes.

Q. Did he look as if he felt bad or look sick? A. No.

Q. Did he act in any way that made you think he looked sick? A. No.

Q. Was he any different between five and nine o'clock from any other time? A. No.

Q. When did you first hear about his—you started to say you didn't hear him say anything

that day. Tell the Court when you first heard about this bump. A. I think I heard Stowe say something about it.

Q. Well, when was that? A. I don't know just when it was.

Q. How long after November 4? A. A couple of days at least.

Q. At least a couple of days after November 4? A. Yes.

Q. Tell the Court what you heard him say. A. He came out of the pit and he was holding his head, and he said he bumped it.

Q. Were you near Mr. Stowe on November 4? A. Yes.

Mr. Scerbo: Let me—go ahead, I will withdraw my objection.

By Mr. McMichael:

Q. You say you didn't see anything like that? A. No.

Mr. McMichael: Take the witness.

Cross examination by Mr. Scerbo:

Q. You didn't see it, did you? A. No.

Q. You didn't hear it? A. No.

Q. But you know that Stowe did, don't you?

Mr. McMichael: Mr. Commissioner——

Mr. Scerbo: I am asking a question, your Honor.

Mr. McMichael: Wait a minute.

Mr. Scerbo: Now, please, your Honor please——

Mr. McMichael: I have never been

talked down before, Mr. Commissioner, and I will not——

The Court: What is the question?

(The reporter read the last question as follows: "Q. But you know that Stowe did, don't you?")

Mr. Scerbo: What is wrong with that question?

Mr. McMichael: I object to the question.

Mr. Scerbo: What is wrong with that question in the cross examination?

The Court: I overrule the objection.

Mr. McMichael: May I state my grounds?

The Court: I waited and you didn't say anything.

Mr. McMichael: I can't talk with this man talking me down. I am objecting to the question on the ground that he asks this witness what somebody else might know. That is not proper cross examination. He asks this witness why Mr. Stowe didn't—(to the reporter) Will you read me that question again?

(The reporter read the last question.)

Mr. Scerbo: If he does not know, all right.

Mr. McMichael: How can this man know what somebody else knew?

Mr. Scerbo: It is a direct question under cross examination which he can either deny or affirm. He admits that Stowe told him two days later that this happened. Therefore, he has got to tell now how he knows Stowe——

The Court: I overrule the objection.
Mr. McMichael: Exception, please.

By Mr. Scerbo:

Q. All right, Mr. Waer. You know Stowe knew it, don't you? A. When he told me I knew it.

Q. Do you work there? A. Yes.

Q. What do you do? A. Grease cars and work on them.

Q. Do you still work for the Minnesink Oil Company? A. Yes.

Q. You still work for the Minnesink Oil Company? A. Yes.

Q. Where do you work now, the same place? A. The same place.

Q. The same place where Miller got hurt? A. Yes.

Q. All right. Now, how many people were working at this station at that time? A. Two.

Q. Two. You and Miller? A. Yes.

Q. You were taking care of the cars as they came in and out, giving them gas, is that so? A. Yes.

Q. That was your job and you were doing—supplying oil, everything of that kind? A. Yes.

Q. You didn't stand there all the while Miller was under there greasing that car. Now, were you there all the time watching? A. I was there when he went down; I was there when he came out.

Q. How many times did Miller go in and out? A. Once.

Q. Only once? A. Once.

Q. Now, listen, Willard. You know about greasing a car, don't you? A. Yes.

Mr. McMichael: Mr. Commissioner, may I ask that Mr. Scerbo should not stand over this witness.

By Mr. Scerbo:

Q. Listen, Willard; you know——

Mr. McMichael: Mr. Commissioner, Mr. Scerbo should be made to take his seat.

By Mr. Scerbo:

Q. You know how to grease cars?

Mr. McMichael: May I ask again, Mr. Commissioner, that——

The Court: Will you sit down, Mr. Scerbo.

By Mr. Scerbo:

Q. Willard, you know how to grease a car, don't you? A. Yes.

Q. You go down in the pit, don't you? A. Yes.

Q. You do something to the car; take the cap off, don't you? A. Well, all I ever—he went down to put the plug in the oil can.

Q. He went down to put the plug on the cap on? A. The plug.

Q. What were you doing that you could not go down? A. Getting the spray gun ready.

Q. You were getting the spray gun ready. Where is the spray gun with relation to where the car is? A. Alongside the pit.

Q. Now, do you still say that you know positively that nothing happened to George? A. I didn't hear him say anything.

Q. He could have hit his head under there and you would not know it, could he? A. He could have.

Q. He could have put his hand to his head and you would not have known anything about it because you were busy with the spray gun? A. I was as close as the others.

Mr. McMichael: What was the answer please?

(The reporter read the last answer.)

By Mr. Scerbo:

Q. Listen, Willard: he could have told something to Stowe and you would not have known about it necessarily? Don't look at your counsel. A. Yes. Stowe said he hit his head when he was coming down the pit.

Q. I say Mr. Miller could have told something to Stowe and you would not have known anything about it necessarily? A. Well, not if he said it when he came out of the pit, because——

Q. All right, but it could have happened without your knowing anything about it? A. It could have, yes.

Mr. Scerbo: That is all.

Redirect examination by Mr. McMichael:

Q. How close were you to Stowe when this happened?

Mr. Scerbo: I object. It is not proper redirect.

The Court: I overrule the objection.

Mr. McMichael: That is a foolish objection, Mr. Commissioner.

(The reporter read the last question as follows: "Q. How close were you to Stowe when this happened?")

By Mr. McMichael:

Q. When he came out of the pit. A. About four feet away.

Q. About four feet away from Stowe? A. Yes.

Q. Anything the matter with your hearing? A. No.

Q. When he came out of the pit did you hear him say anything about hitting his head or holding up his hand?

Mr. Scerbo: I object, your Honor please, as being absolutely improper redirect. He went through this thing in direct. This witness already has testified to these various things, and the real reason for bringing this out in redirect again is to break down what effect the cross examination might have had.

The Court: I overrule the objection.

Mr. McMichael: Answer the question.

(The reporter read the last question as follows: "Q. When he came out of the pit did you hear him say anything about hitting his head or holding up his hand?")

By Mr. McMichael:

Q. To his head? A. No, I didn't see him.

Mr. McMichael: That is all.

Recross examination by Mr. Scerbo:

Q. How long did Mr. Miller and you work to-

gether in that station? A. I don't know just exactly; it must be about two years.

Q. About two years. Worked every day with him, didn't you? A. Every day.

Q. And he did his work just like everybody else did, didn't he? A. Yes.

Q. What kind of looking man was he? A. He was a healthy looking man.

Mr. Scerbo: That is all.

Mr. McMichael: Mr. Commissioner, I ask that that be made part of his own case.

Mr. Scerbo: That is satisfactory, your Honor please.

(Witness excused.)

BENJAMIN J. BRUNE, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination by Mr. McMichael:

Q. Mr. Brune, what is your business? A. I am in charge of compensation for the Standard Accident Insurance Company, investigation.

Q. How long? A. Also do automobile work at the present time.

Q. How long a time, Mr. Brune, have you been employed by the Standard Accident Insurance Company? A. About fifteen years.

Q. Did you have a conversation with the widow, Lottie M. Miller? A. That is right, I did.

Q. As you talked to her did she give you a statement? Did you write any statement down? A. That is right.

Q. And did you prepare this statement in your own handwriting? A. That is right.

Q. Is this the statement which you took from Mrs. Miller? (indicating) as she told you the facts? A. That is right.

Q. And is that in your own handwriting taken at the time? A. That is right.

Mr. McMichael: Mr. Commissioner, I ask that this statement be marked for identification.

(The papers referred to were received and marked, "R-2-a, R-2b, R-2c, March 25, 1933, for identification.)

By Mr. McMichael:

Q. Mr. Brune, would you be able to recall, without using or employing this statement, the date when you saw her? A. I am not positive, but I think it was around the sixteenth of December; I am not positive.

Q. Well, I would like to, if possible, avoid the use of this statement. I am going to ask you whether or not you remember what Mrs. Miller told you.

Mr. Scerbo: I object, your Honor please.

Mr. McMichael: I can ask him whether he remembers without refreshing his recollection.

Mr. Scerbo: The answer to that could be only yes or no.

Mr. McMichael: Yes, that is only what I want him to say.

The Witness: Yes, I think I can.

By Mr. McMichael:

Q. You can do it without the statement? A. I think I can.

Q. All right, that is very good; I am glad you can. Now, Mr. Brune, tell us when, to the best of your recollection, you had this conversation with Mrs. Miller? A. Sixteenth of December, 1931.

Q. 1931. What did Mrs. Miller tell you on that day?

Mr. Scerbo: I object to that absolutely, as having no relationship whatsoever. Mrs. Miller might have told him she had nice baking on that day, unless there is some object for this; I don't know.

Mr. McMichael: How quickly Counsel rushes to the rescue.

Mr. Scerbo: This man is hired by you to say as he pleases, and to say as you please.

The Court: Strike that out of the record. I overrule the objection.

Mr. Scerbo: My objection is, your Honor please, a strictly technical one. And when I am confronted with a witness of this type, I will stick to technical objections.

Mr. McMichael: Mr. Commissioner, I can only say that I am just as careful, and I too bring in everything I can.

The Court: Overrule the objection.

(The reporter read the last question as follows: "Q. 1931. What did Mrs. Miller tell you on that day?")

The Witness: She told me that Mr.

Miller came home at noontime, at—that he had bumped his head in the morning on the car.

By Mr. McMichael:

Q. She told you that he had bumped his head in the morning? A. That is right.

Q. And came home at noontime? A. When he came home at noontime.

Q. When he came home at noontime. Go ahead. A. He went back then and one o'clock he came home and was off—went back again at about—he was at her house till about four o'clock; I mean at his home, and then went back to the station around five; and then came home around six o'clock for his dinner; then he went back to work and stayed until eleven o'clock at night, came home then, ate a piece of pie and glass of milk—something like that, I don't recall —milk or coffee, retired to bed. Two o'clock in the morning, approximately that time, he woke up, put his hands to his head and said that he had a terrible pain in his head. Twenty minutes later he went into unconsciousness and never regained consciousness after that.

Q. You are positive, Mr. Brune, that she told you this alleged occurrence happened in the morning? A. That is right.

Q. What occasioned you to have this conversation? What brought it about?

Mr. Scerbo: I object, your Honor please, as not being in any way material.

The Court: I overrule the objection.

Mr. Scerbo: Exception, please.

Benjamin J. Brune, cross

By Mr. McMichael:

Q. Where did you have the conversation? A. I had the conversation at her attorney's office.

Q. And what was the name of her attorney? A. Mr. Youngelson.

Q. And was this conversation in Mr. Youngelson's presence? A. That is right.

Q. Was he there when she told you that this alleged accident occurred in the morning? A. That is right.

Q. Mr. Youngelson was present? A. That is right.

Q. You are positive of that fact? A. Absolutely.

Mr. McMichael: Take the witness.

Cross examination by Mr. Scerbo:

Q. Does it make any difference to you whether this accident happened in the morning or in the afternoon? A. It does not make any difference to me personally.

Mr. McMichael: That is improper cross examination; "Does it make any difference to this witness whether it happened in the morning?" Counsel should confine himself to what questions I have adduced on direct examination, not make a pig sty out of the record.

Mr. Scerbo: Are you finished, Mr. McMichael?

By Mr. Scerbo:

Q. You are interested in the outcome of this

case, are you or are you not? A. Well, I like to see the company have justice, that is all.

Q. You you like to see the petitioner have justice? A. Absolutely.

Q. I wonder.

Mr. McMichael: Now, Mr. Commissioner, I will ask that that statement go off the record.

The Court: Strike it out.

By Mr. Scerbo:

Q. You particularly remember Mrs. Miller telling you this happened in the morning, don't you? A. Absolutely.

Q. You say it happened in her own attorney's office? A. That is what she told me was her attorney, Mr. Youngelson. She said that was her attorney at the present time.

Q. You are just as sure of that as you are of the other things you testified to? A. I am sure of that as I am sitting here.

Q. Did you ask her when it happened or did she tell you? A. I surely did; how otherwise would I know?

Q. You asked her yourself? A. That is right.

Q. Now, could you be mistaken about that? A. No, I could not be because I went to the office with her.

Q. You are sure it was the sixteenth of December, aren't you? A. I could not swear to the date. I said, I think it was the sixteenth of December, 1931.

Q. Yes. A. I feel practically positive of that.

Q. You feel practically positive that it was the sixteenth of December? A. That is right.

Q. All right. What day of the week was it? A. I beg your pardon?

Q. What day of the week was it? A. I don't know.

Q. You don't know. If you had found that this lady had established her claim, would you have paid her compensation? A. Absolutely. We pay many cases where they never come up for formal hearing.

Q. What was there about this whole thing that made you change your mind? A. Because——

Mr. McMichael: Now, Mr. Commissioner, just a moment. If Counsel would like——

Mr. Scerbo: I will withdraw the question so as to save time.

By Mr. Scerbo:

Q. Where is Mr. Youngelson's office? A. At that time, I believe, it was on the main street in Dover.

Q. It is still there, isn't it? A. I haven't been up to that office since that time.

Q. Where were you, in his private office, where? A. It appeared so. His name was on the door, at least.

Q. Now, tell us this frankly: was Mrs. Miller well composed? A. She was with him. She sat right by the desk with him at the time I got the statement.

Q. No. I say was she composed? Was she excited or crying, or what? A. She was as composed as she appears to be right now.

Q. Was Mr. Youngelson right there present?

A. Mr. Youngelson sat as close as you and Dr. Ruoff are sitting.

Q. She said this and he heard it? A. That is right.

Mr. Scerbo: That is all.

Redirect examination by Mr. McMichael:

Q. Now, Mr. Brune, would there be any way by which you could be sure of the time of this conversation, absolutely sure of the day?

Mr. Scerbo: I object to that.

The Witness: If I could see——

Mr. Scerbo: Just a moment. You have been in Court a number of times, young man, to know that whenever I object you should keep quiet.

I object as not being proper redirect, your Honor please.

The Court: I overrule the objection.

(The reporter read the last question as follows: "Q. Now, Mr. Brune, would there be any way by which you could be sure of the time of this conversation, absolutely sure of the day?")

The Witness: When I take a statement from anybody, I put the date on the top of the statement, and by seeing that statement, I think I would be positively sure when I saw this party.

Mr. McMichael: Now, Mr. Commissioner, I am afraid counsel for the respondent will have to rely upon the Court; when he took this (indicating) thing out of the file we tore it. We took R-2 for Identification out of the file we

tore this little piece (indicating); I think the Court better hold it.

Mr. Scerbo: If it is suspicious I won't hesitate to accuse you.

Mr. McMichael: I will let the Court decide that.

The Court: It is dated November 16.

Mr. Scerbo: November?

The Court: Yes.

Mr. Scerbo: November 16?

The Court: Yes.

Mr. McMichael: It looks like it is November.

Mr. Scerbo: He said December. Didn't you say December?

The Witness: I said I thought it was December.

(Discussion between Court and counsel.)

Mr. Scerbo: It is stipulated on the record that the date of the record is November 16?

Mr. McMichael: Mr. Wegner is reading it.

The Court: November 16, yes.

By Mr. McMichael:

Q. That fixed the date of this conversation, Mr. Brune? A. That is right.

Q. That is why you are sure of the day? A. Positively.

Q. Why did you say December 16? A. I was wrong; I thought it was December. I was under the impression it was December.

Q. In the course of your business do you have many statements to take?

Mr. Scerbo: I object, your Honor please. It is immaterial.

Mr. McMichael: I will withdraw the question.

That is all.

Recross examination by Mr. Scerbo:

Q. Now, if you could be wrong—if you could be a month off on the date that you took that statement, you could be wrong for a couple of hours on the date that you say Mrs. Miller told you the accident happened, could you not? A. I don't think so, because in my experience as an adjuster and investigation, that was one of the main points that was to be determined, at what time the accident occurred. The date on the outside of the statement wasn't so clear, and naturally, I would not remember that easily.

Mr. Scerbo: That is all.

(Witness excused.)

Mr. McMichael: Now, we want to offer this statement in evidence.

Mr. Scerbo: I object to that as absolutely having no value, no evidential value whatever; they don't attempt to contradict anything; furthermore, it was not signed by Mrs. Miller.

The Court: Have they been signed?

Mr. McMichael: The witness said everything was in this statement.

Mr. Scerbo: He is there to testify for you; naturally he would say that.

Mr. McMichael: Will you let me get through?

He said everything was in his own

handwriting, and it is what the widow told him.

Mr. Scerbo: It does not make any difference, your Honor please.

Mr. McMichael: The widow is sitting right there (indicating), and she can rebut it.

Mr. Scerbo: No, your Honor please; that is absolutely improper evidence. It is a fundamental rule that a witness who makes a record of something of that kind and comes into Court himself and testifies——

Mr. McMichael: Never mind, I will withdraw the offer.

Mr. Scerbo: All right, put it in.

Mr. McMichael: No, it is too late. It is now withdrawn.

Mr. Scerbo: All right.

(Whereupon an adjournment was taken to a future date.)

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically before me at the time, place and date, hereinbefore set forth.

JOHN C. O'BRIEN,
Referee.

I HEREBY CERTIFY that the foregoing is a true and accurate copy of the testimony as taken stenographically by me at the time, place and date hereinbefore set forth.

J. BAER.
Court Reporter.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

Morristown, Morris County District

LOTTIE A. MILLER,
Petitioner,
v.
MINNISINK OIL COMPANY INCORPORATED,
Respondent.

April 8, 1933.

Before—Honorable JOHN C. WEGNER, *Referee.*

APPEARANCES:

IRVING YOUNGELSON, Esq., by FRANK C. SCERBO, Esq., for the Petitioner.
WILLIAM B. MCMICHAEL, Esq., for the Respondent.

DR. EARL STAGE, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination by Mr. McMichael:

Q. Dr. Stage, you are a duly licensed practicing physician in the State of New Jersey? A. I am.

Q. And when were you admitted to practice in this State? A. In June, 1933.

Mr. Scerbo: June, 1933?
The Witness: Yes.
Mr. Scerbo: We are not there yet.
The Witness: I beg your pardon, 1932.

By Mr. McMichael:

Q. Doctor, were you the interne in All Souls Hospital on or about November 17, 1931? A. I was.

Q. I show you "R-1 in evidence," the hospital records, and particularly refer you to that part of the record stated as case history and ask you whether or not the case history is in your handwriting? A. It is.

Q. And when was that made? A. At the time of taking the history on examination.

Q. And from whom did you obtain this case history? A. The history was obtained from the man's wife and a family relative.

Q. Doctor, will you kindly read the case history that you say is in your handwriting, which was given to you by Mrs. Miller? A. The patient's name, George Miller, address Dover, New Jersey——

Q. Rather slowly, Doctor, will you, Doctor? A. Personal history, age thirty-seven, married, family history considered irrelevant; habits coffee ten to fifteen cups daily; alcohol moderate, tobacco moderate, past health negative except for ptosis of the left eyelid for the past seventeen years. Present condition: last evening November 4, 1931, patient complained of pain, numbness of lower extremities as well as dimness of vision; at about two A. M. he became comatose and re-

mained so—no change to the present time; four P. M., November 5, treated by local physician at home in the interval; at five A. M. had neck extremely, forceably bent by chiropractor. Physical examination: height five feet, eleven inches, weight one hundred and eighty pounds and nutrition good, temperature one hundred and two-fifths, pulse seventy-two, respiration twenty, blood pressure systolic one forty-eight, diastolic sixty, pulse pressure eighty-eight. Head: left eye diverges latterly, pupils equal and active, reacts to some external stimuli, left eyelid ptosis and facial weakness on left side of rest of face; lungs normal, vascular breathing and pulmonary response no rales heard. Heart and vascular system no enlargement, no murmurs, no thrills; abdomen negative, genito urinary system not examined; neuro-muscular; biceps, triceps equal and active, patella bilatterly hyperactive; ankle jerks bilatterly hyperactive; moves upper extremities but lower seem paralyzed—but lower seem paralyzed; left abdominal active, left side of face shows a loss of muscle tone, skin negative, tentative diagnosis, cerebral hemorrhage internal capacity, dated November 5, 1931.

Q. Now, Dr. Stage, did you ask Mrs. Miller at the time or make any inquiries of her as to whether or not there had been any kind of an accident? A. I specifically asked Mrs. Miller if there had been an accident.

Q. And what did she tell you? A. She told me that there had been none.

Mr. Scerbo: I object to it, if your Honor please. I want to make an observation at this stage which I think is proper and that is to ask the witness will he

kindly refrain from answering the questions until the Court has an opportunity to rule.

Mr. McMichael: What is the objection?

Mr. Scerbo: The record speaks for itself, your Honor please. If that is the history which he obtained from Mrs. Miller, he should have put that down in the history.

Mr. McMichael: Mr. Commissioner, that is just plain argument. I asked Dr. Stage who is under oath whether or not he made any inquiries of the petitioner and certainly it is binding on her to so state if her husband had been in any kind of an accident. I submit that counsel at this time can't start in a lot of argument on that. He can cross examine if he wants to, but what is the objection to the question? On what ground do you object to the question?

Mr. Scerbo: Are you finished?

Mr. McMichael: Yes.

Mr. Scerbo: I think I know my rules of evidence to a certain extent.

Mr. McMichael: Go ahead.

The Court: If there are going to be any side remarks I will put the case off for a month again.

Mr. Scerbo: The only time that evidence of this kind can be brought before your Honor is when the foundation for it is laid at the cross-examination of Mrs. Miller. If he can show me on the record where he asked Mrs. Miller "Did you state so and so to Dr. Stage," and if she

said no, or yes, or whatever the question was, then Dr. Stage can take the stand now to rebut it, but otherwise he can't bring in this kind of hearsay evidence because it is in no way material as direct evidence to the defense in this case. There must always be a proper foundation laid and he could have done so by asking Mrs. Miller those questions. I don't recall any part of the testimony, wherein he asks Mrs. Miller did she or did she not deny to Dr. Stage that there was an accident.

Mr. McMichael: I ask for a ruling, your Honor.

The Court: I sustain the objection.

Mr. McMichael: I respectfully except on the ground that I brought this witness in as direct evidence and I have made no attempt whatsoever to bring him in as a rebuttal witness. I respectfully except to the ruling of the Court. Do I under- I can't ask this witness, Mr. Commissioner, whether or not this petitioner was questioned by him as to what was said?

The Court: You can ask him anything, but the objection is sustained.

Mr. McMichael: You don't allow that question?

The Court: No.

Mr. Scerbo: May I ask that that part of the answer be stricken from the reoord.

The Court: Yes.

Mr. McMichael: Are you striking out the entire evidence from the record?

The Court: No, that part of the answer.

Mr. McMichael: Now, Mr. Commissioner, if you will refer to the evidence of Mrs. Miller, you will find that this woman has testified in court throughout and it was specifically asked and she has testified—never mind, I will withdraw that whole statement on the record. That is all. Exception.

(Witness excused.)

DR. HARRY E. GILLIAND, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination by Mr. McMichael:

Q. Dr. Gilliand, what is your profession? A. Osteopathic physician.

Q. Dr. Gilliand, did you call at the home of the deceased——

Mr. Scerbo: Just a moment.

Mr. McMichael: Will you please wait until I get through with my question?

By Mr. McMichael:

Q. (Continuing.) —on or about November 5, 1931?

Mr. Scerbo: Don't you think I have a right to question him on his qualifications?

Mr. McMichael: Mr. Commissioner, I am not bringing the witness on the stand to testify to medical evidence. I am bringing him here for another purpose.

Mr. Scerbo: He stated in answer to the question, "What is your profession?" osteopathic physician. Now, I always have a right when you ask any kind of a physician questions to determine what his qualifications are so as to determine how it will apply to the ensuing testimony that will follow.

Mr. McMichael: I am not qualifying the witness to testify to medical evidence in this case. He is brought in as a lay witness and he was simply asked what his profession was to designate what he was—whether a bricklayer, digger, etc., or whatever he might be. If I ask a medical question it is time for the petitioner's attorney to object.

Mr. Scerbo: Then I understand he is going to be produced as a lay witness?

Mr. McMichael: I have not attempted to bring him in as anything else.

The Court: Please read the last question.

(The Court Reporter read the last question as follows: "Q. Dr. Gilliand, did you call at the home of the deceased on or about November 5, 1931?")

The Witness: I called at 4:30 in the morning to see Mr. George Miller.

By Mr. McMichael:

Q. Do you remember the occurrence? Do you remember the time you visited there? A. Do you want me to repeat what I found?

Q. No, no. I just want you to tell us what you

saw there at the time you visited his home on November 5.

Mr. Scerbo: I object, if your Honor please, if there is to be any opportunity to give the witness a chance on the observations to testify which will in any way negative any testimony that may have been given. He must first show his qualifications. History can only come to this Court through a regularly licensed physician.

Mr. McMichael: Mr. Commissioner, I ask that the evidence of these alleged witnesses to this alleged occurrence, when the petitioner said he had a blow on the head be stricken from the record if I can't bring in evidence here before this Court to rebut other testimony which is entirely hearsay, and if I can't bring in this testimony by a lay witness, which is all that I am trying to do, then I might as well step back.

Mr. Scerbo: There is no comparison at all between the witnesses who saw this man at the time he came out of the pit and this man who comes here to relate what was told to him.

The Court: Read the question.

(The Court Reporter read the last question as follows: "Q. No, no. I just want you to tell us what you saw there at the time you visited his home on November 5.")

The Court: It is a question as to what he saw.

Mr. Scerbo: It is too general.

By Mr. McMichael:

Q. Did you see anyone there when you called at the home? A. Yes.

Q. Whom did you see? A. Mrs. Miller, Mr. Miller; I don't remember about the children.

Q. Did you see Mr. Miller there? A. I did.

Q. How did he appear to you?

Mr. Scerbo: I object.

The Court: I overrule the objection.

Mr. Scerbo: I ask for an exception, if your Honor please.

By Mr. McMichael:

Q. Go ahead, Doctor. What did he look like? What condition was he in? A. At the time he was unconscious, profuse sweating, no reaction to the eye-balls——

Mr. Scerbo: The answer is not responsive. There is an attempt to bring him in as a lay witness and then develop medical facts. Therefore, we are getting right back to——

Mr. McMichael: Mr. Commissioner——

Mr. Scerbo: Please let me finish. I want the record to be clear on my objection. I agreed with Mr. McMichael that this witness was to be a lay witness, and immediately upon an answer to a very broad question which has been sustained by the Court, we have a technical medical testimony of the man's actual condition, whatever it may be, and I ask before any such attempt is made to bring

testimony of that kind before the Court that this man be qualified, as he must be.

Mr. McMichael: Mr. Commissioner, something tells me here that I could certainly not have been wrong for all these years that I have been practicing in the courts of this State. My impression has been and still is that chiropractors are licensed to practice and in fact I think I have been called upon from time to time to pay their bills. I am not trying to have this witness testify to medical facts.

The Court: The Doctor is an osteopath.

Mr. McMichael: All right. Osteopath, one thing or another. He is licensed to practice under the laws of the State of New Jersey, and, in fact, I know that the Bureau holds that their bills are authorized and that they should be paid. However, going beyond that fact I brought Dr. Gilliand in here to testify as to his observations from a layman's standpoint and he has just testified that he saw the man sweating and a ditch digger can also testify that he saw a man sweating. He can also testify that a man appeared to be unconscious. That is not medical evidence. It is a layman's observation and I respectfully urge that I have a right to bring that out.

Mr. Scerbo: I heard something said about the eyeballs, but as to just exactly what it was I can't remember.

The Court: Read the answer, please.

(The Court Reporter read the last an-

swer as follows: "A. At the time he was unconscious, profuse sweating, no reaction to the eye-balls.")

The Court: Strike out "No reaction to the eye-balls." A lay man can't tell anything about that.

Mr. McMichael: Now, I am going to ask the presiding Referee if he will not allow me to qualify Dr. Gilliand to testify to medical facts on the ground that he is licensed to practice in the State of New Jersey.

Mr. Scerbo: Now, we come right back to where we were.

Mr. McMichael: I am asking for a ruling.

The Court: Yes, ask him. Go ahead.

Mr. Scerbo: Well, ask the questions of the witness.

By Mr. McMichael:

Q. Doctor, did you make an examination of this petitioner?

Mr. Scerbo: I object, if your Honor please. I thought he was going to ask questions as to the Doctor's qualifications.

The Court: You better qualify him first.

By Mr. McMichael:

Q. Doctor, you say you are an osteopath? A. Yes.

Q. And when were you admitted to practice? A. June, 1926.

Q. State your qualifications. A. Two years

premedical; four years Philadelphia High School Course, Surgeon in Pennsylvania.

Q. You say you are a surgeon in Pennsylvania? A. Allowed to practice surgery in the State of Pennsylvania.

Q. An M. D.?

Mr. Scerbo: Please do not lead. I ask that the suggestion on the part of Mr. McMichael as to M. D. be stricken from the record.

Mr. McMichael: Suggesting that this man would commit perjury under Oath?

Mr. Scerbo: Not that he will, or you will.

Mr. McMichael: I am going to state Mr. Commissioner, that if this happened in any Court Mr. Scerbo would be held for contempt of court, and you know it, if what I understood I heard from him I heard correctly, and I am saying that he could not do it in any other court and he knows it.

The Court: There is only one thing that is holding me back and that is the fact that there is a widow and three or four kiddies, and that is the only reason why I am coming up here on a Saturday, because there is a widow and three or four children, and if the nature of the circumstances were not such, I would adjourn the case for a month or two, but I do not want to make somebody else suffer who is in no way responsible. Let us proceed.

By Mr. McMichael:

Q. Did you say you are admitted to practice

as a medical doctor in the State of Pennsylvania? A. No, but we are allowed in the hospital to register under the Harrison Drug Act, to administer drugs and the right to practice surgery.

Q. Are you licensed to practice in this State, Doctor? A. I am.

Q. What year were you licensed? A. June, 1926.

Q. Now, did you make any examination of the deceased——

Mr. Scerbo: If your Honor please——

Mr. McMichael: Will you let me get through my question?

Mr. Scerbo: May I interrupt to ask some questions with respect to the qualifications of this doctor?

Mr. McMichael: Go ahead, then.

By Mr. Scerbo:

Q. You were admitted in June, 1926, as what, Doctor? A. As osteopathic physician licensed—

Q. As osteopathic physician licensed? A. To sign birth and death certificates also.

Mr. Scerbo: Proceed.

Mr. McMichael: All right.

By Mr. McMichael:

Q. Did you make an examination of the deceased George Miller on November 5?

Mr. Scerbo: I object, if your Honor please, to an answer to this question on the ground that the Doctor is not qualified under the rules of the court to testify here as to anything concerning this man's condition if he attempts to do it as a doctor

or physician. I admit that he has qualified himself as an osteopath and if osteopathic questions are propounded to him that come squarely within the rules of osteopathic questions, of course, probably the Court may consider it, but an attempt here in this case to controvert testimony of legally and duly qualified doctors on the stand—Dr. Gilliand is naturally not a proper doctor to give this testimony and I object to it.

The Court: I overrule the objection.

Mr. Scerbo: I have an exception.

Mr. McMichael: Go ahead.

The Witness: I did and found profuse——

Mr. Scerbo: I object, if your Honor please. I think that the question can only be answered yes or no and anything further is not responsive.

Mr. McMichael: Is Mr. Scerbo all through with his objection?

Mr. Scerbo: Yes.

By Mr. McMichael:

Q. You said yes? A. Yes, I did examine him.

Q. Go ahead.

Mr. Scerbo: May I renew my objection at this point without going through it at length and have an exception to your Honor's ruling?

The Court: Yes.

By Mr. McMichael:

Q. What did you find? A. Shall I repeat?

Q. Yes. A. I found a man unconscious, profuse sweating, gnashing of the teeth, apparently trying to raise from the bed as though tied down, muscular contractions, gnashing of his teeth, eyeballs were dilated, no reaction to light whatsoever, no pupillary reaction. Those are the main things.

Q. Did you obtain a history? A. Naturally, I asked specifically had—had he had a fall or anything to cause the symptoms found, which would naturally lead to it, and they said none they knew of. Mrs. Miller told me none she know of at the time.

Mr. Scerbo: I ask that it be stricken out as not responsive. This doctor cannot testify as to what Mrs. Miller said. He was asked specifically as to what he found.

The Witness: I simply stated what I did when I was asked the question.

Mr. Scerbo: Just a moment, please. I don't mean anything to you personally. You misunderstand the technical situation we are under.

Mr. McMichael: Yes, very technical. Mr. Commissioner, I ask whether or not I am permitted to ask this doctor whom you have permitted to testify as to what he found on examination, etc., whether I may now ask him what history was obtained and if so from whom. I am asking for a ruling.

The Court: I believe the Doctor did not answer the question properly. Answer yes or no.

The Witness: Yes.

By Mr. McMichael:

Q. From whom did you obtain the history? A. Mrs. Miller, the wife.

Q. What history did she give you?

Mr. Scerbo: I object to it at this time, if your Honor please, as not being presented in the proper fashion.

The Court: I overrule the objection.

The Witness: Naturally from the symptoms I asked her had the man had an injury——

Mr. Scerbo: Just a moment.

The Court: Answer the question. What history did she give you? It is important.

By Mr. McMichael:

Q. What did Mrs. Miller tell you? Just state what she said to you to the best of your recollection? A. She said Mr. Miller came home and was apparently in good spirits and went to bed and that he awoke and complained of dizziness and then she took—she thought possibly—possibly felt it was a bilious attack and——

Mr. Scerbo: You are assuming or are you relating exactly her words?

The Witness: I mean in the sense she told me she imagined it was bilious attack because of the dizziness and that then he sort of went off into sort of a sleep, that he became drowsy; she was unable to wake him and that is the reason she called me at the time. She could not rouse him. She tried to. Does that cover it?

By Mr. McMichael:

Q. Did you inquire from her as to whether or not Mr. Miller had been in an accident?

Mr. Scerbo: I object, if your Honor please. The Doctor, as a witness, has given the history and that is the history that we are all interested in. Certainly, as to whether he inquired as to that, or did not inquire, would be a leading question in the first place and in the secind place no way material or proper.

The Court: I sustain the objection.

Mr. McMichael: Do I understand, Mr. Commissioner——

The Court: I sustain the objection. I said it loud enough the first time.

Mr. McMichael: I ask an exception to the Commissioner's ruling that I am not permitted to ask the Doctor on the stand as to whether or not he made any inquiry as to whether or not there had been an accident.

The Court: That is not the question. Objection sustained.

Mr. McMichael: Exception.

By Mr. McMichael:

Q. Did you ask Mrs. Miller concerning Mr. Miller as to whether or not he, Mr. Miller, had been in an accident?

Mr. Scerbo: Objected to on the same grounds.

The Court: I sustain the objection.

Mr. McMichael: I ask an exception.

By Mr. McMichael:

Q. Did you have any talk with Mrs. Miller concerning Mr. Miller during the time you were taking this history? A. Well, as I said, the findings at the time naturally led a person—would lead one to ask did he have an injury because of the type of symptoms.

Q. And did you ask her that?

Mr. Scerbo: I object to that answer. It is not responsive.

The Court: Answer the question. The answer is not responsive.

By Mr. McMichael:

Q. Did you ask her?

The Court: It can be answered yes or no.

The Witness: I did.

By Mr. McMichael:

Q. What did she tell you?

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

The Court: I sustain the objection.

Mr. McMichael: I ask an exception. Cross examine.

Mr. Scerbo: No questions, Doctor.

Mr. McMichael: Mr. Commissioner, the respondent feels in view of the Court's ruling that I am not permitted to bring out very salient facts——

Mr. Scerbo: May I ask that this not go on the record, if your Honor please, in the event that it may prejudice the record, because if he attempts to show that

any ruling here was in any way prejudicial I ask that the record be clear of it.

Mr. McMichael: May I complete my statement?

The Court: Suppose you let the statement go on the record and then move to strike out.

Mr. McMichael: The respondent feels, in view of the fact that the Court rules that I am not permitted to bring out what I believe is very, very necessary evidence in this case to show the facts to the Court, because after all I think that is what the Court wants; in view of the fact that I am not permitted to bring out from Dr. Gilliand what the petitioner stated to him to rebut the testimony adduced here by the petitioner, also what Dr. Stage stated he was told at the hospital to rebut the testimony advanced by the petitioner in the case, I therefore feel that I must conclude my defense. I certainly cannot go on if I am to be prohibited from bringing out all of the facts which I want to bring out in this case, and after all time and again the Bureau has held that we are not bound here by the strict rules of evidence and I feel that an injustice to the respondent would occur, and I want to show all the facts that are pertinent to the case. I have tried to do it and I have been unsuccessful and I don't feel at this time that I can go ahead with my defense and prefer, under the circumstances, to stand on the record.

Mr. Scerbo: May I respectfully be heard, if your Honor please? In the first place, the nature of this case is indeed

important. A widow and children await the decision of the Court and I have been put to a great deal of expense and I have had doctors here and I have ended my case.

May I say to your Honor that the petitioner was on the stand and could have been asked any question whatsoever. May I state to your Honor that in stating my objections as I have, I had no other alternative and I could not do otherwise, and your Honor also in view of what Mr. McMichael attempted to do. If he had forewarned me by asking his questions in the proper time during the cross examination of Mrs. Miller naturally he could then have reserved the right to these other questions. I know the rulings are correct in point of law. Therefore, may I respectfully urge that this case be continued to its proper conclusion?

Mr. McMichael: We rest.

The Court: Do you rest also?

Mr. Scerbo: Yes.

The Court: Decision reserved.

I hereby certify that the foregoing is a true and accurate transcript of the testimony in the above entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

MAURICE D. FLYNN,
Court Reporter.

I hereby certify that the foregoing is a true and accurate transcript of the testimony in the above entitled matter as taken stenographically before me at the time, place and date hereinbefore set forth.

JOHN C. WEGNER,
Referee.

Judgment and Determination of Compensation Bureau

(Filed Oct. 10, 1933)

The above matter coming on for hearing and having been submitted for decision, I hereby find and determine as follows:

1. A formal petition was heretofore filed in the above entitled cause, praying for the compensation to which petitioner may be entitled by virtue of the terms and provisions of an act of Legislature of the State of New Jersey entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure, for the determination of liability and compensation thereof," approved April 4, 1911, together with the supplements thereto and amendments thereof; said petition was duly served upon the respondent; and answer was duly filed by the respondent; time and place for hearing of the petition was fixed and due notice thereof was served upon both parties; the petitioner and respondent appeared on the eight day of April, 1933 and other days prior thereto at which time this hearing was had, the petitioner being represented by Frank C. Scerbo, Esq., and the respondent by William B. McMichael, Esq., and both parties produced witnesses who were examined in the presence of said counsel for the respective parties.

2. That one George B. Miller of the Town of Dover, County of Morris and State of New Jersey was on the fourth day of November, 1931

in the employ of the respondent, his duties being manager and operator of a gasoline and oil station owned by the respondent, which said employment was subject to Section II, chapter 95, Laws of 1911, commonly known as the "Workmen's Compensation Act" and the supplements thereto and amendments thereof.

3. That on the fourth day of November, 1931 at about five o'clock in the afternoon, the said George B. Miller met with an accident coming out of and in the course of his employment, from which accident he died on November 7th, 1931; the particulars of which accident are as follows:

On the fourth day of November, 1931, the said George B. Miller was in a greasing pit engaged in the act of greasing an automobile of a customer of the respondent. After having completed the job and ready to emerge from the said pit, he struck his head a blow on the car. That decedent thereafter complained of pains in his head and about two o'clock A. M. of the next day was rendered unconscious and remained in that state of condition until his death on November 7th, 1931, at the All Souls Hospital at Morristown, N. J., to which he had been removed; that notice of the accident was given to employer on November 5th, 1931, that petitioner died as a result of a trauma resulting in a cerebral hemorrhage.

4. That the salary of the decedent was $37.50 per week plus commissions averaging in total $40.00 per week.

5. That the dependents of the said George B. Miller, deceased, and their respective ages at the

time of his death, are his wife, Lottie A. Miller, 36 years of age, George Wm. Miller, 13 years of age, Joseph B. Miller, 6 years of age and Alice N. Miller, 5 years of age, who all were totally dependent on the said George B. Miller, deceased, and are entitled to compensation as follows:

Twenty ($20.00) dollars per week from November 7th, 1931 until George Wm. Miller, the eldest child, reaches the age of sixteen.

Eighteen ($18.00) dollars per week from November 7, 1931 until the expiration of 300 weeks, for his wife, Lottie A. Miller, the petitioner.

Sixteen ($16.00) dollars per week from November 7th, 1931 until Joseph B. Miller reaches the age of sixteen.

Fourteen ($14.00) dollars per week from November 7th, 1931 until Alice N. Miller reaches the age of sixteen.

6. That there is due to the petitioner from respondent the sum of $150.00 for funeral expenses of the said George B. Miller, deceased, which sum has been paid by the petitioner.

7. That expenses at the All Souls Hospital were $47.00 which sum is to be paid by the respondent, of which sum $25.00 is to be paid to the petitioner who had paid said sum.

8. It is further ordered and adjudged that the respondent pay the following medical fees:

Fifty ($50.00) dollars to Dr. Andrew C. Ruoff.
Fifty ($50.00) dollars to Dr. Lowy.
Fifty ($50.00) dollars to Dr. Clifford Mills.

9. It is further ordered and adjudged that the petitioner pay the following medical fees:

One Hundred and Fifty ($150.00) to Dr. Andrew C. Ruoff and Thirty-five ($35.00) dollars each to Dr. A. B. Coultas, Dr. William A. McMurtrie and Dr. Ingrad Dresel.

10. It is further ordered and adjudged that the respondent pay Dr. Gettings and Dr. Ervin McElroy reasonable fees for their services to the decedent while he was at home.

12. And it is further ordered and adjudged that respondent pay to Irving Youngelson, Esq., and Frank C. Scerbo, Esq., Attorneys for the petitioner, the sum of Six Hundred ($600.00) dollars, and the petitioner pay her said attorneys the sum of Four Hundred ($400.00) dollars, a total of One Thousand ($1000.00) Dollars.

Wherefore, it is on this 10th day of Oct., 1933, ordered that judgment final be entered pursuant to the determination and findings herein.

JOHN C. WEGNER,
Referee.

Notice of Appeal to Morris County Common Pleas Court

(Filed Nov. 5, 1933)

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

LOTTIE A. MILLER, *Petitioner,* *v.* MINNISINK OIL CO., INC., a a corporation, *Respondent.*	On Petition for Compensation Notice of Appeal

To:

Secretary of Workmen's Compensation Bureau.
Morris County Clerk.

SIRS:

TAKE NOTICE that the respondent hereby appeals from the judgment of Referee John C. Wegner of the New Jersey Department of Labor, Workmen's Compensation Bureau, dated October 10, 1933, to the Court of Common Pleas of the County of Morris, from the whole of the award made in favor of the petitioner, allowing the following compensation to the petitioner against the respondent:

> "Twenty ($20.00) dollars per week from November 7th, 1931 until George Wm. Miller, the eldest child, reaches the age of sixteen.

"Eighteen ($18.00) dollars per week from November 7, 1931 until the expiration of 300 weeks, for his wife, Lottie A. Miller, the petitioner.

"Sixteen ($16.00) dollars per week from November 7th, 1931 until Joseph B. Miller reaches the age of sixteen.

"Fourteen ($14.00) dollars per week from November 7th, 1931 until Alice N. Miller reaches the age of sixteen.

"6. That there is due to the petitioner from respondent the sum of $150.00 for funeral expenses of the said George B. Miller, deceased, which sum has been paid by the petitioner.

"7. That expenses at the All Souls Hospital were $47.00 which sum is to be paid by the respondent, of which sum $25.00 is to be paid to the petitioner who had paid said sum.

"8. It is further ordered and adjudged that the respondent pay the following medical fees:

Fifty ($50.00) dollars to Dr. Andrew C. Ruoff.
Fifty ($50.00) dollars to Dr. Lowy.
Fifty ($50.00) dollars to Dr. Clifford Mills.

"9. It is further ordered and adjudged that the petitioner pay the following medical fees:

One Hundred and Fifty ($150.00) to Dr. Andrew C. Ruoff and Thirty-five ($35.00) dollars each to Dr. A. B. Coultas, Dr. William A. McMurtrie and Dr. Ingrad Dresel.

"10 It is further ordered and adjudged that the respondent pay Dr. Gettings and Dr. Ervin McElroy reasonable fees for their services to the decedent while he was at home.

"12. And it is further ordered and adjudged that respondent pay to Irving Youngelson, Esq., and Frank C. Scerbo, Esq., Attorneys for the petitioner, the sum of Six Hundred ($600.00) dollars, and the petitioner pay her said attorneys the sum of Four Hundred ($400.00) dollars, a total of One Thousand ($1000.00) Dollars."

Dated, November 4, 1933.

Respectfully,

COLLINS & CORBIN,
Attorneys of Respondent.

Rule Fixing Time and Place for Hearing

(Filed Dec. 5, 1933)

MORRIS COUNTY COURT OF COMMON PLEAS

LOTTIE A. MILLER,
Petitioner-Appellee,
v.
MINNISINK OIL CO., INC., a a corporation,
Respondent-Appellant.

On Appeal from Workmen's Compensation Bureau

Rule Fixing Time and Place for Hearing

On due application:

It is on this 1st day of December, 1933, ORDERED that the argument of the appeal in the above entitled matter will be heard before me at the Court House, Morristown, New Jersey, 10 A. M., on the 5th day of January, 1934.

It is FURTHER ORDERED that the respondent-appellant give to the petitioner-appellee, by serving the same upon her attorney, at least ten days' notice of the time and place above fixed for the hearing of the said appeal.

ALBERT H. HOLLAND,
Judge of Morris County
Court of Common Pleas.

Rule actually entered this 5th day of December, 1933, on motion of

COLLINS & CORBIN,
Attorneys of Respondent-Appellant.

Judgment of Morris County Common Pleas Court

(Filed Oct. 8, 1934)

MORRIS COUNTY COURT OF COMMON PLEAS

LOTTIE A. MILLER, *Petitioner-Appellee,* *v.* MINNISINK OIL CO., INC., a a corporation, *Respondent-Appellant.*	On Appeal from Workmen's Compensation Bureau Finding of Facts and Determination

The above matter coming on for hearing, on appeal from the Workmen's Compensation Bureau, and having been submitted to me for decision, I hereby find and determine as follows:

1. That this is a procedure brought by Lottie A. Miller and against Minnisink Oil Co., Inc., a corporation, under an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compenastion and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto; that said petition was duly served upon the respondent; and answer was duly filed by the respondent; that time and place for hearing was fixed and due notice

thereof was served upon both parties; that hearing of trial thereon was had on the eighth day of April, 1933, and other days prior thereto; and the following finding of facts and determination and award was made by the Workmen's Compensation Bureau:

"1. A formal petition was heretofore filed in the above entitled cause, praying for the compensation to which petitioner may be entitled by virtue of the terms and provisions of an act of Legislature of the State of New Jersey entitled, 'An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure, for the determination of liability and compensation thereof,' approved April 4, 1911, together with the supplements thereto and amendments thereof; said petition was duly served upon the respondent; and answer was duly filed by the respondent; time and place for hearing of the petition was fixed and due notice thereof was served upon both parties; the petitioner and respondent appeared on the eighth day of April, 1933, and other days prior thereto at which time this hearing was had, the petitioner being represented by Frank C. Scerbo, Esq., and the respondent by William B. McMichael, Esq., and both parties produced witnesses who were examined in the presence of said counsel for the respective parties.

"2. That one George B. Miller of the Town of Dover, County of Morris and State of New Jersey was on the fourth day of November, 1931, in the employ of the respondent, his duties being manager and operator of a gasoline and oil station owned by the respondent, which said employment was subject to Section II, chapter 95, Laws of 1911, commonly known as the 'Workmen's Compensation Act' and the supplements thereto and amendments thereof.

"3. That on the fourth day of November, 1931, at about five o'clock in the afternoon, the said George B. Miller met with an accident coming out of and in the course of his employment, from which accident he died on November 7th, 1931; the particulars of which accident are as follows:

"On the fourth day of November, 1931, the said George B. Miller was in a greasing pit engaged in the act of greasing an automobile of a customer of the respondent. After having completed the job and ready to emerge from the said pit, he struck his head a blow on the car. That decedent thereafter complained of pains in his head and about 2 o'clock A. M., of the next day was rendered unconscious and remained in that state of condition until his death on November 7th, 1931, at the All Souls Hospital at Morristown, N. J., to which he had been removed; that notice of the accident was given to the employer on November 5th, 1931, that

petitioner died as a result of a trauma resulting in a cerebral hemorrhage.

"4. That the salary of the decedent was $37.50 per week plus commissions averaging in total $40.00 per week.

"5. That the dependents of the said George B. Miller, deceased, and their respective ages at the time of his death are his wife, Lottie A. Miller, 36 years of age, George Wm. Miller, 13 years of age, Joseph B. Miller, 6 years of age and Alice N. Miller, 5 years of age, who all were dependent on the said George B. Miller, deceased, and are entitled to compensation as follows:

"Twenty ($20.00) Dollars per week from November 7th, 1931, until George Wm. Miller, the eldest child, reaches the age of 16.

"Eighteen ($18.00) Dollars per week from November 7, 1931, until the expiration of 300 weeks, for his wife, Lottie A. Miller, the petitioner.

"Sixteen ($16.00) Dollars per week from November 7, 1931, until Joseph B. Miller reaches the age of 16.

"Fourteen ($14.00) Dollars per week from November 7, 1931, until Alice N. Miller reaches the age of 16.

"6. That there is due to the petitioner from the respondent the sum of $150.00 for funeral expenses of the said George B. Miller, deceased, which sum has been paid by the petitioner.

"7. That expenses at the All Souls Hospital were $47.00, which sum is to be paid by the respondent, of which sum $25.00 is to be paid to the petitioner who had paid said sum.

"8. It is further ordered and adjudged that the respondent pay the following medical fees:

Fifty ($50.00) dollars to Dr. Andrew C. Ruoff.
Fifty ($50.00) dollars to Dr. Lowy.
Fifty ($50.00) dollars to Dr. Clifford Mills.

"9. It is further ordered and adjudged that the petitioner pay the following medical fees:

"One Hundred and Fifty ($150.00) Dollars to Dr. Andrew C. Ruoff and Thirty-five ($35.00) dollars each to Dr. A. B. Coultas, Dr. William A. McMurtrie, and Dr. Ingrad Dressel.

"10. And it is further ordered and adjudged that respondent pay Dr. Gettings and Dr. Ervin McElroy reasonable fees for their services to the decedent while he was at home.

"11. And it is further ordered and adjudged that respondent pay to Irving Youngelson, Esq., and Frank C. Scerbo, Esq., Attorneys for the petitioner, the sum of Six Hundred ($600.00) Dollars, and the petitioner pay her said attorneys the sum of Four Hundred ($400.00) Dollars, a total of One Thousand ($1000.00) Dollars."

That notice of appeal was filed with the Secretary of said Workmen's Compensation Bureau and with the County Clerk of Morris County on November 9, 1933; that order fixing time and place for hearing was made on the fifth day of December, 1933; that notice of the order fixing time and place for hearing appeal was duly served upon the petitioner-appellee; that transcript of the record of the Workmen's Compensation Bureau was duly filed with the County Clerk of Morris County; that said appeal came on for hearing on the fifth day of January, 1934, at which time the respective counsel for petitioner-appellee and respondent-appellant stipulated to submit their arguments by written briefs, which briefs were duly filed by the respective counsel.

2. That I have considered the record and the transcript of the testimony and the briefs submitted by respective counsel for the petitioner-appellee and respondent-appellant and I find no error requiring reversal. Grounds of appeal asserted by the respondent-appellant concerning the testimony of the witnesses, Mayes and Stowe, admitted over objection, is without substance and the testimony was properly received in evidence and is competent to support the findings and determination of the Deputy Commissioner. The respondent-appellant contends that the voluntary exclamation made by the decedent at the time that he was coming up out of the greasing pit and rubbing his head, was not admissible in evidence and cites Helminsky *v.* Ford Motor Co., 111 Law 369, in support of its contention. The instance case is not controlled by the principle laid down in Helminsky *v.* Ford Motor Co. This

case is governed by Murphy *v.* Brown, 91 Law 412, in which Justice Trenchard, who also wrote the opinion in Helminsky *v.* Ford Motor Co., supra, states:

> "The testimony challenged is that of the witnesses Lundy and Bull. It consists of declarations by the decedent. We consider that it was properly admitted as part of the res gestae. It is well settled that the res gestae includes those circumstances which are the undersigned incidents of a particular litigated act. They may be separated from the act by a lapse of time more or less appreciable, and may consist of speeches of anyone concerned, whether participants or bystanders. They may comprise things left undone as well as things done. They must be the necessary incidents of the litigated act in this sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors."

This principle was unanimously affirmed by the Court of Errors and Appeals in the case of State *v.* Doro, 103 Law 88, in which Mr. Justice Trenchard also wrote the opinion.

3. My findings include these facts: "that the decedent sustained an accident on November 4th, 1931, arising out of and in the course of his employment, inflicting a blow on his head, and that the employer had notification of the accident on the following day, November 5th, 1931. That as a result of a trauma he sustained a

cerebral hemorrhage, which caused his death on November 7th, 1931, and that the widow and children are entitled to the award recovered. The Tenth paragraph of the Determination of Facts and Rule for Judgment issued by the Workmen's Compensation Bureau is without legal force and effect and will be considered a surplusage and a nullity," and, therefore, the findings and determination of the Deputy Commissioner will be affirmed in all respects except as to allowance of fees to Dr. Gettings and Dr. McElroy, which are disallowed.

4. It is therefore on this 7th day of September, 1934, ORDERED that the appeal filed and entered in this case be and is hereby dismissed and the findings and determination and award of the Deputy Commissioner are hereby affirmed, and judgment final be entered in favor of the petitioner, Lottie A. Miller, and against the defendant, Minnisink Oil Co., Inc., in and for the full amount of the award made below, together with counsel fees contained in said award and medical expenses, except as to fees ordered below to be paid to Dr. Gettings and Dr. McElroy, which are hereby disallowed, together with costs.

5. And it is further ORDERED that counsel for the petitioner is allowed the sum of $500.00, to be paid in the following manner, that is to say, $250.00 Dollars to be paid by the petitioner-appellee, and $250.00 Dollars to be paid by the respondent-appellant, in addition to the costs awarded by law and the counsel fees contained in the award below.

ALBERT H. HOLLAND,
Judge of the Morris County
Court of Common Pleas.

Reasons on Certiorari

(Filed Dec. 4, 1934)

NEW JERSEY SUPREME COURT

MINNISINK OIL CO., INC., a a corporation, *Prosecutor,* *v.* LOTTIE A. MILLER, *Respondent.*	On Certiorari Reasons

The prosecutor, Minnisink Oil Co., Inc., a corporation, writes down the following reasons why the judgment in the above stated cause in the Morris County Court of Common Pleas, affirming a judgment and determination of the New Jersey Department of Labor, Workmen's Compensation Bureau, should be reversed.

1. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because the proofs failed to establish by competent legal evidence that the decedent sustained an accident arising out of and in the course of his employment.

2. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because the sole proof

that the decedent sustained an accident arising out of and in the course of his employment was hearsay testimony of witnesses.

3. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because the proof failed to establish by competent legal evidence that the decedent's death was due to an accident arising out of and in the course of his employment.

4. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because the sole proof that the cause of decedent's death was due to an accident arising out of and in the course of his employment, was based on hearsay testimony of witnesses.

5. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because there was error in overruling the question addressed to the witness, Dr. Harry Gilliand, "Q. What did she tell you?"

6. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay com-

pensation to Lottie Miller, because there was error in overruling the question addressed to the witness, Dr. Earl Stage, "Q. And what did she tell you?"

7. The Morris County Court of Common Pleas erred in the entry of its judgment dated October 8, 1934, wherein it adjudged that the Minnisink Oil Co., Inc., was liable to pay compensation to Lottie Miller, because there was error in overruling the question addressed to the witness, Dr. Irmgard Dressel, "Q. Now did you ask Mrs. Miller whether or not this man had been hit on the head or hurt in any way?"

Dated, December 3rd, 1934.

COLLINS & CORBIN,
Attorneys of Prosecutor.

Opinion of Supreme Court on Certiorari

(Filed Apr. 4, 1935)

NEW JERSEY SUPREME COURT

No. 220, January Term, 1935

MINNISINK OIL COMPANY,
Prosecutor,
v.
LOTTIE A. MILLER and the MORRIS COUNTY COURT OF COMMON PLEAS,
Respondents.

Submitted January 25, 1935: decided 1935.

On certiorari.

Before Brogan, Chief Justice, and Justices Parker and Bodine.

For the prosecutor, Edward A. Markley and Charles W. Broadhurst.
For the respondent, Frank C. Scerbo.

Per Curiam. This is a workmen's compensation case. The only question raised relates to the evidence rule of *res gestae.* George B. Miller was employed at the defendant's service station where there was a pit to facilitate the greasing of automobiles. He had been working there under a car, and climbed out, holding his hand on the side of his head, and saying "I got

a crack on the head." This was excluded more than once, but finally remained in the testimony. The proof further showed that he became sick that night, vomited, was taken to the hospital, the trouble diagnosed as cerebral hemorrhage, he became unconscious and died on the third day afterwards. There was sufficient evidence, though disputed, to connect the cerebral hemorrhage with a blow on the head; the question was whether the statement of deceased about a "crack on the head" was competent to support a finding that there was in fact a blow on the head. This question is raised in both points made in the brief, in these words: "because the only testimony that the decedent sustained an accident was hearsay testimony of witnesses."

The Common Pleas judge carefully considered this point and held, on the authority of Murphy *v.* Brown, 91 N. J. Law, 412, that the testimony was competent. In that holding we concur. It is further supported by the very recent decision by this court in Demeter *v.* Rosenberg, 114 Id. 55. No other question is raised. The writ will accordingly be dismissed, with costs.

Order Dismissing Writ of Certiorari

(Filed Apr. 20, 1935)

NEW JERSEY SUPREME COURT

MORRIS COUNTY

MINNISINK OIL COMPANY,
Prosecutor,
v.
LOTTIE A. MILLER and the MORRIS COUNTY COURT OF COMMON PLEAS,
Respondents.
} On Certiorari

The above entitled matter coming on for hearing at the January Term of this Court, 1935, and the Court having inspected the transcript and proceedings before the Commissioner and the Common Pleas Judge, finds as follows:

Per Curiam: This is a workmen's compensation case. The only question raised relates to the evidence rule of *res gestae.* George B. Miller was employed at the defendant's service station where there was a pit to facilitate the greasing of automobiles. He had been working there under a car and climbed out, holding his hand on the side of his head, and saying "I got a crack on the head." This was excluded more than once, but finally remained in the testimony. The proof further showed that he became sick that

night, vomited and was taken to the hospital, the trouble diagnosed as cerebral hemorrhage, he became unconscious, and died on the third day afterwards. There was sufficient evidence, though disputed, to connect the cerebral hemorrhage with the blow on the head; the question was whether the statement of the deceased about "crack on the head" was competent to support a finding that there was in fact a blow on the head. This question is raised in both ponits made in the brief, in these words: "because the only testimony that the decedent sustained an accident was hearsay testimony of witnesses."

The Common Pleas Judge carefully considered this point, and held, on the authority of Murphy *vs.* Brown, 91 N. J. Law, 412, that the testimony was competent. In that holding we concur. It is further supported by the very recent decision by this Court in Demeter *vs.* Rosenberg, 114 Id. 55. No other question is raised.

It is therefore ORDERED, that the Writ of Certiorari herein be dismissed with costs and the judgment of the Morris Common Pleas Court be and the same is hereby affirmed, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered April 20, 1935
On Motion of

IRVING YOUNGELSON & FRANK C. SCERBO,
Attorneys for Respondents.

Notice of Appeal

(Filed Apr. 22, 1935)

NEW JERSEY SUPREME COURT

MINNISINK OIL CO., INC., a corporation, *Prosecutor-Appellant*, *v.* LOTTIE A. MILLER, *Respondent-Appellee.*	On Appeal from Supreme Court Workmen's Compensation

To: FRANK C. SCERBO, Esq.,
10 Park Place,
Morristown, N. J.,
Attorney of Respondent-Appellee.

SIR:

PLEASE TAKE NOTICE that Minnisink Oil Co., Inc., the prosecutor-appellant, hereby appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause.

Dated April 12, 1935.

Respectfully,

COLLINS & CORBIN,
Attorneys of Prosecutor-Appellant.

Service acknowledged Apr. 15th, 1935.

FRANK C. SCERBO,
Attorney of Respondent-Appellee.

Grounds of Appeal

(Filed Apr. 22, 1935)

NEW JERSEY COURT OF ERRORS AND APPEALS

MINNISINK OIL CO., INC., a corporation, *Prosecutor-Appellant*,

v.

LOTTIE A. MILLER, *Respondent-Appellee.*

On Appeal from Supreme Court

Prosecutor-appellant, Minnisink Oil Co., Inc., writes down the following grounds of appeal:

Said judgment is erroneous in that it affirms the judgment of the Morris County Court of Common Pleas brought before the New Jersey Supreme Court by writ of certiorari in said cause, whereas said Court by its judgment should have reversed the judgment of the Morris County Court of Common Pleas for one or more of the reasons filed in that Court.

Dated April 12, 1935.

COLLINS & CORBIN,
Attorneys of Prosecutor-Appellant.

Service acknowledged Apr. 15th, 1935.

FRANK C. SCERBO,
Attorney of Respondent-Appellee.

88 MAY.T.1935

New Jersey Court of Errors and Appeals

MINNISINK OIL CO., INC., a corporation, *Prosecutor-Appellant*, *v.* LOTTIE A. MILLER, *Respondent-Appellee.*	ON APPEAL FROM SUPREME COURT

BRIEF IN FAVOR OF PROSECUTOR-APPELLANT

(1)

Statement of the Case

On November 4, 1931, Lottie A. Miller filed a petition for compensation in the Workmen's Compensation Bureau of the New Jersey Department of Labor, alleging that George B. Miller, her husband, died as a result of an accident which arose out of and in the course of his employment with the Minnisink Oil Co., Inc., and sought to recover compensation in behalf of herself and her children (pp. 4-8).

The Minnisink Oil Co., Inc., by its answer filed, denied that its employee, George B. Miller, ever sustained an accident or that his death was due to an accident (pp. 9-11).

The case was tried in the Compensation Bureau before Referee JOHN S. WEGNER, on February 19th and March 18th, 1932, March 25th and April

8th, 1933. On October 10, 1933, Referee WEGNER filed a determination in judgment awarding compensation to the dependents of George B. Miller (pp. 233 to 236).

The Minnisink Oil Co. on November 5, 1933, filed notice of appeal in the Morris County Court of Common Pleas (pp. 237-239), and brought the matter on for argument before Judge HOLLAND, of that Court, on December 1, 1933 (p. 240). On October 8, 1934, Judge HOLLAND filed in the Morris County Court of Common Pleas, his determination and judgment, affirming the award of compensation and entering the same as a judgment in that Court (pp. 241-248).

On November 12, 1934, Justice BODINE allowed a writ of certiorari (pp. 1 and 2). The return to the writ was duly made by Judge HOLLAND and the Clerk of the Morris County Court of Common Pleas (p. 3).

The reasons assigned by the Minnisink Oil Co. on this writ of certiorari why the judgment of the Morris County Court of Common Pleas should be reversed, are:

> 1. The proofs failed to establish by competent legal evidence that the decedent sustained an accident arising out of and in the course of his employment, because the only testimony that the decedent sustained an accident was hearsay testimony of witnesses.
>
> 2. The proofs failed to establish by competent legal evidence that the decedent's death was due to an accident arising out of and in the course of his employment, because the only testimony that he sustained an accident was the hearsay testimony of witnesses.

The Supreme Court by opinion filed April 4, 1935, affirmed the judgment of the Morris County

Court of Common Pleas (p. 252). This appeal is taken to review the action of the Supreme Court (pp. 256 and 257).

(2)

Grounds of Appeal

The only ground of appeal urged is that the Supreme Court erred in affirming the judgment of the Morris County Court of Common Pleas, whereas said Court should have reversed said judgment for one or more of the reasons filed in the Supreme Court (p. 257).

(3)

BRIEF OF THE ARGUMENT

There was no competent legal evidence that George Miller sustained an accident arising out of and in the course of his employment with the Minnisink Oil Co. that was the proximate cause of his death.

The fundamental issue involved on this appeal is whether or not there was any competent legal evidence that George Miller sustained an accident while in the employ of the Minnisink Oil Co. The decision of the question necessitates a recital of the testimony taken on the hearings, upon which testimony the courts below based their judgments. In order to present the matter in the clearest manner possible we will analyze the testimony of the witnesses, not in the order that they were called during the hearings, but in their chronological order with reference to the occurrence under discussion.

George Miller was employed by the Minnisink Oil Co. as the manager of its gasoline and service station located at 24 McFarland Street, Dover, New Jersey (p. 20, ll. 10-20; p. 21, ll. 20-40). His hours of employment were from 6:30 A. M. to 12:45 P. M., and from 5:30 P. M. to 11 P. M. (p. 22, ll. 30-40; p. 23, ll. 1-40).

George Mays, a friend of George Miller, talked with him on November 4, 1931, between 12:30 and 1 P. M. At that time Miller went home to lunch and returned to the service station about 3 P. M. (p. 31, ll. 30-40). Miller and Mays went for a ride and returned about 4:30 P. M. (p. 32, ll. 1-40). Mays returned at this time to the service station and Miller went to his home, coming back to the service station at about 5 P. M. Walter Waer, an employee at the service station was then greasing a car owned by a man named Stowe. The car was standing on the greasing pit (p. 33, ll. 15-40). This pit was twelve feet long, six feet wide and six feet deep. Miller upon his arrival at the service station, went down into the pit and Mays did not see what happened to him, but when Miller came walking up the steps from out of the pit he was holding his right hand to the right side of his head and said to Mays that he had given his head an awful bang (p. 34, l. 10 to p. 36, l. 30). Mays did not see him strike his head. It was only what he heard Miller say (p. 43, ll. 25-35).

As this is the crux of the question to be decided, we wish to quote the language of the witness (p. 44, ll. 1-5):

> "Q. What words did he use? How did he say it? A. He came out of the pit and says, holding his head, 'I gave myself a hell of a bang on the head.'"

The only persons present besides the witness Mays, were Waer and Stowe (p. 44, ll. 10-35). All three were within five feet of each other and of Miller (p. 44, l. 35 to p. 45, l. 20). When Miller took his hand away from his head Mays did not observe any marks or cuts on the head (p. 46, ll. 1-20).

William Stowe testified that he was the owner of a Chevrolet coach, which he took to the service station to be greased (p. 47, ll. 30-40). A boy working there and Miller did the work. The car was placed over a greasing pit. Both the boy and Miller were in the pit doing the work. As Miller came up the steps out of the pit, he was rubbing his head and said, "I got a crack on the head." The witness indicated how his hand was moved in relation to his head and this indicated a brushing movement (p. 48, ll. 10-30; p. 50, ll. 20-30). At the time Stowe saw Miller coming out of the pit and heard the remark, he was sitting in his car. The ladder from the pit to the ground was located at the front end of the car.

Willard L. Waer was an employee at the service station (p. 193, ll. 35-40). Mr. Stowe brought a car to the station about 5 P. M. to be greased. Mays, Stowe and Waer were standing around the pit. Stowe and Mays were about seven feet away. Waer did not see Miller holding his head or strike his head, or hear the remark testified to by the other witnesses. Miller worked with Waer at the station after this car was greased, until 9 P. M., without making any complaint, and acted all right (p. 195, ll. 20-40).

Lottie Miller, the petitioner and wife of George Miller, testified that he worked for the Minnisink Oil Co. one and a half years prior to this occur-

rence, at this service station where he was manager (p. 20, l. 20 to p. 22, l. 40). On November 4, 1931, he went to work at 6:30 A. M. and returned for lunch at 12:45 P. M. He went back to work about 4:30 P. M. and returned for his supper at 6 P. M. After supper he returned to work and came home when the station closed about 11 P. M. (p. 23, ll. 1-40). He usually ate something and had coffee to drink at that time, after which he would sit around and talk. On this night he ate a piece of pie, drank no coffee, and went right to bed (p. 24, ll. 1-25). About 2 A. M. he woke her up and said his head hurt terribly (p. 89, ll. 1-20). When he came home for supper at 6 P. M. he told her he hit his head when he was working on a car in the pit (p. 84, l. 10 to p. 85, l. 30; p. 89, ll. 1-30). When he woke up at 2 A. M. he vomited, shivered, and shortly thereafter lapsed into unconsciousness (p. 26, ll. 15-30). She called Dr. Gillen (p. 27, ll. 1-20). Her husband never regained consciousness and went to the hospital at 4:30 P. M. Thursday, November 5th (p. 28, ll. 1-10). The decedent was five feet tall and weighed 176 pounds (p. 29, ll. 35-40).

Dr. Harry Gilliand, an osteopath, testified that he was called to the home of Mr. Miller at 4:30 A. M. on November 5, 1931. After describing Mr. Miller's physical condition, namely, that he was in a coma, he testified that he asked Mrs. Miller if there was any history of an accident or fall and Mrs. Miller told him there was none that she knew of. She said Mr. Miller came home apparently in good spirits and went to bed, and that he woke up complaining of dizziness. She said that she thought it was sort of a bilious attack and that he went into a sort of sleep from which she was unable to wake him, and

that is why she called the witness (p. 227, l. 10 to p. 228, l. 40).

Dr. Herman Hegner, resident interne of All Souls Hospital, went with an ambulance to remove the patient from his home to the hospital about 1 P. M. on November 5, 1931. The patient was in a coma and in bed. He was removed to the hospital in an ambulance. The doctor made an examination and diagnosed his condition as cerebral hemorrhage. The patient died without ever regaining consciousness. A post mortem examination was made in the witness' presence (p. 68, ll. 30-35). The witness conceded that there was no evidence of trauma on the autopsy (p. 78, ll. 10-35). This witness, over objection that was overruled, testified that in his opinion the cause of the cerebral hemorrhage was accident.

Dr. William A. McMurtrie testified that he was connected with the All Souls Hospital and had Mr. Miller under his care (p. 141, ll. 2-20; p. 148, ll. 25-40). He first saw him November 5, 1931, at 11 P. M. The history obtained was that on the evening of November 4, 1931, the patient complained of pain and numbness of the lower extremities and dimness of vision. About 2 A. M. November 5th, the patient became semi-conscious and almost into a coma, with twitchings; the coma increased; that previous to that (November 4, 1931) the patient had had frequent severe headaches for years. To relieve these headaches the patient drank ten to fifteen cups of coffee a day and had had trouble with his left eye drooping for seventeen years (p. 150, l. 20 to p. 151, l. 20). On examination of the patient November 5th, 11 P. M., this witness found him to be in a semi-conscious condition with a ptosis

(drooping) of the left eyelid, a partial paralysis of the legs, and a spastic condition of the arms, together with exaggerated reflexes. Other than as above stated, the examination disclosed the patient to be normal (p. 157, l. 5; p. 158, l. 20). There were no external manifestations of trauma. The patient died November 7, 1931, at 11:55 P. M. and this doctor's diagnosis was death from cerebral hemorrhage (pachymeningitis hemorrhagica interna). This is a chronic inflammatory condition of the meninges covering the brain, usually coming on for years. It is a gradual formation of new blood vessels from thinning of the old blood vessels. It is the formation of new connective tissue with always little spots of old hemorrhages (p. 158, ll. 20-40). The witness was present at the autopsy, and the autopsy confirmed his diagnosis. He had Miller under his care from the time of entry into the hospital until the time of his death, to wit, November 5th, 11 P. M. to November 7th, 11 P. M. (p. 159, ll. 1-15).

In this witness' opinion the death was not due to trauma (p. 159, ll. 20-30). There is no cerebral hemorrhage due to trauma without external manifestations of it (p. 159, l. 30 to p. 160, l. 20). He never saw or heard of a case and does not think it probable. Cerebral hemorrhage is the result of long standing infections of various kinds (p. 160, ll. 20-28). The onset of the symptoms, as in this case, is a common occurrence in pachymeningitis hemorrhagica interna (p. 161, ll. 30-40). With the findings on the autopsy, even though it is assumed that Miller struck his head, it was not the cause of the hemorrhage or death, in the doctor's opinion (p. 161, l. 41 to p. 162, l. 15). The autopsy disclosed that the cerebral

hemorrhage covered the surface of the brain and extended between the two hemispheres of the brain covering the complete external surface of the brain. It was what is known as a subdural hemorrhage, which is caused by the rupture of some blood vessels in the meninges. It is due to disease and not accident (p. 177, l. 30; p. 178, l. 20).

Dr. Irmgard Dressel testified that she was pathologist at All Souls Hospital. She talked with Mrs. Miller on the admission of Mr. Miller at the hospital and Mrs. Miller told her that the decedent had suffered from severe headaches for years and consumed a great deal of strong coffee to relieve the pain (p. 154, ll. 10-20). The witness performed the autopsy November 7, 1931 (p. 183, ll. 30-40). The findings on the autopsy as stated by the witness were as follows (p. 184, l. 10 to p. 187, l. 30):

> "There are no abrasions or signs of contusions on the skin of the head, trunk and extremities. Found no marks on the head at all. Upon removal of the calvarium the dura is adherent to the convex surface of the brain. In places it must be loosened with instruments. Along its convex side the dura shows considerable thickening and areas of darker brownish color. The convex surface of the brain is covered with hemorrhages. Upon separating the two hemispheres a big clot of coagulated blood covers the corpus collosum, but the blood does not enter the third nor the lateral ventricles. After removal of the clot, the area of brain destruction comprises the upper layers of the corpus collosum, and the adjacent lower gyre of the median facies of both hemispheres."

Dr. Andrew C. Ruoff, Dr. Otto Lowy and Dr. Aldo Coultas, each testified in behalf of the peti-

tioner as a medical expert. They never saw or treated the decedent, but gave their opinion evidence as to the probable causal relationship between the alleged accident and Miller's death solely from the facts contained in a hypothetical question propounded to them. In the hypothetical question propounded to each of these doctors, the vital fact involved in this case was described in the question as, "That the decedent bumped his head on an automobile and gave himself quite a blow" (p. 96, ll. 1-30; p. 118, l. 25 to p. 119, l. 25; p. 133, l. 35 to p. 134, l. 30). Each of these doctors gave it as his opinion, based on the hypothesis that this decedent bumped his head and gave himself quite a blow, that there was a direct causal relationship between that bump on his head and his death. They testified that that blow caused the cerebral hemorrhage, although no exterior indications were present.

From the facts stated it will be observed that the petitioner's entire case rests on the assumption that while in the course of employment with the respondent, George Miller struck his head and that the blow thus received was the cause of his death. It was, we contend, incumbent upon the petitioner to prove first, that the accident or striking of his head did occur; and second, that the striking of his head or accident was the cause of his death. The proof of whether Miller in fact struck his head, restly solely on the hearsay testimony of the witnesses Mays and Stowe, who were present at the service station when the alleged accident occurred, and upon the testimony of Mrs. Miller as to conversations with him after her husband returned from work and before he lapsed into unconsciousness.

The proof of the causal relationship between the death and the alleged accident is based on the opinion of three medical experts who are assuming in the question propounded to them, the fact that he did receive a blow, and as described in the question, "quite a blow."

The finding of Referee WEGNER on the testimony which we have summarized above, was as follows (p. 23, ll. 20-40):

> "On the 4th day of November, 1931, the said George B. Miller was in a greasing pit engaged in the act of greasing an automobile of a customer of the respondent. After having completed the job and ready to emerge from the said pit, he struck his head a blow on the car. That decedent thereafter complained of pains in his head and about two o'clock A. M. of the next day was rendered unconscious and remained in that state of condition until his death on November 7, 1931, at the All Souls Hospital at Morristown, New Jersey, to which he had been removed; that notice of the accident was given to the employer on November 5, 1931; that petitioner died as a result of a trauma resulting in a cerebral hemorrhage."

At the time this case was tried in the Compensation Bureau (the last hearing being on April 8, 1933), the cases of *Johanna Friese* v. *Nagel Packing Co.*, 10 N. J. Misc. Rep. 795; affirmed 110 N. J. L. 588, and *Helminsky* v. *Ford Motor Co.*, 10 N. J. Misc. Rep. 1042, affirmed 111 N. J. L. 369, had not been decided. Those cases hold that while the Compensation Bureau is not bound by technical rules of evidence, it must ascertain the parties' substantial rights from competent evidence; and that while hearsay testimony may be received by the Workmen's Compensation Bureau without necessarily resulting

in a reversal, it cannot, as here, form the basis of an award of compensation. In the cases cited *supra* the testimony on which the plaintiff sought to sustain a judgment was that of the history given by the decedent to the attending physician, which history included the fact that his disability resulted from an accident he sustained while working for his employer. Those cases hold that while such testimony may be received in evidence by the Bureau, it cannot be the basis for an award of compensation.

On the appeal in the case at bar to the Morris County Court of Common Pleas, these cases were brought to the attention of Judge HOLLAND and he, recognizing the ruling contained in them, held, however, that the present case was not controlled by such decisions because the hearsay testimony in this case was competent evidence inasmuch as it was part of the *res gestae* and under the case of *Murphy* v. *Brown,* 91 N. J. L. 412, it was admissible and legally competent to sustain the judgment.

The case of *Murphy* v. *Brown & Co.,* 91 N. J. L. 412, is an opinion of the Supreme Court and the facts of the accident are not stated at any length. All that appears is that on December 9, 1916, the decedent received an acid burn on his fingers. An infection later developed, as a result of which he died. Objection to the award of compensation was made upon the ground that the trial court erroneously admitted hearsay evidence, *i. e.,* declarations made by the decedent to fellow employees. The court's opinion on this phase of the case, in full is as follows (p. 416):

> "The testimony challenged is that of the witnesses Lundy and Bull. It consists of dec-

larations by the decedent. We consider that it was properly admitted as part of the *res gestae*. It is well settled that the *res gestae* includes those circumstances which are the undesigned incidents of a particular litigated act. They may be separated from the act by a lapse of time more or less appreciable, and may consist of speeches of anyone concerned, whether participant or bystander. They may comprise things left undone as well as things done. They must be the necessary incidents of the litigated act in the sense that they are part of the immediate preparations for or emanations of such act and are not produced by the calculated policy of the actors, *Hunter* v. *State*, 40 N. J. L. 495; *State* v. *Kane*, 77 *id.* 244; *Trenton Passenger Ry. Co.* v. *Cooper*, 60 *id.* 219.

"Tested by that rule we think it was not erroneous to admit the statements made by decedent to Lundy and Bull as to the cause of the accident immediately after it happened, and before or during the time his fingers were being bandaged.

"It seems entirely reasonable to conclude that they were undesigned incidents or emanations of the accident, and were spontaneous and unreflecting, and made before decedent had had time to invent or misrepresent."

The case of *Murphy* v. *Brown & Co.*, cited *supra*, relies on three cases as authority for its holding, viz., *Hunter* v. *State*, 40 N. J. L. 495; *State* v. *Kane*, 77 N. J. L. 244, and *Trenton Passenger R. R. Co.* v. *Cooper*, 60 N. J. L. 219.

In *Hunter* v. *State* the deceased wrote a note to his wife in the morning and in the afternoon told his son that he intended to go to Camden that evening with a Mr. Hunter. Both the note and the statement were held admissible on the ground that they were part of the *res gestae*.

In *State* v. *Kane* the defendant to explain the purpose for which he was present in a certain locality, offered a statement he made the prior evening to the effect that he was going to that locality in order to attend church.

In neither one of the above cases was the true doctrine of *res gestae* involved. As pointed out by Professor Wigmore, these two cases fall within a different exception to the hearsay rule designated as statements of intent. The *Hunter* case involved the statement of a present intent to do an act, and in the *Kane* case it was the statement of the present intent to go to a place for a specific purpose (Wigmore on Evidence, Vol. 3, Sec. 1723).

In *Trenton Passenger R. R. Co.* v. *Cooper,* cited *supra,* which according to Professor Wigmore's classification comes strictly within the rule of *res gestae,* it is to be noted from the facts that the plaintiff and a companion were driving a horse which stepped on the trolley rail of the defendant. The horse stopped, shook and quivered and then kicked. While this was occurring, the plaintiff said to his companion, "He has got a shock Sam, catch hold." This statement was admitted in evidence as part of the *res gestae.* Judge Collins in writing the opinion for the Court of Errors and Appeals said:

> "It is not disputed that words spoken while an affair is in progress are admissible in evidence in a narrative of the affair. The claim is that the affair in question had ended before the words were spoken; that it ended with the frightening of the horse, however caused. The contrary seems too plain to need argument. The management of the horse, the conduct of both men (one of them the serv-

> ant of the other) were involved in the affair. Without proof of the call for help how could the plaintiffs satisfactorily account for Bennett's seizing the reins? The ejaculation was part of what occurred, and explained what might otherwise have defeated a recovery by one or both plaintiffs. *It did not prove that the horse had received a shock, but only that Cooper said so.* As was said by Chancellor Zabriski, in a case decided in this court, where words spoken by a bystander in an affray were held admissible in evidence: 'The proof is only proof of the fact that the words were spoken and not of the truth of anything as stated in them.' *Castner* v. *Sliker,* 4 Vroom 507."

From the above it will be observed that the cases on which the Supreme Court relied in *Murphy* v. *Brown & Co.,* do not sustain the proposition that a statement made by a witness some time after an event is admissible in evidence to prove that the event occurred. It may very well be, and we presume the fact was, that in the case of *Murphy* v. *Brown & Co.,* the facts in the record which do not appear in the opinion, indicated that the statement made by the plaintiff was immediately after the accident so as to be really part and parcel of the accident.

It is interesting to note that in the case of *Trenton Passenger Ry. Co.* v. *Cooper,* and *Castner* v. *Sliker,* 43 N. J. L. 507, the court points out the statement was not admissible to prove the fact that the accident occurred, but merely to prove the surrounding circumstances, there being proper evidence of the accident.

In our case, the sole proof in the case that the accident ever happened, is the declaration of the plaintiff, and it does not appear how long after he actually struck his head, if he struck it at all,

that the declaration was made. On the element of time the following cases are important.

In *Robert Estell* v. *The State,* 51 N. J. L. 182, Chief Justice Beasley in speaking for the Supreme Court on this question, said (p. 182, *et seq.*):

> "The pertinent facts were these: The defendant drove his team of mules attached to a wagon through a toll gate of which the deceased man, William H. Hart, was keeper. The state alleged that the defendant's purpose was to escape the payment of toll. Hart, in frustration of this design, ran out and endeavored to stop the team by seizing some part of the harness, and either by this act, or, as was alleged by the state, by incitement from the defendant, the team broke into a run. Hart was dragged a short distance, fell to the ground, the wagon wheels passing over his body, and so badly injuring him that he died within two days.
>
> "The first objection against the proceedings at the trial, as appears from the bill of exceptions, relates to certain statements made by Hart, the injured man; they were made under these circumstances: Hart was run over thirty or forty yards from the toll house; the defendant drove away, leaving him insensible on the ground; in a few minutes he was removed into the toll house, and after being there a short time, perhaps fifteen or twenty minutes, he made the statements in question, being questioned by his wife, thus: 'I said to him, "Why did you not let go?" and he said, "I could not let go, for they whipped up their horses and urged them on, and I did not dare let go for fear I would go under the wheel, they were going so fast." He said they ran over him. I said, "Who?" and he said, "I recognized Cale Patterson, and I think it was his son; he had his face from me, the young man did."'

"The wounded man died in about thirty-six hours afterwards.

"These declarations were admitted by the court, not as dying declarations, but as part of the *res gestae*.

"It is entirely plain that they were not admissible. They were no part of the transaction that was being tried. The issue was, whether or not the defendant had inflicted the mortal injury; the subsequent statements respecting that affair did not belong to it as a portion of its substance or as an incident of it. The *res gestae* were finished, and the wounded man merely described the past transaction. If he could make such description ten minutes after the occurrence, he could do so ten hours afterwards. Nor does it seem that immediate declarations would be more reliable than those that should be made at a later period; for while the latter, in some cases, might afford time and opportunity for fabrication, it is certain the former might be adulterated by reason of the vindicative passion unavoidably awakened by the strife or accident, and which would have had no chance of becoming appeased. All such statements whether proximate or remote, are untrustworthy in the extreme; they are not made under oath; they cannot be discussed by cross examination; nor are they likely to be open to explanation, generally being fragmentary and incomplete, and liable, therefore, to be misunderstood and misreported.

"Mr. Wharton correctly defines the rule of law on this subject when he says, 'All declarations which are in the nature of a narrative of past events are inadmissible.' 1 Law Ev., Sec. 265.

"The decision in the case of the *State* v. *Donelly* rests virtually upon this basis. There the narration of the murdered man was as closey connected in point of time with the transaction to which it referred as was

the narration now in question, and yet the former was not sanctioned on the ground that it was part of the *res gestae*, but, under the circumstances shown, as a dying declaration. On the assumption that the narration in that case was admissible in evidence for the reason that it was parcel of the matter in issue, it would be manifest that the entire discussion of the subject of the receivability of the statements of persons who are *in extremis* was out of place and uncalled for.

"The narrative of the wounded man in the present case should have been excluded."

In the case of *Higgins* v. *Goerke-Kirch Co.*, 91 N. J. L. 464, affirmed 92 N. J. L. 424, the Court of Errors and Appeals said:

"The plaintiff, while examining one of the boxes, placed her hand on its upper edge for the purpose of enabling her to inspect its lower compartment, and while bending down for that purpose the lid of the box dropped upon her hand, injuring her fingers, the damage to which is sought to be compensated by a recovery in this suit. Immediately after the falling of the lid the saleslady exclaimed that the same thing happened that morning.

* * * * * * *

"An initial objection is made to the introduction in evidence of the declaration made by the saleslady at the time of the accident that a similar occurrence happened that morning.

"The rule is elementary in this department of law, that to be admissible such testimony must synchronize with the main occurrence so as to be incidental to, or practically part of it, as *res gestae*. *Grenl. Evid.*, Sec. 108.

"*Blackman* v. *West Jersey, &c., Railroad Co.*, 68 N. J. L. 1, is an instance where such an admission or declaration was rejected.

"The *res gestae* in that case was the fall of the plaintiff from a street car. The admission of the conductor while picking her up that the fault was his in failing to observe her signal to stop was held not to be within the rule of *res gestae.*

"In *Jennings* v. *Okin,* 88 N. J. L. 659, the Court of Errors and Appeals reversed the judgment of the trial court upon the ground that the testimony of defendant's agent relative to his destination while driving a motor car for his principal was properly part of the *res gestae* in ascertaining whether the proposed trip was undertaken upon his own or his principal's business.

"The case *sub judice* seems to fall within a zone of time not paralleled by these two cases. The infirmity of the testimony rests in the fact that it was in nowise related to the fact of the accident, but was essentially an admission of a past occurrence of similar character. It is clearly settled by the rules of evidence that such declarations are not admissible.

"Professor Greenleaf remarks: 'It is to be observed that where declarations are merely narrative of a past occurrence they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act.' *1 Greenl.* 126, and cases cited; 10 R. C. L. 979, and cases."

An examination of the authorities dealing with the doctrine of *res gestae* indicates quite clearly that the courts are loath to extend the doctrine beyond the purpose for which it was originally created. The hearsay rule was created to prevent the possibility of fraud. The fundamental reasons for excluding such testimony were first, that the person who made the statement was not at the time under oath; second, the court had no opportunity of observing his demeanor so as to

judge his truthfulness; and third, he was not subject to cross examination. The reason for the exception to the hearsay rule known as the *res gestae* doctrine was that where an occurrence produced a spontaneous exclamation, the probability of its truth was its spontaneity. In other words, there was no time between the act and the exclamation for the mind to conceive a false explanation. In all of the cases that represent the true *res gestae* doctrine there is always proof of the act or the occurrence as a basis for admitting the exclamation. The fundamental basis of permitting such testimony is entirely destroyed when there is no proof that the act or occurrence ever took place. In other words, how can it possibly be said that the probable truth of a declaration is the spontaneity produced by the act or occurrence, when there is an entire absence of proof that any such act or occurrence ever took place.

In the case at bar the Commissioner in compensation is absolutely unwarranted in his assumption that this man struck his head at any particular time, if he ever did strike his head. He was in the greasing pit for some time working on the greasing of the car. The record is devoid of any proof as to how long that time was. The burden was on the petitioner, if the man in fact struck his head, to indicate that the time between the striking and the exclamation was so close that the statement of Miller was spontaneous. Whether the statement was made 15 minutes, 10 minutes or 5 minutes, or immediately after the striking is left entirely to conjecture. This is not a case where the death is not explainable from the physical condition of Miller, because the proof, outside of the testimony of the

medical experts of the petitioner who never saw or treated this man, indicates that he had a pathological condition of his brain which was a competent producing cause of his death, even though no accident had ever occurred. In other words, he had a pathological condition of long standing which at any time could have been the competent producing cause of a cerebral hemorrhage without any trauma at all.

(4)

Comment on Opinion of Supreme Court

The opinion of the Supreme Court affirms the judgment of the Morris County Court of Common Pleas on the authority of the case of *Murphy* v. *Brown,* 91 N. J. L. 412, which is also an opinion of the Supreme Court. We cannot find that this case was taken to this Court, and therefore the question involved in the appeal in the case at bar has not been decided by this Court. We have in our brief, beginning at page 12, discussed the case of *Murphy* v. *Brown,* cited *supra,* as well as the cases upon which it relies, and have, we believe, indicated that it is not an authority for the action of the courts below taken in the case at bar.

The only other decision referred to by the Supreme Court in its opinion is *Demeter* v. *Rosenberg,* 114 N. J. L. 55, which is a decision of the New Jersey Supreme Court. This case was never taken to this Court for consideration. In that case an action was brought for personal injuries due to plaintiff's intestate falling down a flight of stairs in an apartment house where she

lived. The negligence was the failure to provide lights as required by the Tenement House Statute. The decedent lived on the second floor of the house in question. Another tenant and his family lived on the first floor. The third floor was unoccupied. At about 6:30 in the morning the tenant on the first floor was awakened from his sleep by hearing a thumping noise outside of his door. He went in the hallway and found plaintiff's intestate lying at the bottom of the staircase in an unconscious condition. Plaintiff's intestate remained unconscious until her married daughter who had been summoned, arrived from some distant point. This daughter did not arrive until an hour and a half after the fall. During this time the decedent was unconscious. When the daughter arrived, seeing her mother in an unconscious condition she screamed, "Oh, mama, what happened to you?" The mother who all during this interval had been unconscious, regained consciousness momentarily and answered the question of her daughter, saying: "Annie, I missed my step and fell down the stairs." This testimony was admitted as part of the *res gestae* and a reading of the opinion of the Supreme Court will disclose that the reason for its admission was that from the time of the fall to the time of the statement plaintiff's intestate was unconscious, so that her mind was not able to conceive a false answer to the question of the daughter. At page 57 of the opinion it is stated:

> "It is undisputed that the decedent was unconscious from the time she was found at the foot of the stairs up to the time her daughter, Annie Demeter, arrived and received the mother's reply in answer to her exclamation. * * * In this case, coincident

with her fall, admittedly the injured person lost consciousness. She remained unconscious until the arrival of her daughter who, through fear or anguish, cried out sufficiently to momentarily arouse her mother out of her unconscious state during which conscious interval she said, 'I missed my step and fell down the stairs.' This is one of the exceptions to the general rule that the exclamation or statement must be spontaneous."

In the course of the opinion Chief Justice BROGAN states with approval, the following rules taken from Wigmore on Evidence (p. 58):

"'This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. * * *.'

"The general test as to whether or not such declarations are admissible as part of the *res gestae* seems to be whether or not the speaker has had time to reflect and make up his mind as to the happening and then give utterance to a self-serving statement. If the speaker has had such opportunity to

> reflect and make a statement helpful to himself or if the statement is a narrative, after the happening and lacking in spontaneity, the statement is inadmissible. Such we think was not the case here."

In the case at bar as we have pointed out in this brief under Point (3), subdivision A, there is no proof even from the declarations of the decedent as to when, while he was in the pit, he struck his head, as he stated, "An awful blow." The statement was made as he was coming up the steps from out of the pit. He was in the pit for some time greasing the car. It does not appear whether the striking of his head as stated by him, occurred five, ten, fifteen, or twenty minutes before the statement was made. There is no proof that this man was ever unconscious while in the pit. It appears, therefore, that he had ample opportunity to complain that a pain which may have been produced from natural causes that existed in his body, was due to his striking his head when in fact he had never struck his head. Furthermore, we wish to reiterate the fact that in all the cases dealing with the admission of declarations as part of the *res gestae* there has been proof of the accident or event which is supposed to have so unnerved the person making the declaration that the declaration can be said to be spontaneous and not the result of reflection.

In the case at bar the sole proof of the event which is supposed to be the basis of the declaration being spontaneous is the declaration itself.

We respectfully submit in the admission of the declarations as part of the *res gestae* it is incumbent upon the person seeking to offer the proof to first establish the accident or event, and to

indicate the interval of time between that accident or event and the declaration. If the rule is otherwise, how can it be said that the declaration was the spontaneous exclamation of the witness brought about by the accident or event?

(5)

Conclusion

We respectfully submit that the judgment of the Supreme Court should be reversed and for nothing holden.

May Term, 1935.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel.

COLLINS & CORBIN,
Attorneys of Prosecutor-Appellant.

BAR PRESS, INC., 47 WEST STREET, NEW YORK. BO. 9 — 0157-8

New Jersey Court of Errors and Appeals

Minnisink Oil Co., Inc., a corporation, *Prosecutor-Appellant,* *vs.* Lottie A. Miller, *Respondent-Appellee.*	*On Appeal from Supreme Court.*

BRIEF IN BEHALF OF RESPONDENT-APPELLEE.

(1)

Statement of the Case.

Lottie A. Miller, on January 9th, 1932, filed a formal petition for compensation in the Workmen's Compensation Bureau of the New Jersey Department of Labor, requesting compensation in behalf of herself and her three minor children, by reason of the death of her husband, George B. Miller, who had died on November 7th, 1931, as a result of an accident which occurred on November 4th, 1931, which arose out of and in the course of his employment with the Minnisink Oil Co., Inc., a corporation of the State of New Jersey (pp. 4-8).

The respondent, on January 19th, 1932, filed its answer by which it denied that the deceased had sustained an accident or that his death was due to said accident (pp. 9-11).

The case was brought on for hearing on February 19th, 1932, before Hon. John C. Wegner, Referee, and was tried on subsequent dates thereto with a final determination and judgment being

rendered in favor of the petitioner and awarding compensation to the petitioner and to the dependents on October 10th, 1933.

On November 5th, 1933, the Minnisink Oil Co., Inc., filed notice of appeal on the determination and judgment of Referee Wegner and on December 5th, 1933, the Rule fixing the time and place for hearing was formally entered by Hon. Albert H. Holland, Judge of the Morris County Court of Common Pleas and the matter was submitted on briefs for determination to the Morris County Common Pleas Court on January 5th, 1934.

On October 8th, 1934, Judge Holland filed in the Morris County Court of Common Pleas his finding of facts and determination upon which judgment was entered affirming the award of compensation of the Workmen's Compensation Bureau with the exception of fees ordered by the Referee to be paid to Dr. Gittings and Dr. McElroy, which were disallowed by the Common Pleas Court.

On November 13th, 1934, a Writ of Certiorari was allowed by Justice Bodine and the return of the same was duly made by Hon. Albert H. Holland, Judge of the Court of Morris Common Pleas and E. Bertram Mott, Clerk of the Morris Common Pleas Court.

The sole contention of the prosecutor is that there was not competent legal evidence that the decedent sustained an accident arising out of and in the course of his employment and which resulted in death, because the only evidence that the decedent sustained an accident was based upon hearsay testimony.

(2)

Grounds of Affirmance.

It is urged that the judgment of the Supreme Court was proper in affirming the judgment of the Court of the Morris County Common Pleas.

(3)

BRIEF OF THE ARGUMENT.

The judgment of the Supreme Court affirming the judgment of the Morris County Court of Common Pleas should be affirmed for there was presented a disputed question of fact and there was sufficient legal evidence that the decedent sustained an accident arising out of and in the course of his employment with Prosecutor-Appellant that was the proximate cause of his death.

The testimony offered in support of respondent's case was competent, legal evidence falling squarely within the doctrine of *res gestae* rule.

The decedent, George B. Miller, had been employed by the Minnisink Oil Co. as the manager of its gasoline and service station which was located on State Highway, Route No. 6, in Dover, New Jersey.

While in the act of greasing the car of William Stowe, a customer, the decedent sustained a severe blow to his head as he emerged from the pit over which the car had been standing and he was holding his right hand to the right side of his head and stated that he had received an awful bang on the head (p. 36, ll. 17-20).

The testimony of the witness, George Mays, was that the decedent had come up the steps of

the pit (where he had been greasing the car) holding his head and stated that he gave himself an awful bang on the head (p. 36, ll. 17-20).

The witness, William Stowe, testified that he was the owner of the automobile which had been taken to the service station to be greased (p. 47, ll. 30-40) and that he saw the decedent come out of the pit holding his hand on the side of his head and heard the decedent say that he got a crack on the head (p. 51, ll. 19-20; p. 52, ll. 21-27).

The decedent's widow testified that the decedent was a strong, healthy man prior to the accident (p. 30, ll. 30-35) and that the decedent did not (after having sustained the injury) act as he formerly had prior to the injury and that he appeared ill upon his return to his home after having sustained the injury (p. 24, ll. 9-10).

It is the contention of the prosecutor that the Workmen's Compensation Court and the Common Pleas Court erred in making an award based upon this testimony.

The doctor who attended the deceased, Dr. Herman L. Hegner, testified that the deceased suffered a cerebral hemorrhage (p. 66, ll. 3-5) and that from the time he became unconscious on November 5th, 1931, and removed to the hospital, he never regained consciousness, before his death on November 7th, 1931 (p. 68, ll. 25-30). This witness, who was the attending physician, assigned by the hospital to attend to the deceased, signed the death certificate (p. 69, ll. 10-20), which was marked in evidence "P. 7" (p. 69, l. 40; p. 70, ll. 1-2; p. 73, ll. 32-34). As a result of the treatment and the autopsy findings, the attending physician testified deceased had died from the result of a cerebral hemorrhage due to a trauma (p. 76, ll. 9-20) and the death cer-

tificate in evidence showed that the cause of death was cerebral hemorrhage with a contributory secondary cause of pachymeningitis.

It is the contention of the prosecutor that the instant case is controlled by the principles of the cases of *Friese* v. *Nagle Packing Co.*, 10 N. J. Misc. 795, affirmed 110 N. J. L. 588, 160 Atl. Rep. 765, affirmed 166 Atl. Rep. 307, and *Helminsky* v. *Ford Motor Co.*, 10 N. J. Misc. 1042, affirmed 111 N. J. L. 369, 162 Atl. Rep. 189, affirmed 168 Atl. Rep. 420. But these cases do not support the contention of the prosecutor and are not at all in point nor was the question of *res gestae* raised or the rule applied.

In the case of *Friese* v. *Nagle Packing Co.* the deceased was a truck driver and in the course of his work he moved heavy pieces of meat about. The prosecutrix, the widow of the deceased, testified that he had been in good health up to July 21, 1930; that he came home on that day feeling ill, ate no supper and went to bed. Two doctors were called when his condition got worse, one of them diagnosed the illness as pleurisy and the other as pulmonary tuberculosis. A question of fact was presented as to the claim of the accident resulting in death and several witnesses testified on behalf of the respondent and their testimony negatived the prosecutrix' theory of an accident resulting in death. The prosecutrix was not permitted to testify as to what the deceased had told her, concerning an injury to his chest. The Supreme Court *held* that as to the hearsay evidence, it may have been technical error to exclude it; that such evidence is permitted by the Act, and the fact that the Bureau may make rules of procedure does not justify the exclusion since such a rule

would be inconsistent with the other provisions of the Act.

The Court held, however, that this error was not one requiring reversal, for the wife's other testimony was the same as that of the physician who testified for the prosecutrix on the question of the cause of death. It was further held that the preponderance of the testimony being with the respondent, the judgment of the Workmen's Compensation Bureau was affirmed.

On appeal (110 N. J. L. 588, 166 Atl. Rep. 307), the Court of Errors and Appeals affirmed the judgment of the Supreme Court and held that the evidence supported the judgment upon a factual finding and therefore would not reverse the judgment. The Court further stated that the Bureau, in conducting hearings under the Workmen's Compensation Act, is not bound by the technical rules of evidence, but it is bound to ascertain the substantial rights of the parties.

In the Friese case, the Court points out that the doctor who testified that the cause of death was tuberculosis, said that in his opinion a latent condition had been stirred up by the strain described by the deceased, although in the death certificate no mention was made by the doctor of the trauma.

In the case of *Helminsky* v. *Ford Motor Co.*, 10 N. J. Misc. 1042, affirmed 111 N. J. L. 369; 162 Atl. Rep. 189, affirmed in 168 Atl. Rep. 420, the sole proof of the accident was the testimony of the attending physician to whom the decedent had stated that he fell against the wheel while he was working in the plant of the respondent employer. It was held by the Supreme Court and affirmed in the Court of Errors and Appeals that such testimony was clearly illegal and the rule

is laid down that in a Workmen's Compensation case, the employee's attending physician's testimony that the employee told the attending physician that he received the injury in an accident at the employer's plant, is inadmissible to establish such alleged accident, and cannot be made the basis of an award. The Court also cited the general rule as to the admissibility of statements in evidence made by an injured person to his *physician* for the purpose of treatment and diagnosis, such as statements relating to his symptoms and feelings, are admissible in evidence; but that statements to the attending physician as to the cause of the injury, or as to the place wherein the injury occurred, are inadmissible and should be rejected by the trial court.

In the very recent case of *Demeter* v. *Rosenberg,* 114 N. J. L. 55, 175 Atl. 621, the Supreme Court, in an opinion delivered by Chief Justice Brogan, held, that within a circumscription of the basic principles relative to the admission of testimony coming within the *res gestae* rule, it is a matter of the Court's sound discretion as to whether or not such testimony should be accepted or rejected. In that case, an action had been instituted by the plaintiff as administratrix of the estate of her mother for personal injuries suffered by her deceased mother during life. The deceased had fallen down a flight of stairs, which had been unlighted at the time of the accident. The deceased had died from other causes at a later date. The decedent was a tenant and lived on the second floor of the premises, and on the morning the injuries were sustained, a tenant on the first floor was awakened by a thumping noise outside his door and went out into the hallway to find decedent lying at the bottom of the

staircase, in an unconscious condition. The decedent remained in this unconscious condition until her daughter arrived at the scene an hour and a half later. The daughter on her arrival and seeing her mother in an unconscious condition said, "Oh, mama, what happened to you?" The mother momentarily regained consciousness and answered the question of her daughter, saying, "Annie, I missed my step and fell down the stairs." Thereafter, without saying any more, decedent lapsed into unconsciousness again. The lower Court admitted this testimony and the appellant argued that its admission constituted legal error. The Supreme Court affirmed the judgment and the ruling of the trial court on the admission of this testimony under the doctrine of *res gestae,* and held further, that the Court in receiving this testimony was entitled to receive it as spontaneous and concomitant with the happening. The Court cites *Murphy* v. *Brown,* 91 N. J. L. 412; *State* v. *Kane,* 77 N. J. L. 244; *State* ads *Hunted,* 40 N. J. L. 495, and *Trenton Passenger Railway* v. *Cooper,* 60 N. J. L. 219, in support thereof.

In the case of *Demeter* v. *Rosenberg, supra,* the Chief Justice stated:

> "It is difficult, if not impossible, to lay down a legal principle that would cover each and every situation in which the res gestae ruling might be applied."
>
> "The term itself is defined as a statement or exclamation by an injured person immediately after the injury, declaring the circumstance of the injury, or by a person present at such an occurrence (3 Wigmore, Evidence p. 1746). It is the spontaneous statement of exclamation of the person usually made at the time of the happening."

The Court, quoting Wigmore on Evidence (Vol. 3, p. 1747) stated:

> "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief, as to the facts just observed by him, and may therefore be received as testimony to those facts * * *."

Corpus Juris, Vol. 22, pages 446, 535, states that:

> "The rule is that where the making of a statement in controversy or the doing of an act, assists in constituting the transaction or in proving per se a relevant fact, the declaration or act is competent. Unsworn declarations which are received as part of the res gestae do not depend for their effect on the credit or credibility of the declarant, but derive their probative force from their close connection with the occurrence which they accompany and tend to explain and are admissible as original evidence, although it is frequently stated that they are received under an exception to the hearsay Rule. No hard and fast rule can be laid down as to the admissibility of evidence as part of the res gestae. The evidence and circumstances present in different cases vary so widely that the Courts have come to the point of adjudging this question as it is presented by

the particular case under consideration; and the admissibility vel non of evidence as part of the res gestae is a matter resting very largely in the discretion of the trial court."

At page 451, Vol. 22, *Corpus Juris,* page 543, it is stated:

"It has been laid down as a general rule that in order to constitute a part of the res gestae, an act or declaration must accompany and be contemporaneous with the act of which it is alleged to be part, as otherwise, in the case of a declaration, it amounts to nothing more than a narrative of what has been, or an assertion of what will be. *In few cases, however, can the doing of an act and the making of a statement be precisely synchronous. Part of the essential difficulty of the subject lies in the fact that almost invariably an interval, however slight, must elapse between the act and the declaration. The modern tendency seems to be to treat spontaneity as a substitute for contemporaneousness, so that the act or declaration is not required to be exactly coincident in point of time with the main fact, but may even be separate from it, by a considerable length of time, provided it is so immediately and closely connected with the main fact as to be practically inseparable therefrom and servicable to a clear understanding thereof.* The element of time being of importance, merely bearing on the question of spontaneity. The time when a statement was made, however, must be made to appear before the statement can be admitted."

In the instant case, there is no question that the decedent had been working in the pit greasing a car, which act was in the course and scope of his employment. That the deceased had sustained a blow to his head while working in the pit or coming out of the pit, is a plain inference to be drawn from the testimony.

The testimony of the witnesses, Stowe and Mays, as to the statement made by the deceased at the time of the accident, is part of the very accident itself, a part of the *res gestae.* It is true, that neither of the witnesses, Stowe nor Mays actually saw the defendant injure himself, but the law does not require actual eye witnesses to the very accident for which none are available. Witnesses may testify to facts and circumstances immediately surrounding the injury and as pointed out in the case of *Bryant* v. *Fissel,* 84 N. J. L. 72, it is permissible for the Court to draw the inference that death was caused by an accident and that the decedent died from an accident arising out of his employment.

In the case of *De Fazio's Estate* v. *Goldschmidt De Tinning Co.,* 88 Atl. Rep. 705, and affirmed in 95 Atl. Rep. 549, the deceased was found dead lying under a train of cars. There was no proof of an accident. The Court held that a prima facie case of accident was shown and that circumstantial evidence of such a character would justify an inference that injury or death was due to an accident.

In the case of *Manziano* v. *Public Service Gas Co.,* 92 N. J. L. 322, 105 Atl. Rep. 484, the deceased was found dead in a trench which he had been employed to guard. He was last seen alive by a patrolman a little after 4 A. M. and was not seen again until his body was found asphyxiated in the trench at about 6 A. M. There was a finding for the petitioner in the trial court and on certiorari, to the Supreme Court, the defendant (respondent) argued that:

> "The trial court evidently considered that the evidence justified the inference that the deceased's death was accidental, and arose out of and in the course of his employment,

but no attempt is made to explain how the evidence in this particular case justifies the inference."

Justice Minturn rendering the Court's opinion, stated that:

"If by the argument of the defendant (that the evidence must give a substantial support to the finding), that there must be direct viva voce testimony tending to show the manner in which the deceased met his death, and that rational inference cannot be drawn from proved facts and circumstances, the contention runs counter to the general rules of evidence and of the doctrine established by the adjudged cases in this jurisdiction."

At page 485 (105 Atl. Rep.), Justice Minturn further states:

"Circumstantial or presumptive evidence has always presented a basis for deductive reasoning in philosophy and in every walk of life, as well as in the determination of legal questions, both civil and criminal."

"Referring to the character and legal conclusiveness of such evidence as a basis for the solution of civil causes, Mr. Best briefly but comprehensively defines it as 'a mere preponderance of probabilities, and therefore a sufficient basis of decision.' 1 Best on Evidence, 135; 1 Greenleaf, 15."

The Court further goes on to say at page 485, that:

"It is this preponderance of the aggregate probabilities judicially termed the weight of evidence, which furnishes a legal standard of proof in civil cases."

Discussing this department of proof, Blackstone declares:

"When a fact cannot itself be demonstrated, that which comes nearest to the proof of it, is proof of the circumstances necessarily or usually attending it, this

> proof creates a presumption which is relied upon till the contrary is proved'' (3 Blackstone 371). ''Such presumptions are more or less intuitive, and are based as necessary logical deductions and generalizations upon the common experience of mankind from conceded facts.''

And it was held by the Court that '' the trial court having thus concluded upon the basis of rational inference, tantamount to legal proof of the fact, the 18th Section of the Workmen's Compensation Act (P. L. 1911, p. 134) required an affirmance of the judgment.''

A very interesting case on this point is presented in *Standard Water Systems Co.* v. *Ort,* 10 N. J. Misc. 659, 160 Atl. Rep. 523. The deceased was employed as a machinist and engaged in lifting heavy steel plates. After stopping work at 10:30 A. M., up to which time he had not complained of any accident, injury or pain, he inquired if there was any more work to be done, and around 11:30 A. M. started to walk home. Very shortly thereafter, he returned to the shop and asked to be driven home. During this drive, he complained of pain, slumped down in his seat and said something about having an attack of indigestion. The doctor who treated him found the decedent's heart greatly dilated. Death occurred at 6 o'clock the next morning. The attending physician gave the cause of death as acute dilation of the heart, but did not in the death certificate attribute it to trauma, although in his testimony he said it was traumatic. Both the attending physician and the widow stated that the decedent had told them that he had been doing heavy lifting and ''guessed he had hurt himself.'' The Deputy Commissioner and the Common Pleas Judge had both found that death was caused by an accident. The Supreme Court, on

certiorari, stated that the statements (of the decedent to his wife and Dr. Hunt that he had been doing heavy lifting and guessed that he had strained himself) were admissible in evidence. The Supreme Court felt, however, that in view of the contradictory testimony of the experts, a factual question was presented and two tribunals having already passed upon the question, the finding would not be disturbed where there was any evidence to reasonably support it and the judgment was affirmed.

On appeal, the Court of Errors and Appeals in an opinion by Justice Bodine, reversed the judgment of the Supreme Court holding that there is nothing in the record to show that an accident occurred while the decedent was at work. The Court further held "that testimony by the (decedent's) widow that *he said he guessed he must have hurt himself,* while at work is *competent* proof of nothing." Further, "the weight of medical testimony indicated that petitioner's decedent died of angina pectoris."

It is to be noted that the Court of Errors and Appeals held the testimony related to the wife by the decedent, some time after the alleged accident, was competent but that his statement that "he guessed he had been hurt" was of no value.

In the opinion of Chief Justice Brogan in *Demeter* v. *Rosenberg, supra,* the fact that the defendant had violated the statute in failing to provide a light in the hallway of a tenement house, was an incident of negligence and *the jury was entitled to infer* that the injured tenant was familiar with the hall and staircase, even in its darkened condition, and that her fall and consequent injuries were caused by the negligence of the defendant in failing to provide lights as re-

quired by law. "These, the Court stated, are *legitimate probable inferences that the jury was entitled to draw and determine as facts.*"

In *Keyes* v. *Cedar Falls,* 107 Iowa 509, 78 N. W. 227, it was held that where the plaintiff came into the mill about three minutes after he was hurt, with his clothes covered with dirt, and an employee asked what was the matter and he replied that he had fallen into an excavation and was hurt, that such declaration was admissible as *res gestae.*

There are several other decisions in this State where it was held that a case may be proved by circumstantial evidence in the absence of direct evidence. *Smith, Admx.* v. *Crescent Belting & Packing Co.,* 37 N. J. L. J. 292; *Cramer* v. *Littel,* 38 N. J. L. J. 82.

In *International Railroad Co.* v. *Smith,* 14 S. W. 642, where a passenger alighting from a train on a dark night fell into a wood pile, his statement that the conductor made him get off where he fell, made within fifteen minutes after his fall, while he was still uttering groans and exclamations of pain, was held to be admissible under the *res gestae* rule.

In *Corpus Juris,* with reference to the admissibility of such statements, in Volume 22, at page 465, page 553 (c) states:

> "A statement will ordinarily be deemed spontaneous if, at the time when it was made the condition of the declarant was such as to raise an inference that the effect of the occurrence on his mind still continued, as where he had just received a serious injury, was suffering severe pain, or was under intense excitement."

The case of *Murphy* v. *Brown,* 91 N. J. L. 412, 103 Atl. 28, is cited in the footnotes in *Corpus Juris* in support of this statement.

At page 455, of Volume 22, *Corpus Juris,* page 545, the principle involved is cited as follows:

> "A declaration made or an act done after the happening of the principal fact may be deemed as part of the res gestae, when it is so intimately interwoven with the principal fact by the surrounding circumstances as to raise a reasonable presumption that it was made or done under the immediate influence of the principal transaction or event itself and is the spontaneous utterance or expression of thoughts created by, and springing out of the transaction itself, rather than the result of any premeditation or design. The period over which such facts may legitimately extend is a question of remoteness and varies with the facts of each particular case." * * *

At page 461 of 22 *Corpus Juris,* p. 549, Section 6, the rule is cited as follows:

> "*The rule admitting spontaneous declarations meets the needs of justice when other evidence of the same fact cannot be procured, and the modern tendency is toward the extension of the rule.* The result has been a very general recognition of spontaneity as a sufficient substitute for the requirement of contemporaneous connection and the establishment of a rule to the effect that an unsworn statement is evidence of what it asserts when it is so connected with the transaction as a whole that the utterance may fairly be regarded as an expression of feeling forced from the declarant by the pressure of the circumstances under which it was made, rather than the narrative result of thought."

At pages 468-469, Volume 22, *Corpus Juris,* it is cited:

> "If a statement amounts to a declaration of the present existence of a relevant fact, it may be competent as part of the res gestae although it is narrative in form."

The rule with reference to the admissibility of declarations by a decedent as enunciated in the case of *Murphy* v. *Brown & Co.,* 91 N. J. L. 412, is the established law of this State.

In the Court of Errors and Appeals decision in *State* v. *Doro,* 103 N. J. L. 88, not only is the principle in the Murphy *v.* Brown & Co. case approved, but the very language in the Murphy *v.* Brown & Co. case is quoted verbatim.

In that case (*State* v. *Doro, supra*), Mr. Justice Trenchard, who also rendered the opinion in the Murphy *v.* Brown & Co. case, above cited, held, that it was proper to admit the testimony of two witnesses who testified as to an exclamation made by a bystander as part of the *res gestae.*

The instant case is on all fours with the case of *Murphy* v. *Brown & Co., supra.* In that case it is apparent that a judgment was rendered upon the testimony of the witnesses, Lundy and Bull. The employer, on certiorari proceedings argued that:

> "The trial Court erroneously admitted hearsay evidence, i. e., declarations to fellow employees."

The Court, in its opinion, specifically stated:

> "This point is expressly limited to declarations to fellow employees."

And in reaching its conclusion, the Court stated:

> "It seems entirely reasonable to conclude that they (statements made by decedent to

> Lundy and Bull as to the cause of the accident) were undesigned incidents or emanations of the accident and were spontaneous and unreflecting and made before decedent had time to invent or misrepresent."

Certainly, the same conclusion should be drawn from the facts in the case *sub judice.*

In the very recent case decided December 17th, 1934, the Superior Court of Pennsylvania, in the case of *Bracken* v. *Bethlehem Steel Co.,* reported in 175 Atl. Rep. 643, was confronted with the facts of a case similar to that in question. In that case, the decedent had been employed by the defendant as a screenman and his duties were confined to operating levers of a coke chute. On the morning of April 23rd, 1930, in his usual good health, he went to work, and at about 3:15 of that day, when he had finished his work, he was joined by his son to go home. After they had boarded a street car which was several hundred yards from the entrance of the plant, the decedent complained to his son of a pain on the left side of his back, and stated that he had hurt himself by bumping his back against the gate rest while pulling the lever. Not being able to walk from the end of the street car line to his home, the decedent stopped at the home of his sister-in-law, to whom he told the story of the accident. Other witnesses also testified as to the declarations made by the decedent as to the cause of the injury. A physician was called the day following the accident and he found that the decedent was suffering from cellulitis. Decedent was treated at his home by a physician for the defendant company, until April 30th, when he was taken to the hospital, where he subsequently died on May 2nd, 1930. Other medical testimony tended to show that the defendant had died from

cellulitis, but there was a question of whether or not it was produced by a blow or whether it was systemic. The referee in the Workmen's Compensation Court awarded compensation to the widow and this award was affirmed by the Compensation Court and by the Court of Common Pleas. The employer appealed and its sole contention was that "the declarations made by the decedent to his son, widow and other relatives and neighbors as to the alleged accident, were incompetent, as it was entirely hearsay, and, therefore, the award was based upon incompetent evidence and should be reversed." The Appellate Court affirmed the judgment, and held, "In determining whether the award should be sustained, the fact that incompetent testimony was received is not controlling, if there was sufficient other testimony upon which the referee could base his findings of fact."

In *Wiltbank* v. *Fire Association of Philadelphia,* 293 Pa. 206, 142 Atl. 208, the Court in a per curiam opinion stated:

> "We recently stated, in Johnston *v.* Payne-Yost Construction Co., 292 Pa. 509, 141 Atl. Rep. 481, that while the record of every (compensation) award must show it to be supported by competent proof, yet the rules of evidence are not applied in this case with the same rigor as in litigation before a jury," adding, "Of course, even in compensation cases, the material findings must have a basis of legal proof on which to rest and may not be decided on hearsay alone (but) where there is other evidence to establish the material facts, although some hearsay may have been admitted, the Courts will not for that reason reverse a compensation award."

The case of *Estelle* v. *N. J.,* 51 N. J. L. 182, cited by the prosecutor in support of its conten-

tion, is not in point. The statements made by the deceased in that case were truly, as the Court stated, narrative in form and a description of the entire discussion of the transaction.

It is respectfully submitted that there is sufficient competent legal evidence to sustain the judgment of the Workmen's Compensation Court and the Morris County Common Pleas Court, in the instant case, in that the decedent was a strong man and in good health and had been in good health on the day he sustained the accident; that he complained of receiving a severe blow to his head while emerging from the pit in the ground where he had been greasing an automobile in the performance of his work; and this had occurred at about 5 P. M.; that he had returned to his home for supper at 6 P. M. but did not act normally nor did he eat his supper as he usually did, and that at 2 o'clock the following morning, he awoke complaining of a pain in his head, lapsed into unconsciousness from which he never emerged, having died three days later at the hospital; that he died from a brain hemorrhage which can be caused by a blow.

These circumstances were sufficient from which the Commissioner and the Court of Common Pleas could have found that the defendant suffered an injury while in the course of his employment, as a result of which death occurred.

As hereinabove indicated, the decedent, George B. Miller, while in the act of greasing a car, sustained a severe blow to his head as he emerged from the pit over which the car had been standing. At that very time, he indicated the pain and effect of the blow to his head by rubbing his head with his right hand and declaring "I gave myself a hell of a bang on the head." This hap-

pened between 4:45 and 5:00 o'clock in the afternoon. At 5:45 of that evening, decedent went home for supper (p. 83, l. 35), and did not eat as he usually did at that time (p. 24, l. 20). He explained to his wife that he had hit his head and his head hurt (p. 35, l. 10). The decedent returned to his work and came back home at 11:00 o'clock that night. He immediately went to bed and "at 2:00 a. m. in the morning, he got up and said his head hurt him terribly; and put his hand to his head" (p. 89, l. 10). Twenty minutes after two o'clock, the decedent lapsed into unconsciousness. Dr. Gilland was called immediately (p. 27, l. 10). The doctor tried to talk to decedent and get him to answer but he did not answer. The doctor left and returned at 9:00 o'clock the next morning when he found the decedent still unconscious (p. 27, l. 24). Dr. McElroy was then called and he ordered the decedent removed to All Souls Hospital, Morristown, New Jersey. The decedent was removed from his house on a stretcher in an ambulance in an unconscious condition and taken to All Souls Hospital, Morristown, N. J., about 4:30 o'clock, Thursday afternoon, being on November 5th, 1931, about twenty-four (24) hours after the accident. On November 7th, 1931, decedent died, without ever having regained consciousness from the time the ambulance picked him up at his home to the time of his death (p. 68, l. 26).

Dr. Herman L. Hegner, at that time resident-interne at the All Souls Hospital and directly in charge of the case of the decedent, testified as follows (p. 76, ll. 9 to 13):

> Q As the result of your treatments and the autopsy findings, what were your conclusions as to the cause of his death?

A The conclusions were that the patient died as a result of a cerebral hemorrhage due to accident."

Dr. Hegner had treated the decedent from the time he entered the hospital up to the time of his death and he also assisted at the post-mortem examination and he procured the history from the decedent's wife, as a result of which he made his conclusions.

Dr. Andrew C. Ruoff qualified as an expert, having practised medicine since 1918 and who devoted all of his time to the examination, diagnosis and treatment of traumatic injuries. In reply to a complete hypothetical question relating to the facts and history of the accident and the medical and pathological post-mortem findings, Dr. Ruoff was asked as follows (p. 103, ll. 11 to 19):

"Q What, in your opinion, doctor was the relationship that the blow—of the blow to the head and the cause of death?

The Witness: I think there was a direct relationship between the happening described in the hypothetical question and the man's cause of death."

One of the contentions of the prosecutor is that the post-mortem findings failed to indicate any external evidence of trauma. With relation to this point, Dr. Ruoff testified that it was not necessary that any exterior indications be shown on the exterior portion of the head to produce a cerebral hemorrhage (p. 103, ll. 27 to 30).

Dr. Otto Lowy qualified as an expert, having practised medicine since 1901 and had particularly specialized in pathology (p. 118). In reply to a complete hypothetical question relating to the history and the facts of the accident and the medical and pathological post-mortem find-

ings, of the decedent, Dr. Lowy testified as follows (p. 119, ll. 20 to 25):

"Q Doctor, with those facts before you, in your opinion, was the relationship—is there any relationship between the blow to the head and the cause of death?

A Yes, there is a direct relationship."

On the question as to whether or not it was necessary that a cerebral hemorrhage definitely show external signs of trauma, Dr. Lowy testified as follows (p. 122, ll. 29 to 33):

"Q Now, doctor, is it absolutely necessary that the head injury resulting in cerebral hemorrhage shall definitely show extenal signs of that trauma?

A No, indeed."

Dr. Aldo Coultas (p. 133), qualified as a physician, practising since 1904, and associated as the attending surgeon at the All Souls Hospital, Morristown, N. J., where the decedent died. After having been presented with the complete hypothetical question concerning the accident and the medical and pathological post-mortem findings, Dr. Coultas testified as follows (p. 135, ll. 13 to 24):

"Q There is no doubt in your mind, doctor, that in all probability, due to the nature of this blow and the cerebral hemorrhage that followed it, that the blow was the cause of death?

The Witness: I think it was.

Mr. Scerbo: Cross examine.

The Witness: It was the cause of his death. It was the exciting cause of his death."

In contradiction of the testimony offered by the doctors in behalf of this respondent, the prosecutor presented Dr. William A. McMurtrie (p. 157, l. 31). On the examination of his testi-

mony (pp. 157 to 180), it conclusively shows that the doctor in diagnosing the cause of death did not take in consideration the fact that three days prior to the death, the decedent had struck his head a severe blow against a car while emerging from a greasing pit. He found no external manifestations of trauma (p. 158, l. 22). The history which he obtained did not contain the fact that the decedent had sustained a blow on the head.

Dr. Irmgrad Dresel (p. 181), pathologist of All Souls Hospital, was next produced in behalf of the prosecutor. Dr. Dresel merely testified to the pathological findings. She did not, however, in any part of her testimony, either direct or on cross examination, attempt to give the cause of death. No other doctors testified in behalf of the prosecutor with respect to the cause of death. Dr. Earl Stage was called by the prosecutor with respect to the history obtained from Mrs. Miller, wife of the decedent (p. 214).

We, therefore, find that the medical evidence produced by the prosecutor and respondent as follows:

The prosecutor, through Dr. McMurtrie, contends that the cause of death was cerebral hemorrhage and that because there was no external evidence of trauma, he concluded the death was due to pachymeningitis hemorrhagica interna. Dr. McMurtrie is the only doctor who testified in behalf of the prosecutor and who offered any evidence whatsoever as to the cause of death. The basic distinction between the diagnosis and opinion of the cause of death by Dr. McMurtrie and the doctors in behalf of the respondent is the fact that Dr. McMurtrie does not take into consideration at all the fact that the decedent received a

severe blow on the head within ten (10) hours prior to the time the decedent became unconscious. The Drs. Hegner, Ruoff, Lowy and Coultas, who testified in behalf of the respondent, base their conclusion upon the fact that the decedent received a severe blow on the head and within ten (10) hours was rendered unconscious and within thirty-six (36) hours thereafter died of a cerebral hemorrhage, which cerebral hemorrhage was due to the blow which the decedent sustained on his head as he emerged from the greasing pit. It is plain and evident that the preponderance of the evidence is clearly with the respondent. Surely, it is evident that a disputed question of fact was presented and since there was competent evidence presented by the respondent, it was proper therefore to conclude that the death was the proximate result of the blow which the decedent sustained while emerging from the greasing pit as aforesaid.

The recent case of *Hercules Powder Company,* prosecutor v. *Doris Nieratko, Administratrix Ad Prosequendum of Martin Nieratko, deceased,* respondent, 113 N. J. L. 195, compares very favorably with the medical controversy, in this particular case. In that case there was considerable medical disagreement as to the cause of death, the prosecutor attempting to show that the death was due to the progress of a pre-existing disease. Justice Heher, rendering the opinion for the Supreme Court, said on page 203:

> "The evidence, therefore, furnishes a basis of rational inference, tantamount to a legal proof, of the fact, that decedent's death, and the disability which preceded it, resulted from an accident which arose out of and in the course of his employment. Manziano *v.* Public Service Gas Co., 92 N. J. L. 322. This is fairly inferable from all the facts and cir-

> cumstances, and we so find. In civil cases it is sufficient if the circumstantial evidence be such as to afford a fair and reasonable presumption or presumptive evidence, as a basis of deductive reasoning in the determination of civil causes, is a mere preponderance of probabilities. All that is required is that the claimed conclusion from the offered fact must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses. The test is probability rather than certainty. Jackson *v.* Delaware, Lackawanna and Western Railroad Co., 111 N. J. L. 487."

Measured by this rule, it must necessarily follow that the facts in the case *sub judice* clearly indicate that the decedent suffered an injury while in the course of his employment, as a result of which death occurred.

(4)

Comment on Opinion of Supreme Court.

It is to be noted that in affirming the judgment of the Morris County Court of Common Pleas, the Supreme Court held that the case of *Murphy* v. *Brown*, 91 N. J. L. 412, and the recent decision of *Demeter* v. *Rosenberg*, 114 N. J. L. 55, were directly in point and disposed of the only question raised by the prosecutor-appellant. The latter case is very thoroughly discussed in our brief, beginning at page 7, and the former case (*Murphy* v. *Brown*) is referred to in our brief on pages 16 and 17, and reference is had thereto for the statement cited in *Corpus Juris* in which the case of *Murphy* v. *Brown* is cited as the law in support of the statement set forth therein.

To state that these cases are not an authority for the action of the Courts below, as is the con-

tention of the prosecutor-appellant, would in effect set a new precedent for the principle of *res gestae* and for the over-ruling of the established law of this State. It is the contention of the prosecutor-appellant that it is incumbent upon the defendant-appellee to offer the proof, to first establish the accident or event before declarations as part of the *res gestae* are admissible. Since this point was very thoroughly set forth in our brief, beginning at page 10 and running to and through page 19, it is the established law of this State by the cases therein cited that the actual proof of the accident can be established by evidence of a *res gestae* nature from which legitimate probable inferences may be drawn and determined as facts.

In further support of the opinion of the Supreme Court, we cite the following cases:

Hall v. *Doremus*, 114 N. J. L. 47;

Bernstein Furniture Co. v. *Kelly*, 114 N. J. L. 500, 177 Atl. Rep. 554;

Slayback Van Order Co. v. *Eiben*, 115 N. J. L. 17, 177 Atl. Rep. 671.

In the *Slayback Van Order Co.* v. *Eiben* case, the rule of *res gestae* was very carefully considered in the opinion rendered by Justice Heher, speaking for the Supreme Court, the facts in that case were somewhat similar to the case *sub judice*. In that case the decedent's step-son had observed the deceased holding his hand over his right eye, in which position he remained for two or three minutes. There were no actual eye witnesses to the accident. The deceased, upon being questioned by his step-son as to the cause of trouble, had stated that "I got hit with the wrench." In that case the prosecutor contended that the statement or declaration made by the

deceased was essentially hearsay and incompetent but the Court held to the contrary.

It was further pointed out, in the very careful considered opinion in that case, that the declaration is within the rule of *res gestae* when it is "concomitant with the main fact under consideration, and is so connected with it as to illustrate its character." The Court further stated that the declaration made by the decedent to his step-son was not a mere narrative of a past occurrence. It was exclamatory in character—the undesigned incident or emanation of the accident. That it had the unquestioned element of spontaneity.

In discussing the rule of *res gestae,* the Justice, at page 673, of volume 177 Atl., in the Slayback case, stated as follows:

> "The res gestae includes those circumstances which are the undesigned incidents of a particular litigated act. They may be separated from the act by a lapse of time more or less appreciable, and may consist of remarks of anyone concerned, whether participant or bystander. They may comprise things left undone as well as things done. They must be the necessary incidents of the litigated act in the sense that they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. State *v.* Doro, 103 N. J. L. 88, 93; State *v.* Kane, 77 *Id.* 244; Trenton Passenger Railway Co. *v. Cooper,* 60 *Id.* 219; Hunter *v.* State, 40 *Id.* 495; Donnelly *v.* State, 26 *Id.* 601.
>
> While Checko's testimony leaves one in doubt as to the period intervening between the time of the alleged accident and the declaration, the case is yet within the principle. As pointed out in State *v.* Doro, supra, the lapse of time more or less ap-

preciable is not, in itself, a conclusive criterion of admissibility. In an action upon a policy of insurance against personal injury by accident, the declaration of the deceased insured to his wife, upon his return to their bedroom during the night (he had left it but a short time before), that he had 'fallen down the back stairs, and almost killed himself,' was held to be admissible. Travelers' Insurance Co. *v.* Mosely, 75 U. S. 397; 19 L. Ed. 437. This case declares the underlying considerations for the rule in question. 'To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. * * * In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud or falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not infrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. * * * Here the principal fact is the bodily injury. The res gestae are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The res gestae are the declarations tending to show the realty of its existence, and its extent and character. The tendency of recent adjudications is to extend, rather than narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. * * * In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesi-

tate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason.'

So here, the circumstances attending the making of the statement were calculated to give trustworthiness to it; there is a circumstantial guarantee of trustworthiness that is the practical equivalent of the ordinary test of cross examination. The utterance was, to all intents and purposes, an undesigned incident of the litigated act; it was spontaneous and unreflecting—made before there had been time to contrive and misrepresent. It is not essential that it be strictly contemporaneous with the exciting cause; it may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. Wigm. Ev. (2d ed.) Sec. 1749, 1750. 'Unless such complaints form a part of the "res gestae" they cannot be admitted; and if they are so far detached from the occurrence as to admit of deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as part of the "res gestae." ' Kennedy *v.* Rochester City and B. Railroad Co., 130 N. Y. 654; 29 N. E. Rep. 141. The determination of this question is always inseparable from the circumstances of the case at bar; no two cases are exactly alike. Jack *v.* Mutual R. F. Life Association, 51 C. C. A. 36; 113 Fed. Rep. 49; Wigm. Ev. (2d ed.) Sec. 1750. The close connection in time between the statement or declaration and the act of which it is said to be a part is an element for consideration; but being close in point of time is not, however, 'all of the basis for receiving such evidence.' The ultimate test is spontaneity or instinctiveness and logical relation to the main event; and the tendency of modern cases is to be liberal in the reception of such testi-

mony. Solice *v.* State, 21 Ariz. 592; 193 Pac. Rep. 19."

It is interesting to note that the above case parallels in practically every particular the case at bar. On page 24 of the brief of the prosecutor-appellant it is stressed that "it does not appear whether the striking of his head as stated by him occurred five, ten, fifteen or twenty minutes before the statement was made." The above case of *Slayback Van Order Co.* v. *Eiben,* directly answers that argument, quoting the exact words —"it is not essential that it be strictly contemporaneous with the exciting cause; it may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated." The very fact alone of the decedent emerging from the greasing pit in the act of rubbing his head at the same time he made the declaration "I gave myself a hell of a bang on the head" (p. 44, ll. 1 to 5), would seem directly to come within the above rule. The act of rubbing his head and the declaration contained every element of spontaneity and instinctiveness and logical relation to the main event.

(5)

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

May Term, 1935.

IRVING YOUNGELSON,
FRANK C. SCERBO,
Of Counsel.