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Notice of Appeal.

NOTICE OF APPEAL.

Hudson County Circuit Court

MITCHELL OLLERT, individually and as administrator <i>ad prosequendum</i> of Cornelia Ollert, deceased,	}	<i>Plaintiff,</i>	}	<i>Action at Law.</i> <i>Notice of Appeal.</i>	10
vs. FREDERICK W. ZIEBELL,					

To J. Emil Walscheid, Esq., Attorney of Plaintiff.

Take notice that the defendant does hereby appeal from the judgment entered in favor of the plaintiffs and against the defendant in the Hudson County Circuit Court for Nine Thousand Dollars' damages and costs of suit, on July 1, 1920, to the Court of Errors and Appeals in the last resort in all causes. 20

Dated November 11th, 1920.

Respectfully yours,

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

30

40

Grounds of Appeal.

GROUND OF APPEAL.

Filed December 4, 1920.

New Jersey Court of Errors and Appeals

10

MITCHELL OLLERT, individually and as administrator *ad prosequendum* of Cornelia Ollert, deceased,

Plaintiff-Respondent,

vs.

FREDERICK W. ZIEBELL,

Defendant-Appellant.

Action at Law.

Grounds of Appeal.

20

The defendant-appellant in the above-entitled cause hereby assigns the following as his grounds of appeal in the above-entitled cause:

(1) Because the Trial Court refused to grant defendant's motion for a non-suit.

(2) Because the Trial Court refused to grant defendant's motion to direct a verdict for defendant.

30

(3) Because the Hudson County Circuit Court erroneously entered and permitted judgment to be entered in favor of the plaintiff and against the defendant.

(4) Because the Trial Court erroneously refused to charge defendant's first request to charge, as follows:

"There is no lawful evidence in this case which supports the allegations in the complaint and your verdict must be for the defendant."

(5) Because the Trial Court erroneously refused to charge defendant's second request to charge, as follows:

40

"There is no evidence that the defendant negligently or unskillfully used instruments or appliances in the mouth of Cornelia Ollert which were unsafe, unfit or unsanitary."

(6) Because the Trial Court erroneously refused to charge defendant's third request to charge, as follows:

"There is no lawful evidence that the defendant used instruments or appliances in the mouth of Cornelia Ollert

Grounds of Appeal.

through which the defendant allowed a current of electricity to pass into the mouth of said Cornelia Ollert."

(7) Because the Trial Court erroneously refused to charge defendant's fourth request to charge, as follows:

"There is no lawful evidence that a current of electricity passed through any of the defendant's dental instruments into the mouth or body of the said Cornelia Ollert." 10

(8) Because the Trial Court erroneously refused to charge defendant's fifth request to charge, as follows:

"There is no lawful evidence of any improper or negligent treatment by the defendant of the said Cornelia Ollert."

(9) Because the Trial Court erroneously refused to charge defendant's sixth and seventh requests to charge, as follows:

"The evidence in this case is that Cornelia Ollert died of cerebral congestion, which in turn was caused by tetanus or lockjaw. 20

There is no evidence that the cerebral congestion or the tetanus or lockjaw entered the body of the said Cornelia Ollert by reason of any careless or negligent act on the part of the defendant, and your verdict therefore must be for the defendant."

(10) Because the Trial Court erroneously refused to charge defendant's eighth request to charge, as follows:

"Dr. Adams, who treated Cornelia Ollert, testified that he could not say what caused the lockjaw, and therefore the jury cannot speculate as to what caused it, and the verdict of the jury must be for the defendant." 30

(11) Because the Trial Court erroneously refused to charge defendant's ninth request to charge, as follows:

"There is no lawful evidence that either the defendant or his assistant did anything to the said Cornelia Ollert which the jury might find was careless, improper or negligent treatment of Cornelia Ollert."

(12) Because the Trial Court erroneously refused to charge defendant's tenth request to charge, as follows: 40

"If the jury believe from the evidence that Cornelia Ollert was ill when she first called on Dr. Ziebell on June 13, 1916, and if they further believe that she continued to grow steadily worse and died on July 25, 1916, over four weeks after the last treatment in Dr. Ziebell's office,

Grounds of Appeal.

it is a fair inference that the condition from which she suffered when she first went to Dr. Ziebell's office on June 13, 1916, had a direct bearing upon the cause of her death on July 25th."

10 (13) Because the Trial Court erroneously refused to charge defendant's eleventh request to charge, as follows:

"There is no lawful evidence in this case that any electrical drill or dental instrument operated by electricity was used in the mouth of Cornelia Ollert by either the defendant or his assistant."

(14) Because the Trial Court erroneously refused to charge defendant's twelfth request to charge, as follows:

"The uncontradicted evidence in this case is that nothing was done in the office of the defendant, either by the defendant or his assistant, which burned or cut or lacerated the deceased's mouth."

20

(15) Because the Trial Court erroneously refused to charge defendant's thirteenth request to charge, as follows:

"The jury must disregard that portion of the testimony of Mr. Ollert which purports to relate to statements alleged to have been made by Mrs. Ollert, as follows:

'Mike, that is not a doctor from New York. He worked on my mouth. He was drilling in my tooth when I got an awful shock. He left the drill in my tooth and went across the room, shut off the electricity and came back, and taking the drill out of my mouth said, "My child, what have I done. I didn't mean to do that. You must have suffered awful."'

30

This testimony is what is known in the law as a self-serving declaration not made at the time the alleged happening occurred, it was not made under oath by the speaker, and cannot lawfully be considered by the jury in their decision of this case."

(16) Because the Trial Court erroneously refused to charge defendant's fourteenth request to charge, as follows:

"Assuming all the evidence in the plaintiff's case to be true there is no evidence that anything done by the defendant or his assistant was the proximate cause of the death of the said Cornelia Ollert."

40

(17) Because the Trial Court erroneously refused to charge defendant's fifteenth request to charge, as follows:

"There is no evidence in this case that Dr. F. W. Ziebell, the defendant, himself was guilty of any act, either of commission or omission."

Grounds of Appeal.

(18) Because the Trial Court erroneously refused to charge defendant's sixteenth request to charge, as follows:

"There is no evidence in this case that Dr. Lauckner, who on June 13th and June 19, 1916, was assisting Dr. Ziebell, was guilty of any negligence whatsoever."

(19) Because the Trial Court erroneously refused to charge defendant's seventeenth request to charge, as follows: 10

"The jury must bear in mind that according to the testimony of Mr. Ollert himself the person who Mrs. Ollert said caused injury to her was not Dr. Ziebell and not Dr. Lauckner, but the man who accompanied Dr. Ziebell to Mr. Ollert's house. This, according to the testimony, was Dr. Karl Schmidt, a friend of Dr. Ziebell's, and not the defendant or anyone working for or under the defendant."

(20) Because the Trial Court erroneously refused to charge defendant's eighteenth request to charge, as follows: 20

"The jury must bear in mind that what Mrs. Ollert said to her husband was not under oath, and her husband's statement therefore as to what she said must be scrutinized with great care. They must bear in mind that at the time she said it she pointed out as the person who was drilling her teeth not Dr. Ziebell and not Dr. Lauckner, but Dr. Karl Schmidt, who was with Dr. Ziebell at the time, and who was not employed by the defendant. Likewise they must bear in mind the fact that an hour and a half intervened between the time that Mrs. Ollert left the doctor's office the evening of June 19, 1916, and the time that she arrived at her home, and that there was no evidence whatsoever as to what transpired in that interval." 30

(21) Because the Trial Court erroneously refused to charge defendant's nineteenth request to charge, as follows:

"The plaintiff as administrator *ad prosequendum* cannot recover in this action. This action accrued before the statute was passed providing for the appointment of an administrator *ad prosequendum*, and at the time this action accrued the law required a suit to be brought by a general administrator. Since plaintiff is not a general administrator he cannot recover in this action." 40

(22) Because the Court erroneously charged the jury in the following respect:

"Has the plaintiff made out by the greater weight or fair preponderance of the evidence, whichever way you

Grounds of Appeal.

may better like to have it expressed to you, that this defendant in the manner in which he treated Mrs. Ollert was negligent?"

Whereas there was no lawful evidence of any negligent treatment.

10 (23) Because the Court erroneously charged the jury in the following respect:

"Has the plaintiff made out by the greater weight of the evidence that such negligence, if any established, was the proximate cause of the death of Mrs. Ollert?"

there being no lawful evidence to go to the jury on this question.

(24) Because the Court erroneously charged the jury in the following respect:

20 "and, of course, in that connection, gentlemen, you must apply your good judgment and good common-sense respecting the testimony that is before you. You must take into consideration, of course, all of the testimony that bears upon that point."

(25) Because the Court erroneously charged the jury in the following respect:

"because that may aid and assist you in determining this other important question as to whether or not it has been established that the cause of her death was proximately brought about and caused by any negligence upon the part of the defendant."

30 there being no question for the jury on this point.

(26) Because the Court erroneously charged the jury in the following respect:

40 "Again, let me say to you, merely in passing—not for the purpose of emphasizing any particular piece of testimony over any other, because it is your duty to consider all the testimony in the case, give to it that weight and consideration that you find it to be entitled to—but there is in the case some testimony on the part of Mr. Ollert as to what his wife said on the occasion when he says the defendant and Dr. Lauckner were present. It is evidence, which, if believed, is important evidence in the case, and I simply bring it to your attention because of the importance and the value it has if true upon the cause that is before you for determination, and I say to you that as to it you are to give it just that same careful consideration which I am sure you will give to all of the testimony in the case, and when you have done

Grounds of Appeal.

that use the result of that careful deliberation and scrutiny—I am speaking now of all the testimony—and apply it to the rules which I have given you, and then determine whether or not the plaintiff has made out in the manner I have indicated he must in law, in order to have a verdict, those two things upon which I have already quite extensively spoken to you; and if the result of all of that is that you find the plaintiff has made out those things, and both of them, then the plaintiff is entitled to have a verdict.” Whereas, the alleged statements of Mrs. Ollert were not under oath and were not entitled to the same careful consideration as other testimony in the case and said charge was therefore wholly erroneous. 10

(27) Because the Trial Court erroneously refused over objection to overrule the following question put to the plaintiff:

“What did she (Mrs. Ollert) say?”

(28) Because the Trial Court erroneously permitted the plaintiff to testify on the trial as to statements alleged to have been made by Mrs. Ollert, over timely objection. 20

(29) Because the Trial Court erroneously refused to strike out on defendant’s motion the following testimony of the plaintiff and the following statements alleged to have been made by Mrs. Ollert:

“He is not a doctor from New York. He is the man who worked on my mouth. He was drilling in my tooth and I got an awful shock and he left the drill in my tooth, walked across the room, shut off the electric current, and come back to me. While taking the drill out of my mouth said: ‘My God! child, what have I done? I did not mean to do that. You must have suffered awful.’ ” 30

Whereas the Court should have struck out said testimony.

(30) Because the Trial Court erroneously permitted Dr. Adams to answer the following question over objection:

“Q What was the history of the case?”

(31) Because the Court erroneously permitted the following question to be asked of the witness, Dr. Adams, over objection:

“Q Doctor, when you first treated Mrs. Ollert did you find her suffering from any conditions that you would attribute to injury?” 40

Grounds of Appeal.

(32) Because the Court erroneously permitted the following question to be asked of the witness, Dr. Adams, over objection:

“Q Did you attribute at that time those conditions to injury?”

10 (33) Because the Court erroneously permitted the following question to be asked of the witness, Dr. Adams, over objection:

“Q Did you find any shock?”

(34) Because the Court erroneously permitted the following question to be asked of the witness, Dr. Adams, over objection:

“Q Something which had shocked her or not?”

(35) Because the Court erroneously permitted the following question to be asked of the witness, Dr. Adams, over objection:

20 “Q Now, then, supposing that this woman on the 19th day of June, 1916, had visited and had there been treated by having an instrument inserted in her mouth, and that while this instrument was in her mouth the injury she found in her mouth was occasioned, and that thereafter tetanus developed and that she died from cerebral congestion resulting from this tetanus; what in your opinion would be the probable primal cause of that death?”

(36) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q What was the result you experienced under those circumstances?”

30 (37) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Describe to us what the result of electrical burning is, the appearance of the surface in a human being after the burning.”

(38) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q To what extent will that instrument resist the passage of electric current, in your opinion?”

40 (39) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q What voltage, when in ordinary proper condition?”

(40) Because the Court refused to strike out the answer as follows to the question last above mentioned:

“A There is no capacity at all. They are liable to break at any time.”

Grounds of Appeal.

(41) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q And is it proper electrical practice to attach an instrument of this type, this instrument, for instance, to a lamp socket, which is supplied from a street lighting circuit such as exists in Guttenberg?”

10

(42) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q In your opinion will this instrument as now insulated resist voltage to any greater extent than 800?”

(43) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q And if voltage greater than 1,200 to 1,500 volts reaches this instrument, what happens to the electric current?”

(44) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

20

“Q Does it ever jump insulation?”

(45) Because the Court erroneously permitted the following question to be asked of the witness, Fisher, over objection:

“Q If the voltage is of a 1,500—”

(46) Because the Court erroneously permitted the witness Burgess to testify as an expert, whereas he was not qualified as an expert.

(47) Because the Court erroneously allowed the following question, over objection, to be asked of the witness, Burgess, who was not qualified as an expert:

30

“Q And can you describe to us the appearance of an electric burn upon the human body?”

(48) Because the Court erroneously allowed the following question, over objection, to be asked of the witness, Burgess, who was not qualified as an expert:

“Q Will you tell me where you believe there is insulation in this instrument?”

(49) Because the Court erroneously allowed the following question, over objection, to be asked of the witness, Burgess, who was not qualified as an expert:

40

“Q Now, then, can you tell us whether or not in spite of the fact that this machine has this insulation that you have indicated for the purpose of preventing the flow

Grounds of Appeal.

of electricity—in spite of that fact—whether in spite of that fact a current of electricity can pass through the machine or instrument from the plug which is inserted into the lamp socket to where the drill or burr is attached?”

10 Whereas the said witness had not qualified as an expert, he had not examined or tested the machine and had no knowledge sufficient to answer the questions intelligently.

McDERMOTT & ENRIGHT,
Attorneys of Defendant-Appellant.

20

30

40

Complaint.

(Summons issued June 22, 1918)

COMPLAINT.

Filed June 26, 1918.

HUDSON COUNTY CIRCUIT COURT.

10

MITCHELL OLLERT, as administrator *ad prosequendum* of the estate of Cornelia Ollert, deceased, and Mitchell Ollert, individually,

Plaintiff,

vs.

FREDERICK W. ZIEBELL,

Defendant.

Action at Law.

Complaint.

20

Plaintiff, residing at 4835 Hudson Boulevard, in the Township of North Bergen, in the County of Hudson and State of New Jersey, says:

FIRST COUNT.

1. Defendant on June 13th, 1916, was a dentist licensed to practice dentistry in the State of New Jersey under an act of the Legislature of the State of New Jersey entitled "An Act to regulate the practices of dentistry in the State of New Jersey and to repeal certain acts now relating to the same" (Compiled Statutes, 1910), and on said day, and for a long time prior thereto represented himself to the public and to one Cornelia Ollert in particular as being possessed of ordinary skill in the practice of dentistry and who could treat and prescribe for diseases of the human mouth, gums and teeth.

30

2. On June 13th, 1916, Cornelia Ollert engaged the services of defendant as a dentist to treat her mouth, gums and teeth, and defendant then and there treated the mouth, gums and teeth of said Cornelia Ollert as a dentist, whereupon it became the duty of the defendant to use ordinary skill and care in the treatment of the mouth, gums and teeth of said Cornelia Ollert and to use sanitary, safe and proper instruments in so doing.

40

Complaint.

3. Defendant, in then treating the mouth, gums and teeth of said Cornelia Ollert, did not use ordinary skill and care, but negligently and unskillfully used instruments and appliances in the mouth of said Cornelia Ollert which were unsafe, unfit and unsanitary, and through which said defendant allowed a current
 10 of electricity of great power and violence to pass into the mouth and body of said Cornelia Ollert in such manner that she became sick and disordered and as a result thereof died on July 25th, 1916.

4. Said Cornelia Ollert was twenty-four years of age at the time of her death and left her surviving Mitchell Ollert, her husband, the plaintiff herein.

5. Plaintiff was appointed administrator *ad prosequendum* of the estate of Cornelia Ollert, deceased, by the Surrogate of the County of Hudson, on the 27th day of March, A. D. 1918.

20 6. This action is brought by the plaintiff as administrator *ad prosequendum* and as the personal representative of Cornelia Ollert, deceased, under the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," approved March 3rd, 1848, and the supplements thereto, and has been commenced within twenty-four calendar months of the death of Cornelia Ollert.

30

SECOND COUNT.

1. Plaintiff was the husband of Cornelia Ollert, who died, as hereinafter set out.

2. Plaintiff repeats paragraphs 1, 2 and 3 of the first count.

3. Plaintiff was called upon to expend a large sum of money for doctors, medicines and medical assistance in endeavoring to affect the cure of said Cornelia Ollert, and was called upon to expend a large sum of money for the burial of the said Cornelia Ollert.

40 Plaintiff claims damages upon the first count the sum of \$20,000, and upon the second count the sum of \$1,000.

J. EMIL WALSCHEID,
Attorney for Plaintiff.

Answer.

ANSWER.

Filed July 12, 1918.

Defendant answering plaintiff's complaint says:

10

ANSWER TO FIRST COUNT.

(1) Defendant admits the allegations in paragraph 1 of the complaint.

(2) Defendant admits the allegations in paragraph 2 of the complaint.

(3) Defendant denies each and every allegation in paragraph 3 of the complaint.

(4) Defendant has no knowledge as to the allegations in paragraph 4 of the complaint sufficient to form a belief and leaves plaintiff to his proof thereof.

20

(5) Defendant has no knowledge as to the allegations in paragraph 5 of the complaint and leaves plaintiff to his proof thereof.

(6) Defendant denies each and every allegation in paragraph 6 of the complaint.

ANSWER TO SECOND COUNT.

(1) Defendant admits that plaintiff was the husband of Cornelia Ollert.

30

(2) Defendant repeats the answer above made to paragraphs 1, 2 and 3 of the first count as re-alleged in the second count.

(3) Defendant denies the allegations in paragraph 3 of the complaint.

SEPARATE DEFENSE TO BOTH CAUSES OF ACTION.

This action was not commenced and instituted within two years next after the said alleged causes of action accrued as alleged in plaintiff's complaint, and therefore plaintiff is barred by an act of the Legislature of the State of New Jersey entitled "An Act for the Limitation of Actions," from having and maintaining the said causes of action against this defendant.

40

Reply.

NOTICE OF MOTION.

To the Plaintiffs:

10 Defendant will object at the trial, or before, that the plaintiff as administrator *ad prosequendum* has no right of action against the defendant.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

REPLY.

Filed July 26, 1918.

20 Plaintiff denies the matters set up in the separate defense of the answer.

J. EMIL WALSCHEID,
Attorney for Plaintiff.

30

40

Motion to Dismiss.

HUDSON COUNTY CIRCUIT COURT.

MICHAEL OLLERT, etc.,

Plaintiff,

vs.

FREDERICK W. ZIEBELL,

Defendant.

At Law.

10

Appearances:

J. Emil Walscheid, for the plaintiff.

McDermott & Enright (Mr. Carpenter), for the defendant.

The above-entitled case was tried June 24th, 1920, before Honorable Luther A. Campbell, Judge, and a jury.

20

Mr. Walscheid opened to the jury for the plaintiff.

Mr. Carpenter opened to the jury for the defendant.

Mr. Carpenter. I suppose it not necessary for me to state my legal defense—first, that the cause of action was not started until two years after the alleged act; second, that the plaintiff cannot sue as administrator *ad prosequendum* but only as general administrator, and he is not that.

The Court. I suppose your motion is to dismiss on that ground?

30

Mr. Carpenter. Yes.

The Court. I will decline to do so upon the last reason. What is the other reason?

Mr. Carpenter. They allege that this thing happened on the 19th day of June, 1916, and this suit was started on the 22nd of June, 1918, as appears by the complaint.

Mr. Walscheid. The death occurred on the 25th of July and that is the test.

Mr. Carpenter. Yes, and I contend that that suit must be brought within two years of the date they say was the date this thing happened, whatever it was.

40

The Court. What does the statute say?

Mr. Walscheid. The statute says within two years from the death.

Adele Coursen, direct.

The Court. (After referring himself to the statute.) It seems to be from the date of death. I will deny your motion upon both grounds.

Mr. Carpenter. I ask an exception to both.

The Court. You may have it.

10 *Mr. Walscheid.* I offer in evidence the certificate.

Mr. Carpenter. I object to it on the same ground because this plaintiff has no cause of action, and, further, if there was any cause of action it should have been brought in the name of the general administrator. That is in line with my former objection.

The Court. I will overrule the objection.

Mr. Carpenter. Exception.

20 *Mr. Walscheid.* In the absence of a witness, with Mr. Carpenter's consent—

The Court. I think this should go upon the record: my denial of defendant's motion, addressed to the title in which the plaintiff is suing, is upon the ground that although the death occurred in July, 1916, and the *ad prosequendum* act did not take effect until March 27th, 1917, yet that act is a procedure act and it took effect immediately; and I take it that all proceedings brought under the Death Act where the decedent died intestate from and after the going into effect of that act required the plaintiff to be an administrator *ad prosequendum* rather than a
30 general administrator, irrespective of the time when the cause of action arose, whether before the act went into effect or after. I think it is fair that I should make that statement on the record so that you will have my reason.

Mr. Walscheid. With the consent of Mr. Carpenter, I desire to read the testimony of the witness, Adele Coursen, as given when called by me at the last trial.

(Testimony of Adele Coursen read by Mr. Walscheid.)

40 ADELE COURSEN, sworn.

Direct examination by Mr. Walscheid.

Q Where do you live? A 19 Sixth street, Weehawken.

Q Are you engaged in business in any way? A Only with Dr. Ziebell.

Adele Coursen, direct.

Q What do you do for Dr. Ziebell? A I am his nurse, helping him with instruments.

Q You are his nurse? A Yes.

Q You are also his secretary, aren't you? A Yes.

Q Were you his secretary and his nurse in June, 1916? A Yes. 10

Q Been with him continuously ever since? A Yes.

Q In the month of June, 1916, did Dr. Ziebell have any assistants working in the office? A Yes.

Q How many? A One.

Q What was his name? A Dr. Lauckner.

Q Did he work for him in the month of June, 1916? A Yes.

Q Is he here now? A Yes, sir.

Q I show you a paper and ask you whether you wrote that? A Yes, sir, I did. 20

Q And did you write that on the 13th day of June, 1916? A That was the first visit at the office?

Q Read the question.

(Question repeated by stenographer.)

A Yes.

Q And did you write it for Mrs. Ollert? A Mrs. Ollert, yes.

Q Did you receive a dollar from her at that time? A Yes, sir.

Q Did you book any appointment for her? A Yes, sir.

Q Do you know for what days you booked appointments for her? A I can't tell exactly the date; it was the Thursday or Friday after. 30

Q Did you book an appointment for her for the 19th day of June? A Yes.

Q And what time of day was that appointment—in the evening? A No; that was three o'clock in the afternoon.

Q Three o'clock in the afternoon; and did she keep that appointment? A Yes, sir.

Q Did she keep another appointment that night? A Yes. 40

Q Of the 19th of June? A Yes.

Q Between what hours? A Between seven and eight.

Q That is all.

Mr. Carpenter. No questions.

Mr. Walscheid. I offer this paper in evidence.

Michael Ollert, direct.

Mr. Carpenter. No objection.

(Paper marked Exhibit P. 1.)

Mr. Walscheid. I offer also in evidence the certificate appointing Michael Ollert administrator *ad prosequendum*.

10 *Mr. Carpenter.* For the purpose of saving the objection on the record that I made before, that is, about the statute, I want to object to it on the ground that in my humble judgment this action should be brought, if at all, by the general administrator, and not by a special administrator, under the Act of 1917, for the reason that all these things that they complain of took place in the year 1916, and before the *prosequendum* act was passed.

The Court. I will overrule the objection.

Mr. Carpenter. I ask an exception.

20 *The Court.* You may have it. The paper may be marked.

(Paper marked Exhibit P. 2.)

Mr. Walscheid. Then I offered the paper in evidence which we agreed was a receipt for one dollar, with a contract to pay five more for the filling of two teeth.

Mr. Carpenter. I do not recall what was on it except a receipt for one dollar, and I think the balance five dollars.

Mr. Walscheid. And that receipt has been lost since the last trial.

30 *Mr. Carpenter.* I do not dispute that. I have not seen it since. That is what you want, anyhow, on that paper?

Mr. Walscheid. Yes.

MICHAEL OLLERT, sworn.

Direct examination by Mr. Walscheid.

Q What is your name? A Michael Ollert.

Q Are you the plaintiff in this case? A Yes, sir.

40 *The Court.* You will have to talk louder, because juror number six has not the best of hearing, and if you do not talk louder, why, he won't hear you, I am sure.

Q Are you also known as Michael Ollert? A Yes, sir.

Q Did you use the name Michael Ollert? A They call me Mike, the most of the people.

Michael Ollert, direct.

Q But your right name is Michael Ollert? A Yes.

Q How old are you? A Thirty-five years old.

Q How old are you now? A Thirty-five years old.

Q What is the date of your birth? A Seventeenth of March—or July, I meant to say.

Q Of July? A Yes. 10

Q So that last July on the seventeenth you were thirty-five years? A Yes, sir.

Q Were you married prior to July 25th, 1916? A Yes, sir.

Q What was your wife's name? A Cornelia.

Q Is she dead? A Yes, sir.

Q When did she die? A She died July 25th, 1916.

Q How old was she at the time of her death? A Twenty-five years old.

Q Did you have any children by her? A Yes, sir. 20

Q How many? A Four.

Q What are their names? A Viola.

Q How old is she? A Now, she is thirteen years old.

Q And how old is the next—what is the name of the next?

A Mildred.

Q And how old is she now? A She is twelve years old.

Q And the next? A Is Raymond.

Q And how old is he now? A He is six years old.

Q And the next? A Is Willard Ollert.

Q And how old is he? A He is four years old. 30

Q Prior to July 25th and on July 25th, 1916, where did you and your family live? A 4835 Hudson Boulevard, North Bergen.

Q And what business did you conduct there? A A restaurant and a saloon there.

Q How long had you been in that business up there? A At that time?

Q Yes. A About a month or a month and a half at the longest.

Q Where had you been in business before? A I had never been in business before. 40

The Court. Mr. Juror Number Six, do you hear what this witness says?

Juror Number Six. Yes.

Michael Ollert, direct.

The Court. All right. If you do not at any time let me know.

Q What did you do before you opened your saloon? A I was a painter.

Q You were a painter? A Yes, sir.

10 Q Before you started the saloon, what, if anything, did your wife do in the line of work? A Well, she took care of my home and my children; cooked for me, for the family; she was not ill.

Q And after you started the saloon, what did your wife do? A Well, she helped me such as she could; she served on the porch; that is, meals. She cooked; she took care of the children; she done such work as she could.

Q Did your wife ever earn any money of her own before her death? A No, sir.

20 Q Do you remember any occurrence on the 19th day of June, 1916? A Yes, sir.

Q You saw your wife that day, did you? A Yes, sir.

Q Did she leave your home on that day to go to any particular place?

Mr. Carpenter. I object to that.

A Yes.

30 *Mr. Carpenter.* I do not object to whether she was leaving the home, but whether she was going to any particular place, I object to, because that is a matter of conclusion.

The Court. He simply answers yes; that is all.

Q And about what time was it that she left? A It was after supper.

Q About what time by the clock? A Well, I should judge about half-past six, quarter to seven.

Q Do you know where she was then going? A Yes, sir.

40 Q How long was it before she came back? A About half-past nine in the evening.

Q After she left and before she came back what was the state of the weather? A Why, it was lightning; thunder come up and it was an awful slash to the lightning; a crash, and every time the lightning would crash there would be a roll and a thunder after it.

Michael Ollert, direct.

Q And when did that begin in reference to the time when she went away? A About ten minutes after she has left the place—the home.

Q And was it over when she came back? A It lasted up to about twenty minutes before she had come home.

Q And during all of this time was the storm going on? A 10
Yes, sir.

Q And during all this time was the lightning flashing? A
Yes, sir.

Q During the slashing of this lightning did you hear any report? A Yes, sir; it was big slashes of lightning and then it was a rumble of thunder and then it rolled along.

Q How soon after the flash of lightning did you hear these rumblings of thunder? A About a couple of seconds after.

Q About a couple of seconds after. Do you know where Doctor Ziebell's office was in June, 1916? A Yes, sir; 26th 20
street and Bergenline avenue, in Guttenburg.

Q And how far was that from where you were during this storm? A I would judge about a mile or a mile and a quarter; something in that neighborhood.

Q And did it rain throughout that whole territory or storm throughout that whole territory? A Oh, yes.

Mr. Carpenter. I object unless he knows.

Q Do you know whether it did? A Yes; it rained and 30
stormed.

Q Now, when your wife came back, in your opinion half-past nine at night, what did you notice, if anything, in her appearance? A Why, I noticed she was all excited.

Mr. Carpenter. I object to that as—

A —and her face.

Mr. Carpenter. Just a minute. I object to that as calling for a conclusion. He can say what she did, but that she was all excited is a conclusion, I submit. 40

The Court. I am wondering whether I could not observe whether you were excited, if you ever did get that way. Isn't it just as easy to determine and for one man to speak of another as being excited as to speak of one as being intoxicated?

Michael Ollert, direct.

Mr. Carpenter. You cannot always tell out that.

The Court. I will overrule the objection.

Mr. Carpenter. I ask an exception.

Q Did you notice anything else about her? A Yes.

10 Q Tell the jury what else you noticed about her? A My wife come in the door and she looked exhausted.

Q She looked exhausted? A She looked exhausted, and she was all swollen in the face; puffed up.

Q Where? A All over the face; mostly on the right side.

Q That was worse than the other side? A Yes, and her lip on the right-hand side on the upper jaw was curled up, it was.

Q Yes. A And she said to me—

20 *Mr. Carpenter.* I object to what she said.

Q Never mind what she said at this time. What else did you notice at that time? A I looked into her mouth.

Q You looked into her mouth? A I then looked into her mouth.

Q And what did you find the condition—what condition did you find in her mouth? A Why, her gums, it looks like a burn.

Q It looked like a burn? A Yes.

30 *Mr. Carpenter.* I object to that as calling for a conclusion. You can tell what a burn on the outside of the skin looks like, but how can this inexperienced witness say what a burn on the gums looks like.

Mr. Walscheid. He does not say it was a burn. He says it looks like a burn.

The Court. Let him describe it before I strike it out. Your objection is that the ordinary person not skilled might be able to determine a burn if it were on the exterior of one's body.

40 *Mr. Carpenter.* Because one sees that occasionally; but to say something on the interior, on the mucous membrane, looks like a burn when that sort of thing we do not see, I think is unwarranted and misleading.

The Court. I am inclined to think it ought to be stricken out.

Michael Ollert, direct.

Mr. Walscheid. I say—well, that means it looks like a burn you see on the exterior portion of the body.

The Court. Can he describe?

Q Tell us in detail what you saw in the mouth. A I see the gum on the upper jaw on the right-hand side, it was like a hole drilled into the gum. 10

Q And how big was that hole? A Well, I would judge about as big as my finger nail.

Q Big as your thumb finger nail? A Big as my thumb finger nail.

Q What else did you see in the mouth? A And the skin was all burned away, and it was hanging down in shreds, it was.

Q Are you talking about the mouth generally? A Yes, sir.

Q And then? A And then I looked on the inside of her lip, and her lip—the skin was all hanging down in shreds. 20

Q What was the color of it? A It was a bright red. The skin was white—more on a white—but it looked like a burn to me—

Mr. Carpenter. I object to that and move to strike it out.

Mr. Walscheid. All right.

The Court. Strike that portion out.

The Witness. The burn, what I would say—

Mr. Carpenter. I move to strike that out. 30

Q Well, you say a portion was white? A White; that was the skin that was hanging down.

The Court. That portion that was hanging down then was of a lighter color, sort of whitish, you say?

The Witness. Yes, sort of whitish.

The Court. That which was not hanging down, what was the color of that?

The Witness. A bright red. 40

Q And what was—and differed from the ordinary red in the mouth? A Oh, yes.

Q And this discoloration, did it extend over the whole mouth?

Mr. Carpenter. I object to that as leading.

Michael Ollert, direct.

A No, only about the width of the—

Mr. Walscheid. All right; I withdraw the whole question.

10 Q Over what portion of the mouth did the discoloration extend? A About two teeth; right about here on the gum.

Q And when you speak of the discoloration, what do you mean? A Why, I mean that now it has been bright red, and it is like in a hole, and there was a piece of court plaster over it.

Q And how far did this red, this extraordinary red, extend?

Mr. Carpenter. I move to strike out that there was a piece of court plaster over it unless he knows that.

Mr. Walscheid. Why, he knows what court plaster is.

20 *The Court.* Do you know what court plaster is?

The Witness. It looked like court plaster.

The Court. Had you ever seen it before that time?

The Witness. Yes, sir.

Q (Repeated by the stenographer.) How far did this red, this extraordinary red, extend?

Mr. Carpenter. I object to that, there is no evidence that it was extraordinary.

30 *The Court.* You must, therefore, Mr. Walscheid, be more careful in your selection of words or we will have objections every time. The objection is that you are using the qualification "extraordinary." He has not said extraordinarily red. He said bright red.

Q How far did this red of a different color extend? A The width of three teeth—to the bottom of the gum—to the top of the gum.

40 Q Over what area in the mouth did the hanging shreds of skin extend? A Right over the hole.

Q Right over the hole? A Right over the hole.

Q What else did you notice on the outside of her face excepting that it was swollen? A Well, she had black rings around her eyes about that deep, she did; and her face was swollen.

Michael Ollert, direct.

Q Now, when she left you that night at a quarter to seven or seven o'clock, did she have those black rings under her eyes?

A No, sir.

Q Did she have the swollen cheeks? A No, sir.

Q Did she have the hole over her gum? A No, sir.

Mr. Carpenter. I object unless the witness saw. 10

Q How do you know that she did not have the hole? A Because when my wife came home the 13th day, see—

Q I am talking about the 19th. A Well, I looked into her mouth.

Q You looked into her mouth? A Why, yes. I looked in to see what Mr. Ziebell was going to do for six dollars, the work.

Q And did she have this shredded skin hanging down in the mouth? A No, sir; not at that time. 20

Q Did she have the discoloration? A No, sir.

Q In her mouth? A No, sir.

Q When she went away at six forty-five or seven o'clock to go where you knew she was going did she complain about feeling ill? A No, sir.

Mr. Carpenter. I object to that as hearsay, whether she complained or not because it seems to be based upon hearsay; therefore I move to strike out the answer that was interjected before my objection got in. 30

The Court. I did not hear the objection.

(Objection read by the stenographer.)

Mr. Walscheid. I think the fact that she did not complain is admissible. That precludes hearsay. If she did not complain she did not talk.

The Court. Well, is it so material?

Mr. Walscheid. I do not know. I think I will withdraw the question.

Q Up to the time that your wife went away that night had she had any medical attention of any kind? A No, sir; nothing. 40

Q Had she been sick to your knowledge at any time? A No, sir.

Q And up to that time she had been helping you in this housework as you have described? A Yes, sir.

Michael Ollert, direct.

Q This piece of black court plaster, where did you find that?
A Right on her gum, about here, on the right-hand side where the hole was.

Q And what did it do to the hole? A Why, it covered a part of the hole.

10 *Mr. Carpenter.* Take your hand down, I cannot hear what you say.

The Witness. It covered a part of the hole.

Q Covered a part of the hole. Did you when she came home have a conversation with her?

Mr. Carpenter. I object to—

A Yes, sir.

Mr. Carpenter. —that, as to whether he did or not.

20 Q Did she in that conversation say anything to you about where she had been? A Yes, sir.

Mr. Carpenter. I object—just a minute—I object to that on the ground it is immaterial whether he did or did not have any such conversation; that it would be hearsay.

The Court. It would not be immaterial, but whether or not it is proper evidence—that is, whether it is proper evidence in the sense it is hearsay evidence—

Mr. Carpenter. I object to it on that ground.

30 *The Court.* As to its relevancy I think it would be relevant if it were properly presented. The objection is as to its method of presentation and, of course, the question of what was said has not as yet been attempted to be testified to.

Mr. Carpenter. Is that question withdrawn?

Q (Repeated by the stenographer.) Did she in that conversation say anything to you about where she had been?

40 *Mr. Carpenter.* I object to it because what she may have said to him or he to her would be immaterial, hearsay and improper testimony.

The Court. I do not think the question is improper as far as it has gone, I will overrule the objection.

Mr. Carpenter. Exception.

Michael Ollert, direct.

Q Did she at that time tell you that anything had happened to her? A Yes.

Mr. Carpenter. I object to that. It also calls for a conclusion of the witness as to something that was hearsay. It is hearsay here and, therefore, I object to it as improper testimony. 10

The Court. I will overrule the objection again. You may have an exception.

Mr. Carpenter. I ask an exception.

Q As a result of what she told you, what did you do—

Mr. Carpenter. I object to that, first on the ground that it is leading; second, on the—

Mr. Walscheid. —if anything.

Mr. Carpenter. —ground that it is based on hearsay, 20 and, third, that it is improper testimony.

The Court. I will overrule that objection.

Mr. Carpenter. Exception.

Q (Repeated by the stenographer.) As a result of what she told you what did you do, if anything? A I telephoned to the dentist.

Q What dentist? A Dentist Ziebell.

Q Doctor Ziebell? A Doctor Ziebell.

Q And when you telephoned to him did you get him on the phone? A No, sir; he was not in. 30

Q Did you leave any message for him? A I didn't leave no message. They said he was not in and shortly after—

Mr. Carpenter. I object to what was said.

Q Just answer the question. Did you leave any message for him?

The Court. Yes or no.

A No, sir.

Q Did you leave any word as to calling him? 40

Mr. Carpenter. I object to that as immaterial.

A I said, "Mr. Ollert is calling."

Mr. Carpenter. Well, I withdraw that. He says he did.

Michael Ollert, direct.

Q What happened shortly after that? A Shortly after that Doctor Ziebell rung me up.

Q Called you up on the phone? A Yes.

Q And what was said between you at that time?

10 *Mr. Carpenter.* Just a minute. I object on the ground that somebody called this man on the phone, that it is a conclusion as to whether it was Doctor Ziebell.

Mr. Walscheid. We had the same thing before.

The Court. Go through it and let us get it settled if we are going to have it. Let us have it now.

Q After the person you called on the phone spoke with you what happened? A Doctor Ziebell, he told me that it was Doctor Ziebell telephoning.

20 *Mr. Carpenter.* I move to strike it out.

A And I said to him—

Mr. Carpenter. Just a minute. I object to it.

Mr. Walscheid. Well, I promise to connect it in a minute.

The Court. I do not understand that that is improper testimony.

30 *Mr. Carpenter.* I understand it is improper. If I call on the telephone and I say I am Doctor Ziebell, the conclusion is that it is.

The Court. How are you going to tell unless you can see simultaneously with your talking who is on the other end.

Mr. Carpenter. If the man does not know the voice—

The Court. He does not have to. How would you ever carry on a conversation in the business world if you had to do that sort of thing? I overrule the objection.

Mr. Carpenter. Exception.

40 *The Court.* I understand you to say that the man who answered on the other end said what to you first?

The Witness. He said, "I am Doctor Ziebell talking."

Q And what did you say? A And then I said, "Doctor, what have you done to my wife's mouth?"

Michael Ollert, direct.

The Court. Before you go any further, what doctor did you call up?

Q Where did you call him at that time? A From my business.

Q Where to? Where did your call go? A To the office in Guttenburg. 10

Q To his office in Guttenburg?

The Court. How did you find or know that number?

The Witness. Why, I looked it up in the book.

The Court. You looked it up in the telephone book?

The Witness. I looked it up in the telephone book.

The Court. And did you ask Central for that number?

The Witness. Yes, sir.

The Court. All right. And when you got the connection what did you say first? 20

The Witness. I said, "Is Doctor Ziebell in?" and he was not in.

The Court. Then he called you?

The Witness. Then he called me shortly after.

The Court. When you got the ring of the telephone who spoke first, the man on the other end of the telephone or you?

The Witness. The man on the other end. 30

The Court. What did he say?

The Witness. I said "Hello."

The Court. You said "Hello"?

The Witness. I said, "Hello," and he said, "This is Doctor Ziebell talking." I said, "Doctor, what have you done to my wife's mouth? It is in an awful condition."

Mr. Carpenter. I move to strike it out as a self-serving declaration, no part of the *res gestae*, and it is improper.

The Court. I will overrule the objection. 40

Mr. Carpenter. Exception.

The Court. You may have it.

Q What did Doctor Ziebell say? A I said, "It is in an awful condition"—

Michael Ollert, direct.

Mr. Carpenter. I object.

The Court. I will overrule the objection.

A —and he said, “I will be right over.”

10 Q And what happened then? A Well, about half-past eleven that evening Doctor Ziebell came, rushed into the bar room with another man.

Q All right. Now, what time of night was it when you called him up? A That was about a quarter to ten when I called him up.

The Court. And what time did you get this call from the party on the other end who said it was Doctor Ziebell.

The Witness. I judge it was less than a half an hour.

The Court. After you had called?

20 *The Witness.* Yes.

Q And how long after was it that he was around to your house? A About half-past eleven.

Q Well, that is about half an hour? A About half an hour.

Q And did he bring anybody with him? A Yes, sir; he had a man with him. He come rushing into the barroom.

Q Is that man in court now? A I don't see him.

Q Was he here at the last trial? A Yes, sir.

Q All right. He was here at the last trial. And when Ziebell came in with this man what did Ziebell say to you?

30 *Mr. Carpenter.* I object to that—I object to that as improper.

Q What did Ziebell say to you when he came in with this man? A He said to me, “Where is your wife?” I said, “she is upstairs, to bed.” He said, “Here I brought a doctor from New York probably will help your wife's mouth.” I then takes them upstairs to the wife.

Q The two of them? A Two of them.

40 Q Into the bedroom where your wife was? A Into the bedroom to the wife.

Q Was she in bed? A Yes; she was in bed and I said, “May, here is Doctor Ziebell fetched a doctor from New York.”

Mr. Carpenter. I object to that—move to strike it out as a self-serving declaration. It is immaterial what this man said. Therefore, I ask that it be stricken out.

Michael Ollert, direct.

The Court. I overrule it. It is in the presence of the defendant at the time with which the testimony is concerned.

Mr. Carpenter. Even so, what difference does it make?

The Court. Well, you may note your objection. I have overruled it and you have your exception to it. 10

Mr. Carpenter. Exception.

Q (Repeated by the stenographer.) Was she in bed? A Yes; she was in bed; and I said, "May, here is Doctor Ziebell fetched a doctor from New York."

The Witness. (Continuing.) And my wife—

Mr. Carpenter. I object to what the wife said.

Mr. Walscheid. In the presence of Doctor Ziebell and this man. 20

Mr. Carpenter. I object.

Q What did he say—what did she say?

Mr. Carpenter. I object to it on the ground that no matter what the wife said it is not relevant or material even though in the presence of the defendant.

The Court. Why?

(Mr. Carpenter cites 16 Cyc. 1202, 1203 and 1204; Wigmore on "Evidence," volume II, section 1432; Tiffany on "Death by Wrongful Act," section 194; 64 law, *State against Meyers*, 382; *Donnelly v. The State*, 42 Northwestern, Massachusetts.) 30

Q (Repeated by the stenographer.) What did he say—what did she say?

Mr. Carpenter. On the further ground that it is in violation of the hearsay rule and is allowed under no exception to the hearsay rule, and is also a self-serving declaration.

The Court. I will overrule the objection.

Mr. Carpenter. I ask an exception. 40

The Court. You may have it.

Q (Repeated by the stenographer.) What did he say—what did she say? A My wife said, "He was not no doctor from New York. He is the man that worked on my mouth."

Michael Ollert, direct.

Q What was then said by Doctor Ziebell? A Doctor Ziebell then looked into my wife's mouth.

Q Doctor Ziebell—

Mr. Carpenter. I object to that.

10 Q —then looked into your wife's mouth? A And said, "Mrs. Ollert, now tell me how did this happen?" and then my wife pointed her finger at the man that Doctor Zeibell fetched in and said—

Mr. Carpenter. I object to what she said again, on the same grounds as before.

The Court. This is the answer. I will overrule the objection, however. I overrule the objection and you may have an exception.

20 Q Go ahead. A My wife pointed her finger at the man Doctor Ziebell fetched in and said, "he is not a doctor from New York. He is the man worked on my mouth. He was drilling in my tooth and I got an awful shock and he left the drill in my tooth, walked across the room, shut off the electric current, and come back to me. While taking the drill out of my mouth said, 'My God! child, what have I done? I did not mean to do that. You must have suffered awful?'"

30 *Mr. Carpenter.* I move to strike out the latter part of that as hearsay, not only as relating to a hearsay statement by the wife, but also a hearsay statement from somebody else.

The Court. I will decline to strike it out.

Mr. Carpenter. I ask an exception.

The Court. You may have it.

Q What, if anything, did Doctor Ziebell in reply to that to your wife at that time? Did he say anything to her when she told him this? A No, sir.

40 *Mr. Carpenter.* I object to this on the ground that it is part of the whole evidence of this transaction, is improper.

The Court. Well, he said no.

Q What next happened then? A Both doctors looked at one another and they didn't say a word. We walked out of the room

Michael Ollert, direct.

then and we went downstairs, and we walked into the barroom and then I said to Doctor Ziebell, I said, "Doctor, you put me in an awful hole," and I said, "You see the condition of my wife's mouth, and what do you intend to do about it?" Doctor Ziebell then tapped me on the shoulder and he said, "Don't worry, Mike. I know it is all our fault and I am going to stand for it all. I am going to see you through." So he said, "Keep on swabbing her gum every half hour and I will have my doctor here the first thing in the morning," and then they went away. 10

Q Did he tell you that night who his doctor was going to be the next morning? A No, sir.

Q What happened the next morning? A The next morning at nine o'clock Doctor Ziebell comes in. About half-past nine Doctor Quigley comes in.

Q Had you ever seen Doctor Quigley? A No, sir.

Q Go ahead. A I then takes them upstairs. 20

Q Who takes them upstairs? A I takes Doctor Quigley upstairs.

Q Who? A I did.

Q You did? Did Doctor Zeibell go along? A Yes, sir.

Q What happened up there then? A And Doctor Quigley looked at my wife's mouth and said, "It is a hospital case."

Mr. Carpenter. I object to what Doctor Quigley said.

The Court. Who was present at the time.

The Witness. Doctor Ziebell, Dr. Quigley and myself and my wife. 30

Q And he said what? A He looked at my wife's mouth and he said—

Mr. Carpenter. I object to that.

A —"It is a hospital case—"

Mr. Carpenter. I object. Will you rule on that objection? I object to what Doctor Quigley said.

The Court. Why? 40

Mr. Carpenter. On the ground that it is hearsay even though in the presence of the defendant, and I move to strike it out.

The Court. I will decline to strike it out.

Mr. Carpenter. Exception.

Michael Ollert, direct.

Q (Repeated by the stenographer.) And he said what? A He looked at my wife's mouth and he said—

Q What else happened there then? A My wife said to me, "Mike, don't take me to the hospital."

Mr. Carpenter. I object to that.

10

Mr. Walscheid. Strike it out.

Q Was anything else said by Doctor Quigley or Doctor Ziebell that morning? A Yes, sir. Doctor Quigley said—

Mr. Carpenter. I object to that on the same ground.

The Court. I will overrule it.

A —"See if your wife will consent to go to the hospital and I will be here in the morning."

Q And did he come back? A Yes, sir; he came back the
20 next morning and I said that my wife would not consent to go to the hospital. He said, "Too bad. I got all arrangements made with a New York hospital." He said, "I will be back at one o'clock and see if your wife won't consent to go to the hospital." Shortly after he went and my wife said to me—

Mr. Carpenter. I object.

Q Never mind that. Do not say that. Did he come back after that for further treatment of your wife? A Yes, sir.

Q Doctor Quigley? A Yes, sir.

30 Q When did he come back again? A He came back at one o'clock.

Q Then your wife did not go to the hospital? A No, sir.

Q Is that it? How long did Doctor Quigley remain on the case? A I judge about two days.

Q That is two days. Now, did Doctor Quigley ever send you a bill for those two visits? A No, sir.

Q Did you know Doctor Quigley up to that time? A No, sir.

Q Never saw him before? A Never seen him before.

40 Q What did you do after Doctor Quigley had seen your wife the second time? A Well, shortly after Doctor Quigley went out and my wife said—

Q Never mind that.

Mr. Carpenter. I object.

Mr. Walscheid. You cannot tell that.

Michael Ollert, cross.

A I went to Miss Morgan.

Q You went out and got a nurse? A A nurse.

Q What is her name? A Miss Morgan.

Q And did you also get a doctor? A Yes, sir; Miss Morgan said the best thing—

Mr. Carpenter. I object.

10

Q Never mind what she said. Did you also get a doctor? A Yes, sir.

Q What was the doctor's name? A Mr. Adams—Samuel Adams.

Q And did he thereafter treat your wife? A Yes, sir.

Q And for how long did he treat her? A Up to she died; until the 25th of July.

Q And during that time of her illness she was always at home? A Yes, sir.

Q Did Doctor Ziebell ever come back after that? A No, sir.

20

Q Did he call you up again? A No, sir.

Q Do you know whether or not any other doctor was called in by you besides Adams? A Yes, sir; Doctor Lemmerz.

Q Doctor Lemmerz. Those two doctors? A And Doctor Dickinson.

Q Did you call in Doctor Dickinson? A Mr. Cowan called him in for me.

Q By Mr. Cowan you mean the Reverend Mr. Cowan, pastor of the church of North Hudson? A Yes, sir.

30

Mr. Walscheid. Cross examine.

Cross examination by Mr. Carpenter.

Q What did you say your business is? A Hotel business—saloon business and serving meals.

Q You run a roadhouse in North Bergen, don't you? A No, sir; I do not.

Q What? A I do not.

Q What do you call the business now? A Restaurant and saloon.

40

Q Restaurant and saloon? A Yes, sir.

Q How long have you had that business? A Well, a year and a half, and then I sold out and bought it back again. I am back again about nine months now—about eight or nine months.

Q What was the first time you ever had that business?

Michael Ollert, cross.

Mr. Walscheid. I object to that as irrelevant and immaterial.

The Court. What is the purpose?

Mr. Carpenter. It is cross examination. It was brought out on direct.

10 *The Court.* Is there any particular relevancy to it?

Mr. Carpenter. This man testified some time before his wife died she worked around the place.

The Witness. A month and a half.

Q How long before your wife was taken in did you have this business? A About a month or a month and a half.

Q And all that time your wife worked around the place doing all the cooking? A Helped me out, done as much cooking as she could. I had others working there.

20 Q Did she clean out the place for you? A Served meals and so forth. She often swept up for me, yes.

Q She never had a doctor before? A No, sir.

Q How close to the 13th of June was your youngest child born? A About five months previously.

Q What? A About five months before that.

Q What was the date of the birth of your youngest child?

Mr. Walscheid. I object to that as not proper cross examination.

30 *Mr. Carpenter.* It is to show his wife's condition.

Mr. Walscheid. Well, you are going to show that by proof, if you have any.

Q You testified on the former trial of this case that the child was born three months before this, the youngest child, didn't you? A No, I don't think so; he was five months old when my wife was lost. So how could I testify three months there.

Q Did you not testify at the last trial that the youngest child was born three months before your wife was taken ill?

40 *Mr. Walscheid.* Now, I object to it on the ground—I withdraw the objection.

The Court. I do not see the importance of it.

Mr. Walscheid. I cannot see the importance of it.

Mr. Carpenter. Why, it goes to help. It is a fact that the jury may consider as to the condition of Mrs. Ollert

Michael Ollert, cross.

at the time she went to the doctor's office. It shows her state of health, whether she was able—whether a woman who had just given birth to a child was able to do this hard work around a saloon.

The Court. Go ahead and answer the question. The question is didn't you on the previous trial testify that 10
your youngest child was born three months before June 13th, 1916. You can answer that yes or no.

The Witness. Yes.

Q That is a fact, too, isn't it? A Yes, that is right.

Q Now, what time of day did your wife go to the dentist on the first occasion, the 13th of June? A In the afternoon.

Q What time? A Something around two o'clock.

Q Yes. What time did she get back? A About four something; around four o'clock. 20

Q What was the second time she went to Doctor Ziebell's office, if you know? A It was after supper.

Q What day? A Around June 19th.

Q Do you say that is the second time she went? A That is the second time she went.

Q Now, if she went to his office in that interval between those two days you do not know it, do you? A No, sir; she ain't been there; I don't think.

Q What? A She ain't been there since.

Q What did she go to the dentist's for in the first place, because she had a pain? A Why, if she drawed like that, she had a little hole right about here, and if she sucked wind it would ache her. 30

Q She had a toothache then, between the second and third teeth on the right side of her face, between the first and second teeth? A Right about there.

Q That is the second and third teeth; is that right? A About there.

Mr. Walscheid. On the upper side?

The Witness. On the upper side. 40

Q And she complained to you about toothaches frequently?

A No, she did not say it was a toothache.

Q Did she complain about pain there? A She said, "If I suck like that, why, I get a little sharp pain."

Michael Ollert, cross.

Q And did you advise her to go to the dentist or did she ask your permission to go? A I said, "You better go to a dentist and see what it is."

Q You said a while ago that no other doctor had ever attended your wife. Is that quite right? A Oh, only in childbirth; that is all.

Q Now, do you remember any other occasion when she was treated by a doctor? A No.

Q Only at childbirth? A At childbirth.

Q Now, how long were you with your wife before six o'clock on the 19th of June, 1916? A All day.

Q Before six o'clock in the evening? A All day.

Q You were with her all day? A Yes, sir.

Q Do you mean that she was in your place of business all day? A She was in my place all day, yes.

Q You mean that, do you? A Yes, sir.

Q What was she doing all that day? A Well, serving meals at twelve o'clock; she helped wash dishes after the meals were served; she made supper. I ran—

Q What was she doing between three and four o'clock that day? A Why, she was at the business.

Q What? A At the business.

Q Well, what was she doing? A Well, I would judge she would be about washing dishes about that time.

Q I didn't ask you what you judge. What was she doing at that time, if you know. A Well, she was at the place; I couldn't just tell you what she was doing.

Q Do you recall what she was doing at that time accurately now? A Outside of washing dishes at that time.

Q What kind of an afternoon was the 19th of June, do you remember, 1916? A Yes, sir; it stormed.

Q And the morning, what kind of day was that? A Morning was pretty nice.

Q Pretty nice? A Yes, sir.

Q Didn't rain at all that morning? A Not in the morning; no.

Q Where were you in the evening of the 19th of June? A Right at my business.

Q Right at the place all day and night? A Yes, sir.

Michael Ollert, cross.

Q Do you remember any people that were with you that day?

A I remember three men were there at the bar when my wife came in.

Q Who were they? Who were they? A Mr. Davis, Mr. Hastings and Mr. Watson.

Q Mr. Watson? A And they seen my wife's mouth when she came in, what condition it was. 10

Q Now, did your wife complain at all about pain to you at all that day, to you, the 19th of June? A No, sir.

Q Now, you are positive, are you, that you called up Doctor Ziebell and had him on the 'phone the night of the 19th of June?

A After half-past nine, yes.

Q At about half-past nine and before twelve o'clock? A Yes, sir.

Q And you say after nine thirty that night and before midnight Doctor Ziebell came to your house? A Yes, sir. 20

Q Where was your house located? A At 4835 Hudson Boulevard.

Q Where was Doctor Ziebell's office located at that time? A 26th street, Guttenberg, West New York.

Q Do you remember the location perfectly? A I sure do.

Q You had been there? A No, sir; I ain't.

Q How do you know that his location is there? A Well, I know he has his office there.

Q Well, would you be surprised to know that it was 24th street instead of 26th? A Well, it was in the Guttenberg Bank. 30

Q Where is that at? A It was over the Guttenberg Bank.

Q Now, when your wife went out that night—

The Court. We will stop at this point. It is recess.

(Recess until ten o'clock the following morning.)

Michael Ollert, cross.

June 28th, 1920.

MICHAEL OLLERT, recalled.

Cross examination by Mr. Carpenter (continued).

10 Q I understood you to say that your wife was about twenty-four years old? A Twenty-five years old when she died.

Q Whereabouts was she born? A Jersey City.

Q I see. She had taught school in Bayonne, had she not, before she was married? A That I could not say.

Q You have no knowledge about that at all? A That I could not say.

Q Because you have no knowledge; is that it? A I say I couldn't tell you where she went to school.

20 *The Court.* He does not understand the question apparently. Was she a school teacher? That is the question.

The Witness. No, sir.

Q What did she do before she was married? A She worked down in Schuetzen Park.

Q At Schuetzen Park? A Yes, a cashier.

Q And how old was she when you married her? A Sixteen years.

30 Q Sixteen years old? And you say she never had a doctor before this time except when she had— A Childbirth.

Q —gave birth to a child? A Yes.

Q Whit different doctors attended her on those different occasions? Doctor Pinder was one? A Doctor Croner was the first one.

Q What is that? A Doctor Croner was the first one.

Q Where is he or where is his office? A Well, he is dead now.

Q What is that? A He is dead now.

Q Who was the next doctor? A Doctor Spaulding.

40 Q Doctor Spaulding. Where is his office? A At that time he used to be at Fulton street.

Q Yes. Where is he now? A That I could not say. I believe it is the same place; I could not say for sure.

Q Any other doctor attended her? A Yes; I cannot just say who was the third one; I don't remember.

Michael Ollert, cross.

Q I see. Now, you say your wife never had anything the matter with her at all? A No, sir.

Q Did she ever have convulsions, to your knowledge? A No, sir.

Q Or fits, to your knowledge? A No, sir.

Q Well, on the night that your wife left, the 19th of December—about seven, was it? The 19th day of June, 1916? A About seven o'clock. 10

Q Yes. A Around that.

Q Nice, clear evening, when she left? A When she left it was not very clear, but it was not raining or storming at the time she left.

Q There was no indication of a storm when she left, was there? A Well it didn't just look clear, but it was not raining, and it was not storming when she left. 20

Q And if it was clear there was no indications that a storm was coming: isn't that so?

Mr. Walscheid. I object. The witness has just answered that question.

Q Was there any evidence of a storm coming up at the time your wife left the house on the 19th day of June? A Well, it stormed that afternoon.

Q I didn't ask you that. At the time your wife left the house about seven o'clock, was there any indication of a storm coming up? A Well, I didn't notice at all, no. 30

Q And your wife came back about what time? A About nine thirty.

Q Where were you when she came back? A Behind the bar.

Q Did she come to the barroom first? A Yes, came right in through the barroom.

Q And where did she go from there? A She just went as far as the ice box; about as far as she went; that is the other end of the bar.

Q Yes. And is that on your way into the house? A Yes, sir; to the kitchen. 40

Q Way to the kitchen. Did she go on past the ice box into the kitchen? A No; she has told me what has happened before she reached the ice box; or before she come to the door.

Q I didn't ask you that. She came in the door? A Yes.

Michael Ollert, cross.

Q Walked past you over to the ice box? A Well, of course, she had to walk past me. I was behind the bar.

Q She went past you? A She stopped at the end of the bar where I would have to come out.

10 Q And then you spoke to her there? A Yes; she spoke to me first.

Q And then did she go on into the house? A No; she didn't go on into the house.

Q When did she go into the house? A Not until after I telephoned to Ziebell; then she went upstairs to bed.

Q And when you first telephoned to Doctor Ziebell did you get him on the wire? A No, sir.

Q And your wife went on upstairs? A I took her upstairs; yes, sir.

20 Q How long did your wife stand there at the end of the bar talking to you? A About twenty minutes.

Q Twenty minutes? A Yes; until I tried to get Ziebell, and she explained what happened, and then I took her upstairs to bed.

Q I didn't ask you that. You said she stayed there about twenty minutes? A About twenty minutes, yes.

Q Now, there were others in the barroom with you? A Yes.

30 Q While she was talking with you she was talking with you alone, wasn't she? Just say yes or no. A Why, at that time; but I have showed the others; I have called the others down at the other end of the bar to look what happened in my wife's mouth.

Q And you said that you saw under her lip a piece of court plaster? A Not under the lip; on the gum.

Q On her gum. Was there anything on her lip? A Well, the skin was hanging down in shreds.

Q Well, you said that before. How much skin was hanging down in shreds? A The width of two teeth and a half, about.

Q And was that over the gum or on the lip? A That was both on the gum and lip.

40 Q And while it was the width of two teeth and a half, what was the length of it? A From top to bottom.

Q Top to bottom of what? A Well, from the top of the lip to the bottom of the lip.

Q Well, all the way from the outside of the lip? A No, the inside.

Michael Ollert, cross.

Q The inside. Well, now, how long is that, quarter of an inch? A Well, about as long as mine. Judge mine.

Q Well, I cannot tell how long yours is. Well, quarter of an inch, half an inch, or two or what? A Something around an inch, I should judge.

Q How big was this court plaster that you said was on the inside of the mouth and the gums? A I would judge about a half inch long. 10

Q Well, how wide was it? A About that wide.

Q Well, a quarter of an inch? A About a quarter of an inch, I would say.

Q Of course, you did not see what was under the court plaster at all, did you? A Well, there was a hole there. The hole hardly wasn't covered.

Q What was the court plaster on there for? A I don't know what it was on there for; I couldn't tell you. 20

Q What did it cover? A It covered a part of the hole.

Q Did it cover the whole hole entirely? A No, not the whole hole entirely, no.

Q Well, how much—I see. Now, that was just to the right or to the left? A On the right upper jaw, right there.

Q The only hole that you noticed was what was under the court plaster, a round court plaster, wasn't it? A Well, I have seen it was a little burn was up on top and at the bottom of the court plaster.

Q You mean where the skin was burned off? A Well, the skin was hanging down in shreds. 30

Q Why don't you say torn off? Why do you keep using "hanging down in shreds"? A Well, it had to be burned off to be hanging down in shreds.

Q Well, if it was burned off it would not be hanging there, would it? A It was hanging there.

Q Was it hanging from the top or bottom? A From the top.

Q And none hanging lose on the sides at all, was there? A As far as two inches and a half—I mean the width of two teeth and a half it was hanging. 40

Q And the width of two teeth and a half is how far, about a half inch? A I would judge about an inch. Ain't it?

Q Well, I am asking you what you saw, what you saw. A Well, I would judge same as you would. Now, what would you judge? About two teeth and a half; about an inch.

Michael Ollert, cross.

Q I am asking you to tell what you saw? A I will say—

Q Not on the width of your own teeth? A I will say something about an inch.

Q About an inch long? A Yes.

Q And in that space you say the skin was off? A It was
10 hanging down, yes.

Q Black court plaster was there? A What is that?

Q And there was black court plaster over the skin? A It looked like court plaster to me.

Q You say it was court plaster? A I say it looked like court plaster.

Q Was that all that you noticed about your wife? A No.

Q What else did you notice? A Why, her lip was curled up; her face was puffed up; the right side was swelled more than
20 the left side; there were big black rings around her eyes that deep.

Q Which eye? A Both eyes; and from here right into the nose, and that was not before she left.

Q I see. Now, then, it was the right side of the face that was puffed up, you say? A Yes, sir.

Q Not the left side? A No, sir; the right side.

Q The left side was all right? A Well, it was swollen, but not as much as the right side.

Q Well, now, did not the left side of her face look all right
30 to you? A No, no; far from it.

Q Now, when was it that you first learned that your wife complained about her teeth? A That was on the 12th.

Q On the 12th? A Because she went away on the 13th and the next day when I said have it attended to—

Q Did she at any time after that up to the night of 19th complain to you about pain in her teeth? A No.

Q She did not? A No.

Q When did you first see that there was a cavity in her teeth, a black spot in her teeth? A Why, when she—when she came
40 back with the receipt.

Q What day was that? A That would be the 13th.

Q Did you look at your wife's face before she went to the dentist at all? A No.

Q Didn't pay any attention to it before that. And you say you looked in her mouth because you wanted to see what she was

Michael Ollert, cross.

spending six dollars for; is that right? A That is the idea; to see what Ziebell was going to do for the six dollars.

Q You thought that was an outrageous amount of money to pay? A No, sir; but if I have money to pay out I want to see what I am paying for.

Q Did you complain because the price was high? A No, sir. 10

Q The only reason you looked in her mouth was because you paid the doctor a dollar and you wanted to see what she was getting for the money? A I wanted to see what he was going to do; yes; naturally anybody would do it, probably.

Q You think anybody would have done the same thing? A I think they would.

Q Had your wife ever been to the dentist before that? A No, sir.

Q Never had? A No, sir.

Q Now, this baby that you said was three months old, was that a bottle-fed baby or did she nurse the baby from the breast? A We fed that baby Nestle's food. 20

Q Why was that? Because your wife didn't have any milk to give the baby; isn't that so? A I don't know; I suppose that is right.

Q All the other children had been breast fed, hadn't they? A No; we fed them all on Nestle's food, every one of them.

Q But isn't it a fact that all the other children partly, at least, were breast fed? A Well, so was this, until we weaned it off.

Q And when did you wean it? A I would judge about two months. 30

Q Two months before this happened or two months after the baby was born? A Two months after the baby was born.

Q Now, then, when did—when do you say Doctor Ziebell first came to your house? A That was about the 19th; the night that this happened.

Q About the 19th? A Yes, sir.

Q Or the 20th? A The 19th about.

Q That is the best that you can tell us, is it? A That is the best I can tell you. 40

Q And you haven't any idea that it might have been on the 20th? A Well, the 19th, I figure it.

Q Who was with Doctor Ziebell, as you say, when he first came? A The man that I have identified.

Q Here in court? A Yes, sir.

Michael Ollert, cross.

Q At the last trial? A Yes, sir.

Q And you pointed to Doctor Lauckner? A Yes, sir.

Q And you say Doctor Lauckner is the man who come with Doctor Ziebell? A Yes, sir.

Q Did Doctor Ziebell introduce the man to you when he came
10 in? A Yes, sir.

Q And did he introduce him as Doctor Schmidt or Doctor Lauckner? A He told me, he said, "Where is your wife?" I said, "Upstairs to bed." And he said, "Here, I fetched a doctor from New York. He will probably help your wife's mouth."

Q That was the first time Doctor Ziebell had ever been in your house, wasn't it? A Yes, sir.

Q Did you ask him the name of this doctor from New York? A No, sir.

Q Were you told the name of the doctor from New York? A
20 No, sir.

Q Had you ever seen him before that occasion? A No, sir.

Q Have you ever seen him since until you saw him here in court? A No, sir; that was the first time I seen him since; that is four years ago.

Q And you are positive about the identification, are you? A I am positive.

Q It was Doctor Lauckner; you learned here in court it was Doctor Lauckner? A Yes, sir.

Q That is the man? A That is the man I picked out and his
30 name is Doctor Lauckner, yes.

Q You found out at the last trial that the name was Doctor Lauckner, didn't you? A By the name.

Q Now, then, what time did you say that Doctor Ziebell and this other doctor left? A Left?

Q Left your house? A It was about twenty minutes after twelve, something around that time.

Q Did they give your wife any medicine? A They—no; they didn't give my wife any medicine, no.

Q What did they give her? A My wife was fetched in a
40 bottle of stuff that they had give her a prescription for her to get filled.

Q I asked you, however, whether they gave her any medicine. A No, they didn't give her any medicine, they just said, "Keep on swabbing her gums every half hour." And did you do that?

A I done it.

Michael Ollert, cross.

Q What became of the slip of court plaster? A What is that?

Q What became of the court plaster? A It went right over that.

Q What? A It went right over that.

Q How long did the black court plaster stay on? A It was on the next day yet. 10

Q Who took it off, if anybody? A I cannot say for sure who took it off.

Q Did you? A No. What would I take it off for?

Q Well, I don't know. When did Doctor Quigley first come? A The next morning.

Q Nothing took place in the meantime? A Only swabbing her gums; that is all.

Q What time the next morning did Doctor Quigley come? A About half-past nine. 20

Q Did he come alone or with somebody? A Mr. Ziebell came in first and he came in after.

Q How long after? A About a half an hour.

Q And when did Doctor Quigley come again? A The next morning.

Q You are not set on those—on your dates, are you? A No, sir; no, no, no. That would be the 19th; then he was in again at the 20th.

Q But if he first came in on the 22nd, then, when did he come in the second time? A Then it would be the 23rd—the 21st, I meant to say. 30

Q When did you first call in Doctor Adams? A It was two days after.

Q After what? A After this Doctor Quigley was in.

Q Did you say anything—had you ever seen Doctor Quigley before that? A No, sir.

Q Did you know who he was? A No, sir.

Q Never heard of him? A No, sir.

Q Had you ever had Doctor Adams before that? A No, sir.

Q Never heard of him? A No, sir. 40

Q How did you come to get Doctor Adams? A Through Mrs. Morgan, the nurse.

Q She was a practical nurse? A Yes.

Q When did Mrs. Morgan first come? A The second day after this thing has happened.

Michael Ollert, cross.

Q The second day after the 19th of June, that is, the 21st of June? A No; it would be the 20th of June.

Q If she came on the 20th of June, what time of the day did she come? A After one o'clock; I went for her.

10 Q Now, you remember distinctly that she came in the afternoon? A Yes, sir.

Q Of the 20th of June? A Yes, sir.

Q Now, when Doctor Lauckner, according to your story, and Doctor Ziebell came there it was undoubtedly at night, wasn't it; late at night? A About half-past eleven at night.

Q And you said they left about twenty minutes after twelve? A Yes, sir.

Q What was the last thing you said to them, do you know? A The last thing I said to them?

20 Q Yes. A Yes.

Q What did you say? A I said, "Doctor Ziebell, you put me in an awful hole and you see the condition of my wife's mouth, and what do you intend to do about it?" Doctor Ziebell then tapped me on the shoulder and he said, "Don't worry, Mike, I will stand for it all. I know it is our fault and I will stand for it all."

Q So that was as they were leaving? A No; that was before they left.

Q I said the last thing that was said. Do you remember? A At what time?

30 Q Do you remember anything else was said between you at that time? Do you remember anything else was said by you to them or they to you other than that? A That day or the following day, do you mean?

Q That night as you were downstairs in the barroom? A Yes.

Q What else do you say you said? A They said that "I will stand for it all. I will see you through and keep on—"

Q Whom do you mean by "they"? A Doctor Ziebell.

40 Q You said "they" said that? A Well, the other man was with him.

Q Well, what did he say? A He didn't say anything.

Q Not the whole evening? A No.

Q Stood there upstairs and down in your barroom the whole evening without saying a word? A Just dumbfounded, yes; that is what he was.

Michael Ollert, cross.

Mr. Carpenter. I move to strike that out. That is a conclusion.

The Witness. He didn't say a word.

The Court. All right; it may be stricken out.

Q He never said anything to you? A No.

Q You never heard his voice? A No.

10

Q Just like a mute? A Yes.

Q The whole time he was there? A Yes, sir.

Q And he was there for fifty minutes? A He was there from half-past eleven till a quarter after twelve.

Q How long were the three of you down in the barroom talking? A When?

Q That same night. A When we came down from upstairs?

Q Yes. A About twenty minutes.

Q What were you doing down there, drinking? A No; didn't think of drinking at the time.

20

Q Well, were you talking down there? A Yes; I just told you what he had said.

Q That was all that was said during that whole time? A Well, then he says his doctor will be in the first thing in the morning.

Q That is what he said? A Yes, sir.

Q Didn't he say—didn't Ziebell say to you that you ought to have your own physician to look after your wife because it was not a dentist's case at all; it was a physician's case? A No.

Q Didn't you tell Doctor Ziebell— A No—

30

Q Just a minute. You do not know what I am going to ask you yet, do you? A No.

Q Didn't you tell Doctor Ziebell that you did not have a doctor; that you could not afford a doctor? A No; I didn't tell him that.

Q It was a fact that you didn't have any physician, wasn't it? A I didn't need any before.

Q And you didn't have any at that time, did you? A Why should I have one?

40

The Court. Well, did you?

The Witness. No, sir.

Q And you deny that you told Doctor Ziebell that you had no physician and that you could not afford one? A Why, certainly I did not say that.

Michael Ollert, cross.

Q You did not? A No.

Q Now, you say Doctor Quigley advised you to take your wife to a hospital? A Yes.

Q When did he advise you that? A Well, it was Mr. Ziebell that has told him to make arrangements with a New York
10 hospital.

Q Did he say that in your presence? A Yes.

Q When did he say that? A That was the first morning that they came in.

Q That was the 20th, according to you? A Yes.

Q Where did they say that, in the barroom or upstairs? A
Upstairs.

Q Nobody there but these two gentlemen? A And Doctor Quigley.

Q Doctor Quigley, Doctor Ziebell and you and your wife? A
20 Yes, sir.

Q Now, this other conversation when your wife told you something, was on the night of the 19th, you say, in the presence of yourself and your wife, Doctor Ziebell and Doctor Lauckner? A Yes.

Q About what time of night did that take place? A Well, about twenty-five minutes of twelve that night.

Q Five minutes after these gentlemen came in? A Yes, about five minutes after they came in.

Q Had your wife been asleep up to that time? A No, sir.

Q Had you been up with her at all between nine-thirty and
30 eleven-thirty? A I would run up at different times, yes.

Q Before your wife went out the evening of the 19th, in the hour before she went out had you seen her at all? A The hour before she went out?

Q Had you seen her before she left? I mean between six and seven. A Certainly.

Q What was she doing at that time? A Just before that time we were eating—just about that time.

Q Well, what else was she doing? When you had dinner did
40 she clear away the dishes? A This was supper.

Q All right. Did she clear away the dishes or did somebody else? A No; her mother cleared away the dishes.

Q Did she go away to dress? A She has been dressed.

Q She was dressed. Was that between four and five or five and six? A No, sir; between six and seven.

Michael Ollert, cross.

Q Between six and seven. Then she came down and you had supper?

Mr. Walscheid. I object to that. He has not said that.

The Witness. Around six o'clock.

Q Now, you spoke about a thunderstorm. When was the thunderstorm? Between what hours? A Well, there was a thunderstorm came up about ten minutes after she left the place; there was one in the afternoon. 10

Q Yes. How do you know that? A What?

Q How do you know that? A It is a thing that I will never forget.

Q Have you looked up the records since? A No, sir; I don't need any record.

Q Your wife didn't go to a hospital, did she? A What is that? 20

Q Your wife didn't go to a hospital, did she? A No.

Q Did she stay in bed from the night of the 19th until she died? A Until she died.

Q Same room? A Yes, sir.

Q When Doctor Dickinson came, that was about the sixth of July? A That was about the 20th.

Q 20th of what? A Of June, oh, I mean Dickinson—that is Doctor Adler—Dickinson—let me see—that was the second consultation. 30

Q When was that? A I could not just say; it is within about a week—each week we had a consultation. Doctor Lemerz was the first.

Q I asked you when it was; I didn't ask you all these things. When did Doctor Dickinson come there? A About two weeks after the 19th.

Q Yes. You say you spoke to Doctor Ziebell over the telephone on the night of the 19th or rang him up? A Yes.

Q About what time? A I judge it about—I judge it to be about ten o'clock, a little bit after. 40

Q You brought this suit in the name of Michael Ollert, didn't you? A Yes, sir.

Q Your licenses have always been in the name of Mitchell Ollert, haven't they? A Yes, sir.

Q Why? A Because I figured both names is the same.

Michael Ollert, re-direct.

Q Meaning the same thing to you, do they? A Yes; everybody calls me Mike.

Re-direct examination by Mr. Walscheid.

10 Q You testified that you called others to look at what happened to your wife's mouth when she came in at that time? A Yes, sir.

Q Who were the others looked at it? A There was Mr. Davis, there was Mr. Watson, and there was Mr. Hastings.

Q Where is Mr. Hastings now, do you know? A Hastings? He is working on the railroad.

Q Do you know where he is? A No, I do not; I heard he is gone away. So has Mr. Watson.

Q Have you tried to locate them? A Yes, I have tried to locate them, but I could not.

20 Q Where is Mr. Davis? A He will be here in a few minutes.

Q He is under subpoena? A He is under subpoena.

Q You say you first looked in your wife's mouth on June 13th? A Yes.

Q Did you after that look into your wife's mouth again before she went to the dentist's? A Yes, sir; that night when we ate supper.

Q That night when you ate supper? A Yes, sir.

Q At that time was there any sore spots of any kind in her mouth? A No, sir.

30 *Mr. Carpenter.* I object to that as a leading question and as calling for a conclusion that the witness cannot give us.

The Court. Ask him what he found the condition of her mouth to be.

Q What did you find the condition of her mouth to be then? A Normal, just like mine, not swelled; the gums is not swelled or anything.

40 Q You testified about Doctor Ziebell being there on the 19th or the 20th and then you said if it was the 20th then Doctor Quigley came on the 21st. When was Doctor Ziebell to your house first? A That was the night that that thing had happened.

Q The night that this thing happened. And that was the 19th— A Yes.

Michael Ollert, re-direct.

Q Then he was there that night? A Yes, that night.

Q And if it was the 20th then he was there that night? A Yes.

Q He was there for the first time on the night of this accident? A Yes, sir.

Q Who first suggested the New York hospital? A Doctor Ziebell. 10

Q And what did he say in reference to the New York hospital expenses? A He would stand for it all.

Mr. Carpenter. I object to it as not re-direct examination. It has all been gone over on direct.

The Court. I do not think this particular portion has been gone over.

Mr. Walscheid. What was the answer? 20

A (Repeated by the stenographer.) He would stand for it all.

Q When Ziebell left on the night of the occurrence, on the night of June 19th, as we take it to be, if anything, did he say about returning the next morning? A He said—

Mr. Carpenter. I object. That has already been gone over.

The Court. I think it has. I am just allowing in things which I thought were left out.

The Witness. He said that— 30

Mr. Carpenter. I object.

The Court. Well, I do not know whether it has or not. It will be less trouble to have him say it over than to go back into the record. Do you want your objection on the record?

Mr. Carpenter. It is all in the discretion of the Court.

The Court. Yes; and I thought it would be easier.

Q (Repeated by the stenographer.) When Ziebell left on the night of the occurrence, on the night of June 19th, as we take it to be, what, if anything, did he say about returning the next morning? A He said—he said, "I will have my doctor here the first thing in the morning. Keep on swabbing the mouth." 40

The Court. I remember that now, Mr. Walscheid.

Michael Ollert, re-cross.

Q And did he say he would return the next morning? A He would return with his doctor the first thing in the morning.

Q Did Doctor Quigley in any way prescribe for your wife, give her any prescriptions? A No, sir; he said, "Keep on swabbing her gums."

10 Q Doctor Quigley—Doctor Quigley said— A That was the prescription that my wife fetched in from the dentist.

Q Now, did you notice the condition of the hole in the tooth when she came back on the night of the 19th? A Yes.

Q What was the condition of that hole? A That hole was open.

Q It was not plugged up? A No, sir.

Q So that she came back with an open hole in the tooth? A Open hole in the tooth.

20 *Mr. Walscheid.* That is all.

Re-cross examination by Mr. Carpenter.

Q You said on your cross examination to me that you did not look in your wife's mouth before she left and you said just a minute ago that you did. Now, what is the fact about that?

Mr. Walscheid. I object. He did not say that.

The Court. I do not know whether he did or not.

Mr. Carpenter. Well, we will leave it to the record.

30 Q What is the fact about that? Did you or didn't you? A Yes; I looked in her mouth; yes, sir.

Q Why did you look into her mouth on the 19th just before she started out to see the dentist? A Why, because naturally I do it.

Q You had already looked into her mouth before that on the 12th? A And on the 13th when she come home.

Q When you wanted to see what was being done for those six dollars? A Yes.

40 Q And on the 19th you say you looked into her mouth? A Yes, sir.

Q Did you make a careful examination of her mouth? A Yes.

Q All through? A Yes, sir.

Q Under the lip? A That is in the—on the tooth where this here cavity was.

Michael Ollert, re-cross.

Q You looked right on the spot? A I looked right on the spot, yes.

Q And on the gums where you later found the court plaster, did you? A Yes, down through there.

Q You did that? A What?

Q You looked on the very spot where later you found the court plaster? A I looked at the whole mouth this day, yes. 10

Q Where was that, at the supper table? A After supper, yes.

Q As she was going out to the dentist's? A Yes, before she went to the dentist's.

Q Do you mean that? A Yes; I mean that.

Mr. Carpenter. That is all.

Mr. Walscheid. That is all.

The Court. You said a moment or two ago in answer to Mr. Walscheid about an open hole in the tooth; that is the way I am placing it, as near as I can in your language. 20

The Witness. Yes.

The Court. What tooth was that?

The Witness. That was right about there.

The Court. Is that the same tooth that you spoke of some time back as being the one where she suffered—

The Witness. Yes.

The Court. It would give pain? 30

The Witness. A little sharp pain.

By Mr. Walscheid.

Q And when you say about there, you are indicating that in the upper part of the right jaw, a little to the right of your nose? A Yes.

By Mr. Carpenter.

Q How big was that hole on the 19th, the hole in the tooth that you say was not filled up? A About as big as a pin head. 40

The Court. That is when she came back?

The Witness. Yes; it was only a little black hole before that.

Q And it was still small on the 19th? A No; it was larger.

Samuel Adams, direct.

SAMUEL ADAMS, sworn.

Direct examination by Mr. Walscheid.

Q Doctor, where do you live? A 2845 Boulevard.

Q You are a practicing physician? A Yes, sir.

10 Q How long have you practiced your profession? A Twenty years.

Q Where have you practiced? A In Jersey City, all that time.

Q Right in Jersey City. What institution did you graduate from? A New York Homeopathic.

Q Did you ever meet Mrs. Ollert? A Yes, sir.

Q Did you—prior to treating her, prior to your being called in for the treatment that you have reference to, did you know her? A No, sir.

20 Q Or know any of the Ollert family? A No, sir.

Q Did you ever treat anybody there since? A No, sir.

Q Did you know Mrs. Morgan? A Yes, sir.

Q And when you first treated her, came there, was she there? A Yes, sir.

Q Had Mrs. Morgan worked for you? A Why, she had been a nurse in a case of pneumonia that I had treated down in Bergen.

Q Immediately prior to that? A Yes, sir.

30 Q Do you remember when you treated Mrs. Ollert? A June, 1916.

Q And do you remember the date of your first visit? A I think it was the 23rd.

Q 23rd of June, 1916. When you arrived there where did you find—whom did you find with Mrs. Ollert? A Why, Mrs. Morgan and her husband; that is, Mrs. Ollert's husband.

Q You did you know him up to that time? A No, sir.

Q Did you get a history of the case? A Yes, sir.

Q What was the history of the case?

40 *Mr. Carpenter.* I object to it on the ground that it is irrelevant, immaterial and incompetent and hearsay—hearsay because if they attempt to predicate any evidence of negligence on hearsay testimony which this patient gave the Doctor, I—I think it is incompetent for that purpose; and he can say he had a history without telling us what the history was. He can give his diagnosis.

Samuel Adams, direct.

The Court. Mr. Carpenter, isn't it always relevant for the attending physician to give the history of the case as it has come to him, in order for him to substantiate, if he can, his diagnosis?

Mr. Carpenter. Not, however, for the purpose of by the hearsay itself establishing any negligent act. If it is admissible at all it is for the purpose of substantiating the doctor's own testimony and diagnosis; but no other purpose. 10

The Court. All right. I do not assume the evidence is for any other purpose.

Mr. Carpenter. I object to it generally because it is hearsay, irrelevant, incompetent and also immaterial.

The Court. The only purpose of it is to be used as one of the basis of his diagnosis, and not for the purpose of predicating any negligence upon it at all. It never is usable for that purpose. I will overrule the objection. 20

Mr. Carpenter. Exception.

Q (Repeated by the stenographer.) What was the history of the case? A The history of the case was that Mrs. Ollert had gone to a dentist and the dentist had done some dental work three or four days previous to the time I saw her. In looking into her mouth she—or, rather, she said that the dentist had done something to her and in looking into her mouth I found the mucous membrane of the entire mouth discolored; call it black if you want to; but it was very highly discolored. 30

Q And did you find anything else at that time besides the discoloration? A That was all that I noticed excepting the mucous membrane in places a little—possibly what you might call a little shredding.

Q Shredding. And did you then make an examination of her?

A Of her mouth.

Q Of the mouth? A Yes, sir.

Q Did you then make a diagnosis of what she was then suffering from? A Not at that time. 40

Q Not at that time. Did you thereafter treat her? A Yes, sir.

Q And how long did you treat her? A I treated her from that time up until the time of her death, which was about a month later.

Samuel Adams, direct.

Q On the 25th of July? A Well, I will say about a month; I cannot say whether it was the 23rd, 24th or 25th.

Q And did she die under treatment? A She died, as I say, about a month later after the time I began treating her.

Q And what was the cause of her death? A The cause of her death was what is technically called lockjaw, or, in plainer
10 English—or, rather, technically tetanus, and in plain language lockjaw.

Q When did you first notice the lockjaw? A Two or three days after I began treating her; her jaw became set. She would go into convulsions and the jaw would become fixed so that you could not pry it open with a spoon or an instrument of any kind; they were simply locked.

Q And would that jaw thus remain locked for any period of time? A For the time being, and she would simply relax and then the jaw could be opened.

20 Q This lockjaw is a germ disease, isn't it? A Yes, sir.

Q And in your opinion how did the germ of the lockjaw enter this woman's body?

Mr. Carpenter. I object to that on the ground that it is not subject to opinion testimony. The doctor can give in his opinion whether she had lockjaw; he can give in his opinion, perhaps, how long she had it and what the effect might be; but I do not think he can go further than that, and, therefore, I object to this question.

30 *The Court.* Let me hear the question, Mr. Victory.

Q (Repeated by the stenographer.) And in your opinion how did the germ of the lockjaw enter this woman's body? A Well, I cannot tell.

The Court. I will overrule the objection.

Mr. Carpenter. I ask for an exception.

The Court. You may have your exception.

The Witness. That I cannot tell.

40 Q How does the germ usually enter the body? A Well, it can come in through any of the mucous membranes; that is, through breathing, nose, mouth, or through some abraded surface, or an instrument.

Q I am not talking about possibilities. That would be possible. Is that probable? A Well, probable; an instrument

Samuel Adams, direct.

used that might be not thoroughly sterilized; it would very probably happen in that way.

Mr. Carpenter. I move to strike that out on the ground of his supposing the use of an instrument not properly sterilized when there is no evidence of anything of the kind. 10

Mr. Walscheid. I have no objection to that reference to the sterilized instruments being stricken out.

Mr. Carpenter. And the other thing, I object to that, also.

Q You found in this woman's mouth an abraided surface?

A Yes, sir.

Q Did you find any other abraided surface? A Only as I spoke about; or shredded surfaces that might be used—the same term might be applied to them, because the mucous membrane— 20

Q They were in her mouth? A Yes, sir.

Q They were in her mouth. Did you find any abraided surfaces about her any other place? A You mean on her body?

Q On her body, yes. A No, sir.

Q Isn't it a fact that the lockjaw usually enters the system through abraided surfaces? A Yes, sir.

Q Giving the case, then, Doctor, this woman had this abraided surface in her mouth; and that you found no other abraided surface upon her body; where, in your opinion, do you think that the lockjaw entered this woman's body? 30

Mr. Carpenter. I object to that question on the ground that the doctor has not yet stated whether or not he made an examination which would have discovered any other abraided surface.

The Court. What sort of an examination did you make of this woman, as to what parts of her body, whether only a portion, or, if more than one portion of her body, what portions did you examine? 40

The Witness. Naturally, I examined the mouth and nose—we usually make an examination of the chest and usually of the chest to ascertain the facts—

The Court. How thorough an examination did you make?

Samuel Adams, cross.

The Witness. As I say, the mouth, of course, was the point to which most of the examination was directed. The chest, of course, and the heart were examined with a stethoscope, and in doing that, naturally, we would discover whether there were any abrasions on that part of the body. I did not go below the chest for abrasions.

10

Mr. Carpenter. Therefore, I still press the objection.

The Court. Well, does that make necessarily such testimony as he may give in answer to that question irrelevant? It may go to the weight of it, of course. By that question he is asked to express an opinion.

Mr. Carpenter. I submit as a further objection that he has not qualified to give—

The Court. Very well; cross examine him, then.

20 *Cross examination by Mr. Carpenter as to his qualification.*

Q How many cases of lockjaw have you treated before this?

A One or two previously.

Q Have you been in practice—how many years? A Twenty years.

Q Where was the first case that you had? When was the first case that you had? A As near as I can remember, it was ten or twelve years ago.

30 Q When was the second? A The other was probably three or four years previous to that.

Q What type of lockjaw was the first one you treated? A I don't quite get your "type."

Q There are several types of lockjaw, are there not? A I don't think so.

Q When did you first diagnose Mrs. Ollert's case as lockjaw? A Four or five days after I began treating her.

Q Why didn't you diagnose it as lockjaw when you first began treating her? A Because the jaws were not locked.

40 Q What did you diagnose her condition on the first time that you treated her?

Mr. Walscheid. I object to that as not qualifying this witness.

Q Well, how did the lockjaw enter the patient that you first treated some twelve years ago?

Samuel Adams, cross.

Mr. Walscheid. I object to that as immaterial and irrelevant—oh, I withdraw the objection.

A I don't remember.

Q And the second case that you treated, how did the lockjaw enter the patient? A That I do not recall, either.

Q An abraided surface anywhere on the body would give entry to the germ of lockjaw? A Yes, sir. 10

Q A scratch anywhere on the body? A Yes, sir.

The Court. Are the cases of lockjaw common or prevalent or otherwise, Doctor?

The Witness. They are uncommon.

Q Very rare thing, isn't it? A Yes, sir.

Q Is the germ of lockjaw a germ which is common or is it rare? A Well, I would say that it was not common, and yet it is like other germs; when it finds lodgment it is simply waiting for fertile soil to develop. 20

Q How do you know that lockjaw cannot enter the body through food or through breathing without an abraided surface? A I did not get that.

Q (Repeated by the stenographer.) A Well, it can enter the system; it does not necessarily have to go through any abraided surface; it is simply waiting for fertile soil to develop.

Q Well, will it develop if it is breathed into the lungs? A Probably. 30

Q Probably? A Yes.

Q And if one eats food with a germ of lockjaw on it that will probably give one lockjaw, too, wouldn't it? A Yes; it could.

Q So you do not have to have a scratch on the outside of the body in order to get lockjaw into the system, do you? A Not necessarily; you have to have a fertile soil, though, to have it develop. The same thing would apply to what we call T. B. germs—the germs of tuberculous. 40

Q They can enter the body almost anywhere? A They can enter the body, but it is simply waiting for fertile soil to develop.

Q And they may enter any portion of the body? A Possibly.

Samuel Adams, direct.

Mr. Walscheid. I object to any further testimony along this line as not testimony for the purpose of qualification.

The Court. It was only for the purpose of qualifying him.

10 *Mr. Walscheid.* You are satisfied the doctor is qualified?

Mr. Carpenter. No; I am not.

Q (Repeated by the stenographer.) And they may enter any portion of the body? A Possibly.

The Court. I take it, these germs are not visible to the naked eye. How would you ever make it a question of fact?

20 *Mr. Carpenter.* Perhaps I ought to examine him on that.

Mr. Walscheid. I object to any further examination if the Court is satisfied that this witness is qualified.

The Court. Are these germs visible, Doctor, to the naked eye?

The Witness. No, sir; microscopical.

The Court. They are not evident until they have lodged in a fertile soil and commenced to propagate, and then the result of that is visualized?

The Witness. With a microscope; yes.

30 *The Court.* I will overrule the objection.

Direct examination by Mr. Walscheid resumed.

Q (Repeated by the stenographer.) Where, in your opinion, do you think that the lockjaw entered this woman's body? A That I don't know.

Q Doctor, it is this fertile soil which is needed. What is this fertile soil which is needed? A Well, the want or lacking of resistance would be fertile.

40 Q Well, isn't it the abraded surface which furnishes the fertile soil?

Mr. Carpenter. I object to that as a leading question and improper.

The Court. He has spoken of that, I think. The question has also been asked as to whether other places

Samuel Adams, direct.

in the body other than abraided surfaces might be said to afford fertile soil.

Q What was the immediate cause of this woman's death? A Lockjaw.

Q Well, that produced something in turn, didn't it?

10

Mr. Carpenter. That is leading. I think the doctor ought to testify without the counsel prompting him on his own case on direct examination.

A Cerebral congestion was the ultimate cause.

Q Caused by lockjaw? A Primarily.

Q Suppose, now, Doctor, that this woman you treated, this Mrs. Ollert, had on the 19th day of June, 1916, visited a dentist and had there been treated by having an instrument inserted into her mouth; that while thus having this instrument in her mouth she received the injury which you found in her mouth, and that thereafter the lockjaw developed and she died from cerebral congestion resulting from this lockjaw, what, in your opinion, would be the primary cause of the death by reason of lockjaw?

20

Mr. Carpenter. I object to that question on the ground, first, that there is no evidence that can be taken into consideration on the question of negligence which is a basis for this question. To be more specific, that there is no evidence, no lawful evidence, that there was any injury done to this woman in the doctor's office; there is no evidence so far that she was in the doctor's office—in Doctor Ziebell's office—on the 19th day of June, 1916; there is no evidence that any injury was done to her at that time, and there is no evidence of any—I think the word electric current was used—

30

The Court. It was not used in this question.

Mr. Carpenter. No evidence of anything which was done there as a foundation for this question; and, further, I think that all of the facts are not in that question which have been introduced here.

40

The Court. Well, can you tell me any more facts?

Mr. Carpenter. And some of the facts in there are not in evidence here.

Samuel Adams, direct.

The Court. Now, take out first those that are in the question that are not in the evidence; because you are traveling upon the idea that none of the testimony which goes or might go to the question of negligence is relevant testimony.

10 *Mr. Carpenter.* Yes, so far. Your Honor may have admitted that testimony on the theory that the defendant was present when it was said and did not deny it; but just the same, even though it may be admitted for that purpose, for the purpose of charging the defendant with having heard the thing and not denying it, still it is not proved as a fact in this case that the thing this woman said did happen; in fact, happened; therefore, you cannot predicate negligence upon that testimony which your Honor has before you. You may be able to go so far as to
20 say that you can admit that the defendant was charged with that thing and did not deny it, but you cannot admit a self-serving declaration for basing negligence.

The Court. What was the use of having it in at all? It seems to me it would have no use in the case, then.

Mr. Carpenter. I think so.

The Court. I do not agree with you.

Mr. Carpenter. If you will look at 17 Corpus Juris.

30 *The Court.* Oh, I am not going into it any more than I have. I spent a lot of time on it the other day.

Mr. Carpenter. I found some more law; that is all, and I was going to submit it to your Honor.

The Court. Well, let me have it. If it is any different from that which we had the other day I will be glad to see it.

In the meantime, you might take this question and tell me what facts there are in it which should not be in it, and what facts are not in it that are in evidence.

40 Q (Repeated by the stenographer.) Suppose, now, Doctor, that this woman you treated, this Mrs. Ollert, had on the 19th day of June, 1916, visited a dentist and had there been treated by having an instrument inserted into her mouth; that while thus having this instrument in her mouth she received the injury which you found in her mouth, and that thereafter the

Samuel Adams, direct.

lockjaw developed and she died from cerebral congestion resulting from this lockjaw; what in your opinion would be the primary cause of the death by reason of lockjaw?

Mr. Carpenter. The question assumes first that the injury—that the conditions which the doctor saw when he examined the patient was caused by a dental instrument. It does not take into consideration what the woman's condition was before that. It does not assume that she was—

The Court. I think, Mr. Walscheid, that there is nothing in the evidence so far which suggests the use of any instrument.

(Repeated by the stenographer from the direct examination of the plaintiff.) What was then said by Doctor Ziebell? A Doctor Ziebell then looked into my wife's mouth and said, "Mrs. Ollert, now tell me how did this happen?" And then my wife pointed her finger at the man that Doctor Ziebell fetched in and said—my wife pointed her finger at the man that Doctor Ziebell fetched in and said, "He is not a doctor from New York. He is the man that worked on my mouth. He was drilling in my tooth and I got an awful shock and he left the drill in my mouth, walked across the room, shut off the electric current and come back to me. While taking the drill out of my mouth he said, 'My God, child! What have I done? I did not mean to do that. You must have suffered awful.'"

The Court. Now, what is the other objection? The rest of the question is—

Mr. Carpenter. I say there is no evidence that this surface which the doctor has spoken of was the result of anything that happened in the doctor's office or that the defendant was in any wise connected with it.

The Court. All right. You said there were also some things in evidence that were not stated in this question and should be in this question to make it a proper hypothetical question.

Mr. Carpenter. Well, she had been suffering with toothache and pain before this thing happened. That is not in there. That is one.

The Court. What else?

Samuel Adams, direct.

Mr. Carpenter. That is all that I can recall.

The Court. Probably, Mr. Walscheid, there should be incorporated in the question the fact that she had had some difficulty with her teeth or toothache, which has been testified to.

10 *Mr. Walscheid.* That is not part of the injury. I will withdraw that question.

Q Doctor, when you first treated Mrs. Ollert did you find her suffering from any conditions that you could attribute to injury?

Mr. Carpenter. I object to that as a leading question.

Mr. Walscheid. Oh, I appeal to the Court's discretion.

Mr. Carpenter. And it excludes everything else except the one thing of injury.

20 *The Court.* I will overrule the objection.

Mr. Carpenter. Exception.

Q (Repeated by the stenographer.) A The condition which I found could have been due to injury.

Q Did you attribute at that time those conditions to injury?

Mr. Carpenter. I object to that as calling for a conclusion, and it excludes every other condition.

The Court. I will overrule the objection.

30 *Mr. Carpenter.* Exception.

A Only from the history of the case.

Q Did you find any shock? A Any condition of shock?

Mr. Carpenter. I object to that likewise as leading. The doctor ought to be able to tell what he found without leading by counsel.

The Court. I will overrule it.

Mr. Carpenter. Exception.

The Court. You may have it. Answer the question.

40 A I found her nervous and exhausted. Whether you would call it as a result of shock or something else, that, of course, would be a question; but that was the condition.

Q You know what I mean by shock, don't you, medically? A Yes, sir.

Samuel Adams, direct.

Q Was there any evidence of shock in that patient when you first examined her? A Not to my way of thinking, shock. You would have to see a patient shortly after the shock happened to get the symptoms.

Q Was there any evidence of the after effects of shock? A As I say, the condition as found with the history of her case. 10

Q Indicated what? A Indicated something had happened.

Q Something which had shocked her or not?

Mr. Carpenter. I object to that as leading.

Mr. Walscheid. I am trying to find out; I am trying to draw it out of this witness. I am very frank to say I am having a great deal of trouble with this witness.

Mr. Carpenter. You ought not to.

Mr. Walscheid. I ought not to, but I am. 20

Q (Repeated by the stenographer.) Something which had shocked her or not? 20

Mr. Carpenter. I object to that as leading.

The Court. Objection overruled.

Mr. Carpenter. Exception.

A I think my answer before answers that.

The Court. Well, what did you mean when you answered it before, something had happened—what did you mean? That means everything to us and nothing in particular. 30

The Witness. Well, in taking the case I think the Court will quite agree that you not only take to conditions that you find and see, but in reaching conclusions you have got to take what you hear, as regards what had happened previous to the time you saw the patient.

The Court. That is, the history that you got?

The Witness. Yes, sir. 40

Q Has anybody spoken to you about this case between the last trial and this? A No, sir.

Q Anybody telephoned to you about it, about your testimony?

A No, sir.

Q Nobody at all? A No, sir.

Samuel Adams, direct.

Q Do you remember what you certified the cause of death to be in this case?

10 *Mr. Carpenter.* I object to that as immaterial, what he certified the cause of death to be. He has told here exactly what the cause of death was. What difference does it make what he certified?

Mr. Walscheid. May I not refresh this witness' memory?

The Court. If it can be, yes.

Q Do you remember? A Yes; I do remember.

Q What did you certify as the cause of death? A Cerebral congestion.

20 *Mr. Carpenter.* I object—well, he said cerebral congestion; I do not care about that.

Q Is that all?

Mr. Carpenter. I object to it as immaterial what he certified. The question is as to a fact. What did she die of? He might have certified that she died of old age. It would have been untrue, and we do not care about it.

Q Did you not also certify—

Mr. Carpenter. I object.

30 *Mr. Walscheid.* One moment.

Q For the purpose of refreshing your memory, did you not also certify as a cause of death shock?

Mr. Carpenter. I object to that as improper and immaterial.

The Court. Overruled.

Mr. Carpenter. Exception.

40 A That feature I cannot recall now—if you have a certified copy there and it is there—

Q Will you look at it for the purpose of refreshing your memory? (Handing paper to witness.)

Q Have you looked at it? A (No answer.)

Q Do you now remember what you certified as the cause of death?

Samuel Adams, direct.

Mr. Carpenter. I object to it on the ground it is immaterial.

The Court. Does the fact that you have examined this paper that you have had presented to you, refresh your recollection as to the cause of death?

The Witness. So long as—

10

The Court. Does that refresh your recollection as to the cause of the death of Mrs. Ollert?

The Witness. No, sir.

The Court. It does not.

Q Did Mrs. Ollert die by reason of shock received during an electric storm while having dental work done?

Mr. Carpenter. I object to that question as leading. It is his own witness. He has gone into it.

20

The Court. Yes. I am going to sustain the objection there because that incorporates only certain alleged facts, not all.

Q Was there any evidence of shock in this patient when you first saw her? A Well, as I answered that question before, her highly excitable and nervous condition probably might have been the result of shock.

Q Probably was the result of shock. And shock received by the injuries in her mouth.

30

Mr. Carpenter. I object to that as calling for a conclusion. The doctor can state. It is a leading question. It excludes everything else but that injury. I think the facts in this case as given in cross examination should be in such a question as this on direct examination.

The Court. I do not think the witness could testify to that without having the facts before him.

Mr. Walscheid. Well, he has the history and he has the appearance of the mouth.

The Court. If he will say that he can tell from the mere appearance of the mouth—

40

Mr. Walscheid. And the history, both, he is entitled to each; he is making the diagnosis.

The Court. Do you insist on it?

Samuel Adams, direct.

Mr. Walscheid. I think so.

The Court. I will overrule the objection.

Mr. Carpenter. Exception.

Mr. Walscheid. I will withdraw that particular question.

10

Q To what did you attribute the shock or the evidence of shock which you found? A Well, the history of the case and then during the lucid moments of the patient her saying, "He did something to me."

Mr. Carpenter. Just a minute. I object to what—

Q Well, didn't the condition of her mouth enter into it? A What was that question?

20 Q (Repeated by the stenographer.) A Certainly did. I wasn't there in the beginning to see what happened.

Q I know you weren't. You found a condition of her mouth, didn't you? A Yes, sir.

Q And what, in your opinion, caused that condition in her mouth? A The only way I could answer that question is by getting back to the same thing again, the history of the case as I got it.

Q Now, from an examination of the surface? A That I don't know.

30 Q Didn't you testify what that was at the last trial?

Mr. Carpenter. I object to that.

A I don't think so.

Q What?

Mr. Carpenter. This is an attempt to impeach his own witness. I suppose really—I do not know whether that lies in my mouth to say that or not, but I do object to the leading question. The witness said at the last trial he could not tell. I have his testimony to prove it.

40

Mr. Walscheid. Will you let me put in his testimony at the last trial if it contrary to what you say?

Mr. Carpenter. Of course I won't. But I will tell you what he said.

Mr. Walscheid. We will find in a minute.

Samuel Adams, direct.

Q What was the cause or the causes of the discoloration which you found in this woman's mouth?

Mr. Carpenter. If he can tell.

A Why, it could have come from a number of causes.

Q What are they?

10

Mr. Carpenter. I object to that, what the number of causes is. It seems to be more like a fishing expedition.

The Court. Well, it might be; but he is a qualified witness and he can state when there be two or more causes for a condition, what those different causes may be.

Q (Repeated by the stenographer.) What are they? A From the history of the case—

Q No, what could this discoloration have come from independent of the history. Now, what could that condition have come from? A From the use of strong solutions in the mouth.

20

Q What else? A Electric shock would do it.

Q Electric shock would do it. And how would electric shock do it? A Why, it would burn.

Q By burning the surface? A By burning.

Q Is there any other cause that would produce it? A Yes; a strong solution of carbolic acid would do it; a solution of lythol would do it.

Q Anything else? A Those are the ones I happen to think of.

Q Those are the only ones? A No; I don't say those are the only ones; those are the ones I happen to think of just now.

30

Q And that covers it particularly? A I should say so.

Mr. Carpenter. I object to that as an improper question. I move to strike out the answer.

The Court. Strike it out for the moment. Are there any other causes? You can take as long as you like. Are there any other causes that you can recall that would cause that condition than those you mentioned?

The Witness. Not just now.

40

Q Now, then, supposing that this woman on the 19th day of June, 1916, had visited and had there been treated by having an instrument inserted in her mouth, and that while this instrument was in her mouth the injury she found in her mouth was oc-

Samuel Adams, cross.

caused, and that thereafter tetanus developed and that she died from cerebral congestion resulting from this tetanus; what in your opinion would be the probable primal cause of that death?

10 *Mr. Carpenter.* I object to it on the ground that the question assumes to be a thing which is not proved as a fact—that a dental instrument was put in this woman's mouth; that she visited a dentist; that she there got a shock; that she there got an injury to her mouth; that this was the same injury which the doctor found when he examined the patient; and it also excludes the woman's condition at the time she is alleged to have visited the dentist; it excludes the fact that she had been suffering from toothache before that, and had pain in her teeth before that, the trouble with her teeth before that; and I think on all of these grounds the question is improper and objectionable.

20 *The Court.* I will overrule the objection. Take your exception.

Mr. Carpenter. Exception.

Q (Repeated by the stenographer.) A Injury to the mouth.

Q What? A Injury to the mouth.

Q Injury to the mouth.

Mr. Walscheid. Cross examine.

30 *Cross examination* by Mr. Carpenter.

Q You said on the last trial in answer to that precise question "Probable injuries." Didn't you? A I don't remember that.

Q Here is the precise question on page 50 of the record.

Mr. Walscheid. Now, I object to that. I ask that you read the question and answer to the witness that we may have the benefit of it, too.

40 Q Did you not answer to that same question—

Mr. Walscheid. Now, one moment. May I not have the benefit of what is going on?

The Court. The proper way, Mr. Carpenter, is to read the question that you say was put to him and read what

Samuel Adams, cross.

you say was his answer, and ask him whether he did or did not so testify.

Q Were you asked this question on the last trial: "Given the case, now, Doctor, that this woman on the evening of the 19th of June, 1916, visited a dental office, got into a dental chair; that the dentist or the man having charge of the dental instruments, inserted a dental instrument into her mouth, a dental drill into her mouth; and that while he had this dental drill into her mouth she received a shock; that he, leaving the drill into her mouth, run to the wall to turn off the electric current; that she returned home shortly after this occurred and then for the first time exhibits a mouth which is highly discolored and from which the mucous membrane is hanging in shreds, and you thereafter treated it, and she suffers with tetanus and dies of cerebral congestion; can you state what the probable original cause of that condition was?" And did you not answer "Probably injuries?" A I don't know how I answered it. I presume if that is a transcript of the testimony that was the answer. 10 20

Mr. Walscheid. I will admit that was the answer if you want that. The balance of it, too.

Q Do you remember being asked this question following that "Received when and where?" and did you not answer: "That I cannot answer"? A I don't remember it. If it is there I presume I said it. 30

Mr. Carpenter. You concede that is there?

Mr. Walscheid. Yes. Read the next.

Q Now, Doctor—

Mr. Walscheid. You do not read the next?

Mr. Carpenter. Well, you have a lot to say so far. I am going to run my end of this cross examination, if you please.

Q Doctor, what is the difference between tetanus and trismus? A I think they are two names for the same thing. 40

Q What is it? A I think they are two names for the same thing.

Q You think they are two names for the same thing. Is trismus a germ disease? A I think so.

Samuel Adams, cross.

Q What is that? A I think so.

Q Lockjaw is tetanus undoubtedly, isn't it? A Yes, sir.

Q Is it not a fact that trismus is a kind of lockjaw which is not caused by a germ? A Well, that I am not prepared to say.

10 Q Then it may be an entirely different thing, trismus from tetanus? A It would be, probably.

Q You say this woman did not have trismus on the first time that you saw her? A I did not say that.

Q Well, would you say that she did not have it? A No; I don't think that I would.

Q What is that? A I don't think I would.

Q What was Mrs. Ollert's temperature when you first called on her? A That I do not recall.

Q Did you take it? A Yes; that is four years ago.

20 Q Was it one hundred and two? A It may have been; it may not have been.

Q Did you learn that Doctor Quigley had prescribed calomel and salt? A I don't know what he prescribed. I knew a doctor had been there. Whether it was Doctor Quigley or not, I did not know.

Q Well, did you learn that she had been given calomel and salt? A I do not recall that.

Q Do you know whether she had been given calomel? A No, I do not. In four years you do not remember the details of the case.

30 Q I grant you that. You do not remember the details of the case. A You do not remember the details of a case that you tried four years ago, that I will venture to say.

Q Some I do. A Well, in a general way.

Q Did you learn how long before you were there it had been since Mrs. Ollert's bowels had moved? A I cannot recall that, either.

40 Q Well, did you learn what her physical condition had been before you were there, other than this history that you have spoken about, history of injury? A Well, in a general way we usually go into what has happened within two or three days; whether the bowels had moved, whether there has been this thing, that thing, or the other thing happened.

Q You said on this trial that you recall some shredded tissue in the mouth, didn't you? Now, do you remember being asked this question on the last trial: "Did you find it shred-

Samuel Adams, cross.

ded?" and did you answer: "I cannot recall at this time; it is three and a half years ago." That was at the last trial of this case held in this room on the 30th of October, 1919. A I presume if that is the testimony, I said it.

Q Well, which is better now, your recollection of today or your recollection of last October about this thing three and a half or four years ago? A Well, that would be a question. Probably in trying to figure out some details between then and now—

Q You told Mr. Walscheid that you had not talked with anybody about this thing. A I did not.

Q Last Thursday and Wednesday you were talking with Mr. Walscheid in the court room. A Not about the case.

Q But you were talking to him? A Not about the case.

Q I didn't ask you that. You were talking to him, weren't you? A Not about the case.

Q Will you tell us whether you were talking to him or not? A I was, but not about the case.

Q All right. I did not ask you about that, did I? A Well, I simply want to set myself straight; that is all.

The Court. Just answer the question, Doctor. Were you talking with him?

The Witness. Yes.

Q Now, you said last October that you could not remember whether this woman's mouth was shredded or not. Now, what has caused you since that time to recollect that it was shredded?

A Well, as I was trying to remember some of the details between that time and now.

Q And what part of the mouth do you now recall was shredded—of your recollection, not what somebody told you? I would say it was general; no particular part.

Q General over her mouth? A Yes, sir.

Q It was a general condition of the mouth, wasn't it? A Yes, sir.

Q And you say that her mouth was discolored? A Yes, sir.

Q Do you know what an ulcerative stomatitis is? A Yes.

Q What is it? A Why, it is condition of the stomach showing itself in the mouth, in which they get patches.

Q Patches of what? A Well, patches on the mucous membrane.

Samuel Adams, cross.

Q What kind of patches? A Ordinary patches.

Q Well, ordinary patches of the kind you have on your breeches? A Well, you don't get that kind of patches in your mouth.

10 Q What kind do you mean? I would like to have you tell us? A Well, I am telling you the best I can; the patches which you get in ulcerative stomatitis are due to a condition of the stomach manifesting itself in the mouth.

Q Just tell us how these patches in the mouth looked, will you? A Well, you would not be able to touch them in a mouth of this kind.

Q Well, just take a mouth where there is a case of ulcerative stomatitis. What do the patches look like that are in the mouth? A They are round surfaces with a little whitened area over them, and the surrounding tissues are pink.

20 Q What is the cause of ulcerative stomatitis?

Mr. Walscheid. I object to that.

A Usually some disorder of the stomach.

Mr. Walscheid. I object to that as not proper cross examination. There is no evidence of it in this case.

The Court. No, but he may attempting to draw it. I will overrule the objection.

Q That is a disease, isn't it? A Yes.

30 Q Now, you said when you first saw this woman you couldn't tell what was the matter with her, didn't you? A I didn't make any diagnosis the first day.

Q Did you see her the following day? A Yes, sir.

Q And every day thereafter? A Yes, sir.

Q Did you discover anything on the outside of her face that indicated that she was not well? A No.

Q And the outside of her face was all right? A As far as I can remember now; yes, sir.

40 Q How about the outside of her body? Did you discover anything about that? Were you told that within three months she had given birth to a child? A I don't recall that.

Q You said the cause of her death was cerebral congestion? A (No audible answer.)

Q Did you learn that this woman had prior to your visit had convulsions? A I don't remember that, either.

Samuel Adams, cross.

Q Were you told that she had had epilepsy? A I think not.

Q That is not, as far as you can now recall part of the history of the case? A I don't remember that. If I was told it I don't remember it.

Q What was there about the history of the case that you got—what was there in the history that you got antedating the 13th of June that helped you in your diagnosis? A Nothing that I recall. 10

Q Did you ask about anything before the 13th of June as to her prior condition? A I do not remember whether I did or not now.

Q You were simply told that she went to a dentist's office and everything that you have—and your diagnosis and your testimony here are based entirely on that, aren't they? A Yes.

Q What is that? A Yes. 20

Q Who told you these that had happened at the dentists? A Mrs. Ollert and her husband. She told part of them and her husband told part of them, and Mrs. Morgan, the nurse, told part of them.

Q Did you discover any court plaster on her gums when you saw her? A I don't remember now; I couldn't answer that question.

Q The condition of the mouth which you discovered was a general condition? A Yes.

Q You cannot recall whether one part of the mouth was any worse than the other, can you? A No; I would say it was general. 30

Q Did you notice any part of her mouth where there was a hole that you could distinguish from any other part of her mouth? A No; I did not.

Q Did you notice the condition of her teeth? A I did not examine the teeth very closely. The mouth was the point. I do not remember now whether I did or not examine the teeth closely.

Q Isn't it a fact that her mouth was dirty? I speak now as of a mouth that is kept clean and a mouth that is not kept clean? A Well, it was discolored. Whether you would call it dirty or not is a question. 40

Q Weren't the teeth dirty, looked as if they had not been cared for? A I cannot answer that question.

Samuel Adams, cross.

Q You do not recall. Did you notice if she had a bad breath?

A No; I didn't notice that particularly, either.

Q You do not recall it?

Mr. Walscheid. Did not notice it, he says.

10 Q Did you notice it or are you unable to recall? Which is it? A I don't think I noticed it; and I might say I could not recall it, possibly, if I did.

Q Now, what was the character of this discoloration that you found in her mouth? A Oh, I would call it dark or black; that is, the mucous membrane.

Q Well, it was dark; it was not black, was it? A Well, it might be between dark and black.

20 Q Dark red blood, you mean, under the surface of the mucous membrane; is that what you mean? A No; the mucous membrane discolored. I say it was pretty dark, and you might call it blood.

Q I see. And you called Doctor Dickinson in in consultation, didn't you, afterwards? A I did ask the consultation of the family.

Q Yes. A I think he came in through Reverend Cowan.

Q Well, I do not care how he came; but you did call him in?

A Yes.

Q And he came down and examined the patient, didn't he?

A Yes, sir.

30 Q That was to assist in the diagnosis, wasn't it? A Why, the diagnosis, I think, had been made.

Q But it was to corroborate the diagnosis or to assure you of the correctness of it, wasn't it? A Yes.

Q And you had another doctor in there to do the same thing, didn't you? A Yes.

Q And on what occasion? A Yes, sir.

40 Q Who was the first one you called in? A Why, I don't just recall the order in which they came. It seems to me Doctor Lemmerz—I called in Doctor Lemmerz first in consultation; following that I had Doctor Dickinson, and then Professor Wilson of New York. Now, just the order in which they came I would not venture to say at this moment. I think Doctor Wilson was the last man, the other two having come in before; and as nearly as I can remember Doctor Lemmerz was

Samuel Adams, cross.

first and Doctor Dickinson second, and Professor Wilson the last.

Q Do you remember what Mrs. Ollert's general condition was outside of this condition of the mouth—what the general condition was at the time you first saw her—general condition of her health? A As I recall her general condition now I would say it was about the average for a woman of her age. 10

Q You cannot give us what her temperature was? A I don't remember.

Q What was her pulse? A I don't remember that, either.

Q Her respiration? A I don't remember that. They naturally all would be high.

Q She had some disease or other, didn't she? A She certainly had.

Q And you from the start you was unable to tell just what it was? A I did not make a positive diagnosis for two or three days. 20

Q You gave the cause of death cerebral congestion? A Yes.

Q And you said before that time, before the time of her death she had lockjaw? A Yes.

Q You did not give the cause of death as lockjaw at all, did you, at any time? A Not on the blank, I think.

Q You mean when you reported it to the state you did not give anything—you did not give tetanus or lockjaw as the cause of death, did you? A Well, you are supposed to give primary and secondary cause of death. 30

Q Did you mention tetanus at all as either the primary or secondary cause of death? A I think not, according to this blank.

Q What is that? A I think not according to this blank.

Q Well, what you know of your own knowledge is—as far as your own knowledge teaches you anything about this case—that she had tetanus, that Mrs. Ollert had tetanus and that she died of cerebral congestion; those are the facts that you know, aren't they? A Yes, sir. 40

Q And whatever else you put in the certificate was what somebody told you, wasn't it? A I suppose you might put it that way.

Q That is a fact, isn't it? A At the same time it is the history of the case.

Theodore H. Lemmerz, direct—cross.

Q But it is purely history? Whatever else you put on there aside from those two things was history or what somebody told you? A Yes.

Mr. Carpenter. He says "Yes." That is all.

10 *By Mr. Walscheid.*

Q History supported by the condition of the mouth? A Yes.

(Witness excused.)

THEODORE H. LEMMERZ, sworn.

Direct examination by Mr. Walscheid.

20 Q Doctor, where do you live? A 141 Magnolia avenue, Jersey City.

Q You are a practicing physician? A Yes.

Q How long have you been practicing? A About twenty-five years.

Q Where did you graduate? A In New York; Homeopathic Medical College and Hospital.

Q Do you know Doctor Adams? A I do.

Q Did you ever see Mrs. Ollert in consultation with him? A I did.

Q Do you remember when it was? A Sometime in the summer time, some years ago.

30 Q Sometime when? A In the summer time.

Q Was she ill at that time? A She was.

Q And did you make a diagnosis of the case? A I did.

Q What was she suffering with at the time? A Tetanus.

Q Tetanus? A Or lockjaw or trismus; they are all synonymous.

Q You only saw her once? A That is all; once.

Mr. Walscheid. That is all.

40 *Cross examination by Mr. Carpenter.*

Q What was the date of that examination? A I could not tell you.

Mr. Carpenter. That is all.

Adele Coursen, direct.

DEFENDANT'S MOTION FOR A NON-SUIT.

Mr. Carpenter. I move now for a non-suit on the grounds:

1. That the allegations of the complaint have not been proven. 10

2. On the ground that there is no evidence whatsoever that the defendant was guilty of negligence.

3. There is no evidence of any negligent act committed by the defendant or any act committed by anybody else for which the defendant is responsible in law.

4. On the ground that there is no evidence that the death of this Mrs. Ollert was caused by any negligent act or default or omission on the part of the defendant within the language of the death act. 20

5. There is no proof of anything happening which speaks of negligence.

The Court. (After discussion.) I will decline to non-suit for any of the reasons urged.

Mr. Carpenter. I ask an exception.

The Court. You may have it.

DEFENDANT'S CASE. 30

ADELE COURSEN, sworn.

Direct examination by Mr. Carpenter.

Q Where do you live? A 762 Park avenue, Weehawken.

Q Are you in the employ of Doctor Ziebell, the defendant?

A Yes.

Q How long have you been in his employ? A Five years.

Q Were you in his employ on the 13th of June and the 19th of June, 1916? A Yes, sir.

Q And in what capacity were you working for him? What was your job? A Well, I was his secretary and his nurse also. 40

Q Secretary and nurse? A Yes, sir.

Q Do you remember—are you in the same capacity up to this time? A Yes, sir.

Q Do you remember Mrs. Cornelia Ollert? A Yes, sir.

Adele Coursen, direct.

Q When did you first see her? A 13th of June, when she came to Doctor Ziebell.

Q I wish you would talk up louder, so the last gentleman over there may hear you, and so that the others can hear you.

A That was the 13th of June, 1916.

10 Q About what time of day did she come in? A I think it was around half-past two or three o'clock in the afternoon.

Q Did she get in the doctor's chair that afternoon or at any other time? A She was in the chair that afternoon.

Q Was your attention called to her by the doctor that day? A Yes, sir.

Q Now, just tell the jury what transpired the first afternoon she was there? A Well, she came in the office and doctor called me over to the chair. She had this peculiar condition of sloughness on the gum, right side—

20

The Court. Do the jurors hear this? I cannot hear you, Madam.

* *The Witness.* It was a dark green slough on the upper right side of the jaw.

Q A dark green slough? A Yes, sir.

Q On the— A Upper jaw.

Q Under the lip? A On the gum.

Q On the gum? A Yes, sir.

30

Q And under the lip? A Under the lip.

Q That was the first day she came? A Yes, sir.

Q Now, what did you notice about the outside of her face? A Well, she had a drooping of the eye and she had a very tired look.

Q And what else did you notice? A Well, I don't remember anything else in particular.

Q The doctor called you over? A He called me over.

Q He pointed out that condition, did he? A Exactly.

40 Q Do you know what the doctor did on that occasion, what you saw? A I think he inserted a phenol treatment.

Mr. Walscheid. Who did?

The Witness. Doctor Lauckner.

Q Doctor Lauckner. Was Doctor Ziebell there that first time? A He was there.

Adele Coursen, direct.

Q What was the matter with Doctor Ziebell that time? A He had a sprained wrist, or broken arm.

Q And his arm was in a sling at that time, wasn't it? A Yes, sir.

Q Doctor Lauckner was assisting? A Yes, sir.

Mr. Walscheid. I object to "Doctor" Lauckner. I object to the term "Doctor" Lauckner. There is no evidence at this time that this man was a doctor. 10

Q Who was this Mr. Lauckner? A He was assisting Doctor Ziebell at the time he had the broken arm.

Q Who sent him over to you?

Mr. Walscheid. If you know.

A I don't know.

Q How long had he been there? A Well, not long; I cannot just say; I don't know. 20

Q And you say phenol compound was inserted in the tooth that day, and what was done? A Just the phenol compound.

Q Now, did you book an appointment for Mrs. Ollert after that? A Yes, sir.

Q When did she come back again? A I think it was two days later, on a Thursday.

Q I see. And what time of day did she come in, about? A In the afternoon; I don't just recall the hour.

Q It was the 15th of June? A Yes; I believe so. 30

Q And what was done on that occasion, if you know? A Well, I think that he just excavated the cavity and inserted a new treatment.

Q Do you know what instrument was used in excavating a cavity? A Just a small hand instrument, and excavator.

Q That was on the 15th? A Her second visit.

Q Did she come again after that? A Yes; she was there again.

Q I wish you would talk louder. I can hear you, but I doubt if the gentleman here can. Talk so I can hear you well. When did she come back again? A That was on the 19th. 40

Q About what time? A The afternoon.

Q What time in the afternoon? A I judge between two and three o'clock.

Q Who treated her then? A Lauckner—Mr. Lauckner.

Adele Coursen, direct.

Mr. Walscheid. Mr. Lauckner?

The Witness. Yes.

Q And was Doctor Ziebell there in the afternoon? A In the afternoon; yes.

10 Q Did you notice—

Mr. Walscheid. I object to the form of the question.

Mr. Carpenter. I have not asked it yet.

Mr. Walscheid. You have asked enough.

Q Did you notice what her appearance was on the afternoon of the 19th? A She always had that tired appearance when she came in.

Q And did you notice her eye? A It was drooped.

20 Q What? A It was a drooping of the eye and a tired condition.

Q What about the inside of her mouth? Did you see that on the 19th? A Well, I don't just remember whether I did. I don't think I did; not in the afternoon, I didn't.

Q Now, then, did she come back again that day? A In the evening.

Q What time in the evening did she come back? A About seven thirty.

Q And who was in the office when she came in? A Mr. Lauckner and myself and—that was all in the office.

30 Q Was the office boy there? A Well, he was in the laboratory at that time when she came in.

Q Were you in the room when any work was done that evening on Mrs. Ollert? A I was there all the while.

Q Did Mrs. Ollert get in the dental chair? A Yes.

Q What did Doctor Lauckner do? Just tell the jury in your own words. A He did exactly the same as he did before.

40 Q What was that? A Excavated the cavity. She didn't have any appointment that evening, but she still had a toothache, and she came back, and the doctor took the treatment out, excavated the cavity a little more and inserted a new treatment, and she went home.

Q How about the excavated cavity? How did he excavate a little more? What did he use? A A little hand excavator.

Q Did he at any time use any electrically-driven instrument? A No, sir; positively not.

Adele Coursen, direct.

Q And you were there while she was there? A The whole evening.

Q Did she at that time complain about anything that was done? A No, sir.

Q Was anything done to her to make a complaint? A No, sir.

10

Mr. Walscheid. I object to that as calling for a conclusion and ask that it be stricken out.

Mr. Carpenter. Well, that is probably so, and I do not object to it being stricken out. I will consent to it.

Q What treatment was put in the tooth, did you see? A The phenol compound.

Q How was it put in? A It was a small pellet of cotton sealed in with gutta percha.

Q Phenol compound put on top? A Yes, sir.

20

Q Put in the cavity? A Yes, sir.

Q And sealed up with gutta percha? A Yes, sir.

Q Was anything done to her gums that evening? A No, sir; nothing.

Q And you were there the whole time? A I was there the whole evening.

Q Can you state whether at any time that electrically-driven instrument was being used on Mrs. Ollert? A Not to my knowledge, it was not.

Q What time did Mrs. Ollert leave your office? A Well, I think it was a quarter to eight; ten minutes to eight. She was there only a short time.

30

Q I see. Was Doctor Ziebell there while she was there that evening? A Not while she was in the office; no, sir; not while she was there in the evening; no, sir.

Q When did he come in, do you remember? A It was a short time after; a few minutes; it was not long.

Q Well, can you say whether or not—

Mr. Carpenter. Just strike that out.

40

Q What is done with the instruments in Doctor Ziebell's office and what was done with them at the time of the 19th of June, 1916, after they were used upon one patient and before they were used on another? A They were always boiled in washing soda and dipped in a lysol solution.

Adele Coursen, cross.

Q Now, were the instruments that were used on Mrs. Ollert in Doctor Ziebell's office on the 13th, 15th and 19th of June treated that way before they were used on her? A Well, all instruments, as soon as they are taken from the table, they are sterilized before they are used again.

10 Q And they were at that time? A They were at that time.

Q Did Mrs. Ollert at any time during the evening of June 19, 1916, while she was in your office complain about being hurt or anything of that kind? A No, sir.

The Court. You are referring to the last time she was there?

Mr. Carpenter. Well, yes, sir; last time she was there.

Q Now, Mrs. Ollert—when Mrs. Ollert left on the 19th of June, did she ask for or did you give her another appointment?

20 A I think I gave her an appointment on the next day.

Q For the next day? A When she was in on Monday I gave it to her for a Thursday; but she came in Monday evening and then I gave her another appointment for the next day.

Q Did she come the next day? A No.

Q Did you speak to her about how she felt as she was leaving, or anything like that? A I don't remember.

Q You don't remember? A I noticed she went out.

Mr. Carpenter. Cross examine.

30 *Cross examination by Mr. Walscheid.*

Q Were you near her when she went out? A Well, my desk was in the same room.

Q And you were behind your desk, weren't you? A I was there at my desk and she had to come to my desk to get an appointment.

Q Well, she got her appointment when she came in? A Oh, 40 no, when she goes out.

Q Did you make a record of these appointments? A Sure.

40 Q Where is the record of this appointment? A I think Doctor Ziebell has it.

Q Have you one? A No, sir.

Q You have not one? A Well, Doctor Ziebell has it.

Q You say you have not one? A I haven't any.

Adele Coursen, cross.

Mr. Carpenter. We all have to hear what that is.

Mr. Walscheid. She said she has not one.

The Court. She means herself, I take it.

The Witness. Personally, myself, I haven't any record. Doctor Ziebell keeps it.

Q But did you make an appointment for her the next day? 10

A Yes, sir.

Q And wrote it down, you say? A Yes, sir.

Q At that time? A Yes, sir; exactly.

Q When Mrs. Ollert first came to you on the 13th you saw her that day, didn't you? A Yes, sir.

Q And Doctor Ziebell then examined her? A Yes.

Q And turned her over to Mr. Lauckner for treatment, didn't he? A Yes, sir.

Q Did he show Mr. Lauckner how to treat her? A Well, 20 he advised Mr. Lauckner what to do.

Q Stood right alongside of him— A Exactly.

Q —and said do so and so? A Yes, sir.

Q And then Doctor Lauckner did so and so and Doctor Ziebell was there watching the whole treatment? A Yes, sir.

Q So that the first treatment was made by Doctor Lauckner under Doctor Ziebell's supervision and direction, wasn't it? A Yes, sir.

Q And were you also watching? A I was not watching every move. I was there. 30

Q But you were interested in watching the treatment that Doctor Lauckner was giving, weren't you? A Yes; because Doctor Ziebell had called me over and called my attention to it.

Q You were watching it because Doctor Lauckner was a new man in the office? A Naturally.

Q And it was the first job that Lauckner had done in the office, wasn't it? A Well, I don't remember—in fact, I know it was not, because he had been there.

Q Well, on the other job had Ziebell also stood alongside of him and showed him what to do? A Doctor Ziebell was always 40 in the office.

Q Who was? A Doctor Ziebell.

Q Was always there? A Exactly.

Q Whenever Lauckner worked Ziebell was always there except on the night of the 19th? A And he was not only out but a few minutes.

Adele Coursen, cross.

Q He was out then? A He was out then.

Q And that time Lauckner was operating independently, wasn't he? A Yes, sir.

Q And that is the only occasion that he did operate independently? A Only in between meal times.

10 Q Well, he didn't operate independently then, did he? He waited until the doctor came back, didn't he? A I don't remember all the details.

Q You know that Lauckner at that time was a dental student, don't you? A Well, if he was I don't recall it.

Q You do not recall that. Now, when Mrs. Ollert came to the doctor's office on the 13th you saw her tooth that needed treatment, didn't you? A Yes, sir.

Q What tooth was it? A It was—there were two.

Q Two adjoining teeth? A Yes, sir.

20 Q With a hole or cavity? A Cavity.

Q One cavity, or one cavity running into two teeth, was it? A There was a cavity in two different teeth.

Q Adjoining teeth? A Yes, sir.

Q How big were these cavities? A Oh, they were small cavities.

Q Little pin head cavities? A I think there were larger than a pin head.

Q When they were excavated they were larger? A Yes, sir.

Q They were superficial cavities, weren't they? A Yes, sir.

30 Q Cavities which did not go to the root of the teeth? A There isn't any cavities that goes to the root of the teeth.

Q Am I wrong about that? A Yes.

Q You see, I do not know as much about dentistry as you do. Cavities which merely went to the dentine? A Exactly.

Q That is the matter immediately behind the glossy surface, is it? A Yes.

Q And then behind that comes the pulp; is that right? What do you call the matter in the tooth behind the dentine? A Well, I don't know that myself.

40 Q But you know that there is a third matter in there, don't you? A Yes, sir.

Q And these holes merely went to this second matter called the dentine? A As far as I know.

Q Well, you looked at them. A But I could not tell by looking at them.

Adele Coursen, cross.

Q But weren't you called over to look at them? A Yes; I was called over more to look at the condition of the gums, and I noticed the cavities; but I didn't examine them.

Q Now, you also know the ordinary process of filling the tooth? A The treatment?

Q The treatment that you go through? A Yes. 10

Q First you excavate the cavity, don't you? A Exactly.

Q Then you put in a phenol compound, don't you? A Yes.

Q And you leave that in awhile and then you take out the phenol compound and you fill it; those are the three steps of a filling; is that right? A Well, Mrs. Ollert didn't have her teeth filled.

Q I am not talking about Mrs. Ollert. I am talking about the general course. A Well, it all depends upon the condition of the tooth.

Q Well, you take the teeth—you take a tooth with a simple superficial cavity; isn't that all that is done? A. It sometimes develops— 20

Q I am not talking about developments of ulcers. A Then you are speaking of Mrs. Ollert's condition—

Q No, I am not.

Mr. Carpenter. I think that is more on an examination of a dentist.

The Court. Of course, I am assuming the witness will say she does not know or has not any knowledge in that direction if she hasn't. 30

Q How long have you been with Doctor Ziebell? A Five years.

Q Always in the dental office? A Always in a dental office.

Q And you have seen work carried on there time and time again? A Yes, sir.

Q And you know that the ordinary superficial cavity is treated first by excavation; then by an insertion of a phenol solution, and then by filling; isn't that right? A Yes.

Q That is all there is to it; isn't that right? A That is all there is to it. 40

Q That is all there is to it. And as far as the dental work was concerned which you booked was the filling of these two simple small cavities, wasn't it? A And the condition of her gums also.

Adele Coursen, cross.

Q And the condition of her gums? A That is the condition he called me over to notice.

Q I know that; but as far as the work is concerned everything you booked was the dental work in the two teeth? A Yes.

10 Q That is all; and that he undertook to repair for the sum of six dollars? A Yes.

Q Of which he received one dollar on June 13th? A Yes, sir.

Q And five dollars was owing? A Yes, sir.

Q So that every time Mrs. Ollert came back she came back for treatment to the cavities, didn't she?

Mr. Carpenter. I object to that as calling for a conclusion. Mrs. Ollert and the dentist are the only ones, I suppose, who could say that.

Mr. Walscheid. She booked the work.

20

The Court. She may or she may not know. She may have booked it for one thing and the patient may have come back for that and something else; that is the reason I say she may not know.

Q You were there at each treatment, weren't you? A Yes, sir.

Q And each treatment was given by Doctor Lauckner? A Yes.

30 Q And each treatment consisted of nothing but excavation and filling in of a phenol compound? A I think Doctor Lauckner treated her gums also.

Q Did you see him do that? Yes or no? Did you see him do that? A No.

Q You did not see him do it? And you did not testify that he did it on the last trial; that he did it? A I don't remember.

Q Now, on the first occasion that Doctor Lauckner—that Mr. Lauckner worked on this woman he excavated a cavity, didn't he? A Yes, sir.

Q And he put in phenol, didn't he? A Yes, sir.

40 Q How deep did he excavate? A Oh, I don't know.

Q He sent the woman away? A He sent her to me for an appointment.

Q Sent her to you for another appointment. And on the second occasion which you say was on the afternoon of the 15th what did he do—Mr. Lauckner? A Same treatment.

Adele Coursen, cross.

Q Excavate? A Exactly.

Q And put in phenol? A Exactly.

Q The third time she came back on Monday afternoon, June 19th, didn't she? A Yes, sir.

Q What did he do then? A She got the same treatment.

Q Again did he excavate? A Not in the afternoon, in the evening. 10

Q He did not excavate in the afternoon? A I did not—

Q But he did excavate in the evening? A Exactly.

Q Did you see him excavate in the afternoon? A Well, I didn't exactly in the afternoon.

Q Well, why do you come here to testify that you did? You testified on the afternoon of that Monday he did certain things and wish us to draw the conclusion that that is all he did; didn't you? A Doctor Lauckner—

Q Isn't that the conclusion that you want us to draw? A What is that? 20

Q That you saw all that he did? A I was there to see all that he did.

Q Do you wish us to draw the conclusion from your testimony that you saw all that Mr. Lauckner did to this woman on the four occasions that she was there? A I saw all that went on in Doctor Ziebell's office, yes, treatments and all.

Q And nothing happened there that you did not see? A I don't think so.

Q You do not think so? A There may be little things that I don't recall. 30

Q Little things might have happened that you did not see? Is that right? Is that right? A That I cannot just recall what they are.

Q No, but you will admit that little things may have happened that you did not see. Now, on the afternoon of June 19th he did not excavate, you say? A I don't think he did.

Q Just inserted phenol? A Yes, sir.

Q Now, Miss Coursen, how long does it usually take to excavate and fill a simple superficial cavity? A Sometimes it can be done the first sitting. 40

Q Done the first sitting.

Mr. Carpenter. She says sometimes.

The Witness. Sometimes.

Adele Coursen, cross.

Q Usually done on the one sitting? A I will not say usually.

Q With an ordinary superficial cavity—is there any reason why in an ordinary superficial cavity phenol should be put in time and time again and the cavity not filled?

Mr. Carpenter. If you know?

10

A I don't know.

Q Now, when Mrs. Ollert was there on Monday evening did she sit in the dental chair? A Yes.

Q In front of that dental chair was there an instrument attached to the wall? A A dental engine, do you mean?

Q What? A The engine?

Q Yes. A Yes, sir.

Q And was this dental chair facing the wall where this instrument was attached? A The engine is attached to the wall.

20 Q The engine is attached to the wall; you mean the motor?

A The motor is on the floor.

Q The motor is on the floor; then there is an arm attached to the wall, isn't there? A Yes.

Q And when you use—

Mr. Walscheid. Strike that out, Mr. Stenographer.

Q And that equipment attached to the wall is electrically driven, isn't it? A Well, I don't know those things.

Q You know it now, don't you? A I know it now; but I couldn't speak about it because I am not versed in them at all.

30

Q Well, it was there? A It was there.

Q And you had seen it used? A It was not used—

Q Wait a minute; wait a minute; don't be so fast. You had seen it used before that time on other patients by Doctor Ziebell, hadn't you? A Yes, sir.

Q And he had used it by using the foot? A Control.

Q Lever? A Yes.

Q And by driving it electrically? A Yes.

40 Q So that this woman was sitting in a chair facing the wall upon which wall there was attached this electrically-driven instrument; isn't that so? A Yes.

Q And all a dentist would have to do to use that electrically-driven instrument would be to pull down the handle, insert the bur or drill and kick the foot lever and start the machine; isn't that so? A That is so.

Adele Coursen, cross.

Q Now, this chair that she was sitting in was a metal chair; isn't it? A Yes.

Q And it has on the left side of it a metal cuspidor? A Yes.

Mr. Carpenter. I object to that. I think it is not cross examination. I do not see the point of it at all. It is far fetched. 10

The Court. Well, you went into the question of visits of Mrs. Ollert at the office, and so forth.

Mr. Walscheid. I want to show just what she was sitting in.

Mr. Carpenter. All right; I suppose it does not make any difference.

Q And that metal cuspidor is filled with water, isn't it?

A No, it is not filled with water.

Q Well, it has water in it? A It has running water in it; but it is not always running. 20

Q It is your business as an attendant there to see that that is kept clean, isn't it? A Exactly.

Q So that there is running water running down through that cuspidor? A Yes.

Q Running from it into the waste? A I don't know.

Q Runs down through the floor, does it? A Yes.

Q Into some waste that you do not know? A I do not know.

Q Now, on the evening of the 19th of June, 1917—1916, when Mrs. Ollert came in she sat down in this chair that you have described to me? A Yes, sir. 30

Q Leaned her head back, didn't she? A Yes.

Q And Mr. Lauckner worked on her while she was sitting in that chair? A Yes.

Q And you were sitting at your desk, weren't you? A I was standing by Mrs. Ollert.

Q Standing by Mrs. Ollert during the whole performance?

A During the whole performance.

Q Didn't you say at the last trial that you went over to your desk and sat down? A When Mrs. Ollert was discharged out of the room I sat down at my desk and gave her a new appointment. 40

Q And while Mr. Lauckner was working on Mrs. Ollert in this chair there was an electric storm outside, wasn't there? A There was a storm, yes.

Adele Coursen, cross.

Q And electric lightning was flashing? A Yes.

Q And he was working on her suddenly all the lights went out? A Yes.

Q And remained out? A I don't remember that they remained out all evening or not.

10 Q And Mr. Miller, your assistant, lit the gas? A Yes.

Q And Mr. Lauckner after the gas was lit was still working around Mrs. Ollert? A I think Mrs. Ollert was ready to leave the chair when the lights went out.

Q She was just ready to leave the chair then? But she remained in the chair after the lights went out, didn't she? A Yes.

Q And after the lights went out and the gas was lit Mr. Lauckner said to Mrs. Ollert: "Are you feeling all right now?" Didn't he? A I don't remember.

20 Q You don't remember? A No.

Q Will you say that he did not say that? A I cannot remember everything.

Q You cannot remember that. Did he not at that time after those lights went out and after the gas was lit speak to you about her condition and how she felt? A He may have asked her how she felt; I don't remember that.

Q Well, don't you remember that he did? A I really don't.

Q And these lights went out while the lightning was flashing, didn't they? A It was during the storm.

30 Q During the electric storm? A Yes.

Q Now, did you see the electrically-driven instrument which hangs on the wall used in patients' mouths? A Have I ever saw it used?

Q Yes. A Yes, sir.

Q And when it is used thus, is there a little drill or bur attached to the front of it? A Yes.

Q And what is that bur or drill used for? A It is preparing a cavity for a filling.

40 Q Preparing a cavity for a filling by rounding out the excavation, isn't that right? A Well, I can't just explain those things.

Q Well, didn't you say so the last time?

Mr. Carpenter. I object to the question. The question may be read and her answer.

Adele Coursen, recalled, direct.

Q I am asking didn't you say the last time? A I don't know.

Q Didn't you say in speaking of this drill used the electrical machine say:

"What is the result of the drilling? Isn't that an excavation?" 10

"I can only say what was used for excavating that night."

"I am now asking you whether it is not usual to use these burs for the purpose of digging holes in teeth."

"Dig holes but not excavating."

"Oh, you make a distinction. Round out cavities, isn't it? It is used for that purpose?"

"Yes."

You said that, didn't you? A Yes; I must have said it. 20

Q So that these drills or burs are used just for the purpose of completing and round out the cavities which are started with the hand instrument; aren't they? A Yes, sir.

Q And in order to complete and round out that cavity it was necessary for such a bur to be used, wasn't it?

Mr. Carpenter. I object to that. That calls for a conclusion.

Mr. Walscheid. I withdraw the question. That is all.

Re-direct examination by Mr. Carpenter. 30

Q You said all through the last trial you were there all the time that Mrs. Ollert was in that room that night, didn't you?

A Yes, sir.

Mr. Carpenter. That is all.

(Witness excused.)

ADELE COURSEN, recalled.

By Mr. Carpenter. 40

Q I show you a book which I did not know we had here and ask you to refer to June 13th, and ask if Mrs. Ollert's name appears there that day? A No, sir; it does not.

Q Not on the 13th; there was no appointment for that date; she came in without an appointment? A Yes; as a new patient.

Adele Coursen, recalled, direct.

Mr. Walscheid. I ask that that be stricken out as a conclusion and leading.

Mr. Carpenter. She said that as a fact before.

Q According to your record here when did Mrs. Ollert come in the second time? A A couple of days later; about three
10 days later. It was—she was in on the afternoon—

Q On the 19th, you remember? A On the 19th—

Q On the 19th at three? A Thursday, she came in in the evening instead.

Q I see Mrs. Ollert's name here under date of the 19th at three o'clock. You have two on for three o'clock, haven't you, or a little after three? A Three-fifteen; then she came in the evening again.

Q Then she came in the evening again. This book does not
20 show that? A No; she had no appointment. Her next appointment—

Q She had no appointment for the evening? A No; her next appointment was Thursday.

Q I see here under date of Thursday, June 22, you have Mrs. Ollert. A Yes.

Q When did you give that appointment? A That was given Monday afternoon.

Q Monday, 19th, when she was there in the afternoon, for the next Thursday? A Yes.

30 Q At two o'clock? A Exactly.

Q And then— A And then when she was in Monday evening I changed it from Thursday and made it for Tuesday instead, because she had pain.

Q So you made it Thursday at two-thirty; but you made that date on the 19th in the evening when she was there? A Yes, for the next day.

Q Now, I do not see— A That is Mr.—

Q I do not see anything here on the 15th for Mrs. Ollert?
40 A On Thursday she had an appointment in the afternoon.

Q She had an appointment, you say. Can you find it here?
A I do not see it; but she was in on a Thursday. That I know.

Q Would your charge book show that? A My charge book? No; because there were no payments made.

Adele Coursen, recalled, cross.

Q No payments made? A The only payment I received was this date when she was in on Monday.

Q On the 13th when she was there you got one dollar.

Mr. Carpenter. I want to offer it for identification.

(Book marked D. 1 for identification.)

10

Cross examination by Mr. Walscheid.

Q What record do you keep of new-coming customers? A On the appointment book, the chart.

Q What record do you keep of new-coming customers coming in? A We have a chart, a card system.

Q You have a chart? A A card system.

Q That is when you give out the slip? A Yes.

Q Then you are sure that Mrs. Ollert was in on the 13th because you gave out the receipts that day? A Yes, sir.

20

Q Then you have examined this book—then, of course, you enter into the book the appointment, don't you? A Yes, sir.

Q So that on the 13th you entered into the book the time that Mrs. Ollert was to come? A It was not more than a couple of days later; a couple of—

Q Isn't that when you entered it? A Yes, sir.

Q On the 13th? A Exactly.

Q So that on the 13th of June this book should show the next time Mrs. Ollert was due? Yes or no. A Well, I—

Q Yes or no. A It should.

30

Q And you make all the entries in here, don't you? A Yes, sir.

Q Now, would you say that Mrs. Ollert came in on Thursday the 15th of June? A Yes, she did.

Q She did; but the book shows no such entry, does it? Yes or no. A It does not show; no.

Q She had no appointment for Thursday, the 15th of June, did she, or it would have been in this book, wouldn't it? A Well, no.

Q Yes or no. A Sometimes they are forgotten to be put down.

40

Q Sometimes they are forgotten to be put in. Yet you swore in this case that you did book her for Thursday, didn't you? A Well, we have our cards to show it.

Adele Coursen, recalled, cross.

Q You didn't book her up Thursday, did you? A Not in that book.

Q And naturally the booking would have been done on the 13th? A On the 15th.

Q The 13th when she made the appointment; isn't that so?

10 A Yes.

Q And she was a new patient? A Yes.

Q So that you would naturally book the new patient, wouldn't you? Now, you say that she came in—when next did she come in after the 15th? A It was the 19th.

Q Did you book her for an appointment then? A On Monday afternoon?

Q Did you book her for an appointment on Monday afternoon?

Mr. Carpenter. Let the book speak for itself.

20

Mr. Walscheid. I am asking her.

A I cannot remember the date.

Q Well, on Monday you only had her booked once. A Then because she came in the evening we gave appointment—

Mr. Walscheid. I ask that that be stricken out.

Q You only had her booked on Monday? A Yes.

Q When did you write in the name Mrs. Ollert under the date of Monday, June 19th, 1916? A When did I write it in?

30 Q Yes. A Well, it was during the week when she was there.

Q You didn't write it in prior to June 19th, 1916? A I did not what?

Q Write it in prior to June 19th, 1916; did you? A I can only go—I cannot remember all those names that I mark down for appointment.

Q You say she had an appointment for three o'clock? A There it is.

Q When was it made? A It was during the week.

40 Q Well, why didn't you give her an appointment for three o'clock instead of inserting her name in between the lines? A Look through there and you will find—

Q Answer that. Why didn't you give her an appointment for three o'clock instead of inserting the name in between the lines? A Mr. Walscheid, I haven't inserted any names only what was written on June 19th, 1916.

Adele Coursen, recalled, cross.

Q Now, you say on June 19th you gave her an appointment for the 20th, did you? A On the 20th.

Q For the 20th?

Mr. Carpenter. She did not say that. She said she gave her one for later in the week.

Q Well, did you? A Yes, sir; there it is. 10

Q For June 22nd. Now, under June 22nd you refer me to the name of Mrs. Ohlers; is that right? A Ollert.

Q Oh, you have both names there, haven't you? A Mrs. Ohlers.

Q What happened then was that you had her booked up—you had her booked up on the night of the 19th for work on June 20th? A No.

Q Well, here it is, isn't it, Mrs. Ollert? A That is all right, Mr. Walscheid; I booked her upon this date, it was Thursday. 20

Q You already had her booked— A No.

Q When did you book her for the 20th? A Monday night when she was in without an appointment.

Q You booked her for the 20th? A Next day.

Q Also booked her for the 22nd? A This appointment was never kept.

Q Well, the 20th was not kept? A Why, wasn't it?

Q Because she was hurt on the 19th? A This appointment was never kept. 30

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

The Court. That portion that she was hurt on the 19th may be stricken out.

Mr. Walscheid. Withdraw it. I agree to it.

Q So that the two appointments—so that the two appointments which appear after June 19th were given to her either on June 19 or prior thereto; isn't that right? A It must be; I can't recall. It is so far back. 40

Q Well, your appointments show that she had an appointment for two o'clock on Thursday, June 22nd? A Yes.

Frederick W. Ziebell, direct.

Q She had an appointment for June 30th for two-thirty? A Yes.

(Witness excused.)

RECESS UNTIL TWO O'CLOCK P. M.

10

AFTER RECESS.

FREDERICK W. ZIEBELL, sworn.

Direct examination by Mr. Carpenter.

Q Where do you live? A 61 Highland terrace, Weehawken.

Q What is your profession? A Dental surgeon.

20 Q Whereabouts did you study dentistry? A New York College of Dentistry.

Q What year did you graduate? A 1913.

Q When did you commence to practice? A 1913.

Q Where have you been practicing since that time? A 52 Fourth street, Guttenberg, and 277 Bergenline avenue, Union Hill.

Q That is where your office is now, the latter place? A Yes, sir.

30 Q When did you move from Guttenberg to Union Hill? A In the summer of 1918.

Q Are you engaged practicing generally or are you a specialist? A General practice of dentistry.

Q Did you examine Mrs. Cornelia Ollert in the month of June, 1916? A Yes, sir.

Q What was the first time she called? A 13th.

Q What is that? A The 13th of June, 1916.

Q On the 13th day of June—

Mr. Carpenter. Just strike that out.

40

Q Have you ever had occasion to examine or treat her before that time? A She had been to the office before.

Q How long before? A About a year before that.

Q Now, then, on the 13th of June, when she came in, you personally examined her? A Yes.

Frederick W. Ziebell, direct.

Q Just tell the jury what her condition was at that time. A I found a condition existing in her mouth as follows: Two cavities in the right upper lateral, the second tooth from the median line and the eye tooth, the third tooth.

The Court. Can you show that by your own teeth to the jury? 10

The Witness. The second tooth being the lateral, and the third tooth being the eye tooth; a condition of redness in the area over the apex—or apices of these two teeth, a condition of oedema, swelling in the same area. I found in the right eye, the lower lid, was drooping.

Q What do you mean by drooping? A What?

Q What do you mean by drooping? A It seemed—it seemed to have a peculiar—it didn't seem to close properly. When she tried to close her eye it seemed to be a form of—lack of proper control of the lower lid. 20

Q Did you notice anything upon her gums? A A condition of redness, oedema, swelling over the apex of these two teeth—the apices of these two teeth, I should say.

Q That was on the 13th when she came in? A Yes, sir.

Q At what time of the day was that? A Somewhere between two and three o'clock, if I remember exactly.

Q At that time what was your own physical condition? Were you able to work on a patient? A I had my arm in a sling. 30

Q Did you break it? A I sprained it or broke it; I was just incapacitated.

Q Did you have an assistant in your office at that time? A Yes, sir.

Q Who was that? A Doctor Lauckner.

Q Where did you get him? A Rang up the college and asked for a recent graduate to help me.

Q You mean at the New York Dental College? A Yes, sir; New York College of Dentistry.

Q And they sent Doctor Lauckner over? A Yes, sir. 40

Q Did you do any work yourself on Mrs. Ollert on the 13th or not? A No, sir.

Q Who did? A Lauckner.

Q What did Doctor Lauckner do? A He excavated as much of the broken-down dentine and enamel that he could.

Frederick W. Ziebell, direct.

Q What do you mean by the dentine? A Dentine is the tooth itself—the tooth proper. The enamel is the outer, or protecting portion of the tooth, being extremely hard.

Q And is the dentine as hard as the enamel? A Oh, no, sir.

10 Q That is the boney substance under the enamel? A That is the tooth proper. The tooth proper is called dentine. The enamel or outer coating is the protecting element that protects the dentine or the tooth proper from trauma.

Q How did he excavate that tooth? A The cavities were extremely sensitive.

Mr. Walscheid. I ask that that be stricken out.

Mr. Carpenter. That is proper testimony.

20 *Mr. Walscheid.* Because “How did he excavate?”—that is the question. What did he do physically?

Mr. Carpenter. That objection lies in my mouth, not in yours.

The Court. It may be irresponsive, but that is in the hands of the interrogator.

Mr. Walscheid. Yes; I understand that.

Q Go ahead, Doctor. A The operator could not get the dent—the phenol into the dentine without taking out the broken-down enamel, rotted dentine, and the food debris that had lodged in that cavity.

30 Q Now, what did Doctor Lauckner do? What did he actually do on the 13th, the first day? A With a small spoon excavator just scooped out just enough of that debris so that he could seal in the desensitizing agent.

Q So that he could seal it in? A Yes, sir.

Q What do you mean by desensitizing? A Something that would reduce the sensibility of the part.

Q And what desensitizing agent did he use that night? A Phenol.

Q Phenol what? A Phenol compound.

40 Q And what is phenol compound? A It consists of phenol or carbolic acid, and chrystalized mixture of camphor and distilled water.

Q And you say that is to make the tooth less sensitive? A Yes, sir.

Frederick W. Ziebell, direct.

Q Did he on that occasion use any grinding machine or dental engine to fill—to drill that out? A No, sir; no, sir.

Q Now, then, after the phenol compound was put in that cavity—

Mr. Carpenter. Strike that out.

Q Was there more than one cavity in the tooth? A Yes; there were two cavities; one cavity in the lateral or the second tooth, and the other cavity was in the cuspid. 10

Q And how large were these cavities that you discovered on that first day? A They were minute cavities.

Q Small cavities? A Yes, sir.

Q This spoon excavator, is that an instrument that you used in the hand or is it connected up with the dental engine? A It is a hand instrument. 20

Q A small hand instrument? A It is shaped like a spoon to dig out the tooth.

Q On a handle? Is it fastened on to a handle? A It just has a little handle; just to conveniently hold it.

The Court. It is a metal tube, isn't it, Doctor?

The Witness. Yes, sir.

Q How long was Mrs. Ollert there the first time? A Not very long; fifteen or twenty minutes, possibly.

Q By the way, did you on that occasion call your nurse over to look at Mrs. Ollert? A Yes, sir. 30

Q Why did you call your nurse over? A Because I had never—

Mr. Walscheid. I object.

A —seen a condition similar—

Mr. Walscheid. One moment. I object to the reason as immaterial and irrelevant.

The Court. I suppose his reason is not of necessity of any value. What he did and what he found, of course, would be relevant. 40

Mr. Carpenter. Well, the nurse has testified to that, anyhow.

The Court. Yes.

Frederick W. Ziebell, direct.

Q You did call the nurse over and point to Mrs. Ollert's condition? A Yes, sir.

Q When did Mrs. Ollert come back again? A The following Thursday.

Q Do you know what date in June that was? A 15th.

10 Q 15th. The first was the 13th and she came back on the 15th? A 15th.

Q What time of day did she come in? A In the afternoon, about three o'clock, I imagine.

Q Did you examine her yourself that time? A I saw her; yes, sir.

Q And what did you discover that time? Tell the jury just all you discovered about her condition? A She complained of continued pain. The cavities were treated—that is, the old treatment was removed. With the cavity exposed, it was hyper-
20 sensitive.

Q Hypersensitive means extremely sensitive? A Yes, sir.

Q Go ahead. A We noticed over the apices of these two teeth a slough that was enlarging. We noticed the first slough was small and the second time we saw it the slough was enlarging. It had assumed a grayish—greenish-grayish color.

Q That is over the apices of the teeth? A Over the apices of these two teeth.

Q Yes. A We noticed that the face was becoming swollen. It was red, and the right eyelid, the lower eyelid was drooping,
30 more so than it was the first time.

Q Now, you said you noticed again—or noticed this right slough was getting larger. Was there a grayish-green slough over the apices of these two teeth when she first came? A There was a small slough; just a small pimple like.

Q What do you know as a slough? A Sloughy means a digging off of the mucous membrane, fouls or it becomes infected; it defoliates; it dries off, and becomes infiltrated with the slough. It assumes a peculiar greenish color.

Q And that was there the first time she called? A We
40 saw that, yes, from a small pimple.

Q And you said that it was larger on the second occasion? A Yes, sir.

Q That is the 15th? A Yes.

Q Now, did Mrs. Ollert on the 15th get another appointment for a later time? A Yes, sir.

Frederick W. Ziebell, direct.

Q And what was the second treatment for? What day, do you remember, the third appointment? A Monday afternoon, the 19th of June.

Q Now, then, did Mrs. Ollert come in again on the 19th—
A Yes, sir.

Q Did she come in on the 19th? A Yes, sir. 10

Q What time of day? A Two-thirty or three o'clock.

Q Two-thirty to three. Did you personally see her on that occasion? A Yes, sir.

Q Tell the jury what her condition was then. A Saw that this slough was enlarging in size. It was much greater than it was the first time—the second time, I should say, that we examined her. She still complained of toothache and I personally saw this man take out the remnant of that treatment.

Q By this man, whom do you mean, Lauckner? A Doctor 20
Lauckner.

Q Yes. A Take out the gutta percha and the pellet that had been infiltrated with phenol and attempt to remove some of the decayed dentine that was possibly causing this toothache that this woman was complaining of.

Q And did he at that time use this electric engine on her?
A No, sir.

Q What instrument did he use? A The spoon excavator.

Q And what did he do after taking this spoon instrument and taking out the filling? A He sealed the same desensitizing 30
agent in the cavity the third time.

Q It was fresh treatment, was it? A Yes, sir.

Q Now, was that proper treatment to insert a phenol compound in a cavity? A Certainly it was proper treatment.

Q Customarily used by dentists? A You have got to use that treatment until the tooth is desensitized.

Q Did you speak to her about her physical condition at all?
A Yes, sir.

Q Give us that conversation.

Mr. Walscheid. When? 40

Mr. Carpenter. Well, whenever you had it. When did you have a talk with her?

A First time she was to the office.

Q First time? A Yes, sir.

Frederick W. Ziebell, direct.

Q What did she say? A She told us that they just recently bought that cafe, saloon, and she was extremely run down, tired, fatigued, had not time to take care of herself because of the fact that she was working so hard.

10 Q Did she say anything else about her physical condition? A No, sir.

Q Now, then, did you the third day, the 19th, when she came there—did you have a talk with her about her physical condition then, advised her to get a doctor or anything like that? A No, sir.

Q Now, then, did you see her again on the evening of the 19th? A At some distance—some distance away.

Q Where were you when you saw her? A Across the street.

20 Q What were you doing at the time? A Going into my office.

Q You were going into your office. Where was Mrs. Ollert at the time? A She was down at the doorway.

Q Which way was she going, in or out? A She was going out.

Q She was going out. What time of the evening was that? A It was about seven-forty-five, possibly.

Q About a quarter to eight? A Quarter to eight.

Q Was it raining at that time? A Yes, sir.

30 Q It was. Now, then, were you present in the evening when doctor—while she was in the office? A No, sir.

Q When she left on the 19th in the afternoon, did she get an appointment for a later day? A No; she did not.

Q You do not remember that? On the afternoon of the 19th? A Afternoon appointment—the afternoon sitting she was given an appointment for the following Thursday.

Q And in the evening you were not there, anyhow, while she was in there? A No, sir.

Q Did you get a chance to speak to her in the evening when she left? A No, sir.

40 Q I want you to tell about your instruments. What care do you take of the instruments and did you at that time? What care did you take of the instruments that are used in patients' mouths? A The instruments are all sterilized in boiling soda water, washing soda, saturated solution of washing soda, and then they are—

Frederick W. Ziebell, direct.

Q Were those instruments that were used in Mrs. Ollert's mouth by Doctor Lauckner sterilized in that manner before they were used? A It was Miss Coursen's work to sterilize all instruments.

Q Can you say that those instruments that were used in her mouth were sterilized? A Yes, sir. 10

Q Now, Doctor, when did you next hear from either Mr. or Mrs. Ollert? A I don't comprehend the question.

Q (Repeated by the stenographer.)

Q After you saw her that evening? A On Tuesday morning, the 20th of June.

Q The next morning? A Yes, sir.

Q What did you hear then? A Mr. Ollert telephoned my home and it was about seven o'clock, it was between seven and seven-thirty in the morning, and my mother awoke me. 20

Q She gave you a message? A I answered the phone.

Q Who was on the phone? A I found it was Mr. Ollert.

Q What did he say? A He told me his wife was suffering excruciating pain, that I should please come over.

Q Did he at that time say to you: "What have you done to my wife? She is suffering awful." Or words to that effect?

A No, sir.

Q After you got the message in the morning at seven o'clock what did you do? A I went over to his place.

Q What time did you get there? A About eight-thirty or eight-fifteen. 30

Q Did you notice—did you go to his place at all on the night of the 19th of June? A Absolutely not.

Q Mr. Ollert says that you were there with Doctor Lauckner or a man whom he later identified as Doctor Lauckner; that you got there about eleven-thirty on the night of June 19th— A No, sir.

Q —and left about twelve-forty. Were you there at all that night? A No, sir.

Q When you got there the next morning, the morning of the 20th, did you, his place, at eight-fifteen—I say you went to his house on the 20th the next day, in the morning about eight or eight-fifteen? A Yes, sir. 40

Q When you got there whom did you see? A Mr. Ollert.

Q And did he take you upstairs? A Yes, sir.

Frederick W. Ziebell, direct.

Q Was there anybody with you on that occasion? A No, sir.

Q Did you examine Mrs. Ollert at all? A Yes, sir.

10 Q What did you discover when you examined her? A I discovered that the area that was formerly greenish-gray was now turning black. I discovered her sitting at a window in a room that was neglected.

Q What? A Neglected, dirty.

Q Yes. She was not in bed? A No, sir.

20 Q Did she complain about pain in these teeth? A Yes, sir; she said that the pain was terrible; she could not stand it. I saw the condition. I saw the two cavities still plugged up with this desensitizing phenol and gutta percha, and I suggested that she get—I wrote a prescription for some aconite and iodine to be used as a counter-irritant and suggested that they use that, apply it to the gums.

Q What else did you suggest, if anything? A I suggested that she keep her mouth clean or cleaner.

Q What was the condition of her mouth generally? A Her mouth was dirty.

Q In what respect? A Tartar on all the free margins of the gums, on all the teeth, stain, green stain.

Q Did you speak to either Mr. or Mrs. Ollert about getting a physician? A I told her then that she should have a physician.

30 Q What was the reply made? A Either one of the two said they had no physician.

Q What did you reply? A I said, "Well, you should get some one."

Q Did you say anything about getting your physician? A No; I said I could possibly have some one call.

Q Did they tell you whether or not they had a physician? A They told me they had no physician.

40 Q Did you on that occasion when you called at that time say that this condition was your fault or anything to that effect? A Absolutely no.

Q Now, then, after you left the house what happened—what time did you leave the house? A In about half an hour, a quarter of an hour, I should say.

Q After that where did you go? A I went to the office in Guttenburg.

Frederick W. Ziebell, direct.

Q Did you get in touch with Doctor Quigley? A The following Wednesday afternoon.

Q This was Tuesday morning that you were there? A Tuesday morning.

Q Did you on that occasion tap Mr. Ollert on the back and say, "It is all my fault. I will pay the bills," or anything like that? A Absolutely no. What occasion? 10

Q Did you ever at any time tell him that? A No, sir.

Q When did you first see Doctor Quigley? A The following Wednesday afternoon.

Q That is the next day? A Yes, sir.

Q Had you heard from Mr. Ollert upon that Tuesday morning that you were at his home and the next day, Wednesday, and the following Tuesday morning? A Why, yes; I went there Wednesday at noontime, about noontime.

Q Wednesday noon? A Yes. 20

Q How did you come to come? A I told them I would come back and see if I could not help her.

Q What happened on that occasion, Wednesday noon? A Saw that she was in bed. Her condition was fast getting worse. The black area was extending almost over her whole mouth. Her lips were black, discolored. Her face, particularly on the right side, was red, intensely swollen or intensely red. I noticed that she was in a sort of a coma, delirious, I might call it.

Q Now, then, after you noticed this condition on Wednesday noon, what did you do? A I told them that they must get a physician. 30

Q Yes. And then what was said by them? A Why, they said they had no physician.

Q What did you say? A I said I would get one.

Q And whom did you get after that? A Wednesday afternoon I encountered Doctor Quigley.

Q Where did you meet him? A At the tuberculous clinic.

Q Did you at that time—were you at that time the dentist connected with the Hudson County Tuberculous Sanitarium? A Yes, sir. 40

Q Was Doctor Quigley one of the attending physicians? A Doctor Quigley is one of the members of the board of managers of the tuberculous clinic.

Q Was Doctor Quigley ever your personal family physician? A No, sir.

Frederick W. Ziebell, direct.

Q Had he ever been? A No, sir.

Q And did you speak to Doctor Quigley about this case? A Yes, sir.

Q As a result of that did he go up there? A Yes, sir.

Q Did you go with him? A I met Doctor Quigley at the
10 door.

Q When, what time? A Thursday afternoon.

Q Thursday afternoon? A Yes, sir.

Q What time on Thursday did you go there? A Between
the hours of three and four.

Q And what time did Dr. Quigley get there? A About
the same time I met Doctor Quigley at the door.

Q And did you then go up to Mr. Ollert? A Yes, sir.

Q In the meantime had you been there at the house of Mr.
Ollert with anybody else before Doctor Quigley was there? A
20 On Wednesday evening—

Q Wednesday evening? A I went to the Ollert house with
a college chum of mine who was at my house for dinner.

Q What was this college chum's name? A Doctor Schmidt;
Karl Schmidt.

Q He was afterwards in the navy, wasn't he? A Yes, sir.

Q During the war? A Yes, sir.

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

Q When did he die, do you know? A In the summer of
1918.

Q Before the last trial? A Yes, sir.
30

Q Were you ever at any time at Mr. Ollert's house? A
With Doctor Lauckner, absolutely no.

Q And why did you take Doctor Schmidt along with you that
Wednesday night? A He came to my house for dinner. I just
took him along because I didn't want to leave him sit home.

Q I see. Now, then, in the presence of Doctor Schmidt did
you say to Mr. Ollert: "It is all my fault. I will take care of
you. I will send your wife to the hospital," or anything to that
effect? A No; absolutely no.

Q At that time or any time did Mrs. Ollert say in your pres-
ence, pointing to Doctor Schmidt or to you: "That is not a
doctor from New York. That is the man who worked on my
tooth. While he was—" A She never said that.
40

Q "—drilling the tooth I got an awful shock. He went over
and turned off the electricity and came back and said, 'My child,

Frederick W. Ziebell, direct.

what have I done? 'You must have suffered awful.''' Or words to that effect? A No.

Q Did she at any time complain to you or accuse you of causing her any trouble? A No, sir.

Q About what time on Wednesday night was it that you and Doctor Schmidt were there? A About eight o'clock; between eight and eight-thirty. 10

Q What time did you leave? A In a few minutes, possibly twenty minutes, a half hour.

Q And did you go upstairs at that time and look at Mrs. Ollert's mouth? A Yes, sir.

Q And what was her condition then? A Her condition was the same as I had seen it Wednesday noontime.

Q I see. You went up to see Mrs. Ollert with Doctor Quigley, did you? A Yes, sir. 20

Q And what did Doctor Quigley do? A He examined her mouth and spoke to her regarding her general condition.

Q What did she say? A She said that she had not been well; she had not had an evacuation of the bowels for a certain period.

Q For how long? A I don't remember. She had not had any action.

Q And do you know what Doctor Quigley prescribed for her? A Yes, sir.

Q What did he give her? A He gave her calomel. 30

Q Do you remember anything else? A He gave her a saline.

Q That is salt? A Yes, sir.

Q How long were you and Doctor Quigley there, do you know? A Just a short time; possibly twenty minutes.

Q Did Doctor Quigley say that Mrs. Ollert should go to a hospital? A Yes, sir.

Q And did you say that you would pay the bills at the hospital, it was your fault, or any words to that effect? A No, sir.

Q Did you say you would pay the bills? A No, sir. 40

Q You say that Doctor Quigley did say that she should be in the hospital? A Yes, sir.

Q Now, then, when did you go there again? A I didn't go again.

Q You didn't go again? A After Thursday.

Frederick W. Ziebell, cross.

Q Do you know when Doctor Quigley went again? A Doctor Quigley went on Friday.

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

Mr. Carpenter. I consent. It is hearsay.

10 Q Did you pay for Doctor Quigley's services in going to the house? A No, sir.

Q At any time? Did Doctor Quigley ever ask you to? A No, sir.

Q Now, what kind of a dental engine did you have in your office—what kind of a dental engine did you have in your office on the 19th day of June, 1916? A Engine put up by the ~~Reeder~~ *Ritter* Dental Manufacturing Company.

20 Q Have you got it here in this bag? A Yes, sir; it is in that bag.

Mr. Carpenter. Well, I do not think we will open that.

Q This one that is in here now is the same one that you had in there on the 19th day of June, 1920? A Yes, sir.

Q And were Mrs. Ollert's teeth in such condition that they could have been drilled with this engine on the 19th day of June, 1920? A No; they were not.

Q Why? A Because the cavities were sensitive and the cavities could not be properly prepared until the dental engine could be used.

30 Q Because it would cause too much pain? A Too much pain; yes, sir.

Mr. Carpenter. Cross examine.

Cross examination by Mr. Walscheid.

Q How many of these dental instruments, as you call them, did you have at that time? A I cannot get your question.

Q (Repeated by the stenographer.)

40 *The Court.* To what instruments are you referring?

Mr. Walscheid. The dental instruments that you referred to in your direct examination just now.

A The engine, you mean?

Q Yes. A One.

Q How many chairs did you have? A Two.

Frederick W. Ziebell, cross.

Q And wasn't each chair equipped with one of these instruments? A No, sir.

Q By the way, what do you call the instrument that you have in the bag? A An engine.

Q Engine? A Engine; yes, sir.

Q And that engine is electrically driven, isn't it? A Yes, 10
sir.

Q And how is it connected with the electric supply? A It is connected to a lamp socket.

Q Ordinary lamp socket, and that lamp socket is supplied from the supply of electricity which comes from the street? A Yes, sir.

Q Public Service feed wires; is that right? A Yes, sir.

Q And your office at that time was located at the northwest corner of Bergenline avenue and 24th street? A Yes, sir 20

Q On the second floor? A Yes, sir.

Q And the feed wires were led to this building by the Public Service Corporation by long poles, weren't they?

Mr. Carpenter. I object unless he knows.

Q Well, don't you know? A I don't know.

Q Do you mean to tell me that you don't know that there were poles carrying electricity in front of that building? A Certainly there were poles, but I don't know what they carried.

Q And don't you know that your electric supply came down those poles? A It may have come in through the cellar. 30

Q Come in through the cellar? A Yes.

Q And what does this engine operate when it does operate? A It operates a stone or polishing brush, bur, anything that you want to put into it.

Q Or a drill? A Yes.

Q Bur or a drill? A Yes, sir.

Q And a bur and a drill are the same thing, aren't they? A Yes, sir. 40

Q And what did you use the bur for? A Preparing cavities.

Q Preparing cavities? A Yes, sir.

Q And what do you mean by preparing cavities? A When the cavities are ready to be filled the margins are smoothed out.

Frederick W. Ziebell, cross.

Q Smoothe them out. So that when you first work upon a cavity you work upon it with a hand instrument, don't you?

A Yes, sir.

Q And you excavate the cavity with that hand instrument?

A Yes, sir.

10 Q And then when you have taken out all of the material that you intend to take out you stop using the hand instrument, don't you? A Not necessarily.

Q Isn't that the usual way? A No, sir.

Q Well, what else do you do then? A You can use chisels to prepare the cavity.

Q And when you are through with the chisels what do you do? A Put the filling in.

Q And before the filling is put in don't you use the bur? A You don't have to use the bur.

20 Q I ask you whether you have—I didn't ask you whether you have to. Isn't that the usual case? A No, sir.

Q Well, what is the bur for? A The bur is to prepare the cavity.

Q Prepare it in what way? A Straighten out the margins.

Q To do what? A To straighten out the margins.

Q Straighten out the margins, so that after you have used your chisel and after you have used your hand instrument if you want to straighten out the margins of the cavity you use the bur? A No, sir; you can use a chisel to straighten out a margin.

30 Q Isn't that what the bur is for? A Not necessarily.

Q But isn't that what it is for? A It is used for that purpose.

Q Yes, that is all I want from you. Now, you were there on the night of the 19th? A No, sir.

Q How many times has that cavity been excavated or these cavities? A Three times to my knowledge.

Q Three times. How many times do you think they ought to have been excavated more? A Until the cavity is so desensitized that you can put a filling in.

40 Q How many times do you think that cavity ought to have been excavated more? A Until it was in such condition that the cavity could have been filled.

Q How many times do you think those cavities ought to have been excavated more? A I cannot answer any other way.

Frederick W. Ziebell, cross.

Q All right. And you cannot tell whether or not that cavity was sufficiently excavated or not? A No.

Q All right. And Mr. Lauckner—Mr. Lauckner—used that bur that night in those cavities for the purpose of smoothing out the cavities, do you think he did wrong? A If the patient complained of excruciating pain—

Q Answer the question, please.

10

Mr. Carpenter. I object because there is no evidence that he did use it at all.

The Court. He can ask if so and so was done, was it improper to have done it under the circumstances. Read the question.

Q (Repeated by the stenographer.) A Yes, sir.

Q Well, what was there so wrong about using a bur to smoothe out the cavity in this tooth? A Because the cavity was not in condition to be smoothed out; could not be drilled out.

20

Q Did you tell me you did not know how many times more you would have to excavate that cavity? A You cannot tell.

Q Why? A Because there is no general rule whereby you can lay down.

Q Then it is a matter of judgment? A Yes, sir.

Q You think if Mr. Lauckner's judgment differed from yours and Mr. Lauckner thought that cavity was ready for the bur and used the bur, he was not so wrong, was he?

30

Mr. Carpenter. That is all argumentative, your Honor.

Q It was not wrong treatment, was it?

Mr. Carpenter. There is no evidence that any such treatment was given; therefore, I object to it.

The Court. I will overrule the objection. Answer the question, Doctor.

Q (Repeated by the stenographer.) You think if Mr. Lauckner's judgment differed from yours and Mr. Lauckner thought that cavity was ready for the bur and used the bur, he was not so wrong, was he? A No, sir.

40

Q Besides the dental engine which you speak of you also had a dental chair there? A Yes, sir.

Q Was that also a Reeder chair? A What is that?

Frederick W. Ziebell, cross.

Q A Reeder chair? A A Reeder chair; yes, sir.

Q Metallic chair, metallic chair? A Cane seat.

Q Cane seat and metallic arm pieces? A Metallic base.

Q Metallic arm pieces? A No, sir; wooden arm pieces.

Q Wooden arm pieces? A Yes, sir.

10 Q And metal cuspidor? A No, sir; porcelain cuspidor.

Q Porcelain cuspidor? A Yes, sir.

Q Water line running down to the floor? A The water ran when you turned it on.

Q And the frame work was what— A Metal.

Q —that holds the cuspidor? And running water running down into this cuspidor? A Yes, sir, when you turned it on.

Q On June 13th you were incapacitated from work, weren't you? A I was what?

20 Q Incapacitated; you could not work? A Yes.

Q And you telephoned to the dental college for an assistant, did you? A Yes, sir. I asked for a recent graduate.

Mr. Walscheid. Strike that out, please.

Q You telephoned the dental college, didn't you? A Yes, sir.

Q And what college—what dental college did you telephone?

A New York College of Dentistry.

Q And as a result of that request Mr. Lauckner came over to you? A Yes, sir.

30 Q You did not know Mr. Lauckner at that time, did you?

A Oh, yes, sir.

Q Knew him before? A Yes, sir.

Q Had he assisted you before? A No, sir.

Q Never assisted you before. Did you know him at the dental college? A Yes, sir.

Q How long had you known him? A Possibly three years.

Q Three years. Friend of his? A Fraternity brother.

Q You knew when he came to you that he was not a dental graduate? A No, sir.

40 Q Well, he was not a dental graduate. A I didn't know it.

Q But he was not a dental graduate then, was he? A I didn't know it at that time.

Q Will you answer my question? A He was not a dental graduate at that time.

Frederick W. Ziebell, cross.

Mr. Carpenter. I object. That is a question that perhaps Doctor Lauckner can answer.

The Court. If you know, Doctor.

The Witness. I did not know at that time.

Q You now know that he was not then a dental graduate? 10

A Yes, sir.

Q And you want to tell us that you did not then know that he was not a dental graduate? A Yes, sir.

Q Although you had known him for three years? A Yes, sir.

Q And were his friend. Don't you know that he only graduated in 1918? A I learned that the last trial.

Q Now, you saw Mrs. Ollert on the 13th, didn't you? A Yes, sir. 20

Q Personally? A Yes, sir.

Q You saw her again on the 15th? A Yes, sir.

Q You saw her again on the afternoon of the 19th? A 19th.

Q And on each one of these occasions you saw the condition of her mouth? A Yes, sir.

Q Now, there was not anything very extraordinary about her mouth, was there? A It was.

Q Was there? A It was.

Q Wasn't it an ordinary run of mouths that come to you in your dental practice? A The condition of the teeth was ordinary, yes. 30

Q Wasn't it an ordinary run of mouths as a whole, condition of teeth and everything, that comes to you in your dental practice? A No, sir.

Q Didn't you so testify on the last trial? A Yes, sir.

Q You did? A The condition of her teeth.

Q Didn't you say on the last trial in reply to my question:

"And her mouth was the ordinary run of mouths that come to a dental shop, wasn't it?" 40

"Her mouth is as the ordinary mouth?"

The Court. Ordinary run of mouth?"

"Yes, neglect."

Did you so testify?

Frederick W. Ziebell, cross.

Mr. Carpenter. Let me see that.

The Court. The question is not answered yet.

Q Did you so testify? A Yes.

Q And again:

10 "Many mouths that are presented to you the teeth are fouled with tartar?"

"Yes."

"And the gums are congested?"

"Yes, sir."

"And you treat them?"

"Yes."

"And send them away?"

"Yes, sir."

20 "And nothing that you did to this mouth could have produced the condition in which you saw the mouth afterwards?"

"No, sir."

Did you so testify? A Yes, sir.

Mr. Carpenter. What page is that?

Mr. Walscheid. Pages 117 and 118.

Q And that was true, wasn't it? A Yes, sir.

30 Q And when she came to you you undertook, having seen the mouth, to do certain specific work for her, didn't you? A Replace the destroyed or broken down tooth structure.

Q And that is all you undertook to do? A Yes, sir.

Q That is right, isn't it? A Yes, sir.

Q And for that work of replacing the tooth structure you made a contract with her for six dollars? A Yes, sir.

Q You didn't make any contract with her to do any other work in her mouth, did you? A No, sir.

Q Except to fill these two small cavities? A Yes, sir.

40 Q Now, you say the first time Mr. Ollert called you up on the telephone was in the morning? A Yes, sir.

Q Morning of the 20th? A Morning of—Tuesday, the 20th.

Q Then you went to his house on the morning of the 20th?

A Yes, sir.

Q Alone? A Alone; yes, sir.

Q Sure of that? A Positive.

Frederick W. Ziebell, cross.

Q When next did you go? A Following day.

Q In the morning? A Yes. Mid-day.

Q Alone? A Alone; yes, sir.

Q So that you were there twice alone? A Yes, sir.

Q Before any physician came in? A Yes, sir.

Q Then on the afternoon of Wednesday, the 21st, you got Doctor Quigley, didn't you? A I approached Doctor Quigley on the afternoon of June 21st. 10

Q And you told him to come around to Mrs. Ollert's place? A Yes.

Q And told him to meet you there? A Yes, sir.

Q And you went there again in the afternoon? A I went there in the evening on the 21st.

Q With the doctor? A On Thursday, the 22nd, I went with Doctor Quigley. 20

Q On the 22nd? A Yes, sir.

Q Well, now, which is it? A On Thursday, June 22nd.

Q That is when you went for Doctor Quigley? A Yes, sir.

Q Then you want to correct your testimony given upon direct examination that you went with Doctor Quigley on Wednesday.

Mr. Carpenter. He did not say that. I object to the question. He said he went with Doctor Schmidt on Wednesday.

A On Wednesday afternoon I got in touch with Doctor Quigley. I approached Doctor Quigley on Wednesday, June 21st. 30

Q And that afternoon you testified you went with Doctor Quigley, didn't you? A No; I said the 22nd.

Q Did you go there again Wednesday evening? A With Doctor Schmidt, yes.

Q So that on Wednesday you went there in morning; you went there at noon and you went there at night with this Doctor Schmidt, did you? A Went there in the mid-day, I think; I didn't go there Wednesday morning. I went there before noon.

Q In the forenoon? A Yes, sir. 40

Q And you went there again that night with Doctor Schmidt?

A Yes, sir; yes, sir.

Q Was this Doctor Schmidt a medical man? A What?

Q Was this Doctor Schmidt a medical man? A No, sir; he was a dentist.

Fredèrick W. Ziebell, cross.

Q A dentist. So that the first thing you did was to take a dentist there? A Mr. Schmidt was a guest at my home that day. I took him along.

Q You took him along? A Yes.

10 Q On that night, you say, you went upstairs with Doctor Schmidt; what time of night was it? A About eight o'clock.

Q Wasn't it later? A Possibly; near eight.

Q And you went in the place and you met Ollert at the bar, didn't you? A Yes, sir.

Q Ollert took you upstairs? A Yes, sir.

Q And didn't Ollert say to his wife on this occasion that you took this doctor with you—didn't he say to his wife, "Here is Doctor Ziebell, and he has brought a doctor from New York"?

A He may have.

Q Well, do you say he didn't? A Do I what?

20 Q Do you say he didn't? A I say he may have said that.

Q So that there was an occasion—

Mr. Walscheid. Wait a minute. Strike that out.

Q Did you testify at the last trial that he did say it? A I cannot remember. I say he may have said that.

30 Q So that there was an occasion after nine o'clock on June 19, 1916, when you were in Mr. Ollert's home in the evening with another man and examined the mouth of his wife, at which time and place he may have said, "May," or whatever he called her, "here is Doctor Ziebell and a doctor from New York"? A Not on the night of June 19th.

The Court. He says he did not go there on June 19th.

Q (Repeated by the stenographer.) So that there was an occasion after nine o'clock on June 19th, 1916, when you were in Mr. Ollert's home in the evening with another man and examined the mouth of his wife, at which time and place he may have said, "May," or whatever he called her, "here is Doctor Ziebell and a doctor from New York"?

40 *Mr. Walscheid.* Such an occasion did occur after nine o'clock on June 19th.

Mr. Carpenter. Now, he—

Mr. Walscheid. He says it is on Wednesday.

The Witness. Yes; it was Wednesday, the 21st.

Frederick W. Ziebell, cross.

Q You say it was on Wednesday, do you? A Yes, sir.

Q How long have you had this instrument, this engine? A How long had I had it? How long had I had it in June, 1916?

The Court. Yes.

A About a year.

10

Q You bought it in 1915? A Yes, sir.

Q By the way, when do you say you were admitted to practice in New Jersey? A 1913.

Q Weren't you admitted to practice in 1915? A 1915?

Q Yes, and don't you hold certificate number 1607? A Yes, sir.

Mr. Carpenter. They renew that every year, don't they?

Mr. Walscheid. I don't know.

The Witness. It must be a mistake.

20

Q Is it a mistake? A Yes, sir.

Q You say you were admitted in 1913? A Yes, sir.

Q From whom did you buy this instrument? A From the Cleveland Dental Manufacturing Company.

Q Where are they? A East 41st, New York City.

Q And after you received it who installed it? A Their man.

Q Put it up on your premises. And after it was installed, what, if anything, was done to it between its time of installation on the day and June 19th, 1916? A Nothing, but just used.

30

Q Nothing, but just used? A Yes.

Q Sure about that? A Positive.

Q And since that time where has it been? A Since June 19, 1916, to October, 1918, it was in Guttenberg, and then I moved it to Union Hill.

Q Being used? A Yes, sir.

Q All the time? A Yes, sir.

Q And then you moved it to Union Hill? A Yes, sir.

40

Q And used it there ever since? A No, sir.

Q Didn't put it up there for use? A No, sir.

Q Packed it away? A Put it in a suit case.

Q Been in the suit case ever since? A Yes, sir.

Q Excepting when you took it out? A Yes, sir.

Frederick W. Ziebell, cross.

Q Nothing has been done to it since you put it in the suit case and showed it here? A Only after the last trial, when the armatures were burned out—

Q What was done to it at the last trial? A The armatures were burned out.

10 Q What armature? A The armature of the motor.

Q What did you do with it? A I sent it—I have the Reeder Dental Manufacturing Company call for it here at this court.

Q (*By the Court.*) Where were these armatures burned out?
A In the motor.

The Court. I mean where?

The Witness. The court.

The Court. At the time it was being attempted to be used?

20 *The Witness.* On direct current.

Q So that at that time the repairs were made to it? A Yes, sir.

Q And you don't know what those repairs are, do you? A I do not what?

Q Do you know what the repairs were? A No, sir.

Q And prior to the time when you tried to—

Mr. Walscheid. Strike it out.

30 Q At the last trial there was an attempt made to attach this instrument to the lamp socket in this room? A Yes, sir.

Q And the apparent result at that time was that it blew out certain lights in the building? A Yes, sir.

Q That was the apparent result? A Blew out the fuse.

Q Blew out the fuse in the building. Up to that time nothing whatsoever had been done to the instrument? A No, sir.

Q No examination of it had been made? A No, sir.

Q What is the answer? A No, sir.

40 Q When you were there at Ollert's home on the second occasion, which, if I understand you rightly, was Wednesday forenoon— A Yes, sir.

Q —you say you told Ollert to get a physician? A Yes, sir.

Q Did Ollert then say to you: "Doctor, you put me in an awful hole"? A Well, he may have; I don't recollect.

Q He may have? A Yes; I don't remember.

Frederick W. Ziebell, cross.

Q Well, if he had then said to you: "Doctor, you put me in an awful hole," what—

Mr. Walscheid. Strike that "what" out.

Q —and you heard him testify here in court that he did so tell you as soon as he got in touch with you, what did you think he meant by that? 10

Mr. Carpenter. I object to that as to what this doctor thinks he meant by that.

Mr. Walscheid. I will withdraw the question. I think it is argument for the jury.

Q You will not say that Mr. Ollert did not say: "Doctor, you put me in an awful hole"? A I cannot say it.

Q You cannot say it. Well, why did you go there four times?

A Because the woman was suffering pain; I was trying to help her. 20

Q But you did not know Ollert before. A She was a patient of mine; she came to the office.

Q And you did not know Mr. Ollert before? A Oh, yes; I had.

Q You mean you knew Ollert socially? A What?

Q You knew Ollert socially? A I knew him as a painter; yes.

Q You knew who he was? A Yes. 30

Q And the only reason why you went there four times in succession, as you say you did, is because this woman had been a patient of yours? A Because she was suffering pain. I was trying to obviate the pain.

Q And was that why you took in the dentist? A No, sir.

Q And is that why you took in Doctor Quigley? A I took Doctor Quigley in because he had no physician.

Q Now, didn't you say you took Doctor Quigley in and asked him to come in consultation with you? 40

Mr. Carpenter. What do you mean? When did he say that? I do not recall anything like that.

Q What? A You can infer it that way—as a consultation?

Q No; I am not inferring at all. Didn't you so testify? A Yes, sir.

Frederick W. Ziebell, re-direct.

Q Didn't you say: "Whom did you take there?" "I did not take him. I asked Doctor Quigley to come in consultation"?

A Yes, sir.

Q So that you considered yourself at that time as in charge of that case as the dentist, didn't you? A Yes, sir.

10 Q And you asked Doctor Quigley to come with you in consultation? A Yes, sir.

Q And that is why you went there so often? A She was a patient of mine; yes, sir.

Re-direct examination by Mr. Carpenter.

Q Doctor, did you consider yourself in any way responsible for Mrs. Ollert's condition?

Mr. Walscheid. I object.

20

The Court. What is the purpose?

Mr. Carpenter. Because they are trying to insinuate because he went there three or four times that that would get them in position to argue that he did. Now, I want to get down to the point whether he considered himself responsible for that woman's condition. It is direct rebuttal of the testimony that was brought out on cross examination.

The Court. Suppose the defendant were asked whether or not he considered himself responsible for the happening.

30

Mr. Carpenter. This is not an ordinary negligence case at all.

Mr. Walscheid. Yes, it is.

The Court. It is based upon negligence.

Mr. Carpenter. Yes, but negligence in the treatment of a patient.

The Court. The negligence is the same. It seems to me it would be the height of impropriety to permit a question of that sort to be answered by a defendant. I will sustain the objection.

40

Mr. Carpenter. I ask an exception.

Q Did Mr. or Mrs. Ollert at any time accuse you of improper treatment of Mrs. Ollert? A No, sir.

Gordon Dickinson, direct.

Re-cross examination by Mr. Walscheid.

Q Didn't he say you put him in an awful hole? A I say he may have said that.

Q Well, if he said it, didn't he accuse you of improper treatment? A I cannot say.

Mr. Carpenter. I object to that. Here is what he may have said: When the doctor said to this man, "You have got to go and employ a physician for this woman," then he may have said, "You put me in an awful hole."

10

The Court. You asked the question that brought this on.

Mr. Carpenter. Of course, I did, but that question does not prove anything.

The Court. Why did you ask it, then?

Q (Repeated by the stenographer.) Did Mr. or Mrs. Ollert at any time accuse you of improper treatment of Mrs. Ollert? A No, sir.

20

Q (Repeated from the re-cross examination by Mr. Walscheid.) Didn't he say you put him in an awful hole? A I say he may have said that.

Q (Repeated by the stenographer.) Well, if he said it, didn't he accuse you of improper treatment?

The Court. I will sustain the objection.

Mr. Walscheid. That is all, Doctor.

30

GORDON DICKINSON, sworn.

Direct examination by Mr. Carpenter.

Q You are practicing medicine in the City of Jersey City. How long have you been practicing here? A Since 1877.

Q And what college did you graduate from? A Bellevue.

Q And you are a specialist now, aren't you? A Very much.

Q In surgery? A In surgery.

Q Were you called into consultation by Doctor Adams on or about the 6th of July, 1916, to see Mrs. Ollert? A I was.

40

Q Just tell the jury what condition you found her in. A I found she had lockjaw, and stiff in the muscles of her body.

Q Did you ask her any questions? Just tell the result of your examination. A I don't recollect in detail. Of course,

Gordon Dickinson, direct.

10 I asked questions which she could not reply, and I asked of the family and got into the story of teeth pulling—same old story—and of subsequent trouble. She was then beginning to have what we called tetanus, which is an infection due to a particular type of germ. It is an earth germ. We get it in the wall through the earth; we get it in our occupational injuries through the dirt that comes on clothing; we get it every now and then in the dental chair because there is—people always put their fingers in their mouth to see where the tooth came out.

Q In this case there was no tooth pulled. A No, but I was just speaking of it in a general way. I don't remember the detail as to dentistry.

Q Was this lockjaw or tetanus at the time you went there first or was it some other form of lockjaw? A It was a beginning; it just started as a lockjaw; that is, to my recollection.
20 My testimony at the last trial may be a little bit different; I don't recollect the details.

Q Did you ask Mrs. Ollert whether she had put her finger in her mouth?

Mr. Walscheid. He said she could not talk.

Mr. Carpenter. What is that?

The Witness. She could not reply, but I did ask the question. I always do.

Q What was her condition when you examined her? A
30 Pretty seriously fixed.

Q Did you take her temperature? A I did not myself; I may have asked for it; I don't recollect.

Q Now, if tetanus—you say that is a germ disease? A Germ disease, specific.

Q How may it enter the body? A Through wounds.

Q Through any wound in any portion of the body? A
Through a wound only.

Q Through a wound only? A A wound only.

40 *Mr. Walscheid.* A wound only.

Q In any portion of the body? A In any part of the body.

Q Lockjaw frequently gets in through a nail coming through the shoe into the foot? A Dirty nail with earth on it.

Q It must be dirty in order to get into the— A I have seen it come through cat-gut, the earth, dirt that is in the gut of the

Frederick J. Quigley, direct.

sheep that they make cat-gut out of. Sometimes has a tetanus germ in it and makes trouble.

Q Is that a curable or incurable disease? A It is not curable; it is preventable.

Q Did you when you examined Mrs. Ollert diagnose this tetanus, this case? A I judge so; I have forgotten. 10

Mr. Carpenter. Cross examine.

Mr. Walscheid. No cross examination.

(Witness excused.)

FREDERICK J. QUIGLEY, sworn.

Direct examination by Mr. Carpenter.

Q Doctor Quigley, you are a doctor of medicine? A I am.

Q Graduate of what institution? A University of Louisville. 20

Q How long have you been practicing medicine? A Since 1900.

Q Where have you had your office since that time? A In Union Hill since 1908.

Q Are you in general practice or do you specialize? A I am in general practice.

Q During the war were you in medical service? A I was.

Q What experience did you have during the war? 30

Mr. Walscheid. I object—oh, all right.

Q You may state what your experience was. A I was in command of the sanitary train that consisted of four field hospitals and four ambulance companies.

Q And you came out—

Mr. Walscheid. Went in as a lieutenant and came out a lieutenant-colonel; is that it?

The Witness. Yes. 40

Q Is that it? A Yes.

Q Now, did you examine Mrs. Cornelia Ollert in the month of June, 1916? A I did.

Q How did you come to go up to see her? A I went to see her at the request of Doctor Ziebell.

Frederick J. Quigley, direct.

Q Were you at that time Doctor Ziebell's physician? A No.

Q Connected with him in any public work? A Never have been.

Q Were you on the Hudson County Tuberculous Clinic at that time? A On the Board of Managers of the County Hospital, tuberculous hospital.

Q And Doctor Ziebell was a dentist connected with that, wasn't he? A That is correct.

Q When did you go up to Mrs. Ollert's home to examine her, do you remember? A I went there on June 22nd.

Q Did you go in company with Doctor Ziebell or did you meet him there? A I met him there.

Q Who took you up to see Mrs. Ollert? A Doctor Ziebell and I went up together; I think I met him downstairs; I met him outside.

Q Just tell the jury what condition you found Mrs. Ollert in when you got there? A Going into the room which Mrs. Ollert was in—bedroom; she was in bed—the first thing going toward the bed that attracted my attention was a fluttering of the eyelids. I went over to the bed and I took her history; and then I examined her mouth—the condition of the mouth showed that there was an inflammation of the gums and the inner lining of the cheek, the tongue. There was a covering of small patches about an eighth of an inch in diameter over the gums and tongue and the inner side of the cheek, with a gray-white appearance. There was a bad odor to the breath, a very bad odor to the breath. I had Mrs. Ollert sit up in bed. There was no stiffness of the neck muscles nor of the muscles of the back. From her hysteria I attributed her condition in the mouth to the fact that she was suffering from a condition we call auto-intoxication. She told me at that time that her bowels had not moved for two weeks. That causes a condition of poisoning to take place from the product of decomposition in the body.

After examining Mrs. Ollert I suggested that she be given some calomel to be followed by epsom salts about four hours later, and I also suggested to Doctor Ziebell that he use a mouth wash of glyco-thymolin. I saw her on the following day. Her condition was about the same. I might say that her temperature on the first day was 102 and she had an accelerated pulse and her condition on the following day was practically the same. I did not see her after that date, after the 23rd.

Frederick J. Quigley, cross.

Q Did you go there—you say you did not go there after the 23rd? A No, sir; that was the last I saw her.

Q What is this auto-intoxication that you say she had? A Well, that was responsible for her condition, in my opinion; that was present at the time. It was a condition that we call medically stomatitis.

Q What is stomatitis? A Well, it is an inflammation of the cavity of the mouth caused by—usually caused by an auto-intoxication such as she had, caused by chronic constipation. Her bowels had not moved in two weeks. 10

Q Did you see at that time in Mrs. Ollert's mouth any evidence of injury which might have been attributed to dental work?

A No; I did not.

Q Did you see any evidence of a burn in her mouth? A No.

Q Did you see any evidence of an injury which might have come through a dental instrument? A I did not. 20

Q Were you told by Mrs. Ollert or her husband that she had been injured in a dental chair? A No, sir.

Q Did either one of them complain about Doctor Ziebell or charge him with any improper treatment? A Not in my presence.

Q Did you tell Mr. Ollert that he better take his wife to a hospital or send her to a hospital? A I did.

Q Did you think that was the proper place for her to be treated? A Yes; she was a very sick woman.

Q Did Doctor Ziebell say he would pay the expenses or anything like that? A He did not, not in my presence. 30

Mr. Carpenter. That is all; cross examine.

Cross examination by Mr. Walscheid.

Q You did see an inflammation of the gums, didn't you? A Yes, sir.

Q You did see an inflammation of the lining of the teeth?

A Yes, sir.

Q And you did see an inflammation of the tongue? A I did.

Q And you saw a swollen cheek, didn't you? A Her face was swollen. 40

Q And you saw dark rings in under her eyes? A Yes; I think that is correct.

Q And your opinion is that this inflammation comes from the stomach? A From the intestinal tract.

Frederick J. Quigley, cross.

Q It might also have come from burns, might it not? A No.

Q Not in your opinion? A Not in my opinion, no.

Q If other physicians say it might have come from burns would you say they were wrong? A I would.

10 Q You would say they were wrong. You would not say that the condition which you saw in her mouth was due to burns caused by electricity? A In my opinion they were not.

Q In your opinion they were not. That is just your opinion? A Certainly.

Q How do burns in the mouth caused by electricity look? A Burns? I don't recollect that I ever saw a burn.

Q Oh, then, of course, you are not able to judge, are you, whether or not this condition came from burns or from stomatitis? A Oh, yes; no doubt at the time; I have seen stomatitis very often.

20 Q But Doctor, if you never saw burns caused by electricity how are you able to make a comparison? A I am not making a comparison.

Q I am asking you to make a comparison. You have never seen burns in the mouth caused by electricity? A I never have.

Q Now, what condition did you find in this mouth? A I found an inflammation.

Q So that you do not know whether or not a burn in the mouth would cause an inflammation? A It would never cause such an extensive inflammation as that.

30 Q Well, wouldn't that depend upon the extent of the burn? A It would not be any condition—I mean, to make myself plain, there would be no such condition in the mouth from any burn; there would not be these area of small patches all over, inside of the cheek or gums.

Q Well, why not? A Because there would not.

Q If the burn touched those places? A No.

Q These were white patches, weren't they? A Grayish-white.

40 Q Grayish-white. Now, don't you know, as a matter of fact, that any burns caused by electricity—that in burns caused by electricity there are such grayish-white patches? A No; I do not.

Q Well, you have never seen one, have you? A I have never seen one in the mouth, no.

Frederick J. Quigley, cross.

Q Did you notice anything about her jaws? A Yes, there was a stiffness.

Q A little stiffness. A There was a little stiffness of the jaws.

Q And in lockjaw, you have just that stiffness, don't you? A That is one of the symptoms. 10

Q So that you found, then, one of the symptoms of lockjaw, but you attributed it to something else? A Yes.

Q In other words, you were not ready to make a diagnosis of lockjaw at that time? A I am simply testifying as to the condition I found her in at that time. I don't know the outcome of this case.

Q And you do not know whether or not this woman did develop lockjaw? A No, I do not.

Q What other symptoms of lockjaw are there besides the stiffness of the jaw? A What other symptoms are there? 20

Q Yes. A Well, the most pronounced is a stiffness of the neck and back muscles.

Q And that sets in after the stiffness in the jaw, doesn't it? A Usually, yes.

Q Starts in the jaw? A Yes, true, usually.

Q Now, you say there was a bad breath? A Very bad breath.

Q Well, don't you expect bad breath in a mouth that cannot be opened? A Oh, she could open it some. She had difficulty in opening it full. 30

Q And her mouth was in such a condition that she would not be inclined to open it, would she? A Well, she opened it so that I could get a good view of the interior.

Q In other words, you forced it open? A I didn't have to use any great amount of force, just put a spoon in.

Q I don't care whether you had to use any great amount or what was the amount. You did have to use force to open the mouth? A I don't think I used any force, except to hold her tongue down.

Q Didn't you say that you had difficulty in opening it wide? A She had difficulty in opening it wide. 40

Q She had? A Surely.

Q Now, then, Doctor, isn't it a case that this woman had been burned, say, on the 19th of June, 1916, and that the inside of her mouth was inflamed by reason of that burn, and that the

Frederick J. Quigley, cross.

jaws were locked so that she could not open her mouth with ease, wouldn't you expect when that mouth was opened an offensive odor would come from it?

10 *Mr. Carpenter.* I object to that question on the ground that it assumes to be fact something that is not proved; that the patient was burned; that she was burned in the mouth. There is no evidence of that in the case.

The Court. That is going back to the same thing.

Mr. Carpenter. Absolutely.

The Court. I will overrule the objection.

Mr. Carpenter. I ask an exception.

20 Q (Repeated by the stenographer.) Now, then, Doctor, isn't it a case that this woman had been burned, say, on the 19th of June, 1916, and that the inside of her mouth was inflamed by reason of that burn, and that the jaws were locked so that she could not open her mouth with ease, wouldn't you expect when that mouth was opened an offensive odor would come from it?
A Well, I cannot answer that by yes or no. I will have to take into consideration her history and the condition of her mouth as I found it.

Q Well, finding the condition of her mouth inflamed as you say, suppose that inflammation had come from a burn four days before, wouldn't you expect an odor to come from it?

30 *Mr. Carpenter.* I object to the question on the same ground.

The Court. I overrule the objection.

Mr. Carpenter. Exception.

Q I said four days before—three days before? A You wouldn't get such a condition from a burn in the mouth.

Q How do you know? You never saw one? A I have seen burns from other causes.

40 Q You have never seen one inside of the mouth? A I have seen burns from other causes inside of the mouth.

Q I thought you said you did not.

The Court. From electricity. You are limited—you limited it to electricity, an electrical burn.

Q Did you send Mr. Ollert a bill for your visits. A I did not.

Joseph Kennel, direct.

- Q Did you intend to bill him? A I never did, no.
 Q Did you send Doctor Ziebell a bill? A No, sir.
 Q Did you intend to bill him? A No, sir.
 Q You went there for Doctor Ziebell, didn't you? A Yes, sir.
 Q As a matter of professional courtesy from Quigley to Ziebell? A That is correct. 10
 Q And for no other reason? A No other reason.

Mr. Walscheid. I guess that is all.

Re-direct examination by Mr. Carpenter.

- Q You say you have seen other kinds of burns in the mouth, burns from other causes than electricity? A Yes, sir.
 Q What kind of burns have you seen, Doctor? A I have seen acid burns particularly.
 Q And do they leave any such condition in the mouth as you found in Mrs. Ollert's mouth? A No; they would only leave a burn—the only area that will be burned is where the acid has actually passed over it. This was a diffuse, this was all over the inside of the mouth. 20
 Q And the throat, too? Was it in the throat, too? A In the throat, too.
 Q Did you see any evidence in Mrs. Ollert's mouth of the mucous membrane or skin hanging in shreds? A I don't recollect that. I have—I have a distinct picture of how the inside of her mouth looked as far as these little areas, or these patches which I have described, were present all over the inside of the mouth. 30

(Witness excused.)

JOSEPH KENNEL, sworn.

Direct examination by Mr. Carpenter.

- Q Did you know Cornelia Ollert in her lifetime? A Who?
 Q Did you know Mrs. Ollert in her lifetime? A Yes, Mrs. Ollert, yes. 40
 Q Did you know her before she was married? A Yes, sir.
 Q Where did she work? A She used to work in Scheutzen Park, cashier of the circle swing.
 Q Did you see her have an attack of illness up there?

Joseph Kennel, direct.

Mr. Walscheid. I object on the ground, in the first place, as to whether or not she had an attack, he is not qualified; and that was ten years before.

Mr. Carpenter. I will withdraw that question and ask another.

10 Q What was her name when you knew her, Cornelia Van Horn? A I only knew her under the name of Carrie. They used to call her Carrie.

Q She afterward married Ollert here? A Yes, married Mike.

Q Did you see her any time in Scheutzen Park when she was not well or apparently not well, or apparently not well?

Mr. Walscheid. I object to that as calling for a conclusion of this witness.

20 Q And if so, what did you see?

Mr. Walscheid. On the further ground that it is too remote. This was while this woman was single, and she was married ten years.

Q (Repeated by the stenographer.) Did you see her at any time in Scheutzen Park when she was not well or apparently not well, or apparently not well?

Mr. Walscheid. I object to that as calling for a conclusion of this witness.

30 Q And if so, what did you see?

Mr. Walscheid. On the further ground that it is too remote. This was while this woman was single, and she was married ten years.

Q (Repeated by the stenographer.) Did you see her at any time in Scheutzen Park when she was not well or apparently not well, and if so, what did you see?

40 *The Court.* I think it is very remote. It must be a matter of ten years.

Mr. Carpenter. I want to show her disease is incurable.

The Court. If you will connect it up—

Joseph Kennel, direct.

Mr. Walscheid. Let him show that first. This witness can be had at any time.

The Court. Are you going to be able to show it by inference?

Mr. Carpenter. Well, I am going to show by this witness that it is incurable. 10

The Court. I will overrule the objection.

Mr. Walscheid. Exception.

Q What did you see? A The lady was cashier down there. One day she had a fit.

Mr. Walscheid. I ask that that be stricken out.

The Court. No, I won't strike it out. Wouldn't you know whether I had a fit?

Mr. Walscheid. Well, I don't know; no, sir. 20

The Court. Well, I will take the chance that you would. I will not strike it out.

A (Continuing.) They had her laying on the table, and I didn't see when it started, but when I came over to the table there was Carrie on the table, and she had foam frothing from her mouth, and her hands were closed tight. She was pale and like paralyzed, you know. We opened her hands and after awhile she came to, and a little while after she felt all right again.

Q Did you see her have any more spasms than that one? 30

A Not that I know of.

Q When was that? A This is before she was married.

Q About how many years ago now, do you know? A Oh, this is over twelve years ago, I presume.

Q What aged woman was she at that time? A Well, she might have been eighteen or nineteen.

Mr. Carpenter. That is all. Cross examine.

Mr. Walscheid. No cross examination.

(Witness excused.) 40

Frederick J. Quigley, direct.

DOCTOR QUIGLEY, recalled.

Direct examination by Mr. Carpenter.

10 Q Doctor, have you in your practice, in the course of your practice, treated people who had fits such as described by the last witness?

Mr. Walscheid. I object to the question, "such as described by the last witness," as incompetent and irrelevant.

Q Well, have you treated patients that have had fits?

Mr. Walscheid. I object to that as improper and immaterial and incompetent.

The Court. Why?

20 *Mr. Walscheid.* Because it calls for this man's conclusion as to what is meant by the "fit." Now, we have exactly what this witness means.

The Court. But you objected to his using that expression.

Mr. Walscheid. Yes; I object to his stating to the witness here without repeating what the witness say, because then I don't know what the doctor has in his mind.

The Court. Well, then, I guess, Mr. Carpenter, you will have to repeat what the other witness said.

30 Q Doctor, assuming a person frothed at the mouth, and is rigid, her hands become tightly clasped, foaming at the mouth, lying flat out on a table, can you tell from that description what they are suffering from?

Mr. Walscheid. Yes or no, Doctor.

A It would be one of three conditions; that is as much as I could say offhand from your description.

Q Is one of them fits? A One of them would be epileptic fits.

40 Q What would the other be? A The other would be a condition of the kidneys which we know as uraemia, a blocking up of the kidneys and consequent poisoning. That will produce fits, as you call them, which are similar to this; it also may be ordinary fits, as you call it, in a plain case of hysteria without any real reason for it or foundation for it.

Frederick J. Quigley, cross.

Q Well, do people who have fits—

Mr. Carpenter. Strike that out.

Q Is cerebral congestion one of the causes of death of people who have fits?

Mr. Walscheid. Oh, I object to that as incompetent, immaterial and irrelevant and no probative value whatever. 10

The Court. I will overrule the objection, however, and let you take an exception.

Mr. Walscheid. I won't take any.

The Court. Of course, I have in mind it is only one occurrence twelve years ago.

Mr. Walscheid. I withdraw the objection.

Q (Repeated by the stenographer.) Is cerebral congestion one of the causes of death of people who have fits? A It is. 20

Q Is it a common cause, can you say? A A common cause; yes.

Mr. Carpenter. Cross examine.

Cross examination by Mr. Walscheid.

Q Cerebral congestion is a common cause of death from many other illnesses, isn't it? A Yes.

Q So that you cannot in any way associate the so-called fits with cerebral congestion as cause and effect so far as the testimony has gone which has been given to you? A No, sir. 30

The Court. Just what do you mean, Doctor, in plain language by cerebral congestion, so the jury will understand it.

The Witness. Well, cerebral congestion simply means that the small blood vessels in the brain become so engorged with blood that the covering of the arteries can not hold it and there is a rupture, and then there is a stroke, as you call—a stroke of apoplexy, usually. 40

Q And you wouldn't expect a stroke of this kind to follow a fit twelve years prior thereto, would you? A Well, not unless she had been having fits right along.

Frederick J. Quigley, cross.

Q And this condition which you have described as a fit may be brought about by kidney condition? A Yes.

Q And that is transitory? A Well, it may be transitory. It depends on how efficient the treatment is and how well it was taken.

10 Q An acute kidney condition can produce a fit? A Yes, sir.

Q And acute kidney condition is a transitory condition? A Well, the acute condition is transitory, but the effect of an acute condition are not transitory.

Q And they are not always cerebral congestion, are they? A No.

Q They manifest themselves in many ways? A Yes.

Q And plain hysteria is nothing more or less than an ordinary fit, is it? A Hysterical persons may have a fit which will look exactly like the one that is described.

20 Q Yes, and when you say a person who has hysteria is in a fit you mean that she has a hysterical attack? A Yes, sir.

Q And even in the cases of epilepsy there is false and real epilepsy? A That is correct.

Q And epilepsy arising from the stomach, isn't it, a false epilepsy, which is produced from a stomach condition? A We call a certain type epileptic form. That does not mean necessarily that the person has epilepsy, but that they go through certain contortions in this fit.

30 Q And it doesn't follow at all from that that because a person has had—what do you call it? A Epileptic convulsions.

Q —that that person has true chronic epilepsy? A No, sir.

Q And then there is Jacksonian epilepsy? A Yes, sir.

Q What does that do? A That is merely a collect muscle—just a group of muscles which will go into spasms.

Q And that group of muscles may be the hands and the tongue and mouth? A Yes, any group.

40 Q So that from the fact that this woman had a fit twelve years prior—twelve years ago—you cannot form any conclusion as to what her ailment then was, can you? A Except that if the fit was as described I should say offhand the probabilities are it was one of the three conditions.

Q One of those three conditions? A Yes.

Q And when you speak of the third, the epileptic condition, you include these small epilepsies which are not dangerous? A Yes, sir; that is correct.

Robert R. Lauckner, Jr., direct.

Mr. Walscheid. That is all.

Mr. Carpenter. That is all, Doctor.

(Witness excused.)

ROBERT R. LAUCKNER, JR., sworn.

Direct examination by Mr. Carpenter.

10

Q Doctor Lauckner, where do you live? A Montclair, New Jersey.

Q Were you admitted to practice dentistry in any state? A New York State.

Q Are you engaged in the practice of dentistry in New York State? A I am.

Q How long have you been practicing dentistry? A Two years.

20

Q Are you in business for yourself now? A Practicing for myself.

Q On the 13th and 19th days of June, 1916, were you assisting in the office of Doctor Ziebell, in Guttenberg? A I was there with Doctor Ziebell.

Q What is that? A Yes; I was there with Doctor Ziebell.

Q At that time had you been attending the College of Dentistry in New York City? A Yes.

Q Had you been admitted to practice yet? A No.

Q And you had not graduated yet, had you? A No; I had not.

30

Q Do you remember Mrs. Cornelia Ollert? A I do.

Q When did you first see her? A In June, 1916.

Q Do you remember the 13th of June, the occasion of her first visit? A I remember her first visit.

Q What was her appearance when she first came to the office on the 13th of June? Describe her condition to the jury as best you can. A Mrs. Ollert came into the office of Doctor Ziebell, seemed to be all fagged out, all tired out. She complained first, of course, of toothache, on this right upper side. I noticed that the right eye, the lower lid of the right eye was drooping, and there was a certain amount of redness below this lid and a small amount of swelling, as I understand it, and she came in rather listlessly—

40

Q Rather what? A Listlessly.

Robert R. Lauckner, Jr., direct.

Q Yes. A Then she sat in the chair and we examined her, Doctor Ziebell and I.

Q What did you notice on the inside of her mouth? A Well, the first thing I discovered that in lifting her lip she complained of some pain in this lip and called my attention naturally to her gums, and I noticed they were very red, wavy, inflamed, and her breath was very disagreeable, very offensive breath, and Doctor Ziebell and I questioned her and she told us at that time that her bowels had not moved for quite a period. I don't remember just which. It surprised me a whole lot.

Q Did you notice anything about her teeth on the right side under the gum? A Yes, there was a congestion, swelling, inflammation.

Q Did you notice what they call a sloughy or clot of blood? A There was sloughy present.

Q Sloughy? A Yes, sir.

Q Had you ever seen a condition like that before?

Mr. Walscheid. I object to that as immaterial, whether a dental student had ever seen anything like that before.

The Court. Well, I do not know. He may be asked something else afterwards that may make it necessary that he should have had some experience.

Q Well, had you ever seen any condition like that before? A I had seen cases similar to that, but that was quite an extensive condition; not quite as bad as that.

Recess until 10 o'clock the following morning.

June 29th, 1920.

Trial resumed pursuant to adjournment.

Q *The Court.* Doctor Lauckner, who was on the stand yesterday afternoon, has not yet arrived, and by agreement this witness now being called, and until I tell you further, such witness as will be called will be called by the plaintiff to testify in rebuttal to what has already been testified to.

Richard Davis, direct.

RICHARD DAVIS, sworn.

Direct examination by Mr. Walscheid.

- Q Mr. Davis, where do you live? A 317 Cottage place.
 Q Union Hill? A Yes, sir.
 Q What is your business? A Florist. 10
 Q Florist. Were you in June, 1916, in business for yourself? A Yes, sir.
 Q And where was your business in relation to Ollert's cafe; place of business? A The cemetery.
 Q Is that very near Ollert's cafe? A Right alongside of it.
 Q Are you in business there still? A Yes, sir.
 Q Same place? A Yes, sir.
 Q In June, and prior to June, 1916, were you in the habit of going into Ollert's place? A Yes, sir; every day. 20
 Q For what purpose? A For lunch, cigars and beer.
 Q You ate your noonday meal there, did you? A Yes, sir.
 Q And again at other times? A Yes.
 Q Do you remember an occasion in June, 1916, when Mrs. Ollert came home in the evening? A Yes, sir.
 Q What is it that you remember about that occasion? A Well, she was supposed to have come from the dentist.
 Q Supposed to have come from the dentist? A Yes, sir.

Mr. Carpenter. I move to strike out the supposition.

Mr. Walscheid. Oh, that is just what he remembers about it. 30

The Court. Well, I suppose it is based entirely upon hearsay.

Mr. Walscheid. It is for the purpose of identifying—strike it out.

Q On this occasion that you have reference to, was Mr. Ollert there? A Yes, sir.

Q And what if anything happened—

Mr. Walscheid. Strike that out. 40

Q What time of day or night was it? A Time I don't remember.

Q Well, was it at night? A Yes, sir.

Q At night? A Yes, sir.

Richard Davis, direct.

Q Where did you see Mrs. Ollert? A She came from the kitchen to the bar room, lunch counter.

Q Was Mr. Ollert there? A Yes, sir; talking to us at the bar.

Q And do you remember anything about the weather that day? A Yes, sir.

10 Q What was the weather? What had been the weather? A Stormy, thunder showers, lightning.

Q What if anything—did you look at Mrs. Ollert at the time? A Yes, sir; I passed a remark—

Q How did you happen to look at her? A The condition of her face, the condition her face was in when she came in.

Q The condition of her face? A Yes, sir.

Q Had you seen her before that day? A Yes, sir.

20 Q Now, tell us what you saw on her face that night that was not there according to your opinion at lunch time? A Her face was all sort of swollen. Her right side of her mouth was all drawn up and she had very dark rings under her eyes.

Q Anything else that you remember? A No, sir.

Q Now, you had seen her that luncheon? A Yes, sir; she waited on us.

Q She waited on you? A Yes, sir.

Q She had that swollen face then? A No, sir.

Q Did she have that lip turned up, as you say? A No, sir.

Q Nor the black rings under her eyes? A No, sir.

Q Did you at that time examine her mouth? A Yes.

30

Mr. Carpenter. I object. What time do you mean?

Q On the night of that day? A In the evening; yes, sir. I was called—

Q How did you come to examine her mouth? A Mr. Ollert called me to look at it.

Q When you looked into her mouth what did you notice there? A Well, it was inflamed, in raw condition.

Q Inflamed and in a raw condition? A Yes, sir.

40 Q Is there anything else that you remember about that mouth? A No.

Q Were there any other men with you at that time? A Yes, sir; two other men then at the bar.

Q Looking at the face and the mouth?

Mr. Carpenter. I object.

Richard Davis, cross.

A I don't remember them looking, but I was the nearest to it.

Q Where were these other men standing while you were looking at the mouth? A At the other end of the bar, we were all standing there, the three of us.

Q Do you know who they are? A Yes, sir.

Q What are their names? A Mr. Watson and Mr. Hastings. 10

Mr. Walscheid. Cross examine.

Cross examination by Mr. Carpenter.

Q You are a friend of Mr. Ollert? A No, sir; in a sense.

Q What? A Not in a sense, I am not a friend.

Q Well, in another sense you are a friend? A Yes, in business.

Q You are a friend in the sense that you like to have a drink over his bar when you can get good stuff? A Oh, no. You can't get no good stuff. 20

Q I agree to that. Now, you have talked this thing over with Mr. Ollert at luncheon since this last trial? A No, sir; I have not.

Q Do you forget what you testified at the last trial? A Not much.

Q You say that Mrs. Ollert when you looked at her came out of the kitchen? A Yes, sir.

Q Over to the bar? A Not to the bar, lunch counter.

Q Over to the lunch counter? A Yes, sir.

Q Called to her husband? A No, sir. 30

Q What did she do? A She called her husband.

Q Called her husband? A Yes, sir.

Q Was this right after supper or was it later in the evening? A Later in the evening.

Q Now, then, do you remember testifying this way at the last trial:

“What time in the evening was it when you saw her come back?”

“A That I could not say.” 40

“Was it after supper?”

“A Oh, yes.”

And this question, page 78, Mr. Walscheid—

“Did you look at her mouth?”

“Yes, sir.”

Richard Davis, cross.

A Yes, sir.

Q Were you asked this question:

“What did you see in her mouth at that time?”

And did you answer:

10 “Well, I could not see in her mouth. Her mouth was too closed.”

Did you say that at the last trial? A Well, I cannot tell that.

Q What? A I cannot remember that much, that it was closed.

Q Did you so testify at the last trial? A I don't think so.

Q Well, did you look into her mouth or didn't you? A Well, from the outside. I didn't look in her mouth because she couldn't open her mouth.

20 Q Was her mouth too closed to look in? A Not too closed; it was slightly opened; but I could see from the outside.

Q Was her mouth opened or closed? A Partly closed.

Q How much closed? A It was not opened.

Q How much closed was it? A It was just merely open.

Q Just merely open? A Just merely open. I could see the rings—

Q Her lips together? A No.

Q Were her teeth together? A No.

30 Q Do you remember being asked this question: “*The Court.* Now, was it inflamed?” And did you answer: “Well, what I mean is that she could not open her mouth wide; it was opened too small.” Did you testify so at the last trial? A I don't believe so. I would say about medium.

Q Did you testify at the last trial that you could not see in her mouth, her mouth was too closed? And now you say you did see in her mouth? A I don't remember saying it was too closed.

40 Q Why did you say that at the last trial? A I don't remember saying it.

Q You think the stenographer is taking it down wrong? A I don't believe he is.

Q What? A I don't think he would take it down wrong.

Mr. Carpenter. That is all.

Robert R. Lauckner, direct.

Re-direct examination by Mr. Walscheid.

Q Do you remember Mr. Ollert doing anything that night when he looked at his wife's mouth besides looking at the mouth with you? A No, sir.

Q Do you remember him going to the telephone? A That I don't remember. I was too interested in the conversation. That was between man and wife.

10

Q You don't remember him going to the telephone? A No.

(Witness excused.)

DOCTOR LAUCKNER, recalled.

Direct examination by Mr. Carpenter.

Q Now, then, you remember what you did the first time Mrs. Ollert came to the office? A I do.

20

Q With Doctor Ziebell standing right opposite you all the time? A He was.

Q Do you remember whether he called the nurse over to look at Mrs. Ollert's face or mouth or both? A I believe he did.

Q Now, what did you do on that first occasion? A Mrs. Ollert was complaining of a toothache.

Mr. Walscheid. What did you do? That is the question.

The Witness. Mrs. Ollert was complaining of toothache.

30

Mr. Walscheid. I object unless he answers the question.

The Witness. I am answering the question.

Mr. Walscheid. No, what did you do? is the question.

Mr. Carpenter. That does not lie in your mouth to object to.

The Court. What did you do? Answer the question, please, and let us go on.

40

A Tried to relieve Mrs. Ollert's toothache.

Q Now, in doing that what did you do? A Excavated the cavity with a small hand excavator and then placed phenol compound treatment in that tooth. This treatment is done by taking a—

Robert R. Lauckner, direct.

Mr. Walscheid. I object to that.

Q Just what you did. A I took a small pellet of cotton saturated with phenol, placed it in the cavity. Over that is placed gutta percha. That seals in the treatment. And Mrs. Ollert was dismissed.

10 Q Well, on the second occasion that she came, was that on the 15th of June, the first being the 13th—two days later? A I understand that was my first treatment.

Q What is that? A That was my first treatment.

Q Now, the second time that she came, was the 15th, two days later? A I believe she came about two days later.

Q What was done on the second occasion? What did you observe about her condition at that time? A Her condition kept getting worse. She was still very tired and exhausted physically. She still complained of toothache and pain on the right side.

20 Q Side of her face or jaw or what? A Her jaw, her upper jaw. That slough condition was getting worse. I noticed that particularly.

Q What was the condition of the outside of her face? A The outside of her face was becoming more inflamed, the lower lid, the ring around the lower lid—below the right eye showed up more prominently.

Q Was there a drooping under the right eye?

Mr. Walscheid. I object to the form of the question.

30 Q Had the drooping condition of her eye changed any?

Mr. Walscheid. All right, go ahead.

A There was still the drooping condition of that lower lid.

Q Now, then, what did you do on the second occasion that she came, on the 15th, in the way of treatment, if anything? A The phenol treatment was removed from her tooth and the tooth was also excavated with a hand excavator and fresh phenol treatment put in.

40 Q Was the electrical engine, the drill, used at any time on Mrs. Ollert's tooth on these two occasions? A It was not used.

Q On the first occasion? A It was not used.

Q Now, Mrs. Ollert came back again on the 19th, did she not, the 19th of June? A I believe she did.

Q What time of day did she come back first? A In the afternoon.

Robert R. Lauckner, direct.

Q At what time? A As I remember it, it was about three o'clock.

Q Now, what was done to her on that occasion? A Same procedure as before. Tried to relieve her toothache.

Q Did she still complain of toothache? A Still complained of this pain. It kept getting worse. 10

Q That is, you noticed the condition of her gums above her teeth? A The gums above the teeth were decidedly more—well, they had progressed for the worst. This condition became very severe, this sloughy condition was very marked.

Q Was anything done to the gum itself? A It is not quite clear in my mind, but as I recollect possibly aconite and iodine was painted on the gum.

Q And what is the purpose of that? A That acts as a counter-irritant, relieves the condition. 20

Q Now, there is testimony here that when Mrs. Ollert—well, that is not in the case—was this dressing taken out of the mouth in the afternoon of that day, do you remember? A I think it was taken out of the tooth.

Q Taken out. And what was put in its place? A Fresh phenol treatment put in as before.

Q And was it sealed up? A Sealed up with gutta percha.

Q Now, then, how long was Mrs. Ollert there in the afternoon? A Possibly fifteen minutes.

Q I see. When did you see her again? A She came back again that evening. 30

Q That evening? What time did she come? A Well, I should say about six-thirty or six-forty-five.

Q Was Doctor Ziebell there when she called in the evening? A I don't know whether he was there or not.

Q I see. Now, then, was Miss Coursen there? A Miss Coursen was there.

Q And the laboratory boy? A Mr. Miller was there.

Q Now, then, when she came in the evening what did she say about her condition, if anything? A Well, she still had here trouble, her pain. 40

Q Still complained of her pain? A Yes.

Q Now, what did you do, if anything? A Tried to relieve her condition, her toothache.

Robert R. Lauckner, direct.

Q What did you do? A The old phenol dressing was removed and a fresh one was put in and sealed in with gutta percha.

Q Did you at any time that evening use the electrical engine or any instrument operating by electricity on Mrs. Ollert? A
10 None whatsoever.

Q What is that? A None whatsoever.

Q Was there any excavating done on her tooth that evening other than the taking out of the old filling and putting in a fresh phenol compound treatment? A I don't remember that there was.

Q Now, you have been practicing dentistry in New York? A Yes.

Q How long have you been practicing? A Two years.

Q That is out for yourself? A Yes.
20

Q Is it proper dental treatment to treat a tooth or put in a cavity phenol compound on top and then seal it in with gutta percha? A Good practice.

Q And what is the purpose of that? A Phenol is put in to relieve a condition. It is antiseptic, as we all know. Phenol is carbolic acid, and it is an antiseptic, and also through its alkaline actions relieves toothache, the average form of toothache.

Q Do you remember in the evening whether you put any plaster on Mrs. Ollert's gum or not? A No; I don't remember that.
30

Q Mr. Ollert said that when his wife came home she had what appeared to be a piece of black court plaster on her gum above the two teeth, about a half inch long and, as I recollect it, a quarter inch wide. Was any such court plaster put on her gum? A No.

Q Not by you at any rate? A I didn't put any on.

Q And was any put on in Doctor Ziebell's office? A I don't remember that.

Q Was any hole made in Mrs. Ollert's gum or in her mouth, in the tissues of her mouth or gum or tongue at any time while she was in Doctor Ziebell's office, while you were there? A
40 There was no hole made in it whatsoever.

Q Did she receive to your knowledge any electrical shock while she was in Doctor Ziebell's office at any time on the 19th of June or any other time? A No shock at all.

Robert R. Lauckner, cross.

Q Did she even complain of any shock? A She complained of no shock.

Q Did Mrs. Ollert at any time before she left that evening make any complaint about anything that had been received by her in the treatment of her teeth? A No; she didn't complain at all.

Q Before she left do you know whether she got another appointment? A I don't remember that.

Q Don't remember. Now, then, did you that night—

Mr. Carpenter. Just strike that out.

Q You are the man that Mr. Ollert identified here in court at the last trial, as he said, the man who went to his house? A Yes, sir.

Q Did you on that same night, the 19th of June, 1916, about eleven thirty in the evening, go to Mr. Ollert's house in company with Doctor Ziebell? A I did not.

Q Have you ever been to Mr. Ollert's house? A I have never been to Mr. Ollert's house and I don't know where his house is.

Q Did you ever talk to Mr. Ollert or see him before this last trial? A I never saw Mr. Ollert before this last trial.

Q Did you ever see Mrs. Ollert again after she left Doctor Ziebell's office on the night of June 19th, 1916? A I never saw Mrs. Ollert again.

Q What time that evening did Mrs. Ollert leave you? A She, as I remember it—this last appointment you are speaking of, are you?

Q Yes. A As I remember it, she was there about fifteen minutes.

Q And did the lights go out while she was there? A Yes, the lights went out.

Q And what light did you get after that? A Used gas light.

Q Who lit the gas light? A Mr. Miller.

Mr. Carpenter. Cross examine.

Cross examination by Mr. Walscheid.

Q Where do you live, Doctor? A Montclair, New Jersey.

Q Where? A Montclair, New Jersey.

Q And in June, 1916, you were a dental student, weren't you?

A I was.

Robert R. Lauckner, cross.

Q At what college? A New York College of Dentistry.

Q When did you graduate from that college? A June, 1918.

Q So that you graduated two years after the occurrences that you are talking about? A Yes.

10 Q How long is the dental course, how many years? A It is four years.

Q Four years. How did you happen to go—

Mr. Walscheid. Strike that out.

Q Did you know Doctor Ziebell before you went over to work for him? A Yes.

Q How long had you met him? A At the Dental College.

Q Was he a graduate of the same institution? A Yes.

Q Oh, then, he graduated when, do you know? A I don't remember. I think it was—

20 Q But he was there during your time at the dental college? A Yes, as I remember it now, he was a senior when I entered.

Q He was a senior, I suppose, when you were a freshman? A Yes, sir.

Q I suppose your college runs first year freshman, second year sophomore, third year junior, fourth year senior? A That is the way the course runs.

Q So that Doctor Ziebell was just ahead of you a few years in that college? A Yes, sir.

Q That is how you knew him? A Yes, sir.

30 Q So that he knew, didn't he, when you came over to him, that you were a student in that college? A I don't believe he did.

Q Well, he had known you as a student in there, hadn't he? Just answer the question. A He knew me in 1913.

Q And the question. Did he know you as a student in that college? A In 1913 in that college he knew me as a student.

Q As a student? Are you fraternity members? A We are fraternity members.

Q You are fraternity members? A Yes.

40 Q And that fraternity is a society whereby you swear friendship to each other? A Swear friendship.

Q And in June, 1916, you did not get any pay for that, did you? A I received no pay.

Q In other words, you were working there for the experience? A To assist him in his trouble.

Robert R. Lauckner, cross.

Q And for the experience you were getting out of it? A I got experience there and I am still getting experience. We are getting experience all through life.

Q But you needed more experience then than you do now? A And I still need some more.

Q Still need some more? And when you did the first work on Mrs. Ollert Doctor Ziebell stood there, Doctor Ziebell stood there alongside of you, didn't he? A He did. 10

Q And directed you as to just what you should do? A Yes.

Q So that you were then working and gathering your experience under his supervision, weren't you? A More or less.

Q Now, this phenol compound that you speak about is a compound which you use daily, isn't it? A It is.

Q You use it whenever you excavate a tooth, don't you? A No. 20

Q Well, whenever you excavate a tooth and don't fill it immediately? A No.

Q On what occasions don't you use it? A Putrescent conditions.

Q What? A Putrescent conditions of the tooth.

Q Or in bad conditions of the tooth? A I didn't say that. I said putrescent.

Q That means a bad condition? A It means a pus condition in the tooth itself. 30

Q Putrescent means rotten? A It is not a correct term, no.

Q Not to you. A It is not a correct term, no.

Q In other words, when you get a tooth where there is pus you don't use phenol? A No.

Q In all other conditions, however, where the tooth is healthy you use phenol compound? A Not necessarily.

Q But you do, don't you? A It is used.

Q Not necessarily, but you do? A It is used, not always.

Q It is used when the tooth is healthy. Phenol compound is a proper dressing? A It is a proper dressing. 40

Q Under those circumstances? A Under those circumstances.

Q And the only thing that you did to that tooth on the four occasions, or to these teeth on the four occasions that Mrs. Ollert was in your chair was to excavate and insert dressing and seal it up with gutta percha? A Yes.

Robert R. Lauckner, cross.

Q You did nothing else. So that you treated those teeth as you would treat healthy teeth, didn't you? A Yes, and the gums were—

Q That will do. A You asked me how I treated that case.

Q That is all. A And the gums were treated with iodine.

10 *Mr. Carpenter.* Yes. I can bring that out later.

The Court. It may be stricken out.

Q Now, on the occasion when she was there in the evening she was treated in a dental chair, wasn't she? A Yes.

Q A Reeder dental chair? A I don't know what it was.

Q And that dental chair was faced towards the wall? A Towards the window.

Q Or towards a window, and within easy reach of your hand while you were working there there was erected this Reeder dental engine which you saw in the last case? A There was an engine there.

Q Erected so that you could use it in connection with this chair? A Oh, yes.

Q And you use, do you not, in excavating or in preparing dental excavations for filling—you do use a bur or a drill? A Burs are used for preparing cavities.

Q What? A For preparing cavities.

Q For preparing cavities. And you did have a cavity in that tooth? A There was a cavity in that tooth.

30 Q Which you were treating? A Which I was treating.

Q And which at some time you intended to kill? A Some time it was intended to be killed.

Q And upon which at some time you intended to use a bur or a drill if you had completed the work? A Yes; it probably would be used—

Q That is all. And this bur and drill under those circumstances when used is used in this electric engine, isn't it? A It is.

40 Q And is used when the engine is operated by electricity? A Yes.

Q Now, you had excavated that tooth three times before, hadn't you, before this fourth visit? A I don't know whether it was excavated four times before or not.

Q Well, you so testified on the last trial. A I said the treatment was changed.

Robert R. Lauckner, cross.

Q Now, well, let us see. On the trial didn't you testify that you excavated on each occasion?

Mr. Carpenter. Read the question.

Mr. Walscheid. I am asking the witness now for his memory.

Mr. Carpenter. I object to the question as put. Let him read the question and the answer. 10

The Court. The witness is entitled to have the question and answer that you refer to presented to him.

Mr. Walscheid. Well, all right.

Q Didn't you so testify today? A As I remember it, I said today that treatments were changed. The first time I think I said excavated and the third time—

Q All right, we will find it. Well, did you excavate on the night of the 19th? A I might have. I would not say for sure. 20

Q So that you are not very sure just what you did on the night of the 19th? A I am very sure that I put in a phenol dressing.

Q Well, you naturally would do that after an excavation? A Phenol dressings are sometimes put in after excavation.

Q Well, you would naturally in this particular tooth put in a phenol dressing after excavation, wouldn't you? A Yes, I would in this particular case.

Q So that that does not tell you whether or not you excavated that night? A No, it does not. 30

Q And that does not tell you whether or not you rounded out the cavities or prepared the cavities for filling—the cavities for filling? A They were not prepared for filling as far as I remember.

Q How do you know—as far as you what? A As far as I remember.

Q As far as you remember. But you cannot at this time swear that that cavity was prepared for filling? A It was being treated for toothache. 40

Q But you would not dig the cavity out to treat it for toothache? A To remove overhanging enamel or dentine, and remove superficial decay.

Q But that does not require three or four excavations? A Occasionally it does.

Robert R. Lauckner, cross.

Q What was the size of this hole in this tooth? A Fairly small hole.

Q And you mean to say that you had to go back to that hole and excavate in it three or four times in succession to get away this enamel or dentine that was affecting this lady? A I have
10 excavated—yes—and I have excavated teeth ten times.

Q That is what I want to know. And while you were doing this on the night of the 19th was Doctor Ziebell present? A Kindly repeat the question.

Q (Repeated by the stenographer.) A He was not in the office.

Q You do not know whether he was present or not, do you? A He was not in the office.

Q You don't know whether he was in the suite of offices? A
20 Oh, I don't know where he was in the building.

Q You don't know that, do you? A No.

Q But you do remember that while you were working on this woman she was sitting in your dental chair? A Of course.

Q And while you were working on this woman the weather outside was very stormy? A That evening a storm did come up.

Q And while you were working on this woman it was very stormy? A While I was working on that woman a storm came up.

Q And it was storming while you were working on her? A Yes, sir.

30 Q And electric light or lightning was flashing? A Yes.

Q And there was a great deal of lightning, wasn't there? A There was one awful crash.

Q And right after that particular crash all your lights went out, didn't they? A Yes, sir.

Q And the woman was in your chair? A Yes, sir.

Q And then you had to work the rest of the evening with gas lights? Yes or no. A I cannot answer it yes or no.

Q Did you have to work with gas light? A Not on Mrs. Ollert.

40 Q What was the answer? A Not on Mrs. Ollert.

Q Why, you testified on direct that you worked on Mrs. Ollert with gas light.

Mr. Carpenter. I object. There is no such testimony. He said the lights were lighted after the lights went out.

Robert R. Lauckner, re-direct.

Q Did you work on Mrs. Ollert after the lights were lit with gas light? A I don't think I did.

Q Did you testify as follows at the last trial: "Did you have any storms that night?" "Yes, had a nice one." Did you say that? A I believe I did.

Q "Had a nice one. Did you have any electric trouble in that place that night?" "I believe the lights went out. They did go out. I remember that." "They went out while you were working on this woman?" "Yes." Did you say that? A Yes, possibly. 10

Q Possibly? A I possibly did.

Q Don't you know you did? A I believe I did.

Q Then why do you say "possibly"? A Because I mean possibly. I don't remember word for word of the last trial, I am sorry.

Q Then you were working upon this woman when the lights went out after this crash? A I didn't say I was working with gas light, though. 20

Q Well, you continued to work with gas light after that, didn't you? A I don't think I did after Mrs. Ollert.

Q After Mrs. Ollert? A After the lights went out I don't think I worked on Mrs. Ollert.

Q Oh, you mean— A My work had been completed at that time.

Q This is what happened: You were working on this woman when the lights went out, weren't you? A Yes, sir. 30

Q And you didn't do any further work on her after the gas light was lit, is that right? Yes or no. A As I remember— yes.

Q All right. Now, the condition of that mouth—

Mr. Walscheid. Strike that out. That is all.

Re-direct examination by Mr. Carpenter.

Q At what stage of your work were you when the lights went out? A As I remember it, I was just sealing in the phenol treatment and was just closing it up with gutta percha. 40

Q You mean by that that your work was finished? A My work was—

Mr. Walscheid. I object to that.

A —finished.

John C. Forstbauer, direct.

Mr. Walscheid. I object to that.

Mr. Carpenter. All right. Strike it out.

Q How do you fill up or close up a cavity with gutta percha?

10 *Mr. Walscheid.* I object to that as not proper rebuttal on re-direct.

The Court. I think it is.

Mr. Walscheid. All right. I withdraw the objection.

The Court. Go ahead and answer the question.

A This pellet, this treatment, is placed in a cavity and gutta percha is slightly warmed—is warmed slightly and a small piece is placed in the cavity and is rubbed over with a blunt instrument to smooth it over the margins of the cavity. That completes the treatment.

20 Q Now, you were smoothing over that treatment—

Mr. Walscheid. I object to the form of the question.

Mr. Carpenter. Well, all right.

Q Is the instrument with which you smooth over that gutta percha a hand instrument or one that is operated by electricity?

A It is a hand instrument.

Q And it is a blunt instrument that is used for smoothing that over to conform with the surface of the tooth? A It is a very blunt instrument.

30 Q How long after that did Mrs. Ollert leave? A Shortly after that.

Re-cross examination by Mr. Walscheid.

Q This instrument that you smooth the surface over with is what kind of an instrument? A We call it a burnisher.

Q And you burnish with a bur? A Absolutely not.

Q You weren't a registered dentist at any place at that time, were you? A No, I was not registered.

40 (Witness excused.)

JOHN C. FORSTBAUER, sworn.

Direct examination by Mr. Carpenter.

Q Mr. Forstbauer, where do you live? A Brooklyn.

John C. Forstbauer, direct.

Q What is your business? A Dental supply business; dental equipment business, I should say.

Q Are you employed by the ~~Reeder~~ Dental Manufacturing Company? A I am. *Ritter*

Q In what capacity? A District representative.

Q Do you know this dental engine that I have here in this bag? A Yes, I do. 10

Mr. Carpenter. Doctor Ziebell, will you give me a hand here?

Q Do you know anything about electricity, Mr. Forstbauer? A I do, all that is necessary for my particular branch of electricity.

Q And do you know how this engine and this type of engine is built? A I do.

Q By whom are these engines used in the ordinary course of events in business? A By dentists. 20

Q And is it commonly used by dentists? A Yes, in ninety-five per cent. of the cases.

Q Ninety-five per cent. of the engines that are used by dentists are of this type? A Are ~~Reeder~~ make engines. That is a recent type. *Ritter*

Q I want you to say whether or not if such an instrument is in use in a dentist's office it is possible for electricity to travel down through it, through the bur which is used for the purpose of excavating teeth when it is used? A Not directly, no. 30

Q What do you mean by "not directly"? A It is utterly impossible for an electric current to travel through this point here, through the insulation at that point. This is the insulator.

Q What is it made of? A It is made of a vulcanized material. There is no metal connection between this point and that point.

Q And you say that electricity cannot go through that? A Utterly impossible.

Q I see. Now, then, when this is set up there are cords that run down to turn the bur on, are there not? A Yes, sir. 40

Q Linen cords? A Linen cords.

Q Is it possible for electricity to run down through that cord at this point? A Utterly impossible.

Q Can you say whether or not it is possible for electricity to get into the bur of this instrument? A It is not possible.

John C. Forstbauer, direct.

Q You say this is one of the late types of engine? A Well, it is what we would refer to as a recent type.

Q This engine was here in court the last time this case was tried; was it not? A Yes, sir.

Q And you were here in the court room? A Yes, sir.

10 Q Did you see this engine attached up to one of the sockets here? A No, I did not.

Q Do you know whether the armature had been re-wound since it was here in court? A It was not.

Q It was not, to your knowledge? A It was not. I believe the engine was over in our shop, and as a rule we are vitally interested in the conditions—

Mr. Walscheid. I ask that that be stricken out — their interest.

The Court. Well, it may be.

20 Q What was done with the engine over in your shop?

Mr. Walscheid. I object unless he was there and saw it.

Q If you know. A The cords were pulled in.

Mr. Walscheid. Were you there to see it?

The Witness. Yes.

Q What was done? A These cords were pulled in at these points here, due to careless handling and the cords being wavy, we pulled it in. In other words, I don't think the cord—

30 Q Just put that down on the floor a minute, will you? Why is that box down there? A That is known as a controller for speed regulation.

Q If one is to operate with electricity, that is, if it is being used to operate this bur, is it necessary to go across the room and turn off the power or can the operator use his foot? A It is not necessary to turn off at any stage.

Q What does the operator do? A Simply lets in the lever.

Q To turn it on what is done? A You simply use the lever.

40 Q That way? A That is it.

Q And keep the foot against it? A And keep the foot against it.

Q While it is being used? A While it is being used.

Q And to turn it off all you have to do is to take your foot off? A Just remove your foot.

John C. Forstbauer, cross.

Mr. Carpenter. Cross examine.

Cross examination by Mr. Walscheid.

Q Will you bring that machine out here, now, Mr. Forstbauer—is that your name, Mr. Forstbauer? A Yes, sir.

Q This instrument as now laid out on the floor shows a socket here, doesn't it, or a connection? A A connection plug. 10

Q A connection plug. And that connection plug is inserted in what? A A receptacle.

Q Into a what? A A receptacle, as we call it.

Q A receptacle or a lamp socket? A It can be inserted anywhere.

Q A lamp socket. A Well, another attachment would be necessary.

Q Another attachment would be necessary so as to make that possible? A Yes, sir.

Q And if inserted into a lamp socket or a wall receptacle the current which comes to the instrument comes from the outside supply, doesn't it? A Yes, sir. 20

Q Street supply? A That is it.

Q And that current travels through that wire to this box. What is that box called? A That is known as the resistance box.

Q And from that resistance box it travels through this light brown cord, doesn't it? A No, through the black cord.

Q To this box? A Yes, sir.

Q That is the controller. And from the controller how does it get to your engine? A This cord contains four wires. It passes back through there and through that other cord. 30

Q It passes back through there and then passes through that light brown cord to the engine? A Yes, sir.

Q And the light brown cord, I suppose, only contains two wires? A Four wires.

Q And the current is supposed to reach the engine, isn't it, and this round ball here contains the engine? A Contains the engine.

Q You don't call it engine, do you? A We really call it an engine. 40

Q Well, what is the proper name of it? A Well, years ago, previous to the use of a dental engine, the dentists used a foot-driven arrangement which was known as a foot engine, and we

John C. Forstbauer, cross.

always call it an electric engine—we simply call it electric motor or electric engine.

Q It is an electric motor? A That is it, exactly.

Q So that when we are talking about the engine here we are talking about the electric motor? A Yes.

10 Q And that electric motor is like any other electric motor, isn't it? A Yes.

The Court. It is a fan motor, is it; similar to a fan motor.

The Witness. Similar to a fan motor; armature and field coils.

Q Similar to a fan motor, armature and field coils, and the electricity is supposed to reach that motor, and then, so as to prevent electricity from coming down to the operator, you insert an insulation, do you not? A Yes, sir.

20

Q And that insulation is this? A There and various other points.

Q Where are the other points? First, you say this is insulation up here? A Yes, sir.

Q At the head of this fork? A Yes.

Q The two black spots? A That is right.

Q And where else is the insulation? A In here. I would have to take that off.

30

Q I don't want you to take that off. Where else is the insulation? A The brush holders and field coils.

Q But the insulation—insulation—where are the brush motors? Where are they? A Right on the front of the motor.

Q Well, there is no insulation before you get to the motor. This is where the insulation starts at the motor? A Insulation all through it, you might say.

Q You mean the wires are wound with insulation? A Yes.

40

Q But you also know what I mean by insulation in this case. That insulation around the wires merely prevents the electricity from disfusing and keeps it in the wires, doesn't it? A And then, too, there is insulation from the brush to the commutator.

Q I am not talking about that kind of insulation. I am talking about insulation that would prevent the progress of the electric current. That starts up here, doesn't it? A You

John C. Forstbauer, cross.

pardon me to explain in detail. Every conductor has to be insulated; therefore, I cannot say the insulation is at any given point. It is distributed at every point where there is an electrical contact.

Q Now, do you recognize two different kinds of insulation, or insulation for two different purposes? A Yes. 10

Q What is the first purpose that you recognize it for? A Well, the first insulation is to prevent a ground. For example, from this conductor to this point here.

Q That is— A And we have the outside covering plus a bushing at that point.

Q And the wire runs through that point, doesn't it? A Yes.

Q So that the electricity is conducted through that point to this point? A And at that point we have another insulation.

Q Another insulation to prevent it from going on to the outside there? A Well, it covers two purposes. 20

Q Well, at this point the electricity proceeds into this ball, doesn't it? A Yes.

Q And from that ball where does it go—there it stops? A It enters the field and armature at this point.

Q And at that point in this ball the purpose there is to turn the electric bur and give it motor power? A Yes.

Q And it does turn into motor power? And there it is turned into motor power, isn't it? A That is right.

Q And that motor power is then conveyed by means of these cords to this point? A That is it. 30

Mr. Carpenter. Which point do you mean now?

Mr. Walscheid. The drill point of this handle.

The Witness. That is right.

Q And this tool, this handle, in turn is insulated, isn't it? A That is right.

Q And that insulation is put on there to protect the operator, isn't it? A Not necessarily.

Q Well, it is to protect the man who holds this instrument? A It is simply a better grip to the handle, and then, too, to prevent— 40

Q At the same time what is it composed of? What is it composed of? A The main purpose—

Q What is it composed of? A Vulcanite.

John C. Forstbauer, cross.

Q What is this insulation composed of? A Vulcanite.

Q Vulcanite, too. All right. And when you operate—

Mr. Walscheid. Have you a bur or a drill here, Doctor? Let me have one.

10 Q Well, the bur or drill is inserted at the point of this holder, isn't it? A Yes.

Mr. Carpenter. Look in the case there. There may be one inside of that.

Q The drill is inserted at the point of that holder, isn't it? A That is right.

Q Have you manufactured any of these engines yourself?

A Yes, sir.

20 Q Have you manufactured any of that type? A Not that type; no.

Q So that at the time that this type was manufactured you were out in the field selling, I suppose, were you? A That is right.

Q And you know nothing about the manufacture of this particular instrument, do you? A I do know something about it; yes.

Q About its general construction? A Yes.

Q But about the actual physical work done on this machine you know nothing? A Only a conception of it.

30 Q For instance, you do not know whether or not the insulation upon this machine was tested; you were not there to see any test made? A I know it is customary to test all of them.

Q But you were not there to see any test on this particular machine? A Not that particular machine.

Q And you never made any tests on the insulation of this particular machine? A No.

Q Now, getting to the custom, that instrument is customarily tested by your firm to withstand a certain electric resistance or power, isn't it? A Voltage.

40 Q Voltage, a certain amount of voltage. And what voltage is tested out? A 800.

Q 800. And what would happen with a current stronger than 800 volt reaches that insulation? A Well, in the majority of cases it would blow the fuse.

John C. Forstbauer, re-direct—re-cross.

Q If it does not blow the fuse, what happens at that point with the electricity? A Nothing. The resistance is strong—the insulation is strong enough to withstand it.

Q Your insulation is tested to 800 volts? A That is an arbitrary test.

Q That is what you test it for? A It will stand 2,400 just as easy as 800. 10

Q How do you know that? A Because I know. I know that mica will stand that.

Q But this is not mica? A There is mica in that.

Q There is vulcanite fibre? A Well, at that point.

Q Is that vulcanized fibre at that point? A At the point of resistance between armature and the commutator—

Q I am talking about that point. That is vulcanized fibre? A I want to understand that. If you are confining your questions to that point— 20

Q I am talking about this particular point. What would happen there to that insulation? A At what voltage?

Q At voltage over 800? A It would not affect it.

Q What would happen if 2,000? A It would not affect it.

Q Did you ever hear of electricity of 2,000 voltage jumping the insulation? A It could not.

Q Did you ever hear of it? A Yes, surely, but 2,000 would never reach that point.

Mr. Walscheid. That is all.

Re-direct examination by Mr. Carpenter. 30

Q Why wouldn't 2,000 reach that point? A The fuse in all probability would blow out.

Mr. Walscheid. "In all probability would blow out."

Q What would happen in the motor if you got 2,000 volts running up to the motor? A It would burn out.

Q Was that motor here at the time it was in court burned out? A No. 40

Mr. Carpenter. That is all.

Re-cross examination by Mr. Walscheid.

Q What kind of a current is required by this instrument? A Alternating current.

Oscar H. Pieper, direct.

Q Merely attaching this instrument to a direct current of 110 volts would not burn out your motor, would it? A The fuse would blow out.

Q That is all that would happen. That is all.

By Mr. Carpenter.

10 Q Would it be possible if this engine had a high—well, had had a fuse blow out—would it have been possible for a dentist to have kept using it in his office for another year? A Utterly impossible.

By Mr. Walscheid.

Q So that if this engine were opened and it was found that the armature burned out it would not happen from attaching it to a direct current of 110 voltage? A The fuse would blow out instantly.

20 Q The fuse would blow out instantly? A Yes.

Q It would not reach the armature at all? A No.

Mr. Walscheid. That is all.

By Mr. Carpenter.

Q Can you tell me whether or not sometimes you have these hand grips of metal instead of fibre? A The only reason—the fact that metal is nickel plated, it is only a question of a short time the nickel plating wears, in other words, a brassy color, and that is more practical for the purpose and that is why it is being used.

30 Q But you do make them of metal in case the dentist wants it? A Yes.

Mr. Carpenter. That is all.

(Witness excused.)

OSCAR H. PIEPER, sworn.

40 *Direct examination* by Mr. Carpenter.

Q What is your business? A I am factory manager for the Reeder Dental Manufacturing Company.

Reeder
Ritter
Q Do you know this dental engine which we have here before us now? A I do.

Oscar H. Pieper, direct.

Q What do you have to do with the making or the designing of this particular type of engine?

Mr. Walscheid. This particular type or this particular engine.

Mr. Carpenter. This type of engine or this particular engine. 10

A Helped to plan it.

Q Are you the inventor of this engine? A My brother and myself are co-inventors.

Q You and your brother invented it. Now, then, I want you to state are you acquainted with electricity? A I am.

Q Graduate of what college? A I attended Stamford University in California.

Q I want you to state whether or not it is possible for electricity to get down in one of these engines in use to the bur at the point where it is designed to drill in a tooth? A It is not. 20

Q Why not? A Because of the insulation.

Q Insulation at what point, Mr. Pieper? A At various points.

Q Will you tell the jury where those points are? A A number of them are in the motor, in the foot controller; then there is also one on the arm.

Q This point where the force is? A Yes, sir.

Q Is that the last insulator? A That is the last one. 30

Q And the others you say are in the motor and down through the engine? A Yes, sir.

Q At what voltage is this designed to work? A I would have to look at it.

Q Well, suppose you do and just tell us? A Well, 110 volts alternating current.

Q 10 amps? A No, it is one amp.

Mr. Walscheid. Designed to operate at—

The Witness. 110 volts alternating current. 40

Q Now, if the high power current should hit that machine what would happen? A Why, it would probably burn it out.

Q If it did not burn it out what would happen? A Well, the fuse might blow. It depends on the kind of fuse that is protecting it.

Oscar H. Pieper, cross.

Q The fuse would burn up or the motor would blow out, one of two things? A Yes.

The Court. It is just the reverse. The fuse would blow out or the motor would burn out.

10 Q Is it possible if the motor had burned out or if the fuse had blown out to keep on using that same instrument in the course of the next year without having it repaired? A That would be impossible.

Mr. Carpenter. Cross examine.

Cross examination by Mr. Walscheid.

Q You are a graduate of Stamford? A No, I did not graduate.

20 Q What were you doing there, taking a special course? A Yes.

Q What was the special course in? A Chiefly mathematics.

Q Mathematics, not in electricity. A No.

Q You are not an electrician? A Yes, I am an electrician.

Q Practical electrician? You mean you have acquired what you know of electricity by practical experience? A Not altogether.

Q And by reading? A By reading and by my knowledge of mathematics.

30 Q Oh, you mean you have applied your knowledge of mathematics to electrical work? A That is it.

Q Now, let me understand. You say this machine as you see it there—you have never seen it before to day, have you?

A Well—

Q Are you still with the ^{*Bitter*}~~Reeder~~ Dental Company? A Yes, sir.

Q Have you seen this particular machine prior to today? A I could not say as to that.

Q Cannot identify it. What do you do for the Reeder people now? A I am factory manager.

40 Q Factory manager. And as factory manager you—

Mr. Walscheid. Strike that out.

Q Now, I understand you to say that if a high power of electricity—that is the wrong expression—if a current of electricity of high voltage reached this machine while in operation

Robert R. Lauckner, Jr., direct.

the result would be that the armature and field wiring in the motor would burn out? A Yes, sir.

Q That is what would happen? A Yes, sir.

Q And the current would pass on, wouldn't it? A That would depend on conditions.

Q And the current would pass on. The current wouldn't die there, would it? A It could not pass on if in the act of burning out it ruptured the wires. 10

Q Now, your current will not stop until it reaches mother earth, will it? A It has nothing to do with mother earth.

Q Doesn't all electricity return to the earth? A No.

Q All right. You say it does not. You say in turning that armature and that field the current would stop there? A It would depend altogether on what would happen.

Q Conceding for the sake of this question that this current of high voltage reached that armature and burned it out, what would become of that current? A Why, it would be interrupted there. 20

Q It would be interrupted? A Yes.

Q After the interruption what would become of that current?

A There could not be any current if it was interrupted.

Q Couldn't what? A Could not be any current, could not be a circuit if it was interrupted.

Q There is no circuit there. It is on its way, isn't it? A No.

Mr. Walscheid. All right. That is all. 30

Mr. Carpenter. That is all.

(Witness excused.)

DOCTOR LAUCKNER, recalled.

By Mr. Carpenter.

Q Did you get any electrical shock at all on the 19th day of June, 1916? A No; I got no electrical shock.

Q Did anything happen to that dental engine in Doctor Ziebell's office on the 19th of June, 1916? A No. 40

Mr. Carpenter. That is all.

Mr. Walscheid. That is all.

(Witness excused.)

DEFENDANT RESTS.

Charles Fisher, direct.

CHARLES FISHER, sworn in rebuttal.

Direct examination by Mr. Walscheid.

Q Where do you live? A West Hoboken.

Q What is your business or profession? A Electrical main-
10 tenance.

Q How long have you been engaged in the electrical work?
A Since 1895, twenty-five years.

Q What work have you done to qualify yourself for the
work that you are now doing? A Why, I have studied con-
siderably.

Q Where did you study? A I have taken a course in the
Chicago Institute of Correspondence.

Q And what other work have you done, done any research
work? A Research work; yes, sir.

20 Q Where did you do any research work? A At home.

Q How much time did you spend doing research work? A
Oh, I should judge half of my life.

Q And what do you do now in the electrical line? A Now
I don't do anything just at present; up till four years ago I
was constructing motors, rewinding them, installing them, and
so forth.

Q Whom did you work for? A Myself all the time.

Q Did you ever work for the Public Service? A Yes, sir;
off and on.

30 Q And when last did you work for the Public Service? A
1911.

Q Have you been in their plant since? A No, sir.

Q Do you know the Town of Guttenburg? A Yes, sir.

Q Done electrical work up there? A Yes, sir.

Q Do you know the bank building at the northwest corner of
24th street and Bergenline avenue? A I do.

Q Do you know where the supply of electricity comes from
that goes into that building? A Yes, sir.

Q Where from? A 6th street, West New York.

40 Q Who furnishes it? A Public Service.

Q Is it generated at 6th street, West New York? A No.

Mr. Carpenter. I object. There is no evidence that he
knows anything about that.

Q Are you guessing about that? A No, sir.

Charles Fisher, direct.

Q Where is it generated? A Marion.

Mr. Carpenter. If you know.

Q At Marion. Tell us at what voltage it leaves the Marion station.

Mr. Carpenter. I object. He has not shown that he knows anything about that. 10

Q When you worked there at what voltage did it leave? A It was generated at 13,000 volts.

Mr. Carpenter. I move to strike that out because the time is not shown.

The Court. He has not worked there since 1911, he says. That is a matter of five years prior to this particular occurrence.

Mr. Walscheid. All right. Then I say that the presumption is that the condition, the same condition is presumed to continue to exist. 20

The Court. No, sir; not at all.

Q Well, do you know what the voltage is in West New York?

Mr. Carpenter. I object.

The Court. You can answer yes or no, without saying anything else.

A Yes.

The Court. The next question is how does he know. 30

Q How do you know? A The transformers are all—

Mr. Carpenter. I object to that because we are not concerned with West New York at all.

Q Is the West New York the same line that goes to this building? A Yes, sir.

Q Where does it run from?

Mr. Carpenter. I object without he first shows his qualifications. I think he probably should inquire what his knowledge is about this. 40

The Court. That is what I am trying to do, Mr. Carpenter. That is the reason I sustained the objection.

Charles Fisher, direct.

Q Do you know the line? A Considerably, yes.

Q Do you know that it runs into that 6th street building?

A Yes, sir.

10 Q And from 6th street building where does it run to? A It distributes along Bergenline avenue, practically the whole West New York and Guttenberg.

Q And goes up Bergenline avenue? A Yes, sir.

Q To the 24th street corner? A Yes, sir.

Q And how many transformer boxes are there between this distributing station at 6th street and 24th street, Guttenberg?

A I couldn't just say that. I presume there is about—

Mr. Carpenter. Just a minute. I object to that.

The Witness. I cannot answer just how many. There is a half dozen, anyway.

20 Q At least six? A Yes, sir.

Q Have you seen them? A Yes, sir.

Q Have you seen the markings on them? A Not on those, but on that particular kind.

Q On that particular kind? A Yes, sir.

Q Do you recognize the kind from seeing them there? A Yes, sir.

Q What kind of transformer box is it? A Some of them made by Westinghouse and others by the General Electric Company.

30 Q What kind of transformers are they? A It is a particularly—

Mr. Carpenter. Just a minute. I object to this. It is absolutely immaterial and irrelevant.

The Court. I do not know where it is going to lead to.

Mr. Carpenter. I think something ought to be shown here to indicate that it is going to lead to something; otherwise it is not relevant.

40 *The Court.* For all I know he may be going to show that the voltage as it reaches this building is 8,000, or 6,000 or 10,000. Until it gets to the point where I can tell—

Q What kind of transformers are they? A Cool transformer.

Charles Fisher, cross.

Q What kind are they? A Oil-cooled transformer.

Q Describe them to us.

Mr. Carpenter. I object. There is no evidence that they were there at the time this thing happened in 1916. They might have been changed three times for all I know.

The Court. Of course, that is so. It is important that these should be as of this time. I think it is a matter of common observation that dispensers of electric current renew and change their appliances from time. 10

Q Are they the same kind of transformers that were in use there in 1916?

Mr. Carpenter. I object to that question unless the witness first shows his knowledge. I submit I ought to be allowed to cross examine.

Mr. Walscheid. Cross examine him as much as you wish. 20

Cross examination as to qualifications by Mr. Carpenter.

Q What kind of a feeder was there outside of the First National Bank Building, Guttenberg, on the 1st of June, 1916? A What kind of a feeder? The Public Service feeder or the feeder that feeds the house; there are two feeders.

Q What kind of a feeder was the Public Service feeder? A They usually run—

Q Oh, what was there on the 1st of June, 1916? A Well, that I cannot answer, not the size. 30

Q What kind was there on the 1st of July, 1916? A That I cannot answer, not the size.

Q What did you do for the Public Service when you worked for them? A I went there under repair work several times.

Q Where? A Different plants, Hoboken, Marion.

Q What kind of repair work did you do? A Armature winding, field winding.

Q Did you ever do any armature winding? A Yes, sir; lots of it. 40

Q What is your business now? A I have no business at the present time. Up until I quit it was—

Q Didn't you work as a clerk in a hardware store for five or six years? A No, sir.

Charles Fisher, direct.

Q Have you ever worked as a clerk in a hardware store? A I did.

Q Up until what time? A 1902.

Q From what time until what time? A From 1889.

Q And after 1902 whom did you work for? A Then I
10 worked for myself.

Q How long did you work for the Public Service Electric Company? A I never worked for them any particular time. It was on my own time that I worked for them.

Q Does the electricity that runs to the First National Bank Building, Guttenberg, from the Public Service, run from a power house or from a sub-station? A Both, it comes from both.

Q It does? A Yes, sir.

Q Well, what sub-station does it come from? A Sixth
20 street, Hoboken.

Q And you don't know anything about it, do you? A What is that?

Q You don't know anything about it, do you? A I certainly do. I am answering it in an intelligent way, I believe.

Q When was this feeder that served the First National Bank Building installed and ran from the sub-station? A I think that sub-station is about ten or twelve years old.

Q When was it put in? A I cannot answer the date.

Q You don't know what phase current it carries? A What?
30

Q That is, what phase current did it carry prior to the 1st of June, 1916? A Carries both, two phase and single phase.

Mr. Carpenter. That is all; I object it.

Direct examination by Mr. Walscheid (continued).

Q What voltage is the single phase?

Mr. Carpenter. I object because the witness says he
40 does not know about it between the 1st of June and the 1st of July, 1916.

The Witness. What current was furnished.

Q Do you know?

Mr. Carpenter. I object. He said he did not know and therefore I object.

Charles Fisher, cross.

Further cross examination by Mr. Carpenter.

Q What kind of current was in the First National Bank Building in Guttenberg on June 1st, 1916? A Single phase.

Mr. Walscheid. Alternating current?

The Witness. Alternating current.

10

Q What voltage was there at the First National Bank Building on the 1st of June, 1916? A 110 volt.

Q How do you know? A No, it is 220 volt, 3-wire feeder going in there.

Q You saw the voltage? A No; I saw the feeder.

Q Where do you say that came from, the current? A 6th street, West New York.

Q How do you get that knowledge? A All the Public Service lines are connected. In case of a breakdown they shift from one power house to another. Ordinarily it is furnished from 6th street. In case of an accident it is furnished from Hoboken, Marion, Newark—anywhere.

20

Q Referring to June, 1916, four years ago, in what way did you get your knowledge about that particular month? A Referring to June? I have no knowledge of that particular month.

Q You have no knowledge about what the electricity was there that month? A Oh, yes; but as to particular knowledge as to just that one point I have no particular knowledge. We had alternating current for the past fifteen years.

30

Q Well, do you know what current there was on 24th street, Guttenberg, in the month of June, 1916? A Yes, sir.

Q I thought you said a minute ago that you did not know? A I did not say that. I know what current there was there for the last fifteen years for that particular point.

Q Do you know whether there was any change there in the spring of 1916? A No, sir; there was no change.

Q How do you know there has not been? Were you working there all the time? A No; but I have kept myself acquainted with the different lines. I have been selling motors all these years.

40

Q What kind was there at 14th street, Hoboken, in June, 1916? A Alternating current and direct current.

Q What was the voltage? A For commercial use 110 volts. For power use 2,200 volts.

Charles Fisher, direct.

Q How do you get your knowledge on that particular point?

A Why, it is generated at 13,000. The transformation takes place to 2,200 volts which is distributed on the line.

Q Do you know how many years that has been done? A For the last fifteen years.

10 Q Have you any knowledge—have you any particular knowledge about June, 1916? A Yes, sir.

Q You can give it all over this community? A What is that?

Q You can tell all over the community what the service was that month? A Not all over the community, but the greater part of North Hudson. I am not so well acquainted in Jersey City.

Mr. Carpenter. Well, I still want to press my objection.

20 Q (Repeated by the stenographer from the direct examination of the plaintiff.) Are they the same kind of transformers that were in use in 1916?

The Court. I will overrule the objection.

Mr. Walscheid. Will you answer that question now.

The Witness. If they are the same kind?

Mr. Walscheid. Yes.

The Witness. Well, I should say they are.

Direct examination by Mr. Walscheid (continued).

30 Q And you say they had there at least six of them between 6th street, West New York, and 24th street, Guttenberg? A Yes, sir; on the commercial lighting circuit.

Q On the commercial lighting circuit? A There are many of them on the power circuit.

Q And this commercial lighting circuit that you speak about goes into this bank building? A Yes, sir.

Q What is the voltage of the current that is carried to this bank building on the outside of the building? A 2,200 volts.

40 *Mr. Carpenter.* I object because we are only concerned with the 19th of June, 1916.

The Witness. Well, that is as of that time.

Q What? A At that time I am now speaking of.

Q 2,200 volts? A Yes, sir.

Charles Fisher, direct.

Q What is done to reduce the current? A It is sent through a transformer.

Q And for lighting purposes to what voltage is it reduced?

A Well, it is not safe against lightning at any time.

The Court. Well, you are not asked that, sir.

Q (Repeated by the stenographer.) And for lighting purposes to what voltage is it reduced? A There is the transformation of current or an induced current from one coil to another through an iron coil.

10

Q From 2,200 volts to what volt is it reduced for lighting purposes? A To 220—

Mr. Carpenter. I object because we are concerned only with the 16th of June.

The Court. I am assuming that is directed to that.

Q I am talking as of that time? A At that time.

20

Q You are answering all these questions— A As of that time.

Q —as of that time.

Q (Repeated by the stenographer.) From 2,200 volts to what volt is it reduced for lighting purposes? (Mr. Walscheid continuing.) To 220 or 110? A To 220, and then divided to 110. That is only done through a division.

Q Are you acquainted with the Reeder dental apparatus of the type that is on the floor here? A Yes, sir.

Q Have you handled any of them before? A Yes.

30

Q What have you done to them? A Repaired them several times.

Q Know their construction? A Yes, sir.

Q Do you know what effect electricity of high voltage has when it comes in contact with the human body in the course of completing a circuit?

Mr. Carpenter. I object to that as calling for a medical conclusion.

The Court. Not necessarily, Mr. Carpenter. He is simply asking whether he knows or not.

40

Q Yes or no. A Yes, sir.

Q And how did you acquire that knowledge? A From practical experience.

Charles Fisher, direct.

Q And by watching the result? A Yes, sir.

Q Have you seen any results— A Quite a few.

Q —of such electrical activity? A Yes.

10 *Mr. Carpenter.* That is leading and it calls for a conclusion. Three may be many and a thousand may be many.

The Witness. Well, I saw a dozen cases or more.

Q And what did you see under those circumstances?

Mr. Carpenter. I object to that. The question is whether he has ever seen anybody with a burn in the mouth and on the lip.

Q Have you yourself experienced the result? A Yes, sir.

20 Q And what was the result you experienced under those circumstances.

Mr. Carpenter. I object to that question on the ground, if concerned with at all, we are concerned only with the effect of electricity in the mouth.

The Court. Provided, of course, that there is a different result, if it be in the mouth or some external portion of the body. I do not know that there is any difference.

Mr. Carpenter. We all know that mucous membrane is one kind of tissue and the skin on the hand is another.

30 *Mr. Walscheid.* Is it?

Mr. Carpenter. Yes.

Mr. Walscheid. You may know that but I do not.

Mr. Carpenter. You can tell by the looks of it.

The Court. I am going to overrule the objection. Take your exception.

Q (Repeated by the stenographer.) And what was the result which you experienced under those circumstances? A Severe burns.

40 Q Have you seen that same result in others? A Yes, sir.

Q And have you seen the indications of electrical burning?
A Yes, sir.

Q Describe to us what the result of electrical burning is, the appearance of the surface in a human being after the burning.

Charles Fisher, direct.

Mr. Carpenter. I object to that. We are not concerned with that at all. It is only a question whether he ever saw a burn inside of a patient's mouth. That is the kind of a burn we are talking about. I object to it now because it is immaterial, because there is no evidence that this woman was ever burned by electricity or that any electricity was used in the doctor's office. Now we have the positive testimony that there was no burning in the doctor's office, and it is not rebuttal, because the sole testimony produced here in regard to this engine was that electricity could not go down through the bur.

10

The Court. Very well. I will permit it. I permitted it before. I will overrule your objection. Take your exception and let us go on.

Q (Repeated by the stenographer.) Describe to us what the result of electrical burning is, the appearance of the surface in a human being after the burning. A An electric burn, burns the skin, the flesh, the color of sulphur, which is a very light yellow.

20

Q Whitish yellow? A Yes, sir; very light yellow.

Q Go ahead. A And the meat around it is naturally bright red.

Q How about depth? A It strikes very deep. It strikes to the bone, if it gets a chance.

Q And does it produce a hole? A Yes, sir.

Q Produces a hole? A Yes, sir.

30

Q Mr. Fisher, you say you are acquainted with this instrument? A Yes, sir.

Q In your opinion as an electrician or a man versed in electricity, do you consider such an instrument safe to be used in dental work—

Mr. Carpenter. Just a minute. I object.

Mr. Walscheid. Wait a minute.

Q —in drilling in a person's mouth when that instrument is attached to a lamp socket of 110 voltage when it receives its electrical supply from the street of 2,200 volts?

40

Mr. Carpenter. I object to that question, to that question, first, on the ground that it calls for a conclusion of a dentist rather than an electrician. Second, that it calls

Charles Fisher, direct.

for an opinion on a matter which this man is not qualified to give an opinion on, or has not qualified himself to give, and it assumes that the current that was running to the machine was 2,200 volts.

The Court. He does not say 2,200 volts.

10 *Mr. Walscheid.* I have said 2,200 volts based upon the information that the outside line was 2,200 volts.

Mr. Carpenter. I object on the ground that the witness said the voltage was reduced at that time to 110.

20 *The Court.* Well, now, gentlemen, in the first place, the chief objection I would see to the question put to this witness is that he is asked whether it is a safe instrument to use. That may mean any degree of safety. It may mean is it absolutely safe? That is not the degree we are speaking of here. All, as I understand it, that this defendant was obliged to do was to use reasonable care, and to use instruments that were commonly used and reasonably safe.

Mr. Walscheid. I accept your Honor's correction.

Q Would you say that such an instrument is reasonably safe—

30 *The Court.* I cannot let you go any further than that because you are asking it to take the place of the jury. It seems to me what you can do in this case is to direct your question to this instrument, as you did with the other witness who was on the stand, as to whether or not—

Mr. Walscheid. I withdraw the question.

The Court. You see the point I am making is that you are placing this witness in the place of the jury in passing upon the question of negligence.

Mr. Walscheid. Mr. Fisher, kindly step down and examine that instrument.

40 *The Court.* He says he has.

The Witness. I have examined that.

Q This particular one? A Oh!

Q This particular one? A (Witness leaves the witness stand and examines the instrument.)

Charles Fisher, cross.

Q Have you examined it? A Yes, sir.

Q Examine the insulation? A Yes, sir, such as is visible.

Q And you are acquainted with the construction of it? A Inside; yes, sir.

Q To what extent will that instrument resist the passage of electric current—

10

Mr. Carpenter. I object to that on the ground—

Q—in your opinion?

Mr. Carpenter. He has never tested it and on the ground he knows nothing about it.

The Court. What is the question?

Q (Repeated by the stenographer.) To what extent will that instrument resist the passage of electric current, in your opinion?

20

The Court. What is the objection?

Mr. Carpenter. There is no evidence that he ever tested that as to current, or knows what voltage went through it, or could go through it. He has taken the instrument apart, that is all. May I cross examine him on that?

Cross examination as to qualifications by Mr. Carpenter.

Q Did you ever try to run electricity down to the bur coming in that? A No, but made tests to that effect, though.

30

Q What? A Made tests to that effect.

Q Did you ever try to run electricity in at the inlet and see whether it came out of the bur? A Yes, sir.

Q Where did you test it? A Home.

Q With this particular machine? A Yes.

Q Same engine? A Not the same one.

Q Where did you get the engine that you tested? A Why, I believe Doctor Hyman on Palisade avenue, got one, the same type.

Q Where did you get the one that you used? A I believe that was the one. One of them anyway.

40

Q Did you get it yourself? A Yes, sir.

Q Did you get any electricity down to the bur? A No, but there are some of them where there was electricity to the bur.

Mr. Walscheid. There were some.

Charles Fisher, direct.

Q Did you have a ^{Reeder} ~~Reeder~~ Dental Engine of this type? A Yes, sir.

Q And which one you tested— A Yes, sir.

Q You were getting through the engine as it is in this condition here today? A Positively. I can get it through that one.

The Court. Wait a minute. You are answering yes, yes. When it comes to the end of the question you may be answering no.

Q Have you got in your custody now or control any engine of this type where you got in normal use of it electricity down to the bur? A Have I got one now?

Q Yes. A No.

Q Do you know any one of these engines of this type in which when electricity normally comes into it, in the normal use the electricity runs down to the bur? A No, sir.

Q Can you name a single engine, which in normal use—single dental engine of this type, ^{Reeder} ~~Reeder~~ dental engine of this type—the electricity in the normal use of it will run down to the bur? A No, sir.

Mr. Carpenter. That is all.

Direct examination continued by Mr. Walseheid.

Q How many of these engines have you tested to see whether electricity will run down? A Oh, half dozen or more.

Q And in how many of them did electricity run down to the bur?

Mr. Carpenter. I object to that. He said none of them.

The Court. Half a dozen or more, he said. He said he had tested them.

Q In how many of them did the electricity run down? A In one of them.

Q Did you work on that one? A Yes, sir.

Mr. Walseheid. Now, we will go back to that preceding question.

Q (Repeated from the previous direct examination of the witness.) To what extent will that instrument resist the pass-

Charles Fisher, direct.

age of electric current, in your opinion? A To what extent?

Q What voltage, when in ordinary proper condition?

Mr. Carpenter. I object to that, as calling for a matter of opinion, whereas it should call for a matter of fact. There is the fact about this. It will resist up to a certain voltage. Now, if there is a fact about it the fact ought to be testified to and not this man's opinion. 10

The Witness. There is no capacity at all. They are liable to break at any time.

Mr. Carpenter. I move to strike that out. It is objectionable and a conclusion.

The Court. Why?

The Witness. It may stand 110 volts it may stand a 1,000, it may not stand 100. 20

Q Why? A Because the insulation is used in a motor and is nothing more than a chair. It is the weakest link or the weakest point.

Q What do you say about the quality of that insulation? A It is good. It is right in line with the ordinary insulation.

Q And is it proper electrical practice to attach an instrument of this type, this instrument, for instance, to a lamp socket, which is supplied from a street lighting circuit such as exists in Guttenberg? A No, sir.

Mr. Carpenter. I object to that on the ground that this man is not qualified to give that opinion according to his own qualification. 30

The Court. I will overrule the objection.

Mr. Carpenter. Exception.

Q Why? A A lamp socket is a single switch and one conductor is always alive.

Q What do you mean by always alive? The jury does not understand that? A The current is always at the point of one conductor. If you shut off the socket the circuit still flows to the starting switch of your apparatus on one side. 40

Q Any other reason why not? A No; that is the only one.

Q Have you heard the testimony that this instrument is insulated to resist voltage to the extent of 800? A Yes, sir.

The Court. Tested?

Charles Fisher, direct.

Q Tested. A Yes, sir.

Q In your opinion will this instrument as now insulated resist voltage to any greater extent than 800?

10 *Mr. Carpenter.* I object to that. That is not a matter of opinion at all. It is a matter of fact, and I submit the facts should be called for as not a matter of opinion on a matter of this kind.

The Court. This witness has been offered and assumed to be an expert on matters relating to electrical currents and electrical appliances. However expert he may be and what the degree of his expertness is, are matters which would go to the quality, and how far he may venture on opinions of this sort.

20 *Mr. Carpenter.* It is not a matter of opinion. It is a matter of fact.

The Court. Then you can only get that by making a test?

Mr. Carpenter. Absolutely.

The Court. I do not think that is called for. I will overrule the objection.

Mr. Carpenter. Exception.

30 Q (Repeated by the stenographer). In your opinion will this instrument as now insulated resist voltage to any greater extent than 800? A Under normal conditions, yes.

Q And what would you say the limitation is? A Why, I should judge from 1,200 to 1,500.

Q 1,200 to 1,500? A On a break down.

Q And if voltage greater than 1,200 to 1,500 volts reaches this instrument what happens to the electric current?

40 *Mr. Carpenter.* I object to that. We are only concerned with the normal, ordinary conditions. The dentist is only required to use reasonable care, to use an instrument as is ordinarily used, that would stand an ordinary test. When we get beyond that we are getting in the realm of speculation. Now, there is no evidence, furthermore, that any voltage above 1,200 or 1,500 ever went through this instrument.

Charles Fisher, direct.

The Court. I suppose if he says 1,500 is the maximum, and the current did go through it must have been a higher voltage than 1,500?

Mr. Carpenter. But there is no evidence that any current ever went through that.

The Court. Possibly no direct evidence, no; but you have in mind always that we must observe this testimony that you have been objecting to strenuously, perhaps properly. 10

Mr. Carpenter. Now, we have, furthermore, the fact in the case, sworn testimony of witnesses—

The Court. It may be that the testimony that is in is true. I do not know. If it is true the jury would have to say that no electric current ever entered the mouth of this woman. But we are not yet in that position. It may be that taking all the testimony the jury may say they do not believe that testimony. I will overrule the objection. 20

Mr. Carpenter. You have no objection to my taking an exception?

Q (Repeated by the stenographer.) And if voltage greater than 1,200 to 1,500 volts reaches this instrument what happens to the electric current? A It breaks down the insulation.

Q And where does the electric current go?

Mr. Carpenter. I object unless he knows. 30

The Court. I am assuming that he knows.

A If it breaks down and it is not connected with the ground it closes itself through an arc and disappears. If it is connected with the ground it goes into the ground.

Q If it reaches the insulation what does it do? A Burns it through.

Q And goes through? A Goes into the frame.

Q Does it ever jump insulation?

Mr. Carpenter. I object to that. There is no evidence —on the same ground. 40

The Court. I will overrule the objection.

Q (Repeated by the stenographer.) Does it ever jump insulation? A No; it will jump the gap.

Charles Fisher, cross.

Q In which the insulation is? A Where the insulation was.

Q And will you take this instrument and trace for us, if you can, the course of such a current of electricity, the course it traverses? A Yes. Here it can travel in that instrument in two ways, one through the starting switch, through the person who is operating the machine—

10 Q When you are talking of the starting switch, indicate it. Come here and indicate it. A That is the starting switch.

Q Reaching that point which way would it go? A Either way. The current can travel through the person operating the machine through the drill, entering the person who he comes in contact with, provided they are connected with the ground.

Q Provided the person— A Is in any way connected with the ground.

Q And the insulation which is upon this instrument, would it or would it not stop such a current? A Well, that all depends on the voltage. If the voltage is high enough it would not.

Q If the voltage is of a 1,500— A Yes, sir; 1,500 or more.

Mr. Carpenter. I object to that as calling for a conclusion. Same objection.

The Court. Same ruling.

Mr. Carpenter. Exception.

Q It would not? A No, sir.

30 *Cross examination by Mr. Carpenter.*

Q You do not mean to say it is improper to get electricity from the Public Service, do you? A No, sir.

Q You do not mean to say it is improper to use 110 voltage A. C.? A During a lightning storm; yes, sir.

Q I didn't ask you that. It is all right to use that current, isn't it? A Yes, sir.

Q You say it is all right to use this engine with 800 volts? A No, sir.

Q Didn't you say that before that at 800 volts it would be all right? A No, sir.

Q Didn't you say that a little while ago? A No, sir.

Q Up to what voltage will it stand without burning out? A That I cannot answer.

Q You cannot. Why can't you answer? A Because the weakest point—

Charles Fisher, cross.

Q What is the weakest point? A That is in the instrument. No man living can tell you that.

Q What portion of the instrument is the weakest? A There is no particular part that is weaker than any other which is—

Q At what point will the weakest part of that engine blow out? A Either in the armature or the fields. 10

Q Which is the weakest? A One just like the other.

Q And what voltage will any portion of it blow out? A That I cannot answer.

Q Well, if a current comes in there too strong for the engine the motor will either burn out or the fuse blow out; isn't that so? A Either one, yes.

Q And if it goes too strong—if it does that what would happen? Suppose it burns out the motor? A Well, suppose it burns out one of the windings?

Q No, take the motor. Suppose the motor is burned out by excessive current, what would happen? A The wire generally burns fast to the frame. 20

Q And you couldn't use the machine again until it was fixed up? A You couldn't run the machine.

Q Now, if the current came in this engine strong enough to jump past this insulation— A Yes, sir.

Q —it would burn it out, burn out the insulation? A Not necessarily. It would jump over it.

Q Didn't you say awhile ago on your direct examination that before it jumped over it would burn it out? A No, sir. 30

Q How would it jump over? A Why, jump the gap.

Q What would it do to the insulation, knock it off, wouldn't it? A In some cases it would not do anything. In other cases it would knock it off. It is a question of the intensity of the spark.

The Court. Right at that point, and taking the last part of your answer, taking again, I will say the point where Mr. Carpenter has pointed to the two pieces of insulation below his finger—I take it they are about a quarter of an inch in length. 40

The Witness. Half an inch or three-eighths of an inch in diameter.

The Court. What intensity of current would be necessary to make it jump that distance?

Charles Fisher, cross.

The Witness. Why, you could jump that with about two thousand volts.

The Court. Now, there is another place further down.

The Witness. Down in the motor. You mean that nickel in the motor?

10 *Mr. Carpenter.* Down here.

The Witness. That is a wood insulator. That is movable and adjustable.

Q You think this one up here is all right? A That is the best one of the two.

Q And to jump the one in the motor it would have to burn it out? A Not necessarily.

Q What would it do? A You could just burn off some of the insulation of the wire.

20 Q You wouldn't be able to use it again, would you? A Yes.

Q Without it being fixed up? A Yes.

Q Did you ever know a case where one of those has been burned out that way? A Yes, sir.

Q Where? A I don't know just where.

Q When did you see it? A During my time.

Q Well, you are no spring chicken. How long ago is that?
A Well, say six years ago.

Q Same type of engine as this? A No, not the same type.

30 Q Not the same type. Do you know what make of engine it was—Reeder? A I believe there was a Morris motor on it, though; I don't believe they made their own motors at that time.

Q How was that motor wound, do you know? What kind of windings? A Series windings.

Q What? A Series windings.

Q Not shunt winding? A No, sir.

Q You told us what effect high voltage would have? A Yes, sir.

40 Q What effect do the different amperes have on one of those things? A Why, the ampere is the counter electric motor force; that is the heat; that is what burns them up.

Q You mean to say what you want us to get from your testimony is that if lightning should hit that and come down a person would get a shock? Is that what you mean?

Charles Fisher, cross.

Mr. Walscheid. He has not said anything about lightning. I object.

A Not necessarily.

Q Is that what you tried to give us? A No, sir.

Q You are speaking about a current of 2,000 volts jumping that insulation? A Yes, sir; under condition. 10

Q What would happen when the 2,000-volt current came—broke its way through the transformer on the pole? A Nothing.

Q It would not burn out? A No, sir.

Q How could it go through without doing it? A Through the transformer?

Q Yes. A The transformer has three legs. The neutral leg of the transformer is grounded. The two outside legs have absolutely no ground connection. The outside legs should break down and ground itself upon the cord and burn out the secondary windings, the outside legs, secondary windings also carry the current indefinitely to almost any length; it goes on. 20

Q If 2,000 volts came down through the pole down through this engine it would burn the thing out? A No, sir.

Q Blow the fuse out? A Possibly.

Q You know it would, don't you? A No, sir. I have seen cases where there were fuses that an elephant couldn't pull it off.

Q You are hitting the unusual fuse now, aren't you? A Not unusual. It is usual. 30

Q If a 2,000 volt came down through that machine you would not be able to use it until it had all been fixed up, would you? A No, sir.

By Mr. Walscheid.

Q What do you mean by "No, sir"? A You would not be able to use it on anybody.

Q That you would or would not? A Not.

The Court. Have you had any experience, Mr. Witness, either by research or study to know what voltage of electricity is necessary to produce that in a human being? 40

Mr. Walscheid. I object to that as not a fair question.

The Court. I won't ask it.

Mr. Walscheid. I would like to say "produce a burn."

Charles Fisher, cross.

The Court. If a voltage of 2,000 volts entered that instrument and passed beyond the engine and passed on down to the end of the instrument, would the voltage be the same at the time it left the instrument as at the time it came in, namely, 2,000?

10 *The Witness.* Yes, sir, if it went through the instrument.

The Court. If it went through the instrument as has been said, there might be a possibility or probability of it doing—what I am getting at is when it enters the instrument at 2,000, when it left the instrument, if it did leave the instrument at either end, it would still have the same voltage, 2,000?

The Witness. Provided it comes in on one side.

20 *By Mr. Carpenter.*

Q If the patient got a shock the operator would certainly get one, too, if the current came through? A If it went through the operator.

Q But if it went through the machine? A He would not.

Q Where are you going to get it now coming up through the chair? A What is that?

30 Q If the current went through the engine and got down to the patient and the operator had hold of the engine, he would get a shock, too, wouldn't he? A No; absolutely not.

By Mr. Walscheid.

Q Why not? A Because he is not grounded.

Q And the patient is grounded? A Possibly, yes.

Q The patient sitting in that chair.

Mr. Carpenter. I move to strike that out. He said possibly. He is testifying to possibilities and not probabilities.

40 Q The patient sitting in a dental chair, metal dental chair, with these wooden arm pieces and with this cuspidor, procelain cuspidor, and the metal bracket and the water line running down to the ground, as I have heretofore described to you—is such a person grounded? A Well, let me ask what a porcelain cus-

Edith McFarland, direct.

pidor means. Is it a steel cuspidor covered with porcelain enamel or is it a porcelain cuspidor?

The Court. We cannot tell you that. All we have is a porcelain cuspidor.

Mr. Walscheid. And flowing water in the cuspidor running down. 10

A That has a tendency to carry current; yes, sir.

Q Is that person grounded? A Provided she is touching any of those parts, yes, sir.

Q Providing she is touching any part of that chair excepting the wooden arm? A Yes, sir.

Mr. Walscheid. That is all.

Mr. Carpenter. That is all.

(Witness excused.) 20

EDITH McFARLAND, sworn.

Direct examination by Mr. Walscheid.

Q Where do you live? A 4680 Hudson Boulevard, Union Hill.

Q Are you married? A Yes, sir.

Q What is your husband's name? A Raymond McFarland.

Q Did you know Cornelia Ollert in your lifetime? A Yes, sir. 30

Q How long did you know her? A Between eight or nine years.

Q Were you in the habit of visiting her? A Quite frequently.

Q Did your husband visit her, too? A Yes, sir.

Q How often would you visit her? A Well, we tried to see each other once a week. If she came to see us or we came to see her.

Q So that you saw each other on the average of twice a week? A No, once a week. Either she came one week and we went the other week. 40

Q Do you remember the time when she first went to the dentist's in 1916? A I saw her a few days before. She told me she was going to the dentist's.

Edith McFarland, direct.

Mr. Carpenter. I object to that and move to strike it out. It is hearsay.

The Court. Well, "She told me she was going to the dentist's"—it is only for the purpose of fixing the time?

Mr. Walscheid. That is all.

10 Q Did you see her after the time that she is supposed—in relation to the 19th day of June, 1916—in relation to that time, just before that when did you last see her? A I saw her the day after she made her first visit to the dentist's.

Mr. Carpenter. I move to strike that out as a conclusion.

Mr. Walscheid. All right.

20 Q How many days before, before the 19th? A I saw her on the 14th.

Q On the 14th? A On the 14th.

Q On the 14th of June. And where did you then see her? A I saw her in her kitchen.

Q Were you with her any length of time? A I should say about an hour.

Q Talk to her? A Yes.

Q Did you notice her general appearance? A Why, I saw nothing different about her, just as she always was.

30 Q Was there anything—did you notice anything about her eyelids?

Mr. Carpenter. I object to that as not rebuttal testimony.

Mr. Walscheid. Well, certainly it is.

The Court. There were certain other things brought out on your side as to her appearance.

Mr. Carpenter. I know that, but that was in direct defense of the plaintiff's main case.

40 *The Court.* If you brought out anything at all that they did not bring out they certainly have the right to attempt to rebut it.

Mr. Carpenter. Well, I only want to call it to your Honor's attention. I would like to get through with this case some time.

The Court. You are not any more anxious than I am.

Edith McFarland, cross.

Q (Repeated by the stenographer.) Was there anything—did you notice anything about her eyelids? A Nothing unusual.

Q Was there any drooping in the right or left eyelid? A Not that I could see, and I was pretty close to her.

Q Was there any swelling in the cheek? A Not that I noticed. 10

Q Was there any florid discoloration of the cheek? A Not that I noticed.

Q Was there anything about her breath that you noticed?

Mr. Carpenter. I object to that as leading.

A Nothing, not at all.

Mr. Carpenter. The witness can't tell what her condition was.

Mr. Walscheid. I did not ask her about her condition. 20

The Court. Well, you see, this is rebuttal, too, and it goes directly to the denial of some particular thing, if it does deny.

Q Did you ever notice Mrs. Ollert's teeth? A Yes, very often.

Q What kind of teeth did she have? A She had very nice teeth, clean.

Q As to cleanliness, were they clean or dirty? A They were very clean. 30

Q Very clean? A Yes.

Q Did you ever notice the condition of her home? A Yes, I did. She was—

Q Was that clean or dirty? A Very clean. She was very neat.

Cross examination by Mr. Carpenter.

Q Where do you live? A 4680 Hudson Boulevard.

Q Were you a friend of Mrs. Ollert? A Yes.

Q What is the number of Mr. Ollert's place on the Boulevard? A That I don't remember. I know where it is, though. 40

Q How far away from him do you live? A I am at Third street and he is about at Tenth street on the Boulevard.

Q You do not remember her condition particularly on the 14th of June, nothing more than you had known her six months

Raymond McFarland, direct.

before? A Why, yes, I do. She had just moved a short time and I had talked to her and noticed her very particularly.

Q How do you know it was the 14th of June you were there?

A Because she said she was to the dentist before, the day before.

10 Q That is the only reason you remember it? A And that was the 13th.

Q It might have been the 14th of May that she actually went to the dentist's on the 14th—the 13th of May? A Well, I can remember it was June.

Q You mean on the 14th of June you had her open her mouth and you examined her teeth, do you? A No, certainly not.

RAYMOND McFARLAND, sworn.

20 *Direct examination by Mr. Walscheid.*

Q You are the husband of the preceding witness? A Yes, sir.

Q Did you know Mrs. Cornelia Ollert in her lifetime? A Yes, sir.

Q How often did you see her in her lifetime? A Possibly once, at least, a week; once a week.

Q And what would you do on those occasions? I mean how did you happen to meet? A Well, it was just for sociability sake. We would go there for an evening up to her place and
30 Mrs. Ollert would come to our place.

Q Do you remember the time she took sick? A Yes, sir.

Q The sickness which was followed by her death? A Yes, sir.

Q In relation to the date when she took sick, do you know that date? A No; I don't know the exact date.

Q Can't you speak up a little bit? A I don't remember the date.

Q Do you remember the year? A It was in 1916.

Q And the month? A It was in June.

40 Q In relation to that date, did you see her after that date?
A After the—

Q After the date that she took sick?

Mr. Carpenter. He does not know the date she took sick.

Raymond McFarland, direct.

Q In relation to that occurrence did you see her after she took sick? A Yes; I saw her.

Q Where did you see her then? A I saw her up in her house.

Q In her bed? A Yes, in her bed.

Q What was the condition of the room she was in? A The room was all right. 10

Q As to cleanliness? A Clean.

Q And did you see her before— A Yes, sir.

Q —she took sick? A Yes, sir.

Q How shortly before? A Possibly three or four days.

Q Three or four days before. And when did you then see her? A I saw her in her kitchen.

Q Did you talk to her? A Yes, sir.

Q At that time did you notice her general appearance? A Yes, sir. 20

Q Notice anything about it? A Not a thing.

Q Was there any drooping of the eyelids, right or left? A No, sir.

Mr. Carpenter. That you noticed?

Q Well, was there at that time? A No, sir.

Q Was there any swelling of the cheeks at that time? A No, sir. 30

Q Was there any florid discoloration of the cheeks at that time? A No, sir.

Q Was there anything about her breath at that time that was offensive? A Not that I could see or smell.

Q Did you come near enough to her to know? A No; I wasn't very close to her.

Q How close to her were you? A Why, she was sitting at one end of her table and I was way up at the other end.

Q Did you notice Mrs. Ollert's teeth? A Why, when she smiled you could always see. She always raised her— 40

Q What kind of teeth did she have? A Very nice teeth.

Q Were they white or discolored? A They seemed to be white.

Mr. Walscheid. Cross examine.

John W. Burgess, direct.

Cross examination by Mr. Carpenter.

Q You didn't pay any particular attention to them at all, did you? A What is that?

10 Q You did not pay any particular attention to her teeth at any time, did you? A Why, you couldn't help but notice them when she smiled.

Q You mean they were prominent? A Yes, sir.

Q You didn't have her open her mouth and examine them? A No.

Q You were not any closer to her in the month of June, 1916, to examine her teeth than I am from you; were you? A I might have been closer than that.

Q Well, a foot or two nearer? A Yes.

20 Q You did not make any careful examination of her at all? A I did not make no careful examination.

JOHN W. BURGESS, sworn.

Direct examination by Mr. Walscheid.

Q Where do you live, Mr—? A Union Hill—I live in Weehawken.

Q What is your occupation? A Engaged in starting and lighting systems on automobiles at the present time.

Q Have you had any electrical training? A Yes, sir.

30 Q What training have you had? A About seven years with the Westinghouse people; about three and half years—

Q You say the Westinghouse people, whom do you mean? A The Westinghouse Electric Manufacturing Company, Pittsburgh.

Q And what did you do with them? A Well, it was principally testing work, and some construction work.

Q What other experience have you had? A I have been with the Hudson and Manhattan people down here three and a half, Hudson and Manhattan Railway.

40 Q The line that comes into Hoboken here? A Yes, sir.

Q The subway? A From the Manhattan Transfer.

Q What did you do with that company? A I was electrical maintenance worker, construction work.

Q Have you had any personal experience coming in contact with electricity? A Yes, sir.

John W. Burgess, direct.

Q What have been the results? A Sometimes it was a shock; other times it resulted in a burn.

Q Shock and burn? A Yes, sir.

Q Have you seen any cases of the result of coming in contact with electrical current? A Yes, sir.

Q About how many? A Well, a great many when you take into consideration small burns and shocks. 10

Q And can you describe to us the appearance of an electric burn upon the human body?

Mr. Carpenter. I object to that because it has already been gone over and there is no evidence that this woman had an electric burn or that this instrument was used on her. Same old objection.

The Court. I will rule the same. Take your exception.

Q Can you? A Yes, sir. 20

Q Do so, loudly so the jury can hear you? A Usually a white or very light yellow spot. The burn—the flesh is somewhat irritated around the outer edges of it, and if the burn is bad enough it will burn in very deep.

Q Produces a hole?

Mr. Carpenter. I object to that as—

Mr. Walscheid. All right. Strike it out. Burns very deep.

Q Are you acquainted with the type of machine, the Reeder dental machine? A No, I am not. 30

Q You are not. Will you examine the machine, please? A (Witness does so.)

Q Have you done so? A About as thoroughly as could be done without tearing it down.

Q If such a machine is hitched to a supply line running to the building in which it is located, which supply line carries electricity of a voltage of 1,500 volts or more and the instrument is used upon a patient during an electrical storm, would it or would it not be probable that an electric current should pass through the instrument to the drill or bur used by the operator? 40

Mr. Carpenter. I object to that. The witness says he does not know anything about that machine. He looked at it as a jurymen can look at it or your Honor

John W. Burgess, direct.

can look at it. He made no tests of it or examination of it and is not familiar with the thing; and I submit anyhow the question on the form of it is improper. It is hypothetical and does not contain the facts in this case. There is no evidence of any current of 1,500 volts or more going through.

10

The Court. Do you think, Mr. Witness, yourself that with the examination you made you could properly answer that question?

The Witness. Well, there are a great many things—

The Court. Could you answer that question honestly and fairly with the examination you made and the knowledge you now have?

20

The Witness. Yes, sir, under the conditions Mr. Walscheid mentioned, I could.

The Court. Without any qualification of the intensity of this electric current or anything of the kind?

The Witness. Why, I think it would be very safe; yes, sir.

The Court. Very safe for you to answer?

The Witness. Yes, sir.

The Court. I will let him answer. Take your exception to it.

30

Mr. Carpenter. I take it.

Q (Repeated by the stenographer.) If such a machine is hitched to a supply line running to the building in which it is located, which supply line carries electricity of a voltage of 1,500 volts, or more, and the instrument is used upon a patient during an electrical storm, would it or would it not be probable that an electric current should pass through the instrument to the drill or bur used by the operator?

40

The Court. I have changed my mind, gentlemen. I will sustain the objection.

Mr. Walscheid. I pray an exception.

The Court. You may have it.

Mr. Walscheid. In order that I may reframe the question, may I have your Honor's reasoning?

John W. Burgess, direct.

The Court. I do not think the witness is qualified. I cannot make myself believe that a witness by merely a superficial examination of this instrument without any designation—

Mr. Walscheid. Let us see whether that is so.

Q Do you know what this box is? A Yes, sir; that is the resistance. 10

Q What is it? A That is the resistance box controlling the feed and the motor.

Q What is this box? A Controller box.

Q What is in here? A The armature and field windings.

Q And is there anything peculiar—armature and field windings, is that what you call it? A They are all about the same.

Q They are all about the same. And the contents of this box which you have called—what did you call it? A That is the controller box. 20

Q What are the contents of that controller box?

Mr. Carpenter. If you know, if you have knowledge.

Q What should it contain? A That controls both the direction and rotation of your motor, and also the speed of your motor.

Q Does it do anything else? A And at the neutral point disconnects the current.

Q What does this box do? A That contains the resistance which controls the various speeds of your motor. 30

Q Now, is there anything else that you should know in order to be able to testify about that machine?

Mr. Carpenter. I object to that question as improper and speculative in the superlative degree.

Mr. Walscheid. I withdraw the question.

Q Did you notice the insulation? Do you know where the points of insulation are, can you tell? A From what can be seen on the outside, yes. 40

Q Where else would you expect insulation? A On your windings, armature and fields.

Q And where else? A And field.

Q And in dealing with this question are you taking in that insulation which you expect to find? A Yes, sir.

John W. Burgess, direct.

The Court. Do you know what the insulation is that you mentioned in the armature and field.

The Witness. Yes.

The Court. In that particular instrument?

10 *The Witness.* Well, it is practically the same in all generators.

The Court. Well, assuming that it is, do you know in this instrument what it is?

The Witness. I imagine it is.

The Court. You imagine?

The Witness. Yes, sir.

Q How long would it take you to look at it? A It would have to be stripped down.

20 *The Court.* And that would have some bearing upon your answer, would it not?

The Witness. Yes, sir.

Q Have you heard Mr. Forstbauer's testimony? A Yes, sir.

Q Tell us what insulation he spoke about?

Mr. Carpenter. I object to that. That is calling on this man to characterize Mr. Forstbauer's testimony.

30 *The Court.* No; he is simply asking him what he testifying to.

Mr. Walscheid. I want to give this witness the benefit of giving your Honor an honest opinion.

Mr. Carpenter. An honest opinion, yes. We all want that.

Mr. Walscheid. Of course we do.

Q Now, tell us, if you will, what insulation you say there is in that instrument based upon what Mr. Forstbauer said.

40 *Mr. Carpenter.* I object to that. The question is improper.

Q How long would it take to open that box?

The Court. Well, it would take so long I am not going to have it done now. It is going to be done, if done at

Michael Ollert, direct.

all, at some period when we are not going on with the case.

Mr. Walscheid. Well, may we take a recess at this time of ten minutes to two?

The Court. No. Are there any other witnesses? If you have other witnesses, why, he may make the examination then. 10

(Witness withdrawn for the present.)

MICHAEL OLLERT, recalled.

Direct examination by Mr. Walscheid.

Q Mr. Ollert, prior to the 19th day of June, 1916, was there any apparent trouble in your wife's face outside of this tooth which you have spoken about? A No, sir. 20

Mr. Carpenter. I object to that as calling for a conclusion.

Mr. Walscheid, Apparent, I said.

Q Was there any drooping or fluttering of the eyelid? A No, sir.

Q Neither one? A No, sir.

Q Was there any swelling of the cheeks? A No, sir.

Q Was there any discoloration of the cheeks? A No, sir.

Q Any florid discoloration? A No, sir. 30

Q Did you ever notice your wife's teeth? A Yes, sir.

Q What did you notice about them? A I noticed that she brushed them every morning when she got up.

Q Was there any scum or tartar on them? A No, sir.

Q And what about the house? Was it dirty or clean? A Very clean.

Q And after the occurrence, after she was taken to bed, what was the condition of the room in which she was kept? A Very clean. 40

Q And who attended to the cleaning then? A At that time?

Q Yes. A Why, her mother; my mother-in-law.

Q Her mother?

Mr. Walscheid. Cross examine.

Michael Ollert, cross.

Cross examination by Mr. Carpenter.

Q Mr. Ollert, were you ever convicted of a crime? A No, sir.

Q Were you not sentenced to jail for sixty days for stealing brass by Justice of the Peace E. A. Pollus of North Bergen? A I refuse to answer that.

The Court. What is the objection?

Mr. Walscheid. Why, Pollus has no jurisdiction to send a man to jail, a justice of the peace, your Honor knows that—for larceny.

Mr. Carpenter. Well, we will find out about this.

Mr. Walscheid. And the only way to do it is to produce the record of conviction. He has denied it.

The Court. He might, if the question were proper, admit it on further questioning, but I do not know.

Mr. Walscheid. What is the date?

The Witness. Not for stealing brass; no, sir.

Q Were you convicted and sentenced to jail?

Mr. Walscheid. I object to that as immaterial and irrelevant.

The Court. Oh, well, it is not.

Mr. Walscheid. It must be for a crime if a justice of the peace might send him away.

Mr. Carpenter. It was.

Mr. Walscheid. I object.

The Court. Did not a justice of the peace have jurisdiction over petty larceny cases until recently?

Mr. Walscheid. No, sir.

The Court. All right. Then the question, I suppose, is improper, because he could not be convicted.

Q Were you convicted of stealing brass or stripping brass from an engine? A No, sir.

Q Were you sentenced to jail for some such charge as that?

Mr. Walscheid. I object to that "some such charge as that."

Michael Ollert, cross.

Q Did a police magistrate of North Bergen by the name of E. H. Pollus—

Mr. Walscheid. I object to that. The record must now be produced.

The Court. No.

Mr. Walscheid. Secondly, that the justice had no jurisdiction over such a crime.

The Court. I do not think the question is improper. He might ask him as long as I will permit him to ask him if he was convicted of a crime, and he may continue to deny it. If he continues to deny it then the proper proof will be by the record undoubtedly.

Q Answer the question. A No.

Q You said a minute ago in answer to my question, "Not for stealing brass, no." What was the charge that you were convicted of?

Mr. Walscheid. I object to that as incompetent, immaterial and irrelevant.

The Court. Why do you say it is immaterial and irrelevant?

Mr. Walscheid. Because it is only made so by the statute.

The Court. Of course.

Mr. Walscheid. And the statute distinctly prescribes that it shall be a crime. Now, then, if it was before a justice of the peace it could not have been a crime, because a justice of the peace has not had and has not now any jurisdiction over a crime except as a committing magistrate—oh, I withdraw the objection.

Q What did you mean when you said, "Not receiving brass, no"? What did you mean? Just tell the jury. A Why, I didn't steal any brass and I never stripped any engine.

Q Weren't you sentenced to jail for sixty days? A I have been sentenced to jail for sixty days.

Q What for? A What for? Because I tried to prove my innocence and he said, "You are too damned fresh and I will give you ninety days."

John W. Burgess, direct.

Q And you went to jail for it, too, didn't you? A Well, I was there only a day.

Q You were convicted of it, weren't you, by the Judge? A For being fresh, yes, and trying to prove that I did not steal this brass or never stripped an engine.

10 Q You were accused of a crime and you were found guilty and sent up, weren't you, and you stayed there only one day? A No, I was not found guilty.

Mr. Kappes. I object. It brings up the same question again as to whether or not there was a conviction.

The Court. I understood the objection was withdrawn to it.

Mr. Kappes. There could not be a conviction.

The Court. I suppose we are back to it again.

20 *Mr. Walscheid.* Withdraw it. It is withdrawn. Let it go.

Mr. Carpenter. That is all.

Mr. Walscheid. That is all.

(Witness excused.)

Recess until 2 o'clock P. M.

AFTER RECESS.

30

JOHN W. BURGESS, recalled.

Direct examination by Mr. Walscheid resumed.

Mr. Walscheid. I withdraw the last question of this witness.

40 Q Can you tell us whether or not a current of electricity could pass from this plug to the instrument which I have in my hand to the point at which the control or bur is inserted, as that instrument is equipped?

Mr. Carpenter. I object to that question. I submit the witness has not yet familiarized himself with that machine, has not tested it, has not examined at the noon recess, as suggested by your Honor.

John W. Burgess, direct.

The Court. I did not make the suggestion. However, I would like to know whether or not you have examined it.

The Witness. No, sir; I have not.

Q From your examination are you satisfied that you can tell—

Mr. Carpenter. I object. He said he made no examination. 10

Mr. Walscheid. He has examined it.

The Court. Well, now, if you do not qualify him further, Mr. Walscheid, I am not going to permit the examination to proceed, because I am not satisfied that he has qualified himself sufficiently to speak.

Q Did you hear the testimony of Mr. Forstbauer as to the insulation? A Yes, sir.

Q Can you tell us what insulation he said there was in that instrument, in that machine? 20

Mr. Carpenter. I object to that. It is simply basing this witness' testimony on somebody else's testimony and I submit under the rules of evidence that is not proper.

The Court. How can I say yes to that? He is asked to base his testimony upon that of a witness that was produced by your side. You certainly cannot, I take it, quarrel with the testimony of the witness that this witness is being referred to; but the difficulty is the witness might say, "Yes, I did hear and understand—" 30

Mr. Walscheid. I am getting over that by having him tell.

The Court. We will have to go back over the testimony of the witness in question to see if he did understand it correctly.

Mr. Walscheid. Your Honor can recollect whether or not it is the testimony.

The Court. I can only recollect only provided I know exactly the witness you are referring to did say, and I cannot say that I do remember that. The exact and careful way would be to go back and incorporate in your question that witness' testimony. 40

Mr. Carpenter. Mr. Hillis incorporates what I think is the meat of this by saying that the witness must testify

John W. Burgess, direct.

of his own knowledge and not from what somebody else said in court.

The Court. He is not going to be asked to pass upon the testimony of this other witness and qualify it or hold it down.

10 *Mr. Walscheid.* I withdraw that question for the moment.

Q Will you step down here? A (Witness does so.)

Q Will you tell me whether you believe there is insulation in this instrument?

Mr. Carpenter. I object. This man does not know anything about that machine. He says he does not. So, therefore, why let him guess about it?

20 *The Court.* He may show some portions that he can say there are some insulations that are open.

Q Now, go ahead. A Here are two of them.

Mr. Carpenter. I ask an exception to the ruling.

Q Here are two of them, indicating what? A Indicating that this arm is insulated from this arm.

Q Where else do you say that there is insulation? A This is another insulator here.

Q Another insulator there, indicating the line which is the inlet line to the— A Motor.

30 Q To the motor? A Yes.

Q And was that pointed out by Mr. Forstbauer? A Yes, sir; I believe it was.

Q Now, where else is the insulation? A And then there is the usual insulation on the inside of the motor; that is the field and the armature winding.

Q Was that also pointed out by Mr. Forstbauer? A I believe it was, sir.

40 Q Were there any other insulations pointed out by him that you heard? A Insulation on the inside of this controller box.

Q Insulation on the inside of this controller box? A And the resistance box.

Q Was that pointed out by Mr. Forstbauer? A Yes, sir.

Q Was there any other? A Of course, this wire is naturally insulated.

John W. Burgess, direct.

Q Insulated on the outside? A Yes.

Q But that insulation does not stop the flow of current to the motor? A No, sir.

Q That is to stop the flow of current from getting outside the wire? A That is all.

Q Now, what insulation is there on this machine to stop the flow of current as distinguished from insulation to prevent it getting outside of the wire in which the current travels? A The insulation on the wire. 10

Q You do not understand my question. A Well, nothing, any more than these bushings at this point, and at this point here.

Q That is all. The other insulation is merely to keep the current in—

Mr. Carpenter. I object to that. 20

Q Well, for what purpose is the other insulation? A To confine the current to the wires.

Q Now, then, can you tell us whether or not in spite of the fact that this machine has this insulation that you have indicated for the purpose of preventing the flow of electricity—in spite of that fact—whether in spite of that fact a current of electricity can pass through the machine or instrument from the plug which is inserted into the lamp socket to where the drill or bur is attached?

Mr. Carpenter. I object. He has not qualified a bit more than he was this morning, and he is simply guessing about it. 30

The Court. However, I am going to let the question be asked, and take your exception. I realize the fact that he did not make the examination.

Q Why couldn't you make the examination? A Well, it would take considerable time.

Q Could you open the motor? A Well, I did not examine it very carefully to see— 40

Q What about the nuts or bolts? A It looked to me as though they needed a special wrench.

Q You could not open it without a special bit of machinery? A That is the way it appeared to me.

Q Now, I ask you to answer the question.

Motion for Direction of Verdict.

The Court. Take your exception.

Mr. Carpenter. I take it.

A Yes, sir; it can.

Q That is, the current can pass through? A Yes, sir.

Mr. Walscheid. Cross examine.

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Cross examination by Mr. Carpenter.

Q You did not even try this noon to test that machine, did you? A No, sir.

Q You never tried to see whether you could get a current in there or not? A Not on that particular machine; no, sir.

Q When you say a current could pass to the end of it, you are just guessing at it, aren't you? A No, sir.

Q You are not? A No, sir.

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Q Upon what do you base your supposition, then, that currents can get through? A If the pressure were high enough it would pass through anything.

Q What is that? A If the voltage were high enough it would pass through any kind of insulation.

Q That is what you mean by your testimony? A Yes, sir.

Mr. Carpenter. That is all.

Mr. Walscheid. That is all.

(Witness excused.)

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BOTH SIDES REST.

DEFENDANT'S MOTION FOR DIRECTION OF VERDICT.

Mr. Carpenter. I move for a direction of verdict in favor of the defendant on the same grounds I made in the motion for non-suit, and on the further ground that it now appears affirmatively from the defendant's testimony that there was no instrument using electricity, or machine in which electricity may be used, in fact used on Cornelia Ollert on the 19th of June, 1916; on the further ground that it now appears that Cornelia Ollert when she first went to the dentist was ill. It appears that she had this drooping eyelid; that she had this condition around the gums at the time she first went to the dentist, and that she had a condition that gradually grew worse; and there is

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Motion for Direction of Verdict.

absolutely no connection proved in this case between the treatment of the dentist, according to the facts which are in the case, and the fact of death on the 25th of July, over a month later than the date she was last treated by the dentist.

There is no causal connection proved between the tenderness and the cerebral congestion from which she died, and the treatment in the dental place; because we have it uncontradicted that every instrument used on Mrs. Ollert was sterilized before it was used; every instrument used was such as is used in the common practice of dentistry. There is no proof that anything that happened caused tetanus, and it was from tetanus that this cerebral congestion resulted which caused death.

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Now, you cannot point out in this case how tetanus got in that woman's system, and you certainly cannot connect tetanus with anything that happened in the doctor's office.

The Court. Suppose, Mr. Carpenter, that I have in my person, whether it be in my mouth or in my cheek, or hand or arm, or any other part of my body, that which contains, or which would develop tetanus germs, and you by your negligence cause an injury to happen to me and by and through that injury the germs reach my body, that they propogate and develop lock-jaw. Would you say that then there might not be a recovery.

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Mr. Carpenter. Well, that is a different case than this. There is no evidence in this case that there was any tetanus germs.

The Court. Of course, they can not be seen.

Mr. Carpenter. And, furthermore, their own doctor testified that you can get tetanus germs in the system by breathing, or on the food that you eat. Now, you have got to exclude before you can say there is any causal connection between tetanus and anything that happened in the doctor's office—you have got to exclude the possibility of those germs getting into her system either through the mouth or otherwise.

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The Court. No, you are not obliged to absolutely exclude—

Mr. Carpenter. But the burden is on the plaintiff to prove by the fair weight of the evidence, and where they have not proved it I think it is a court question. I think it is beyond dispute that there is a court question here.

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The Court. I cannot see it that way. I decline to direct a verdict.

Mr. Carpenter. I ask an exception.

Charge to Jury.

The Court. You may have it.

Mr. Carpenter. I offer this machine in evidence.

Mr. Walscheid. I understood it was offered.

The Court. If it was not it will be admitted, because it was used.

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Mr. Carpenter summed up to the jury for the defendant.

Mr. Walscheid summed up to the jury for the plaintiff.

COURT'S CHARGE TO THE JURY.*Gentlemen of the Jury:*

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This is an action by Mitchell Ollert, as administrator of the estate of his deceased wife, Cornelia Ollert—not as a general administrator, but as an administrator for the purpose of prosecuting the action, and is against Frederick W. Ziebell.

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The plaintiff by this action is seeking to have at your hands a recovery for the death of his wife, which death he alleges was proximately caused and brought about by the alleged negligent manner in which she received treatment at Dr. Ziebell's office, running from June 13th to June 19th, inclusive, and particularly directed to June 19th and the evening of that day, in 1916, from which alleged negligent treatment, as I have before said he alleges, his wife came to her death, that death occurring on July 25, 1916.

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In actions of this character there are several things which the plaintiff must make out, and make out by the greater weight of the evidence before he is in anywise entitled to have a verdict. One thing that must be made out, probably the most prominent thing—I say prominent because to my mind it seems it is the thing which must first engage the attention of jurors and to be satisfactorily decided, pursuant to the rule which I have given you of the greater weight of the evidence, in favor of the plaintiff, before any jury should ever go any further with a consideration of any other phase of the case, and that is the question of the alleged negligence.

Now, what does the plaintiff say that negligence was? I am reading now from the complaint in the cause which is the technical pleading which sets forth his allegations and his conten-

Charge to Jury.

tion. He says the defendant, meaning Dr. Ziebell, in treating the mouth and gums and teeth of said Cornelia Ollert, did not use ordinary skill and care, but negligently and unskillfully used instruments and appliances in the mouth of said Cornelia Ollert, which were unsafe, unfit, and unsanitary, and through which the said defendant allowed a current of electricity of great power and violence to pass into the mouth and body of said Cornelia Ollert in such manner that she became sick and disordered, and as a result thereof died on July 25, 1916.

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Negligence is determined from acts of the person charged, and may be either from things done which should not be done, or things omitted to be done which should have been done. Of course, before that explanation has any great value, or any value, it will be evident to you that there must be some rule of admeasurement of care which the one charged with negligence is in law expected and required to live up to. That was so in this case. The law does charge dentists, surgeons, physicians, professional men of that character, with the performance of their work and the treatment of their patients with a defined degree of care, and that defined degree of care in law is that care and skill which amounts to a reasonable degree of care and skill; that is, such reasonable degree of care and skill as dentitsts ordinarily exercise in the treatment of their patients. So as to the instruments and appliances which may be used by such persons; they must be reasonably safe and suitable, and such as ordinarily used and are in reasonably good repair; so that it may be said, and it is a fact, that the degree of care which this defendant was called upon in law to exercise toward his patients, including Mrs. Ollert, was reasonable care, that ordinarily reasonable care that ordinarily should be exercised by persons carrying on such a profession.

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So, therefore, you see, that is the rule of admeasurement, as it were, it is practically the yardstick by which you will pass upon the evidence which you have or may have before you which goes to the question of negligence.

I will say to you again that negligence may consist in either the doing of something which is not permitted by the rule which I have given you, or the failure to do something which that rule requires.

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I have already said to you that there are several matters which a plaintiff in a case of this character must establish, and

Charge to Jury.

must establish by the greater weight, or, as is sometimes said, fair preponderance of evidence before he is entitled to have you consider a verdict in his behalf.

10 The first thing I have already brought to your attention, and that is the question of negligence, and the question before you is—prominently before you, is, has the plaintiff made out by the greater weight or fair preponderance of the evidence, whichever you may better like to have it expressed to you, that this defendant in the manner in which he treated Mrs. Ollert was negligent? If your answer to that is no, that has not been made out, that has not been made out by the degree of evidence which the law requires, then you may stop your deliberations at that point; because then in fact and in law the plaintiff is not entitled to have a verdict, and your verdict may immediately be for the defendant.

20 If that has been made out, the next question, and serious one, immediately arises, and the query there would be, the question that you would put to yourselves would naturally be: Has the plaintiff made out by the greater weight of the evidence that such negligence, if any established, was the proximate cause of the death of Mrs. Ollert? If your answer to that is no, if that has not been made out, then again you need not go any further with your consideration of the case, because then again your verdict must be for the defendant.

30 You see, gentlemen, it is not only necessary, and it is not enough only to make out negligence, but if that has been made out then the next question is, has it likewise been made out by the same degree of evidence that such negligence was the proximate cause of the death of Mrs. Ollert, that it was the thing that produced and brought about her death? They are so linked up and tied up together, gentlemen, that the proving or establishing the one with the other is not sufficient. They must both be established by that same degree of evidence: namely, fair preponderance or greater weight of the evidence.

40 Now, the attending physician, as I recall it, says that the cause of death was cerebral congestion caused by lockjaw. I am bringing that to your attention for this reason: That with respect to that second matter, namely, whether or not it has been established that negligence on the part of the defendant, if any has been established, was the proximate cause of the

Charge to Jury.

happening, is closely connected up with the producing cause of death; and upon this point, and as to that, it is not enough, gentlemen, that the plaintiff leaves you in this position, namely, that you can say that it is possible that her death was caused as the result of the negligence, if any, of the defendant; but the plaintiff in law must go further, he must satisfy you by that preponderance or greater weight of the evidence of facts, from which you can reasonably say that, taking all of the facts and all of the circumstances into consideration, it is reasonably probable that Mrs. Ollert's death resulted as the proximate result of negligence worked toward her by this defendant, or by negligence which he was chargeable with; and, of course, in that connection, gentlemen, you must apply your good judgment and good common sense respecting the testimony that is before you. You must take into consideration, of course, all of the testimony that bears upon that point. Amongst those items of testimony certainly you will take into consideration what you find from the evidence to be true, and which you believe, and that of it which you do believe as to what was the condition of Mrs. Ollert and before the time complained of; because that may aid and assist you in determining this other important question as to whether or not it has been established that the cause of her death was proximately brought about and caused by any negligence upon the part of the defendant.

If these things have been established, gentlemen, and they have been established in the manner and by the weight and character of testimony which I indicated, then the plaintiff is entitled to have a verdict. Again, let me say to you, merely in passing—not for the purpose of emphasizing any particular piece of testimony over any other, because it is your duty to consider all the testimony in the case, give to it just that weight and consideration that you find it to be entitled to—but there is in the case some testimony on the part of Mr. Ollert as to what his wife said on the occasion when he says the defendant and Dr. Lauckner were present. It is evidence, which if believed, is important evidence in the case, and I simply bring it to your attention because of the importance and the value it has if true upon the cause that is before you for determination, and I say to you that as to it you are to give it just that same careful consideration which I am sure you will give to all of the testimony in the case, and when you have done that use the result

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Charge to Jury.

of that careful deliberation and scrutiny--I am speaking now of all the testimony--and apply to it the rules which I have given you, and then determine whether or not the plaintiff has made out in the manner I have indicated he must in law, in order to have a verdict, those two things upon which I have
 10 already quite extensively spoken to you; and if the result of all of that is that you find the plaintiff has made out those things, and both of them, then the plaintiff is entitled to have a verdict. If he has not done so, if he has failed in respect to any one of them, then he is not entitled to have a verdict, and your verdict must go to the defendant.

If the plaintiff is entitled to a verdict, of course, you will then need to know for what a verdict in a case of this kind and character may be had, and it is important that you should give unusual attention, if I may say so, gentlemen, to what I have to
 20 say to you upon the subject of a verdict in this case; because this is an action which is brought and maintained, and can only be brought and maintained under what we know as the death act; and if it were not for that act such an action as this could not be maintained; because, you see, Mrs. Ollert is dead, and, therefore, what a verdict may be for if the plaintiff is entitled to one, is controlled absolutely by what this act says a verdict may be had for, provided the plaintiff is entitled to one; in other words, you are limited to a finding, if one is to be had for the plaintiff, of that only which this act says there may be a finding for; and you
 30 cannot step aside from that without seriously transgressing and making your verdict an improper one. Now, that act says that in every such action as this the jury may give such damages as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the husband and next of kin of the deceased person. There is a husband in this case, and there are four children, constituting the next of kin. What is meant by pecuniary injury or pecuniary loss is defined to be this: A loss of money or of something by which money or something of money value may be acquired. In a case of this character you
 40 may not and cannot under your oaths and under the law which you are sworn to observe find anything for wounded feelings or loss of society or anything of a sentimental value. You see, the language is "pecuniary loss," or "pecuniary injury." Our courts have defined that to be this: "The deprivation of a

Chargè to Jury.

reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased." Compensation for such deprivation is, therefore, the sole measure of damages.

The question pertinently is this: What pecuniary return or value would have come to Mr. Ollert and the four children had Mrs. Ollert lived, for and during her lifetime, and that of himself and the children? You are to take into consideration a great number of things, far more, probably, than those which I will briefly bring to your attention; in fact, you are to take into consideration—the law requires you to take into consideration all the reasonable possibilities that your good judgment may bring to your attention in determining what the measure of damages would be. Amongst the items would be these:

Had nothing happened and the death of Mrs. Ollert taken place when it did, and had she continued to live, she might have died from natural or other causes at some short period thereafter. Then, of course, your pecuniary value to her husband and children would have ceased. It may be that had she lived her husband would have died at some short period from this time, even during her lifetime. Of course, the benefit to him then would cease, if any he were to have during his wife's lifetime. It would have ceased when he died. So with respect to the children. You are to take into consideration the age of the husband, which is thirty-five, I believe. The age of the wife at the time of her death was, I believe, twenty-five; and the ages of the children, which I understand to be four, six, twelve and thirteen years. You are to take into consideration and may take into consideration this also: Mrs. Ollert, had she lived, might have been taken down with some infirmity or illness that would have prevented and made it impossible for her to have been of pecuniary value or advantage to her husband and next of kin; or, if not totally disabled, it might have lessened her value from a pecuniary standpoint to her husband and next of kin. Of course, you are also to take into consideration this: That during that time, which would be the lifetime of Mrs. Ollert, and during the lifetime of Mr. Ollert, whatever pecuniary advantage would have come to him because of her living and continuing to live as his wife, he would have been under an obligation to clothe and care for her. Of course, by her death that has ceased.

Charge to Jury.

Now, it may seem, gentlemen, very mercenary that I should talk to you in this wise, but I have to, and I have to because that is the limitation of this statute. You see, it is only for pecuniary injury that a recovery may be had, and when you speak of pecuniary injury you must necessarily speak of it in this mercenary manner in which I have spoken of it.

There is one more thing, gentlemen: When you come to measure a verdict for the plaintiff, if the plaintiff is entitled to one, what the plaintiff is entitled to have is not that total sum which you may find he would have had as a pecuniary advantage to him and to the children had the wife lived and during their respective lives; because that advantage would not have come to him and them at one given time, but would have been spread out, as it were, and run over a period which marked the lifetime of his wife, as well as of himself and of the children, respectively. Now, and by a verdict given under this act the sum is to be fixed as of this time; and, therefore, it should not be that total sum which by the application of the rule I have given you would be the first sum at which you would arrive, but it would be that sum which you would first arrive at reduced, capitalized, as it were, or reduced to its present-day worth. It is that lesser sum which, given today, would equal in value the first sum which you may find in reasonable probability would have been received had Mrs. Ollert lived, and received during the lifetime of the respective parties; namely, the husband and the children, for and during the times that they would respectively live.

Now, gentlemen, that is all I can say to you in a case of this character. I have tried to make the rules plain, and they are not great in number. I have tried to impress upon you, although I think it is unnecessary for me so to do, the care with which you should pass upon the testimony that is before you; because the case is one of importance. It is important that the right should prevail as far as the law and as far as the evidence in the case warrants that happening.

It is your particular duty, of course, to pass upon and weigh up the evidence, determine what of it you believe and what weight you are to give to it, and then when you have done that to apply thereto the rules of law which I have given to you. When you have done that then your verdict will be a legal

Exceptions to Charge.

and a proper one. Anything short of that will not reach that point, and your verdict will not be a legal or a proper one.

If your verdict should be for the defendant you announce that by saying that you find for the defendant and against the plaintiff.

If you find that the plaintiff is entitled to have a verdict 10
you will say that you find for the plaintiff and against the defendant and assess the plaintiff's damages at so much money, which would be expressed in one lump sum.

With that you may take the case.

(The jury retired.)

Mr. Walscheid. I take exception to the Court saying it was the duty of the plaintiff to prove by the greater weight of the evidence, or by the preponderance of the evidence, whatever 20
they choose to call it, that the negligence of the defendant produced the death of the plaintiff's intestate.

The Court. You may have it.

Mr. Carpenter. I ask an exception to the Court's refusal to charge each of the defendant's requests to charge as they were handed up.

The Court. I declined to charge all of them except as to number 6, which I did practically charge.

Mr. Carpenter. I see. To each of the others you will give 30
me an exception to your refusal.

The Court. Number 18 I declined to charge, except in the language in which I did charge upon the subject. The others I declined to charge.

Mr. Carpenter. I want to ask an exception to the Court leaving to the jury the question whether or not the defendant used or exercised the care required by law; also to the Court's leaving to the jury the question whether the plaintiff has made out that the defendant was guilty of negligence, which I think was 40
a Court question, and that there was no evidence; also to your Honor's leaving to the jury to say whether the plaintiff has proved such negligence to have been the proximate cause of the death of Mrs. Ollert. I contend that there is no causal connection proved between them.

Defendant's Requests to Charge.

Also to the charge to the effect that if these things are established by the plaintiff, the plaintiff is entitled to a verdict. I think that is a Court question and not for the jury.

Also to the Court's charging that if his, Ollert's evidence is believed, it is important evidence.

10 Also I except to the Court's charging the jury to "give the said evidence of Ollert that same careful consideration that you do all of the evidence."

It is my contention that that should be disregarded by the jury. I think that all those conversations of Mrs. Ollert should not be considered by the jury on the question of negligence.

Also the statement of the Court to the jury that had not this thing complained of happened, she might have died soon afterward. My contention being that there is no legal proof that anything happened to the plaintiff's intestate, Mrs. Ollert.

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DEFENDANT'S REQUESTS TO CHARGE.

(1) There is no lawful evidence in this case which supports the allegations in the complaint and your verdict must be for the defendant.

(2) There is no evidence that the defendant negligently or unskillfully used instruments or appliances in the mouth of Cornelia Ollert which were unsafe, unfit or unsanitary.

30 (3) There is no lawful evidence that the defendant used instruments or appliances in the mouth of Cornelia Ollert through which the defendant allowed a current of electricity to pass into the mouth of said Cornelia Ollert.

(4) There is no lawful evidence that a current of electricity passed through any of the defendant's dental instruments into the mouth or body of the said Cornelia Ollert.

(5) There is no lawful evidence of any improper or negligent treatment by the defendant of the said Cornelia Ollert.

40 (6) The evidence in this case is that Cornelia Ollert died of cerebral congestion, which in turn was caused by tetanus or lockjaw.

(7) There is no evidence that the cerebral congestion or the tetanus or lockjaw entered the body of the said Cornelia Ollert

Defendant's Requests to Charge.

by reason of any careless or negligent act on the part of the defendant, and your verdict therefore must be for the defendant.

(8) Dr. Adams, who treated Cornelia Ollert, testified that he could not say what caused the lockjaw, and therefore the jury cannot speculate as to what caused it, and the verdict of the jury must be for the defendant.

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(9) There is no lawful evidence that either the defendant or his assistant did anything to the said Cornelia Ollert which the jury might find was careless, improper or negligent treatment of Cornelia Ollert.

(10) If the jury believe from the evidence that Cornelia Ollert was ill when she first called on Dr. Ziebell on June 13, 1916, and if they further believe that she continued to grow steadily worse and died on July 25, 1916, over four weeks after the last treatment in Dr. Ziebell's office, it is a fair inference that the condition from which she suffered when she first went to Dr. Ziebell's office on June 13, 1916, had a direct bearing upon the cause of her death on July 25th.

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(11) There is no lawful evidence in this case that any electrical drill or dental instrument operated by electricity was used in the mouth of Cornelia Ollert by either the defendant or his assistant.

(12) The uncontradicted evidence in this case is that nothing was done in the office of the defendant, either by the defendant or his assistant, which burned or cut or lacerated the deceased's mouth.

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(13) The jury must disregard that portion of the testimony of Mr. Ollert, which purports to relate to statements alleged to have been made by Mr. Ollert as follows:

"Mike, that is not a doctor from New York. He worked on my mouth. He was drilling in my tooth when I got an awful shock. He left the drill in my tooth and went across the room, shut off the electricity and came back, and taking the drill out of my mouth said, 'My child, what have I done. I didn't mean to do that. You must have suffered awful.'"

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This testimony is what is known in the law as a self-serving declaration not made at the time the alleged happening occurred, it was not made under oath by the speaker, and cannot lawfully be considered by the jury in their decision of this case.

Defendant's Requests to Charge.

(14) Assuming all the evidence in the plaintiff's case to be true, there is no evidence that anything done by the defendant or his assistant was the proximate cause of the death of the said Cornelia Ollert.

10 (15) There is no evidence in this case that Dr. F. W. Ziebell, the defendant, himself was guilty of any act, either of commission or omission.

(16) There is no evidence in this case that Dr. Lauckner, who on June 13th and June 19th, 1916, was assisting Dr. Ziebell, was guilty of any negligence whatsoever.

20 (17) The jury must bear in mind that according to the testimony of Mr. Ollert himself the person who Mrs. Ollert said caused injury to her was not Dr. Ziebell and not Dr. Lauckner, but the man who accompanied Dr. Ziebell to Mr. Ollert's house. This, according to the testimony, was Dr. Karl Schmidt, a friend of Dr. Ziebell's, and not the defendant or any one working for or under the defendant.

NOT TO BE CHARGED IF THE TESTIMONY HEREINAFTER REFERRED TO
IS STRICKEN OUT BY THE COURT, OR IF REQUEST
NO. 13 IS CHARGED.

30 (18) The jury must bear in mind that what Mrs. Ollert said to her husband was not under oath, and her husband's statement therefore as to what she said must be scrutinized with great care. They must bear in mind that at the time she said it she pointed out as the person who was drilling her teeth not as Dr. Ziebell and not Dr. Lauckner, but Dr. Karl Schmidt, who was with Dr. Ziebell at the time, and who was not employed by the defendant. Likewise they must bear in mind the fact that an hour and a half intervened between the time that Mrs. Ollert left the doctor's office the evening of June 19, 1916, and the time that she arrived at her home, and that there was no evidence whatsoever as to what transpired in that interval.

40 (19) The plaintiff as administrator *ad prosequendum* cannot recover in this action. This action accrued before the statute was passed providing for the appointment of an administrator *ad prosequendum*, and at the time this action accrued the law required a suit to be brought by a general administrator. Since plaintiff is not a general administrator, he cannot recover in this action.

Rule for Judgment.

RULE FOR JUDGMENT.

Entered in Circuit Court Minutes Vol. 64, p. 549.

HUDSON COUNTY CIRCUIT COURT.

<p>MITCHELL OLLERT, as administrator <i>ad</i> <i>prosequendum</i> of CORNELIA OLLERT, de- ceased,</p> <p style="text-align: center;"><i>vs.</i></p> <p>FREDERICK W. ZIEBELL,</p>	<p style="font-size: 3em;">}</p>	<p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>Defendant.</i></p>	<p>10</p> <p><i>Action at Law.</i></p> <p><i>Rule for</i> <i>Judgment.</i></p>
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This action being tried before Judge Luther A. Campbell, with a jury, in the presence of counsel for the respective parties on June 24th, June 28th and June 29th, 1920, and the jury having returned a verdict in favor of the plaintiff for Nine Thousand Dollars (\$9,000) damages, 20

IT IS ORDERED that judgment final be entered in favor of the plaintiff, Mitchell Ollert as administrator *ad prosequendum* of the estate of Cornelia Ollert, deceased, against the defendant, Frederick W. Ziebell, in the sum of Nine Thousand Dollars (\$9,000) and the plaintiff's costs to be taxed.

LUTHER A. CAMPBELL,
Judge. 30.

Rule actually entered this 1st day of July, A. D. 1920, on motion of J. Emil Walscheid, attorney for plaintiff.

Rule to Show Cause.

RULE TO SHOW CAUSE.

Filed July 2, 1920.

HUDSON COUNTY CIRCUIT COURT.

10

MITCHELL OLLERT, individually and as administrator *ad prosequendum* of CORNELIA OLLERT, deceased,

Plaintiff,

vs.

FREDERICK W. ZIEBELL,

Defendant.

Action at Law.

Rule to Show Cause.

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Defendant having applied for this rule within due time,
IT IS ORDERED that the plaintiff show cause before Hon. Luther A. Campbell, Circuit Court Judge, at the court house in the City of Jersey City, on Friday, the 31st day of July, 1920, at the hour of ten o'clock in the forenoon, why the verdict in the above-entitled cause in favor of the plaintiff and against the defendant should not be set aside and a new trial granted, on the ground that the verdict is excessive. All of defendant's exceptions taken on the trial of this action are hereby reserved as grounds of appeal.

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Let this rule be entered in the minutes.

LUTHER A. CAMPBELL,

Judge.

Dated—July , 1920.

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Conclusions on Rule for New Trial.

CONCLUSIONS ON RULE FOR NEW TRIAL.

Filed November 9, 1920.

HUDSON COUNTY CIRCUIT COURT.

MITCHELL OLLERT, administrator <i>ad prosequendum</i> of CORNELIA OLLERT, deceased, <i>vs.</i> FREDERICK W. ZIEBELL.	}	<i>On Rule for New Trial.</i>	10
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J. Emil Walscheid, Esq., attorney for plaintiff.

Messrs. McDermott and Enright, attorneys for defendant.

CONCLUSIONS, CAMPBELL, *J.*

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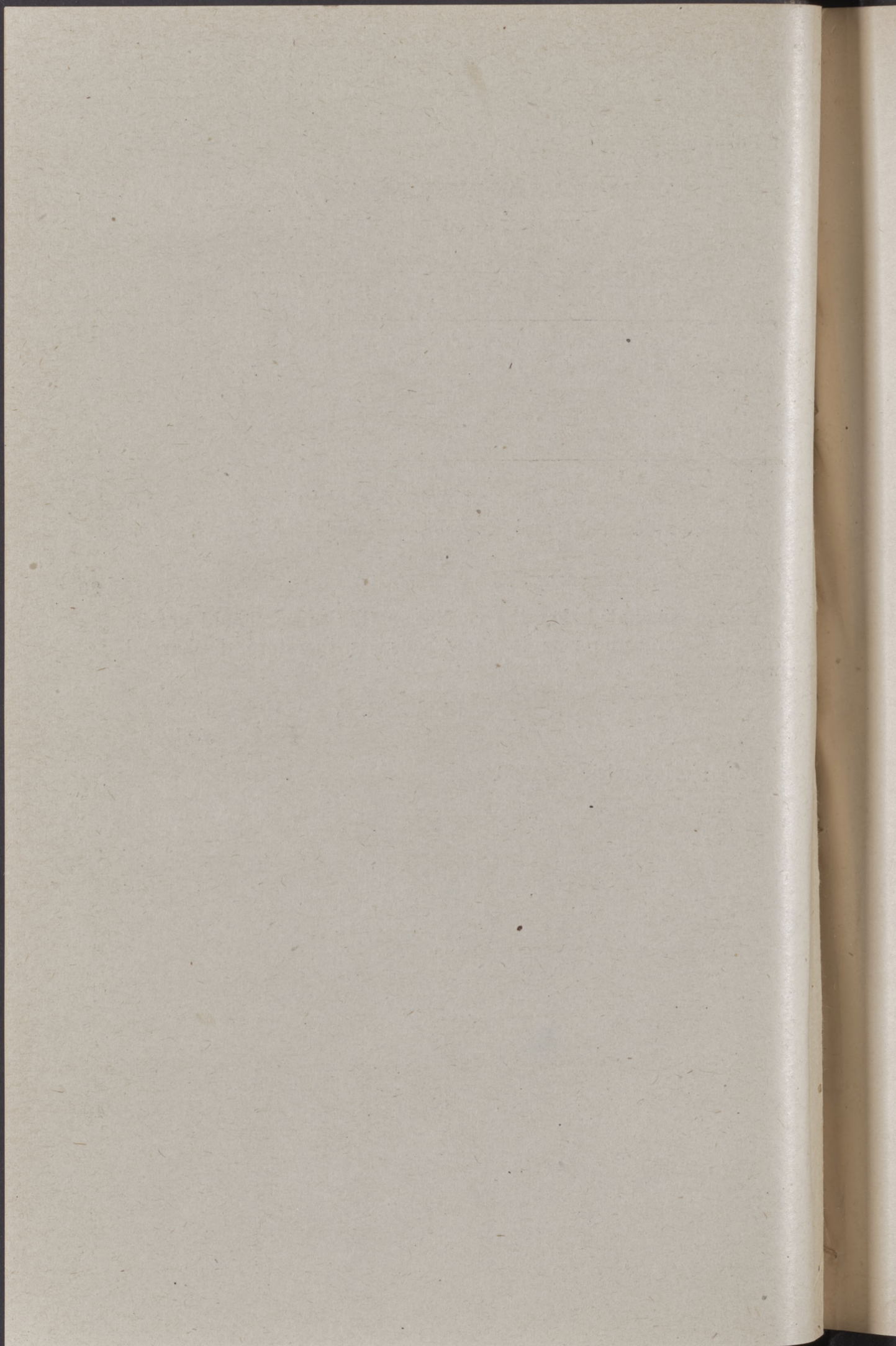
I have concluded that the verdict in this cause should not be disturbed and the rule to show cause is therefore discharged with costs.

LUTHER A. CAMPBELL,
Judge.

Dated—November 5, 1920.

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New Jersey Court of Errors and Appeals

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MITCHELL OLLERT, as administrator,
etc., of Cornelia Ollert,
Plaintiff-Appellee,

vs.

FREDERICK W. ZIEBELL,
Defendant-Appellant.

ACTION
AT LAW.

APPEAL FROM
HUDSON CIR-
CUIT COURT.

BRIEF FOR PLAINTIFF-APPELLEE. 20

Statement.

This appeal brings up a judgment had by the plaintiff against the defendant for the sum of Nine thousand (\$9,000) Dollars.

According to the evidence for the plaintiff Cornelia Ollert, the decedent, on June 19th, 1916, between seven and nine o'clock in the evening visited the office of the defendant for dental treatment. While there she was treated with an instrument driven by electricity, which was inserted in her mouth. From this instrument, while under treatment, she received a charge of electricity in her mouth and through the wound thus occasioned lock-jaw and tetanus germs entered her system causing her death on July 25th, 1916. 30

The defendant below had a rule to show cause reserving exceptions (page 220). This rule to show 40

cause, after argument, was discharged (page 221). The defendant below submits eight points why the judgment brought up on appeal should be reversed and in presenting his argument seems to treat the case as if the Court of Appeals had power upon this appeal to review the weight of the testimony and the credibility of witnesses; the brief is drawn as if questions which properly might have been presented upon rule to show cause are to be considered here. In preparing this brief, I have ignored all argument upon the credibility of witnesses or the weight of testimony and have addressed myself solely to the legal propositions involved in the points advanced.

POINT I.

20 The declarations alleged to have been made by Mrs. Ollert were legally admitted in evidence.

The evidence discloses that on June 19th, 1916, Cornelia Ollert, the decedent, left her home after supper about six-thirty to quarter-of-seven, and that she came back about half-past nine o'clock in the evening; that about ten minutes after she left and until about twenty minutes before her return it was storming continuously (page 20, fols. 30-40). When she came back she was all excited (page 21, fol. 30), she looked exhausted and she was all swollen in the face, puffed up—all over her face, mostly on the right side and her lip on the right hand side on the upper jaw was curled up (page 22), and her gum on the upper jaw on the right hand side was like a hole drilled into the gum about as big as a thumb-nail—and the skin was all burned away and it was hanging down in shreds—the skin that was hanging down was whitish, that which was not

hanging down was a bright red—different from the ordinary red (page 23) and this red discoloration extended, and it is like in a hole, the width of three teeth to the bottom of the gum, to the top of the gum and there is a piece of court plaster over it, something that looked like court plaster (page 24). The condition just described did not exist when she went away that evening (page 25).

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As the result of conversation between decedent and plaintiff, the latter thereupon got into telephonic communication with defendant that same evening—and said to the defendant “Doctor, what have you done to my wife’s mouth. It is in an awful condition” (page 29, fols. 30-40). Whereupon the doctor replied “I will be right over” (page 30, fol. 10). About eleven-thirty that night, defendant came to plaintiff’s house with another man and said, “Where is your wife? Here I have brought a doctor from New York, who probably will help your wife’s mouth.” Plaintiff took defendant and this other man into the bedroom to his wife, and said to her “May, here is Dr. Ziebell fetched a doctor from New York” (page 30, fol. 40). My wife said “He is not no doctor from New York, he is the man that worked on my mouth” (page 31, fol. 40). Defendant then looked into decedent’s mouth and said “Mrs. Ollert, now tell me how did this happen” (page 32, fol. 10), whereupon decedent according to the testimony of plaintiff:

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“Pointed her finger at the man Dr. Ziebell
 “‘fetched in and said, ‘He is not a doctor from
 “‘New York. He is the man worked on my
 “‘mouth. He was drilling in my tooth and I
 “‘got an awful shock and he left the drill in
 “‘my tooth, walked across the room, shut off
 “‘the electric current, and came back to me!

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“while taking the drill out of my mouth said
 ““My God child, what have I done? I did not
 “mean to do that. You must have suffered
 “‘awful’ ” (page 32, fols. 20-30).

10 When decedent said this to defendant the latter
 made no reply (page 32, fol. 40), but both doctors
 looked at one another and they did not say a word
 (page 32, fol. 40). Defendant and the other doctor
 and plaintiff walked out of the room and plaintiff
 said to defendant “Doctor, you put me in an awful
 hole, you see the condition of my wife’s mouth,
 what do you intend to do about it?” to which the
 defendant replied, “Don’t worry, Mike, I know it
 is all our fault and I am going to stand for it all.
 I am going to see you through, keep on swabbing
 her gum every half hour and I will have my
 doctor here the first thing in the morning” (page
 20 32, fols. 1-15).

The next day defendant came back with a medi-
 cal doctor—a Doctor Quigley (page 32, fol. 20).

Plaintiff during the trial identified one Robert
 R. Lauckner, Jr.—*the assistant who actually
 worked on decedent’s mouth as the man who ac-
 companied defendant as “the doctor from New
 York”* (page 46, fols. 1-10).

30 It is submitted that the evidence objected to
 under this point of appellant’s brief was relevant,
 competent and material testimony.

It is every day’s practice to admit in evidence
 anything said in the presence of the party, and un-
 contradicted by him, and whether this is said by a
 stranger, by the wife of the party or even by the
 opposite party himself; it makes no difference.

Boyles vs. McEowen, 3 N. J. L., 253 star,
 page 677.

40 In the case at bar the statements made by plain-
 tiff’s decedent were made at the defendant’s re-

quest in his presence and related to the conduct of Lauckner, who was present, and *for whose conduct the defendant was responsible*. The statement made by plaintiff's decedent amounted to *an accusation of malpractice* for which defendant was legally responsible; the accusation was made at a time when it was proper to draw an inference that defendant *had already heard the version of his assistant Lauckner as to the occurrence*; it was made at a time when it was defendant's duty to reply to the accusation. He heard the accusation and remained silent, thereby allowing the inference to be drawn that the statement was a true statement of what had happened to Mrs. Ollert. 10

The case at bar seems to be parallel to *State vs. Landise*, 86 N. J. L., 230. That was a trial for murder of an infant; evidence was admitted, over objection, of an accusation by the prisoner's wife, charging the prisoner with the paternity of the child. The accusation had been made in the presence of the prisoner and of the testifying witness. Mr. Justice Swayze, speaking for the Court of Errors, said: 20

"He (defendant) complains of the admission of testimony by a third person as to a statement made in his presence by his wife, and his silence and final reply. It is said that this, in effect, was compelling the wife to give evidence against her husband in a criminal proceeding, a course not authorized by Section 5 of the Evidence Act. We think the argument involves a misapprehension of the nature of the evidence. Whatever effect the testimony may have had was due *not to the statement of the wife, but to the silence and final reply* of the husband. The evidence was the evidence of *his own conduct and his* 30 40

“own language, and the fact that the occasion of his conduct and language was the words of his wife does not make it less evidential than any other conduct or omission on his part. Boyles vs. McEowen, 3 N. J. L., 677.”

10 And in *Donnelly vs. State*, 26 N. J. L., 463, Mr. Chief Justice Green, speaking, says at page 504:

20 “A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself, unless such statement is made under circumstances which prevented a reply. *Bartlett’s case*, 7 Car. & P., 832; *Joy on Conf.*, 77; 1 *Greenl. Ev.*, 215; 1 *Phil. & Amos*, 422. In the most recent treatise on criminal law the rule is thus stated: ‘Where a man, at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury.’ *Wharton’s Cr. Law* (ed. 1867), page 696; (ed. 1852), 258.

30 “In civil actions the same principle prevails. What is asserted in the presence of a party to a suit, and not contradicted by him, is received on the ground that his silence is *an admission of the truth of what was said.* *Bottoms vs. Sellers*, 5 Har. & Johns., 119; 2 *Phil. Ev. (Con. & H. notes)*, 192, note 191.”

See also

40 *Donnelly vs. State*, in the Court of Errors, 26 N. J. L., 601, page 612.
Parker vs. State, 61 N. J. L., 308, at page 313; affirmed 62 N. J. L., 801.

And in *Duysters vs. Crawford*, 69 N. J. L., 614, the Court in rejecting a letter as a self-serving declaration says, at bottom of page 616:

“That such a self-serving declaration is not inadmissible as evidence *unless* it constitutes a part of the *res gestae*, or is made in the presence of the opposite party and is acquiesced in by him, is a principle so elementary as not to require any citation of authority in its support.” 10

See also

Wigmore on Evidence, Vol. 2, page 1253,
paragraph 1071.
16 cyc, 956-960.

A separate objection was taken by counsel for defendant to the latter part of the statement made by Mrs. Ollert, and now under scrutiny, as follows: 20

“Mr. Carpenter: I move to strike out the latter part of that *as hearsay*, not only relating to a hearsay statement by the wife, but also a hearsay statement from somebody else” (page 32, fols. 28-32). 30

This motion to strike, which was denied, plainly referred to that part of Mrs. Ollert's statement which reads: “While taking the drill out of my mouth (he) said, ‘My God, child, what have I done? I did not mean to do that. You must have suffered awful.’” (page 32, fols. 26-29).

If Mrs. Ollert had appeared in the case and had testified to the statement made by her to Dr. Ziebell, the defendant, and Lauckner, his assistant, 40

the portion of the statement thus objected, made as it was by Lauckner *at the time* of and *during* the occurrence, would plainly be admissible as part of the *res gestae*.

- 10 Luse vs. Jones, 39 N. J. L., 708;
 Hunter vs. State, 40 N. J. L., 495, page
 536;
 Frome vs. Dennis, 45 N. J. L., 515;
 State vs. McCormick, 93 N. J. L., 288.

The statement therefore was *part of the very occurrence* which Mrs. Ollert *had been invited* to relate by the defendant, Dr. Ziebell.

- 20 The statement was *part* of what Mrs. Ollert said *to the defendant, Dr. Ziebell, as part of the occurrence which she was relating to him*; as part of the occurrence which the defendant *heard* and *did not deny*. Professor Wigmore gives as the basis for the principle of assent by silence the maxim "*Qui tacet consentire videtur.*" He says in paragraph 1071 that silence *implies* assent *to the correctness of a communication*, and if that is the *test*, then it is immaterial whether that communication is based upon single or repeated hearsay, so long as the *whole* communication, to which it is claimed the defendant
 30 *gave his assent*, is presented to Court and jury, for primarily it is not the competency as evidence of the statement made *to* defendant which is the determining factor but the *conduct* of the defendant *in the face of the communication*. His own *demeanor* and his *silence alone* make the communication competent and legal testimony. And it is for this reason that any statement made in a parties' presence as auditor is received,—
 40 if acquiesced by him when he ought to have spoken.

I therefore submit that viewed as the basis of an implied admission by the defendant, or as assent by silence, on the part of the defendant, to the correctness of the *description of an occurrence*, the whole statement objected to was properly admitted in evidence.

But there is another view in which this testimony may be considered by the Court and that is *in connection with the actual admission* made by the defendant immediately after he left the presence of Mrs. Ollert when the following colloquy ensued: 10

“Ollert: Doctor you put me in an awful hole, you see the condition of my wife’s mouth, what do you intend to do about it?”

“Dr. Ziebell: Don’t worry, Mike, I know it is all our fault and I am going to stand for it all. I am going to see you through; keep on swabbing her gum every half hour and I will have my doctor here the first thing in the morning” (page 33, fols. 1-20). 20

To paraphrase the language of Mr. Justice Swayze in *State vs. Landise*, 86 N. J. L., 230—“Whatever effect the testimony may have had, was not due to the statements of the decedent, Mrs. Ollert, but to the silence, *and final reply* of the defendant, when he said to the plaintiff: “Don’t worry, Mike, I know it is all our fault and I am going to see you through.” 30

The correctness of the ruling of the Trial Court in allowing the statement of Mrs. Ollert to go into evidence must be tested in the light of *all of the evidence in the case*; must be tested in the light of *the subsequent admission of guilt and liability made by defendant to plaintiff* on this same evening and immediately after they had left the 40

presence of the decedent. The visit of the defendant and of his assistant to the home of plaintiff on the evening in question and everything that occurred during that visit relevant to the issues in this cause *was but one occurrence*, and it was proper to submit to the jury any part of the occurrence of that evening which tended either to constitute an implied admission or which tended to *explain* and delimit the actual admission made by defendant. The Trial Court had the right to infer when the testimony of the *actual* admission was before the Court, that this actual admission *related to the facts as given in the statement made by Mrs. Ollert* and that the actual admission was based in whole or in part at least *upon the information which defendant had received from Mrs. Ollert* in response to his question to her that she tell him how the thing had happened. Viewed in this light the statement made by Mrs. Ollert together with the subsequent actual admission of liability are so related that it was proper to receive the evidence of the statement made by Mrs. Ollert as part of and as the basis of the subsequent actual admission.

POINT II.

The Trial Court did not err in charging the jury to give to Mrs. Ollert's alleged declaration the same careful consideration as other evidence in the case.

Under Point Two of appellant's brief, he singles out of the judge's charge an excerpt in which the trial judge comments upon certain testimony in the case; the portion of the charge found objectionable is:

“But there is in the case some testimony on
 “the part of Mr. Ollert as to what his wife said
 “on the occasion when he says the defendant
 “and Dr. Lauckner were present. It is evi-
 “dence which, *if believed*, is important evi-
 “dence in the case, and I simply bring it to
 “your attention because of the importance and
 “the value it has, *if true*, upon the cause that 10
 “is before you for determination, and I say to
 “you that as to it you are to give it *just that*
 “*same* careful consideration which I am sure
 “you will give to *all* of the testimony in the
 “case” (page 211, fols. 36-45).

The only objection which appellant urges against
 this portion of the charge is that the Court deals
 separately with a fragment of the testimony, that it
 was given undue prominence *and characterized as* 20
important.

Yet the Court in leading up to this matter said:

“Again let me say to you, *merely in pass-*
 “*ing,—not for the purpose of emphasizing any*
 “*particular piece of the testimony over any*
 “*other, because it is your duty to consider all*
 “*the testimony in the case, give it just that*
 “*weight and consideration that you find it en-*
 “*titled to;—but there is in the case some testi-* 30
 “*mony,*” etc.

The Court therefore expressly warned the jury
 that it was not *emphasizing this testimony*, that
 they were to consider *all* the testimony and that
 they should give it such weight as they thought
 proper.

And it has been generally held in this country
 that error is not assignable for singling out par-

particular facts where the jury is further instructed to consider all the evidence.

38 Cyc, 1678, note 79.

10 So an instruction is not erroneous as singling out and giving undue prominence to particular facts where the facts stated comprise all the facts essential to a determination of the case.

38 Cyc, 1678, note 80.

And in this case it must be conceded that the testimony referred to certainly carried most of the facts essential to a determination of the case.

20 But while the foregoing citations from Cyc seem to indicate the general practice, the practice in New Jersey is certainly even more liberal. In New Jersey it cannot be disputed that the trial judge has an undoubted right to make such comments and expressions upon the testimony as he thinks necessary for the direction of the jury, as long as he leaves the jury to determine the facts and draw their own conclusions.

Merklinger vs. Lambert, 76 N. J. L., 806,
page 813;

30 Camden, etc., R. R. Co. vs. Williams, 61
N. J. L., 646, page 652.

POINT III.

There was sufficient evidence in the case to permit an inference of negligence on the part of the defendant.

40 Under the third point of appellant's brief, defendant submits that "plaintiff proved no act of

defendant or his assistant from which Court or jury could properly infer negligence or negligent treatment."

The point involves the motion to direct a verdict, it involves the legality of the refusal to direct and under the circumstances the plaintiff is entitled to have *all* of the evidence considered *in the light most favorable to the verdict*,—to the plaintiff,—and, if upon such a consideration of the evidence, as it affects the question of negligence, there was *any* evidence from which an inference of negligence might be drawn, the verdict must be allowed to stand. 10

The question to be decided is not governed by the weight of the evidence or the credence to be given to testimony. The case is not before the Court upon rule to show cause. Defendant had a rule to show cause in this case reserving objections and the rule was, after argument, discharged. 20

The evidence in the case permits of the following inferences:

That decedent on June 19th, 1916, was well; on the evening of that day she visited defendant's office; her mouth up to that time was in a normal condition; she had not been sick and had been helping plaintiff in his business and had performed her housework as any other healthy person would (page 25); while at the dental office an unlicensed assistant, a dental student, drilled in a tooth of the decedent with an instrument driven by electricity, the current for which came from an electric lighting socket set in the wall of the room (page 113, fols. 10-30); while he was thus drilling decedent received an awful shock of electricity in the mouth; the operator left the drill in decedent's mouth, went to the lamp socket, cut off the electric current, came back and took out the drill; her mouth was burned by the electric current; a 30 40

- hole was burned into her gum by the electric current; the electricity came to this lamp socket from a high voltage line; the electricity could run down the instrument used to the burr or drill (pages 179-180; 183-184); *it is not proper electrical practice to attach an instrument of the kind used to a lamp socket which is supplied with electricity from a*
- 10 *high power lighting system, because a lamp socket is a single switch and one conductor is always alive—the current is always at the point of one conductor. If you shut off the socket the circuit still flows to the starting switch of your apparatus on one side* (page 181); defendant confessed his fault and admitted his negligence (page 33, fols. 1-10); the condition of decedent's mouth after the accident was one which could be produced by electricity and the burning caused by electricity (page
- 20 71, fols. 15-30); there is no evidence of any strong solution having been used in decedent's mouth and the affirmative proof negatives any other cause for the burning than electricity; the machine used had never been inspected or tested between the date of the installation and the date of the accident (page 121, fol. 30); after the accident the machine was not used (page 121, fol. 40), and *finally* the decedent *had been burned* by electricity while being treated.
- 30 The foregoing synopsis of testimony, which is by no means all there is upon the subject, would entitle the Court to submit to the verdict of a jury the question whether decedent was burned by electricity which came through the instrument, whether that instrument was a reasonably safe appliance as against the passage of electricity, whether it was reasonably safe to attach the instrument to an ordinary lamp socket and whether the accident was
- 40 caused by the negligence of the defendant.

But there is a presumption of negligence in the case arising out of the very occurrence of the accident.

In an action of this character where plaintiff has shown that the thing which caused the injury was under the management of the defendant or his servants, and the accident was so unlikely to occur if proper care had been exercised as to justify an inference that it was due to some neglect of duty, there is something in the facts that speaks of the negligence of the defendant and the *presumption* of negligence, *res ipsa loquitur* applies. 10

Bahr vs. Lombard Ayres & Co., 53 N. J. L., 233;

Excelsior Elect. Co. vs. Sweet, 57 N. J. L., 224, page 228;

Consolidated Tract. Co. vs. Thalheimer, 59 N. J. L., 474, page 476; 20

Mumma vs. Easton & Amboy R. R. Co., 73 N. J. L., 653, page 658, *et seq.*;

Delahunt vs. United Telephone & Telegraph Co. (Pa.), 64 Atl., 515.

In the case at bar, defendant,—when plaintiff rested,—was undoubtedly called upon to produce evidence showing that the accident occurred *without any negligence on his part*. He attempted to do this by showing that his instruments were *sanitary*, by showing what solutions had been used in decedent's mouth, by attempting to show that a current of electricity *could not pass* through the instrument used, but when he had finished his proof, fair minded men might still honestly differ as to the conclusions to be drawn from all the facts, whether controverted or uncontroverted, and it was the duty of the Court to submit the case to the jury. 30

Mumma vs. Easton & Amboy R. R. Co., 73 N. J. L., 653, page 658 at bottom. 40

POINT IV.

There was sufficient evidence of causal connection between the visit of decedent to defendant's dental office, her treatment there, and her death from tetanus five weeks later.

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Under the fourth point of appellant's brief, defendant submits that there was no causal connection between decedent's visit to defendant's office, her treatment there and her death from tetanus five weeks later.

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This point also involves the motion to direct a verdict, it involves the legality of the refusal to direct and under the circumstances the plaintiff is entitled to have all of the evidence upon this objection considered in the light most favorable to plaintiff, and if upon such consideration, there was any evidence upon which an inference of causal connection could be drawn, the verdict must be allowed to stand.

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The question here to be decided is again not governed by the weight of the evidence or the credence to be given to the testimony. The case, as has been said before, is not before the Court on rule to show cause. The defendant had a rule to show cause in this case reserving objections and the rule was, after argument, discharged. The evidence in the case upon which plaintiff claims the Court was justified in sending the case to the jury, viewed in the light in which the Court is bound to take of the same is as follows:

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Decedent on June 19th, 1916, was well and on the evening of that day visited a dentist's office, her mouth up to that time was in a normal condition excepting that she had one or two pin-hole cavities in one or two of her teeth, which required filling; she had not been sick and had been helping plaintiff

in his business and had performed her housework as any other healthy person would; while at the dental office, an unlicensed assistant, a dental student, drilled in a tooth of decedent with an instrument driven by electricity, while he was thus drilling decedent received an awful shock of electricity in her mouth; and the electric current thus introduced into her mouth burned the same and burned a hole into her gum. When she arrived at home that evening she was sick and her mouth showed evidences of the electric burning, as described by the plaintiff. Dr. Adams was called within a day or two. He first treated the decedent on June 23rd, 1916. He got the history of the case (page 56). The history of the case was that Mrs. Ollert had gone to a dentist and the dentist had done some dental work three or four days previous to the time when he first saw her; that the dentist had done something to her and in looking into her mouth, the doctor found the mucous membrane of the entire mouth discolored—black—highly discolored and shredding. He at that time made an examination of the mouth and treated her from that time forward up to the time of death (page 57, fols. 25-40). The cause of death was lockjaw or tetanus. The doctor first noticed this lockjaw two or three days after treating her. Lockjaw is a germ disease (page 58, fol. 20). It can come into the body through any of the mucous membranes or through some abraided surface or an instrument. The doctor found in this woman an abraided surface in her mouth. He found no other such surface (page 59, fols. 20-30). And lockjaw usually enters the system through an abraided surface (page 59, fols. 20-30). The discoloration of the mouth could have come from the use of strong solutions in the mouth and an electric shock would do it. Electric shock

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would do it by burning. A strong solution of carbolic acid would do it, a solution of lythol would do it (page 71, fols. 20-30). The decedent died of cerebral congestion induced by lockjaw.

10 Dr. Dickinson, a witness who had been called in consultation upon the case and who was called by the defendant, testified that decedent was suffering from lockjaw. Questioned as to the cause of lockjaw he said:

“Q. Now if tetanus—you say that is a germ disease? A. Germ disease, specific.

Q. How may it enter the body? A. Through wounds.

Q. Through any wound in any portion of the body? A. Through a wound only.

20 Q. Through a wound only? A. A wound only.

Q. In any portion of the body? A. In any part of the body” (page 126, fols. 30-40).

At the end of Dr. Adam’s direct examination, he was asked this hypothetical question:

30 “Q. Now then suppose that this woman on the 19th day of June, 1916, had visited a dentist and had there been treated by having an instrument inserted in her mouth and that while this instrument was in her mouth, the injury which you found in her mouth had been occasioned and that thereafter tetanus developed and she died from cerebral congestion resulting from this tetanus, what in your opinion would be the probable primal cause of that death? A. Injury to the mouth.

40 Q. What? A. Injury to the mouth” (page 71, fol. 40; page 72, fols. 1-28).

The foregoing evidence, I respectfully submit, is sufficient to have permitted the Court to submit the question of causal connection between the visit of decedent to the dentist's office, her treatment there and her death from tetanus five weeks later, to the jury.

POINT V.

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The Trial Court did not err in permitting witness Burgess to testify as an expert and in allowing certain questions to be put to him.

Under the affirmative of the foregoing statement defendant argues Nos. 46, 47, 48 and 49 of his grounds of appeal (see page 40, fol. 5 of Appellant's Brief).

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An examination of the 46th, 47th, 48th and 49th ground of appeal (page 9 of State of the Case) will disclose that the objections are all based upon the motion that Burgess *was not qualified as an expert*. No other ground or reason is advanced.

"Who is entitled to be considered as an expert in regard to any question of science or skill cannot be determined by any precise rule, but from the nature of the case must be left very much to the discretion of the trial judge, and his decision is *conclusive* unless clearly shown to be erroneous in matter of law."

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New Jersey Zinc & Iron Co. vs. Lehigh Zinc & Iron Co., 59 N. J. L., 189, page 194.

"The question whether a witness has such special knowledge or experience as to qualify

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“him to give opinion evidence is a question of
 “fact for the determination of the trial court,
 “whose finding is not reviewable on writ of
 “error if there was any legal evidence to sup-
 “port it.”

10 Burns vs. Delaware & Atl. Tel. Co., 70
 N. J. L., 746, page 755.

“The qualification of an expert is to be de-
 “termined by the trial court as a question of
 “fact, and its conclusion will not be dis-
 “turbed on error if there be legal evidence
 “to support the finding that a witness has the
 “necessary experience to qualify him to give
 “opinion evidence.”

20 Kinney vs. Phila. Watch Case Co., 76
 N. J. L., 735, page 738.

30 In the case at bar the plaintiff offered the wit-
 ness Burgess as an electrical expert, not as an ex-
 pert in dental engines. The witness showed that
 he had experience in the electrical field and the fact
 that the Trial Court allowed the witness to answer
 (page 205, fol. 30) is sufficient evidence upon this
 appeal that the court below *found as a fact* that
 the witness was qualified to answer. The defend-
 ant had produced two electrical experts, John C.
 Forstbauer and Oscar H. Pieper, both of whom
 had testified that it was *impossible* for electricity
 to get into the burr or drill of the instrument
 alleged to have caused the damage (page 157, fol.
 40) (page 165, fol. 20). Under the circumstances
 it was proper for plaintiff to rebut this testimony
 by experts skilled in electricity by showing that it
 was possible to have electricity reach this burr or
 drill through this instrument.

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There was sufficient evidence before the Trial Court to enable that Court in the exercise of a legal discretion to find that the witness Burgess had qualified as an electrical expert, and that finding cannot be reviewed upon this appeal. The weight of that testimony and its credibility were open to attack upon proper cross examination, but subject to the result of any such attack, the testimony was properly submitted to the jury. 10

POINT VI.

The Trial Court did not err in allowing Dr. Adams to answer the question discussed under Point Six of appellant's brief.

Dr. Adams undoubtedly qualified as a medical expert within the rules laid down in the cases cited under the preceding point of this brief. 20

Appellant objects to the following question asked the doctor and answered by him :

“Q. Now, then, supposing that this woman on the nineteenth day of June, 1916, had visited a dentist and had there been treated by having an instrument inserted in her mouth, and that while this instrument was in her mouth the injury she found in her mouth was occasioned and thereafter tetanus developed and that she died from cerebral congestion resulting from this tetanus what, in your opinion, would be the probable, primal cause of that death?” (page 72). 30

If I understand the point which appellant seems to be making in regard to this question, it is that 40

it presents the same question as in *Merkel vs. Railway Mail Ass'n.*, 226 S. W. Rep., 299. If I understand that case the objection to the expert's testimony was that the doctor was permitted to *deduce* as a cause for peritonitis, *the existence of a personal injury* from peritonitis because that is *the most frequent cause of it*—but neither the case just cited nor the case of *Glasgow vs. St. Ry. Co.*, 191 Mo., 347, are at all like the case at bar. In the case at bar the existence of the injury is established as a fact *independent* of the hypothetical question by the testimony of the plaintiff and of Dr. Adams, who *both saw the injuries*. The death by cerebral congestion induced by tetanus is also established as a fact *independent* of the hypothetical question and the only effect of the question and its answer is to link the two independent facts, injury and death, together in a causal chain by showing through this expert the *probability* in his experienced opinion that the tetanus germs entered the body of decedent through these injuries and thus caused the death. The question was certainly a proper one, the weight to be given to the answer in view of his testimony that these germs *might* also enter the system in other ways and of Dr. Dickinson's *emphatic* statement that they could *only* enter through a wound was a matter for jury consideration. The ordinary layman cannot see tetanus germs and knows nothing about their habits and it was this subject which was particularly within the range of expert testimony.

POINT VII.

The Trial Court did not err in allowing the question set out in appellant's brief under his Seventh Point to be put to the witness Fisher.

The only objection urged to these questions at the trial was that Fisher was not qualified to answer and that the subject under discussion, i. e., the action of electricity in relation to metal instruments and insulation, was not a subject for expert opinion,—in his brief, appellant now, for the first time, adds a third objection as to the last of these questions, namely, that no ground for this question was alleged in the complaint. 10

The question of the qualification of this witness as an electrical expert is governed by the cases cited under Point Five of this brief. 20

The question whether the subject under discussion was one for expert testimony seems too elementary to require argument.

The question now first raised as to the last question mentioned (see page 45, fols. 16-20 of appellant's brief), namely, that no ground for this question was alleged in the complaint can,—if it has any merit,—quickly be answered. It comes too late. It was not called to the attention of the Trial Court (page 181, fol. 30 of State of Case). 30
The only ground of objection advanced to the Trial Court was the lack of qualifications of the witness. If the attention of the Trial Court had been called to the objection the Trial Court could have dealt with the situation by allowing an amendment if necessary.

Burns vs. Del. & Atl. Tel. Co., 70 N. J. L.,
745, page 750.

40

10 But the question was plainly within the issues as framed and being tried. Plaintiff's allegation in the complaint was that defendant had used instruments and appliances in the mouth of Cornelia Ollert which were unsafe * * * and through which defendant had allowed a current of electricity of great power and violence to pass into the mouth and body of said Cornelia Ollert (page 12, fols. 1-12).

The evidence sought to be adduced and actually adduced through this question tended to show that the instrument used was unsafe, and was in such condition as to allow a current of electricity to pass through it.

20 Besides two witnesses had testified for the defendant that it was impossible for electricity to pass through the instrument to the burr or drill in the mouth of decedent. This question was intended to show the probability of electricity thus passing to and through this instrument and the subsequent questions and answers on page 181 of the State of the Case (page 181, fols. 35-45), showed why this was both possible and probable. In other words, it was a fair inference that an instrument thus connected to a lamp socket was an unsafe instrument and would allow the electricity to pass through the instrument to the burr or drill and into the mouth of decedent.

30 I submit that there was no error in the question asked the witness Fisher.

POINT VIII.

The Trial Court did not err in refusing to charge defendant's requests.

40 Under Point VIII of appellant's brief, appellant criticises the refusal of the Trial Court to charge

the Second, Third, Fourth and Fifth request of defendant to charge found as the 5th, 6th, 7th and 8th grounds of appeal (pages 2-3) and the Seventh request to charge found as part of the 9th ground of appeal (page 3).

Each one of the requests thus brought to the attention of the Court is plainly bad and was properly refused and counsel for appellant in his brief states no reason why any of them should have been charged by the Court. 10

CONCLUSION.

It is respectfully submitted that the judgment brought up by this appeal should be affirmed.

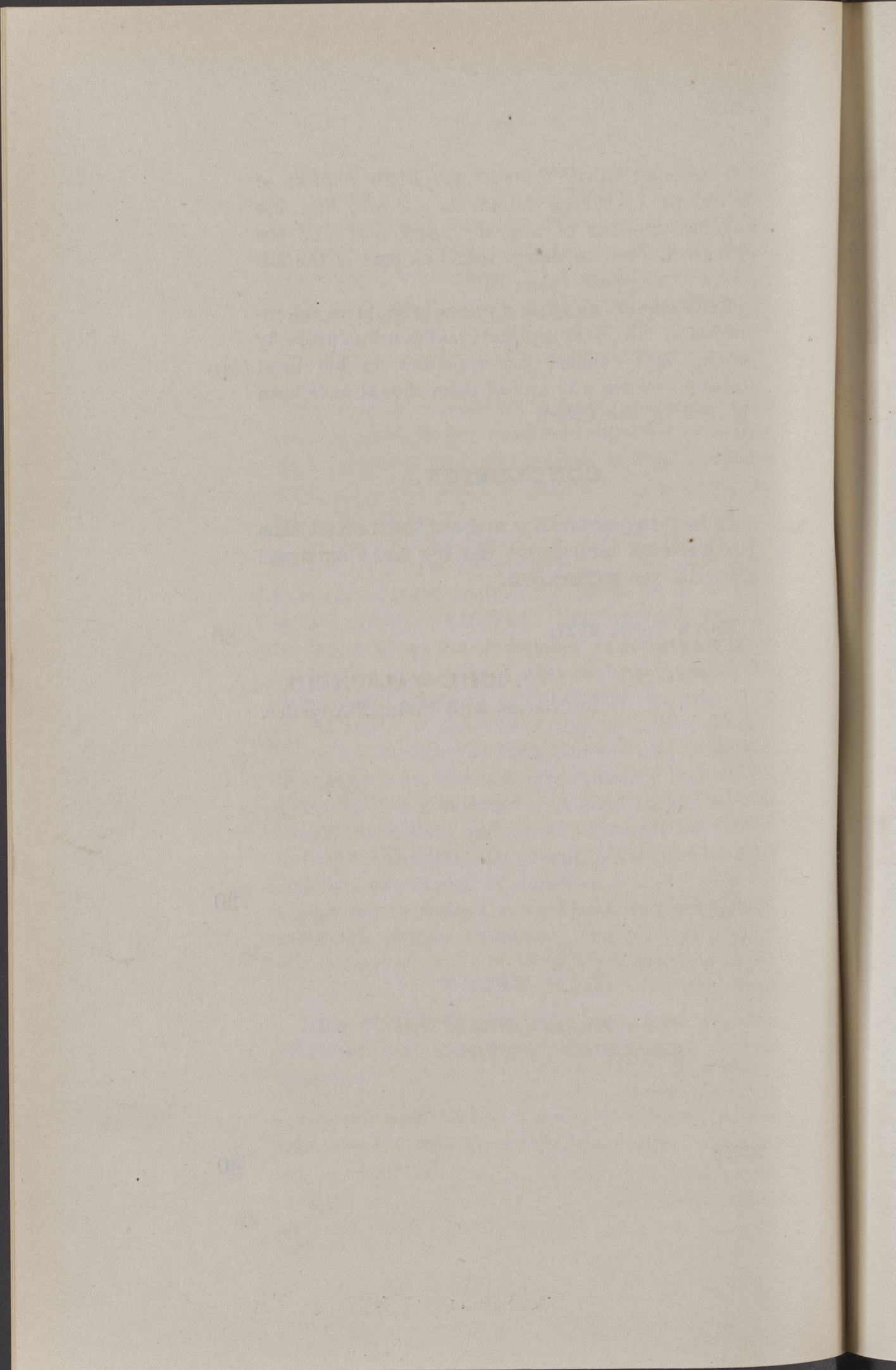
March Term, 1921. 20

J. EMIL WALSCHEID,
of Counsel with Plaintiff-Appellee.

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32626

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New Jersey Court of Errors and Appeals.

MITCHELL OLLERT, individually and
as Administrator ad prosequen-
dum of Cornelia Ollert, Deceased,

Plaintiff-Appellee,

vs.

FREDERICK W. ZIEBELL,

Defendant-Appellant.

Action at 10
Law.
On Appeal
from Hud-
son Circuit
Court.

BRIEF OF McDERMOTT & EN- RIGHT FOR APPELLANT.

20

This is an appeal taken by the defendant from a judgment of \$9,000 entered in favor of the plaintiff July 1, 1920. The suit was brought under the Death Act for damages alleged to have been suffered because of the death of plaintiff's wife. Defendant is a dentist who is charged with malpractice.

The case was tried before Hon. Luther A. Campbell, Circuit Court Judge, and jury, for three days, and was the second trial of the action, the first jury having disagreed. 30

The Facts of the Case.

Cornelia Ollert, on June 13, 1916, became a patient of the defendant, a duly licensed dentist, whose office was at 26th Street and Bergenline Avenue, Guttenberg, N. J. She went to the dentist because she complained of a toothache. Mrs. Ollert was in the dentist's office on June 13, June 15, and twice on June 19, 1916. Each time she 40

complained of a toothache and each time her aching teeth were treated. The evidence is uncontradicted that all the instruments used in the defendant's office were sterilized by the defendant's nurse before and after being used. Mrs. Ollert died on July 25, 1916, of tetanus or lockjaw.

The complaint alleges (pg. 12 of case) that:

10 "Defendant, in then treating the mouth, gums and teeth of said Cornelia Ollert, did not use ordinary skill and care, but negligently and unskillfully used instruments and appliances in the mouth of said Cornelia Ollert which were unsafe, unfit and unsanitary, and through which said defendant allowed a current of electricity of great power and violence to pass into the mouth and body of said Cornelia Ollert in such manner that she became sick and disordered and as a result thereof died on July 25th, 1916."

This is the only allegation of negligence.

20 The defendant denies that he was guilty of negligence. He pleaded the statute of limitations and that the plaintiff as administrator ad prosequendum had no right of action against the defendant, the treatment and death of Mrs. Ollert having taken place a considerable time before the ad prosequendum statute was passed.

P. L. 1917, Ch. 181.

30 The suit was started June 26, 1918, or more than two years from the date that Dr. Ziebell last treated Mrs. Ollert, although one month short of two years from the date of Mrs. Ollert's death.

The defendant contends that plaintiff proved no act of commission or omission on the part of the defendant, and that there was no causal connection established between the defendant's treatment of Mrs. Ollert and her death five weeks later of lockjaw.

40

When Mrs. Ollert called on Dr. Ziebell for the first time her case was so unusual that Dr. Ziebell called his nurse and showed her the condition of Mrs. Ollert's mouth. The nurse said that Mrs. Ollert "had this peculiar condition of sloughness on the gum, right side—It was a dark green slough on the upper right side of the jaw, on the gum under the lip" (Miss Coursen, the nurse, pg. 82).

Dr. Ziebell described Mrs. Ollert's condition **10** when she came in as follows:

"Two cavities in the right upper lateral, the second tooth from the median line and the eye tooth, the third tooth.

(Continuing) "The second tooth being the lateral, and the third tooth being the eye tooth; a condition of redness in the area over the apex—or apices of these two teeth, a condition of oedema, swelling in the same area. I found in the right eye, the lower lid was drooping" (pg. 101). **20**

At this time Dr. Ziebell, the defendant, was incapacitated owing to a sprained or broken arm, his arm was in a sling and he had an assistant in his office, Dr. Robert R. Lauckner, Jr., then a student in the College of Dentistry, New York City, who had not yet been admitted to practice, but whose services Dr. Ziebell had procured by telephoning to the College (from which Dr. Ziebell had graduated) and asking them to send an assistant to him. Dr. Lauckner has since been admitted to practice in New York State and at the time of the trial was practicing in New York City and residing in Montclair, N. J. (p. 139). **30**

Mrs. Ollert had been treated by defendant about a year previous (p. 100).

Dr. Lauckner described Mrs. Ollert's condition when she first came to Dr. Ziebell's office, as follows: **40**

"She complained first, of course, of toothache, on this right upper side. I noticed that the right eye, the lower lid of the right eye was drooping, and there was a certain amount of redness below this lid and a small amount of swelling, as I understand it, and she came in rather listlessly."

He says:

10 "that in lifting her lip she complained of some pain in this lip and called my attention naturally to her gums, and I noticed they were very red, wavy, inflamed, and her breath was very disagreeable, very offensive breath, and Dr. Ziebell and I questioned her and she told us at that time that her bowels had not moved for quite a period. I don't remember just which. It surprised me a whole lot" (pp. 139-140).

20 Dr. Ziebell, Miss Coursen, his nurse, and Dr. Lauckner agree that Mrs. Ollert's condition became progressively worse and her teeth were so sensitive that all that was done by the dentist was to scrape out the cavities in her teeth with a hand excavator and to insert a treatment on cotton consisting of phenol compound, a desensitizing agent. Each time that she called the old treatment was taken out and a fresh treatment inserted, the cotton after being placed in the cavity being sealed in with gutta percha.

30 The last time that Mrs. Ollert called on the defendant was on June 19, 1916, about 7:30 P. M. Dr. Lauckner and the nurse were alone in the office (p. 84). She came without an appointment, complained again of toothache, and Dr. Lauckner took out the old treatment, excavated the cavity a little more with a little hand excavator and inserted a new treatment as before, and Mrs. Ollert went home. She was in the office only ten or fifteen minutes (p. 85). Miss Coursen was present the whole time Mrs. Ollert was in the office.

When Mrs. Ollert left she did not complain about anything that was done and in fact was given an appointment for a later date. The nurse testified positively that at no time was an electrically driven instrument used on Mrs. Ollert, and particularly that no electrically driven instrument was used on Mrs. Ollert the night of June 19th (p. 85). All the instruments that were used in the defendant's office, the nurse testified, were "always boiled in washing soda and dipped in a lysol solution" (p. 85). This was to sterilize them. 10

Dr Lauckner corroborates this testimony of the nurse that no electrically operated instruments were ever used on Mrs. Ollert and that in particular no electrical instrument was used on her on June 19, 1916. While Mrs. Ollert was in the dental chair the lights went out momentarily because of a flash of lightning, but no one was struck in the office and nothing happened in the office because of the flash of lightning, except that the electric lights went out and gas lights were lighted. 20

Mitchell Ollert testified that after supper on June 19, 1916, about half past six or a quarter to seven his wife left the house, and returned about *half past nine in the evening*. He said that after she left and before she came back "it was lightning; thunder come up and it was an awful slash to the lightning; a crash, and every time the lightning would crash there would be a roll and a thunder after it" (p. 20). He testified that it began about ten minutes after Mrs. Ollert left and it lasted until about twenty minutes before she returned home; that the storm was on all of this time and that during all this time the lightning was flashing (p. 21). 30

Plaintiff further testified that after his wife

returned she was very excited (p. 21, line 33). A moment later he testified that when his wife came in she looked *exhausted* (p. 22, line 11); that she was all puffed up in the face, mostly on the right side; that her lip on the right-hand side on the upper jaw was curled up; that plaintiff looked into her mouth. Plaintiff said:

10 "I see the gum on the upper jaw on the right-hand side, it was like a hole drilled into the gum. I would judge about as big as my finger nail; big as my thumb finger nail, and the skin was all burned away, and it was hanging down in shreds, it was.

"A. And then I looked on the inside of her lip, and her lip—the skin was all hanging down in shreds" (p. 23).

20 Plaintiff further testified that the shreds of skin were hanging down right over the hole and that she had black rings around her eyes and that her face was swollen (bottom pg. 24). Plaintiff testified that before Mrs. Ollert left at a quarter to seven she did not have rings under her eyes, did not have swollen cheeks, and did not have a hole over her gum. Plaintiff testified that he, the husband, looked into his wife's mouth before she went to the dentist because he wanted to see what the dentist was going to do for six dollars (p. 25); that up to the time his wife went away that night she had not had any medical attention, she had not been sick, but had been helping plaintiff

30 about the house and helping him to run his cafe, in cooking and serving meals. (She had given birth to a child three months before).

Plaintiff testified, page 24:

"Q. And when you speak of the discoloration, what do you mean? A. Why, I mean that now it has been bright red, and it is like in a hole, and there was a piece of court plaster over it."

On page 26 witness was asked:

"Q. This piece of black court plaster, where did you find that? A. Right on her gum, about here, on the right-hand side where the hole was.

"Q. And what did it do to the hole? A. Why, it covered a part of the hole."

Plaintiff testified that that same evening he telephoned to Dr. Ziebell and not finding the Doctor in, left word for him to call back; that shortly afterwards Dr. Ziebell rung up the plaintiff (p. 28); that plaintiff said to Dr. Ziebell: "Doctor, what have you done to my wife's mouth", and that the Doctor stated that he would be right over. He testified that about eleven-thirty that evening Dr. Ziebell came and rushed into the bar room with another man; that Dr. Ziebell said, "Where is your wife?" to which plaintiff said he replied, "She is upstairs to bed", and Dr. Ziebell replied, "Here I brought a doctor from New York who probably will help your wife's mouth." "I then takes them upstairs to the wife."

Plaintiff said to his wife upon entering the bedroom: "May, here is Doctor Ziebell fetched a doctor from New York."

Timely objections were made to all the statements alleged to have been made by the wife to the husband in the alleged presence of the defendant, as will appear from the record pages 30, 31, 32 and 33.

Plaintiff says that his wife then said:

"He was not no doctor from New York. He is the man that worked on my mouth."

Plaintiff testified that Dr. Ziebell then looked into Mrs. Ollert's mouth and said:

"Mrs. Ollert, now tell me how did this happen?"

Plaintiff says that his wife then pointed at the man whom Dr. Ziebell brought with him and said (objected to, &c., p. 32) :

10 "He is not a doctor from New York. He is the man worked on my mouth. He was drilling in my tooth and I got an awful shock and he left the drill in my tooth, walked across the room, shut off the electric current, and come back to me. While taking the drill out of my mouth said, 'My God! child, what have I done? I did not mean to do that. You must have suffered awful?'"

Defendant moved to strike out the answer as hearsay, not only as relating to a hearsay statement by the wife, but also a hearsay statement from somebody else. The Court refused to strike out (p. 32).

20 Plaintiff testified that Dr. Ziebell made no reply; that both doctors looked at each other and did not say a word and then left and went downstairs, went into the bar-room, and plaintiff said to the Doctor :

30 " 'Doctor, you put me in an awful hole,' and I said, 'You see the condition of my wife's mouth, and what do you intend to do about it?' Dr. Ziebell then tapped me on the shoulder and he said, 'Don't worry, Mike, I know it is all our fault and I am going to stand for it all. I am going to see you through.' So he said, 'Keep on swabbing her gum every half hour and I will have my doctor here the first thing in the morning,' and then they went away."

Plaintiff testified that the next morning at nine o'clock defendant came in and that about nine-thirty o'clock Dr. Quigley came in. Plaintiff had never before seen Dr. Quigley. Plaintiff says that Dr. Quigley after looking into his wife's mouth said: "It is a hospital case." This was likewise objected to.

The plaintiff in the course of his examination pointed out Dr. Lauckner in the Court room as the man who was present with Dr. Ziebell in Mrs. Ollert's bedroom when Mrs. Ollert is alleged to have made these statements above quoted (p. 46).

The witness had identified Dr. Lauckner in Court on the first trial as the man who was present with Dr. Ziebell when Mrs. Ollert is alleged to have made the statements quoted above.

Dr. Ziebell testified that he was not in Mr. Ollert's house the night this conversation is alleged to have occurred (p. 107). Dr. Lauckner testified that he was never in his life in Mr. Ollert's home, and both denied that any such conversation ever took place in their presence (Dr. Ziebell, p. 110; Dr. Lauckner, p. 149). 10

Dr. Ziebell did testify (p. 107) that the morning of June 20th, between seven and seven-thirty o'clock his mother awoke him to answer Mr. Ollert on the telephone. Mr. Ollert told the Doctor that his wife was suffering excruciating pain and asked if he would please come over. The Doctor denied that Ollert said: "What have you done to my wife? She is suffering awful", or words to that effect (p. 107). Dr. Ziebell called at Ollert's house about eight-fifteen or eight-thirty A. M. He examined Mrs. Ollert upstairs (p. 108): 20

"I discovered that the area that was formerly greenish-gray was now turning black. I discovered her sitting at a window in a room that was neglected, dirty. She said that the pain was terrible; she could not stand it. I saw the condition. I saw the two cavities still plugged up with this desensitizing phenol and gutta percha, and I suggested that she get—I wrote a prescription for some aconite and iodine to be used as a counter-irritant and suggested that they use that, apply it to the gums. * * * I suggested that 30 40

she keep her mouth clean or cleaner. Her mouth was dirty. I told her then that she should have a physician. Either one of the two said they had no physician. I said, 'Well, you should get someone'."

After they told Dr. Ziebell that they had no physician he stated that he could possibly get someone to call on them.

10 The next afternoon (Wednesday) Dr. Ziebell, who is the dentist for the Hudson County Tuberculosis Sanitarium, met Dr. Quigley at the sanitarium. Dr. Quigley was one of the attending physicians of that institution (p. 109). Dr. Quigley was not defendant's physician. About noon of the same day Dr. Ziebell had again called on Mrs. Ollert. He had told them the day before that he would come back and see if he could help her. On Wednesday noon Dr. Ziebell testified that he:

20 "Saw that she was in bed. Her condition was fast getting worse. The black area was extending almost over her whole mouth. Her lips were black, discolored. Her face, particularly on the right side, was red, intensely swollen or intensely red. I noticed that she was in a sort of coma, delirious, I might call it. I told them that they must get a physician."

30 Dr. Ziebell said that they stated that "they had no physician" (p. 109, line 33). Dr. Ziebell then said that he would get one. After meeting Dr. Quigley he asked him to see the case and Dr. Quigley did go Thursday afternoon, June 22nd, between three and four o'clock. Dr. Ziebell met Dr. Quigley at Mrs. Ollert's door. Dr. Ziebell said that on Wednesday evening he went to the Ollert house with a college chum of his, Dr. Karl Schmidt, who was at his home for dinner. Dr. Schmidt was afterwards in the Navy and died 40 during the war, and before the first trial (p. 110).

Defendant denied that Dr. Lauckner was ever at plaintiff's home and denied that Mrs. Ollert made any such statements as Mr. Ollert testified to regarding what is alleged to have happened at the defendant's office. He also denied saying, "It is all my fault; I will see you through, &c." Defendant likewise testified that Mrs. Ollert at no time complained to him or accused him of causing her any trouble. Dr. Ziebell testified that Dr. Quigley on Thursday afternoon examined Mrs. Ollert and spoke to her regarding her general condition. 10

"She said that she had not been well; she had not had an evacuation of the bowels for a certain period.

"Q. For how long? A. I don't remember. She had not had any action.

"Q. And do you know what Dr. Quigley prescribed for her? A. Yes, sir.

"Q. What did he give her? A. He gave her calomel. 20

"Q. Do you remember anything else? A. He gave her a saline.

"Q. That is salts? A. Yes, sir" (p. 111).

Dr. Quigley said that Mrs. Ollert should go to a hospital (p. 111). Dr. Ziebell did not go again to Mrs. Ollert's house and the defendant did not pay Dr. Quigley for his services.

Dr. Ziebell testified that the dental engine which was in his office on the 19th of June, was made by the Ritter Dental Manufacturing Company. The engine was in Court (p. 112). Defendant testified that it could not have been used to drill Mrs. Ollert's teeth because they were too sensitive. 30

Dr. Quigley who has been practicing medicine since 1900 and been engaged in the general practice in Union Hill since 1908, and who entered the Medical Corps of the Army as a lieutenant and was discharged as a lieutenant colonel, testi- 40

fied that he examined Mrs. Ollert on June 22nd; that he met Dr. Ziebell at Mrs. Ollert's home. He testifies:

10 "Going into the room which Mrs. Ollert was in—bedroom; she was in bed—the first thing going towards the bed that attracted my attention was a fluttering of the eyelids. I went over to the bed and I took her history; and then I examined her mouth—the condi-
 20 tion of the mouth showed that there was an inflammation of the gums and the inner lining of the cheek, the tongue. There was a covering of small patches about an eighth of an inch in diameter over the gums and tongue and the inner side of the cheek, with a gray-white appearance. There was a bad odor to the breath, a very bad odor to the breath. I had Mrs. Ollert sit up in bed. There was no stiffness of the neck muscles nor of the muscles of the back. From her hysteria I attributed her condition in the mouth to the fact that
 30 she was suffering from a condition we call autointoxication. She told me at that time that her bowels had not moved for two weeks. That causes a condition of poisoning to take place from the product of decomposition in the body. After examining Mrs. Ollert I suggested that she be given some calomel to be followed by epsom salts about four hours later, and I also suggested to Dr. Ziebell that he use a mouth wash of glycothymolin. I saw her on the following day. Her condition was about the same. I might say that her
 40 temperature on the first day was 102 and she had an accelerated pulse and her condition on the following day was practically the same. I did not see her after that date, after the 23rd" (p. 128).

Dr. Quigley further testified (p. 129):

"Q. What is this auto-intoxication that you say she had? A. Well, that was responsible for her condition, in my opinion; that was present at the time. It was a condition that we call medically stomatitis.

“Q. What is stomatitis? A. Well, it is an inflammation of the cavity of the mouth caused by—usually caused by an auto-intoxication such as she had, caused by chronic constipation. Her bowels had not moved in two weeks.

“Q. Did you see at that time in Mrs. Ollert’s mouth any evidence of injury which might have been attributed to dental work?

A. No; I did not.

“Q. Did you see any evidence of a burn in her mouth? A. No. 10

“Q. Did you see any evidence of an injury which might have come through a dental instrument? A. I did not.

“Q. Were you told by Mrs. Ollert or her husband that she had been injured in a dental chair? A. No, sir.

“Q. Did either one of them complain about Dr. Ziebell or charge him with any improper treatment? A. Not in my presence.”

For the plaintiff Dr. Samuel Adams of Jersey City testified that he was called in to treat Mrs. Ollert June 23rd. This was the same day that Dr. Quigley saw Mrs. Ollert the last time. He testified: 20

“In looking into her mouth she—or, rather, she said that the dentist had done something to her and in looking into her mouth I found the mucous membrane of the entire mouth discolored; call it black if you want to; but it was very highly discolored.

“Q. And did you find anything else at that time besides the discoloration? A. That was all that I noticed excepting the mucous membrane in places a little—possibly what you might call a little shredding.” 30

Dr. Adams did not make a diagnosis of what she was suffering from at this time. He treated her from that time until her death (p. 57). Dr. Adams testified (p. 58) that he first noticed the lockjaw two or three days after he began treat-

ing her; her jaw became set. In answering the question:

“And in your opinion how did the germ of the lockjaw enter this woman’s body?”

Dr. Adams testified:

“A. Well, I cannot tell (p. 58, line 31).

10 “Q. How does the germ usually enter the body? A. Well, it can come in through any of the mucous membranes; that is, through breathing, nose, mouth, or through some abraided surface, or an instrument.”

Page 60 Dr. Adams testified that he examined Mrs. Ollert’s mouth and he examined her chest and heart with a stethoscope. He did not go below the chest for abrasions. Dr. Adams testified that an abraided surface anywhere on the body would give entry to the germ of lockjaw, or a scratch anywhere on the body. Also:

20 “Q. Is the germ of lockjaw a germ which is common or is it rare? A. Well, I would say that it was not common, and yet it is like other germs; when it finds lodgment it is simply waiting for fertile soil to develop.”

Again the Doctor testified:

“Q. Well, will it develop if it is breathed into the lungs? A. Probably.

“Q. Probably? A. Yes.

30 “Q. And if one eats food with a germ of lockjaw on it that will probably give one lockjaw too, wouldn’t it? A. Yes; it could.

“Q. So you do not have to have a scratch on the outside of the body in order to get lockjaw into the system, do you? A. Not necessarily; you have to have a fertile soil, though, to have it develop. The same thing would apply to what we call T. B. germs—the germs of tuberculosis.

“Q. They can enter the body almost anywhere. A. They can enter the body, but it is simply waiting for fertile soil to develop.

"Q. And they may enter any portion of the body? A. Possibly" (p. 61).

On re-direct examination Dr. Adams testified:

"Q. Where, in your opinion, do you think that the lockjaw entered this woman's body?
A. *That I don't know.*"

Witness also was asked:

"Q. What was the immediate cause of this woman's death?" 10

and he answered: "Lockjaw" (p. 63).

"Q. Well, that produced something in turn, didn't it?

"Objected to.

"A. Cerebral congestion was the ultimate cause.

"Q. Caused the lockjaw? A. Primarily" (p. 63).

At the close of plaintiff's case defendant moved for a non-suit (p. 81) on the ground that the allegations of the complaint had not been proven; that there is no evidence that the defendant was guilty of negligence; that there is no evidence of any negligent act committed by the defendant or any act committed by anybody else for which the defendant is responsible in law; on the ground that there is no evidence that the death of Mrs. Ollert was caused by any negligent act or default or omission on the part of the defendant within the language of the death act, and finally that there is no proof of anything which speaks of negligence. The Court refused to non-suit and gave defendant an exception (p. 81). 20 30

Part of the testimony offered in defense has been above referred to, and in addition thereto, Dr. Gordon Dickinson testified that he was called into consultation by Dr. Adams July 6th, 1916. He testified that Mrs. Ollert

"was then beginning to have what we called tetanus, which is an infection due to a particular type of germ. It is an earth germ. We get it in the wall through the earth; we get it in our occupational injuries through the dirt that comes on clothing; we get it every now and then in the dental chair because there is—people always put their fingers in their mouth to see where the tooth came out.

10 "Q. In this case there was no tooth pulled. A. No, but I was just speaking of it in a general way. I don't remember the detail as to dentistry."

Dr. Dickinson's opinion is that the germ enters the body through wounds only in any part of the body.

Defendant also called John C. Forstbauer, District Representative of the Ritter Dental Manufacturing Company, who testified that Ritter Dental Engines are used by 95% of the dentists and that the dental engine which Dr. Ziebell had in Court was one of the recent types. Mr. Forstbauer qualified as an expert in his particular branch of electricity, and testified that it is utterly impossible for electricity to run through the dental engine, through the burr and into a patient. This witness pointed out several points in the engine where there is insulation which prevents electricity from passing down to the handle held by the operator and thence to the burr. Witness testified that the dental engines are tested to a voltage of eight hundred and that if a stronger current reached the insulation in the majority of cases it will blow out the fuse (p. 162); that if it does not blow the fuse nothing would happen; that the insulation is strong enough to withstand it (p. 163). Witness testified that a voltage of 2000 volts would not jump the insulation in this particular engine (p. 163).

If it entered the engine the fuse would probably blow out or the motor would burn out.

Defendant also called Oscar H. Pieper, factory manager for the Ritter Dental Manufacturing Company, who with his brother invented the dental engine. He testified that it was impossible for electricity to get down in one of these engines in use to the burr at the point where it is designed to drill in a tooth because of the insulation in the engine. He says that the insulation is at various points in the engine; that a number of them are in the motor, in the foot controller, one in the arm and down through the engine. This engine is designed to be operated with 110 volts alternating current; that if high power current should hit it, it would probably blow out the fuse or burn out the motor (p. 165). 10

Dr. Ziebell continued to use the same engine without any repairs for a year or more after June 19, 1916—an impossibility, if a high current had injured it. 20

Dr. Lauckner recalled, testified (p. 167) that he got no electrical shock at all on June 19, 1916, and that nothing happened to the dental engine in Dr. Ziebell's office that day.

On re-direct plaintiff offered two witnesses as experts in electricity for the purpose of showing that electricity could run through the dental engine that was produced in Court by Dr. Ziebell. It is submitted that neither of these witnesses qualified as an expert and that the Court erred in permitting certain questions to be asked of each. 30

The witness Fisher had never tested the dental engine that was produced in Court, and he testified (p. 180):

“Q. Do you know any one of these engines of this type in which when electricity nor-

mally comes into it, in the normal use the electricity runs down to the burr? A. No, sir.

"Q. Can you name a single engine which in normal use—single dental engine of this type, Ritter dental engine of this type—the electricity in the normal use of it will run down to the burr? A. No, sir."

On re-direct this witness testified:

10 "Q. In your opinion will this instrument as now insulated resist voltage to any greater extent than 800? A. Under normal conditions, yes.

"Q. And what would you say the limitation is? A. Why, I should judge from 1200 to 1500."

Plaintiff called in rebuttal several people who had called at his home and who testified regarding Mrs. Ollert's appearances before and after she went to the dentist's office. No one of them
20 made more than a casual observation of her, and as against the testimony of defendant's medical experts who made a thorough examination of Mrs. Ollert, their testimony was valueless. It was not even enough to make a jury question on the subject of her physical condition while she was under defendant's treatment.

At the close of the case defendant moved for a direction on the same grounds on which the non-suit was asked, and on the further ground that
30 it appears from defendant's testimony affirmatively that there was no instrument using electricity, or machine in which electricity may be used, in fact used on Mrs. Ollert; on the further ground that it appears that Mrs. Ollert when she first went to the dentist was ill; that she had a drooping eyelid and sloughy condition about the gums when she first went to the dentist; that that condition gradually grew worse; that there is no connection between the treatment of the

dentist and the fact of death on the 25th of July, over a month later than the date she was last treated; that there is no causal connection between the tetanus and the cerebral congestion from which Mrs. Ollert died, and the treatment in the dentist's office, because it is uncontradicted that every instrument used on Mrs. Ollert was sterilized before it was used, and every instrument was such as is used in the common practice of dentistry; that there is no proof that anything 10 that happened caused tetanus, and it was from tetanus that this cerebral congestion resulted which caused death.

The Court declined to direct a verdict and allowed an exception to the ruling.

Grounds of Appeal.

Defendant's principal grounds of appeal are:

(1) That the Court refused to non-suit the 20 plaintiff.

(2) The refusal of the Court to direct a verdict for defendant.

(3) Because the Court erroneously refused to charge defendant's several requests to charge which are printed in full on pages 2, 3, 4 and 5 of the record, grounds of appeal numbered 4 to 21 inclusive.

(4) Because the Court erroneously charged the jury as alleged in grounds of appeal number- 30 ed 22 to 26 inclusive, pages 5 to 7 inclusive of record.

(5) Because the Court erroneously refused to overrule the question put to the plaintiff: "What did she (Mrs. Ollert) say?" (ground of appeal No. 27, pg. 7) which brought from plaintiff the alleged statement made by Mrs. Ollert not under oath.

(6) Because the trial Court erroneously per- 40

mitted plaintiff to testify as to statements alleged to have been made by Mrs. Ollert, over timely objection (ground of appeal No. 28, pg. 7).

(7) Because the trial Court erroneously refused to strike out Mrs. Ollert's alleged statement (ground of appeal No. 29, pg. 7).

(8) Because the trial Court erroneously permitted Dr. Adams to answer the question "What was the history of the case?" (ground of appeal **10** No. 30, pg. 7).

(9) Because the trial Court permitted the questions to be asked of and answered by Dr. Adams contained in grounds of appeal 31 to 35 inclusive, pages 7 and 8 of record.

(10) Because the Court erroneously permitted questions to be asked of the witness Fisher, which are fully contained in grounds of appeal 36 to 45 inclusive, and refused to strike out the answers **20** which are noted in said grounds of appeal, pages 8 and 9.

(11) Because the Court erroneously permitted the witness Burgess to testify as an expert, whereas he was not qualified (ground of appeal 46, p. 9).

(12) Because the Court erroneously allowed the witness Burgess to answer the questions set forth in grounds of appeal 47 to 49 inclusive, page 9, whereas the said witness was not qualified **30** as an expert.

For the sake of brevity we do not quote all the grounds of appeal at length.

POINT I.

The declarations alleged to have been made by Mrs. Ollert were not under oath and were erroneously admitted in evidence.

The statement alleged to have been made by Mrs. Ollert in the presence of the defendant and Dr. Lauckner was objected to before made on the 10 ground that it was a self serving declaration; that it was immaterial; that its admission was in violation of the hearsay rule and is allowed under no exception to the hearsay rule (pp. 30-31). Objection was made and exception allowed to the Court's ruling. Plaintiff testified:

"My wife pointed her finger at the man Dr. Ziebell fetched in and said, 'He is not a doctor from New York. He is the man work- 20 ed on my mouth. He was drilling in my tooth and I got an awful shock and he left the drill in my tooth, walked across the room, shut off the electric current, and came back to me.' While taking the drill out of my mouth said, 'My God! child, what have I done? I did not mean to do that. You must have suffered awful'" (p. 32, lines 20-30).

Counsel for the defendant moved to strike out the latter part of the answer as hearsay, not only as relating to a hearsay statement by the wife, but 30 also a hearsay statement from somebody else. This was denied and exception allowed (p. 32).

The above alleged statement was not admissible on the ground that it was part of the res gesta for the res gesta relates only to the main fact or transaction.

Luse v. Jones, 39 N. J. L. 707.

It was not admissible as a dying declaration (1) because there is no evidence that Mrs. Ollert 40 at the time she is alleged to have made the state-

ment was in contemplation of death; (2) because the proceeding in which dying declarations may be offered in evidence may not be a civil case.

Wigmore on Evidence, Vol. 2, Sec. 1432.

"The rule, in the absence of statute providing otherwise, is that declarations which are objectionable as hearsay are not rendered competent by the fact that the declarant has died since such declarations were made."

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22 C. J., Sec. 179, pg. 216.

Dying declarations of a person as to the validity or existence of a note executed by him are, in an action on such note against his personal representatives, inadmissible in their favor.

Thayer vs. Lombard, (Mass. Sup. Ct., Field, C. J.), 42 N. E., 563;

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In *Wilson vs. Boerem*, 15 Johns. (N. Y.) 286, action of assumpsit on promissory note, dying declaration of maker was offered in defense. Thompson, C. J., said:

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"Assuming that Brown would have been a competent witness, had he been living, and admitting that he was in extremis when the declarations were made which were received in evidence (of which, however, there is very great doubt), the only question in the case is, whether such declarations were at all admissible. No case, either in the English courts or in our own, has fallen under my observation, where such evidence has been admitted in a civil suit. Such testimony is inconsistent with two fundamental rules in the law of evidence. It is mere hearsay, not under oath, and no opportunity is given for cross examination; and writers on the law of evidence have, I apprehend, either fallen into a mistake, or been a little unguarded, in laying down the rule relative to the admission of the dying declaration of a person, even in criminal cases. * * * It is, I apprehend, confined to the single case of homicide; and so

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it seems to be considered by East, in his Crown Law (Vol. 1, p. 253). 'Besides,' says he, 'the usual evidence of guilt in general cases of felony, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed'. Evidence of this sort is admissible, in this case, on the fullest necessity. For it often happens, that there is no third person present to be an eyewitness to the fact, and the usual witness, on occasion of other felonies, namely, the party injured himself, is got rid of. Whatever might have been the ground on which this kind of evidence was first admitted, in cases of homicide, we find it has long been an established rule in such cases, and, I may say, in such cases only. * * * Baron Eyre, in Woodcock's case, considers it an exception to the general rule, which requires that witnesses should be examined in open court on oath, and an opportunity afforded for cross examination."

Again Chief Justice Thompson adds:

"In *Capron v. Austin*, 7 Johns. Rep. 96, it is said, that the law requires the sanction of an oath to all parol testimony. It never gives credit to the bare assertion of any one, however high his rank, or pure his morals; and it is fairly to be inferred from this case, that the court meant to say, that declarations in extremis were inadmissible evidence, except in the single case of homicide. Having an opportunity to cross examine a witness is a high and important right, and ought not to be violated, except from the most imperious necessity; and I am persuaded, that neither principle nor policy requires the adoption of any such rule of evidence in civil cases."

In *Sir Walter Raleigh's Case*, 1 Jardine's Crim-Trials, 429, 430 (1603), Sir Walter Raleigh said:

"In all this I find not myself touched,

scarce named; and the course of proof is strange; if witnesses are to speak by relation of one another, by this means you may have any man's life in a week; and I may be massacred by mere hearsay, as Sir Nicholas Throckmorton was like to have been in Queen Mary's time. You say, that Brooke told Watson what Cobham told Brooke, that I had said to him; what proof is this?"

See also

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Donnelly vs. State, 26 N. J. L., pp. 617-618;
Tiffany on Death by Wrongful Acts,
Sec. 194.

See statement of Justice Collins in *Camden & Atlantic R. R. Co. vs. Williams*, 61 N. J. L., 651.

The statement was inadmissible as a self serving declaration, not being a part of the *res gesta*.

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Duysters vs. Crawford, 69 N. J. L., 616.

"It is a well established general rule that a statement of a party, whether oral or written, which is of a self-serving nature, is not admissible in evidence in his favor while such statements are usually made because the declarant is for some reason interested, at the time, in having the fact supposed or believed to be as stated by him; the element of present interest is not essential, for it has been considered that the rule applies with full force notwithstanding the fact that the declarant was disinterested at the time when the statement was made. Such declarations are not rendered admissible by having been part of a conversation or correspondence with the declarant's witness, or with a person sent by the opposite party, or with the adverse party himself, or his agent; by having been brought to the attention of the other party or his agent and commented upon by him; by having been entered upon a book of account or other record; or by being brought out on

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cross examination. Such declarations are equally inadmissible when offered by the declarant's representatives, and the rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf."

22 C. J., Sec. 193, pp. 220-226 inclusive.

It is therefore respectfully submitted that the Court erred in overruling the objection to the question which brought forth this testimony (p. 31 of record; grounds of appeal 27 and 28, p. 7). The Court likewise erred in refusing to strike out the testimony after it was given (p. 32; ground of appeal 29, p. 7).

POINT II.

The trial court erred in charging the jury to give Mrs. Ollert's alleged declaration the same careful consideration as other evidence in the cause.

Bearing in mind that Mrs. Ollert's alleged declaration was not made while she was under oath; that there was no opportunity to cross examine her; that the jury did not see her and that both Dr. Ziebell and Dr. Lauckner denied they were present (as Mr. Ollert alleged) when the alleged statement was made, it would seem that the Court's charge respecting that testimony is erroneous. The Court said:

"but there is in the case some testimony on the part of Mr. Ollert as to what his wife said on the occasion when he says the defendant and Dr. Lauckner were present. It is evidence, which if believed, is important evidence in the case, and I simply bring it to your attention because of the importance and the value it has if true upon the cause that is before you for determination, and I say to you that as to it you are to give it just that same careful consideration which I am sure

you will give to all of the testimony in the case, &c." (p. 211, lines 36 to 45).

Exception taken page 216, lines 8 to 15; ground of appeal No. 26, pg. 6.

In 38 Cyc., p. 1675, it is stated:

10 "It is not the duty of the trial court to deal separately with particular phases or fragments of the testimony, and instruct thereon. On the contrary it is very generally held that an instruction should not give undue prominence to facts by singling them out for special consideration. Likewise, undue prominence should not be given by frequent repetition of such facts, or by characterizing them as 'important'. The giving of instructions faulty in this respect is erroneous."

The alleged statement of Mrs. Ollert as testified to by her husband is indeed a remarkable piece of evidence. Plaintiff says that Dr. Ziebell was present and that he introduced his companion as a doctor from New York (p. 30, line 33). Dr. Ziebell testified that he was not present at Mr. Ollert's house that night (p. 107, lines 30 to 40). Defendant says he did go there with Dr. Karl Schmidt, his college chum, who was visiting him, on Wednesday night, June 21, between eight and eight-thirty o'clock (p. 111, line 10). Defendant denied that Mrs. Ollert ever made the alleged statement in his presence (bottom p. 110, top p. 30 111). He denied that he was ever present at Mr. Ollert's house with Dr. Lauckner (p. 110, lines 31, 32). Dr. Lauckner testified:

"I have never been to Mr. Ollert's house and I don't know where his house is" (p. 149, lines 22 to 24).

Dr. Lauckner testified that he was the man that Mr. Ollert identified at the first trial as the man who went to his house (p. 149, line 16), but he 40 says he never saw Ollert before the first trial (p.

149, line 26). He never saw Mrs. Ollert after she left defendant's office on the night of June 19th (p. 149, line 28).

Plaintiff admits that the man he identified on the first trial as the man who was with Dr. Ziebell at his house was Dr. Lauckner (p. 30, line 27 and top p. 46).

Another striking aspect of the alleged declaration of Mrs. Ollert is its remarkable all-inclusiveness. Plaintiff proves his whole case in one breath and in all its varying elements, as follows: 10

(1) "He is the man who worked on my mouth." (This proves identity).

(2) "He was drilling in my tooth." (This proves agency of operator).

(3) "He left the drill in my tooth, walked across the room, shut off the electric current, and come back to me. While taking the drill out of my mouth said, 'My God! child, what have I done? I did not mean to do that.'" (The attempt to prove negligence). 20

(4) "You must have suffered awful." (The attempt to prove pain and suffering).

In the next breath the plaintiff brings in the alleged admission of the defendant himself and the alleged adoption by the defendant of the assistant's alleged negligent act, by the statement that Dr. Ziebell said: "I know it is all our fault and I am going to stand for it all. I am going to see you through." 30

These statements are proven false by facts that Ollert himself did not know, as follows:

(1) Ollert thought the man who went with defendant when he called on Mrs. Ollert two days after she was at his office, was the office assistant. (This man was Dr. Karl Schmidt, defendant's college friend, and not Dr. Lauckner).

(2) Plaintiff assumed the electrically driven burr was used to excavate Mrs. Ollert's tooth. (This was false because a hand excavator only was used. Testimony of Miss Coursen, the nurse, and Dr. Lauckner).

(3) Plaintiff assumed that it would be necessary to cross the room and turn off the electric current. (This was wrong because the current is turned on and off by shifting a pedal with the
10 foot of the operator, as an inspection of the dental engine shows. This pedal in the use of the machine would be at the operator's foot as he stood beside the chair. Mr. Ollert evidently did not know this).

(4) An operator could not leave the drill in a front tooth and walk across the room, because the instrument is so constructed that the handle and drill would of their own weight drop out of the patient's mouth the instant the operator re-
20 leased hold on them, unless, of course, the patient should bite on the instrument and hold it in her mouth.

(5) Finally plaintiff is alleging a burn on the gums, but according to this very statement the drill was in the tooth when the patient got the shock and not sticking into the gums.

In view of these facts was the Court justified in charging the jury "to give it just that careful
30 consideration which I am sure you will give to all of the testimony in the case?" Was the Court moreover justified in charging the jury that the alleged statement of Mrs. Ollert "is evidence, which if believed, is important evidence in this case?"

Finally, plaintiff was the owner and operator of a North Hudson County "Road House" and had been convicted on a charge of stealing brass from an engine, was sentenced to jail for 90 days,
40 but boasts he got out after one day (pgs. 201-2).

We submit that the alleged statement was not important evidence in the case, and that if the jury were entitled to consider it at all (which we respectfully deny), that the Court should then have charged the jury defendant's 17th and 18th requests (page 218 of record; grounds of appeal No. 19 and 20, pg. 5).

The Court on the contrary should have charged the jury defendant's 13th request, which was to disregard that portion of the testimony of Mr. Ollert which purported to relate statements alleged to have been made by Mrs. Ollert (ground of appeal No. 15, pg. 4). 10

POINT III.

Plaintiff proved no act of defendant or his assistant from which court or jury could properly infer negligence or negligent treatment.

If the alleged statement of Mrs. Ollert is excluded then there was no proof of any act whatsoever of either commission or omission on the part of the defendant or his assistant. 20

The following facts are not in dispute:

(1) It is undisputed that all defendant's dental instruments were sterilized before being used on the patient (Miss Coursen, p. 85; Dr. Ziebell, bottom p. 106).

(2) There is no proof in the case that anything done in the defendant's office was done improperly, or that anything that was done or any instrument used or any treatment given by the defendant was improper or contrary to the customary practice of dentists. 30

Not a single dentist or a single witness was called by plaintiff to prove that any act of the defendant was an improper act in the practice of dentistry. 40

There was affirmative proof on the part of the defendant: (1) That 95% of the dentists use the Ritter Dental Engine, and that the engine used by the defendant was a recent type (Mr. Forstbauer, p. 157; Mr. Pieper, p. 165).

(2) There was affirmative evidence that the use of phenol compound as a desensitizing agent was proper dental practice (Dr. Ziebell, p. 105; Dr. Lauckner, p. 148).

10 "The ubiquitous protectorate which jurisprudence extends to all material interests and to every science and to every art takes note of our common fate, with the possibilities of failure in the professional treatment of disease, and accords the medical practitioner in every case the presumption that he has done his whole duty."

Martin vs. Courtney, 87 Minn. 197; 91 N. W., 487.

20 In *Sheldon vs. Wright*, 67 Atl. Rep., 807, the Supreme Court of Vermont held in an action against a physician for malpractice:

"Where in a case like this there is no expert evidence, which the jury can accept, tending to show malpractice, the jury must give a verdict for the defendant."

All that the defendant was required to do was to exercise proper care and skill as a dentist.

30 *Ely vs. Wilbur*, 20 Vr., p. 685.

In *Friend vs. Kramer*, (Sup. Ct. Penn.) 85 Atl. Rep., p. 12, it was alleged that the defendant improperly and unskillfully injected cocaine into plaintiff's gum or jaw, and applied to her tooth a pair of powerful forceps which had not been properly cleansed, and extracted her tooth applying such force as to fracture plaintiff's jawbone, and that by reason of the unclean instruments

her jaw was affected by poisonous germs. In affirming a judgment of non-suit the Court referred to the expert testimony which was to the effect that plaintiff could have become infected from the air, from drinking water, or from food taken into the mouth, &c. Justice Moschzisker said that:

“With the testimony in this condition the conclusion that the plaintiff’s illness was properly ascribable to the alleged negligence of the defendant would have been a mere guess and not a finding based on evidence which, on the theory of reasonable probability, would lead the mind naturally to the conclusion contended for by the plaintiff.”

Dr. Adams, plaintiff’s own expert, testified that he could not tell how the germ of lockjaw entered Mrs. Ollert’s body (p. 58, line 31), and also he said that the germ of lockjaw can come in through any of the mucous membranes, that is, through breathing, nose, mouth or through an abraided surface, or an instrument. He likewise said that the germ is like other germs; when it finds lodgment it is simply waiting for fertile soil to develop; that the germ can enter the body anywhere, like T. B. germs (p. 61). He said he could not tell where the germs entered the body. He could not tell how they entered the body, and, of course, he could not tell and did not tell when they entered the body.

Therefore, on this showing, we contend, it was improper for the trial court to permit the jury to guess about the defendant’s negligence.

Mrs. Ollert left her home the evening of June 19th at 6.30 or 6.45 P. M. (pg. 20, line 35). She returned about 9.30 P. M. (pg. 20, line 39). She reached Dr. Ziebell’s office about 7.30 P. M. (pg. 84, line 28) and left at 7.45 or 7.50 P. M. (pg. 85, line 30). Dr. Ziebell’s office was about

a mile or a mile and a quarter from Ollert's home (pg. 21, line 23).

What happened to Mrs. Ollert in the hour and a half or hour and three quarters between her leaving the defendant's office and reaching home has not been shown. She may have gone to another dentist. She may have been assaulted. She may have fallen and injured her face. Beyond dispute she left defendant's office in good
 10 condition, without making any complaints (pg. 85, lines 1-10).

There is a vital gap of at least an hour and a half between defendant's office and plaintiff's home which the testimony does not bridge-over.

It was therefore error to deny the motion of non-suit (p. 81; ground of appeal No. 1, p. 2); it was error to refuse to direct a verdict for the defendant (p. 206; ground of appeal No. 2); it was error for the Court not to charge defendant's
 20 fifteenth request to the effect that Dr. Ziebell himself was not guilty of any negligence, (because there was absolutely no evidence that he himself did anything, and as a professional man he was entitled to have the jury so instructed where the negligence was charged against his assistant only). (Ground of appeal No. 16, p. 4). It was error not to charge defendant's sixteenth request to the effect that there was no evidence that Dr. Lauckner was guilty of any negligence.

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POINT IV.

There was no causal connection between deceased's visit to defendant's office, her treatment there and her death from tetanus five weeks later.

When Dr. Quigley first saw Mrs. Ollert June 22nd, three days after she was last in Dr. Ziebell's office, there was no evidence of tetanus (p. 128, line 32). Dr. Quigley diagnosed her condition as
 40 stomatitis, caused by chronic constipation (p.

129, lines 9 to 15). He saw no evidence of any burn in her mouth or anything that might be attributed to dental work (p. 129, line 17).

When Dr. Adams called the next day he did not diagnose her condition (p. 57, line 40). He first noticed symptoms of lockjaw "two or three days after I began treating her; her jaw became set" (p. 58, lines 12, 13).

Dr. Dickinson testified that when he examined Mrs. Ollert, at the request of Dr. Adams on July 6th:

"It was a beginning; it just started as a lockjaw" (p. 126, lines 18, 19).

Assuming that Mrs. Ollert did receive a severe shock in the defendant's office, (a fact which is denied) and assuming that she came home with shredded gums, (another fact which is denied) what is the authority for presuming that the germ of tetanus entered deceased's body by means of the shredded gums and through no other source?

If as is disclosed on plaintiff's own case these germs may enter on any fertile soil, as by breathing, or through the mouth, or through any of the mucous membranes, or an abraded surface, can the jury be permitted to guess that they in fact came in through one particular alleged laceration?

It has been repeatedly held that the mere proof of the happening of an accident is not sufficient to carry damages.

Price vs. New York Central, 92 N. J. L., 429;

Kingsley vs. D. L. & W. R. R. Co., 81 N. J. L., 536;

Dotson vs. Erie R. R., 68 N. J. L., 679;

Paynter vs. Bridgeton, &c. Traction Co., 67 N. J. L., 619.

The doctrine of *res ipsa loquitur* is applicable only when the thing shown speaks of the negligence of the defendant and not merely of the happening of an accident.

Corkhill vs. C. & S. Ry. Co., 40 Vr., 97;
Faul vs. N. J. St. Ry. Co., 41 Vr., 795.

10 For the same reason that prompted the decision of the cases cited above, it must follow that the causal connection between the treatment of Mrs. Ollert by the defendant with the tetanus that developed days or weeks later and her death weeks after that from cerebral congestion, must be proved by facts and not left to mere conjecture or surmise.

20 "When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not sufficient."

30 *Stumpf vs. D. L. & W. R. R. Co.*, 47 Vr., 155-156;
Chester vs. Cape May Real Estate Co., 49 Vr., 131;
Suburban Electric Co. vs. Nugent, 29 Vr., 658.

And in *Houston vs. Traphagen*, 18 Vr., 23, it was held that:

40 "When it is claimed that the fall produced or excited disease, it should appear, in order

to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause."

In *State ex rel. Bush v. Sturgis, et al*, 221 S. W. 91, the Court said:

"If an injury may have resulted from one of two causes, for one of which and not the other defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture the defendant is not liable."

In *State ex rel Johnson Hardware Co. v. Dist. Court of Carver County, et al.*, 177 N. W. 644, (May 7, 1920), an employee died from "Hodgin's Disease". He had been employed as a tinner and plumber for more than twenty years and was so employed at the time of the injury. Hydrochloric acid was used in the soldering process and deceased had been using the acid for upwards of twenty years. More than a month after the alleged inhalation of these fumes, ulcerations were found on decedent's nose. Medical evidence was to the effect that the germ origin of "Hodgin's Disease" is unknown. One of the witnesses testified that while the origin of the disease was not known it might, and in his opinion, did, occur from the inhalation of acid fumes. Judgment was for the plaintiff, and the employer appealed.

It was held, that there is no evidence to support the finding that the disease resulted from the inhalation of acid fumes. The cause of such disease was admittedly unknown, and the *physician's statement that the inhalation of acid fumes was the cause, was mere conjecture.*

The judgment of the District Court, Carver County, was reversed by the Supreme Court of Minnesota.

The lines italicized are particularly applicable to the testimony of the plaintiff's physician, Dr. Adams, who says, "The condition which I found could have been due to the injury" (p. 66, lines 22-23). This conclusion of Dr. Adams moreover was of a "possibility", and it is only where the *probabilities* are involved that a jury question is raised.

10 The Court therefore should have granted defendant's motion for a non-suit; should have directed a verdict for defendant and should have charged defendant's 6th, 7th and 8th requests, the last of which was:

"Dr. Adams, who treated Cornelia Ollert, testified that he could not say what caused the lockjaw, and therefore the jury cannot speculate as to what caused it, and the verdict of the jury must be for the defendant."

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POINT V.

The trial court erred in permitting witness Burgess to testify as an expert and in allowing certain questions put to him.

Burgess was called as an electrical expert in dental engines and he testified that he was "engaged in starting and lighting systems on automobiles" (p. 194). He had been employed by the
 30 Westinghouse Electric Manufacturing Company and Hudson and Manhattan Railway Company as maintenance worker, but he was not acquainted with the Ritter Dental machine (p. 195, line 30). Counsel then asked him to examine the machine in Court before the jury (p. 195, line 32). He was asked if he had done so, and he said, "About as thoroughly as could be done without tearing it down". Counsel then asked him a hypothetical question and counsel objected on the ground that

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the witness was not qualified (bottom p. 195). Judge Campbell then asked the witness if he, the witness, thought that with the examination he had made he could properly answer the question (p. 196, line 12). The witness answered:

"Well, there are a great many things—

"THE COURT: Could you answer that question honestly and fairly with the examination you made and the knowledge you now have? 10

"WITNESS: Yes, sir, under the conditions Mr. Walscheid mentioned, I could.

"THE COURT: Without any qualification of the intensity of this electric current or anything of the kind?

"WITNESS: Why, I think it would be very safe; yes, sir.

"THE COURT: Very safe for you to answer?

"WITNESS: Yes, sir.

"THE COURT: I will let him answer. Take your exception to it" (p. 196). 20

The question was then repeated by the stenographer and after being read the Court said:

"I have changed my mind, gentlemen. I will sustain the objection" (bottom p. 196).

At the top of page 197 the Court said:

"I do not think the witness is qualified. I cannot make myself believe that a witness by merely a superficial examination of this instrument without any designation— 30

"MR. WALSCHEID: Let us see whether that is so" (p. 197).

Counsel for the plaintiff thereupon asked the alleged expert about the machine and the testimony of other experts about the machine and just before lunch the Court said in response to a question that had been asked the witness regarding taking down part of the machine:

"Well, it would take so long I am not go- 40

ing to have it done now. It is going to be done, if done at all, at some period when we are not going on with the case" (bottom p. 198, top p. 199).

After lunch Burgess was recalled as a witness and more expert questions were put to him, the Court ruling (p. 203, line 12):

10 "Well, now, if you do not qualify him further, Mr. Walscheid, I am not going to permit the examination to proceed, because I am not satisfied that he has qualified himself sufficiently to speak."

Within a minute or two later plaintiff's attorney asked Burgess:

20 "Q. Now, then, can you tell us whether or not in spite of the fact that this machine has this insulation that you have indicated for the purpose of preventing the flow of electricity—in spite of that fact—whether in spite of that fact a current of electricity can pass through the machine or instrument from the plug which is inserted into the lamp socket to where the drill or burr is attached.

"MR. CARPENTER: I object. He has not qualified a bit more than he was this morning, and he is simply guessing about it.

"THE COURT: However, I am going to let the question be asked, and take your exception. I realize the fact that he did not make the examination (p. 205, lines 20 to 35).

"WITNESS: Yes, sir; it can" (top p. 206).

30 The witness immediately afterwards on cross examination said that he did not even try at the noon hour to test the machine. He never tested the machine to see whether a current would go through or not. The witness in trying to qualify testified that he never tested the machine or any machine like it.

40 "Who is entitled to be considered as an expert in regard to any question of science or skill cannot be determined by any precise

rule, but from the nature of the case must be left very much to the discretion of the trial judge, and his decision is conclusive unless clearly shown to be erroneous in matter of law."

Dixon, J. in *New Jersey Zinc & Iron Co. vs. Lehigh Zinc & Iron Co.*, 30 Vr., at page 194.

Justice Pitney in *Burns vs. Delaware & Atlantic Telegraph Co.*, 41 Vr., at page 755, said:

"The question whether a witness has such special knowledge or experience as to qualify him to give opinion evidence is a question of fact for the determination of the trial court, whose finding is not reviewable on writ of error if there be any legal evidence to support it." 10

In *Kinney vs. Philadelphia Watch Case Co.*, 47 Vr., at page 738, this Court said:

"The qualification of an expert is to be determined by the trial court as a question of fact, and its conclusion will not be disturbed on error if there be legal evidence to support the finding that a witness has the necessary experience to qualify him to give opinion evidence." 20

And cited with approval *Bacon vs. Williams*, 13 Gray, 525, to the effect that:

"This court would be slow to revise a ruling on such a question, unless the error was very plain and palpable." 30

Judge Campbell's own ruling on two occasions that this witness was not an expert shows the plain and palpable error in his finally permitting Burgess to testify. Defendant's experts, thoroughly familiar with the dental engine, had testified that electricity could not go through it to the burr. Plaintiff's expert who had never tested the machine and who was not familiar with the machine was permitted to testify that electricity

would go through it to the burr, after the Court had twice ruled as a fact that he was not qualified.

We submit that Burgess was improperly permitted to testify as an expert and the hypothetical question was improperly allowed (grounds of appeal No. 46, 47, 48 and 49, pg. 9 of record).

POINT VI.

10 **The court erroneously allowed questions put to Dr. Adams, plaintiff's doctor.**

Perhaps the most objectionable question put to Dr. Adams and allowed is the following (bottom p. 71):

20 "Q. Now, then supposing that this woman on the 19th day of June, 1916, had visited and had there been treated by having an instrument inserted in her mouth, and that while this instrument was in her mouth the injury she found in her mouth was occasioned, and that thereafter tetanus developed and that she died from cerebral congestion resulting from this tetanus, what in your opinion would be the probable primal cause of that death.

30 "MR. CARPENTER: I object to it on the ground that the question assumes to be a thing which is not proved as a fact—that a dental instrument was put in this woman's mouth; that she visited a dentist; that she there got a shock; that she there got an injury to her mouth; that this was the same injury which the doctor found when he examined the patient; and it also excludes the woman's condition at the time she is alleged to have visited the dentist; it excludes the fact that she had been suffering from toothache before that, and had pain in her teeth before that, the trouble with her teeth before that; and I think on all of these grounds the question is improper and objectionable.

"THE COURT: I will overrule the objection.
Take your exception.

"MR. CARPENTER: Exception.

"(Repeated by the stenographer).

"A. Injury to the mouth" (p. 72).

To the same question on the previous trial the witness had answered: "Probable injuries" (p. 73, lines 1 to 25).

The precise point here raised has just been decided by the Missouri Court of Appeals, *Merkel* 10
vs. Railway Mail Assn., 226 S. W. Rep., pg. 299,
(Adv. Sheets No. 2, Feb. 9, 1921). Deceased died
of peritonitis, and there was testimony from
which it might be inferred that the peritonitis
was due to an accidental blow over the stomach.
Plaintiff's physician testified "this condition
could be caused by a strangulated bowel, a blood
clot, or interdisposition," but that he found none
of these conditions present, and when asked the
question: 20

"Could that condition that you found
there, be caused by a blow on the stomach?"

he answered:

"That is the most frequent cause of it;
that this condition was due to injury; that
the mark upon the abdomen was about $\frac{1}{2}$
inch wide and 3 or 4 inches long, and was
caused from external violence."

The Court of Appeals held: 30

"One of the issues in the case was whether
the general peritonitis with which, according
to the physician who testified for plaintiff,
the deceased suffered and was the cause of
his death, was caused by external violence,
and to permit a medical expert, over proper
objection, to testify that the general peritoni-
tis was due to an injury, is permitting such
witness to 'substitute his reasoning and con-
clusions for the reasoning and conclusions of
the jury upon an issue before the triers of 40

fact.' " *Deiner v. Sutermeister*, 296 Mo., 505, loc. cit. 521, 178 S. W. 757.

"In *Glasgow v. St. Ry Co.*, 191 Mo. 347, 89 S. W. 915, the main question in the case was whether plaintiff's condition was the result of the alleged accident. Expert witnesses for plaintiff were permitted to testify, over timely objections, as to what was the cause that produced the plaintiff's affliction, and it was held on appeal that this constituted reversible error."

10 In the course of the opinion it is said:

"It was competent for them, in giving their opinions, to speak of that which they knew from their scientific learning and experience. It was not competent for them to draw conclusions of facts from the evidence in the case; yet that is what they did. If the jury gave credit to the testimony of the physicians, the verdict, paraphrased, would say: 'We the jury find that, whilst the plaintiff's affliction might have resulted from many causes, yet the doctors have said it was the result of the fall, and we therefore so find.'"

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The court in giving its approval to this testimony said to the jury, in effect:

"'Whilst it is your duty to ascertain from all the evidence in the case whether or not the plaintiff's disease was produced by the fall she claims to have received, and whilst these learned gentlemen have said that there are many causes that produce such disease, yet in their opinion the plaintiff's trouble was produced by a fall; therefore, if you think these men are worthy of credit, you may base your verdict on their opinion, and find that there was a fall and that it produced this result.' It in effect authorized the jury to adopt the conclusion drawn by the experts from the evidence, rather than to draw their own conclusions. * * * But the testimony of these expert witnesses went to establish the fact of the alleged fall, which was

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not a fact they learned from the medical books. Thus the weight of their testimony went into the scales on the question of whether or not there was an accident."

The Court held that the admission of the medical testimony above quoted was prejudicial error.

The examination of Dr. Adams before this hypothetical question was allowed contains several questions which we claim were erroneously allowed over objection. They are contained in 10 grounds of appeal No. 30, 31, 32, 33 and 34, pg. 7-8 of record. The most serious error was that above mentioned, ground of appeal No. 35.

POINT VII.

The court erred in allowing questions put to the witness Fisher.

Charles Fisher, who took a course in the Chicago Institute of Correspondence in electricity and 20 had been engaged in electrical maintenance work was asked these questions:

"Q. Describe to us what the result of electrical burning is, the appearance of the surface in a human being after the burning" (bottom p. 176).

"Objection overruled" (top p. 177).

"A. An electric burn, burns the skin, the flesh, the color of sulphur, which is a very light yellow" (p. 177, line 20; ground of appeal No. 37, pg. 8). 30

Later the witness testified that he never saw a dental engine of this type which in normal use permitted the electricity to run down to the burr (p. 180, lines 10 to 25). Bottom of page 180 he was asked:

"Q. To what extent will that instrument resist the passage of electric current, in your opinion? A. To what extent? 40

"Q. What voltage, when in ordinary proper condition?

"MR. CARPENTER: I object to that, as calling for a matter of opinion, whereas it should call for a matter of fact. There is a fact about this. It will resist up to a certain voltage. Now, if there is a fact about it the fact ought to be testified to and not this man's opinion.

"WITNESS: There is no capacity at all. They are liable to break at any time.

10 "MR. CARPENTER: I move to strike that out. It is objectionable and a conclusion.

"THE COURT: Why?

"WITNESS: It may stand 110 volts, it may stand a 1,000, it may not stand 100.

"Q. Why. A. Because the insulation is used in a motor and is nothing more than a chair. It is the weakest link or the weakest point.

20 "Q. What do you say about the quality of that insulation? A. It is good. It is right in line with the ordinary insulation." (p. 181, ll. 1 to 25).

On page 182 the witness was asked:

"Q. In your opinion will this instrument as now insulated resist voltage to any greater extent than 800?

"MR. CARPENTER: I object to that. That is not a matter of opinion at all. It is a matter of fact, and I submit the facts should be called for and not a matter of opinion on a matter of this kind.

30 "THE COURT: This witness has been offered and assumed to be an expert on matters relating to electrical currents and electrical appliances. However expert he may be and what the degree of his expertness is, are matters which would go to the quality, and how far he may venture on opinions of this sort.

"MR. CARPENTER: It is not a matter of opinion. It is a matter of fact.

"THE COURT: Then you can only get that by making a test?

40 "MR. CARPENTER: Absolutely.

"THE COURT: I do not think that is called for. I will overrule the objection.

"MR. CARPENTER: Exception.

"WITNESS: Under normal conditions, yes.

"Q. And what would you say the limitation is? A. Why, I should judge from 1,200 to 1,500.

"Q. 1,200 to 1,500? A. On a break down.

"Q. And if voltage greater than 1,200 to 1,500 volts reaches this instrument what happens to the electric current?"

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Objection stated bottom page 182.

"A. It breaks down the insulation (p. 183).

"Q. Does it ever jump insulation?

"Objected to.

"A. No; it will jump the gap."

This witness was also asked:

"Q. And is it proper electrical practice to attach an instrument of this type, this instrument, for instance, to a lamp socket, which is supplied from a street lighting circuit such as exists in Guttenberg."

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Objected to that the witness had not qualified to give that opinion according to his own qualifications. Objection overruled (p. 181, l. 30), Moreover no ground for this question was alleged in the complaint. The only examination that this witness made of this engine was in the Court Room where he examined the insulation (bottom p. 178, top p. 179). This witness had testified that he had examined a dental engine, which he said was of the same type, but he did not get any electricity down to the burr (bottom, p. 179).

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Despite his lack of knowledge the Court permitted him to testify as an expert, giving his opinions where the matter was not of an opinion at all, but matters of fact which could have been demonstrated to a mathematical certainty.

We submit that opinion evidence cannot be

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given in such situations, and moreover that this witness was not qualified as an expert (Grounds of appeal No. 36 to 45 inclusive, pp. 8-9 of record).

POINT VIII.

The trial court erred in refusing to charge defendant's requests to charge.

10 Defendant submitted nineteen requests to charge (pp. 216 to 218 inclusive), and the Court's refusal to charge them brings up practically all of the questions argued above. (Grounds of appeal No. 4 to 21 inclusive, pp. 2 to 5 of record).

According to the undisputed evidence defendant was entitled to have the Court charge the jury that there was no evidence that defendant negligently or unskillfully used instruments or
20 appliances on Mrs. Ollert which were unsafe, unfit or unsanitary (2nd request; ground of appeal No. 5).

There was no evidence that defendant or his assistant used instruments or appliances on Mrs. Ollert through which defendant allowed a current of electricity to pass into Mrs. Ollert's mouth (3rd request; ground of appeal No. 6).

There was no lawful evidence that a current of electricity passed through any of the defendant's dental instruments and into Mrs. Ollert
30 (4th request; ground of appeal No. 7).

There was no lawful evidence of any improper or negligent treatment of Mrs. Ollert (5th request; ground of appeal, No. 8).

The defendant was likewise entitled to have the jury charged:

"There is no evidence that the cerebral congestion or the tetanus or lockjaw entered

the body of the said Cornelia Ollert by reason of any careless or negligent act on the part of the defendant, and your verdict therefore must be for the defendant."

The argument hereinabove contained supports the defendant's right to have had the several requests charged to the jury and the refusal of the Court to charge them constituted error.

POINT IX.

We respectfully submit that the judgment below should be reversed and a new trial ordered.

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JAMES D. CARPENTER, JR.,
Of Counsel.

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POINT IX.

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Attorneys & Counselors

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Of Counsel

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New Jersey Court of Errors and Appeals.

No. 37, March Term, 1921.

MITCHELL OLLERT, as Adminis-
trator, &c., of Cornelia Ollert,
deceased,

Plaintiff-Appellee,

vs.

FREDERICK W. ZIEBELL,

Defendant-Appellant.

Action
at Law.
On Appeal
from
Hudson
Circuit
Court.

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REPLY BRIEF FOR APPELLANT. 20

The Declarations of Mrs. Ollert were not admissible as an admission.

Perhaps the leading case in the country on the subject of admissions by silence is *Commonwealth vs. Kenney*, 12 Metc., 235, opinion by Shaw, C. J.

In *State vs. Landise*, 86 N. J. L., 230, the Court held:

“Whatever effect the testimony may have had was due *not to the statements of the wife*, but to the silence and final reply of the husband.”

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In *Donnelly vs. State*, 26 N. J. L., 601, the gist of the reason for admitting the accusation was that it was part of the *res gestae*.

In *Parker vs. State*, 61 N. J. L., 313, Magie, C. J., said:

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“Statements thus admitted are not direct evidence against the person charged, but his conduct, when such statements are made, is admissible so far as it tends to show acquiescence therein by silence when he would naturally speak.”

10 In *Roessel vs. State*, 33 Vr., at page 235, Justice Depew said that such statements to be admissible must have been made on an occasion when a reply from him might properly be expected.

“I will never receive such evidence, unless, as my Lord Kenyon used to say, the twelve judges in the House of Lords tell me that I must. Really, it is most dangerous evidence.”

Chief Justice Best in

Child vs. Grace, 2 C. & P., 193.

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LEWIS & CLARK