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NOTICE OF APPEAL.

Essex County Circuit Court

LOUISE P. HARING and EDWARD H. HARING, her husband, <i>Plaintiffs,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE, <i>Defendants.</i>	}	<i>Notice of Appeal.</i>	

Messrs. Coult and Satz, attorneys of plaintiffs. 20

SIRS:

TAKE NOTICE, that the defendant, Charles W. Banks, appeals to the New Jersey Supreme Court from the whole of the judgments entered in the above-stated cause.

WILLIAM P. BRAUN,
Attorney of Defendant, Charles W. Banks.

Service of within notice of appeal is acknowledged this 5th day of July, 1928. 30

COULT & SATZ,
Attorneys of Plaintiffs.

GROUNDS OF APPEAL.

ESSEX COUNTY CIRCUIT COURT.

10	LOUISE P. HARING and EDWARD H. HARING,	}	<i>Plaintiffs,</i>		<i>Action at Law.</i>
	<i>vs.</i>				
	CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE,	}	<i>Defendants.</i>		<i>Grounds of Appeal.</i>

20 To Messrs. Coult and Satz, attorneys for appellees:

SIRS:

TAKE NOTICE, that the following are the grounds upon which the appellant, Charles W. Banks, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause:

- 30 1. The trial court refused to grant the motion on behalf of the defendant, Charles W. Banks, for a non-suit on the first count, at the conclusion of the plaintiffs' opening.
2. The trial court refused to grant the motion on behalf of the defendant, Charles W. Banks, for a non-suit on the second count, at the conclusion of the plaintiffs' opening.
3. The trial court refused to grant the motion on behalf of the defendant, Charles W. Banks, for a non-suit on the fourth count, at the conclusion of the plaintiffs' opening.

40

Grounds of Appeal.

4. The trial court refused to grant the motion on behalf of the defendant, Charles W. Banks, for a non-suit on the fifth count, at the conclusion of the plaintiffs' opening.

5. The trial court erroneously permitted the introduction in evidence of photograph, Exhibit P. 1, over defendant's, Charles W. Banks' objection. 10

6. The trial court erroneously permitted the introduction in evidence of photograph, Exhibit P. 2, over defendant's, Charles W. Banks' objection.

7. The trial court refused to permit the following question to be asked on cross examination in behalf of defendant, Charles W. Banks, of plaintiffs' witness, Edith M. Baigrie: 20

“How did he say it?”

8. The trial court refused to permit the following question to be asked on cross examination in behalf of defendant Charles W. Banks, of plaintiffs' witness, Edith M. Baigrie:

“What tone of voice did he use?”

9. The trial court denied a motion in behalf of defendant, Charles W. Banks, for non-suit of the first count at the conclusion of plaintiffs' case. 30

10. The trial court denied a motion in behalf of defendant, Charles W. Banks, for non-suit of the second count at the conclusion of the plaintiffs' case.

11. The trial court denied a motion in behalf of defendant, Charles W. Banks, for non-suit of the fourth count at the conclusion of the plaintiffs' case. 40

Grounds of Appeal.

12. The trial court denied a motion in behalf of the defendant, Charles W. Banks, for nonsuit of the fifth count at the conclusion of the plaintiffs' case.

10 13. The trial court erroneously sustained the objection to question asked of Dr. James H. Brothers, one of the witnesses in behalf of the defense, and struck out the answer thereto, which question and answer were as follows:

20 "Q Suppose she had indicated her abdomen and then her shoulder, and stated, 'I expected this, but not this,' would that put you on notice * * * would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot water bottle? A Not in my opinion."

14. Trial court refused the motion for direction of verdict in favor of defendant, Charles W. Banks, on the first count.

15. Trial court refused the motion for direction of verdict in favor of defendant, Charles W. Banks, on the second count.

30 16. Trial court refused the motion for direction of verdict in favor of defendant, Charles W. Banks, on the fourth count.

17. Trial court refused the motion for direction of verdict in favor of defendant, Charles W. Banks, on the fifth count.

18. The trial court erroneously refused defendant's Charles W. Banks' request to charge the jury as follows:

40 Defendants are limited to the number of physicians they can have examine the plaintiff physically.

Grounds of Appeal.

19. The trial court erroneously charged the jury as follows:

It is conceded in this case that it would be improper to place a patient on a hot water bottle.

20. The trial court erroneously refused to charge the jury in behalf of the defendant, Charles W. Banks, as follows: 10

If you find from the evidence of the case that there was no duty on the part of Charles W. Banks to see that the ether bed was properly prepared or inspected for the placing of the patient, you must find in favor of Dr. Charles W. Banks.

21. The trial court erroneously refused to charge the jury in behalf of the defendant, Charles W. Banks, as follows: 20

If you find from the evidence of the case that there is no duty on the part of Dr. Charles Banks or Dr. Winifred Banks to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of Dr. Charles W. Banks.

22. The trial court erroneously refused to charge the jury in behalf of the defendant, Charles W. Banks, as follows: 30

If you find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the patient therein, you cannot find a verdict against Dr. Charles W. Banks.

23. The trial court erroneously refused to charge the jury in behalf of the defendant, Charles W. Banks, as follows:

If you find that defendant Baigrie, Mrs. Haring's private nurse, was in the room 40

Grounds of Appeal.

10 where patient was received after the operation, while the patient was being transferred from the carriage to the ether bed, then under the testimony of the case, you cannot find a verdict against defendant, Charles W. Banks, Winifred Banks or Charles B. Anuario.

WILLIAM P. BRAUN,
Attorney of Appellant, Charles W. Banks.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20 JOHN J. GHEGAN, being duly sworn on his oath according to law, deposes and says that he served the within grounds of appeal on Messrs. Coult and Satz, at their office, 790 Broad street, Newark, N. J., by leaving a copy of the same with Miss Helen Astrofsky, over the age of eighteen years, on July 12, 1928, at 12:40 P. M.

JOHN J. GHEGAN.

30 Sworn and subscribed before
me this 19th day of July,
1928.

WILLIAM P. BRAUN.

SUMMONS.

The State of New Jersey to Charles
 (L. s.) W. Banks, Winifred Banks, Charles
 B. Anuario, Agnes Grant, Edith M.
 Baigrie. YOU ARE SUMMONED to answer the an- 10
 nexed complaint of Louise P. Haring and Ed-
 ward H. Haring, her husband, in an action at
 law in the Essex County Circuit Court. AND
 TAKE NOTICE, that unless you file your answers
 to said complaint with the Clerk of the said
 Essex County Circuit Court at Newark, New
 Jersey, within twenty days after the service upon
 you of this writ and the annexed complaint, the
 plaintiffs may proceed to suit, and judgment may
 be entered against you.

WITNESS, WILLIAM A. SMITH, Judge of the 20
 Essex County Circuit Court at Newark, New
 Jersey, this 3rd day of August, one thousand nine
 hundred and twenty-seven.

JOHN H. SCOTT,
 Clerk.

COULT & SATZ,
 Attorneys.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

10	LOUISE P. HARING and EDWARD H. HARING, her husband, <i>Plaintiffs,</i>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE, <i>Defendants.</i>	}	<i>Complaint.</i>

20 Plaintiffs, Louise P. Haring and Edward H. Haring, residing at No. 9 Irving street, in the City of East Orange, County of Essex and State of New Jersey, say:

FIRST COUNT.

1. Defendant, Charles W. Banks, before and at the time of the wrong herein complained of was a practicing physician and surgeon in the State of New Jersey.
- 30 2. Said defendant on the 9th day of March, 1927, undertook, for hire and reward, to perform a certain surgical operation upon plaintiff, Louise P. Haring, for the removal of said plaintiff's appendix vermiform, and of a tumor.
3. Said operation was performed at the hospital known as St. Mary's Hospital, in the City of Orange, County of Essex and State of New Jersey.
- 40 4. For the purpose of said operation said defendant caused said Louise P. Haring to be

Complaint.

put under the influence of a certain anesthetic, which rendered her, the said Louise P. Haring, unconscious.

5. That while the said Louise P. Haring was under the influence of the said anesthetic and unconscious, and while the said defendant was acting as her representative, selected by her, and owing her the duty of so acting in her interest that she should receive the full benefit of that professional judgment and skill to which she was entitled, he, the said defendant, failed to exercise reasonable and ordinary care and intelligence in the exertion of his skill and the application of his knowledge in that he, the said defendant, by himself, and by his agents and servants thereunto duly authorized, carelessly and negligently caused, suffered and procured the said Louise P. Haring, while still unconscious, to be laid upon a certain heating apparatus commonly called a hot water bottle, which, because of its extreme heat, was then and there a dangerous instrumentality when applied to or near to a human body, although said water bottle was lying in open view on a certain bed where by the exercise of ordinary care and skill its presence and danger would have been discovered.

6. Whereby, and as a result whereof, the said Louise P. Haring was severely and seriously burned and injured in and about her back, her nervous system was shocked, and she became sore, lame and disordered, and was confined to her bed for a long space of time, and will continue to be sore, injured and confined in the future, and has received serious injuries of a permanent nature.

Complaint.

7. Plaintiff, Louise P. Haring, demands on this count the sum of twenty thousand dollars (\$20,000) damages.

SECOND COUNT.

10 1. Plaintiff repeats and makes part of this count paragraphs one, two, three and four of the first count.

20 2. That, while the said Louise P. Haring was under the influence of said anesthetic and unconscious, she was placed or laid upon a bed in said hospital which contained a certain heating apparatus commonly called a hot water bottle, which, because of its extreme and dangerous heat, caused her to be burned on and about the back and shoulders, and when said Louise P. Haring was recovering from the effects of said anesthetic and regaining consciousness, she made outcry and complained to the defendant of the pain and agony which she was then suffering because of the presence of said water bottle under her back and shoulders, but the said defendant failed to use and exercise reasonable and ordinary care and intelligence and exertion of his skill and in the application of his knowledge in that he failed to discover the presence of the
30 said hot water bottle, and caused, suffered and permitted the said Louise P. Haring to lie and rest upon said hot water bottle for a long space of time.

3. Plaintiff repeats and makes part of this count paragraph six of the first count.

4. Plaintiff, Louise P. Haring, demands on this count the sum of twenty thousand dollars (\$20,000) damages.

40

Complaint.

THIRD COUNT.

1. Before and at the time of the wrongs herein complained of, defendants Winifred Banks and Charles B. Anuario were practicing physicians and surgeons of the State of New Jersey, and defendants Agnes Grant and Edith Baigrie were graduate nurses. 10

2. On the fifth day of March, 1927, one Charles W. Banks, a physician and surgeon of the State of New Jersey, performed a certain surgical operation on the plaintiff, Louise P. Haring.

3. Said operation was performed in the hospital known as St. Mary's Hospital of the City of Orange, County of Essex and State of New Jersey. 20

4. The said four last-mentioned defendants assisted the said Charles W. Banks in performing the said operation and in the care of the said plaintiff, Louise P. Haring.

5. Plaintiff repeats and makes part of this count paragraph four of the first count.

6. Said four last-mentioned defendants, or some of them, negligently and carelessly placed and put a certain heating apparatus known as a hot water bottle in a certain bed in said hospital when the said hot water bottle, because of its extreme heat, was then and there a dangerous instrumentality when applied to or near a human body, and afterwards, said four last-mentioned defendants, or some of them, carried and conveyed said plaintiff, Louise P. Haring, while she was still unconscious and under the influence of said anesthetic, and laid her and caused her to be laid upon said hot water bottle which was 40

Complaint.

then and there lying on the said bed where by the exercise of ordinary care and skill its presence and its danger would have been discovered.

7. Plaintiff, Louise P. Haring, repeats and makes part of this count paragraph six of the first count.

8. Plaintiff, Louise P. Haring, demands on this count the sum of twenty thousand dollars (\$20,000) damages.

FOURTH COUNT.

The plaintiff, Edward H. Haring, says:

1. On the fifth day of March, 1927, he was, and still is, the husband of the plaintiff, Louise P. Haring.

2. He repeats and makes part of this count paragraphs one, two, three, four, five and six of the first count.

3. As a result of the negligence aforesaid of the defendant, Charles W. Banks, the plaintiff, Edward H. Haring has been, and in the future will be, deprived of the comfort, society and services of his wife, and has expended, and will in the future expend, large sums of money for medical attendance and medicines in order to cure his wife of her injuries, and has expended, and will in the future expend, other sums of money for the hiring of services of others to do those things which his wife theretofore did for him.

4. Plaintiff, Edward H. Haring, demands on this count five thousand dollars (\$5,000) damages.

Complaint.

FIFTH COUNT.

The plaintiff, Edward H. Haring, says that:

1. He repeats and makes part hereof paragraph one of the fourth count.

2. He repeats and makes part hereof paragraphs one, two, three and four of the first count. 10

3. He repeats and makes part hereof paragraph two of the second count.

4. As a result of the negligence aforesaid of the defendants, Charles Banks, Winifred Banks, Charles B. Anuario, Agnes Grant and Edith Baigrie, the plaintiff, Edward H. Haring has been, and in the future will be, deprived of the comfort, society and services of his wife, and has expended, and will in the future expend, large sums of money for medical attendance and medicines in order to cure his wife of her injuries, and has expended, and will in the future expend, other sums of money for the hiring of services of others to do those things which his wife theretofore did for him. 20

5. Plaintiff, Edward H. Haring, demands on this count five thousand dollars (\$5,000) damages. 30

COULT & SATZ,
Attorneys for Plaintiffs.

**ANSWER OF DEFENDANT, CHARLES
W. BANKS.**

ESSEX COUNTY CIRCUIT COURT.

10	LOUISE P. HARING and EDWARD H. HARING, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Answer of Defendant Charles W. Banks.</i>
	CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE, <div style="text-align: right;"><i>Defendants.</i></div>		

20 Defendant, Charles W. Banks, residing in the
 City of East Orange, Essex County, New Jer-
 sey, in answer to the complaint of the plaintiffs,
 says:

ANSWER TO FIRST COUNT.

- 30
1. Paragraph one is admitted.
 2. Paragraph two is admitted.
 3. Paragraph three is admitted.
 4. Paragraph four is admitted.
 5. Paragraph five is denied.
 6. Paragraph six is denied.
 7. Paragraph seven is denied.

ANSWER TO SECOND COUNT.

40 1. Defendant, Charles W. Banks, repeats his
 answers to paragraphs one, two, three and four
 of the first count as though the same were herein
 specifically set forth.

Answer.

2. Paragraph two is denied.
3. Paragraph three is denied.

ANSWER TO THIRD COUNT.

1. Paragraph one is admitted. 10
2. Paragraph two is admitted.
3. Paragraph three is admitted.
4. Paragraph four is denied except that this defendant admits that Drs. Winifred Banks and Charles B. Anuario, and defendant Agnes Grant, assisted in the operation referred to in the complaint.
5. Paragraph five is admitted.
6. Defendant has no knowledge or information from which to form a belief as to the allegations contained in paragraph six of the third count. 20
7. Paragraph seven is denied.
8. Paragraph eight is denied.

ANSWER TO FOURTH COUNT.

1. Paragraph one is admitted. 30
2. Defendant, Charles W. Banks, repeats his answers to paragraphs one, two, three, four, five and six of the first count as though the same were herein specifically set forth.
3. Paragraph three is denied.
4. Paragraph four is denied.

Answer.

ANSWER TO FIFTH COUNT.

1. Paragraph one is admitted.
2. Defendant, Charles W. Banks, repeats his answers to paragraphs one, two, three and four of the first count as though the same were
10 herein specifically set forth.
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.

FIRST SEPARATE DEFENSE TO
FIRST COUNT.

20 Plaintiff, Louise P. Haring, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she, through her agent, servant or employee, negligently caused, suffered and procured the said hot water bottle referred to in paragraph five to be placed in a position where it came in contact with the body of the said plaintiff, Louise P. Haring.

FIRST SEPARATE DEFENSE TO
SECOND COUNT.

30 Plaintiff, Louise P. Haring, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she, through her agent, servant or employee, negligently caused, suffered and procured the said hot water bottle referred to in paragraph two to be placed in a position where it came in contact with the body of the said plaintiff, Louise P. Haring.

40

Answer.

FIRST SEPARATE DEFENSE TO
THIRD COUNT.

Plaintiff, Louise P. Haring, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she, through her agent, servant or employee, negligently caused, suffered and procured the said hot water bottle referred to in paragraph six to be placed in a position where it came in contact with the body of the said plaintiff, Louise P. Haring. 10

FIRST SEPARATE DEFENSE TO
FOURTH COUNT.

Plaintiff, Louise P. Haring, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she, through her agent, servant or employee, negligently caused, suffered and procured the said hot water bottle referred to in paragraph one to be placed in a position where it came in contact with the body of the said plaintiff, Louise P. Haring. 20

FIRST SEPARATE DEFENSE TO
FIFTH COUNT.

Plaintiff, Louise P. Haring, was guilty of negligence which caused or contributed to the happening of the alleged accident in that she, through her agent, servant, or employee, negligently caused, suffered and procured the said hot water bottle referred to in paragraph two to be placed in a position where it came in contact with the body of the said plaintiff, Louise P. Haring. 30

WILLIAM P. BRAUN,
Attorney of Defendant, Charles W. Banks. 40

**REPLY TO ANSWER OF DEFENDANT,
CHARLES W. BANKS.**

ESSEX COUNTY CIRCUIT COURT.

10	LOUISE P. HARING and EDWARD H. HARING, her husband, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Reply to Answer of Defendant Charles W. Banks.</i>
	CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE, <div style="text-align: right;"><i>Defendants.</i></div>		

20 Plaintiffs, replying to the answer of defendant, Charles W. Banks, say:

1. The allegations contained in the first separate defense to first count are denied.
2. The allegations contained in the first separate defense to second count are denied.
3. The allegations contained in the first separate defense to third count are denied.
- 30 4. The allegations contained in the first separate defense to fourth count are denied.
5. The allegations contained in the first separate defense to fifth count are denied.

COULT & SATZ,
Attorneys for Plaintiffs.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

43659	}	<i>Action at Law.</i>	10
LOUISE P. HARING and EDWARD H. HARING, <div style="text-align: right; padding-right: 20px;"><i>Plaintiffs,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE, <div style="text-align: left; padding-left: 20px;"><i>Defendants.</i></div>			<i>After Verdict.</i>

Judgment entered, June 15, 1928. 20

Damage	\$5,000.00
Damage	2,000.00
Costs	121.54 Pltf.
Total	\$7,121.54
Costs	\$ 105.00 Deft.

Coult, Satz & Tomlinson, attorneys of plain-
tiffs. 30

E. M. & R. Colie, attorneys for defendant,
Winifred Banks.

Judgment after verdict in the above-entitled
action was rendered on the fifteenth day of
June, A. D. nineteen hundred and twenty-eight
in favor of the plaintiff, Louise P. Haring, and
against the defendant, Charles W. Banks, for the
sum of five thousand (\$5,000) damage; and they
also find in favor of the plaintiff, Edward H.

Plaintiffs' Opening.

Haring and against the defendant, Charles W. Banks, for the sum of two thousand (\$2,000) damage and one hundred twenty-one dollars and fifty-four cents costs of suit; and by their foreman they also find in favor of the defendants, Winifred Banks and Charles B. Anuario and
10 against the plaintiffs, Louise P. Haring and Edward H. Haring, for the sum of one hundred five dollars costs of suit.

Judgment entered and signed June 15, 1928.

JOHN H. SCOTT,
Clerk.

Recorded in Book 105, Circuit Court Judgment, pages 71 and 72.

20

30

40

Plaintiffs' Opening.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

Tuesday, June 12, 1928.

LOUISE P. HARING, *et al.*,

vs.

CHARLES W. BANKS, *et al.*

} *Action*
} *at Law.*

10

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiffs appear Coult & Satz (by Joseph Coult).

For the defendant Charles W. Banks appears William P. Braun. 20

For the defendant Winifred Banks appear E. M. & R. Colie (by Edward M. Colie).

For the defendant Charles Anuario appear Lindabury, Depue & Faulks (by Burtis S. Horner).

For the defendant Agnes Grant appear Levy, Fenster & McCloskey (by Wilbur J. Bernard).

For the defendant Edith M. Baigrie appears Carl A. Quaglia. 30

(A jury is called and sworn.)

Mr. Coult: If the Court please, in the second paragraph of the first count it should be changed from the 5th to the 9th of March; in the fifth count in the fourth paragraph I want to add to the names of the defendants the name of Dr. Charles W. Banks which was inadvertently omitted. I spoke to counsel for Dr. Charles W. Banks and he has no objection, so where it says 40

Plaintiffs' Opening.

“the aforesaid defendants” I want to insert the name of Charles W. Banks.

The Court: Before Winifred Banks?

Mr. Coult: Yes, sir.

Mr. Coult opens for the plaintiffs as follows:

10 If the Court please, and gentlemen of the jury: I represent in this case the plaintiffs, Louise P. Haring and Edward H. Haring, who is her husband. They are bringing suit against these defendants, whose names you have heard mentioned so frequently while the jury was being drawn: Dr. Charles W. Banks, his wife Winifred Banks, Dr. Charles B. Anuario, Agnes Grant, and Edith M. Baigrie.

20 The plaintiff Louise P. Haring was very cruelly and very seriously injured as a result, we say, of the negligence of these defendants, or of some servant or agent of these defendants. The circumstances by which she received these injuries are these: She was suffering from a tumor and her family physician, who was no one of these defendants, had recommended an operation, and Dr. Charles W. Banks was called in to perform an operation for the removal of the tumor, and incidentally he was to take out the
30 lady's appendix, I believe.

This operation was performed on the 9th of March, 1927, at St. Mary's Hospital in Orange. Dr. Charles W. Banks called in his wife, Dr. Winifred Banks, to assist him, I think, in anesthetizing Mrs. Haring.

Dr. Charles W. Banks and Dr. Winifred Banks practice together—they have a sort of joint practice—

40 Mr. Braun: I object on the ground that there is no such allegation in the complaint that there

Plaintiffs' Opening.

is any relationship of partnership or other allegation of agency. Agency and partnership are not synonymous—

Mr. Coult: (Continuing.) When I said "joint" maybe I should have said this: They practiced together; they have the same office; they have the same telephone number; and they work in pairs. 10
Our claim in this case, and we say it is properly alleged in this case, is that for the purpose of this operation Dr. Winifred Banks became and was the agent of Dr. Charles W. Banks, so if in the premises he did anything wrong his responsibility will follow. That is really a question of law on which the Court will rule and on which the Court will instruct you.

Dr. Winifred Banks, as I said, was also the wife of Dr. Charles W. Banks, and we are going 20
to claim here that if she was guilty of a tort or wrong, whether it was committed in the presence of her husband or not, he would be responsible for her wrongful acts as her husband.

Since that question has been raised, I will make my position plain in the beginning. Dr. Charles W. Banks performed this operation, as I said, with the assistance of his wife. There was present at the operation also Dr. Charles Anuario. What assistance he rendered, I do 30
not know. I suppose that will appear later. There was also present at the operation the defendant Agnes Grant.

Now, Agnes Grant, as I understand it, was not furnished to Mrs. Haring by Dr. Banks, but was a hospital nurse and her duties were to assist in and about the operation itself.

Before this operation was performed Mrs. Haring was prepared for it by another defendant here, Edith M. Baigrie. She was gowned and 40

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fixed up and put on a carrier and was delivered to the operating room. It was the duty of Mrs. Baigrie, also acting for the hospital, to prepare what we call an ether bed for the reception of Mrs. Haring after the operation to recover from the effects of the ether, and I suppose the same
 10 bed would probably be used for her convalescence.

In preparing the room, the windows were open; it was cooled off and Mrs. Baigrie, what is ordinary and usual in cases of this kind, prepared a hot water bottle; a very hot hot water bottle, and put it into the bed, the ether bed. That hot water bottle was placed right where the patient's shoulders would come if she were lying normally in the bed, and it was the intention, of course,
 20 to remove that bottle before the patient should be put on it, because in the condition that it was in it was highly dangerous, and anybody with experience either as a nurse or as a doctor would be well aware that it would be a highly dangerous thing to take a person who was unconscious and under the influence of an anesthetic and put her on a hot water bag heated to where such bags would be, in a dangerous condition.

Mrs. Baigrie, after preparing the bed and putting the hot water bottle in it, for some reason which we do not know and which I suppose will have to come from her own lips if we are going to prove it, went out of the room and left it in the condition I am going to describe.
 30

At this point the operation happened to be completed. Mrs. Haring was put on a car and was taken down to the ether bed by Dr. Winifred Banks, Dr. Anuario and Agnes Grant. It was no part of their duty whatever to put this patient in the bed. That duty rested upon the hospital
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acting through Edith M. Baigrie; but when they got down there Mrs. Baigrie was not there and instead of waiting for her to complete the preparation of the bed and herself to move the patient into this bed, they undertook to do it themselves, although it was no part of their duty to do it.

10

Now, our contention—it is not for me to tell you what the law is—but our contention here is that if they assumed a duty which was not their own and undertook to do it, that there devolved upon them the duty to use ordinary and reasonable care in doing it.

When they got to this bed the hot water bottle was in plain sight; there wasn't one of those who were carrying this poor unconscious woman down there, who did not know or at least ought not to have known that that hot water bottle present in that bed would be a source of the most extreme danger to this lady if it came in contact with her person, and yet, in spite of that, the three of them picked this unconscious woman up and placed her on that hot water bottle in the bed.

20

She was just about coming out of the anesthetic at that time and she will tell you that instantly upon coming to her senses she was conscious of a most terrific pain in her back and that she made an outcry about it. About that time Dr. Charles W. Banks came down and came into the room where she was and she, as best she could, tried to tell him about it, and she will tell you that she expected pain here (indicating) but not here (indicating), and she made the complaint that something was cutting her in her back. The doctor said, "You will be all right." And then the doctor said, "She's got a beaut."

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Plaintiffs' Opening.

And that poor lady was left alive on that bottle we don't know exactly how long. We will try to find out before the case is concluded.

10 I might say that just about a few minutes after she was put on the bed her husband and her four sisters who are here, who had during the time that the operation was being performed been waiting in the corridor, were permitted to walk into the room. They were in there and saw her come out of this condition, and it was quite apparent to all of them that something was the matter and her suffering was patent to them, but they were told, "It's all right." And they heard her complain of her condition but nothing was done. They were allowed in the room for only a few minutes and then they went out.

20 In the meantime, Dr. Charles W. Banks, Dr. Winifred Banks, Dr. Anuario and Miss Grant had left the room. Mrs. Baigrie was in there alone. Mrs. Haring will tell you what occurred so far as she can remember after she made these outcrys and before she lapsed into unconsciousness again, because she did before long for the reason that in that time the flesh was being cooked off her back.

30 She will tell you that she has a recollection of complaining to Mrs. Baigrie and she will tell you that some time or other she had a glimmering of consciousness and she heard somebody say, "Put it on thick; put in on thick."

40 In the meantime the members of her family who had been in the room and had gone out again were outside; they had some talk with Dr. Charles Banks. He went up and performed another operation and then came down again and after they had been out of the room for some considerable length of time they saw Mrs. Baigrie

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who apparently had been in the room with the patient all the time, hurrying out and she came back again with another nurse, whose name, I believe, is McCarrick, and the two of them went into the room. Then, after awhile McCarrick came out and she hurried away and then she came back. When she came back she had a hypodermic syringe in her hand. I don't know whether we will be able to establish that fact. Our proof will have to come out of the mouths of the defendants because the plaintiff was unconscious most of the time, but the circumstances seem to point very strongly and very definitely to the facts that the presence of the hot water bottle was then discovered. 10

After everybody had gone away; after everybody had left the room, at the time Baigrie went out and got McCarrick and McCarrick went out and got the hypodermic, at least two people observed the hypodermic syringe, and that points to the length of time during which this young lady, unconscious, was lying upon this hot water bottle and, as I say, that was cooking the flesh off her back. This was on a Wednesday. 20

I will not undertake to detail to you in words the many conversations that were had in this affair between my clients and their witnesses and the people who were involved in it; that is, there are certain conversations that are binding upon and not binding upon the others, and certain conversations with Dr. Banks binding upon him and not upon the others; but I can tell you this: This matter was hushed up. Nobody was told anything about it until the following Friday; that is to say, this occurred on Wednesday morning. Somebody must have been aware that this terrible burn had been inflicted, yet nobody 30 40

Plaintiffs' Opening.

told the husband and nobody told the lady what had happened to her, and it was not until Friday that as a result of the conversation with Dr. Charles W. Banks the husband found that his wife had sustained this burn; and it was Friday before Mrs. Haring found out what had
 10 happened; she had had an idea that she had been cut on the operating table; that is what she tried to make known. Nobody told her anything about it for two whole days or more, and then it was disclosed that this woman had a most terrible excoriation of her shoulder. For two whole months she practically didn't sleep at all. Morphine seemed to have no effect on her. She couldn't take an anesthetic and the flesh had to be cut off her back. She sat there while the
 20 doctor with a scalpel took this flesh off her back like steaks. She saw all that; the pain was excruciating. Her hands were like claws bent in this position. She had what is called a third degree burn.

She was in the hospital, I think, thirteen weeks, and from that time on she has never been a well woman and she never will be. She has on her back now simply a membrane of scar tissue running from a point a little below the nape of
 30 her neck down to a point underneath her right arm just where this bag made its imprint on her back. There is practically no flesh under that scar tissue at all; it is just stretched over her back.

There is one thing I recall that Dr. Banks said; he did not expect her to live because her lungs were exposed and he thought if a serious condition would set in he would lose his patient.

The flesh healed by granulation; there is no
 40 flesh there at all, just a mere membrane at the

Plaintiffs' Opening.

present time. That is breaking down; that is, she has what appear to be boils coming out all around the edge of this scar. How long that will continue I don't know. I am trying to get some opinion from the doctors of the defendants as to how long this will be likely to endure.

She is subject from time to time to the breaking away of this tissue. She hasn't the full use of her right arm; she can't use it because the motion of her right arm is tighter and drawn down by this scar which runs right under it.

Dr. Banks told her, after she was able to hear the news, that there was a hole in her back that he could put his fist through.

That is briefly the story in this case. We are going to claim that Louise P. Haring is entitled to compensatory damages; that is, for such sum of money that will make her, so far as money can make her, whole; that is, for the condition she was in after this unfortunate affair occurred.

Mr. Haring is going to ask you to repay him his expenses. He has never had a bill from the hospital; they never made any demands on him. Whatever that bill is he will have to pay it some time. We have never had any bill from Dr. Banks; we have tried to ascertain from him what that bill is, but that will have to be paid. Mr. Haring, however, has hired household help for his wife. He is still employing household help that he did not have to have before and which will have to go on for an indefinite time because she is in no condition to do the work and probably never will be.

We are asking for these damages on the theory that Winifred Banks, Charles Anuario and

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Defendant Chas. W. Banks' Motion for Non-suit.

Agnes Grant, when they took this lady under their care, unconscious, absolutely helpless as a baby, and laid her on the hot water bag, that they knew was dangerous and which was absolutely obvious lying in this bed, that when they did that they did not use ordinary care, and
10 when you say that Charles W. Banks, although he had no part in the actual injuries, is nevertheless responsible in this case for the acts of his wife, Winifred Banks.

As far as Mrs. Baigrie is concerned, she did not place the lady on the bag; if she was negligent in her preparation of the bed, or failing to give warning if she had a chance to give warn-
20 ing. We have sued everybody we know of that had anything to do with this case. Somebody is responsible for this injury. Our allegation is that every defendant in this case is to some extent responsible.

Mr. Braun: I move for a non-suit on behalf of the defendant Charles W. Banks on the first and second, fourth and fifth counts on counsel's opening in which he stated that as far as the first count is concerned, these other defendants, Winifred Banks, Charles Anuario and Agnes Grant,
30 were doing something they were not obliged to do when they put the woman into the bed and therefore they could not have been doing anything even if they were the agents of Dr. Charles W. Banks, which he would be responsible for; and on the second count, the mere fact that this woman was talking and having hallucinations, in coming out of the ether is no notice to him of any untoward condition. This burn would have been
40 averted had he known of it then and I say

Edward H. Haring—for plaintiffs—direct.

there is no negligence in that. And as to the fourth and fifth counts on the same facts.

The Court: I will deny the motion.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

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Exception noted as ground of appeal.

Mr. Horner opens for the defendants Charles Anuario, Charles W. Banks, Winifred Banks and Agnes Grant.

Mr. Quaglia opens for the defendant Edith M. Baigrie.

At one o'clock P. M. the Court takes a recess of one hour.

20

AFTER RECESS.

EDWARD H. HARING, one of the plaintiffs, sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Where do you live, Mr. Haring? A East Orange, 9 Irving street.

30

Q What is your business? A Salesman.

Q Are you employed by somebody? A Yes, sir.

Q By whom? A Proctor & Gamble Distributing Company.

Q Where are they located? A 906 Broadway, New York.

Q You are one of the plaintiffs in this case? A I am.

Q And your wife is Louise P. Haring? A Yes.

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Edward H. Haring—for plaintiffs—direct.

Q Mr. Haring, do you remember the occasion of your wife being operated on? A I do, yes, sir.

Q When was that? A March 9, 1927.

10 Q By whom was she being treated immediately before the operation? A Dr. Potter of East Orange.

Q And did Charles W. Banks come into the case? A Yes, sir.

Q In what way? A Dr. Potter recommended an operation but he was shortly to go on his vacation and was to be away about ten days, and as he decided it was urgent, we decided to get another doctor and we called on Dr. Charles W. Banks.

20 Q Was your wife operated on? A Yes, sir.

Q Where? A St. Mary's Hospital in Orange.

Q Were you there? A Yes, sir.

Q When did you go to the hospital? A The Wednesday morning that she was to be operated on.

Q At what time? A I should say about nine o'clock.

30 Q Was there anybody with you? A Four of us—four of Mrs. Haring's sisters and myself.

Q What are their names? A Adele English, Helen Opp, Mary Sullivan, and Ada G. Hunter.

Q After you got to the hospital where did you go? A I went to Mrs. Haring's room.

Q Where was that? A As I remember, it was on the second floor of the hospital.

Q What sort of a room was that? A A private room.

40 Q Had you made arrangements with the hospital for this operation? A I hadn't, no; they had been made by Dr. Banks.

Edward H. Haring—for plaintiffs—direct.

Q What was the arrangement with Dr. Banks as to the hospital charges and arrangements? A We were to pay the hospital.

Q Did you know what nurses were to attend your wife? A No, sir.

Q Before the operation? A No, sir, I did not. 10

Q Do you know Edith M. Baigrie? A Yes, I do.

Q When did she first come into this case, as far as you know? A Wednesday morning, the morning of the operation.

Q Did you select her? A No, sir.

Q How did you find her on the case? A She was in Mrs. Haring's room when I went in there.

Q Do you know who had selected her? A Why, I presume that the hospital had selected her. 20

Q What was your wife's condition when you first saw her? A Well, she appeared to be nervous but as I remarked to one of her sisters later—

Q Don't tell us what you said to one of her sisters, how did she appear? A Rather nervous.

Q And aside from that? A She appeared to be in as good spirits as she could be under the circumstances. 30

Q Previous to this operation, going back for a minute, what had been the condition of Mrs. Haring's health? A She had been not exactly healthy.

Q For how long? A I should say for about two months.

Q Previous to those two months what had been the condition of her health? A Very good, I thought. 40

Edward H. Haring—for plaintiffs—direct.

Q Previous to this operation who had done your work at home? A Mrs. Haring.

Q Did she have any help? A No, sir.

Q Of what did your family consist? A My wife, my two boys and myself.

10 Q How old were the boys? A One eight and one ten.

Q And did she look after the children? A Yes, sir.

Q And do the housework? A Yes, sir.

Q Did you accompany your wife to the operating room? A No, sir, I did not.

Q While she was being operated on where were you? A I was sitting in what I believe is known as the conservatory at the end of the hall.

20 Q Where was that with relation to the room she was occupying? A On the same floor, but towards the end of the hall.

Q Was the door of her room in sight from where you were? A Yes, sir.

Q Were the ladies who were with you in the conservatory, too? A They were with me.

Q Where were you seated? A So we could watch the corridor for the carriage when it came downstairs.

30 Q What was the first thing you saw? A We saw the carriage being wheeled down the corridor to her room.

By the Court.

Q This was after the operation? A Yes, sir.

By Mr. Coult.

40 Q Did you see it go out of her room? A Yes, sir.

Edward H. Haring—for plaintiffs—direct.

Q When was that? A Maybe twenty minutes after or half-past nine.

Q When did you see it again? A Not until the return from the operating room.

Q About what time was that? Can you give us any idea? A About 10:15.

Q Where did it go in? A Into her room.

Q Were there any people with it? A I noticed some people with it.

Q Do you know who they were? A No, sir, I do not.

Q What did the carriage look like? Can you describe it? A Why, it has an iron frame work with four spoke wheels; that is, wire wheels; and it has a handle in back, I believe, that they push it with.

Q What happened after the carriage went into the room? A We got up and walked down the corridor to the window seat almost opposite my wife's room.

Q About how long did you stay there? A We stayed there about two hours; that is, we were in and out of the room—

Q No, how long was it that you stayed opposite the door? A Before I saw anyone, you mean?

Q Yes. A About from five to seven minutes.

Q Then what happened? A Then Dr. Banks came downstairs.

Q Had you gone into the room before you saw Dr. Banks? A No, I had not.

Q Did you have a conversation with Dr. Banks at that time? A Yes, sir.

Q With regard to what? A With regard to Mrs. Haring.

Q What did he say to you and what did you say to him?

Edward H. Haring—for plaintiffs—direct.

The Court: When you saw Dr. Banks, you mean.

The Witness: Dr. Banks came down and opened it and beckoned with his finger to us like this (indicating) and said, "You can go in."

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Q Then what did you do? A We got up and walked into the room.

Q Who is "we"? A Her four sisters and myself.

Q Who was in the room? A Nobody besides Dr. Charles Banks.

Q Nobody besides Dr. Charles Banks and the patient, you mean? A Sure.

20

Q What did you observe with regard to your wife at that time? A She seemed to be in a great deal of pain; I would describe it as agony rather than pain.

Q What did she do? A She was crying a great deal and she was talking about how badly she felt.

Q Did she have any conversation with Dr. Banks at that time? A Yes, she did.

30

Q Can you recall what was said by her? A She said, "Doctor, I feel terrible; get me out of this."

Q Can you remember anything else she said to him? A She said, "I expected this but not this" pointing to her operation and then to her shoulders.

Q So, when she said, "I expected this" she pointed to where she had had the operation? A Yes, sir.

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Q And when she said, "But not this" she pointed to her shoulders? A Yes, sir.

Edward H. Haring—for plaintiffs—direct.

Q Did he say anything? A He said, "You will be all right, Louise."

Q Did Mrs. Haring say anything else? A Yes, she kept insisting on getting out of that room. She said, "Get me out of this; I feel terrible. My shoulders are all cut."

Q Did Dr. Banks say anything when she said, "My shoulders are all cut"? A Nothing that I remember. 10

Q What did she do? A Mrs. Haring finally said in a strenuous way—she used an oath I had never heard her use before. She said, "Doctor, you have got to help me out of this." And Dr. Banks turned to us and said, "She's got a fine jag on."

Q Did she say anything else? A No. I knew she must be in terrible agony when I heard that oath and I walked out and her sisters came out of the room after me. 20

Q When you left was there anybody in the room with her? A Mrs. Baigrie had come into the room in the meantime.

Q Can you recall about how long after you entered the room Mrs. Baigrie came in? A Not more than two or three minutes.

Q What did you do then? A I went out and sat down on the window seat and the girls came out and sat down with me. 30

Q How long did you stay there? A I guess three-quarters of an hour before Dr. Banks came back.

Q Did anything happen between that time and the time Dr. Banks came back? A Yes, Mrs. Baigrie had gone in and closed the door and ten or fifteen minutes after that she came out and walked very hurriedly down the hall. She came back with Miss McCarriek, I believe it is, and 40

Edward H. Haring—for plaintiffs—direct.

both of them closed the door. Then Miss McCarrick came out and walked down the hall and when she came back she came with a hypodermic needle in her hand and walked hurriedly into the room with it and closed the door.

10 Q What happened after that? A I turned to my sister-in-law and—

Q Don't tell us what you said. What did you do? A Dr. Banks came down again. He told us the first time that he had another operation. He came down, I presume from his second operation, and he had the tumor he had removed from Mrs. Haring with him, and he showed it to the girls and myself.

Q Did he say anything about Mrs. Haring's condition? A He did not.

20 Q Did you have any conversation with him? A Only that he said, "You can go ahead now. She will be all right. You can come back this afternoon if you want to."

Q Then where did you go? A We went home.

Q Had anything been said to you up to that time about the burn to your wife's back? A Not a word.

30 Q Up to that time that you left, had you seen Mrs. Baigrie after she went into the room with Miss McCarrick? A No.

Q Had anybody come out of the room after Miss McCarrick went in with the hypodermic? A I don't remember anybody coming out, Mr. Coult, no.

Q When did you see your wife again? A That afternoon.

40 Q About what time was that? A Somewhere in the neighborhood of two o'clock.

Edward H. Haring—for plaintiffs—direct.

Q Where did you see her? A In her room in bed.

Q Who were present? A My sister, Mrs. Hunter, and Mrs. Baigrie came in about two minutes after we got into the room. She wasn't in the room when we first got there.

Q You can't tell anything that was said by you or your wife previous to the time Mrs. Baigrie came into the room, but after Mrs. Baigrie came into room was there any conversation about the affair? A Nothing about the burn. She said she had a little ether in her yet. 10

Q What was your wife's condition at that time? A She still seemed to be in great pain.

Q While Mrs. Baigrie was there did your wife say anything about her condition? A No, she did not. 20

Q What did she do? A When Mrs. Bagrie turned and left the room to get something I went over and stood alongside of my wife's bed and I asked her how she felt—

Q Was Mrs. Baigrie out of the room? A At least she wasn't alongside of the bed.

Q Don't tell us what your wife said then. When did you see her again? A Friday morning.

Q Up to Friday morning was anything said to you about the condition of your wife's shoulders? A No, sir. 30

By the Court.

Q You didn't see your wife on Thursday? A Yes, sir. I saw her both morning and afternoon on Thursday.

By Mr. Coult.

Q At that time what was her condition? A Thursday afternoon she was still complaining 40

Edward H. Haring—for plaintiffs—direct.

about her shoulders and I said, "Louise, what's the matter with you?"

Q Was Mrs. Baigrie there at that time? A I don't think so, Mr. Coult.

10 Q You cannot tell conversations unless some one of these defendants was present. Was any one of them present at that time? A I wouldn't say she was in the room; she wasn't alongside the bed.

Q When you saw your wife on Thursday you cannot recall any conversation with your wife in which any of these defendants was present? A I asked Mrs. Baigrie how she was coming along.

Q What did she say? A She said, "All right."

20 Q Then you saw your wife on Friday? A Yes, sir.

Q That was three days after the operation? A Yes, sir.

Q When was that? A In the morning, about half-past nine I should say.

Q Who was present when you saw her then? A Mrs. Hunter and Mrs. Baigrie.

30 Q At that time what was said by you and your wife and Mrs. Hunter and Mrs. Baigrie in Mrs. Baigrie's presence? A I asked Mrs. Haring how she was. She still complained of feeling terrible from the pain in her shoulders.

Q Did she describe it to you? A She said she felt as though she had been cut.

Q What was her appearance? A She was in very bad physical shape; a whole lot worse than she should be.

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

40 The Court: Strike it out.

Edward H. Haring—for plaintiffs—direct.

Q Describe as nearly as you can how she looked. A Her face was all drawn up with pain; her fingers were all drawn up that way (indicating) as she had them lying on the covers; and she was very white and pale. I can only describe it by saying she looked as though she were in agony. She complained about her shoulders all the time. 10

Q Did she complain of anything besides her shoulders? A No, she did not.

Q Did she say anything about how her shoulders felt? A She said she felt as though she had been cut.

Mr. Braun: I object to that as leading.

The Court: I will allow it.

Q What did she say, if anything, with reference to the condition of her shoulders? A She said, "My shoulders are all cut." 20

Q Up to Friday night did you have any knowledge of what was the trouble with your wife's shoulders? A I did not.

Q When did you find out? A I found out from Dr. Charles Banks about half-past six or seven o'clock Friday night over the 'phone.

Q What was the occasion for that? A I called Dr. Banks up and told him that I had tried to get some information from both of his nurses as to what was wrong with Mrs. Haring's back. 30

Q Which two nurses? A The night and day nurse.

Q Who was the day nurse? A Mrs. Baigrie.

Q What was said by her? A Mrs. Hunter called Mrs. Baigrie up and asked her what was wrong with Mrs. Haring's back.

Q You got that from Mrs. Hunter? A Yes, sir. 40

Edward H. Haring—for plaintiffs—direct.

Q Never mind it, then. You called Dr. Banks, and what did he say? A He said, "She has been burned."

10 Q What did you say to that? A I said, "What do you mean by burned?" He said, "Why, that Baigrie woman left a hot water bag in the bed." I said, "Is she badly burned?" He said, "It is coming along all right." I said, "I understand that burns are first degree or second degree or third degree burns. What do you think this is?" He said, "I think this is a second degree burn." I said, "Will it keep it more than it would ordinarily keep her there from the operation?" He said, "No, she will be out in a few days; maybe a few days longer than she would otherwise have been."

20 Q How long was she in the hospital? A Thirteen weeks.

Q How soon after this conversation with Dr. Banks did you see your wife again? A Saturday morning and Saturday afternoon.

Q When you saw her on Saturday did she make any complaints about her condition? A She was still complaining about her shoulders.

30 Q What did she say then? A She had a terrible pain in her shoulders and couldn't understand what it was.

Q From then up to the time that Mrs. Haring left the hospital did you see her frequently? A I saw her every night in the week.

Q Can you state, without going into too great detail, just what her condition up to the time she left the hospital was? A She was in a continual state of suffering. She didn't sleep and couldn't sleep.

40

Mr. Colie: I object to that.

Edward H. Haring—for plaintiffs—direct.

Mr. Coult: I consent that it be stricken out.

Q Tell what you saw. A I would get up there at half-past seven and stay until half-past nine in the evening. She couldn't talk except in monosyllables. She seemed to lie in bed and preferred not to have anybody bother her. She said the less she had people the better she could stand it because she couldn't talk— 10

The Court: Don't tell us what she said.

Q You spoke of the condition of her hands. For how long did that stay that way? A For at least two months, and she asked me to massage her fingers so she could get the pain out of them. 20

Q Did you see her back? A I did.

Q When did you first see it? A Sunday afternoon following the operation.

Q What did it look like? A Well, it would be a very hard thing to describe, Mr. Coult. It looked to me like a piece of steak that you might have been broiling over a hot fire. That is all I can describe of it.

Q You had some photographs of her back taken later, didn't you? A Yes, sir, I did. 30

Q I show you a photograph and I ask you if you recognize it. A I do, yes, sir.

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

(The same is marked Exhibit P. 1 for identification.)

Q I show you Exhibit P. 1 for identification and ask you if you were present when that photograph was taken? A I was. 40

Edward H. Haring—for plaintiffs—direct.

Q Where was it taken? A On the second floor in the front room of my home.

Q By whom was it taken? A A photographer, R. T. Burpo.

Q What time? A June 9th.

Q What time of the day? A In the morning.

Q That would be three months after the accident? A Yes, sir.

Q Did you see your wife's back at the time the photograph was taken? A Yes, sir, I did.

Q I ask you if that is a correct depiction of the condition of your wife's shoulders as you saw them at the time the photograph was taken.

Mr. Colie: I object to that as improper. The photographer should testify as to how it was taken and what it showed.

The Court: If that is the only objection I will allow it.

Mr. Horner: I object on the further ground that it is not the best evidence. The testimony by a physician as to the actual condition would give this jury a far better idea of it.

Mr. Coult: That would rule out all photographs of everything.

The Court: I suppose it would be a very good way to have the physician describe it or an eyewitness describe it. That does not require that I rule out a photograph; a photograph is supposed to be a reproduction of what one sees in black and white.

Mr. Horner: It is common knowledge that a photograph which attempts to depict flesh and skin and bones will not give the proper perspective of the condition.

Edward H. Haring—for plaintiffs—direct.

Mr. Colie: My point is that I never introduce in court at all a photograph without the photographer. The result obtained depends very much upon the manner in which it is taken and the position. They are never true.

The Court: No, I think a person who was present at the taking of the photograph, if he recognizes that photograph as a true representation of the object can prove it. That is my ruling, Mr. Colie. 10

Mr. Braun: I also enter an objection on the ground that there is no proof as to who took the photograph and whether this is a reproduction of the untouched negative; and on the further ground that there are further memorandums on the back of the photograph that have not yet been identified or explained. 20

Mr. Coult: It says "Taken June 9th" which is already in evidence. I will erase that.

The Court: I will allow it in evidence and give exceptions to all defendants. I suppose the same objections will be made on all the other photographs.

Exceptions noted as ground of appeal. 30

Mr. Colie: It all depends on what this witness testifies.

(The photograph previously marked Exhibit P. 1 is received in evidence and marked Exhibit P. 1.)

By Mr. Coult.

Q I show another photograph. Do you recognize this? A Yes, sir. 40

Edward H. Haring—for plaintiffs—direct.

Mr. Coult: I ask that this be marked for identification.

(The same is marked Exhibit P. 2 for identification.)

Q I show you Exhibit P. 2 for identification.
10 Were you present when this photograph was taken? A I was, yes, sir.

Q Where was it taken? A On the second floor in the front room of the house.

Q When was it taken? A June 9th.

Q The same time that the other one was taken? A Yes, sir.

By Mr. Colie.

20 Q This year? A 1927.

By Mr. Coult.

Q Did you see your wife's back at the time this photograph was taken? A Yes, sir.

Q Is this a correct photographic reproduction of the condition of your wife's back at the time the photograph was taken? A I should say it was; yes, sir.

30 Mr. Braun: The same objections.

The Court: I will allow it and I will grant exceptions to all the defendants.

Mr. Braun: On the same grounds, and on further ground that the witness had to refer to the photograph and refresh his recollection from the memorandums on the back has not yet been identified as his own memorandums, as to the dates.

40 The Witness: From the photographer's memorandums.

Edward H. Haring—for plaintiffs—direct.

Mr. Horner: Do I understand counsel will be allowed an exception to the objections raised by the other counsel?

The Court: If you so desire it.

Exceptions on behalf of all defendants noted as ground of appeal.

(The photograph is marked Exhibit P. 2.)

10

By Mr. Coult.

Q I hand you another photographs and ask you if you recognize it. A Yes, sir.

(The same is marked Exhibit P. 3.)

Q Were you present when this photograph was taken? A No, sir, I was not.

Q You didn't see that taken? A No, sir, I did not.

20

Q Do you know who was present when it was taken? A The photographer, my wife and Mrs. Baigrie.

Mr. Colie: How can he know that? I ask that it be stricken out.

The Court: I will strike it out.

Q How long was it before your wife's back healed over? A I did the last dressing on it on October 11th.

30

Q 1927? A Yes, sir.

Q What did you put a dressing on for? A Dr. Banks had left, I suppose, a healing salve, you might call it, that I was putting on this open wound; that is, the sore spot.

Q Then there was still a sore spot at that time? A Yes, sir.

40

Edward H. Haring—for plaintiffs—direct.

Q What is the condition of your wife's back now? I mean, what does it look like? A It is an angry red and it is full of these scars and tissues that they formed on the back of it where it was burned.

10 Q Have you seen anything else on or about this scar since the time it healed over? A Yes, a great many things that look like boils, small boils, have formed around this scar.

Q Where have they formed? A Around the edges, as a rule.

Q Do you know how often they come? A They come and go. She may have three or four at a time and then they clear up and then two or three more or four come again.

20 Q Has she any now? A I believe there are some now, yes, sir.

30 Mr. Coult: At this point I want to say, your Honor, I am dependent for the testimony on the doctors who have examined this lady for the defendant. I am not producing any physician and I know the Court's disinclination to permit a jury to see the person of a lady. By reference to these photographs your Honor has been able to see very well the location of this injury. I do not want to urge particularly the exposing of this back to the jury, nor do I want to be open to criticism if I do not offer to. This case will probably take until tomorrow. I would like to ask Mrs. Haring to wear a low-backed dress tomorrow.

Mr. Braun: I would suggest that we have other photographs taken.

40 The Court: I do not suppose I have any control over the natural dress of the plain-

Edward H. Haring—for plaintiffs—direct.

tiff. As far as her exhibiting her scars to the jury is concerned, I do not think that I will grant the application; that is, a full exhibition to the jury of the scars, unless the defendants want it. I think the photographs in evidence would indicate where the scar is and the general nature of the scars and I suppose any jurymen knows what scar tissue is—what remains after the scar is formed after a burn—and they can form their own conclusion as to what sort of a scar it is from the testimony of the plaintiff. 10

Mr. Coult: I am still in doubt, if she did wear a dress which is practically an evening dress, whether it would be a proper way to come into court.

The Court: I suppose she may wear an evening dress. 20

Mr. Coult: Not necessarily an evening dress, but something to expose the back. I do not want to do it if there is any impropriety about it. I will go a little more fully into the description of it.

By Mr. Coult.

Q Can you tell the Court and jury about where these scars are located? A The scar is all across the shoulders. 30

Q Can you illustrate about where it is in your own way? Can you point it out on your own person? A If I had a man here I could point it out.

Q Will I do? A Yes, sir. The scar starts about here (indicating) and finishes up about there (indicating); starts in here under the arm and runs to about there (indicating). It is the exact size, I would say, of a hot water bag. 40

Edward H. Haring—for plaintiffs—direct.

Q When you say here and here and there, you pointed, as I felt, to a point a few inches below the back of my neck and shoulder? A Right.

Q And the right to a point pretty nearly under the right armpit? A Under the armpit.

10 Q And to a point a little in back of the shoulder blade? A On the shoulder blade, yes, sir.

Q Do you recall the occasion of your wife's leaving the hospital? A Yes, sir.

Q What was her condition at that time? A Very poor.

Q That does not mean anything. A She said that if I kept her in the hospital she would lose her mind—

20 Q No. Avoid two things: one is your conclusion and the other is what your wife said to you. Was she strong? A No.

Q Was she able to do her housework? A No, sir.

Q For how long was she unable to do her housework? A She hasn't been able to do anything yet to amount to anything.

Q Were you required to get any household help? A Yes, sir.

30 Q From when until when? A From the date of the operation until today.

Q Whom did you hire? A I hired a colored woman to come in by the week.

Q Mr. Colie would like her name and address. A I don't know her; perhaps Mrs. Haring does.

Q Do you know what you paid her? A I paid one woman for three months \$15 a week or \$20 a week.

Edward H. Haring—for plaintiffs—direct.

By the Court.

Q Which? A One woman \$20 a week. Then she stopped coming for the week and came in one day a week, when I paid her on the average of \$5.

Q A week? A For the one day's work.

10

Q \$5 each week for the one day? A Yes, sir.

Q How long did that continue? A We still have her.

Q Had you ever, previous to your wife's operation, employed help in the house? A No, sir, I had not.

Q What is your wife's condition now as you observed it? A She is in a very nervous condition.

Q How does that show itself? A By breaking down in what I would call hysterical crying spells.

20

Q How often does she have hysterical crying spells? A Maybe one or two a week; maybe three and maybe four.

Q How long has that continued? A Ever since she came back from the hospital.

Q Has that condition changed since she came out of the hospital and does she have more or less or what? A Just about the same.

30

Q Have you paid the hospital bill? A No, sir, I have never received a bill from the hospital.

Q Do you know how much it is? A No, sir, I should imagine it would be in the neighborhood of—

The Court: Don't tell us that.

Q Have you ever paid Dr. Banks? A No, sir.

40

Edward H. Haring—for plaintiffs—direct.

Q Have you ever received a bill from him? A No, sir.

Q Have you ever paid Mrs. Baigrie? A I have not.

Q Did you ever receive a bill from her? A No, sir.

10 Q How much did you agree to pay her? A \$7 a day; \$49 a week.

Q For how many weeks was she there? A Six weeks.

Q Did you have any other nurses? A We had a night nurse.

Q How long did you have her? A About three weeks and a half.

Q How much did you pay her a week? A The same salary as Mrs. Baigrie; \$49 a week.

20 Q Were you put to any other expense by reason of this injury? A May I look at a list that I have here?

Q When did you make it? A This morning.

Q Can you search your memory? A Yes, sir. I got down here about \$25 for medicines—

Q No, tell us what you spent? A \$25 for medicines, approximately; \$12 for Dr. Sherman—

30 Q What did he do? A I called on Dr. Sherman as a result of one of my wife's nervous spells.

Q When was that? A In the latter part of January.

Q What year? A 1928.

Q Anything else? A And \$435 for maids.

By the Court.

Q That is what you have already testified to? A Yes, sir.

40

Edward H. Haring—for plaintiffs—direct.

Q Have you figured up the amount you paid the nurses? A Mrs. Baigrie's, I believe, would be \$300; the night nurse, I believe, was about \$184—

Q Just before your wife left the hospital did you have any talk with Dr. Banks about what had happened and about what you were going to do? A Yes, sir. 10

Q Who was present? A Mrs. Baigrie; Sister Regis, the superintendent of the hospital; Dr. Banks; and myself.

By the Court.

Q Who were present? A Dr. Charles Banks, Mrs. Baigrie, Sister Regis, who is the superintendent of the hospital, and myself. 20

By Mr. Coult.

Q Can you fix the date of that with any degree of certainty? A About May 27th.

Q At the hospital? A Yes, sir.

By Mr. Colie.

Q 1927? A 1927.

By Mr. Coult.

Q What was the subject of that conversation? What was said? A Dr. Banks was asking Mrs. Baigrie as to what she had done in relation to putting that bag in bed on the morning of the operation. 30

Q Can you give that conversation as nearly as you can remember it? A Dr. Banks asked Mrs. Baigrie if she had put it into the bed. She said, "Yes, doctor, I did." He said, "Did you test that bag?" She said, "No, doctor, I did 40

Edward H. Haring—for plaintiffs—cross.

not." He said, "About what temperature was that bag?" She said, "About lukewarm—about a hundred degrees." He said, "You don't know what this was?" She said, "No, doctor, I do not." Then he said, "What happened?" She said, "I fixed the covers on the bed." He said,
 10 "How were they fixed?" She said, "They were rolled to the bottom of the bed." He said, "Are you sure?" She said, "Yes." He said, "What else was on the bed?" She said, "I had a towel on the bed." He said, "What for?" She said, "In case Mrs. Haring should vomit." He said—

Mr. Colie: I object unless it is only to be binding on Dr. Banks and Mrs. Baigrie.

The Court: It is admissible now. As to whom it binds is another thing.
 20

Mr. Colie: I want to reserve the right to object on the ground that it is not binding on the other defendants.

Q Continue. A He said, "Isn't it possible, Mrs. Baigrie, that that bag was covered by that towel?" She said, "No, it was not."

Q Was anything said on that occasion as to where the bag was placed on the bed? A Below the pillow on the bed.

30 Q Who said it? A Mrs. Baigrie. Dr. Banks asked her where she had put the bag and she said, "On the bed, below the pillow."

Cross examination by Mr. Colie.

Q Mr. Haring, you spoke of Dr. Sherman's having been called in? A Yes, sir.

40 Mr. Quaglia: Do I understand that Mr. Colie is cross examining for all the defendants, except my client?

Edward H. Haring—for plaintiffs—cross.

Mr. Colie: I am mouthpiece for these gentlemen.

The Court: You may chose your own order and then if there hasn't been anything covered you may ask it yourselves.

Mr. Horner: We think we can save a lot of time by handling it in this way. 10

The Court: Very well, proceed.

By Mr. Colie.

Q Mr. Haring, you spoke of calling Dr. Sherman comparatively recently when your wife had a hysterical attack? A Yes, sir.

Q When was it you called him in? A January, 1928.

Q Dr. Sherman had been consulted medically in your family before that date, had he not? A Yes, sir. 20

Q How many years has Dr. Sherman been called in and consulted about your family ailments? A Well, I should say off and on for five or six years, anyway.

Q He was an old friend of your wife's, wasn't he? A He was, I believe.

Q They had gone together, hadn't they? A That I couldn't say. 30

Q You had known him for how long? A About twelve or fourteen years anyway.

Q Isn't it a fact that you know from the family that your wife had an attack of infantile paralysis? A Yes, sir.

Q And isn't it a fact that your wife for years and still does, for all I know, wear a brace because of that infantile paralysis? A Yes, sir.

Q And isn't it a fact that during these years and before this operation your wife was subject to great periods of depression and hysteria? A No, sir. 40

Edward H. Haring—for plaintiffs—cross.

Q Wasn't your wife nervous for many, many years? Hasn't your wife been a highly nervous woman for many, many years? A No, sir; she has not.

Q For how many years has he been seeing your family? A As I say, for six years.

10 Q What does that period cover? A It must be from 1922 to 1928; possibly before that.

Q Now, to go back, you said a moment ago, as I understood your testimony, that you arranged with Mrs. Baigrie that she was to have \$7 a day for nursing, is that so? A I didn't arrange with her; that is what these nurses are paid. I didn't arrange it with her.

Q Who did arrange it for the private nurse? A Dr. Charles Banks.

20 Q By whom was she to be paid? A By me.

Q Did Dr. Banks make an arrangement with the hospital whereby you should have a day nurse and a night nurse? A That's right.

Q Do I understand you to say you didn't know who was to become the night nurse and who the day nurse? A No, sir; I did not.

30 Q As a matter of fact, Mrs. Baigrie has been well known in your family as a nurse for many years, hasn't she? A She might have been known by Mrs. Haring's sisters; not by me.

Q You didn't know whether your wife knew her in the capacity of a nurse prior to meeting her at the hospital? A Yes, sir; she did.

Q You know she thought highly of her, don't you?

Objected to.

Objection sustained.

40 Q Did they express any preference, to your knowledge, that if she went to the hospital Mrs.

Edward H. Haring—for plaintiffs—cross.

Baigrie might be assigned to her? A No, sir; she did not.

Q To your knowledge? A Not to my knowledge, no, sir.

Q Going back now to the hospital on that Wednesday about 9:40, that is when this operation was to be, wasn't it? A About that time, yes, sir. 10

Q Did you know that the operation was to be two-fold; first an operation for appendicitis and then an operation for the removal of this fibroid tumor? A No, sir; I understood it was to be a tumor operation and Dr. Banks said, "While I have her open I will take her appendix out."

Q What did you say to that? A I didn't say anything to it.

Q In other words, you acquiesced? A Yes, sir. 20

Q In your testimony you spoke of Dr. Banks coming down to the floor— A Yes, sir.

Q (Continuing.) —on which Mrs. Haring's room was? A Yes.

Q And on which you were sitting waiting? A Yes.

Q Isn't it a fact that the operating room was on the very self-same floor with Mrs. Haring's room? A It may be; I don't know it to be a fact. 30

Q You don't mean that they had to bring Mrs. Haring after the operation downstairs to another floor? A That may have been the term I used. To be frank about it, I don't know whether the operating room is upstairs or down.

Q And you went into the conservatory with your sisters-in-law? A Yes, sir.

Q And you say further that the door of the room that Mrs. Haring had was how far away?

A Well, I should say about seventy-five feet. 40

Edward H. Haring—for plaintiffs—cross.

Q You could see where the door was? Was it open or shut? A I couldn't see from where I sat.

Q You did see them take Mrs. Haring down to the operating room? A Yes, sir.

10 Q Who took her down? A I saw Mrs. Baigrie and Dr. Banks were with her, although I may be mistaken. I was paying more attention to my wife.

Mr. Braun: I move to strike out Dr. Banks unless he is certain of it.

The Court: Strike it out.

20 Q Didn't you say on direct examination you didn't know who was with your wife when she went down on the carriage to the operating room? A I don't remember saying that.

Q Do you know who did go down with her? A To the operating room?

Q Yes. A I know Mrs. Baigrie went with her when she was on the carriage.

By the Court.

Q This was when she went to the operating room? A Yes, sir.

30 *By Mr. Colie.*

Q You stayed in the conservatory while the operation was going on? A Yes, sir.

Q It was no nearer to Mrs. Haring's room? A The window seat was almost directly opposite the room.

40 Q And you saw her brought back from the operating room? A Not while I was in the window seat, no; while I was at the end of the hall in the conservatory I saw her brought back.

Edward H. Haring—for plaintiffs—cross.

Q Was she brought back to her room after the operation before you went to the window seat that you are talking about? A Yes, sir; she was.

Q And did you go back to the window seat after she had been taken into the room? A After she had been taken into the room, yes. 10

Q At the time that you saw Mrs. Haring taken into her room where did you see Mrs. Baigrie? A I didn't see Mrs. Baigrie.

Q You don't know where she was? A I don't know anything about it.

Q And you think it was how long after Mrs. Haring was taken into her room that Dr. Banks came up, as you say, came up to the room and beckoned to you with his finger and told you that you and your sisters-in-law might go in and see Mrs. Haring for a few moments, is that right? A Yes. 20

Q How long was that after the carriage had brought Mrs. Haring back from the operating room? A I should say about from five to seven minutes.

Q Then you went in and saw Mrs. Haring and you say you observed that she seemed to be in great agony—that was your word, wasn't it? A Yes, sir. 30

Q (Continuing.) And that she was talking or trying to talk and she uttered an oath. What was it? A She said—after she had complained for some time she said—

Q What was the oath? A She said, "God damn it; get me out of here."

Q And that was about seven minutes after she had come up from the operating room? A No; this might have been now ten minutes. I was in the room— 40

Edward H. Haring—for plaintiffs—cross.

Q Ten minutes after having come up after being anesthetized and her appendix taken out and the tumor removed. You said there was pain. Have you ever seen a person come out of an anesthetic? A Yes, I did; my youngest boy.

10 Q Don't you know that an anesthetic takes an hour to come off? A No, I don't know anything about it; I am not a doctor.

Q Did your wife call you by name? A No, sir.

Q She really didn't know you, did she?

Mr. Coult: I object to that.

Q Did she indicate in any way that she knew you? A Yes.

20 Q How? A By looking up at me and smiling when I talked to her. She tried to force a smile to her face, as I said, "How are you?"

Q And at the same time she was using this language? A Not at the same time. She used this language after she had been complaining for some time.

Q How long were you in there? A I should say about eight minutes; possibly ten minutes altogether.

30 Q Was Mrs. Baigrie there all the time? A No, sir; she was not.

Q So you were in there all along without a nurse to look after this woman, is that right? A No, I didn't say that. Mrs. Baigrie was not there when we first entered it.

Q How long were you in there before she came in? A About two or three minutes.

40 Q After you had gone out of the room you went to the window seat, did you? A I did; yes, sir.

Edward H. Haring—for plaintiffs—cross.

Q Why did you stay there if your wife was in all this pain? A I wanted to be with her.

Q You didn't expect in any hospital to be allowed with an anesthetized patient? A I left when I was asked to leave; I left that to the jurisdiction of the doctor.

Q Did you go back again and see her after the first time? A No, I did not. 10

Q You went home? A I did.

Q How long did you wait around there before you went home? A I should say altogether about two hours.

Q Did you speak to Dr. Banks about having the privilege of going in again to see your wife? A No, sir; I did not.

Q He saw you? A Yes, sir; he did.

Q Was Dr. Banks in the room at all when your wife was in this mood in which she uttered this language? A He was; yes, sir. 20

Q In the room? A Yes, sir.

Q What did he say when she did that? A He said, "She certainly has got a wonderful jag there."

Q Didn't you understand that to mean that she was in a state of intoxication from the anesthetic?

Mr. Coult: I object to that. What difference does it make what he considered it to be? 30

Objection sustained.

Q What makes you say that the remark that your wife made was directed to Dr. Banks and not to you? A It wasn't directed to me; it was directed to Dr. Banks.

Q How did it come about that you met Dr. Banks and Mrs. Baigrie and Sister Regis on 40

Edward H. Haring—for plaintiffs—cross.

May 27, 1927? A Trying to fix the responsibility for this burn.

Q Who called that meeting? A I had had a previous conversation with Sister Regis and as a result of that conversation we got together in Sister Regis' office at the hospital.

10 Q Where is Sister Regis now? A I believe she is still at the hospital.

Q You didn't know she had left the hospital? A I did not; no, sir.

Q Have you made any efforts to get Sister Regis here?

Mr. Coult: I object to that.

Objection sustained.

Mr. Colie: Have you, Mr. Coult?

20 Mr. Coult: No. Have you?

Mr. Colie: Yes, we have.

Mr. Coult: Do you want an adjournment?

Q No. Mr. Haring, speaking of these expenses, isn't it a fact, and don't you know that Mrs. Baigrie paid the bill for the night nurse?

A Mrs. Baigrie told me that she had.

Q Did you know she had? A I didn't know she had; she told me she did.

30 Q Assuming that she told the truth in that instance, have you any doubt in your mind about it?

Mr. Coult: I object to that.

The Court: If you will confine your question as to whether he has any doubt about it, all right.

40 Q When did she tell you she had paid the night nurse? A After my wife had been in the hospital about a month.

Edward H. Haring—for plaintiffs—cross.

Q Did you know that the hospital required Mrs. Baigrie to pay that night nurse?

Mr. Coult: I object to that.
Objection sustained.

Q When your wife went home, do you know that Mrs. Baigrie paid the wages of an assistant at the house? A I know that she gave me the money. 10

Q Who made that arrangement? A We made it at this meeting at Sister Regis' office.

Q Did you arrange at that time that she should pay the night nurse? A No, sir.

Q But you did— A (Interrupting.) I did, that she was to pay for the—

Q (Continuing.) But at that interview you did arrange for her to pay for the hire of someone to help your wife at home? A Yes, sir. 20

Q How long did she continue to pay that? A For one month.

Q Which month? A The month of June.

Q June, 1927? A Yes, sir.

Q That was in consequence of this meeting? A Right.

Q At which you tried to find out who was responsible for the burn? A Yes, sir.

Q And that was the reason you went there? A Yes, sir; it was also on account of finding out who was going to pay for this woman's coming into the house. 30

Q So I understand you had to have domestic help and you went to the hospital to this conference with Dr. Banks and Sister Regis and yourself and Mrs. Baigrie to find out who was responsible or who was to blame for this burning and who was to pay for the woman helping your wife? A Yes, sir. 40

Edward H. Haring—for plaintiffs—cross.

Q And Mrs. Baigrie was present at that time?

A Yes, sir.

Q After your wife got home and she came back on May 27th, 1927? A No; she came back on the 29th of May, I think it was.

10 Q I am only two days off? A Yes, sir; that's how I can place the date of that meeting because it was either that day or the day before.

Q Your wife, after she got home from the hospital, required medical attention for this burn, didn't she? A Yes, sir.

Q Will you tell us who was the physician who treated that burn? A Dr. Charles W. Banks.

Q For how long? A Up until about the middle of September.

Q Of this year or last year? A Of 1927.

20 Q How frequently did he come? A Well, he came with Mrs. Baigrie. Mrs. Baigrie used to dress the back and Dr. Banks would run in twice a week or three times a week to look at it.

Q Mrs. Baigrie, after your wife left the hospital on the 29th of May, 1927, kept coming to your house and dressing this wound, is that right?

A Yes, sir.

Q For how many months did she keep on coming there for the purpose of dressing this wound? A Well, about two months.

30 Q That was without compensation to her? A I never paid Mrs. Baigrie, no.

Q You didn't expect to, do you? A No; I did not.

Q You understood you were not to? A Right.

Q You said Dr. Banks was there until September 15, 1927. He kept coming frequently to see you, didn't he? A Towards the last Mrs. Baigrie left and Dr. Banks dressed the back himself.

40

Edward H. Haring—for plaintiffs—cross.

Q For how long? A I should say Dr. Banks did it possibly a month.

Q Up until the 15th of September, 1927? A Yes, sir.

Q After Dr. Banks had come and gone, did you have any other regular medical attendance on your wife to dress the wound? A I did not; no, sir. 10

Q You had no medical attention for that? A No, sir; Dr. Banks left the bandages—

Q No, you had no medical attention for this burn after September 15, 1927? A I did not, no, sir.

Q Nor any nurse to take care of your wife? A No, sir, I did not.

Q Can you tell us the date on which Mrs. Baigrie last came to dress your wife's back? A I cannot, no. 20

Q Can you give us an approximation of it? A Somewhere in the middle of August, I should imagine.

Q Could it have been in the early part of August? A Possibly, yes, sir.

Q Can you locate it? A Not by date, no, sir.

Q Did she cease coming to dress your wife before you brought this suit? A No, she was still—now, wait a minute— 30

Mr. Coult: Give him the date of the inception of the suit.

The Witness: I can't say positively; I don't know.

Cross examination by Mr. Quaglia.

Q Did you request the hospital authorities to engage a day nurse and a night nurse for 40

Edward H. Haring—for plaintiffs—cross.

your wife? A Dr. Banks did—through Dr. Banks I suppose you might say.

Q You requested Dr. Banks to look after that phase of the matter? A I didn't ask him to; he said he would take care of it.

10 Q Did you say you would get a day and night nurse? A He said he would need a day and night nurse.

Q And you told him to go ahead and get them? A Yes, sir.

Q Mrs. Haring entered St. Mary's Hospital on March 9, is that correct? A No, March 8th in the evening.

Q Was Mrs. Baigrie present at that time when you brought Mrs. Haring in? A Not in the evening, no, sir.

20 Q What was the first time you saw Mrs. Baigrie taking care of Mrs. Haring? A On the morning of the operation, which was Wednesday morning.

Q Did I understand you to say that Mrs. Baigrie accompanied the carriage at the time Mrs. Haring went to the operating room? A I think she did.

30 Q You were then in the conservatory, as you say, is that correct? A No, I had just come from her room.

Q You say Mrs. Baigrie was accompanying the carriage? A I believe I did see her, yes.

Q Was there anyone else there? A I don't remember.

Q Did you see Mrs. Baigrie come back? A I did not.

40 Q Did you at any time see Mrs. Baigrie go into Mrs. Haring's room from the time that Mrs. Haring left the room until the time she was

Edward H. Haring—for plaintiffs—cross.

brought back? A Yes, sir, after I got there myself she came into the room.

Q When was that? A After the operation.

Q Had they already brought Mrs. Haring into the room when she came in? A They had—wait a minute; I won't say that. The first time I saw her Mrs. Haring had been in the room, but I don't know whether Mrs. Baigrie had been there before that. 10

Q When was that? When she was brought down? A After she came from the operating room.

Q Did you go in immediately after the carriage was brought into the room? A I did not.

Q How soon afterwards? A About five to seven minutes, I said.

Q Mrs. Baigrie there at that time? A I didn't see her. 20

Q Going back to this conversation that you had on May 27, 1927, and you say Sister Regis was there and yourself and Mrs. Baigrie and Dr. Charles Banks, is that right? A Yes.

Q You also said that the purpose of that conference was to place the responsibility, is that the word you used? A Yes—now, that I think of it there was someone else in the room. Dr. Winifred Banks was in the room, too. 30

Q What was said as to the responsibility or reliability of any person at that time? A Mrs. Baigrie said that she did not feel responsible for that bag.

Q And how was it that Mrs. Baigrie paid for the maid at your home? A I can only repeat the conversation I had with Mrs. Baigrie to answer that question.

Q Was that had at the same time? A No, it was had in the afternoon in Mrs. Haring's room. 40

Edward H. Haring—for plaintiffs—cross.

Q What did she say to you and what did you say to her at that time?

Mr. Braun: I object to that.

The Court: I will allow it, but it does not bind the other defendants.

10

Mr. Coult: If the Court please, I think I will have to object to it on the ground that it does not lie within the mouth of this counsel to produce declarations of his own client except in so far as they may point out and give effect to statements Mr. Haring made.

The Court: No, this witness told her something and she should be allowed to bring in what she said to deny her responsibility.

20

A Mrs. Baigrie came to the room later and said, "When do you need me at the house, Louise?" I said, "Mrs. Baigrie, we don't want you at the house at all." She said, "I thought you wanted me to come down." I said, "No, we wanted you to take care of a woman to come down." Evidently Mrs. Baigrie had misunderstood the arrangements. I said, "You are not the type of woman we want. You keep your position and in that way you will be earning money to pay for the woman; otherwise you would be losing your salary as a nurse." She said, "I didn't understand it that way." She was crying at the time. I said, "It is too bad, Mrs. Baigrie, and I feel awfully sorry." She said, "I am not responsible." I said, "If you are not responsible, why do you pay for this woman?" She said, "What chance have I got. You saw what they did to me."

30

40

Edward H. Haring—for plaintiffs—cross.

By Mr. Colie.

Q Who was present of the defendants excepting Mrs. Baigrie?

The Court: She has already testified to that.

10

Mr. Colie: I don't know how we can get on the records a statement—

The Court: The only way to take care of that is to take care of it as a request to charge. I will rule that it is only binding on Mrs. Baigrie.

Mr. Colie: We object to any statement except in so far as it binds only that defendant. If we make that stipulation—

Mr. Coult: I will not enter into that stipulation. 20

The Court: You will have to make your objections as we go along.

Mr. Horner: May we have one counsel make the objections to save time?

The Court: Certainly, you objected to the statement that Mrs. Baigrie made to him and I allow it in evidence because it is binding on her and not on any other defendants.

30

By Mr. Quaglia.

Q Was there anything said at that conference of May 27th in so far as Mrs. Baigrie was concerned to pay for the maid that you employed? A Yes, Dr. Banks spoke to Mrs. Baigrie.

Q What did he say? A I will repeat the entire conversation as near as I can remember it. He said, "Baigrie, you are a nurse," she 40

Edward H. Haring—for plaintiffs—cross.

said, "Yes, doctor." He said, "You depend on nursing for a living." She said, "Yes, doctor—

Mr. Colie: I object to this so far as everybody is concerned except Mrs. Baigrie.

10 Mr. Quaglia: It is already testified that Dr. Charles Banks, Sister Regis, Mr. Haring and Mrs. Baigrie were present at that conference.

The Witness: (Continuing.) She said, "Yes, doctor." He said, "You board with your sister, don't you?" She said, "Yes." He said, "You have a little girl, too, haven't you?" She said, "Yes." He said, "You are depending on nursing for a living." She said, "Yes." He said, "Don't you realize, Baigrie, if Mr. Haring takes this into court and he takes the hospital into it you will have a hard time getting any cases up here?" She said, "Yes, I know." He said, "You know you are deaf and have been refused in other hospitals." She said, "Yes." He said, "Why don't you do as Mrs. Haring wants you to do? You will only have to do it a month." She said, "What else can I do?" He said, "Well, if I were you I would do as she asks you to do." She got up and left
20
30 the room and said, "All right, I will."

Q Did you request her to pay for the maid?

A No, sir, I said for them to fix up who was to pay for the maid; I said I wasn't going to.

Q So you didn't request the maid as he said?

A Not directly, I didn't, no.

Q Did you pay Mrs. Baigrie for her services?

A I did not.

40 Q Do you expect to pay for them? A I have never received a bill.

Edward H. Haring—for plaintiffs—re-direct.

Mr. Colie: I move to strike that out.

The Court: It is not an answer. I will strike it out.

Q Do you know that the night nurse was paid by Mrs. Baigrie? A I have been told that.

Q Did Mrs. Baigrie furnish you with the money to pay your household help for a period of one month? A She did. 10

Q Who requested Mrs. Baigrie to come to dress the back of Mrs. Haring? A Dr. Charles Banks and Sister Regis.

Q Did you expect to pay for those dressings? A I did not.

Q So that all that took place at this conference was the fact that Mrs. Baigrie was told by Dr. Banks to pay for this household help, is that correct? 20

Mr. Braun: I object to that. That isn't what he testified to.

Mr. Colie: I move to strike it out.

Mr. Quaglia: The testimony of the witness is that the only reason Mrs. Baigrie paid for these services was because Dr. Banks—

The Court: I will sustain the objection. 30

By Mr. Quaglia.

Q As a result of this conference did Mrs. Baigrie pay the help that you engaged? A She did, for a month.

Re-direct examination by Mr. Coult.

Q You say for one month? A For one month. 40

Irving M. Vanderhoff—for plaintiffs—direct.

Cross examination by Mr. Braun.

Q You went to the hospital, though, demanding that somebody do that? A I did.

Q And there was a conference there and there was nothing said at that time by Mrs. Baigrie as to her innocence or guilt? A Yes, there was.

Q What was said? A She said that she wasn't responsible for it.

Q Did Sister Regis insist upon her paying? A Sister Regis said she thought she ought to pay.

Q Did she say anything about her not getting any work at the hospital? A No, sir.

Re-cross examination by Mr. Quaglia.

Q Who did say about her not getting any more work at the hospital? A Dr. Charles Banks.

IRVING M. VANDERHOFF, sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Where do you live, doctor? A Short Hills, New Jersey.

Q And you are a licensed physician and surgeon of the State of New Jersey? A Yes, sir.

Q Where is your office? A Newark, 9 Clinton street.

Mr. Coult: Do all the defendants admit the doctor's qualifications?

Irving M. Vanderhoff—for plaintiffs—cross.

Mr. Horner: I have no objection.

Mr. Colie: I have no objection.

The Court: He has qualified before, so go ahead.

Q Doctor, you made an examination of the plaintiff in this case, didn't you? A Yes, sir. 10

Q And you did that at the request of one of the defendants, didn't you?

Mr. Braun: I object to that as absolutely immaterial as to how he came to do it.

The Court: I will sustain the objection.

Mr. Braun: And I think it is highly improper.

Cross examination by Mr. Braun. 20

Q What did you find at that examination? A I found a scar on her back.

Q Was it entirely healed? A Yes, sir.

Q Did you find any limitation of use of the arm or the muscles of the back? A No, sir, she could use the arms freely; the scar didn't involve the muscles or restrict the motion.

Q And outside of the disfiguration of the fact that comes from any scar is there any permanent disability or injury there? A No. 30

Q Is this woman nervous? A She wasn't at the time I saw her.

Q Does she show signs of being in a highly nervous, excitable condition? A No, she was not nervous at the time I saw her; her pulse was eighty-one.

Irving M. Vanderhoff—for plaintiffs—re-direct.

Re-direct examination by Mr. Coult.

Q How large was the scar, doctor? A It was about six inches vertically in diameter and about ten inches transverse.

10 Q How deep was it? A It involved the fat and the skin, but not the muscle.

Q Where was the deepest point of it? A I think over the lower part of the shoulder blade.

Q On which side? A The right shoulder blade.

Q Where did you make this examination? A At your office.

Q When? A I think it was the 27th of December, 1927.

20 Q What did you do to find out whether there was any involvement of the use of the right arm? A I had the patient move it, I suppose you would call it a client.

Q How did she move the arm? A The same as anybody else.

Q But in what way? A All around; she raised it straight up this way (indicating).

Q Was I present? A You were.

Q You had her put her arm over her head? A Yes, sir, I did.

30 Q Did she complain of any pain over her arm at that time? A She said there was a drawing feeling; I think that was the word she used, I think she said it felt taut.

Q As a doctor do you think there was a drawing feeling? A I think at times she may be conscious of the arm, but it doesn't limit the motion in any way.

40 Q In other words, if she keeps perfectly still and does not do anything it is all right. A I think at times when she stretches the scar, until

Irving M. Vanderhoff—for plaintiffs—re-direct.

it does become stretched with motion, it will feel taut.

Q What likelihood is there of that scar breaking down? A No likelihood without further injury.

Q Would the use of the arm be likely to cause the scar to break down? A No, sir, the scar is too movable for that. 10

Q At the time you saw her were there any boils or pustules? A No boils; I think she had what they call acne pustules.

Q Is that a usual concomitant of scars? A No, that comes to people who have never been injured.

Q In cases where there is scar tissue, would these be likely to form? A Not in the scar.

Q Are they likely to form alongside the scar? A Anybody is likely to have them. 20

Q You did see pustules around the scar. A They are outside the scar.

Q But around the scar. A I don't think that is the proper word to use; it indicates they run around the scar. They do not.

Q Where are they? A In the middle of the back, some of them near the scar and some farther away in relation to the scar.

Q Did you find any relation between the existence of the pustules and the fact that the scars are near there? A No. 30

Q Doctor, I want to show you a photograph, Exhibit P. 2. Did you see that before? A I think you showed me that.

Q Assuming that that photograph was taken three months after the burn, what would you say the degree of burn was? A I couldn't say from photographs.

Q Can you from your examination and with the aid of the photograph say what degree burn 40

Irving M. Vanderhoff—for plaintiffs—re-cross.

this lady suffered? A I can from the examination. Not from the photograph.

Q What can you say from your examination?

A Third degree burn.

Q What is a third degree burn? A Below the depth of the skin.

10 Q What is second degree? A A burn which involve skin only, causing blistering.

Q And what is a third degree burn? A Deeper than skin.

Q Is there any degree beyond that? A No, sir. There are other classifications; that is the one I used.

Q Is there any fourth degree burn? A I think some text books give five degrees, but I don't know that classification.

20 Q But the ordinary classification is first, second and third degree? A Yes, sir.

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

Q The worse possible conditions characterize a third degree burn as the worst possible burn?

A The depth of the burn is not so much as the seriousness of the burn.

Q How large does a burn have to be to be serious? A About two-thirds of the extent of the body to kill a person.

30 Q When you say it has to extend over two-thirds of the body, if it is less than that, it is not serious, is it? A In the sense of killing a person, yes, sir.

Re-cross examination by Mr. Braun.

Q How does the condition of Mrs. Haring's back at the time you saw it compare with the way it appears in those photographs, doctor? A There are these little pustules as they have been
40 called. Mostly we call them pimples, around

Charles W. Banks—for plaintiffs—direct.

some parts of the skin. At the time I saw the burn it was healed; supposedly it was healed. Here it is not healed.

Q How large an area did the scar tissue cover? A It covers most of this area.

Q Most of the area indicated in the photograph? A Yes, sir. 10

Q You say there are some pimples or pustules apparent in the photograph? A Yes, sir.

Q They have no relation whatever to this burn in your opinion, have they? A In my opinion they have no relation. A large number of people have them; the same people have them on the face and they say a person's face is pimply.

By the Court. 20

Q What is the dark part of that photograph? A I don't know sir.

Mr. Colie: That is the trouble with photographs.

CHARLES W. BANKS, one of the defendants,
sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult. 30

Q Where do you live, Dr. Banks? A 6 North Munn avenue, East Orange.

Q You are a practicing physician and surgeon of New Jersey? A Yes, sir.

Q And you are one of the defendants in this suit? A Yes, sir.

Q You operated upon Louise P. Haring on the 9th day of March, 1927, did you not? A I did. 40

Charles W. Banks—for plaintiffs—direct.

Q Where? A St. Mary's Hospital, Orange.

Q And you removed the appendix and a fibroid tumor? A I did.

Q Was the appendix diseased? A It was.

Q After the operation what happened to Mrs. Haring? A She was removed to the operating
10 room and taken to her private room.

Q Who went with her? A Dr. Winifred Banks, Dr. Anuario and Miss Grant.

Q Dr. Winifred Banks is your wife? A Yes.

Q Her practice is with you? A Her practice is independent from mine.

Q She has the same office as yours? A Yes and no. She uses mine sometimes and I use hers sometimes.

Q You have the same telephone number? A
20 The same telephone.

Q And she works in some of your cases, doesn't she? A She does.

Q For instance, you called her into this case.
A Yes.

Q What do you do with the proceeds of your practice? A I can testify what I do with mine; I don't know always what she does with hers.

Q You use it to support your wife and family?
A I do my best.

Q And does she also contribute to the support
30 of your family? A Sometimes I think she does and sometimes I think that she does not.

Q You have a community interest in your income, haven't you? A Well, we live together peaceably and harmoniously.

Q And practice together? A She has her own practice and I have my own.

Q You have your own patients and she has her own? A Yes.

Q And you work sometimes on her cases and
40 she works sometimes on yours? A Yes, sir.

Charles W. Banks—for plaintiffs—direct.

Q In this case you were employed, were you not? A Yes, sir.

Q And you selected your wife to assist you? A Yes.

Q And it is the usual thing to have someone assist with the anesthesia, isn't it? A Yes.

Q You were not requested by anybody to employ her? A No. 10

Mr. Braun: I have not objected before this, but I have to from now on.

Mr. Coult: You are too late. There is no question before the Court now. I may drop this subject entirely.

Mr. Braun: I want to ask that Judge Coult do not lead quite so much in order to avoid unnecessary objections. 20

Q Did you make any arrangement with Mr. Haring with reference to the cost of this operation? A No, sir.

Q Who selected the hospital? A There was some conversation at home about the hospital.

Q Who selected it? A (Witness continuing with previous answer.) The nurse.

Q Who selected it? A It was agreed that the patient go to St. Mary's Hospital.

Q Who suggested St. Mary's? A Mrs. Haring and I both thought that that would be the best selection. 30

Q Did you select the nurses? A No, sir.

Q Who did? A You mean in this particular case?

Q Yes. A Why, Mrs. Baigrie's name was mentioned at the home at the time of this conference and the hope was expressed that we could get her because they knew her very well and knew she was a good nurse. 40

Charles W. Banks—for plaintiffs—direct.

Q Who got her? A Mr. Haring says that I did—

Q I say, "Who did it"? Don't tell me what Mr. Haring said. A I don't remember whether I ordered the nurse or not.

10 *By the Court.*

Q The selection was satisfactory to you, wasn't it? A Yes.

By Mr. Coult.

Q When did you first learn that Mrs. Haring had received the burn on the shoulder? A The second day—March 10th.

20 Q That would be the next day after the operation? A Yes.

Q What time of the day? A When I called at the hospital, I think it was late in the morning—late in the forenoon.

Q What time did you leave the hospital the day before? A It must have been in the neighborhood of one o'clock because I had another operation after Mrs. Haring's. I concluded her operation at 10:50 and probably the other one lasted until after twelve.

30 Q Do you know when Mrs. Winifred Banks left the hospital on that day? A Right after we finished this case.

Q Did you see her go out? A No, sir.

Q Did Dr. Anuario stay at the hospital? A The next case that I operated was his case and he was there with me during that operation.

Q He has some connection with the hospital, has he not? A He was then acting as house surgeon.

40

Charles W. Banks—for plaintiffs—direct.

Q Was he provided by the hospital as your assistant? A No, I think I asked him to assist me.

Q You are a member of the staff of the hospital, are you not? A Yes, sir.

Q What was his position in the hospital? A I said he was acting house physician. 10

Q What are the duties of the acting house physician? A They were to look at the ward cases.

By the Court.

Q He had no duty in regard to this particular patient? A No, sir.

By Mr. Coult.

Q How soon did you see Mrs. Haring after you learned that she had been burned? A I saw her immediately. 20

Q What did you find her condition to be when you saw her then? A That was in the forenoon of the second day—Thursday. I saw that she had been burned, and gave instructions as to the treatment.

Q What were those instructions? A To cover the area with unguentine spread on a piece of linen. 30

Q Did you make an examination when you saw her first? A Yes.

Q What was on then? A She had a piece of linen with something on.

Q Was there any unguentine on it? A I can't say whether it was unguentine or not.

Q When you instructed that unguentine be put on the wound was that made to Mrs. Baigrie? A Yes, sir. 40

Charles W. Banks—for plaintiffs—direct.

Q Did she say anything about having put unguentine on? A No.

Q Did she say anything at all about the case to you? A She said that she had burned her with a hot water bottle.

Q And that was the first you knew about it?

10 A That was the first I knew about it.

Q And the following night, that would be Friday night, in response to a telephone conversation from Mr. Haring, you told Mr. Haring about it, didn't you? A Yes, sir.

Q And there was no reason for telling him anything before that? A No, sir.

Q There was no reason for telling Mr. Haring before that time? A No, sir.

Q It was just because you didn't happen to
20 call him up or he didn't happen to call you up?

A No.

Q Wasn't he at the hospital on Thursday? A I didn't see him.

Q Were you in the hospital Thursday morning? A Yes, sir.

Q Was he there? A I didn't see him.

Q Were you at the hospital Thursday afternoon? A No, sir.

Q Were you there Friday morning? A Yes,
30 sir.

Q Was he there? A I didn't see him.

Q Were you there Friday afternoon? A Yes, sir.

Q I understand that you learned about it about half-past ten Thursday morning. A It was nearer noontime Thursday morning.

Q And you didn't speak to Mr. Haring until he telephoned to you? A No, sir.

Q What kind of burn do you say this was?

40 A At the time of the first observation it is im-

Charles W. Banks—for plaintiffs—direct.

possible for anybody to tell whether it is going to be first, or second, or third.

Q What did it develop into? A A third degree burn.

Q How long did you treat her? A You mean the burn or the patient?

Q The burn. A From the 10th of March until the middle of September. 10

Q How deep did that burn go at its worst? A I should think on the left side it was a superficial burn and on the right side it was rather deep; I should think an inch or an inch and a quarter.

Q Was she burned down to the lungs? A Oh, no.

Q Did you tell Mrs. Hunter that that burn went down to the lungs? A I did not. 20

Q Did you ever have any conversation with Mrs. Hunter about this condition? A I don't recall any distinct conversation. I saw Mrs. Hunter a number of times.

Q Do you remember about three months after the accident you had a conversation with Mrs. Hunter in which you said that you—

Mr. Colie: Whereabouts?

Mr. Coult: At the hospital. 30

Mr. Colie: I ask for the time and place.

Mr. Coult: This is a party to the suit.

Q (Continuing.) And you said that you didn't expect that Mrs. Haring would live at one time?

Mr. Braun: I object unless the time and place are specified. He is endeavoring to impeach his own witness. 40

Charles W. Banks—for plaintiffs—direct.

Mr. Coult: I will withdraw the question.

Q Did you or did you not about three months after the accident in a conversation with Mrs. Hunter say anything to her with regard to whether or not you expected Mrs. Haring to live?

10 A I don't remember making such a statement at all.

Q At the same time and place did you have a conversation in which you said to Mrs. Hunter with reference to the fact that the lungs were exposed and that you expected empyema to result? A I didn't say anything of the kind. That would be out of the question.

Q Did you say anything at any time about empyema developing? A No, sir.

20 Q What is empyema? A That is pus in the pleural cavity.

Q Was there any pus in the pleural cavity in this case? A No, sir.

Q Was there any danger of any pus in the pleural cavity in this case? A No, sir.

Q How much is your bill, doctor? A I haven't made it out yet.

30 Q Can you make it out over night? A Oh, yes.

Q Will you have it here in the morning? A Yes, I will do that.

Q Do you know how much the hospital bill is? A For board and nurse, you mean?

Q Yes. A I don't know.

Q Can you find out for me over night? A The hospital clerk is here in court.

40 Mr. Braun: I object. That is not the duty of the doctor.

Charles W. Banks—for plaintiffs—direct.

The Court: I don't think the doctor is called upon to do that.

Adjourned to Wednesday, June 13, 1928,
at 10 o'clock P. M.

SECOND DAY.

10

Wednesday, June 13, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

CHARLES W. BANKS, resumes the stand.

Direct examination (continued) by Mr. Coult.

20

Q Doctor, did you check your bill? A Well, I talked to my attorney about the bill and I can give that to you later; I haven't made it up.

Q What was the amount of your charge?

Mr. Braun: I object unless it is limited to the treatment for the burn, because I hope counsel is not going to try to recover the amount of the bill for the operation. The only question in this case at all would be the reasonable value of the treatment for the burn.

30

The Court: I suppose that is so. He is obligated, of course, to pay for the operation. You cannot recover the cost of the operation against these defendants.

Mr. Coult: I do not expect to, but what I wanted to do was get his full bill and then find out his charge for the operation and take it off.

40

Charles W. Banks—for plaintiffs—direct.

The Court: I will sustain the objection. You may ask him the reasonable value for his services for the burn.

By Mr. Coult.

10 Q Have you gone over your charges to separate the amount of compensation to which you are entitled for the treatment of this burn? A I have a record of the calls I made in my book at the office. I haven't it here.

Q Don't you know what it is? A I charge \$3 a visit.

Q How much would be the reasonable charge for the services you performed for treating the burn? A Well, I would have to find out how many visits I made.

20 Q Didn't you do that? A Not yet.

Q You don't know? A I could find out by referring to my books.

Q Where is your book? A In my office.

Q You didn't bring it with you? A No.

Q Where is your office? A In East Orange.

Q Can you send for the books? A I can.

Q Can you get the information over the telephone? A Yes.

30 Mr. Braun: I think we can get that information from the agreement during the noon recess.

Mr. Coult: We can do it right now if you know what it is.

Mr. Braun: I do not.

40 Q Doctor, the operation which you performed for the removal of the tumor and the appendix was successful, wasn't it? A Yes, sir.

Charles W. Banks—for plaintiffs—cross.

Q If there had been no complications after that operation—no burn—how long would Mrs. Haring have been necessarily confined to the hospital?

Mr. Braun: I object unless the doctor knows. 10

The Court: I suppose he can give his best judgment; he is a medical man. I will allow the question.

A The average case of that character remains in the hospital about two weeks.

Q Doctor, are you familiar with the rate of charge by this hospital for such a room as Mrs. Haring had? A I don't know absolutely, but I think it is \$35 or \$40 a week. 20

Q You don't know whether it was \$35 or \$40 a week in this case? A I don't know anything about that, sir.

Cross examination by Mr. Braun.

Q Doctor, on your direct testimony you said that Mrs. Haring was conducted out of the operation room by Drs. Winifred Banks and An- nario, and Miss Grant. Do you know that of your own knowledge or from what someone told you? 30
A No, I don't know of my own knowledge.

Mr. Braun: I move that that part of the testimony on direct be stricken out.

The Court: Strike it out.

Q Where were you when the patient was taken from the operating room? A Why, I think I was taking off my gown and rubber gloves and cleaning up a little. 40

Charles W. Banks—for plaintiffs—cross.

Q Where did you clean up? In the operating room? A No, in the doctor's special room for that purpose.

10 Q With respect to your relationship to the practice of Dr. Winifred Banks, is there any community interest in that practice with your wife's, or does she practice independently of you?

Mr. Coult: I object to the question.

The Court: It is asking for a conclusion.

Mr. Braun: This is cross examination. She was asked on direct whether they practiced together or not.

20 The Court: It is very hard for the jury to know what a community of interest is. We have no legal classification for that. We have partnership and joint arrangement, but what community of interest is, I don't know. If you will ask him what the arrangement is, he can probably give it.

30 Q What arrangement, if any, doctor, was there between you and your wife with respect to her practice and the income derived therefrom as far as any share that you might have is concerned? A We have no common interest whatever. Our business is separate and independent and we have separate bank accounts.

Q Does she account to you or pay over to you any of the moneys she takes in in her private practice? A None whatever.

40 Q Is she paid for any services that she might perform in connection with any operation that you perform? A She is sometimes, unless we have some mutual understanding about the fee beforehand.

Charles W. Banks—for plaintiffs—cross.

Q And she has her own private patients and you have your patients? A Yes, sir.

Q In connection with her services as an anesthetist in this particular case what duties was she to perform in respect to the ether bed? A None whatever.

Q Is it ever the duty of the anesthetist to prepare or inspect the ether bed? A Never. 10

Q In whose custody and control is the patient's ether bed? A The nurse upon duty with the patient.

Q And whose duty was it in this particular case to prepare and to make ready the ether bed for the reception of the patient? A The private nurse, Mrs. Baigrie.

Q What were Dr. Anuario's duties in connection with the services for which he was engaged in this particular case? A Why, he assisted me at the operation. 20

Q What does that consist of? A Oh, he stands on the opposite side of the table and clamps blood vessels, hands me instruments, and wipes blood at the point of operation.

Q Is that a specialized field? A One must be a surgeon. A great many physicians do not like that sort of thing and there is a great difference in the quality of assistants. I usually pick one who is a good assistant. 30

Q Are there any qualifications necessary for an assistant in a major operation? A Yes.

Q By the way, was this a major operation? A Yes.

Q Are the duties of the assistant specifically defined in the practice of surgery? A Well, what constitutes a good assistant is specifically defined.

Q Why is an assistant necessary? A It would be impossible to operate single handed. 40

Charles W. Banks—for plaintiffs—cross.

Suppose something happened to you? Who is going on with the operation? The patient with the abdomen opened and nobody to close it. You have to have an assistant who is competent enough to go ahead in the event of anything happening to the operator.

10 Q In connection with the operation itself, is it possible or is it practicable to perform an operation in the light of present-day surgery without an assistant? A You cannot do an operation without an assistant.

Q Is that because your interests are engrossed and your skill must be directed toward some specific attainment? A It is necessary from a physical standpoint to have two pairs of hands.

20 Q You say the assistant hands you instruments and clamps blood vessels and things of that sort? A Yes.

Mr. Coult: I object to it. I do not see the materiality of this.

The Court: I will allow it.

Q Is that an important duty? A Very.

30 Q Is that essential to the safety or the life of the patient? A It is essential to the speed of the operation, which is essential to the life of the patient.

Q And in performing an operation of this kind, is there ever any time when the surgeon's hands are occupied with some particular duty and some other contingency arises and must be taken care of by a qualified assistant? A I think that in every operation there are contingencies that arise of that kind; a spreading of a blood vessel is a usual thing; and the assistant
40 usually takes care of that.

Charles W. Banks—for plaintiffs—cross.

Q And in performing his duties his attention is engrossed, is it not? A Yes.

Q Your attention is engrossed on your particular duties, is it not? A Yes, sir.

Q And the anesthetist has her specific field? A Yes.

Q Which engrosses her attention? A Yes. 10

Q What is the anesthetist's specific duty with respect to the condition of the patient? A She must see that the heart condition is normal; that the breathing is normal; she must watch the pupils to see that there is no undue shock and to take in generally the condition of the patient.

Q While she is so occupied, is it possible for her to take care of her duties properly and at the same time observe what is going on in the surrounding field? A She hasn't any time to take in what is going on in the surrounding field. In fact, on most all of the operating tables there is a screen which shuts her off so she cannot even see the scene of the operating field. She must give all her attention to the patient. 20

Q What have you to say as to the duties of the assistant in so far as the preparation and condition of the ether bed is concerned for the reception of the patient? A He has no duties whatever. 30

Q Have the anesthetist or the assistant or both of them any duties with respect to placing the patient in the bed? A Absolutely not.

Q And is that the general practice? A That is the general practice.

Q What are the duties of a supervising nurse in the operating room? A Why, she prepares the operating room, selects the instruments which are to be used for the particular operation; they are thoroughly sterilized; they are placed on trays which are sterile; she supervises all the tech- 40

Charles W. Banks—for plaintiffs—cross.

nique of the operating room, and as a rule she sends for the patient when the operating room is ready and directs the exit of the patient.

Q There are other persons involved in an operation other than the people you have named, namely, the surgeon, the assistant, the anesthet-
10 ist and the supervising nurse; isn't that so? A Yes; there is a nurse—some have two or three nurses, one to take care of the sutures, one to take care of the artery clamps—in our hospital we have one who takes care of it all.

Q Is she the one known as the sterile nurse?

A She is the one who is known as the sterile nurse.

Q Who was the supervising nurse in this case? A Miss Grant.

Q Did she have any duty so far as the ether
20 bed and reception of the patients are concerned?

A None whatever.

Q Has she any duty to inspect it? A No, sir.

Q By whom was Miss Grant employed? A The hospital.

Q Was she regularly employed there at that time? A She was regularly employed at that time.

30 *By the Court.*

Q Did you select her? A No, sir.

Q She came with the operating room? A Yes, sir.

By Mr. Braun.

Q Was Dr. Anuario selected by you in this particular case? A Yes.

Q Was he paid by you? A Yes.

40 Q To act as assistant? A Yes.

Charles W. Banks—for plaintiffs—cross.

Q Was there any duty on Dr. Anuario and Dr. Winifred Banks to inspect this bed? A No duty whatever.

Q They had a right to assume that the nurse had taken care of her duties?

Mr. Coult: I object to that.

10

Objection sustained.

Q After this operation, doctor, how long a time elapsed before you saw the patient again?

A Why, I think it was soon after the operation.

Q Do you know what sort of an anesthetic was used in this case? A I do.

Q What was used? A Nitrous oxide, oxygen and ether.

Q How long did the operation last? A From 9:50 to 10:40. 20

Q Was the patient during that period continually and completely under the anesthetic? A She was.

Q Doctor, you have performed many operations, have you not? A A great many.

Q And you have seen a great many types of patients under anesthesia? A Yes. I might say all our patients in addition to the anesthesia have a hypodermic injection of morphine before the anesthesia starts; that deepens the anesthesia and helps the relaxation of the patient and extends the period of anesthesia more than it normally would. 30

Q And it prolongs the period of unconsciousness? A It prolongs the period of unconsciousness.

Q How soon after the operation did you see the patient? A From the time she left the room? 40

Charles W. Banks—for plaintiffs—cross.

Q Yes. A About ten minutes.

Q What was her condition then?

By the Court.

10 Q Then you went to see her before the start of the second operation? A Yes.

By Mr. Braun.

Q What was her condition then?

Mr. Coult: I object to that as not cross examination, if the Court please. I have not examined the doctor at all as to what took place after the operation. That is part of the defendants' case.

20 Mr. Braun: He has gone into the operation and the treatment afterwards.

The Court: I don't think he went as far as to ask the doctor about his actions after the operation.

Mr. Coult: There is nothing in the direct examination that passed between the doctor and his patient.

Mr. Braun: He went into the treatment, if your Honor please.

30 Mr. Coult: I went into the amount of the bill.

The Court: I will sustain the objection.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Braun.

40 Q At that time did you know that her back was burned? A I did not.

Charles W. Banks—for plaintiffs—cross.

Q Did she ever tell you that her back was burned? A No.

Q How long did that first visit consume? A Well, it was just a minute. I had to get back to the operating room for another operation. I just wanted to assure myself that she was all right.

Q Was she all right? A Yes, sir—

10

Mr. Coult: I object to that on the same ground.

The Court: I will sustain the objection.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Braun.

20

Q How long would it take for a patient of Mrs. Haring's type who had been given an injection of morphine and then anesthetized by nitrous oxide, oxygen and followed by ether during an operation that consumed approximately fifty minutes from the time of the completion of the operation to a period when she would regain sufficient consciousness to be aware of pain and able to express coherently or intelligently to even a physician or surgeon that she was suffering such pain or had received some injury? A Ordinarily two or three hours.

30

Q When a person comes out of anesthesia what is their condition and what is their normal reaction as they are coming out?

Mr. Coult: I object to that as not cross examination.

The Court: I think it is your main case. I will sustain the objection.

40

Charles W. Banks—for plaintiffs—cross.

Q Did Mrs. Haring ever swear in your presence?

Mr. Coult: I object.

Objection sustained.

10 The Court: As I understand it, he was not asked with regard to the occurrence about which the husband testified as to what took place in the room.

Mr. Braun: That is true, but this witness was asked about the patient's condition and treatment after the operation and I think I can go into it.

The Court: You and I disagree on that and you may have your exception, so we won't waste any time on it.

20 Mr. Braun: I want to get them on the record.

The Court: If one ruling is bad the other is bad.

By Mr. Braun.

Q When was the second time that you saw Mrs. Haring after the operation? A It was after the next operation before I went home. I
30 should think it was in the neighborhood of one o'clock, possibly.

Q Was she conscious then?

Mr. Coult: I object to that as not cross examination.

Objection sustained.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

40 Exception noted as ground of appeal.

Charles W. Banks—for plaintiffs—cross.

Q Was she burned then to your knowledge?

A No, sir.

Q Did you treat her for any burns then? A No, sir.

Q What did you treat her for? A Do you mean after I saw her the first time?

Q On the second visit. A Why, I simply left orders for the nurse what to do if occasion should arise, as is my usual practice, to give them the post-operative orders. 10

Q Was her condition such that you had to give specific orders? A No, sir.

Mr. Coult: I object to that.

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

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

Q What was her condition then? Good or bad?

Mr. Coult: I object to that.

Objection sustained.

Counsel for the defendant, Charles W. Banks, prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q Was there anything about her condition, doctor, to indicate that she had been burned or was then suffering from being burned? A No.

Q On what do you base that conclusion? On what facts? A A patient is more or less under the influence of an anesthetic within that time and not able to express herself competently. 40

Charles W. Banks—for plaintiffs—cross.

Q How long did you stay on that occasion? A
I just looked in, gave the orders, and went out.

Q When did you see her again?

Mr. Coult: I object to that on the ground
that it is not cross examination.

10 Objection sustained.

Counsel for the defendant, Charles W.
Banks, prays an exception to this ruling of
the Court.

Exception noted as ground of appeal.

Q What other treatment did you give her fol-
lowing that second visit, or what other visits did
you make?

20 Mr. Coult: I object to that as not cross
examination.

Objection sustained.

Counsel for the defendant, Charles W.
Banks, prays an exception to this ruling of
the Court.

Exception noted as ground of appeal.

30 The Court: Of course, I will allow you to
ask him for the purpose of finding out what
number of visits were made, because that was
asked on direct, too.

Mr. Coult: I will withdraw the objection
to the last question.

A I think I probably replied to that question.
The next visit was that same night. I was in
touch with the patient, however, by telephone
later in the afternoon.

40 Q Did you learn on that occasion that Mrs.
Haring had been burned? A No.

Charles W. Banks—for plaintiffs—cross.

Q Who was on duty then? A Mrs. Baigrie, the special nurse.

By the Court.

Q That was in the afternoon? A Late in the afternoon; that was before the day nurse went off. 10

By Mr. Braun.

Q That was a telephone conversation? A Yes, sir.

Q When you made the call that night who was on duty? A Miss Sitnesky.

Q Did you learn from her that the patient had been burned? A No, sir.

Q Did you treat the patient at all then? A Why, I gave the night nurse orders and told her what to do if there should be any occasion to give medication. 20

Q And what did those orders refer to? A That the patient was in pain; they usually have pain after an operation and they are more or less restless, and our ordinary practice is to give them a hypodermic injection of morphine.

Q Is the recovery from an operation of this sort painful? A Why, I think most of them complain of pain. 30

Q Does that pain vary with the individual or with the operation? A Why, it varies with the individual, I think, first, because of this fact: That pain and the expression of pain are two very distinct things. Expression of pain is the measure of the patient's temperament very largely.

Q When you learned of this burn from whom did you learn it? A Mrs. Baigrie. 40

Q What did she say?

Charles W. Banks—for plaintiffs—cross.

Mr. Coult: I object unless it was in the presence of the plaintiff.

Mr. Braun: It was asked on direct examination that he learned it on the following day.

10 Mr. Coult: He is asking now what Mrs. Baigrie said when she was not under oath.

The Court: I will sustain the objection.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: You may call him later on if it is necessary to contradict Mrs. Baigrie.

20 Mr. Braun: Evidence is in on the direct that he learned it the next day. I want to find out how he learned it.

Mr. Coult: That is already in; that he learned it from Mrs. Baigrie.

The Court: I will allow you to find that out. He said that he first learned of the burn the second day from Mrs. Baigrie. I suppose they are entitled to know in what way he learned it.

30 Mr. Coult: Of course, nobody knows what the doctor is going to say. Mrs. Baigrie was not under oath when she had the conversation with the doctor.

The Court: I will allow it.

A Mrs. Baigrie told me that she had burned the patient with a hot water bottle.

40 Q That she had burned the patient? A Yes, sir.

Charles W. Banks—for plaintiffs—cross.

Mr. Coult: I move that that be stricken out on the same ground.

The Court: I will let it stand.

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

Exception noted as ground of appeal. 10

Q Doctor, you were asked on direct examination whether you had a conversation with a Mrs. Hunter in which you said that the lungs were exposed. Were the lungs of Mrs. Haring ever exposed? A No, far from it.

Q What is between the site of this burn and Mrs. Haring's lungs, what part of the anatomy?

A All the ribs, a bony case, and in between the ribs are layers of muscles and on top of the ribs are more muscles. 20

Q This particular part of the anatomy where Mrs. Haring was burned is quite muscular, isn't it? A Yes, it is quite muscular and you have the shoulder blade at the top.

Q And this burn, in order to expose the lungs would have had not only to destroy the skin, the fat, the shoulder muscles that operate the arm, the shoulder blades, the muscles underneath the shoulder blades, the ribs, the muscles underneath the ribs, the bony case, and the muscles around the lungs. A Surrounding the lungs we have a membrane known as the pleural membrane which covers not only the lungs but lines the chest. 30

Q That would have to be burned in order to expose Mrs. Haring's lungs? A Yes.

Q Was there ever any danger throughout her entire illness or indisposition of anything like that happening? A No.

Q Was there any infection that might have destroyed this tissue or bone? A Never. 40

Charles W. Banks—for plaintiffs—cross.

Q Did she make a normal recovery from the burn? A She did.

Q Were any of the muscular tissues destroyed? A They were not.

Q Except for outside injury from some other source, was there any danger of the scar tissue
10 of Mrs. Haring's wound breaking down?

Mr. Coult: I object to that as not cross examination.

Objection overruled.

A I don't think there is any danger at all, no, sir.

Q Would the nature of her injury cause any boils or pimples to form?

20

Mr. Coult: I object to that as not cross examination.

The Court: I will allow it. He was asked with regard to the burn and the treatment on direct examination.

Mr. Coult: He was asked whether there was any exposure of the lungs. I have not examined the doctor as to the consequences of this injury.

30

The Court: You asked him what kind of a burn it was. I think they are entitled to go into it.

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

Exception noted as ground of appeal.

A No.

Q Doctor, did you ever tell Mrs. Baigrie in the presence of Mr. Haring that she had to pay for
40 a night nurse?

Charles W. Banks—for plaintiffs—cross.

Mr. Quaglia: I object to that as not cross examination. It was not brought out on direct.

The Court: I will allow it.

A I never did.

Q Did you ever tell her she had to contribute toward any help at the house? 10

Mr. Coult: That certainly is not cross examination and I object.

Objection sustained.

Q At the time that you recommended the operation and it was decided to have the operation, who were present? A Well, I can't recall that; I don't remember. 20

Q Was Mrs. Haring present? A Oh, yes.

Q Did she say anything at that time about what nurse she would like to have? A Yes.

Q What did she say? A She said, "I hope I get Mrs. Baigrie" because they knew her very well and she was a competent nurse and they knew her in the family.

Q Doctor, how long have you known Mrs. Haring? A Oh, a good many years; probably eighteen or twenty years. 30

Q And aside from whatever information you had regarding her history, from your acquaintance, did you take a history when you examined her and recommended this operation? A You mean the hospital history?

Q No. On the 6th of March, 1927? A You mean her past history?

Q Yes. A I knew something of her past history. I simply made an examination and saw 40

Charles W. Banks—for plaintiffs—cross.

that the operation was necessary and strongly recommended it.

Q Did you get any information as to how long the symptoms from which she complained had persisted? A She told me that she had had a backache for three years.

10 Q Are you sure it wasn't two months that she had been ailing? A Three years, and that fact was also reported in the hospital record by Dr. Anuario.

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

The Court: I will strike it out.

20 Q What did she tell you was wrong with her when you got there?

Mr. Coult: I object to that as not cross examination.

The Court: I will sustain the objection.

Mr. Braun: If the Court please, this is part of the treatment. He was asked about being engaged.

30 Q You mean what she said at the time he was engaged?

Mr. Braun: Yes, sir, at the time he was called in. I will allow that.

Mr. Coult: This is all as to the previous history of the patient. Now he is trying to prove his defense on cross examination of Dr. Banks.

40 The Court: I suppose it all goes to the handling of the operation. I will allow it.

Charles W. Banks—for plaintiffs—cross.

A Her chief complaint at the time of the examination was pain, particularly in the abdomen and in the right lower quadrant of the abdomen, which made me feel she had trouble with the appendix. She was tender on pressure and had had this pain off and on for some time.

Q How long off and on had she had this pain, did she tell you? A She did tell me, but I think it was a comparatively short time. 10

Q You examined her at that time, doctor? A Yes.

Q What did you find her condition to be? A Nervousness.

Mr. Coult: I object to that as not cross examination.

Objection overruled. 20

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

Exception noted as ground of appeal.

A Well, a patient in that condition is more or less nervous, especially if they have an operation confronting them.

Q This tumor that you removed, would that have any effect on her nervousness? A Yes. 30

Q What effect, if any, would it have? A Well, the authorities are rather pronounced on that. In the literature on fibroid tumors the authorities say that most of those cases are nervous.

Q Could you say, doctor, from the history and the nature of the tumor that you found in Mrs. Haring's body, how long she had been suffering from that condition? A Well, a fibroid tumor is ordinarily a slow growth. 40

Charles W. Banks—for plaintiffs—cross.

10 Q What do you call slow growth? That might mean a week and it might mean years. A It may take some of them twenty years to develop to large size. I presume likely some of them get large earlier than that; some of them may take longer, but ordinarily they are of slow growth.

By the Court.

Q It is a matter of years? A It is a matter of years.

By Mr. Braun.

20 Q During that period of growth do they evidence symptoms of nervousness? A I think in most cases some of them do show nervous conditions. The authorities say they all do.

Q Have you had some experience that would help you to form your own opinion? A Yes, sir.

Q What is your opinion? A My opinion is that the authorities are right.

30 Q Do you know on what date Mrs. Haring was discharged from the hospital? A Well, I couldn't tell exactly without looking up the records. I think it was May 28th or 29th.

Q It was about eleven weeks— A I have a copy of the record in my pocket.

Q You cannot refer to the records.

The Court: Any objection?

Mr. Coult: No, I have no objection.

The Court: You may refer to the record.

40 A We have the hospital record here, I think.

Charles W. Banks—for plaintiffs—cross.

By the Court.

Q You took that from the hospital record?
A Yes, sir, I took that from the hospital record,
May 28th.

By Mr. Braun.

10

Q That was eleven weeks and how many days?
A She entered on March 8th.

The Court: That is a matter of computation.

Q When she went home, was she in bed? A
No, she was in bed and out; I think she was up
more than she was in bed.

Q Do you know of your own knowledge
whether she was in bed or not? A Of my own
knowledge, yes. 20

Q Do you know of your own knowledge
whether she was able to attend any social functions? A Yes.

Q How long after the operation? A Well,
I can't tell you how long after she went home,
but I know that she attended social functions.

Q While you were still treating her? A
While I was still treating her. In fact, she rode
with me in my car to her card club. 30

Q And you continued to treat her after suit
was instituted against you, did you, doctor? A
I did.

Q Why did you do that? A Well, I wanted
to finish the job. I was very much interested in
the healing of the burn and I thought it was my
duty to complete the work.

Q Why did you feel it was your duty to complete it? Because you had started it? 40

Charles W. Banks—for plaintiffs—cross.

The Court: I think that is immaterial.

Cross examination by Mr. Quaglia.

Q Doctor, you said on direct examination, also on cross examination, that the first time you
10 learned about this burn was on March 10th, is that correct? A That is correct.

Q That was the day after the accident? A That was the day after the accident.

Q When was it that you exhibited the tumor you had removed to Mr. Haring? A The day of the operation.

Q Was that the first visit before the second operation or after the second operation? A I think it was after the second operation.

20 Q Did Mrs. Baigrie tell you at the time that the patient had been burned with the hot water bottle? A No, sir.

Q Are you sure? A Very sure.

Q Isn't it a fact that she told you at the time the patient had been burned with the hot water bottle? A No, sir.

Q Didn't she tell you she had already applied unguentine on the burn? A No, sir, I knew nothing about it.

30 Q So the only knowledge you had was on the second day? A On the second day.

Q There has been a lot said about the ether bed. Can you tell us how the ether bed is made up? A I have never made one; I have seen a good many of them, but I fear that I could not put it up right if I started. We have some experts here who can tell you about it; the superintendent of the hospital is here.

Q You cannot tell us of your own knowledge?

40 A No, I never made one.

Charles W. Banks—for plaintiffs—re-direct.

Q Have you ever seen an ether bed? A Yes, sir.

Q Are the blankets rolled on the bottom of the bed or on the side of the bed? A On the side—

Mr. Coult: I object to that. 10

The Court: He was examined as to the duties but not as to the bed.

Mr. Quaglia: I will withdraw the question.

Re-direct examination by Mr. Coult.

Q You say that the thing nearest to the lungs is the pleura, is that right? A Yes.

Q That is a very thin membrane, isn't it? A Yes. 20

Q Can you see through it? A I never tried.

Q It is translucent, isn't it? A I don't know about that.

Q What is the function of it? A It lubricates the movement of the lungs and the lining of the chest cavity.

Q How thick is it? Can you compare it with something? A I should think it was probably as thick as two plies of this paper (indicating). 30

Q And you think that that would have to be destroyed in order to expose the lungs? A Well—

By the Court.

Q It is part of the lungs, isn't it? A Yes. To absolutely expose the lungs.

Charles W. Banks—for plaintiffs—re-direct.

By Mr. Coult.

Q Between the pleura and the skin there are muscles, are there not? A Yes.

Q Would you have to destroy the ribs in order to expose the lungs? A I think you would in most cases.

10 Q In other words, you couldn't get an opening between the ribs and the lungs? A You could get a small opening so you could put the fingers in.

Q That would be an exposure, wouldn't it? A Not a very good exposure. I have tried it many times.

Q Would you get an exposure at the site of this scar? A Oh, yes.

20 Q The only thing besides the skin which would have to be destroyed in order to expose the pleura would be the layer of muscle? A You are speaking of this case particularly?

Q Yes. A In this case you would have to have the shoulder blade burned, which is a flat bone, which is pretty well involved in this scar area, as I remember.

Q I show you Exhibit P. 1 and I ask you if the deepest portion of that scar is not at the lower end? A It is.

30 Q Is that below the shoulder blade? A It is not.

Q The shoulder blade you think runs all the way across? A The shoulder blade comes down around here, about half of this.

Q Doesn't that run all the way under her arm, practically? A You mean the scar?

Q Yes. A No, it does not.

Q And you think the shoulder blade would be between that scar and the lungs? A I should think about half of it.

40

Charles W. Banks—for plaintiffs—re-direct.

Q Half of what? A Half of the scar area on the right-hand side.

Q Half of it is over the shoulder blade? A Yes.

Q And half of it is not, is that right? A Half of it is not; that is right.

Q Directing your attention to the half that is not, if that at any time had been deep enough to expose the lungs, there would be nothing but muscle to be destroyed? A Yes, but in that area there is a great wad of muscle tissue.

Q I didn't ask you about how great a wad it is; but it is only muscle, isn't it? A It is only muscle and ribs.

Q There are spaces between the muscle and ribs, aren't there? A Yes.

Q Can you fix the date when you took Mrs. Haring to the card club? A No, sir.

Q When was it? A I don't remember. I distinctly remember when I happened to be going in that direction and I asked her to ride with me.

Q Was that after the suit was begun? A I don't remember.

Q It might have been? A It might have been.

Q If this lady had never had any pustules or boils before this burn and has had them constantly since, would you say there was no connection between the boils and pustules and the burn? A No, sir.

Q It just happened? A Yes.

By the Court.

Q You would say that the assistant surgeon and the anesthetist were inside the scope of their duties in placing the patient in bed? A That

Charles W. Banks—for plaintiffs—re-cross.

is a voluntary matter. Some of the anesthetists are particular to go with the patient to the bed to see that they are placed properly in bed. I don't think there is any hospital rule about it, but a great many anesthetists are conscientious enough to take the patient and deliver her to the bed.

By the Court.

Q But that would not be going beyond her duty? A Oh, no.

Q The assistant surgeon you said was employed by you and paid by you? A Yes, sir.

Q What about your wife, was she employed by you and paid by you? A Yes.

20 *Re-cross examination by Mr. Braun.*

Q In the case where the anesthetist accompanies the patient to the room, for what purpose does she go along?

Mr. Coult: I object to that.

The Court: For the purpose of the performance of her duties to the patient, I suppose. I will sustain the objection.

30 Mr. Braun: I want to find out what those duties are.

The Court: Then ask him that.

Q What duties would she have in accompanying the patient to the bed in connection with the anesthesia?

The Court: I will allow that.

40 A Keeping her head as quiet as possible so that the tongue won't slip back in the throat and

Charles W. Banks—for plaintiffs—re-cross.

obstruct respiration; to see that the pulse and heart are in good condition; and to see that the patient is delivered in bed—general observation.

Q Where would she get that observation from, the head or from the trunk or the feet of the patient? A From the head.

Q Would that require observation of any particular part of the body? A Yes; usually she watches the pulse and feels the pulse and if the tongue falls back in the throat the patient has difficulty in breathing at once, which anybody could observe; and then they know the degree of shock that the patient has.

Q That does not involve lifting the patient into bed, does it? A No.

Q On these photographs that Judge Coult asked you about, referring to Exhibit P. 1, you were asked about the deepest area. What constituted the deepest area there—to what did you refer? To that dark area here to the right of the burn (indicating)? A Yes.

Q How did you interpret that? From the shading of the picture? A Well, yes. The granulations or paler portions are here, and do not come out as strongly as these granulations that have healed over.

Q What are these dark blotches? Are they medicine? A I don't know whether she had mercurochrome on or not. I know we treated her with mercurochrome and I don't know whether mercurochrome would cast a shadow. Mereurochrome is one of the newest antiseptics; it is one of the best germicides we have.

Q Does it stain? A Yes.

Q Is it light or dark? A It is a dark scarlet.

Q But can you say what those blotches are?

A The ulcerated portions are the paler portions.

10

20

30

40

Agnes Grant—for plaintiffs—direct-cross.

Re-direct examination by Mr. Coult.

Q What do you mean by ulcerated portions?

A Granulated tissue—a healing sore.

Q Without consulting the photograph but referring to your memory, did she have an ulcerated area? A Yes.

Q Referring to your own memory, was the burn deepest at the right-hand side? A Yes, it was.

AGNES GRANT, one of the defendants, sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Miss Grant, you were the operating nurse in this case, weren't you, in which Mrs. Haring was operated? A I was.

Q You went to the private room with the patient? A I did.

Q Did you have anything to do with putting her in bed? A I did not.

Cross examination by Mr. Bernard.

Q As the carriage was wheeled into the patient's room, who was in the room, if anyone? A Mrs. Baigrie immediately preceded the carriage.

Q Before the carriage was brought in? A Yes.

Q With reference to the room, where was the bed situated? A On the east side.

Q Running in what direction? A North and south.

Agnes Grant—for plaintiffs—cross.

Q Was it nearest the east wall of the room or the west wall of the room? A The bed was nearest the east wall.

Q With the head facing where? A North.

Q As this carriage was wheeled into the room, where was it placed with reference to the bed? A It was placed near the east side of the room, just enough space for someone to stand between the wall and the carriage. 10

Q What were the various positions of the various people in that room at that time? A Mrs. Baigrie entered first and stood in the north-east corner; Dr. Anuario stood on the west side of the bed; and Dr. Winifred Branks on the east side and myself at the foot of the bed.

Q Before they put the patient into the bed, did you have occasion to see the bed? A I did. 20

Q Was it regularly prepared? A Yes.

Q Were there any hot water bottles visible in the bed? A No.

Q In putting the patient into bed, how did each one assist? A Dr. Anuario was on one side of the lifter—

Q Will you describe to the Court and jury what a lifter is? A It is a draw sheet the size of about half a normal sized sheet folded half. It is placed below the patient, below the shoulder blade and below the trunk to support the heaviest part of the body and the ends of the sheet extend on either side of the patient so that someone can very easily lift the patient and form a hammock in lifting the patient from the bed to the carriage or from the carriage to the bed. 30

Q You say Dr. Anuario was on the west side of the bed? A Yes.

Q Where was Dr. Winifred Banks? A On the east side. 40

Agnes Grant—for plaintiffs—cross.

Q She was on the other side of the lifter? A Yes.

Q Where was Mrs. Baigrie? A At the head.

Q They all three assisted in putting the patient into the bed? A Yes.

10 Q What did you do? A I lifted the top blanket and returned the carriage and blanket to the operating room and left the room because the patient was completely covered.

Q When did you first find out that the patient was burned? A On Saturday noon the week of the operation.

Q From Wednesday to Saturday you knew nothing about it? A No.

20 Q Will you describe to the Court and jury how an ether bed is prepared? A A sheet is placed over the mattress in an ordinary manner. The center of the bed has a rubber sheet and that rubber sheet takes in the entire middle of the bed, leaving a small portion of the mattress above and below which is not protected by the rubber sheet. That rubber sheet is covered by a draw sheet. A blanket is then placed over the rubber sheet and draw sheet and fastened tightly and drawn on very smooth so that there is no wrinkling or bulging. Then a double blanket is
30 laid on not attached or fastened in place on the bed. The bottom of the blanket which is usually fastened is left just loose and left hanging over the bed. Then the sheet comes as an ordinary top sheet, then the blanket, then the spread. That is four coverings are folded into a folded roll and placed on the side of the bed opposite to the side that the patient is received on. The pillow is attached to the top of the bed but it is not placed so that a head could rest on it; it is standing up in order to protect the head from the bars
40 of the bed.

Agnes Grant—for plaintiffs—cross.

Q Was this bed prepared in that manner? A
It was.

Q It was prepared to receive the patient? A
Yes.

Q How large is the pillow for use beneath the
head? A The usual size of any pillow.

Q How much of the surface of the bed does it
cover? A (No answer.) 10

Q It is placed on the bed? A No; it is not
placed so a head could rest on it; it is standing
up and pinned to the bars of the bed.

Q If you know, upon whom is the duty to
remove hot water bottles from the ether bed? A
The nurse in charge.

Q Whose duty is it to put the hot water bot-
tles in an ether bed? A The nurse that pre-
pares the bed. 20

Q When the hot water bottles are placed in
an ether bed in what part of the bed are they
placed? A They are placed in the lower part of
the bed first—

Q How many hot water bottles do you usually
use in preparing an ether bed? A Three.

Q Where are they placed in the bed? A One
about where the feet would rest, one in the center
and one above the center.

Q Assuming there was only one hot water
bottle to be placed in that bed, where would it be
put? A At the foot of the bed. 30

Q Where the patient's feet would be? A
Yes.

Q Just where are the hot water bottles placed
in the bed? Are they under blankets or— (inter-
rupting). A No, they are on the top of the
first blanket, the blanket that the patient is sup-
posed to lie on.

Q That is the blanket that is used as a sheet?
A Yes. 40

Agnes Grant—for plaintiffs—re-direct-cross.

Re-direct examination by Mr. Coult.

Q The custom is to put the hot water bottle right on top of the bed in plain view? A Yes.

Q Did you look to see whether there were any hot water bottles there? A I did.

10 Q That is not part of your duties, is it? A No.

Q Why did you look? A To see that the bed was in readiness for the patient.

Q What would you have done if the hot water bottle had been there? A I would remove it.

Q Why? A So as not to place the patient on it.

Q It is dangerous, isn't it? A Yes.

20 Q You didn't have anything to do with taking this lady off the carriage and putting her on to the bed at all, did you? A No.

Cross examination by Mr. Quaglia.

Q You say that Mrs. Baigrie was at the north-east corner of the room and that she immediately preceded the carriage, is that correct? A Yes.

Q So that when the carriage was brought in she was already in the room, is that it? A Yes.

Q You are quite sure about that? A I am.

30 Q What part did Mrs. Baigrie play in the removal of the patient from that carriage, if any? A She got at the head.

Q Was the head to the north of the room? A Yes.

40 Q In placing the patient on this ether bed is the patient placed on the blankets that were drawn tightly under the mattresses or is there a sheet put over that blanket before the patient is put into the ether bed? A The patient is placed on the blanket.

Agnes Grant—for plaintiffs—cross.

Q With no sheet over that blanket? A No.

Q Isn't there a sheet on the carriage? A

A Yes.

Q And isn't that sheet used to remove the patient and also to cover up the blanket on the bed? A No, the carriage is covered by a sheet which remains on the carriage, and the lifter is the sheet that is lifted off the carriage. 10

Q And is that lifter removed after the patient is put into the bed? A Yes.

By the Court.

Q That is pulled out from under? A Yes.

By Mr. Quaglia.

Q Assuming that there was a hot water bottle there, would this lifter cover the hot water bottle? 20

The Court: That would depend on where the hot water bottle was.

Mr. Quaglia: She has testified they would put three—

By the Court.

Q If it was in any of the three places you mentioned. A Yes— 30

By Mr. Quaglia.

Q If one is placed at the head of the bed where the shoulders would be, would that sheet cover the bottle if it was there? A Not if it was there near the shoulders.

Q Suppose it were a trifle below the shoulders, would it then cover the back? A No.

Q It would not? A No. 40

Agnes Grant—for plaintiffs—cross.

Q You are quite sure that the remaining double blanket that is over the top blanket was returned and rolled on the side of the bed opposite the side that the patient was drawn from, is that correct? A Yes.

10 Q Isn't it a fact that the blankets were rolled to the bottom of that bed? A No.

Q Are you still connected with the hospital? A I am doing private duty at the hospital. I am not employed at the hospital.

Q Isn't it a fact that it was the practice at the time that this occurred to draw the double blanket to the foot of the bed? A No.

Q And isn't it a fact that it has been changed recently to draw the blanket to the side of the bed? A No, sir.

20 Q Are there always three hot water bottles placed in an ether bed? A No.

Q The only thing that Mrs. Baigrie did in assisting this patient was merely to guide the head, is that correct? A As far as I can remember.

Q Who lifted the patient from the carriage? A Dr. Anuario and Dr. Winifred Banks.

30 Q Who stayed near the carriage; that is, who took the opposite end of the drawsheet near the carriage? A Dr. Winifred Banks.

By the Court.

Q That is, the carriage was between her and the bed? A The carriage was between her and the bed.

By Mr. Quaglia.

40 Q As a matter of fact, at the time this carriage was brought in there Mrs. Baigrie was not in the room, is that so? A No.

Edith M. Baigrie—for plaintiffs—direct.

By Mr. Bernard.

Q When you say no you mean that she was in the room, is that right?

The Court: She has testified to that.

By Mr. Horner.

10

Q Was or was not Mrs. Baigrie in the room at the time that the patient was placed in the bed?

A She preceded the carriage.

Mr. Coult: I will take a voluntary non-suit as to Miss Grant. I don't see that there is anything to hold her in the case.

20

EDITH M. BAIGRIE, one of the defendants,
sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Where do you live, Mrs. Baigrie? A 15
Ridge street, Orange.

Q What is your business? A Nursing.

Q Do you recall the occasion of the operation on Mrs. Haring which is the subject of this suit? 30

A I do.

Q How did you come into the case? A I was called to the hospital.

Q By whom? A Sister Felix.

Q Who is she? A The nun that has charge of the office.

Q Who was she, did you say? A She is in the office.

Q Of what? A Where the calls come in for the nurses at the registry at the hospital. 40

Edith M. Baigrie—for plaintiffs—direct.

Q Which hospital? A St. Mary's.

Q What was the first thing that you did in connection with this case? A I prepared Mrs. Haring for operation.

Q In order to do that, what did you do? A I had to prepare her.

10 Q What was the preparation? A I had to shave the abdomen, wash it off with green soap and put alcohol on her and put a special topping on the abdomen.

Q When was that? A The same morning before she went into the operating room.

Q How did she go into the operating room? A On the carriage.

Q What is the carriage? A It conveys the patient from her room into the operating room.

20 Q Who put her on the carriage? A I did.

Q Without any assistance? A Well, I think I did.

Q Do you remember about what time that was? A Well, it was some time in the early morning.

Q Can you remember the date? A I think it was the 8th of March.

Q Wasn't it the 9th of March? A It might have been the 9th; I don't recall.

30 Q Then what did you do after that? A Then I came into the room and made up my ether bed.

Q How did you make up the ether bed? A I turned over the mattress, I put on the white sheet, then I put on the rubber draw sheet, over the rubber draw sheet I put on a white draw sheet, over that I put a brown blanket drawn tightly across the bed, then I put the pillow up against the head of the bed—

Q (Interrupting.) How did the pillows stand?

40 A Straight.

Edith M. Baigrie—for plaintiffs—direct.

Q When you say straight you mean on its edge? A At the head of the bed.

Q Was it up on edge or lying flat? A No, on edge.

Q Then what did you do? A Then I turned her bed clothes down to the foot of the bed.

Q What do you mean by that? A Why, a sheet, another blanket and a spread. 10

Q How did you turn them down? A I folded them all carefully and put them at the foot of the bed.

Q Were any of those clothes on the body of the bed at all? A Nothing at all but the sheet, the draw sheet and the brown blanket.

Q What was on the top? A The hot water bottle I placed in the bed.

Q When did you prepare the hot water bottle? A After I had the ether bed made up. 20

Q When you put the hot water bottle in the bed what was it lying on? A The brown blanket.

Q Over what portion of the bed did that brown blanket extend? A All over the bed.

Q Was there anything else on there except the pillow? A No.

Q Then what did you do? A I placed the hot water bottle in the center of the bed where I thought her shoulders would rest because the room was very, very cold. 30

Q Then what did you do? A Then I covered it partly over with a white towel.

Q How much of the hot water bottle did the towel cover? A About three-quarters.

Q What was the color of the bottle? A About three-quarters.

Q The color. A Red.

Q What was the towel there for? A Why, to retain the heat. 40

Edith M. Baigrie—for plaintiffs—direct.

Q Was the water in the bottle hot? A Yes, it was hot.

Q Where did you get it? A I reheated it because the water out of the faucet was not hot.

Q Why did you want to get it hot? A Because the room was very cold and I was afraid
10 the patient would get pneumonia.

Q Had you ever put hot water bottles in beds before? A I have.

Q Is it a customary thing to do? A Yes.

Q What did you do after you got the bottle into the bed? A Why, I left the room.

Q Where did you go? A Oh, I went around the corridors waiting for the patient to come back.

Q Did you see her come back? A I did not.

Q How long were you out of the room? A
20 I don't know.

Q Well, you finally went back, didn't you? A Yes.

Q What did you see when you got back to the room? A The patient and the people that brought her from the operating room.

Q Where was the patient? A They were dragging her across the bed.

Q Who was dragging her across the bed? A
30 Dr. Anuario, Miss Grant and Dr. Winifred Banks.

Q Was Miss Grant doing it, too? A Miss Grant was drawing the patient across the bed.

Q Where was Dr. Banks? A Dr. Banks was not in the room.

Q Dr. Winifred Banks? A Dr. Winifred Banks stood on the opposite side of the carriage.

Q When you say the opposite side of the carriage, which side with relation to the bed? A
40 The bed stands, we will say so, then the carriage, then Dr. Winifred Banks.

Edith M. Baigrie—for plaintiffs—direct.

Q Where was Dr. Anuario? A On the other side of the bed.

Q What were they doing? A Dragging the patient across the bed.

Q How far across the bed was she then? A Pretty much all across.

Q Did you say anything to them about the hot water bag? A I did not.

Q Why not? A Why, I took it for granted that the hot water bottle was removed.

Q What did you do after you came into the room? A Why, I looked after the patient.

Q What did you do in that regard? A Well, I had to fix her in position in case she vomited.

Q Was she at that time still under the influence of the anesthetic? A Not fully.

Q To what extent was she under the influence of the anesthetic? A Well, she wasn't functioning.

Q Was she able to talk? A Not at the time.

Q What did she do while she was in bed while you were attending or immediately after you got into the room? A As she was coming out of the anesthetic she said, "Edith, I have a pain in my back."

Q Is your name Edith? A Yes.

Q What did you do? A I rubbed her back.

Q And what part of her back did you rub? A The lower part.

Q Do you remember some people coming into the room? A Not at that time.

Q How soon afterwards? A Well, quite a while afterwards.

Q How many minutes? A I don't know.

Q Who came in? A Dr. Charles Banks.

Edith M. Baigrie—for plaintiffs—direct.

By the Court.

Q He was the first one to come in? A I don't recall that, judge.

By Mr. Coult.

10 Q Did anybody else come into the room besides Dr. Banks? A Yes, the family was in.

Q How many of the family? A I don't know.

Q Did you know the family? A Yes, I knew the family.

Q Do you remember which one of them came into the room? A Why, there were two or three of them in the room.

Q Was your attention at that time centered on your patient? A Yes.

20 Q What did she do and what did she say during that time? A Well, Mrs. Haring said, "Edith, my back hurts." I said, "Louise, you can't expect that pain to disappear so quickly." I rubbed her back. A short time afterwards she said, "Edith, my shoulder hurts." I said, "Your shoulder, Louise?" I said, "My God, the hot water bottle is in the bed."

Q When was that? A After she came back from the operating room.

30 Q When you said, "My God, the hot water bottle is in the bed," was Dr. Charles Banks in the room? A He was not.

Q Were any of these other people in the room? A They were not.

Q How long had they been out? A I couldn't say; I don't think they had been in the room.

Q You don't think they had been in the room as yet? A Before I took out the bottle.

40 Q What did you do with the bottle when you took it out? A I don't know.

Edith M. Baigrie—for plaintiffs—cross.

Q Where was the bottle when you found it?
A On her shoulder.

Q On what part of her shoulder? A Mostly the right side.

Q What did you do for her then? A Well, I went to the door and I called one of the girls, and I asked her to go for Miss McCarrick and Miss McCarrick came into the room and she said, "What's the matter, Baigrie?" I said, "The patient has a hot water burn." She said, "A hot water burn?" I said, "Yes." She said, "You are crazy; that's pressure from the table." I said, "Don't tell me that because I took the bottle out." And Miss McCarrick went out and got me some K-Y lubricant and I applied it on the back. 10

Q You say that Dr. Charles W. Banks came into the room? A Yes, he came in with the gown on with the specimen to show Mrs. Haring. 20

Q Did you tell him about the burn? A Yes.

Q When did you tell him? A Before he left the room.

Q At that time? A At that time.

Cross examination waived by Mr. Quaglia.

Cross examination by Mr. Braun. 30

Q Mrs. Baigrie, I show you a paper and I ask you if this is your signature? A Yes, it is.

Q And is that writing in black ink your handwriting? A It is.

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

(The same is marked Exhibit DCWB 1. for identification.) 40

Edith M. Baigrie—for plaintiffs—cross.

Q When did you go on duty in this case? At what time and on what day? A Seven o'clock on the day of the operation; seven o'clock in the morning.

Q Where did you find Mrs. Haring when you went on duty? A In her bed.

10 Q Which room? A Room twenty-six.

Q Was there more than one bed in that room? A There were two beds.

Q That room is on the west side of the corridor, is it not? A Well, I don't know whether it is west or east.

Q It is on the west side of the corridor that runs north and south in the hospital, isn't it? A Yes.

Q The north and south walls are blank, are they not? A I don't know what you mean.

Q The north and south walls of the room are blank. A There are two windows in that room.

Q Those windows are in the west wall, are they not? A I don't know what you mean.

Q Towards the mountains. A Yes, there are two windows on the side toward the mountains.

Q And these two beds ran north and south with the heads toward the north, did they not?

30 A No, they ran this way; they were placed like this (indicating) along that side of the wall.

Q They ran parallel with the wall in which the windows were located, didn't they? A Yes.

Q And Mrs. Haring spent the night in the bed nearest the window, did she not? A That is where I found her when I went in.

Q And that was seven o'clock in the morning? A Yes.

Q Which bed did you prepare for her reception after the operation? A The same bed she was in.

40

Edith M. Baigrie—for plaintiffs—cross.

Q You are sure about that? A Positive.

Q You are sure it wasn't in the east bed? A I put her in the bed when she came out.

Q Why did you do that? A Because that was prepared for her.

Q You didn't use the other bed? A No. 10

Q Was the other bed made up? A Yes.

Q You had to make up the other bed in which she had slept? A I did.

Q What did you do in preparing her for the operation? A I had to shave the abdomen and wash it off with green soap.

Q You are sure you put her back into the same bed? A I did.

Q In which she had already slept? A She was put back in the room by the people who brought her back from the operating room, not by me; I wasn't there. 20

The Court: I don't think the witness understands.

Q You didn't get clean blankets to prepare the ether pads? A I had to get a clean blanket for the ether bed.

Q Did you use the same blankets she had had before? A Yes. 30

Q Where did you put them? A At the foot of the bed.

Q Wasn't there a blanket underneath? A Yes.

Q Didn't you leave that underneath? A I left that on the bed.

Q The same one that had been used by her before the operation? A No, I had to get an extra blanket to make up my ether bed. 40

Edith M. Baigrie—for plaintiffs—cross.

Q That room you say was very cold? A Very cold.

Q Was there a thermometer in that room? A No.

Q Was it uncomfortably cold? A You couldn't stay in it. I couldn't stay in it while
10 the patient was in the operating room.

Q It was so cold you couldn't stay there? A No, I couldn't.

Q In preparing the patient you say you had to shave the abdomen? A Yes, sir.

Q The entire abdomen? A Yes.

Q And you had to use soap and water? A Yes.

Q What else did you use? A Alcohol.

Q What else? A Then I applied a special
20 towel and fastened it down with adhesive tape.

Q How was the patient dressed while you were doing this? A She had her nightdress on.

Q What kind of a nightdress was it? A I don't know.

Q Do you know what kind of material it was made of? A I don't know.

Q Was it wool? A I don't know.

Q Was it thin? A I don't know.

Q She was in the bed nearest the window
30 when you were preparing her? A Yes.

Q Although the room was very cold? A Very cold.

Q So cold that you couldn't stand it. A I could not.

Q Yet you prepared this patient by shaving her abdomen and using green soap and water and alcohol on her? A I prepared her abdomen.

Q I asked you: Yet you prepared this
40 patient by shaving her abdomen and using green soap and water and alcohol on her. A Yes.

Edith M. Baigrie—for plaintiffs—cross.

Q And that was a room so cold that you couldn't stay there? A I was in the same room.

Q But you couldn't stay there after the patient had gone to the operating room and you had prepared the ether bed? A Well, there wasn't anything to keep me in that room. 10

Q Did you or did you not say it was so cold you could not stay there? A Yes, there was nothing to keep me there.

Q Did you leave because there was nothing to keep you there or because it was so cold you couldn't stay there? A There was nothing to keep me there.

Q Where did you go? A I went out in the corridors. 20

Q Where in the corridors? A I don't know.

Q Didn't you have any specific object when you went out there? A No.

Q Now, let us see if we can find out. You accompanied the patient to the operating room, did you not? A I did.

Q And you stayed there with her until she was under the anesthetic? A I did.

Q She got a morphine injection first? A Before the operation? 30

Q Yes. A I don't remember.

Q Do you know what anesthetic was used? A I don't know.

Q How long were you in the operating room while Mrs. Haring was going under the anesthetic? A I don't know how long.

Q Do you know about? A No.

Q After she went under the anesthetic you left? A When they started to prepare her abdomen I left the room, which is customary. 40

Edith M. Baigrie—for plaintiffs—cross.

Q The operating room is on a corridor which runs off this main corridor on which Mrs. Haring's room was located? A Yes.

Q And it runs approximately east and west, doesn't it? A Yes.

10 Q And to the west of the main corridor is located the operating room? A Yes.

Q At the end of the cross corridor? A Yes.

Q There are several rooms in between, the superintendent's office, and so forth? A Yes.

Q Who was in the operating room when you left it? A I don't remember.

Q On the way back to Mrs. Haring's room, did you meet anybody? A I don't remember.

Q Did you talk to anybody before you started to prepare the bed? A Pardon me?

20 Q Did you talk to anybody before you started to prepare the bed? A I don't remember.

Q But you are sure that you went back to prepare the bed? A I prepared the bed.

Q You remember that distinctly? A Yes.

30 Q What was the first thing you did in preparing the bed? A I turned the mattress; I put on a white sheet, over that I put on a rubber draw sheet, over that I put on another white draw sheet, after that I put over that a brown blanket, then I stood up my pillow and pinned it to the head of the bed, then I folded my bedclothes and put them at the foot of the bed.

Q What were the bedclothes? A A sheet, a blanket and a spread.

Q What was the sheet? A Why, I put that on first.

Q So that that would come in contact with the patient? A Yes.

40 Q Is that good practice? A Well, the blanket that comes back from the operating room is left on the patient.

Edith M. Baigrie—for plaintiffs—cross.

Q You are sure about that? A I am sure about it.

Q Was it left on in this case? A Why, I guess it was.

Q Don't you remember? A Why, yes; I know it was on.

Q You are sure about it? A Yes. 10

Q And it covered the patient? A Oh, yes; the blanket covered the patient.

Q Was it on her when she was on the carriage? A Why, it must have been; they couldn't bring her back from the operating room without a blanket.

Q You are sure it was on her? A Yes.

Q You saw it there? A I didn't see it; I wasn't in the room when she came in.

Q Where were you? A I was out in the corridor. 20

Q After you had folded the bedclothes what did you do next? A I put the hot water bottle in the bed.

Q Where did you get it? A In the supply room.

Q Where is that located? A On the same corridor.

Q How far away? A Well, that is at the other end of the corridor. 30

Q Where did you get the water to fill it up with? A In the nurses' room.

Q Where is that located? A On the same floor.

Q At which end of the corridor? A That is in the center of the building.

Q Is that off the main corridor? A Yes, that is off the main corridor.

Q In which direction is it from Mrs. Haring's room? A Why, it is on that side. 40

Edith M. Baigrie—for plaintiffs—cross.

Q On the same side? A Yes.

Q How far is it from there? How many doors? A Why, that was the end room, twenty-six, and then comes the staircase and then comes the nurses' room.

10 Q About twenty feet away, was it? A Oh, I don't know.

Q Was it to the north or south of Mrs. Haring's room? A North—to the left.

Q How did you heat the water? A I put it in the kettle.

Q How did you put it into the bag? Did you pour it right in? A I poured it right in.

Q Then what did you do? A I took it back to the patient's room.

Q Did you test it? A I did not.

20 Q Why not? A I had no use for the water; I wasn't going to use the water for anything only to heat the patient's bed.

Q Wasn't there a standard temperature that was recommended for this purpose? A I suppose there is.

Q Did you ever hear of it? A I suppose I did.

Q Had you ever been taught it? A Yes.

Q What is it? A About 125.

30 Q Was this bag 125 degrees? A I don't know.

Q Why don't you know? A Why, because I don't know; I didn't know that the bottle was going to be left in the bed.

Mr. Braun: I move to strike that out as not responsive.

The Court: I will let it stand.

40 Q Didn't you know whether this bag was 125 or not? A No.

Edith M. Baigrie—for plaintiffs—cross.

Q Why didn't you know? A Because I didn't think about it.

Q You thought about everything else, however, didn't you? A Well, I think I did; I tried to.

Q How many hot water bottles is it customary to use for an ether bed? A It has never been specified how many bottles you put in a bed; you are very fortunate if you get one sometimes. 10

Q How many did you try to get on this particular occasion? A I took one.

Q Were there any others there? A I didn't look for any more.

Q You only wanted one? A That's all I wanted.

Q So you were satisfied that you were fortunate in getting what you wanted, is that right? A Yes. 20

Q Why didn't you use more? A Because I very seldom put a hot water bottle in the patient's bed.

Q Even in an ether bed? A Even in an ether bed.

Q Even when the room was very cold? A That was a different thing; the room was cold.

Q Very cold, wasn't it? A Yes.

Q And you only used one hot water bottle? A That's all. 30

Q And you placed that where? A Where I thought her shoulders would rest.

Q Where was that with relation to the bed? Can you give us some idea? A Well, I should think about that far (indicating).

Q Why didn't you put that hot water bottle toward the foot of the bed? A Because I wanted to protect her shoulders and her lungs. I was afraid she would develop pneumonia. 40

Edith M. Baigrie—for plaintiffs—cross.

Q Doesn't a patient usually get cold around the feet and extremities first? A I wasn't thinking about that; I was thinking about her shoulders.

10 Q You were not thinking about the coldness of the room or where her body would be cold first? A I thought her body would be cold first at the shoulders.

Q Not at the feet? A No.

Q Isn't that where people get cold first? A The girls usually put the hot water bottles where they please.

Mr. Braun: I move that that be stricken out as not responsive.

The Court: Strike it out.

20

Q Isn't that where people get cold first? A At their feet?

Q Yes. A I don't know. I put my bottles where I thought my patient was going to get cold.

Q You thought your patient was going to get cold around the shoulders and not around the feet? A Yes.

Q You had known Mrs. Haring for some time? A Yes.

30

Q You were a friend of the family? A Yes.

Q She called you "Edith" and you called her "Louise"? A Yes.

Q Having put the hot water bottle in the bed you say you covered it up? A I put a white towel over three-quarters of the bottle.

Q Over what three-quarters of the bottle? A Over the top part.

Q Which way was the bottle lying in the bed, lengthwise or across? A Across.

40

Edith M. Baigrie—for plaintiffs—cross.

Q And which side was the filling portion or neck pointing? A I don't remember, but from the picture must have been the right side.

Q Why didn't you turn some of the covers over the bottle if you wanted to retain the heat in the bed? A Because I had a blanket there and a hot water bottle, and it is customary for a nurse to turn her blankets down. 10

Q How long after Mrs. Haring had been left at the operating room by you did you take for the fixing of the bed? A I had to fix the bed.

Q You made up the bed first? A Yes, and after I made up the bed I put the hot water bottle in.

Q Then you tidied up the room? A Yes.

Q From the time you left Mrs. Haring at the operating room until you put the hot water bottle in the room how much time expired? A I have no idea; I didn't time it. 20

Q Can you give us some idea? A No.

Q Don't you know how long it ordinarily takes to do that? A No, I do not.

Q Was it hours? A No, I don't think it was hours.

Q Was it a half hour? A I don't know.

Q How long did it take you to tidy up the room? A I don't know. 30

Q You left the room and went out into the corridor? A Yes.

Q And which part of the corridor did you go to? A Well, I was up around where the patient's bed was, up in that corridor.

Q Did you go towards the operating room or away from it? A I went all over it.

Q You wandered all over that floor? A Yes.

Q You took a stroll. A Yes. 40

Edith M. Baigrie—for plaintiffs—cross.

Q You knew that it was your duty to be there when the patient returned, didn't you? A Yes.

Q And it was your duty to see that the bed was in proper shape to receive the patient? A Yes.

10 Q And it was your duty to assist in getting the patient into the bed and comfortable? A I suppose it is.

Q Isn't it? A Yes.

Q And it was your duty to remove any hot water bottles you may have placed in the bed? A Yes.

Q And you didn't know how long this operation was going to take. A No, I didn't.

20 Q You made no inquiries at the operating room as to how much longer it would be? A I don't remember.

Q Did you or did you not? A I don't remember.

Q You didn't go in that direction, did you? A I don't remember.

Q And yet you wandered around this corridor and around that floor at times out of sight of this room? A Yes.

Q Into the nurses' room? A Yes.

30 Q Out into the solarium at the other end? A I walked down that way.

Q Did you have a chat with somebody? A Maybe I did; I don't remember.

Q How long did you do that? A Quite some time, and then I glanced into the patient's room and then the people were in it—

Q I didn't ask you that. How long did you wander around? A I don't know.

Q Was it an hour? A I don't know.

40 Q Was it a half hour? A I don't recall at all.

Edith M. Baigrie—for plaintiffs—cross.

Q But you remember distinctly being there when the patient was there? A Yes.

Q And you could see everybody that was in the room? A I could see at a glance.

Q That is pictured in your brain? A Yes.

Q Dr. Anuario was on the west side of the bed? A Dr. Anuario and Miss Grant stood at the side of the bed as you look out in the room. 10

Q Where was Dr. Winifred Banks? A She was alongside the carriage with the carriage between her and the bed.

Q Where did you go? A I was in the room there.

Q Just wandering around? A I don't know what I was doing.

Q Did you help to lift the patient? A No.

Q Whose patient was she? A They were working when I got into the room. 20

Q You were satisfied to have them do the work? A I was satisfied because I knew they were all trained people—professional people.

Q Had you ever been instructed that it was your duty to stay there and receive the patient?

A Yes.

Q Well, as a matter of fact, wasn't that patient put into the east bed into that room in the bed farthest from the windows? A She was put into the bed that she came out of. 30

Q You are sure of that? A I am positive.

Q And you are sure Dr. Anuario was alongside the carriage nearest the window? A Dr. Winifred Banks was next to the carriage on the side where the window was.

Q There was no doubt as to that? A What, east?

Q There is no doubt as to that? A I know where the room was and where the carriage was. 40

Edith M. Baigrie—for plaintiffs—cross.

Q What were they doing? A Dragging the patient across the bed.

Q Dragging her? A Yes.

Q With what? A With the draw.

Q They didn't lift her at all? A No, I wouldn't call it a lift.

10 Q Just dragged her off the car? A Yes.

Q And you thought they were careful and able to do their duties by dragging her across the bed? A I couldn't put the patient in myself.

Q Couldn't you protest against such treatment? A I wasn't there when they came in.

Q You didn't say a word? A No, because that is the way they always do it.

Q You didn't say anything about the treatment of your patient? A I did not.

20 Q How much did Mrs. Haring weigh? A Well, I don't remember.

Q She wasn't a heavy woman, was she? A I don't know.

Q You lifted her onto the carriage to take her to the operating room, didn't you? A I don't know whether she weighed a hundred or 150 pounds because she helped herself onto the carriage.

30 Q Did she help herself onto the operating table? A Yes, partly.

Q And you gave her a lift during this treatment in the bed turning her around? A She was fully able to turn herself.

Q During the first week? A No, I turned the patient.

Q Can you give us from that any idea as to her weight? A No.

40 Q Would you call her a heavy woman or a medium-weighted woman or a lightweight? A I don't know.

Edith M. Baigrie—for plaintiffs—cross.

Q You don't know whether she weighed a hundred or 150? A No, I do not.

Q What part did Miss Grant take in the dragging of this patient across the bed? A She had hold of the draw sheet.

Q How many people had hold of this draw sheet? A Three of them. 10

Q Which side did she have? A The side as you walk into the room.

Q On Dr. Anuario's side? A Yes.

Q She wasn't helping Dr. Winifred Banks? A No, she was not.

Q She wasn't helping her drag her share of the lady? A No, she was helping both of them.

Q Who was supporting the patient's head while this dragging was going on? A I don't know. 20

Q Did her head just hang from being dragged across the bed? A I don't know.

Q You saw it, didn't you? A I saw it dragging across the bed.

Q You saw her head, didn't you? A I saw her whole body.

Q You say that when the patient finally got into the bed she was not fully under the influence of the anesthetic? A No—

Q Was she conscious? A Semi. 30

Q To what extent would you say? A Well, she felt the pain in her back.

Q And that was how long after she had been brought into the room? A I don't know; shortly after, I should imagine.

Q You are sure about that? A Yes.

Q She was able to talk to you? A Yes, she told me she had a pain in her back.

Q Did she talk to anybody else? A When Dr. Banks came in she talked about her father and about her sister. 40

Edith M. Baigrie—for plaintiffs—cross.

Q How long was it that he came back? A Long enough to change his clothes.

Q Was that the first time Dr. Banks had been there? A Yes.

10 Q How long did he stay there? A Quite a few minutes.

Q A very nice little chat? A Yes.

Q And that was a short time after she had been brought back? A Yes.

Q She was fully conscious at that time? A I wouldn't say fully conscious.

Q Did she appear to know what she was talking about? A Well, she was very talkative.

Q Very talkative? A Very talkative.

20 Q People are frequently very talkative when they come out of ether? A Some of them.

Q And at the same time not know what they are talking about. A Yes.

Q They have hallucinations. A I think so.

Q They think people are trying to hurt them, don't they? A It wasn't that way with Mrs. Haring.

Q Isn't it common for people coming out of ether to have hallucinations and dreams? A Yes.

30 Q Sometimes they have terrible nightmares? A I don't remember.

Q How long have you been nursing? A Seventeen years.

Q You have been graduated that long? A 1912.

Q You say first she said her back hurts? A Yes.

Q Did she point to where it hurt? A No.

40 Q Did she say anything about feeling any better after you rubbed it? A No.

Edith M. Baigrie—for plaintiff's—cross.

Q How long again was it before she complained? A Well, a few minutes.

Q When you rubbed her back did you turn her over for that purpose? A I did not.

Q How did you do it? A I slipped my hand underneath the covers and rubbed her back.

10

Q What part? A The lower part.

Q At what point on the spinal column, or the hips, or anything you think the jury will understand? A In the lumbar region, I think.

Q Where is that? A Right here (indicating).

Q That is commonly called the small of the back? A Yes.

Q And fully across? A Well, I just couldn't say if I went all across, but I know I rubbed her back.

20

Q Did you rub her any higher? A No.

Q But you did rub across there? A I rubbed her back.

Q You just ran your hand in under the blanket? A Yes, sir.

Q In doing that did you feel anything unusual? A I did not.

Q Did you feel this towel over the hot water bottle? A I wasn't near the hot water bottle; if I had been I would have removed it.

30

Q You had one there, didn't you? A I did.

Q And it was covered with a towel? A Yes, sir.

Q How long and how wide? A It was just a hand towel.

Q Can you indicate it with your hands? A It was a white towel with a blue border down the center (indicating).

40

Edith M. Baigrie—for plaintiffs—cross.

Mr. Braun: What would you say, Judge Coult, as to the size indicated, eighteen inches?

Mr. Coult: I don't know.

By the Court.

10 Q How long was it? A It was just a small towel about that size (indicating).

The Court: About eighteen inches.

By Mr. Braun.

Q About how wide? A Well, about that much (indicating).

Q About twelve or fourteen inches? A I don't know.

20 Q Which way was it across the bag? A I laid it across the bag.

Q At right angles to the bag? A Just across the bag.

Q Did the towel extend with its long side up and down the bed? A Yes, across the bag, not up and down—across the bag.

Q Your bag was across the bed, wasn't it? A This way (indicating).

30 Q Lengthwise or crosswise? A Turn your papers around the other way. That's the way the bag was in the bed.

By the Court.

Q In other words, the opening of the hot water bottle was toward the side? A No, it was right in the center of the bed.

Q But did it point toward the inside of the bed or toward the head of the bed or toward the foot of the bed? A The side of the bed.

40

Edith M. Baigrie—for plaintiffs—cross.

By Mr. Braun.

Q And the towel was the same way? A The towel was the same way.

Q But you didn't feel anything? A No, not when I rubbed her back.

Q You didn't feel any undue heat? A No. 10

Q The patient did not complain when you were doing that? A No.

Q When you raised her up? A I didn't have to raise her.

Q Didn't that throw more weight on her shoulders? A No, sir.

Q She didn't have to arch her shoulders? A No.

Q Did you throw the covers back to get back there? A No, I slipped my hand under the covers and under her back. 20

Q From the side? A From the side of the bed.

Q How long after that was it that she complained about her shoulders? A I think it was a few minutes.

Q What did she say then? A She said, "Edith, my shoulder hurts."

Q And as soon as she said that you said, "My God, the hot water bottle is in the bed." A Yes. 30

Q As soon as she said it you knew what was wrong? A I knew the hot water bottle was not removed from the bed.

Q As soon as she said her shoulder hurts? A Yes.

Q When she said her back hurt it didn't mean anything? A Only the shoulder.

Q You never told any different story about this thing, did you? A No, because I would tell a story if I did. 40

Edith M. Baigrie—for plaintiffs—cross.

Q You didn't tell anybody else anything different about this, did you? A I don't think so.

Q And this was at what time that you found the hot water bottle? A After the patient came back from the operating room.

10 Q What time of the day? A I don't know, I tell you.

Q What time of the day? A In the morning.

Q Still in the morning? A Yes.

Q You couldn't be mistaken about it? A It was before Dr. Banks came in with his gown on and I took out the hot water bottle.

Q He came in shortly after that then? A Yes.

20 Q Again? A That was the first visit he made.

Q Did he come back after you discovered the burn before noon? A Yes, before he left the hospital Dr. Charles made another visit.

Q And did you tell him about the burn? A Yes, I told him when he went out that the patient had a hot water burn.

Q Before he performed the second operation? A I couldn't account for where he went; he still had his gown on.

30 Q You are positive that was in the morning? A Yes.

Q Why didn't you enter it in the morning instead of waiting until three o'clock and marking it on the chart? A Because Dr. Banks told me not to record it.

Q But you went ahead and recorded it, didn't you? A If it is there I put it down.

40 Q And the first time you entered it it was three o'clock? A You can't leave the patient to make up the chart.

Edith M. Baigrie—for plaintiffs—cross.

Q But you entered on the chart the time you do a thing and not the time you enter it? A I don't know.

Q Then what are all these times listed here, the time when you entered it or the time that you did the thing that you entered? A I don't know whether it is the time I gave her the hypodermic or the time I came back from the operating room. I know it was in the morning. 10

Q Why does it say there you entered seven o'clock? A It says here "Prepared for operation," doesn't it?

Q Did you do that at seven or enter it at seven? A I did it at seven.

Q So these signs on the left indicate when the thing occurred or when it was done, is that so? A I prepared the patient at seven o'clock after I went on duty. 20

Q This entry indicated at three o'clock is the first indication on this chart or on the record that anything had happened to Mrs. Haring's back, isn't it? A Yes.

Q And that is when you put the first dressing on. A I put the dressing on the back in the morning.

Q Why did you make it three o'clock on the chart? A Probably I gave that hypodermic at three o'clock. 30

Q The hypodermic is marked at eighty-thirty, isn't it? A Then I gave the hypodermic at 8.30 in the morning.

Q And the dressing at three? A I applied the dressing as soon as I got it and when Dr. Charles Banks came back the second time he said to use unguentine and I said I had already sent for it and he said, "That's fine." 40

Edith M. Baigrie—for plaintiffs—cross.

Q That was the next morning, wasn't it? A No, that was the morning of the operation.

Q You record all the visits that the doctor makes to the patient? A Yes, I try to.

10 Q And you reported his phone call at seven o'clock? A I did if it is there.

Q But you haven't a single visit recorded there, have you? A Dr. Banks did not come in before the operation.

Q According to this he didn't come in before seven o'clock, did he? A He came after the operation.

Q According to this Dr. Banks wasn't there at all or made any communication with the patient or you until seven o'clock. A Seven o'clock when?

20 Q On the night of March 9th. A Dr. Banks had to come into my room and leave his orders before he left the hospital.

Q But that isn't on the chart. A Maybe not.

Q The only thing that shows on your chart is that Dr. Banks was in at seven o'clock, and that is the only sheet for your period on duty? A Yes.

30 Q And there isn't a word about it? A It says she was operated on by Dr. Charles Banks. Look at your records; it is on the last sheet on the operating sheet.

Q But these are your notes? A Yes.

Q And these are supposed to record anything that happens in your presence? A Yes.

Q And every call that the doctor makes? A Yes, sir.

Q And what the patient's condition is from time to time? A Yes.

40 Q Everything you did for the patient? A Yes.

Edith M. Baigrie—for plaintiffs—cross.

Q Whether you give an injection or apply a dressing or give a dose of medicine? A Yes.

Q Or when the doctor calls? A Yes.

Q And there is nothing on there to show that Dr. Banks was there at all during your period on duty? A Dr. Banks made two visits the morning of the operation. 10

Q I mean according to this— A Yes, if it isn't on, it isn't on.

Q It is not recorded? A No.

Q I want to show you some more of these sheets. I show you another paper and ask you if that is in your handwriting in black ink? A Yes.

Q And that is for what date? A I can see March, but I can't tell you what it is.

Q Is is the light that bothers you? A No, I guess it is my eyes that bother me. 20

Q That is for March 10th, isn't it? A I don't know.

Q Isn't that one—zero—t—h, Thursday? A I see the Thursday.

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

(Same is marked Exhibit D. C. W. B. 2 for identification.)

Q Did you say anything on there about a visit by Dr. Banks? A Probably the doctor didn't come in that day. 30

Q Look at that and see. A I see Dr. Banks' name, but I don't see what is in front of it.

Q Where? A (Indicating.)

Q That is your writing, isn't it? A Yes.

Q Doesn't it say "Seen by Dr. Banks"? A I made up that chart before I went off duty.

Q What time was she seen? She was seen twelve o'clock, wasn't she? A Maybe it was 40

Edith M. Baigrie—for plaintiffs—cross.

twelve o'clock that Dr Banks made his second visit.

Q It says here "Seen by Dr. Banks"? A Yes.

Q He was there that day, wasn't he? A He was there twice that day.

10

By the Court.

Q You mean the second day, the day after the operation? A Oh—

By Mr. Braun.

Q He was there that day, wasn't he? A Oh, yes, he made a visit.

Q At twelve o'clock? A Yes.

20 Q And you entered it on here? A If he made a visit it is down.

Q But you didn't enter his visits that you spoke about on the preceding day when you say you told him about this burn? A We all know that Dr. Banks was in the room.

Q But you didn't enter it on the chart? A It is not on the chart.

Q This is an official record, isn't it? A So you say.

30 Q Do you say so? You kept that. That is the official chart for the hospital; that is part of your duty? A Yes.

Q So that Dr. Banks again came in to look at it to see what is on it? A Yes.

Q This second visit is the visit when you told him, as a matter of fact, on the second day— A (Interrupting.) I told Dr. Banks on the day of the operation.

40 Q You are positive of that? A I am positive of it.

Edith M. Baigrie—for plaintiffs—cross.

Q Let us see whether we can refresh your recollection some other way. You say that after you discovered the burn you sent for Mrs. McCarrick? A Yes.

Q And she told you you were crazy; that it was pressure from the table? A Yes.

Q That was the first interpretation of it in that respect that you heard of it? A Yes.

10

Q That was the first time you had ever heard any explanation given for Mrs. Haring's condition which explained it as pressure from the table, isn't it? A Mrs. McCarrick said it is pressure from the table.

Q That is the first time you had heard that expression used with respect to Mrs. Haring's back? A Yes.

20

Q What appearance did Mrs. Haring's back have? A Very red.

Q That is all, isn't it? A Yes.

Q When did you again hear that explanation given? A I don't remember hearing it again.

Q When did you go off duty on March 9th? A Seven o'clock.

Q Who relieved you? A Miss Sitnesky.

Q What time did she go on? A I don't know.

30

Q Did you leave at seven? A I left after I had a talk with the night nurse, Miss Sitnesky.

Q Where did you have that talk? A In the lavatory.

Q And that was across the hall from the nurses' room, was it? A No, it was two doors below Mrs. Haring's room.

Q How did she come there? Did you ask her to go there? A She was called from the hospital for night duty.

40

Edith M. Baigrie—for plaintiffs—cross.

Q How did she come to be with you? A We walked down instead of staying in the patient's room; we walked down the corridor.

10 Q Didn't you, as a matter of fact, come down to Miss Sitnesky while she was changing clothes in the nurses' room and after explaining what the general treatment of the patient was coming across the hall? A No.

Q Didn't you have a conversation with her at that time which was about ten minutes or a quarter past seven on March 9th in the room across the nurses' room and saying that there was a terrible accident to Mrs. Haring? A Yes.

Q That you burned her with a hot water bottle? A I didn't say I—

20 Q Just a minute. That you burned her with a hot water bottle, and that you didn't know why you had put it in the bed and that nothing like this had ever happened in your seventeen years of nursing? A I don't remember that.

By the Court.

Q You don't remember what? A That I told Miss Sitnesky that I burned the patient.

30 *By Mr. Braun.*

Q Did you tell her that you didn't know why you put the hot water bottle in the bed? A I put the hot water bottle in the bed.

Q Did you tell her that? A I don't remember.

Q Did you tell her nothing like this had ever happened to you in your seventeen years of nursing? A Neither it has.

40 Q Did you tell her that? A I didn't tell her that.

Edith M. Baigrie—for plaintiffs—cross.

Q Were you nervous and excited? A I was almost crazy.

Q Why? A Because the patient got a hot water burn.

Q It didn't make any difference whose fault it was? A I was taking care of the patient.

Q It didn't make any difference to you whom the responsibility rested on, did it? A I wasn't in the room when they put the patient back because I was out in the corridor.

Q You didn't feel at fault about this, did you? A I don't understand.

Q You didn't think it was your fault, did you? A I did not.

Q Why were you nervous and excited and worried? A So would you be if you found a hot water bottle against your patient's back.

Q And that is what made you excited and worried? A Yes, I was almost crazy.

Q Didn't you further tell Miss Sitnesky on this same occasion and in this same conversation not to tell the patient or the patient's family that the patient had been burned, but if any inquiry was made about the patient's condition or the condition of her back to say that it was caused by being on the operating table and by pressure?

A I did, because Dr. Banks told me.

Q Of course, Miss McCarrick's remarks that it was pressure from the operating table did not give you that idea, did it? A No, because it was not pressure.

Q You had forgotten that at this time, hadn't you? A Yes.

Q Do you remember when Mrs. Haring was told about this incident? A Why, I think Mrs. Haring knew at that time, because Dr. Banks told her she had a beautiful back.

Edith M. Baigrie—for plaintiffs—cross.

Q The day of the operation? A The day of the operation.

Q You are positive of that? A I am positive of that.

Q There is no doubt in your mind at all? A There is no doubt in my mind at all.

10 Q Were you there when he told her? A I was.

Q Didn't you show it to him on the second visit? A I don't remember; I never showed Dr. Banks Mrs. Haring's back when he came in to make his second visit.

Q That is when he told her that her back was burned? A Yes.

Q And you were there when he told her? A I was there.

20 Q Who was present when you told Dr. Banks about this burn? A I don't remember anybody else being in the room. It was in the patient's room.

Q You are positive that was the first time? A I am positive.

Q Do you remember Mr. Haring testifying when he came in with Dr. Banks on the first visit— A I couldn't say.

30 Q Do you remember him saying that? A No, I do not.

Q That wouldn't change your recollection any, would it? A No.

Q Did you hear Mrs. Haring swear? A Well, yes, I did.

Q On March 9th, I mean? A Yes, I did.

Q Who was there then? A I think Dr. Banks and her sisters were there. That was the first time Dr. Banks came into the room.

40 Q What time was that? A Before he had changed his gown when he came in to see her with the specimen.

Edith M. Baigrie—for plaintiffs—cross.

Q And you told him about the burn? A Yes, I told him that the patient had a hot water burn.

Q That was the first time he was there? A That was the first visit.

Q How long had that bottle been there the first time? A I don't know. 10

Q Don't you know how long it was since you had put it into the bed? A I don't know.

Q And Mr. Haring and Mrs. Haring's sisters were in the room on that visit, too, weren't they? A Yes, sir.

Q So they must have heard you tell Dr. Banks? A No, they didn't hear it.

Q How big was this room? A A nice sized room, and I told him as he was going out of the door. 20

Q Where were these other people? A I don't know whether they were nearby or not.

Q Is that when he told her she had a nice back? A No.

Q When did he tell Mrs. Haring, then? A When he came back and made a second visit.

Q I thought you told us a little while ago that he told Mrs. Haring on the first visit? A He did no such thing; he told her on the second visit. 30

Q Now, it is the second visit, you say. What time was that? Before noon? A Well, he had changed his clothes apparently to leave the building.

Q What did Mrs. Haring say when she found that out? A I don't know.

Q You don't remember that? A No.

Q Didn't she show any curiosity about how bad it was or who had done it and how it happened? A I suppose the pain wasn't so 40

Edith M. Baigrie—for plaintiffs—cross.

severe then because she wasn't so fully out of the anesthetic.

Q She wasn't out of the anesthetic then? A Not fully. What I mean is that I suppose the ether still had a little effect on her so she would not feel the severe pain.

10 Q Was she conscious? A Yes.

Q She must have been pretty well out of the ether as far as her faculties were concerned if she was in a fair state of consciousness at the first visit, isn't that so? A She was partly conscious at the first visit because she was talking to them.

Q And she was better at the second visit?

A Yes.

Q Did Dr. Banks come back that afternoon?

20 A I don't remember.

Q When were the Harings there? A What?

Q When were Mrs. Haring's relatives there? The first or second visit? A They were waiting for the operation.

Q But when were they in the room with Mrs. Haring after the operation? The first or second visit? A The first visit, Dr. Banks came in they were in the room.

30 Q You are positive about that now? A Yes, I am positive.

Q And that is when you told Dr. Banks? A Yes, as he was leaving the room.

Q And then he came back after performing the operation and told her? A Yes, he looked at her back and told her she had a beautiful burn.

Q Then he told her she had been burned? A Yes.

40 Q There is no doubt about that, is there? A No, no doubt.

Edith M. Baigrie—for plaintiffs—cross.

Q Was Mr. Haring there then? A I don't know.

Q Was he outside in the corridor? A I don't know.

Q You don't remember seeing him there again? A I don't remember; I couldn't tell you.

Q Mrs. Haring knew about it then on the day of the operation? A Yes. 10

Q Then why was it necessary to tell Miss Sitnesky not to tell the patient or her family what had happened to her? A Because the patient was very nervous and Dr. Banks said not to tell her.

Q She knew she was burned, didn't she? A Not to tell the family.

Q He was worried about the family? A Yes.

Q He wasn't worried about the patient, was he? A What good would it do the patient if he told the family? 20

Q What harm didn't it do? A I don't know; I don't think Dr. Banks told us to tell the family.

Q You took it upon yourself to tell Miss Sitnesky not to tell the family? A Dr. Banks told me to tell her.

Q Dr. Banks told you not to tell the family when he had already told her about it? A He looked at her back and he said, "You have got a beautiful back." 30

Q I thought you said, "A beautiful burn" a few minutes ago. A What's the difference?

Q Of course, she would know the burn was on the back if he told her that? A Well—

Q You asked Dr. Banks to break the news to Mrs. Haring, didn't you? A To break the news to her?

Q Yes. Didn't you tell him you didn't have the heart to tell her? A I don't remember. 40

Edith M. Baigrie—for plaintiffs—cross.

Q Wasn't that on Thursday or Friday? A I don't know. Dr. Banks knew it on the day of the operation.

Q Isn't it a fact that Mrs. Haring was not told about it until Thursday or Friday of that week? A I don't know, but I showed the doctor
10 her back when he came in on the second visit.

Q You made no attempt to check up on this hot water bottle at all, did you? A What do you mean?

Q After you saw the patient being placed in the bed. A No.

Q And of course, you expected that Dr. Winifred Banks or Dr. Anuario or Miss Grant had removed the bottle? A Yes.

Q And that they had been kind enough to take
20 it outside where it belonged? A I certainly thought they had taken it out.

Q Weren't you responsible for that bottle? A I put the bottle into the bed.

Q Weren't you responsible for the custody of the bottle? Didn't you have to return it to the hospital when you were finished with it? A Not at any special time.

Q But you were to return it when you were finished? A Yes, I was to place it back.

Q You didn't go back to see where it was? A
30 How do you know I didn't put it back?

Q Didn't you say on direct examination you didn't know what you did with the bottle? A I said I was almost crazy when I found the bottle.

Q But before you discovered Mrs. Haring was burned you came in and saw her being placed in the bed? A Yes.

Q Where did you think they had put the bottle? A I thought they had taken it out of the
40 bed.

Edith M. Baigrie—for plaintiffs—cross.

Q Where did you think they had put the bottle? A There were vacant tables and chairs.

Q Did you see it? A No.

Q Didn't it occur to you that it ought to go back to the proper rooms so that somebody else could use it? A No.

10

Q In fact, there wasn't a bottle when she was put on it, was there? A No, sir.

Q Wasn't that bottle put in afterwards because you forgot to put one in to warm the bed before she was placed there? A No, no such thing.

Q Isn't it because you were out in the corridors gallivanting in the corridors? A No, no such thing. I put it in when I made up the ether bed.

20

Q That is one thing you can remember? A Yes.

Q But you cannot remember why you did not check up on it afterward? A No.

Q Then why did you say to Miss Sitnesky that you didn't know why you put the bottle in the bed? A I didn't say it.

Q You don't remember whether you did or not. A I don't remember.

Q You might have said it? A I might have. 30

Q Why would you make such a remark that you didn't know why you put the bottle in the bed? A Well, I will tell you; I was sorry I had put it in. I was very sorry. Mrs. Haring might better have gotten pneumonia than have the bottle where I found it.

Q You think that, do you? A Yes, because I was afraid Mrs. Haring would develop pneumonia; that is the reason I put the bottle in the bed.

40

Edith M. Baigrie—for plaintiffs—cross.

Q You never put any hot water bottles in the bed after Mrs. Haring was there? A No, I did not.

Q Never on any occasion at all? A No.

Q She was never cold in that cold room, was she? A No; she was very comfortable until
10 Dr. Banks ordered a wet dressing on her back.

Q Did you get any heat into that room? A She was transferred to 35.

Q Where is 35? A She was transferred because it was too cold in 26.

Q Where is 35? A At the extreme end of the corridor.

Q Where, with relation to the operating room? A It is on the same floor.

20 Q Is it to the north or the south end of the corridor? A I don't know; it is the other end. I don't know whether it is north or south.

Q Mrs. Haring's room was south in the corridor from the operating room? A I guess so, I don't know where it is, if it is north or south; I couldn't tell you.

Q Doesn't that corridor run north and south parallel with the mountain? A Yes.

30 Q The mountain runs north and south approximately, doesn't it? A That's the way.

Q Facing the mountain to the west— A (Interrupting.) That was the room 26.

Q Was it to the right or the left of the operating room that this room 35 is located? A No, the opposite side.

Q The opposite side of the corridor? A Room 35 is not on the side where the operating room is.

40 Q It isn't on that corridor? A No, because the operating rooms run this way (indicating).

Edith M. Baigrie—for plaintiffs—cross.

Q The operating room is on a short corridor running toward the mountains from the main corridor, isn't it? A Yes.

Q Standing at the intersection between the short corridor and the long corridor facing the mountain, which hand is nearest to room 35 and which hand is nearest to room 26. A Room 26 is on the left. 10

Q That is to the south? A Oh, 35 is farther away from the operating room than 26. 26 is on the left-hand side—on the mountain side.

Q How wide is this bed that you prepared for Mrs. Haring? A I think they are quarter beds—this a full-sized bed, I know.

Q Can you give us the approximate width? A About this wide (indicating). 20

Q About three feet wide? A I don't know.

Q What was the temperature out in the corridor? A I didn't look at it.

Q Was it warmer in the corridor than it was in the room? A Yes.

Q You didn't have to go very far from the room to get warm, did you? A No, I could have gotten warm anywhere outside of the room.

Q Weren't you watching for the patient? A Yes. 30

Q And didn't you run in ahead of the carriage? A No, I did not.

Q You are sure of that, aren't you? A I am positive.

Q You didn't come across the hall there, did you? A I was in the corridor somewhere.

Q What made you come back? A To see whether my patient was there, because when I left the room I closed the door to keep as much heat in it as I could. 40

Edith M. Baigrie—for plaintiffs—cross.

Q After you got outside where it was warmer you felt if you closed the door to this cold room there would be more heat in there afterward?
A I did, really.

10 Q Where did you think the heat was coming from? A I don't know where it was coming from because there was no heat in the room.

Q And by closing the door you thought you would get more heat in the room? A That's what I thought.

Q Who paid Miss Sitnesky? A I did.

Q Why? A Sister Regis asked me to.

Q How much did you pay her? A I think it was \$184—\$182 or \$184.

Q How did you pay it? A By a check my sister gave me.

20 Q When did you make that arrangement? A I didn't make any arrangement.

Q When were you asked to pay it? A Why, Sister Regis asked me sometime, I think, when Miss Sitnesky's time was up and I said, "Sister, I haven't got it."

30 Q What else did you say? A And there was nothing more said about it. Then Sister Regis asked me the second time for it. Then I said, "Sister, I will ask my sister if she will give it to me." And I asked her for it and she said as long as Sister Regis demands it she gave it to me.

Q And the only reason for not giving it to her the first time was because you didn't have it?
A No.

Q That is the only answer you gave? A Because the Sister held me responsible.

By the Court.

40 Q And that is the only reason you are paying?
A Yes, Dr. Charles Banks told me I couldn't work in the hospital if I didn't come to terms.

Edith M. Baigrie—for plaintiffs—cross.

By Mr. Braun.

Q What authority did he have in the hospital?

A I don't know.

Q That hospital is governed by a superintendent, isn't it? A By the sisters.

Q And they have absolute control over the hospital, haven't they? A Yes. 10

Q They hire and fire, don't they? A Yes.

Q Nobody else has anything to say about it?

A Well, Sister Regis held me responsible, that's all I know.

Q Why do you say Dr. Banks told you you couldn't work in the hospital? A He said, "Baigrie, I feel sorry. You have a child to support. You have been nursing here seventeen or eighteen years. I have always found you a competent nurse." And he said, "Go and see what Mrs. Haring wants and do it and we will all be happy." That's what he told me. 20

Q And he felt you were responsible?

Mr. Coult: I object to that.

Objection sustained.

Q Did he tell you you were responsible? A Those were the words he used— 30

Mr. Coult: I object. What difference does it make?

Objection sustained.

Q Was anything said about your responsibility for it? A By me?

Q By anybody. A No.

Q Didn't Sister Regis say anything about your being responsible? A She said she would 40

Edith M. Baigrie—for plaintiffs—cross.

hold me responsible because I was the nurse on the case.

Q Who was Sister Regis? A In charge of the hospital.

10 Q Then it was Sister Regis said you were responsible and not Dr. Banks. A No, Dr. Banks told me to do what Mrs. Haring wanted me to do so I could stay on the registry.

Q He was advising you, then, wasn't he? A I don't know what he did it for.

Q You could tell from his manner whether or not he was laying down a mandate.

Mr. Coult: I object to that.
Objection sustained.

20 Q How did he say it?

Mr. Coult: I object to that.
Objection sustained.

Q What tone of voice did he use?

Mr. Coult: I object to that.
Objection sustained.

30 Counsel for the defendant, Charles W. Banks, prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Was this the result of a conference? A Yes, that was the last time—that was just before Mrs. Haring left the hospital.

Q On what date? A I don't know.

40 Q Who was present? A Mr. Haring, Sister Regis, Dr. Charles Banks and myself.

Edith M. Baigrie—for plaintiffs—cross.

Q Wasn't Dr. Winifred Banks there? A Dr. Winifred Banks was not there.

Q You are sure about that? A I am sure about that.

At one o'clock P. M. the Court takes a recess of one hour.

10

AFTER RECESS.

EDITH M. BAIGRIE, resumes the stand.

Cross examination (continued) by Mr. Braun.

Q Mrs. Baigrie, I understood you to say that you paid Miss Sitnesky in May. A I don't remember what month it was, but I paid her after the four weeks. 20

Q Wasn't it in April? A I don't know; she was four weeks on the case.

By the Court.

Q This was the night nurse? A Yes, sir.

By Mr. Braun.

Q Wasn't she paid in April? A I don't know. 30

Q How did she come to discontinue her care of the patient as night nurse? A Well, when the Sister asked me for the money I couldn't afford to pay Miss Sitnesky any longer.

Q Didn't you ask her to leave? A No.

Q Didn't you call her up and tell her to discontinue coming? A Yes, I did that.

Q Do you recall the conversation with Miss Sitnesky in which she told you that Mr. Haring 40

Edith M. Baigrie—for plaintiffs—cross.

had called up the night before while she was on duty and that he was becoming very inquisitive and that you would have to tell the family, and in which you answered that you had asked Dr. Banks to tell Mrs. Haring in the morning? A I don't remember.

10 Q Would you say that you didn't say that?
A I couldn't say.

Q Well, now, as I understood your testimony on direct examination, you said that you paid Miss Sitnesky as the result of a conference with Sister Regis. A No, Sister Regis told me that I was responsible and she asked me for the money and I said, "Sister, I haven't got it." And a couple of days later the Sister asked me for the money again.

20 Q Wasn't that when you told Miss Sitnesky not to come on the case again? A That I can't remember.

Q Was it before or after that that Miss Sitnesky left? A I couldn't say.

Q Was it before or after this conference at which Dr. Banks was present? A That was before.

Q This conference at which Dr. Banks was present was when she put Mr. Haring's demands
30 for somebody to pay for the help? A Yes, sir.

Q How much did you pay toward the help? A Four weeks, I think.

Q How much a week? A \$20.

Q And when did you make the last payment?
A I don't remember.

Q Was it the first four weeks after Mrs. Haring left the hospital? A Yes.

Q And that was May 28th? A I don't know.

Q Were you asked to make any more payments in addition to those four? A Well, when
40

Edith M. Baigrie—re-direct.

Dr. Banks told me to go upstairs and do as Mrs. Haring told me to do I asked the doctor how long? A About a month it would take.

Q Were you asked by Mr. and Mrs. Haring to make any more payments after you discontinued?

A No.

Q Did you go to treat Mrs. Haring and dress her back after you made these payments? A Yes, until I was called on an obstetric case. 10

Q When was that? A It was August; I won't say positively.

Q It was after you discontinued dressing Mrs. Haring's back that suit was started, wasn't it?

A Yes.

Cross examination by Mr. Quaglia.

Q You keep a daily report of the patient and incoming calls, doctor's visits and so forth, is that correct? A I don't understand you. 20

Q Do you keep a daily report for the patient? A Yes.

Q Do you remember whether or not on your report of May 9th, that is the day of the burning, whether you put in that record that the patient sustained a burn? A Dr. Banks told me not to chart it. 30

Q Was that the reason you didn't put it into the report? A Yes, that's the reason.

Re-direct examination by Mr. Coult.

Q Mrs. Baigrie, did you ever put down in the hospital record anything about an injury to Mrs. Haring's shoulders? A Shoulder? Yes, I think I charted it.

Q When did you chart it, do you know? A I don't remember. 40

Edith M. Baigrie—re-direct.

Mr. Coult: Have you any objection to my using the sheet you used with this witness? I will have to call her back if you don't.

Mr. Braun: No objection.

Q Here is this paper which has been marked
10 Exhibit D. C. W. B. 1 for identification. This entry at three o'clock is for dressing to back, isn't it? A It is down; I don't know just what time it was.

Q It says, "Dressing for back," doesn't it?
A Yes.

Q But there isn't anything in that chart to show what made it necessary to put a dressing on, is there? A Well, Dr. Banks told me not to
20 chart it.

By the Court.

Q Did you put anything down there regardless of what he said? A Well, probably it was on another sheet.

By Mr. Coult.

Q Is there anything on this sheet I have shown you? A No, sir.

30 Q Nor on these other sheets I have shown you which are D. C. W. B. 1 and D. C. W. B. 2 for identification? A No, sir.

By the Court.

Q On the first visit of Dr. Banks, that is, when you say he came in after the first operation and as I recall, you told him about the burn on the way out, did you tell him the cause of the burn?
40 A I said she had a hot water burn.

Edith M. Baigrie—re-direct.

Q Did you tell him anything else? A Dr. Banks left the room.

Q Did you tell him anything else? A No.

Q You didn't tell him it was from a hot water bottle left in the bed? A He took it for granted that it was from the hot water bottle that was left in the bed. 10

The Court: I will strike that out.

Q You didn't tell him the cause of the burn?
A I said it was a hot water burn.

By Mr. Coult.

Q Did he look at the burn then? A No, sir, on the second visit.

20

By Mr. Braun.

Q You say Dr. Banks told you not to enter it on the chart? A Yes, he did.

Q Did you enter it on the record? A I don't know.

Q Are you familiar with the progress notes?
A That is up to Dr. Banks to start that.

Q Did you ever see them? A I don't remember.

Q Where were they kept? A On the same chart? 30

Q All the records are kept together? A Yes.

Q You never looked at his records? A Maybe I did.

Q You can't say whether he ever entered anything about the burn or not? A I can't say.

40

Ambrose F. Dowd—for plaintiffs—direct.

AMBROSE F. DOWD, sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

10 Q Where do you live, Dr. Dowd? A 239
Broadway, Newark, New Jersey.

Q You are a practicing physician and surgeon of the State of New Jersey? A Yes.

Q Where do you practice? A Newark, New Jersey.

Q Did you make an examination of the plaintiff, Mrs. Haring? A Yes.

Q Where? A At your office.

Q When? A May 24, 1928.

Q For whom did you make that examination?

20 Mr. Horner: I object to that as immaterial. That same question was asked by Judge Coult before—

The Court: In view of the other testimony I will sustain the objection. If it becomes material I will allow it.

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

Exception noted as ground of appeal.

30 Q What sort of an examination did you make, doctor? A I examined Mrs. Haring's back and obtained the history of the case and her subjective complaints.

Q What was the history that you got? A The history was that on the 9th of March, 1927, Mrs. Haring was subjected to an operation for the removal of the fibroid uterine tumor and possibly the appendix, and while still completely or partially anesthetized she was removed to bed and
40 there burned by a hot water bottle.

Ambrose F. Dowd—for plaintiffs—direct.

Q What was the subjective complaints that she made? A Excitability—

Mr. Horner: It seems to me that that testimony should be confined to the examination. It is immaterial as far as the history of the case is concerned. 10

Mr. Coult: If it does not appear in the case how he came to examine her how can counsel make that statement?

The Court: I think you will have to show the materiality of his testimony before you can ask for the history.

Q Were you called into this case by me for the purpose of testifying? 20

Mr. Horner: It seems to me it is immaterial.

The Court: I will allow that because if he was called by Judge Coult I think he has a right to ask these questions.

Mr. Horner: But the answer to the question is going to be absolutely not permissible.

The Court: I will allow it.

A No. 30

Mr. Braun: I object, your Honor.

The Court: As far as I can tell now he is called by Judge Coult to give his opinion following an examination. If that is the case, he certainly has the right to ask who called him in. I think he has a right to ask who called him in.

Mr. Braun: But he hasn't a right to ask him about the history. 40

Ambrose F. Dowd—for plaintiffs—direct.

The Court: I will withdraw the question as to the complaints.

Q You took a history of the case, you say? A I obtained it, yes.

10 Q What sort of a physical examination did you make? A It was confined to palpation and inspection of her back and having her raise her arms and move her body.

20 Q What did you find? A I found an irregularly circular or oval scar on her back covering the greater part of the right shoulder blade, not the entire top of it, and extending below the right shoulder blade and about two inches to the left of the midline of the back. The right part of that scar is raised and thickened along the margins and for half an inch or three-quarters of an inch in toward the center of the scar, and the remainder of the scar is thin and not adherent. Along the left margins and lower margins of that scar there were some small ulcerations. There seemed to be, when she raised her arm upward and outward, some difficulty and limitation of motion.

30 Q Could you see what caused that limitation and difficulty in motion? A It was apparently caused by pain and tenderness in the scar near the margins and near the ulcerations.

Q What relation were the ulcerations to the scar?

Mr. Horner: I object to that unless the doctor is appearing as an expert.

The Court: You are asking for the physical aspect of it?

40 Mr. Coult: I don't think that is a proper objection; I think it is for the doctor—

Ambrose F. Dowd—for plaintiffs—direct.

By Mr. Coult.

Q Do you object to giving an opinion? A Yes.

Q Is that because you were not given an expert's fee? A No.

Q Why, then? A Because I was retained by someone else to give an opinion and I would rather not sell it to anyone else. 10

The Court: The doctor is not called upon to give an opinion. He should not be called upon to give an opinion unless he is employed and accepts the employment.

Q You don't care to accept any employment? A No, sir, and I am here under subpoena.

Q You understand, of course, I am willing to pay? A I understand that perfectly. 20

Q And you are not willing to? A I am not willing to.

Q From the condition of that scar as you observed it, could you tell whether or not there was a good blood supply there? A That calls for an expression of opinion.

Q Could you tell from observation? A No, I don't think anyone can.

Q And you don't want to express an opinion as to whether or not there was a good blood supply? A No, I don't want to express an opinion. 30

Q Could you tell from observation how much muscular tissue there was beneath the scar?

Mr. Horner: It seems to me, if your Honor please, this is all going into expert opinion.

The Court: I suppose if it is something he could see he could tell about it. 40

Ada G. Hunter—for plaintiffs—direct.

A The scar is not conspicuously depressed; it is filled up with something, I couldn't tell whether it is muscular or fibrous tissue.

Q And you are not willing to express an opinion as to what you think it is? A No, I will not express an opinion as to that.

10

Cross examination waived.

ADA G. HUNTER, sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Where do you live, Mrs. Hunter? A 54
20 Berwin street, Orange.

Q You are the sister of Mrs. Haring, the plaintiff in this case? A Yes, sir.

Q Do you recall the occasion of her operation in March, 1927? A Yes.

Q Were you at the hospital? A Yes.

Q You went there with somebody else? A I went there with my sisters and Mr. Haring.

Q What was the first thing you did after you got there? A I sat in the hall. I didn't see
30 Mrs. Harding before her operation.

Q Did you see her after the operation? A Shortly afterward.

Q What was the first you saw of her? A Dr. Banks came down about five minutes after the operation and called us into the room.

Q Did you see her come back into the room? A Yes, from the solarium at the end of the corridor.

Q How did she come back into the room? A
40 On a carriage.

Ada G. Hunter—for plaintiffs—direct.

Q How long was it before Dr. Banks came?
A Oh, about five minutes.

Q What did you do? A He went to the door of her room and then he called us and told us we could come in for a few minutes.

Q Who is "us"? A Mr. Haring and my three sisters. 10

Q What did you find when you got in? A I found Mrs. Haring in bed. We asked her how she was and she said, "I am awful; I am terrible."

Q Who was there then? A Dr. Banks, my three sisters and myself.

Q Was there a nurse in there at that time?
A I couldn't say.

Q Where were you? A About three feet from the bed.

Q What did she look like? A I thought she looked awful. Her eyes were wide open and she was staring. 20

Q Have you seen anybody come out of ether before? A Six or seven.

Q Had you ever seen any look like this before?

Mr. Braun: I object.

Objection sustained. 30

Q Can you say whether there was any difference you saw between those six or seven persons you saw coming out of ether and your sister?

Mr. Braun: I object.

Objection sustained.

Q Can you describe her appearance? A She looked to me as if she were in great pain. Her eyes looked wild when she opened them. 40

Ada G. Hunter—for plaintiffs—direct.

Q Was Dr. Banks in the room then? A Yes.

Q Where was he? A Standing nearer the head of the bed than I was.

Q Where were you? A On the same side as Dr. Banks nearer the foot.

10 Q How far was Dr. Banks from you? A A foot or two feet.

Q What else did your sister say? A She said, "Get me out of this."

Q Did anybody say anything to her in response to that? A Dr. Banks said she had a beautiful jag on.

Q Did she say anything to Dr. Banks? A Nothing except, "Get me out of this." She said that to him.

20 Q What did you do? A Just then we turned and walked out of the room after she said that.

Q How long were you in there altogether? A At least three minutes; possibly four.

Q Were your other sisters in the room at the time you left? A I won't say we all left together, but we all started for the door together.

Q Do you know who went out first? A I don't recall that.

30 Q Can you remember anything else that your sister said on that occasion besides, "Get me out of this"? A I don't remember whether it was on that occasion or the next time I saw her.

Q When did you see her the next time? A In the afternoon with Mr. Haring.

Q Who else was present at that time? A As far as I can remember just the two of us.

Q Where did you see her? A In her room.

Q In the hospital? A In the hospital.

40 Q Was Mrs. Baigrie there? A At one time while we were in the room she came in, yes.

Ada G. Hunter—for plaintiffs—direct.

Q While Mrs. Baigrie was in the room, did you have any conversation with your sister? A I had a conversation with her but I wouldn't be sure that Mrs. Baigrie was in the room at the time.

Q You are limited, you understand, in reciting any conversations, to those which occurred while Mrs. Baigrie was in there. Is there any conversation you recall definitely as being in her presence? A I don't remember. 10

Q What was your sister's appearance at that time? A She still appeared to be suffering.

Q In what position was she in bed? A A little to one side, as I remember.

By the Court.

Q On her back? A Not exactly. 20

By Mr. Coult.

Q What were the positions of her hands and her arms? A Her hands were outside the covers and clutched in that position (indicating); she couldn't relax.

Q When you say "in that position" you illustrate by holding your hands claw-like, is that it? A Yes. 30

Q When did you first learn that your sister had a burn? A Mr. Haring told me on Friday evening.

Q Previous to that time had you seen Dr. Charles Banks? A I saw Dr. Banks the morning of the operation.

Q At the time you were in the room? A Yes.

Q Did you see him after that? A Yes.

Q When was that? A When he came down after the operation. 40

Ada G. Hunter—for plaintiffs—direct.

Q Where were you then? A Sitting in the hall on the window seat.

Q What did he say and do at that time? A He showed us the tumor that he had removed.

Q Did he talk about Mrs. Haring at that time? A When he came out of the room he did.

10 Q What did he say? A He said she was coming out of it nicely and for us to go home.

By the Court.

Q That was the second time? A The second time.

By Mr. Coult.

Q How long was he in there? A I couldn't say positively; not very long.

20 Q Were you in there with him? A Not the second time.

Q After you went into the room on the occasion of Dr. Banks' being down the first time and he came down again, did you see Mrs. Baigrie? A Yes.

Q Where did she come from? A From Mrs. Haring's room.

Q How soon was that after you came out? A I would say it was fifteen minutes.

30

By the Court.

Q Did you stay there in the corridor or around there between the time that Dr. Banks first came down and the time he came down the second time? A Yes, on the window seat.

By Mr. Coult.

Q How near was the window seat to the door? A Almost opposite it.

40

Ada G. Hunter—for plaintiffs—direct.

Q How far from it? A Twelve or fifteen feet.

Q Have you any recollection of Mrs. Baigrie's going into the room after you came out? You say you came out when you were in there with Dr. Banks. A Yes, sir.

10

Q In between that time and the time you saw Mrs. Baigrie come out of the room did you see her go into the room? A No, she came in just as we were going out the first time.

Q What did she do when she came out of the room afterward? A She went hurriedly up the hall and came back in a few minutes with Miss McCarrick.

Q Do you know Miss McCarrick? A Yes.

Q What did Miss McCarrick do? A They both went into the room and closed the door.

20

Q Then what happened? A Miss McCarrick came out in about two minutes and went hurriedly up the hall and came back with a hypodermic in her hand.

Q Did you know what it was? A Yes, sir.

Q Suppose you describe it. A It had a steel needle about five inches long with a glass barrel and it had something in it.

Q About how soon after Dr. Banks came out? A About a half an hour.

30

Q And it was after that that Dr. Banks came out and told you that everything was all right and to go home? A Yes.

Q Did you hear the conversation with Dr. Banks just before your sister left the hospital?

A I don't remember any then.

Q About three months after the operation?

A Yes, I did.

Q Where was that? A In Mrs. Haring's home.

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Ada G. Hunter—for plaintiffs—direct.

Q Can you fix the date any more definitely than that? A No, I can't remember the date.

Q On that occasion what did he say to you and what did you say to him?

10 Mr. Horner: I object to this as to any of the defendants other than Dr. Charles Banks.

The Court: I said before that I will instruct the jury now that anything that is in the nature of an admission by one defendant does not necessarily bind the other defendants.

Mr. Horner: It doesn't bind them at all.

Mr. Coult: This is likely to affect Dr. Banks' credibility and in that respect it will affect the whole case.

20 Mr. Horner: I don't see how attacking Dr. Banks' credibility will attack the other defendants' credibility.

Q What was said? A Dr. Banks said that the burn was so deep that her lungs were exposed and that he had not expected she would live because he thought empyema would develop.

30 Q Did you know what empyema was? A A little bit; I don't know positively, but I know it is pus in the pleural cavity or the long cavity.

Q Did he tell you anything else? A He said there was danger of infection from the time the burn had come on her back until it was entirely healed over.

Q Did he tell you anything as to the size of the burn? A No; I had seen the burn.

40 Q Did he say anything to you as to the depth of it? A Except that the lungs were exposed, I don't remember anything else.

Ada G. Hunter—for plaintiffs—direct.

Q Did you see your sister from time to time after she received this burn up to the time she left the hospital? A Almost every day.

Q And did you see her after she left the hospital? A Oh, yes.

Q Up until when? A For two months afterwards. 10

Q Just describe to the jury what this condition of her back looked like during the time that you saw it and how she appeared and acted. A Well, it was most horrible. The most horrible thing I ever saw. It looked like red, raw beef; pusy and runny.

Q How long did it continue to look like that? A For months.

Q What was her condition during that time? A Very nervous and she couldn't relax. She cried nearly all the time. 20

Q Did she appear to you to be suffering pain? A Terrible pain.

Q How long did that continue? A Almost all the time it was being dressed, up until September.

Q Previous to this time what had been your sister's condition of health? A I thought she was in very fine condition. 30

Q Can you recall when she began to suffer from complaints that made the operation necessary? A No, I don't know that.

Q When did you learn that an operation in her case had been advised? A On the Sunday previous to the operation.

Q Had your sister had any help in her household? A No.

Q Has she had any help since this? A Always since. 40

Ada G. Hunter—for plaintiffs—direct.

Q What kind of help? A General help to do her work for awhile.

Q That is still continuing? A That is still continuing.

Q What is her condition of health now? A I think she is very nervous.

10 Q How does she show that? A She twitches as if in pain and she says it is drawing her and she can't get comfortable.

Q You said something about her crying. Has that ceased? A No.

Q Does she have crying spells yet? A Yes, she still cries.

Q How frequently? A Every time I see her.

Q Did she ever do that before the accident? A Never.

20 Q Have you ever seen any pustules or boils around this scar? A I can't say that I have.

Q Previous to the happening of this accident what was her condition as to nervousness? A I don't think she was a bit nervous.

Q Was she able to engage in social activities? A Yes.

30 Q How about her activities outdoors and being able to get about? A She was always active. She rode a bicycle, drove a car; she has always been able to do anything she wanted to do all her life.

Q What has been her condition since this burn? A She has not been able to engage in anything.

Q Something has been said about her engaging in social activities. Has she been able to get about?

Mr. Braun: I object. The plaintiff can give the best evidence as to that.

40 Mr. Coult: I will withdraw the question.

Ada G. Hunter—for plaintiffs—cross.

Cross examination by Mr. Braun.

Q Mrs. Hunter, your sister has always been in perfect health, has she? A As far as I know she appeared to be.

Q Are you younger or older? A I am older.

Q Do you recall that she had infantile paralysis? A Yes.

Q Do you recall it was necessary for her to wear a brace? A Yes.

Q Does she still wear a brace? A Yes.

Q Yet you say she could do all those things? A Yes, she has danced and she could ride a bicycle and she has driven a car.

Q When did she ride a bicycle? A When they were in style.

Q You don't know whether she could ride a bicycle just before this operation or not, do you? A No.

Q Do you know how long she had this tumor or whatever it was? A No.

Q Do you know whether or not she was complaining of headache and feeling tired for the past three years? A No, sir, I do not.

Q She never told you anything about that? A No.

Q So that you don't know how she felt personally? A She appeared to be all right.

Q Your father died of cancer, did he not? A Yes.

Q She also had an operation for tonsilitis, did she not? A Yes.

Q How long ago was that? A I really couldn't remember.

Q 1925, was it not? A I don't remember.

Q About that time? A Perhaps about that time.

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Ada G. Hunter—for plaintiffs—cross.

Q You would say she was in perfect health notwithstanding that she went through this operation? A As far as I could see she was in perfect health.

Q Do you know what the trouble was with her foot that she had to wear a brace? A She had infantile paralysis.

Q Do you know what condition it was? A I couldn't say.

Q Was it a foot drop? A Her foot does drop.

Q You testified to going into the room about five minutes after your sister returned from the operating room. A Yes.

Q Had you seen your sister return? A I saw her while I was sitting in the solarium at the end of the corridor. I saw the carriage come down with her on it.

Q You then did what? A We came from the solarium down the corridor and then sat on the window seat.

Q Did you see Mrs. Baigrie at any time during the time you were sitting in the solarium until Dr. Banks came? A No, I don't recall.

Q Was the door in your vision? A The entrance to the room was in plain vision of the solarium.

Q Were you watching? A Yes.

Q When did you first see Mrs. Baigrie? A When Mrs. Baigrie came into the room just as we was leaving the first time.

Q Had you seen anyone else come out of the room before that? A No, I don't remember.

Q You didn't see Dr. Anuario or Miss Grant or Dr. Winifred Banks come out? A I don't recall seeing anybody.

Q Did Dr. Banks call you when he came out or did he beckon to you? A He beckoned to us.

Ada G. Hunter—for plaintiffs—cross.

Q He said for you to peek in, did he not? A He said we could come in for a few minutes.

Q Did he say anything about just looking at her? A No.

Q Did he say anything about talking to her? A No, we did talk to her; we asked her how she was. 10

Q Was she conscious? A Semi-conscious.

Q Did she appear to be delirious at all? A No.

Q What did she say? A To Dr. Banks to get her out of it.

Q How did you know she said it to Dr. Banks? A Dr. Banks said, "Hello, Louise." And that is when she turned to him and said to him, "Get me out of this." 20

Q You were in the room only four minutes at the most? A Yes.

Q Was Mrs. Baigrie in the room at that time? A She came in as we were going out.

Q When did Dr. Banks go out? A We all started out together; whether we all got out together or not, I don't remember.

Q What did you do when you got outside? A Sat on the window seat.

Q Who was with you? A My three sisters and Mr. Haring. 30

Q Where did Dr. Banks go? A Up for the second operation.

Q Immediately? A Immediately.

Q You didn't hear any conversation between Dr. Banks and Mrs. Baigrie, did you? A I didn't notice; I didn't hear any.

Q It didn't take long for you to get out of the room, did it? A It may have been two minutes.

Q To get out of the room? A We walked slowly out of the room. 40

Ada G. Hunter—for plaintiffs—cross.

Q When Dr. Banks came down again what was the first thing he did? A He showed us the tumor he had removed from Mrs. Haring.

Q Before he went into the room? A Yes.

Q Was Mrs. Baigrie present at that time? A No, this was out in the corridor.

10 Q Was the door open? A I couldn't say.

Q Where were you standing with reference to the door? A About twelve or fifteen feet away from the door at the window seat which I mentioned before.

Q Twelve or fifteen feet from where? A To the opposite side of the corridor, north from the door.

Q Could you look into the room from where you were? A A short distance; we couldn't look into the bed.

20 Q Which way was the bed? A North and south.

Q Did it extend to the doorway? A The bed extended almost to the door but we were further up the corridor.

Q How far was the bed from the door? Just a few feet? A I don't remember that.

Q You don't know whether it was just inside the door? A I don't remember; I know it was in the room but I don't know just where.

30 Q You recall where everybody stood at the time? A Yes.

Q Which side of the bed did you stand on at that time? A We stood on the side of the bed nearest the door.

Q Where did Dr. Banks stand? A In the same place, a little nearer the head of the bed.

Q How close to the door were you when you were standing there? A I really couldn't say; I was a foot or two feet from the bed; I don't know how near the door I was.

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Ada G. Hunter—for plaintiffs—cross.

Q Did you see the bureau in the room? A I didn't notice it.

Q Did you notice the other bed? A I didn't notice it.

Q You were there that afternoon, weren't you?
A The same afternoon.

Q Don't you recall the bureau? A I don't recall the bureau.

Q You were there quite frequently before your sister was moved? A Yes.

Q Didn't you see the bureau? A I know there was one there, but I can't remember it.

Q Don't you remember the other bed? A No.

Q And you stood by your sister's bedside and you were facing your sister, of course, toward the window? A Yes.

Q Was there anything between you and the door? Could you walk right to the bed? A As I thought, we did, but I am not sure of that.

Q That is your best impression? A Yes.

Q So the best you can say is that there wasn't anything between you and the door. A I don't remember seeing anything.

Q When Dr. Banks came back the second time after showing you the specimen, you say he went into the room again? A Yes.

Q How long did he stay there? Just a few minutes? A About three minutes, perhaps; I am not sure, but I think three or four minutes.

Q You don't know whether anyone else was in the room with him at the time or not? A I am not sure.

Q You didn't hear any conversation at that time? A No, sir.

Q You saw your sister that afternoon? A Yes.

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Ada G. Hunter—for plaintiffs—cross.

Q Did she say anything to you then about having been told by Dr. Banks that she had been burned? A No.

Q Did she ever tell you that she had been burned before your brother-in-law told you? A No.

10 Q Although you saw her every day from that time on? A Yes.

Q From that time on until you found out about it? A She told me something but not that she was burned.

Q When Dr. Banks came out the second time you say he said she was getting along fine and she would be all right? A As I recall it. He said she was resting comfortably and for us to go home.

20 Q What time was that? A About between half-past eleven and twelve.

Q How long did you stay after that. A We went—after Dr. Banks told us to go we went home.

30 Q Up to that time you had been continually outside this room or at the end of the corridor where you could see the room from the time your sister was taken to the operating room? A No, I will contradict that. When Mrs. Haring was taken to the operating room, myself and one of my sisters went out and drove out to get some flowers, and we were back before she was brought from the operating room.

Q From the time she was brought from the operating room you had her door in constant view? A Yes, it was in view.

Q And you say you saw this nurse with the hypodermic needle? A Yes.

40 Q Did you see anything else? A Not that I can remember.

Ada G. Hunter—for plaintiffs—cross.

Q Did you see any dressings or bandages? A I didn't notice anything else.

Q Did you see anything else in her hands? A Yes.

Q You saw this hypodermic needle? A Yes, she was carrying it in her hands with some cotton. 10

Q How much cotton was there? A I wasn't close enough for that.

Q In which hand did she have it? A I don't recall.

Q Did she have it in position to use with the plunger in her hand? A I can't say.

Q Did she have it above the waist line? A Carrying it, yes, above the waist line.

Q Did she have anything else in her hand? A I didn't see anything. 20

Q You didn't see Mrs. Baigrie have anything? A I didn't notice.

Q You didn't hear any other conversation between your sister and Dr. Banks other than you have related? A No, I did not.

Q Or between your sister and anybody else in the room? A I heard conversations between my sister, her husband and myself.

Q I mean in the afternoon when Dr. Banks was there? A No. 30

Q You didn't hear any other remarks? A No.

Q This conversation that you had with Dr. Banks in which you say empyema was mentioned, do you recall the date of that? A No, I do not.

Q What day of the week was it? A I don't know.

Q Where did it take place? A Down at Mrs. Haring's home, I believe, in her living room.

Q Who was present? A My sister and myself. 40

Ada G. Hunter—for plaintiffs—cross.

Q Anyone else? A No, sir.

Q Where was Mrs. Haring? A She was dressing after getting her back dressed.

10 Q Where did this conversation take place? A I asked Dr. Banks how she was coming along and that is the information he gave me.

Q Only that the lungs were exposed and about the empyema? A Only that he didn't expect her to live; he said he had thought it in the beginning.

Q Which was it, that the lungs were exposed or would be exposed to empyema? A That she was so burned that in the beginning the lungs were exposed and that he thought empyema would develop.

20 Q You are positive about that? A I am positive about that?

Q You, of course, never studied anatomy and medicine. A No.

Q Empyema was a new word to you then, wasn't it? A No, it was not. I had heard it several times before.

Q Under what circumstances? A Several years before a neighbor of ours had it.

Q Had it ever been explained to you by a doctor? A No.

30 Q But he used that word.? A He did.

Cross examination by Mr. Quaglia.

Q Did you see the carriage being brought back from the operating room with Mrs. Haring on it? A Yes.

Q Did you see Mrs. Baigrie at any time? A No.

40 Q Did you see Mrs. Baigrie walking hurriedly in front of this carriage? A No.

Adele English—for plaintiffs—direct.

Re-direct examination by Mr. Coult.

Q In response to a question by Mr. Braun you said that while Mrs. Haring had not told you that her back was burned she told you something. What was that something?

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Mr. Braun: I object to that.

The Court: It doesn't appear it was in the presence of any of the defendants.

Mr. Coult: Counsel elicited parts of it and I wanted to get the rest of it.

ADELE ENGLISH, sworn in behalf of the plaintiffs.

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Direct examination by Mr. Coult.

Q Mrs. English, where do you live? A 57 Hampton terrace, Orange.

Q You are a sister of the plaintiff, Mrs. Haring? A I am.

Q And you were present at the hospital at the time of her operation? A I was.

Mr. Coult: Your Honor, I don't want to slight this case, but there is so much of this preparatory—

30

The Court: Start in where you want to and it will come out on cross examination if they want it.

Q You came in with your sisters and brother-in-law and waited outside of her room? A Yes.

Q Did you see her brought to the room? A Yes, sir, on the carriage.

40

Adele English—for plaintiffs—direct.

Q Did you go into the room later? A Later when Dr. Banks told us we could go in.

Q Do you recall how long after she came into the room? A I waited five or six minutes.

10 Q Where did you go in the room? A On the side of the bed towards the windows.

Q How far is that from the windows? A About four or five feet.

Q Was there anything between you and the window? A I don't recall that there was.

Q Was Dr. Banks there? A Dr. Banks was, yes.

Q Where was he? A Standing at the bed on the other side from me.

20 Q Will you describe what the appearance of your sister was? How she looked and how she acted. A She looked as if she was in great pain. When she opened her eyes she seemed to stare. It was a rather wild expression. Her skin was sort of green and her hands were clutched resting on the top of the covers.

Q Did you hear her say anything? A Yes, I heard her say, "Get me out of this."

Q Did you hear Dr. Banks say anything? A I heard him say, "She has an old-fashioned jag on."

30 Q Did you hear your sister say anything else? A She spoke to me when I was going out.

Mr. Braun: I object.

Q Was Dr. Banks there? A Yes.

Q What did your sister say? A I asked her how she was. I said, "Be brave. We are praying for you." She said, "Adele, I am all cut."

40 Q Did she say anything more as to where she was cut? A No, she did not.

Adele English—for plaintiffs—direct.

Q Did you hear her have any conversation with Dr. Banks? A Just to have her say, "Get me out of this."

Q How long were you in the room? A About three or four minutes.

Q Where did you go from there? A I went out of the room. 10

Q Where did you go when you went out of the room? A Sat on the window seat.

Q How near was that to the door of the room? A About twelve or fifteen feet.

Q What was the first thing you noticed in connection with her room while you were out there? Did you see anyone come out there? A Not that I recall, no.

Q Do you remember seeing anybody come in or out of the room afterward? A I remember seeing Mrs. Baigrie and I remember seeing Miss McCarrick go up and down the hall. 20

Q Do you recall whether she carried anything? A I don't recall.

Q Do you know where they went? A No, I do not.

Q How long was it after you went out of the room before you saw Dr. Charles Banks again? A Well, I would say maybe three-quarters of an hour. 30

Q Where were you then? A Sitting at the window seat.

Q What did he say or do at that time? A He said we should go home then.

Q Previous to that you don't know whether he was in her room or not? A I don't recall.

Q Then you went home? A Then I went home.

Q What was your sister's condition of health before this occurrence? A I think very good. 40

Adele English—for plaintiffs—direct.

Q Something has been said here about her having had infantile paralysis. Do you know when that was? A When she was about five years old.

Q Are you older or younger than she is? A A trifle older.

10 Q Do you recall when she was a youngster?

A I do.

Q Did she wear a brace? A Yes.

Q Was she able to get around? A She was.

Q So far as activities were concerned, could she take part in them? A She danced and she played tennis.

Q How long did she continue to play tennis?

A I think until she was married.

20 Q How long ago was that? A I think she is married about eleven years.

Q After her marriage and up to the time she had this operation was she active otherwise? A Active.

Q She danced? A She danced, yes, sir.

Q What has been her condition since this operation? A She is very nervous.

30 Q Did you see much of her after she was operated on? A Every day after school I went up there to the hospital about half-past three or four and stayed until about six.

Q Do you teach school? A I do.

Q Where? A Orange, New Jersey.

Q What was her condition while she was in the hospital? A She was always very nervous every time I went in.

Q Did she appear to be in pain? A Very much so.

40 Q How did that show itself? A By her eyes and hands while she was lying in the bed. Her eyes were staring and wide and her hands were clutched as though she couldn't relax.

Adele English—for plaintiffs—cross.

Q How long did that continue? A That continued as long as I went to the hospital.

Q After she got out of the hospital and when she got home have you had an opportunity to observe her? A Not as often.

Q But you have seen her? A Yes, sir.

Q How did she act? A She cried and seemed hysterical every time we asked her how she was. 10

Q How often did she cry? A Every time I have seen her.

Cross examination by Mr. Braun.

Q Has she cried today? A She certainly did.

Q Is she in the court room now? A I don't know whether she is or not. I can't see her. Yes, she is. 20

Q Is she crying now? A No, she is not crying now.

Q How often would you see her when you visited her at the hospital? A I would go to the solarium often during the time.

Q She was never nervous at all before this, was she? A Not with me.

Q Did you ever hear her use an expression, "I am so nervous I could jump out of my skin"? 30

A No, she might have used it before the operation, but not to me.

Q Her eyes stared and she had a wild expression when you saw her right after the operation? A Yes.

Q And the eyes were not normal at all? A Not to me.

Q She didn't seem rational? A She spoke rationally, but her expression was wild when she looked at me. 40

Adele English—for plaintiffs—cross.

Q And she said, "I am all cut"? A That's what she said to me.

Q She didn't say where? A No, she didn't.

Q You didn't hear her swear? A Yes, I did.

Q On that occasion or some other time? A

A No, I think it was that occasion.

10 Q You are not sure? A I am not positive.

Q You saw her a number of times when she was complaining? A A number of times at the hospital I saw her.

Q And it is rather difficult to separate what happened on each occasion? A It isn't difficult to separate the first time I saw her.

Q It is difficult to separate the conversations, of course? A Some conversations.

20 Q Her appearance, of course, was something new to you. A Yes.

Q So that, of course, that made a marked impression on you. A Very much so.

Q But conversations from time to time have gradually made it difficult for you to separate them and say on which particular occasion you heard different things said or said certain things in your sister's presence, isn't that so? A I think so.

30 Q And it is rather difficult to say who was present at the time they were said. A I think so.

Q For instance, you can't say definitely where Mrs. Baigrie was during that conversation? A I didn't see Mrs. Baigrie.

Q You have no conscious remembrance of that now? A You mean the first day.

Q At any time. A I don't remember the first time.

40 Q You don't know how she got there? A I don't know because there was another bed and there was the screen there and other people there.

Adele English—for plaintiffs—cross.

Q You were interested in your sister and not these other people. A I was the last of my family to leave. I was lingering. There was another bed and the screen in between.

Q But you were not interested in the other people but in your sister? A That's right.

Q Where were you standing? A At the bed near the window. 10

Q On which side of the bed? A Well, according to the patient, on her right side.

Q Where was Dr. Banks? A He was on the other side of the bed.

Q Where was Mrs. Baigrie when you saw her? A Mrs. Baigrie was at the door.

Q Who went out first? A I don't know whether Mrs. Hunter or my other two sisters went out first, I couldn't say. 20

Q Who went out last? A I think I went out last with my family.

Q When did Mrs. Baigrie go out? A I don't know when she went out.

Q Do you know when Dr. Banks went out? A I couldn't say.

Q You don't know whether he preceded you or followed you? A I don't know.

Q You don't know whether there was a conversation between him and Mrs. Bagrie? A I don't know. 30

Q Did you hear any conversation? A I did not.

Q How did you come to leave? A Mrs. Baigrie was at the door. I thought she wanted to go; she had her finger to her lips. I thought I had better not talk any more so I got out as quickly as I could.

Q When you got outside did you see Dr. Banks? A I don't recall seeing him right then. 40

Adele English—for plaintiffs—cross.

I think shortly after I saw him going to the operating room. He had another operation.

Q Did you see Mrs. Baigrie come out of the room after that? A I can't say that I did.

Q Did you see Miss McCarrick? A I recall seeing her go up the hall; I don't recall her coming out of the room.

10 Q Where were you when you saw her? A In the window seat.

Q With the rest of your family? A Yes.

Q And Dr. Banks did not come back again until about three-quarters of an hour later? A I would say about that time.

Q Did you have any conversation with him then? A He showed us the tumor he had removed from Mrs. Haring and told us we could go home.

20 Q Did he tell you you could go home before he went into the room or after? A I couldn't say that; I think before he went in, but I am not positive.

Cross examination by Mr. Quaglia.

Q Did you see Mrs. Haring being brought back to the room after the operation? A What I thought was Mrs. Haring on the carrier.

30 Q Did that go into the room of Mrs. Haring? A Yes.

Q Did you see Mrs. Baigrie at that time? A I did not.

Q Did you see Mrs. Baigrie walking hurriedly in front of the carriage? A I did not.

Mr. Coult: I offer to call the others, but I wish to shorten the case.

40 The Court: And you offer them before cross examination.

Louise P. Haring—for plaintiffs—direct.

Mr. Coult: Yes, I want to shorten the case and I will not call these witnesses if the failure of production is not commented upon, and if all counsel will agree to that I will not call them.

Mr. Colie: I will have no comments.

Mr. Braun: Neither will I

Mr. Horner: And I will not.

Mr. Braun: But I want it understood only that they were to be called as to what happened at the hospital and in the conversation at the house.

Mr. Coult: Oh, just what happened at the hospital and the condition of health of Mrs. Haring.

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LOUISE P. HARING, one of the plaintiffs,
sworn in behalf of the plaintiffs.

Direct examination by Mr. Coult.

Q Mrs. Haring, where do you live? A 9
Irving street, East Orange, New Jersey.

Q You are one of the plaintiffs in this case?

A I am.

30

Q You had infantile paralysis in your youth,
had you not? A As a child.

Q Do you remember it? A Yes, sir.

Q And you have worn a brace? A Yes.

Q On which leg? A On the right foot.

Q Has that brace been an inconvenience to
you in your activities? A Absolutely none.

Q When did you learn to get along with it?

A Well, it seemed to be as a child—it seemed to
grow up with me.

40

Louise P. Haring—for plaintiffs—direct.

Q When you have your brace on have you any disability in that leg? A Absolutely none.

Q Previous to the day of your operation on March 9, 1927, what had been your condition of health? A Perfect.

10 Q When did you first know that you had to be operated on? A Sunday morning, two days before the operation, by an examination by Dr. Potter.

Q What had been the matter with you at that time? A I had not been feeling like I should.

Q How long had that been going on? A Perhaps about a year.

Q How did you feel? A I felt tired and at times I had a pain in my back.

Q You knew Dr. Banks? A Very well.

20 Q And he was not your family doctor? A Not at that time.

Q Who was your family doctor? A Dr. Potter.

Q You recall the operation, I suppose? A Very readily.

Q Do you remember going to the hospital? A I do.

Q When did you go there? A Tuesday evening about five o'clock.

30 Q Do you know what day of the month that was? A March 8, 1927.

Q When you went there did you know what nurse you were going to have? A No, I did not.

Q When did you first know who your nurse was going to be? A I didn't know it until the morning of my operation.

Q Had you expressed any preference as to a nurse? A Not that I can recall.

40 Q When did you first meet Mrs. Baigrie? A Wednesday morning at seven o'clock, when she came on duty.

Louise P. Haring—for plaintiffs—direct.

Q Had you known her before? A Yes.

Q In what way? A She was a friend of my sisters and also took care of me in a confinement for my younger boy at St. Mary's Hospital.

Q Was anything out of the ordinary done with regard to your operation on the 8th of March? A I went in there in the evening of March 8th. 10

Q What did you do that evening? A I was taken to the third floor, the first room that I was assigned to, and later in the evening Mr. Haring found out there that that—

Q Never mind that. What happened later in the evening? A I was transferred to the second floor.

Q Did you stay there? A Yes.

Q What happened the next morning? A Mrs. Baigrie came in about nine o'clock. I was surprised to see her and she was agreeably surprised to see me. 20

Q What did she do? A She prepared me for the operation.

Q Where did you go from there? A To the operating room.

Q Where was the operating room? A I believe it was at the end of the corridor, to the right of my room.

Q How did you go out there? A On a carriage. 30

Q Who put you on the carriage? A Partly I helped myself with Mrs. Baigrie's assistance.

Q When you got to the operating room what did you find? A I saw Dr. Charles Banks.

Q Anybody else? A And Sister—Dr. Winifred Banks, a nurse, and Mrs. Baigrie was with me.

Q Was Dr. Anuario there? A I don't recall him. I wasn't familiar with Dr. Anuario as I 40

Louise P. Haring—for plaintiffs—direct.

had only seen him the night before for a few minutes.

Q What happened to you there? A I was assisted onto the operating table.

Q Where you were operated upon? A
10 Where I was operated upon.

Q Do you remember being put under ether?
A Yes.

Q Who did that? A Dr. Winifred Banks.

Q Was she behind a screen or in an alcove?
A No, I believe she was at my head.

Q You had some trouble getting the ether?
A Yes, the bag broke twice.

Q How long was it before you were anesthetized? A I don't remember.

20 Q How long was it between the time you came into the operating room until you were brought back? Can you tell us step by step what happened? A As I got on the operating table Dr. Winifred Banks asked Dr. Charles Banks was he ready and he said, "Yes," and she put some kind of funnel on my nose and a few seconds afterward said, "Oh, sister, there goes the bag," and she asked for adhesive tape and the sister handed it to her and she repaired the bag—

30 Q How long did it take? A Perhaps a few seconds; I don't recall.

Q How long a time was it between the time you got in the operating room and on the table to the time you were etherized, can you remember that?

Mr. Braun: I object to that.

The Court: I don't suppose she can.

40 Mr. Coult: She can tell how much time elapsed between the time she got in and—

Louise P. Haring—for plaintiffs—direct.

A It seemed an eternity before I became unconscious.

Q Can you tell us how long it was?

Mr. Colie: I think that shows the uselessness of the question and the impropriety of the question.

10

Q Did the bag break twice? A Yes.

Q And it was mended twice? A I presume it was.

Q After that what is the first recollection you have? A I can remember myself moaning and I can remember Dr. Banks talking very loud to me, saying, "Hello, Louise. How are you?" I said, "Dr. Banks, I am terrible." And he stood and looked at me in the doorway like this (indicating), which is very characteristic of Dr. Banks. I said, "Doctor, I expected this, but not this" (indicating).

20

Q When you say you "expected this but not this" you are putting your right hand on your abdomen and your left hand on your shoulder. Is that what you did at that time? A Yes.

Q What did he say to that? Anything? A He didn't say anything. He just looked at me.

Q What happened after that? A Well, I kept moaning all the time, "Get me out of this; get me out of this." And nobody seemed to pay any attention to me and as Dr. Banks turned to leave the room I swore.

30

Q Was your family in the room at that time?

A I don't recall that, Mr. Coult.

Q Do you remember having a conversation with any of your family? A My sister, Mrs. English, after I had said that.

Q Can you tell us how long it was between the time you spoke to Dr. Banks and the time you had

40

Louise P. Haring—for plaintiffs—direct.

the conversation with your sister? A It seemed to me that it was at the same time.

Q What did you say to her and what did she say to you? A She leaned over and kissed me and she said, "It will be all right, Louise; we are praying hard." And I said, "Dell, I am all cut.
10 My shoulders are all cut."

Q Why did you say your shoulders were cut, do you recall? A Because I had a terrible pain from my shoulders; I thought they were bleeding.

Q Did you make any other complaints? A Not that I can recall other than to keep crying for them to get me out of it.

Q Do you remember how many times you said, "Get me out of this"? A All the time.

20 Q What is the next recollection you have? A I recall Dr. Banks again and I apologized to him for swearing. I said, "Dr. Banks, I should have said, 'God help me' instead of what I said."

Q Do you remember what was happening then? A Nothing, only extreme agony in my shoulders.

Q Can you recall anything being applied to your back? A Yes.

30 Q When was that? A Right in the morning after my operation I recall after Dr. Banks and my sister left the room and I heard Miss McCarrick and Mrs. Baigrie in the room and I heard Miss McCarrick saying, "Put it on thick; put it on thick."

Q What was your position in the bed? A I can't recall that.

40 Q Did you remain conscious between the time you talked to Dr. Banks and your sister at the time that you recall Mrs. Baigrie and this other nurse putting something on your back? A I don't believe I did.

Louise P. Haring—for plaintiffs—direct.

Q Without going into too great detail, just being as brief as you can, will you tell the Court and jury what happened to you in the hospital by way of treatment between the time you had the operation and the time you left? A Applications of unguentine were applied to my back, I don't know how often, but perhaps once a day, with great thick bandages, and I couldn't lie on my back, I couldn't lie on my stomach and I couldn't lie on this side either, because it was around the arm, so I had to rest on this side. I couldn't be given an anesthetic because the doctor told me they would have had to give me too much to overcome me because I was in hysteria. For three months, I can safely say, I did not shut my eyes either night or day. About a week after the operation, or rather the burn, Dr. Banks cut me; that is, cut the flesh off my back on two different occasions. I sat up in bed as I am sitting now—

Q Can you recall when the first time was that Dr. Banks cut the flesh off your back? A I think it was about a week later, or perhaps four or five days later, and while he was cutting it, I said, "Dr. Banks, I can't stand it." He said, "Yes, you can." I said, "I can't stand it." He said, "Louise, you are good stuff and you have got to stand it." I said, "Dr. Banks, you will kill me." He said, "If I don't do it it will kill you." He said, "If I don't cut this off you will die."

Q Did you see what he took off your back? A Yes.

Q What did it look like? A Like elephant hide; like thick leather.

Q How thick? A The stuff that came off was like codfish steaks, about a half-inch thick, with flesh and pus and blood. It was a horrible sight.

Louise P. Haring—for plaintiffs—direct.

Q How long did the first operation last? A Perhaps about a half hour.

Q Where was it performed? A In the room that I was changed to, in room 36.

Q In the room you were taken to from the operating room? A No.

10 Q How long was it between the first time your back was cut and the second time? A Perhaps a few days.

Q On the second occasion what was taken off? A Some more of that hide, I believe the doctor called it. It had to be taken away to make a vent for the pus to come out.

Q How did you know that? A He told me that.

20 Q Who told you that? A Dr. Charles Banks.

Q That the pus could come out from where? A Well, from the sore.

Q Did that hurt? A I don't like to think of it.

Q How long was it after that, Mrs. Haring, before you ceased having dressings applied? A Nine months.

Q And during that time did you suffer any pain? A Extreme pain.

30 Q And after the dressings were removed did you have any trouble with your back? A Yes, I have trouble to this day.

Q Have you had any trouble with boils or pustules? A Yes, I don't know whether they are boils or pimples, but they seem to come to a head and there is pus in them and they break.

Q Have you got any now? A I believe I have.

40 Q Did you ever have those before? A I can't recall that I ever had them.

Louise P. Haring—for plaintiffs—direct.

Q Where do they come? A All over the back, particularly around the surface of the scar.

Q What difficulty, if any, do you have now in getting around and getting the full use of your limbs? A My limbs are all right.

Q I mean your arms. A I can't move my arms without pulling my flesh. 10

Q Can you explain that more definitely? A It seems to me that the flesh is all drawn and shriveled and anybody can feel that it is all drawn up in lumps and as I move that it seems to pull it so; the tissue has been completely destroyed. I asked Dr. Banks one day when I seemed to be discouraged why I was not getting along quicker—

Q Did Dr. Banks ever tell you how big a burn that was? A Yes, sir. 20

Q What did he say? A He said I had a hole in my back that he could put his hand in and he did that (indicating). He said I was a lucky girl that I was alive.

Q When did he tell you that? A About three months afterwards; when I came back from the hospital.

Q When did you find out that you were burned? A Before my husband.

Q Do you know what date? A I can't recall exactly, but it was before Friday night. I believe Dr. Banks made a visit and I asked him what was the matter with my back that I seemed to be in such agony. 30

Q Was there anybody around when you asked him that? A I think Mrs. Baigrie.

Q Did he tell you what kind of a burn you had? A He just said, "You have a beaut." And I started to cry. I said, "Dr. Banks, Ed will go crazy." He said, "Well, don't tell Ed." 40

Louise P. Haring—for plaintiffs—cross.

Q Who is Ed? A My husband.

Q Did you tell him? A No, I didn't; I didn't want to worry him.

10 Q Was it the same day of the operation that he told you? A I don't recall; I know it was before Friday night when my husband found out because it kept me nearly crazy trying not to let them know because they were worried. I must have shown signs to them.

Cross examination by Mr. Colie.

Q You went to the hospital on March 8, 1927? A Yes.

Q You were operated on March 9, 1927? A Yes.

20 Q You left the hospital on May 28th? A I was under the impression that I left May 29th; that was the day before Decoration Day.

Q It has been testified to on your side that the last treatment for the burn was on September 15, 1927. A By whom was that?

Q That is the last dressing that anybody made for the back. A No, my husband made the dressings in October; he took the last dressing off October 11, 1927.

30 Q But this date of September 15, 1927, must refer to a dressing by Dr. Banks. A Perhaps so.

Q Because Mrs. Baigrie testified today—

Mr. Coult: I object to that.

Q When did Mrs. Baigrie give you the last dressing? A Some time in August.

40 Q Did you ever have a Dr. Sherman as a physician in your family? A Yes.

Louise P. Haring—for plaintiffs—cross.

Q Until when? A For a slight operation on our younger boy.

Q But prior to that had he been your family physician? A No.

Q Had he ever treated you? A Not up to that time.

Q Has he since? A Yes, sir. 10

Q Up to what time did Dr. Sherman act as your family physician? A Dr. Sherman called on me I think it was perhaps for an attack of laryngitis I had.

Q I am asking you about the date. A I can't recall the date, but perhaps it might be four years ago.

Q He was an old acquaintance of yours? A Yes, he was an acquaintance; I went to school with him. 20

Q You had known each other ever since you went to school? A As acquaintances; not as friends.

Q When did you first learn that something was the matter beyond the things that appertained to the operation? A I had—

Q When did you first learn that something happened to you beyond the performance of the operation?

The Court: Do you mean by feeling or— 30

Q I mean by being told— A Four years ago—

Q When did you learn from anybody that something had been done with you besides the performing of the operation? A When I was told by Dr. Banks when I asked him what was the matter with my back.

Q You had a night nurse, didn't you? A Yes. 40

Louise P. Haring—for plaintiffs—cross.

Q Didn't you ask Miss Sitnesky on the first night she was there with you what was the matter with your back? A I don't recall it.

Q Do you recall Miss Sitnesky's saying anything to you that it was owing to the impression of your back when you were on the operating table? A She didn't say that.

Q What did she say? A She said it was a slight irritation from the operating table.

Q That is the first thing you heard of what was the matter? A Yes.

Q Now, the next was from Dr. Banks? A Yes.

Q Do you recollect Dr. Banks being in your room and Mrs. Baigrie being there and he said to you that Mrs. Baigrie asked him to tell you that you were burned? A No, I don't recall that.

Q You can't say it did not take place? A I asked Dr. Banks myself.

Q You can't say it did not take place? A I didn't hear it.

Q You mean you don't recollect it? A I don't recollect it.

Q Do you recollect a conversation with Miss Sitnesky, your night nurse in the hospital, while she was there, in which she said to you and in which you said to her, when you were talking about your burn, that Mrs. Baigrie had burned you with a hot water bottle and Dr. Banks had told you that and had told you that Mrs. Baigrie asked him to tell you how it happened? A No, I do not.

Q You don't recollect that? A No.

Q Do you recollect when Dr. Sherman was attending you that you complained of a highly nervous condition and saying to him that you were so nervous you would like to step out of your skin? A I might have said that.

Louise P. Haring—for plaintiffs—cross.

Q The room in which you were prepared for the operation was the room which had two beds in it, is that right? A Yes.

Q On the night previous to the operation in which of those two beds did you sleep? A In the bed nearer the windows.

Q And that is the bed in which you found yourself when you came out of the anesthetic? A Yes.

Q Are you very certain that you were put in the ether bed in the same bed that you had been lying in on this night and for which all the preparations for the operation had been made? A Yes.

Q Didn't that strike you as odd that you should be put in this room in the bed in which you had slept and in the bed in which you had been washed off and fixed for the operation? A I didn't think anything of it at all.

Q Then, are you certain that you were in the same bed? A Positive.

Q And you remained in that bed until you went into the other room? A Yes.

Q How long? A I think about the Monday morning after.

Q How were you taken up to the other room? On a carriage? A On a carriage.

Q And you really could not locate Dr. Banks' exact position with relation to the other members of your family when he came in there before he had gone to the second operation? You could not locate him, could you? A No, I could not.

Q Where was Dr. Banks when, as you testified, he said, "Hello, Louise"? A Standing in the doorway.

Q Where was he? A I presume it was on his entrance.

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40

Louise P. Haring—for plaintiffs—re-direct.

Q What did he say when he went out? A He didn't say anything except after swearing—

Q Did you hear him say that you had a fine old-fashioned jag on? A I did, after I swore.

10 Q I suppose when your family alluded to your expression—from time to time they alluded to it, didn't they? A I was conscious of it myself.

Q Has it been talked about in your family about how you performed on that occasion and the doctor said you had a jag on? A Yes, they heard me say it.

20 Q But I asked you has it been mentioned in conversation in your family. A They told me they felt something was terrible when I said it because they never heard me say it before in my life.

Q Are you sure you really recollect having said that? A Absolutely.

Q And your having it called to your mind by reason of your family having called your attention to it? A Absolutely not.

Re-direct examination by Mr. Coult.

30 Q Mrs. Haring, since this operation what has been your condition as to nervousness? A Terrible.

Q Do you have crying spells? A All the time.

Mr. Coult: If Dr. Banks has his bill and we can agree on it here we will do it now; if not, I will put him on the stand and then I am through.

Mr. Braun: I think we can agree on it.

Motions for a Non-suit.

Mr. Coult: It is stipulated that Dr. Banks' bill for services in connection with the burn alone shall be \$250.

PLAINTIFFS REST.

At four o'clock P. M. the Court excuses the jury until ten A. M. the following day. 10

Counsel for the defendant, Dr. Winifred Banks, moves that plaintiff be non-suited on the ground that there was no legal duty upon this defendant to perform the services that she performed.

The Court: (After argument.) In so far as the defendant, Dr. Winifred Banks, is concerned, it seems to me that the case is in a small compass, and that is whether she assisted in putting the plaintiff on a hot water bag. That is a question of fact that is sharply in dispute. It may be that she had not the duty of preparing her or supervising the preparation of the bed, but the nurse said that she left the room and when she returned she found them putting the patient on the bed and found the hot water bag there later. The jury would have a right to infer negligence from that where the bottle is said to have been in plain view and that she lifted her onto that without seeing that it was removed. She was doing an active thing. It was not as if she was standing by watching somebody else do it; she was acting in the proceeding. And again, she is under a duty to abstain from acts that are harmful. She is a trained woman and the jury might infer it was an improper thing to do. According to the nurse, she must have done this. If she stood and let the other professional people 20 30 40

Motions for a Non-suit.

do the duty she was to do and she stood by
and let them do it and not interfere that
would be one thing, but here it is charged
she actively assisted the patient onto the bed.
The testimony is that she was on one side of
the carriage with the carriage between her and
the bed and that the other doctor was on the
other side of the bed, that is my recollection
of the testimony.

10

I do not think it would make any difference
in my ruling, however, because I cannot pass
on the quantum of the fact; it is only
whether the fact is in dispute or not, and
here she assisted in doing the actual things
and that brings the case past the non-suit. I
will deny the motion.

20

Counsel for the defendant, Dr. Winifred
Banks prays an exception to this ruling of
the Court.

Exception noted as ground of appeal.

Counsel for the defendant Anuario moves
that the plaintiff be non-suited on the follow-
ing grounds:

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1. That it was not shown that the defend-
ant Anuario had any duty with respect to the
preparation of the ether bed upon which the
plaintiff was placed;

2. It is not shown that the defendant
Anuario was negligent with respect to any
duty imposed upon him;

40

3. The plaintiffs have not shown any neg-
ligence on the part of the defendant Anuario;
the defendant Anuario at most was a mere
volunteer and as such can only be liable for
an affirmative or wilfull act of negligence;

Motions for a Non-suit.

4. Finally, that if it can be said that the defendant Anuario was negligent there is the intervening negligence of the defendant Baigrie, and, therefore, he cannot be held liable in the case.

The Court: I will deny your motion. It is the function of the jury to decide whether that or something else was the proximate cause.

10

Mr. Braun: I respectfully move for a non-suit on behalf of the defendant Charles W. Banks on the ground that there is no evidence of any negligence on his part or on the part of anyone acting in such a capacity—

The Court: You have two counts, so I suppose you had better separate them. The first count, as I recall it, alleges the negligence by his agents; that is, something that did not happen in his view. The second count alleges his own negligence, I suppose, in not discovering the burn and treating it sooner.

20

Mr. Braun: The fourth and fifth counts I have run concurrently with the first and second. On the first count I move on the ground that there is no agency established, and even if there is any agency established there is nothing in the scope of that agency which would constitute negligence. Dr. Banks engaged the other two, but whether he did it on behalf of himself or on behalf of the plaintiff has not been shown. Neither is there any proof that he engaged the services of Miss Grant who was a hospital employee. There is nothing in the case to show that he engaged the services of Mrs. Baigrie.

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Motions for a Non-suit.

The Court: I think that is true, unless there was something that she did in his presence in the operating room, because then she was under his control, I suppose. But I do not think he has any control over her outside of the operating room.

10 Mr. Coult: To shorten the case, I will not claim that Dr. Anuario was the agent of Dr. Banks at the time he assisted in placing the patient in the bed. I will not urge that he was vicariously acting for Dr. Charles W. Banks, but I will urge that Dr. Winifred Banks was.

20 Mr. Braun: On the second count it is claimed that Dr. Banks was negligent in not discovering the condition of the patient that existed. The only thing in this case is the testimony by the relatives of this plaintiff that she was complaining and requested to be taken out of it, but every one of them has described her condition as wildness of the eyes and staring and there isn't a thing in the case to show that what she said put anybody in that room on notice or on guard that there was any hot water bottle under her. Dr. Banks had a right to assume that Mrs. Baigrie would fully perform the duties for which she was responsible and would do them in proper manner.

30 The Court: It seems to me that the scope of the agency is a jury question. The two doctors were the agents of Dr. Charles Banks in the performance of this operation. What the scope of the agency was is a jury question because he had some duty to deliver her to somebody after he had performed the operation. I think it becomes a jury question

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Motions for a Non-suit.

as to whether or not it was within the scope of their agency to do what they did when they got down there and did not find the nurse. I suppose she was in the hands of her own representatives when he delivered her to the nurse.

Mr. Coult: The second count, it seems to me, is a question for the jury to determine whether this lady, when she came out of the ether—there was something more than the mere after-effects of ether. There is evidence that she was green and that her eyes stared wildly. 10

The Court: Of course, the doctor denies the statement of the nurse, but the nurse said that she told him on the way out that she had been burned and then, of course, there is the evidence that she pointed to the burned spots. One, of course, might indicate that she had some conscious knowledge because she pointed to her abdomen and then she pointed to her back. And then, assuming it to be true, the doctor left and went off on another operation. He had not looked at her or examined her when the burn was. I appreciate that the doctor does not agree with that as a fact, but that puts the issue before the jury as a question of fact. I will deny the motion. 20 30

Counsel for the defendant, Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Colie: I want to note an exception on the record to your Honor's ruling.

Exception noted as ground of appeal.

The Court: I will grant an exception to each party. 40

Charles W. Banks—for defendants—direct.

Mr. Horner: If I did not ask for an exception at the time your Honor ruled on my motion I ask for it now.

Exceptions noted as ground of appeal.

Adjourned to Thursday, June 14, 1928, at ten o'clock, A. M.

10

THIRD DAY.

Thursday, June 14, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

20 CHARLES W. BANKS, one of the defendants, previously sworn in behalf of the plaintiffs, recalled in his own behalf.

Direct examination by Mr. Braun.

Q Doctor, this burn of Mrs. Haring's was a third degree burn, was it not? A Yes.

Q What is generally considered a third degree burn in medicine? A A third degree burn is one where the flesh is burned.

30 Q That is, deeper than the skin? A Well, not always, it may be a destruction of the skin or the structures underneath the skin.

Q Did this burn at any time-expose Mrs. Haring's lungs? A No.

Q Did it ever threaten to expose the lungs? A No.

Q Did it ever expose the ribs? A No, sir.

Q Did it ever expose the muscle tissue between the ribs? A No.

40

Charles W. Banks—for defendants—direct.

Q Was there any infection present? A No, sir.

Q What was this cutting operation that was performed by you as described by Mrs. Haring as she sat in bed? A Why, the skin, as a result of the contact with the hot water bottle, was dried up and parchment-like. Of course, there is no feeling in that because the nerves were killed by the burn; that is, I mean the nerves in the skin. And the cutting operation was simply lifting off the parched skin and shaving it away. 10

Q How thick were these pieces you removed? A Oh, about a thirty-second of an inch.

Q And how thick is the normal human skin on that part of the body? A It would be less than that.

Q Did this include anything other than the skin? A Some subcutaneous tissue—the loose tissue beneath the skin. 20

Q Did you take off any live tissue that would have any sensation in it? A No. None whatever. I simply cut through the necrotic tissue.

Q What did you use for that, doctor? A I had a pair of thumb forceps and a knife, the blade of which was very sharp, going through the dead skin. 30

Q When did you begin to do that? A As soon as I saw signs of its beginning to separate. I don't recall when it was.

Q Do you know approximately how long after the operation? A It may have been one or two weeks afterwards.

Q Is that a painful operation? A Not ordinarily.

Q Was it in this case? A Why, she expressed pain. 40

Charles W. Banks—for defendants—direct.

Q Did she screech? A She made—yes, she made some outcry.

Q Did she screech and yell? A I don't think she did.

Q You would remember if she did? A I would remember if she did, yes.

10 Q What in your opinion was the cause of that outcry? A Well, of course, she was nervous and I attributed a good deal of it to her nervous condition.

Q By that do you mean apprehension of pain? A Yes.

Mr. Coult: I object to that as leading.

The Court: I will let it stand.

20 Q What would be the cause of any pain, if any, in connection with the operation of cutting off the dead skin? A The operation is painless, the knife going through dead tissue does not give any pain.

Q Are you sure this skin was dead? A Yes.

Q What did give pain, if anything? A The tension; I had to draw the skin taut so I could cut it away easily.

30 Q How large were the pieces? A Well, she had an area, I should think, six inches by eight that was dried and as soon as I saw evidences of its beginning to separate I wanted to get it out of the way so it would not pent up any discharges underneath it. We rather think that is the thing to do.

Q Wherever there is an irritation is there not more or less discharge of lymph and other liquids? A Yes.

Q That did not indicate any infection, did it, doctor? A No, it was in anticipation of any infection that it was done.

40

Charles W. Banks—for defendants—direct.

Q Did that in any way affect the speed of the cure? A Yes, that was the one reason why it was done, because it would speed the cure.

Q How long after the first of these cutting operations was the second performed? A Well, of course, I didn't remove it all the first time and I finished the removal of it a few days afterward. I don't recall just how many days it was. 10

Q How many times did you do it altogether? A Twice.

Q And was that in the nature of an operation? A No.

Q Did you classify it as an operation? A I think not.

Q Doctor, I think you already testified to this— 20

The Court: Don't let us repeat anything. I think the doctor went pretty well over the case. What took place in the room is what I did not allow cross examination on.

Q Doctor, at any time was there a depression or a hole made by loss of tissue in Mrs. Haring's back that was deep enough for you to put your fist into? A No.

Q Did you ever tell anyone that there was such a depression there? A No, I never did. 30

Q Did you ever tell anyone that you were afraid of empyema? A No, sir.

Q What could possibly cause empyema in a case of this kind? A Well, there would have to be an intimate contact with the outside world. Empyema is an infective thing due to a germ and germs have to get into the pleural cavity in some way. There was no contact of the pleural cavity with the external world in this case. 40

Charles W. Banks—for defendants—direct.

Q Was there any danger of it? A No.

Q When you returned to Mrs. Haring's room after the operation, how long after she had left the operating room was that? A Oh, about five minutes.

10 Q What was her condition at that time as to consciousness? A She was unconscious.

Q Do you know what the cause of her unconsciousness was? A Well, the same as it is in every case when they are anesthetized; they are always unconscious for some period after the operation.

Q And was this or was this not a serious operation? A It was a capital operation.

Q In fact, it was a double operation, was it not, doctor? A Yes.

20 Q I don't remember, doctor, as to whether you testified as to the nature of the anesthesia that was used in this case. A She had nitrous oxide gas together with oxygen until she was unconscious and then ether was gradually given to her for the reason that we can secure a deep relaxation with nitrous oxide and oxygen and we are compelled to give a complete ether narcosis for these big undertakings.

30 Q Did anything precede the nitrous oxide and oxygen? A She had morphine and atropin.

Q What was the purpose of that? A That was so as to give less anesthetic so that she would go under easier and so as to prolong the unconscious period after the operation.

Q Would that prolong the unconscious period after the operation? A It would help considerably.

40 Q How long would that unconscious period normally last? A Well, it varies in different

Charles W. Banks—for defendants—direct.

cases. Of course, it depends on the nature of the operation and the amount of anesthesia they had.

Q In this case. A In this case, I would expect that period to extend two or three hours.

Q And during that period would a patient be able to experience a sensation of pain sufficient to know and understand that it was pain and to be able to intelligibly express or describe the sensation to anyone else? A I don't think so. 10

Q Were there any symptoms on the part of Mrs. Haring or evidenced by her while you were there at the first visit that could be interpreted by you in any way as a manifestation of pain at the shoulder caused by anything outside of what she had gone through in the operating room? A There were none.

Q What manifestations, if any, did you notice? A Why, she was lying very quietly at the first visit, asleep. 20

Q Did she open her eyes at any time? A I don't recall that she did.

Q Did you speak to her on that occasion? A No, sir, I never do things of that kind; I always want them to sleep.

Q Do you recall beckoning to the family? A Yes.

Q What was your purpose in doing that? A I thought they would be interested to see that she was in good condition. 30

Q Was she in good condition? A She was.

Q And you permitted them to look at her? A Yes.

Q Do you know how long you permitted them to stay there? A Oh, I think not more than two minutes.

Q And did they have any conversation at that time with the patient? A I don't recall that 40

Charles W. Banks—for defendants—direct.

they did; I know I would not have permitted it.

Q Is it good medical or surgical practice to permit conversation five or ten minutes after a patient comes out of the operating room? A Never; that is very bad practice.

Q Did you have any conversation with Mrs. Baigrie at the time about the patient's condition?

A No, I was satisfied with the condition; I just told her to use ordinary post-operative care.

Q Were there any complications that you had to advise or instruct her about? A No.

Q Did she at that time tell you that the patient had been burned? A She did not.

By the Court.

Q That was at your first visit before the second operation? A That was on my first visit before the operation.

By Mr. Braun.

Q Did she tell you that the patient had been burned after the second operation? A She did not.

Q That was when you made your second visit, isn't it, doctor? A She didn't tell me at that time.

Q Did you at any time tell Mrs. Baigrie not to tell the patient? A I did not.

The Court: Point out when he was told about it. He has not testified when he learned of it yet.

Mr. Braun: He told us yesterday.

By the Court.

Q When was it, doctor? A I was at the hospital about eleven o'clock the next day—I called

Charles W. Banks—for defendants—direct.

at the hospital the next day about eleven o'clock to make my rounds and she told me then. That was the day following the operation.

By Mr. Braun.

Q In connection with your care and treatment of Mrs. Haring did you make any record or progress notes? A I did; that is customary in all operations or all medical visits to the hospital. 10

Q I show you a paper and ask you what that is? A These are the progress notes made by me following the operation of Mrs. Haring.

Q What is the date on the first page? A The first date is March 9th.

Q What is the second? A March 10th.

Q When did you make the entry which is dated March 9th? A I made that on March 10th; that was my official calling time after the operation and I sit down to make up all the personal notes—the progress notes. 20

Q And those two were written at the same time, were they? A They were.

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

(The same is marked Exhibit D. C. W. B. 3 for identification.) 30

Mr. Braun: I offer it in evidence.

Mr. Coult: No objection.

Mr. Quaglia: No objection.

(The same is received in evidence and marked D. C. W. B. 3.)

Q "March 9th. When patient came out of anesthetic complained of pain between shoulders, particularly over right shoulder. Examination 40

Charles W. Banks—for defendants—direct.

showed that she had been burned by a hot water bottle. Degree of burn not known at this time, C. W. B." Doctor, on what information did you make that entry? A That is information that I gave myself by examining the patient and information given to me by the nurse.

10 Q Which information did you put there of your own knowledge and which information and from what nurse was it secured? A The nurse reported she had pain between her shoulders—

Q Which nurse? A Mrs. Baigrie. My examination showed she had been burned by a hot water bottle. I knew it was a hot water bottle because the lines of the hot water bottle were almost perfect on the back. In the first twenty-four hours there is just a mere reddening, so we
20 do not know the degree of the burn. If it is a second degree burn we know by the water blisters on the surface and the skin becomes dried up later if it is a third degree burn.

Q When did you make the examination? A On the morning of March 10th.

Q That was the morning after the operation?
A Yes.

Q How did you come to make the examination? A The nurse, Mrs. Baigrie, told me she
30 had burned her with a hot water bottle.

Q Did she tell you how she came to find that out? A No.

Q Where did you get the information that the patient complained of pain after she came out of the anesthetic? A Mrs. Baigrie told me.

Q After this visit you continued to treat Mrs. Haring? A I did.

Q What progress did she make with respect to her operative wound? A Her operative
40 wound was perfect.

Charles W. Banks—for defendants—direct.

Q What progress did she make with respect to this burn? A Why, as I say, she developed a third degree burn and we treated that successfully, but it was a rather slow process.

Q Was it a normal or an abnormal or an unusual case? A Well, it was the first time I ever saw a burn case in my practice, if that is what you mean by unusual, but as far as the burn itself was concerned, no, it was not unusual. 10

Q When did you tell the patient, doctor? A I don't remember the exact date; but it was several days after the operation.

Q Had you had any conversation with her about it before that? A With the patient?

Q Yes. A None whatever.

Q Why not? A Because I thought if we deferred the time to a little later—I knew it would shock her a little bit to tell her and I forebore for her own good. 20

Q Did you instruct Miss Sitnesky to tell the patient or instruct Mrs. Baigrie to tell the patient that she had been hurt on the operating table or that the back condition was the result of pressure or pain from the operating table? A I did not.

Q Did you instruct either one of them not to tell the family? A No, sir. 30

Q Did you tell the family? A I did.

Q Whom did you tell? A I told Mr. Haring.

Q What did you tell him? A I just can't recall the date. I told him she had been burned by a hot water bottle.

Q Did you tell him who had burned her? A I don't recall whether I did tell him or not; I told him that she had been burned by a hot water bottle. 40

Charles W. Banks—for defendants—direct.

Q Do you recall the conversation between Mr. Haring, Mrs. Baigrie and Sister Regis? A Yes, sir.

Q Was Dr. Winifred Banks present at that time? A She was not.

Q Who called that conference, doctor? A
10 It was called by the Sister Superior at the hospital, Sister Regis.

Q By the way, do you know where Sister Regis is now? A Up until a month or six weeks ago she was the Sister Superior at the hospital and then she was transferred to some other institution. I don't know where she went, but I think she is in White Plains, New York.

Q Did you make any effort to communicate with her? A I did.

Q Were you successful in doing so? A I
20 was not.

Q It has been testified that you told Mrs. Baigrie, or used words to this effect: that she was getting old and deaf; it would be difficult for her to secure work elsewhere if she were barred from the hospital, and therefore she had better make some arrangement with Mrs. Haring to take care of his expenses? A No, sir; I never did.

Q What did you tell her? A I told her—of
30 course, I was merely voicing the feeling of the Sister Superior—

Mr. Coult: I move to strike that out.

The Court: Strike it out.

By the Court.

Q Tell us just what you said? A I told her
40 I thought she and Mrs. Haring had better get together on the thing and settle it amicably.

Charles W. Banks—for defendants—direct.

Q Did you make any arrangements with her for delivering any checks or making any payments to Sister Regis to be turned over to Miss Sitnesky? A I know nothing about that.

Q Do you know who paid Miss Sitnesky? A No.

Q Did you know of your own knowledge whether or not Mrs. Baigrie had paid Mr. Haring for his expenses at his home? A Not from my own knowledge. I heard that she had.

Q In whose presence did you tell Mrs. Haring what had happened to her? A In the presence of the nurse, Mrs. Baigrie.

Q How did you come to tell her? A Why, she was worrying considerably about it and she asked me to tell her.

Q Who asked you to tell whom? A Mrs. Baigrie asked me to tell Mrs. Haring.

Q What did you tell the patient? A I told her that she had been burned by a hot water bottle.

Q Anything else? A Why, I told her not to worry about it; that I thought it would soon be healed.

Q Did you tell her who was responsible or who burned her or how she was burned? A I don't think I did. I said she was burned by a hot water bottle; it wouldn't be nice for me to accuse Mrs. Baigrie because she was a patient of hers.

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

The Court: Strike out the last part of the answer "it wouldn't be nice" and so forth.

10

20

30

40

Charles W. Banks—for defendants—direct.

Q Was any claim or demand made upon you, or were you informed by Mr. or Mrs. Haring or anybody else that you would be held responsible for this? A Never.

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

The Court: I will let it stand.

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

Exception noted as ground of appeal.

Q What were your relations with Mrs. Haring? A Very pleasant.

20 Q Do you recall what room Mrs. Haring was in immediately after the operation? A She was in room 26; that is the first room on the right-hand side as you go down the south corridor.

Q That would be on the west side of the corridor? A On the west side, yes, sir.

Q How many beds were in that room at that time? A There were two.

Q And how were they placed? A The heads of the beds were toward the north wall.

30 Q So that would place one toward the west side and one toward the east side of the room? A Yes.

Q Which bed was Mrs. Haring in when you first saw her after the operation? A She was in the east bed nearer the door.

Q Doctor, I would like to briefly review the facts leading up to the operation. You were called in on a Sunday, were you? A Yes, sir.

40 Q What history did Mrs. Haring give you at that time? A She gave me a history of the

Charles W. Banks—for defendants—direct.

pain in her abdomen which was localized to the right lower angle of the abdomen—

By the Court.

Q Was this tumor where the appendix was?

A In the immediate proximity. The tumor was immediately below it in the middle line. 10

By Mr. Braun.

Q Was there any other history? A Yes, the history of the duration of the pain. She said she had had the pain off and on for quite a while and had had backaches for three years.

Q Anything else? A Well, I thought that the symptoms of the appendix were rather urgent and I advised her to have the appendix removed and have the tumor removed at the same time. 20

Q Who was present at that time, do you recall, aside from Mrs. Haring? A I can't recall who else was present.

Q Do you remember whether Mr. Haring was present? A I don't recall.

Q What was said about consenting to the operation, if anything? A I think they had fully made up their minds to have the operation; in fact, it had been talked about before and the matter of where she would be operated and who would take care of her and Mrs. Haring expressed the wish to have Mrs. Baigrie as the nurse. 30

Q Then you secured the services or arranged for the services of whom, in connection with the operation?

The Court: Haven't we been all over this? He said he got his wife and the other doctor and told us what he got them for. I 40

Charles W. Banks—for defendants—cross.

don't want to shut you off, but I don't want to go over the same facts.

Mr. Braun: That is true, your Honor, but we have things sort of mixed up.

The Court: But we went over that.

10 Mr. Braun: We were limited to a certain degree in bringing out our side of the case.

The Court: As I understand it you were limited to what took place in the patient's room, as I recall it.

Mr. Braun: And there were some conversations and other things; that makes a sort of hodge-podge of it. I will try to be as brief as I can.

The Court: Very well.

20 Q Doctor, for whose services did you arrange in connection with the operation? A Dr. Winifred Banks to give the anesthetic and Dr. Anuario to assist me.

Q Were they paid for their services? A Yes.

Q What duties did they perform? A Dr. Winifred Banks gave the anesthetic and Dr. Anuario stood on the opposite side of the operating table and assisted me.

30 Mr. Braun: I think I have gone over the duties.

The Court: I think you have had him testify to their duties.

Cross examination by Mr. Coult.

Q Dr. Banks, is a burn painful? A Yes.

40 Q And the deeper the burn the greater the pain? A Not necessarily, the skin is the sensitive area.

Charles W. Banks—for defendants—cross.

Q Then, if you are lucky enough to have the skin burned off it doesn't hurt you much, is that the idea? A No, I didn't say that. The nerves of sensation are in the skin; there are not so many in what we call the subcutaneous tissue.

Q Then it hurts as much as it can when the skin is burned? A If it is a third degree burn it hurts less because the nerves are destroyed.

10

Q Is the process of destroying those nerves painful?

Mr. Braun: I object to that as not cross examination. I don't think I went into the technicalities.

The Court: He is subject to cross examination on the entire case.

20

A Why, in a third degree burn they are destroyed very quickly.

Q Is it painful? A I think so.

Q How long would you expect a person with a third degree burn such as this one to continue to be in pain from the burn? A It all depends on the patient. I don't know whether you are talking about pain or the expression of pain.

Q I am talking about pain. A It is difficult to estimate the amount of pain that some patients have because they do not express it.

30

Q Then you cannot tell us how long a patient will— A No, I don't think anybody can.

Q You can't give us any idea? A No definite idea.

Q I notice in this exhibit D. C. W. B. 3, under date of March 19th, "Patient depressed; is restless and sleepless; pain in the shoulders; morphine given." Does that indicate that she was in pain? A No, that does not indicate she was in

40

Charles W. Banks—for defendants—cross.

pain; it is an indication of the patient's temperament.

Q Why did you put down "pain in the shoulders" if there wasn't any? A That is what she told me.

Q Do you think there was? A I believe so.

10 Q Then it did mean she was in pain, didn't it?
A Well, she probably had pain.

Q Well, she had pain, that is so, isn't it, and you entered it on the record? A I did.

Q What did you give her the morphine for?

A Not only to control the pain but to control the general nervous condition.

Q Did you give it to her because she was in pain? A I said that I did.

20 Q Look at the entry of March 7th, "C. W. Banks. Pain in back continues." When you wrote that did you think she was having continuous pain? A Yes.

Q Was the pain worse when she first got the burn in your opinion? A Well, I think she expressed it more at that time.

Q And is there any doubt in your mind that she was receiving the burn when you were first in her room? A There is considerable doubt in my mind, yes, sir.

30 Q Considerable doubt? A Yes, sir.

Q At the time you first were in her room she was unconscious? A Yes.

Q And she made no expression of pain or of any intelligence while you were there? A No, sir.

Q And that was the time the family was there? A That was the time the family was there.

40 Q You didn't call the family into the room that they might speak to her? A No, that would be very unwise.

Charles W. Banks—for defendants—cross.

Q You just brought them in to look at an unconscious woman lying there? A Sometimes they look pretty healthy lying unconscious, too.

Q You just brought them in to look at an unconscious woman lying there? A Yes.

Q You didn't say, "Hello, Louise, how are you?" A Oh, no. 10

Q Do you think, as a matter of fact, if there was a hot water bottle there heated near the boiling point that that would have accelerated her coming out of the ether? A I don't think so, because she was under the influence of morphine as well as ether.

Q You think that if you anesthetized a person and rendered him unconscious and then put him on a hot water bag, so hot that it would give him a third degree burn, that that would not make him a little more lively in coming out of the ether than otherwise? A I hardly think so at that time. 20

Q Do you think you could heat a hot water bottle as this was heated up that a person coming out of the anesthesia would feel the pain there first? A It might hasten the return to consciousness.

Q Do you think a person coming out of unconsciousness would know of the pain there first? 30

Mr. Braun: I object to the question because it is—

The Court: I will allow it.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You didn't know anything about this on the 9th of March, at all? A No, sir. 40

Charles W. Banks—for defendants—cross.

Q You didn't discover it until the 10th? A Until the 10th.

Q I call your attention to the entry here signed by your initials "March 9th. When patient came out of the anesthetic complained of pain between shoulders particularly over the right shoulder. Examination showed that she had been burned by a hot water bottle. Degree of burn not known at this time." Why did you enter that as of the 9th? A I am supposed to keep daily records and I did not enter that until the 10th.

Q Why did you put it in under the 9th? A Because I would have a daily record.

Q And when you say "examination showed she had been burned by a hot water bottle" you mean that that was your examination, don't you? A Oh, no.

Q You do not? A Oh, no.

Q Whose examination were you referring to there? A The nurse reported to me this morning that I made the entry.

Q Why didn't you put in your record under date of March 10th that the nurse had reported that the woman had been burned and she had found it on the 9th? A Why, we always like to have a daily record, that's all, and I put it in under date of March 9th.

Q So when you wrote in here "When patient came out of anesthetic complained of pain between shoulders, particularly over right shoulder. Examination showed she had been burned by a hot water bottle, degree of burn not known at this time. C. W. B.," you meant by "this time" March 10th, didn't you? A I meant by "this time" March 9th.

Charles W. Banks—for defendants—cross.

Q You said "degree of burn not known at this time." Did you mean not known by you? A She told me it was red.

Q Then this entry does not mean much, does it? A It means a lot to me. As a matter of history it is right; as a matter of the historical progress of the case it is absolutely right. 10

Q You made an examination on March 10th, yourself, didn't you? A Yes.

Q "Large area over dorsal back about the dimensions of a hot water bottle, very red; it looks like a third degree burn, pain continuous, general condition as good as expected." When did you write that in? A That was written March 10th.

Q How does it happen you made the 10th on the 10th and the 9th on the 10th? Why didn't you make it on the 11th? A A man doesn't have 20 to make an entry each day.

Q You say you put the one on the 10th in when you found out? A I did.

Q Are these records of March 9th and March 10th made on the consecutive days? A I wrote March 9th on the 10th.

Q And the 10th, too? A Yes, sir.

Q Why didn't you write the 10th on the 11th? A I don't know why. 30

Q In other words, you want to have it appear over your initials that on March 9th an examination had been made which showed that she had been burned by a hot water bottle on March 9th? A Yes, sir.

Q Although you didn't know on March 9th that that had happened at all? A I didn't know until the 10th.

Q You say you told Mrs. Baigrie about this condition of hers some days after the operation?

A You don't mean Mrs. Baigrie. 40

Charles W. Banks—for defendants—cross.

Q I mean Mrs. Haring. A I did.

Q Can you tell us how many days after that was? A I don't recall how many days it was, no, sir.

Q Can't you give us any idea? A Several days.

10 Q Do you mean by "several" as many as three? A I think it was more than three; three or four days.

Q A dressing was applied to her back on the 9th, wasn't it? A Yes.

Q When do you say she had recovered from the effects of the anesthetic?

Mr. Braun: If the Court please, he didn't say when she recovered.

20 Q I am asking you do you know? A I don't know.

Q Do you know when she became conscious so that she could converse intelligently? A No.

Q You saw her on the 10th, didn't you? A Yes, sir.

Q Did she talk on the 10th? A She did.

Q Did she make herself understood? A Yes.

30 Q Could she understand what you said? A I hope so.

Q Did she make any complaints about her back then? A She did.

Q What did you tell her? A I didn't tell her she had been burned.

Q What did you tell her? A I told her she had an irritation of the back.

Q Didn't she want to know what kind of an irritation it was? A I don't think she did.

40 Q You didn't give her any kind of an explanation at all? A No.

Charles W. Banks—for defendants—cross.

Q Didn't she continue to inquire about what was the matter with her? A No.

Q In other words, she was content to remain in pain and take your word for it that it was some kind of irritation of her shoulder? A No.

Q During that time she was not suffering very much, was she? A She expressed considerable pain. 10

Q Didn't she have any pain? A Yes.

Q Severe pain? A I think she had a fair amount of pain, yes.

Q About five days after the operation you lifted some of the skin off the burn, didn't you? A Yes. Well, I won't say just when. Approximately five days—

Q Did you put that into your record? A No.

Q Why not? A I don't know why I didn't. It isn't in the record. There are some things I don't put in the record because the record of the patient that is convalescent is sometimes kept in the patient's room. 20

Q Aren't you supposed to put into your record whatever you do to your patient? A We do ordinarily.

Q You do if you give them a hypodermic of morphine? A The nurse does.

Q You put it into your record over your signature, don't you? A No, sir. 30

Q Under March 19th, "Depressed, sleepless, pain in the shoulders, morphine given." A I didn't do it.

Q It is in your record, isn't it? A Yes.

Q What is this under March 15th? A "Narcotic given for sleep on account of pain."

Q You thought that was sufficiently important to put into your record. A That was put in as all the news I had to report. 40

Charles W. Banks—for defendants—cross.

Q Didn't you have news to report after you had stripped the skin, or whatever you say it was, off this lady's back? A That wouldn't be important to put in there.

Q You think that would be less important than giving a shot of morphine? A I think so.

10 Q You did that twice, didn't you? A Yes, sir.

Q You did it in her room, didn't you? A Yes.

Q Why didn't you take her to the operating room? A It wasn't necessary.

Q Why didn't you give her an anesthetic? A It wasn't necessary.

20 Q Didn't you think it hurt that woman? A I was cutting through dead tissue, it should not have hurt very much.

Q Didn't you think you should have given an anesthetic? A I don't think it was good practice; it wasn't wise to do it because she had been through great shock in the operation.

Q You couldn't give an anesthetic? A I didn't.

30 Q Didn't she say, "Doctor, this is going to kill me," and didn't you say, "Louise, it will kill you if I don't do it"? A No, sir.

Q Didn't she scream? A She made some outcry.

Q What kind of outcries were they? A Outcries evidencing pain.

40 Q Didn't you say on your direct examination that you thought that was evidence of nervousness? A Well, the expression of pain is a psychological thing, largely, and what is sometimes interpreted as expression of pain is a nervous condition.

Charles W. Banks—for defendants—cross.

Q Do you think that on this occasion in the case of Mrs. Haring that it was really pain that made her make the outcries? A I think that she was apprehensive lest I would hurt her a whole lot.

Q You weren't, were you? A Well, you consider her feelings, yes, sir. I had no object in inflicting any pain on her. I tried to spare her all the pain possible. 10

Q In order to spare a patient pain the usual course is to give some kind of anesthesia, isn't it? A If it is of any magnitude.

Q Wasn't this of any magnitude? A I don't think it was.

Q Let us understand each other. Is the reason that you didn't administer an anesthetic because you didn't think it was wise to do so or because you think it was unnecessary? A Both. 20

Q In her room, while she was in bed, without an anesthetic, you cut away these pieces of skin from this burn? A Yes, sir; and if you were a good surgeon you would do the same thing.

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

The Court: Strike it out.

Q And you think that is good surgery? A Yes, sir. 30

Q You said something about her condition being such that you didn't think it was wise to give her an anesthetic? A I don't think it is wise to give anybody an anesthetic unless it is terribly imperative. It is unwise to give a patient an anesthetic if there is nothing the matter with them.

Q What did you cut away the first time? A Some parchmented skin.

Q Did you cut it all away? A No, not the first time. 40

Charles W. Banks—for defendants—cross.

Q Why not? A I didn't want to subject her to too long a process.

Q Why not? A She expressed her disapproval and I deferred it to another time. I didn't jeopardize anything.

Q Her disapproval didn't mean anything? A
10 She made quite an outcry.

Q You didn't think the outcry meant anything except nervousness and apprehension? A Well—

Q Couldn't you have prevented the outcry by anesthetic? A Oh, yes, but it would have been very poor surgical judgment to give her an anesthetic.

Q Why? A Because it is bad judgment to give anybody an anesthetic unless it is very im-
20 perative.

Q You didn't think the fact that you had to stop and wait three or four times before going on and completing the excision of the skin and flesh indicated it was necessary to have the patient unconscious and out of pain? A No.

Q You didn't put either one of these little operations into your record at all, did you? A No, sir.

Q So you told Mr. Haring what really was the matter with his wife on the evening of Friday?
30 A Yes, sir.

Q And that was in response to a telephone conversation in which he got you? A Yes, sir.

Q And he asked you what was the matter with his wife, didn't he? A He did.

Q And he told you he couldn't find out? A He didn't ask me before then.

Q You didn't see him before then? A No.

Q Had you seen him or hadn't you? A I
40 had not seen him since the day of the operation.

Charles W. Banks—for defendants—cross.

Q In other words, during the time that you were at the hospital you never saw Mr. Haring?
A No.

Q Did you know he was coming every day to see his wife? A Coming in the evening, as a rule, when I didn't visit the hospital.

Q Did you know he came in the morning? A 10
I had my regular hours for visiting at the hospital and they didn't seem to be the same time he was there.

Q After you found it was a hot water bottle burn, when you found it out on the 10th, did you make any inquiry around the hospital to see whether you could find Mr. Haring to tell him what had happened to his wife? A I did not.

Mr. Braun: I object. 20

The Court: I will allow it.

Q You considered yourself on friendly terms with the Harings? A Yes.

Q He had a telephone? A Yes.

Q Did you consider this condition of Mrs. Haring's back a serious thing in any sense? A Why, it was a serious thing.

Q Did you feel under any obligation at all to get hold of Mr. Haring and tell him about it? A 30
Why, I expected to tell him the first time I met him.

Q Well, you hadn't met him until the evening of Friday and you didn't meet him then, that is so, isn't it? A Yes.

Q When did you expect to meet him? A I hoped to meet him soon.

Q Where? A At the hospital.

Q You said you had your regular hours and he came in the evening. A He came regularly 40
in the evening.

Charles W. Banks—for defendants—cross.

Q How did you find that out? A I heard him testify to that and I knew he was there each evening.

Q When you knew this lady had this burn and her husband didn't know about it did you know when he was coming to the hospital? A No.

10 Q And you didn't try to find it out? A No.

Q And you had no idea about when you were going to tell him. A I didn't see how that would help his wife, even if I did tell him. I had no objection to telling him; I was perfectly willing to tell him. There was no reason why I did not tell him.

Q There was no reason for you to conceal this burn or the seriousness of it from anybody, was there? A No, only the patient until she got by the operative shock.

20 Q The patient was the only one you told? A I told her after the conversation with Mrs. Baigrie.

Q Did you tell her not to tell her husband? A I did not.

Q You had a conversation with Mr. Haring and with Sister Regis which has been brought to your attention. Do you recall that? A Yes.

30 Q You deny, as I understand it, that you told Mrs. Baigrie that she had a child to support and that she had better pay or she would not continue to get business at the hospital. A That is absolutely a piece of fiction.

Q She did have a child, didn't she? A I don't know that I knew until later.

Q You do know it, don't you? A Yes.

Q And she does work at the hospital? A Yes.

Q And she continued to work at the hospital? A Yes.

40

Charles W. Banks—for defendants—direct.

Q And she continued to work on this case, didn't she? A Yes.

Q You say that it is a matter of considerable doubt between you whether or not this hot water bottle was under that lady when you first came into this room? A I don't believe it was there.

Q And you have always been of that opinion? 10
A I never felt that the hot water bottle was there and that the patient was put there.

Q Mrs. Baigrie was in charge of the patient, wasn't she? A Yes.

Q And having that in mind you permitted Mrs. Baigrie to go on and treat this lady, didn't you? A Yes.

Mr. Braun: I object.

Q Having in mind the fact that you were then 20
of the opinion that the hot water bottle was under the patient at the time that you first went into the room? A I am pretty sure there was no hot water bottle there.

Q Why? A For the reason that it would be an impossibility to overlook a thing of that kind.

Q Is that the only reason? A Well, it is customary to put hot water bottles in—

Q Is that the only reason? A Well, I know 30
from the attending doctors that they didn't see any hot water bottles.

Q In other words, you have been told by your wife and by Dr. Anuario they didn't see any hot water bottle? A And Miss Grant.

Q When did you find that out? A That was several days after the operation.

Q How many days after it? A I don't remember.

Q Didn't you take it upon yourself to find 40
out how this thing happened? A Oh, yes.

Charles W. Banks—for defendants—cross.

Q Didn't you talk to your wife about it? A Yes.

Q Did you talk to her just as soon as you found out what had happened? A Yes, sir.

Q Did you get her version of it? A Yes.

10 Q And you found out, you say, on the 10th of March? A I found out the patient was burned.

Q You knew it was the hot water bottle because of the shape of the burn? A Yes.

Q Had you talked to your wife? A Yes.

Q You and she must have had considerable to say. A I certainly did.

Q You were told then that the bottle was not in the bed? A I was.

20 Q On Friday night when Mr. Haring called you up didn't you say to him, "That Baigrie woman left a hot water bottle in your wife's bed?" A I don't think I said, "That Baigrie woman." That isn't just like me.

Q Did you say the rest of it? A I said, "Mrs. Baigrie burned the patient with a hot water bottle."

Q You didn't say anything about its being left in the bed? A No.

30 Q Did you make any investigation to find out just how the hot water bottle did get under the shoulders? A Why, I assumed that Mrs. Baigrie put it there.

Q When? A The first time soon after the patient was returned to her room.

40 Q In other words, you assume that Mrs. Baigrie heated a water bottle to a point where it would inflict a burn like this and placed it under Mrs. Haring's shoulders after you had seen her in the room the first time? A Yes; I think that is the reasonable explanation of it, too.

Charles W. Banks—for defendants—cross.

Q Have you anything to say about what nurse shall look after a patient in the hospital?

Mr. Braun: I don't think that is material.

Q Did you have any authority as to which nurse in that hospital should continue to look after your patient? A I could have made a complaint to the Superior. 10

Q Did you make a complaint to the Superior in this case? A I did.

Q Did you tell her that in your opinion Mrs. Baigrie, after the operation had been performed and some time after you had been in the room the first time, had put a bottle under Mrs. Haring's shoulders and caused this burn? A That is practically the phraseology I used in my complaint to the Sister Superior. 20

Q To whom was that? A The Sister Superior.

Q Sister Regis? A Yes.

Q And you don't know where she is? A I do not; I tried to get her and couldn't.

By the Court.

Q Doctor, would it be a usual thing for a nurse in treating a woman such as Mrs. Haring in that period of time; that is, between the time of the operation and the time you found out she had been burned; to put a hot water bottle under the shoulders? Would there be any occasion to do that? A They are not supposed to put a hot water bottle there except by the authority of the attending physician. 30

Q Would there be any occasion for it? A I think at the time she complained of pain in 40

Charles W. Banks—for defendants—re-direct.

her back and rubbed it with alcohol she slipped a hot water bottle under the back.

Q A hot water bottle might relieve the pain if there were pain? A Yes.

Q And is that usual? A Yes.

10 *Re-direct examination* by Mr. Braun.

Q Is there danger to the life of a patient who has nothing wrong with him whatsoever in going under an anesthetic? A There is always a grave element of danger.

Q What is the danger? A Danger of death.

Q From what cause? A Suspension of respiration or suspension of the heart function.

20 Q You wouldn't give an anesthetic for a minor cutting even in live tissue, would you? A Never.

Q A general anesthetic? A No.

Q You could have used a local anesthetic in this case if it was necessary? A I don't think a local anesthetic would have been any good in this case.

Q And why not? A Because the tissues that I cut were parchmented and it would not absorb any anesthetic.

30 Q These progress notes that Mr. Coult asked you about so particularly as why you didn't enter every little detail; they are just for important items that occur during the attendance of the case? A Yes.

Q There are other records, are there not, besides these? A Yes.

Q Kept by whom? A Kept by the nurse.

40 Q And do they carry out the detailed treatments such as washing a patient— A The

Charles W. Banks—for defendants—re-direct.

nurse is supposed to incorporate every detail of what happens.

Q And this was written on the 10th? A The first two items were written on the 10th.

By the Court.

Q What is the primary purpose of an anesthetic, doctor? A To render the patient unconscious to pain. 10

Q Isn't it to make the patient involuntary so that you can work over her? A That is the first object; the patient may be unconscious and rigid and we have to have deep anesthesia so we can handle the patient successfully.

By Mr. Braun.

Q How long had you known Mrs. Baigrie prior to this operation? A I think Mrs. Baigrie was in one of the first classes that was graduated in St. Mary's Hospital; I should think a matter of fifteen or eighteen years at any rate. 20

Q Why didn't you insist on her removal from this case? A I had always known Mrs. Baigrie to be a very good, conscientious, careful nurse and I felt in this instance in her very anxiety to do something for an old friend—to do something for her— 30

Q I don't think you have quite answered my question. A Of course, you cannot dismiss a nurse; you have to make a complaint to the head of the hospital.

Q Was there any action taken on that? A There was no action taken.

Q Would the mere fact that the nurse had made a mistake be customary to dismiss her if she were ordinarily a good nurse? A I don't 40

Charles W. Banks—for defendants—re-cross.

think they are ordinarily dismissed; I would feel she would be a better nurse than ever after having had an accident of that kind.

Re-cross examination by Mr. Coult.

10 Q You did make a complaint to the Sister Superior, didn't you? A Oh, that is absolutely imperative upon me to make a complaint to the head of the hospital.

Mr. Coult: Mr. Braun, you have the hospital record.

Mr. Braun: I have some of it.

20 Mr. Coult: Will you produce the nurse's notes showing the cutting away of the skin by Dr. Banks?

Mr. Braun: I don't know whether they are here or not.

The Witness: I can tell you if you would like to have me testify to that.

30 Q No, I understood you to say in response to counsel's question that these little things like cutting off the skin and things like that do not go in the doctor's report, is that right? A I do not say it is a little thing. The doctor's report is a matter very largely for his own information.

Q And in response to another question you said that the nurse put down every step of the treatment in her report? A That's right.

Q So she has that in her report, hasn't she?

Mr. Braun: I object to that as not re-cross.

40 Objection sustained.

Blanche Sitnesky—for defendants—direct.

BLANCHE SITNESKY, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q You are a trained nurse? A I am.

Q And a graduate of what hospital? A St. Mary's Hospital, Orange, New Jersey. 10

Q Have you been connected with any other hospital since then? A I have.

Q What hospital? A Providence Hospital, Oakland, California.

Q In what capacity? A Supervisor.

Q You graduated in what year from St. Mary's? A 1924.

Q In your course of instruction and in your duties at the hospital were you instructed and familiarized with the usual method of preparing an ether bed? A I was. 20

Q Will you describe to the jury just how that sort of bed is prepared. A I can.

The Court: Is there any doubt about it?

Mr. Colie: Yes, there is; it is one of the fundamental things in this case.

A A sheet is placed over the mattress in the ordinary method of putting a sheet; over this sheet is placed a rubber sheet which extends across the middle of the bed going from side to side; it doesn't cover the entire sheet; over this rubber sheet is placed a draw sheet which is the same size as the rubber sheet; over this is placed a blanket which is tucked in on both sides so that there are no wrinkles; then the pillow is placed on the top of the bed edgewise; it is pinned to the bars of the bed; then a blanket and sheet, another 30 40

Blanche Sitnesky—for defendants—direct.

blanket and a spread is placed over the bed and this is rolled to a side extending over the left of the bed.

Q Is that roll the full length of the bed or is it turned from the top to the bottom? A It is the full length of the bed.

10 Q From side to side? A From side to side.

Q And that always has been the practice at St. Mary's Hospital? A As far as I know, yes.

Q What provision, if any, is made for warming the bed? A Usually there are three or four hot water bottles put in the bed.

Q Where are they placed? A They are placed starting from the foot to the top in rotation.

20 Q Assuming you only had one hot water bottle, where would you place it? A At the foot of the bed.

Q What is the purpose of placing it there? A Usually that is the—the lower extremities usually get cold first.

Q Whose duty is it to prepare the ether bed where a private nurse is engaged to take care of the patient and prepare her for the operation and take care of her after the operation? A The private nurse on the case.

30 Q Are those bottles in the bed after the patient is brought back from the operating room? A They are not.

Q And whose duty is it to remove them? A The private nurse on the case.

Q Are the hot water bottles left exposed to full view or are they partly covered while the bed is being warmed? A They are exposed.

Q Entirely? A About three-quarters.

Q Is anything done with the covering of the bed before the patient is put in? A No.

40

Blanche Sitnesky—for defendants—direct.

Q What covers the hot water bottles—the one cover that is not exposed? A The roll of the blankets.

Q Could the patient be placed in the bed without doing something to that roll at first or is it sufficiently far over? A It is sufficiently far over; the patient can be placed in the bed without disturbing the blankets. 10

Q You came on duty on Mrs. Haring's case on what date? A The evening of March 9th.

Q Did you know whom you were to take care of before you got to the hospital? A No.

Q Who called you on the case? A The hospital.

Q When you got to the hospital you were directed, I assume, to the patient. A I was told at the office who the patient was and what room. 20

Q Where did you go first? Direct to the room or elsewhere? A I went to the nurses' room.

Q What was your purpose in going there? A To change from my street clothes to my uniform.

Q What time was it when you got to the nurses' room? A About a quarter to seven.

Q While you were at the nurses' room did you meet anybody? A I did.

Q Whom? A I met Mrs. Baigrie. 30

Q Was she there when you arrived at the nurses' room or did she arrive later? A She came in with me; she met me in the corridor.

Q Did you have any conversation with her? A I did.

Q What was that conversation? A It was in regard to the patient.

Q What did she say in regard to Mrs. Haring? A She told me what was the nature of the operation and what treatments were to be given 40

Blanche Sitnesky—for defendants—direct.

and what care I was to give the patient that night.

Q Was there anything else said? A Not at that time.

Q How soon afterward was there any further conversation? A She asked me to step across
10 the hall.

Q Did you go across the hall? A I did.

Q Where to? A Toward the room opposite the nurses' room.

Q Did you have any further conversation there? A We did.

Q What conversation did you have? A She told me that a terrible accident had happened to Mrs. Haring.

Q Did she say what the nature of the accident
20 was? A She did.

Q What else did she say? A She told me she had burned Mrs. Haring with a hot water bottle.

Q Did she say anything else about it? A She did.

Q What else did she say? A She told me that in all her seventeen years of practice she had never had anything happen to her like this; she didn't know why she had put the hot water
30 bottle in the bed. She told me not to tell the family or tell Mrs. Haring; she told me not to tell anyone. She told me not to tell any of the nurses and not to bring any of the nurses into the room; that if I had to have assistance not to bring them into the room and to take care of Mrs. Haring as best I could without any assistance.

Q Did she tell you what explanation was to be given Mrs. Haring if she complained of her condition? A She did.
40

Blanche Sitnesky—for defendants—direct.

Q What did she say? A She told me to tell Mrs. Haring that she had a slight irritation on the back from the operating table; from pressure on the back from the operating table.

Q Did you inquire from Mrs. Baigrie as to how she came to put the hot water bottle in the bed? A I did and she evaded the question. 10

Q What did she say? A She said, "I don't know."

Q Did you have any subsequent conversations as to how she came to put the hot water bottle in the bed? A I did.

Q What did she say? A Every time I asked her why the hot water bottle was there or when it was placed in the bed she said, "Let's not talk about it" or "I don't know."

Q You got on duty about what time of the night? A About a quarter after seven— 20

Q I mean actually in the room. A At seven o'clock.

Q Mrs. Baigrie left then, did she? A She did.

Q Where did you find Mrs. Haring when you got in the room? A In the center of the room—in bed in the center of the room. There was only one bed in the room at the time I arrived at the hospital. 30

Q You didn't see any other bed at that time? A No.

Q Did Mrs. Haring ever inquire about the condition of her back? A She did.

Q And did you give her the explanation that Mrs. Baigrie instructed you to give? A I did.

Q Did anyone call on Mrs. Haring that evening after you went on duty? A Yes, Mr. Haring and Mrs. Haring's sisters.

Q Anyone else? A Dr. Banks made a visit. 40

Blanche Sitnesky—for defendants—direct.

Q What time was that? A That was after visiting hours.

Q Did Dr. Banks give you any instructions to tell or conceal the fact that Mrs. Haring had been burned? A He did not; he didn't mention the burn at all.

10 Q Did he discuss the burn with you? A He did not.

Q Did you tell him anything about the burn? A I did not.

Q Did he look at Mrs. Haring? A Mrs. Haring at that time was sleeping; she had had a hypodermic.

By the Court.

Q Did you look at the burn the first night? A
20 I saw the burn, yes, sir.

By Mr. Braun.

Q Mrs. Baigrie had instructed you not to discuss it with anyone? A Yes.

Q Did you subsequently find out how Mrs. Haring learned about her condition? A Yes, Mrs. Haring told me herself.

Q Mrs. Haring told you herself? A She did.

30 Q What did she tell you? A She told me she had found out what had happened to her back.

Q Did she tell you how she had found out? A She did.

Q What did she say? A She said that Dr. Banks had come in with Mrs. Baigrie and in Mrs. Baigrie's presence told her that Mrs. Baigrie had burned her with a hot water bottle.

40 Q Did she say how Dr. Banks had come to tell her? A That Mrs. Baigrie had requested him to do so.

Blanche Sitnesky—for defendants—direct.

Q When were you paid for your services? A April 11, 1927.

Q How were you paid? A By check.

Q By whom was the check drawn? A By someone by the name of Hague.

Q To whose order was it made out? A It was made payable to Sister Regis. 10

Q Was it endorsed to you? A It was endorsed to me.

Q How did you come to get it from Sister Regis? A (No answer.)

Mr. Braun: I will withdraw the question.

Q Did you have any conversation with Mr. Haring about the payment? A I did.

Q What was that conversation? A Mr. Haring asked me if I had received any money and I told him I had not. 20

Q When was that? While you were still on the case? A That was while I was still on the case.

Q How long after you had gone on the case? A Oh, it was more than two weeks; close to three weeks.

Q And what further conversation did you have at that time? A He said, "I don't intend to pay you or anyone else" and he said, "Go down and have a talk with Sister Regis." And I went down and talked to Sister Regis. 30

Q And as a result you got this check? A I went down and had a talk with Sister Regis and I said to her—

Mr. Coult: I object to that.

Q Don't tell us what you said to her and what she said to you, but as a result of that conversation did you go back again? A To Sister Regis, yes. 40

Blanche Sitnesky—for defendants—cross.

Q And did you get the check? A I did.

Q Was this check signed by a man or a woman? A It was a woman's handwriting.

Q How did you come to discontinue treating Mrs. Haring? A Mrs. Baigrie called me on the phone and told me not to come on duty.

10

Cross examination by Mr. Quaglia.

Q Where are you employed now? A I am not doing any work now.

Q When did you come back from California? A About two months ago.

Q Have you been employed during that two months? A I have not.

20 Q Is it customary to put hot water bottles in an ether bed? A It is.

Q And the temperature, I believe, is 125 degrees? A About 115 to 120.

Q Do you know how many degrees a hot water bottle can stand before bursting? A Before bursting?

Q Yes. A I never tested it.

Q And it is for that reason that you heat the water to 115 degrees? A That is what we are taught.

30 Q You are taught that if you put any more in the hot water bag it will burst, isn't that so? A No.

Q Is it always customary to put three or four hot water bottles in an ether bed? A Yes, it is.

Q Have you ever made an ether bed with only one hot water bottle? A Yes, when I couldn't get any more.

40 Q Do you always get three hot water bottles in the hospital? A I always did when I wanted to make an ether bed.

Blanche Sitnesky—for defendants—cross.

Q Is it unusual to get only one hot water bottle? A It is.

Q You testified that the blankets are rolled to the side of the ether bed. A Yes.

Q You heard Mrs. Baigrie testify that the blankets were rolled or folded toward the bottom or the foot of the bed, didn't you? A Yes. 10

Q Assuming those blankets are rolled or folded to the end of the bed and you only had one hot water bottle, where would you put that hot water bottle? A At the foot of the bed.

Q Wouldn't the fact that the blankets were at the foot of the bed make you put that hot water bottle somewhere else? A No.

Q Wouldn't the blankets keep that section of the bed warm? A No, putting the hot water bottle at the foot of the bed heats the whole blanket and when the blanket was put over the patient it would be warm. 20

Q But it is absolutely necessary to put a hot water bottle in an ether bed; that is absolutely necessary? A It is.

Q Did you see this burn the first evening that you went on duty? A I did.

Q Do you keep a record of anything you might do during the time that you are on duty? A I do. 30

Q Did you enter into your records that the patient had a hot water bottle burn? A No.

Q Why didn't you do that? A Because it was something that happened not in my presence or on my duty.

Q Wasn't it necessary during the time that you were on duty to dress that back? A I dressed it two or three nights.

Q Did you dress it on the night of March 9th? A I did. 40

Blanche Sitnesky—for defendants—cross.

Q Did you enter that in your record? A I believe I did.

Mr. Quaglia: Have you the record here, Mr. Braun?

Mr. Braun: I am looking to see.

10

Q You knew that Mrs. Baigrie was paying your wages? A I did not at the time I received the check; I didn't know where I was getting the money from.

Q What did Sister Regis tell you when you inquired of her as to who was going to pay you? A She said she didn't know.

Q Yet you continued working? A At Sister Regis' request.

20

Q What did she tell you to do? A To stay on the case until I saw what turned up.

Q Were you going to give your services gratuitously? A No, I questioned Sister Regis.

Q You say that Mrs. Baigrie told you that she had burned Mrs. Haring with a hot water bottle? A She did.

Q You are positive of that? A I am.

30 Q Didn't she tell you that the patient was placed on this hot water bottle upon returning from the operating room? A She did not.

Q Didn't she tell you not to tell anyone connected with Mrs. Haring's family that this accident had occurred? A She did.

Q And didn't she tell you that Dr. Banks had instructed you to tell her that? A She did not.

40

Mr. Quaglia: Have you found that record, Mr. Braun?

Blanche Sitnesky—for defendants—cross.

Mr. Braun: You want the record of the 9th?

Mr. Quaglia: Yes, of the 9th as to this particular nurse.

Mr. Braun: Here is the balance of it. That is the 9th and the early morning of the 10th. 10

By Mr. Quaglia.

Q Did you see Dr. Banks on the morning of March 10th? A No.

Q Is it customary after the patient has been brought back from the operating room and placed in the bed, while she is still unconscious, to place a hot water bottle near her shoulders or any part of her body? A Her shoulders? No. 20

Q That is not customary? A That is not customary.

Q Is it customary without the doctor's orders to place a hot water bottle in the bed? A Yes, at times.

Q It is customary? A At times, yes.

Q Did I understand you to say that inasmuch as this burn had taken place during the day that you had not reported it on your record? A Yes. 30

Q Do you remember how many times you dressed her back that night? A I don't remember how many times.

Q Do you remember dressing her back at all? A I do.

Q What did you apply to the back? A Unguentine.

Q You are sure that was unguentine? A I certainly am.

Q It wasn't K—Y? A No. 40

Blanche Sitnesky—for defendants—cross.

Q That is a lubricant, isn't it? A K—Y is a lubricant.

Q And you are positive that it was not K—Y but that it was unguentine? A It was unguentine.

10 *Cross examination by Mr. Coult.*

Q I want to show you Exhibits D. C. W. B. 1 and 2 for identification. Do you recognize those papers? A Yes, I do.

Q Do they contain your notes? A Yes, the lower part here. This part in the red writing.

Q Is that on both sheets? A Yes, sir.

Q Will you just look this over and see if you did enter anything about the dressing on the
20 back or any pain that this lady complained of in the shoulders? A What was the question?

Mr. Quaglia: I will withdraw it.

Q Do you find anything there relating to the dressing on the shoulders? A No.

Q Did you find anything there relating to any pain in the shoulders? A No.

Q You do find in there several notations of
30 abdominal pain? A Yes.

Q And pain in the pelvic region? A Yes.

Q Did she have pain in her shoulders? A She did.

Q Why didn't you put it into your notes? A I was requested by Mrs. Baigrie not to note it.

Q Were you requested by Dr. Banks not to note it? A I was not.

Q Do you mean to say you would not note something in the record because another nurse in
40 the hospital asked you not to? A I do.

James H. Brothers—for defendants—direct.

Re-direct examination by Mr. Braun.

Q Did Mrs. Baigrie tell you when she had discovered the burn? A Yes.

Q When did she discover it? A Late in the afternoon when she turned the patient on her side to rub her back. 10

By the Court.

Q Was the patient conscious when you came on the case? A Yes, sir.

JAMES H. BROTHERS, sworn in behalf of the defendant, Charles W. Banks.

20

Direct examination by Mr. Braun.

Q Doctor, you are a licensed physician and surgeon of the State of New Jersey? A Yes, sir.

Q Are you connected with any hospitals? A St. Barnabas.

Q In your practice have you had occasion to go through the usual internship and aside from that have you had occasion to be present and operate yourself on frequent occasions since then? A Oh, yes. 30

Q Are you familiar with the usual effects of ether, nitrous oxide, oxygen, and morphine on a patient? A Oh, yes.

Q Now, doctor, assuming that a woman thirty-six years of age is—

Mr. Coult: Your Honor, it occurred to me last night that Mrs. Haring's age is not in this record. 40

James H. Brothers—for defendants—direct.

Mr. Braun: It is thirty-six years of age according to the hospital record.

Mrs. Haring (from the back of the court room): I am thirty-eight. I made a mistake; I was thirty-seven at the time of the operation.

10

Q (Continuing.) A woman thirty-seven years of age is subjected to a morphine injection followed by nitrous oxide and oxygen and then ether and continued under the ether for a period of—

The Court: You mean an operating period?

20

Q Yes. An operating period of fifty minutes, during which time complete relaxation is secured and she is operated on for the removal of an appendix and also for the removal of a tumor. What would you say would be the condition of that patient five minutes after she returned from the operating room as to consciousness? A She would not be conscious.

30

Q For how long a period would that unconsciousness normally extend? A She would undoubtedly come out and could be aroused perhaps a half hour after she was returned to the room, but she would immediately fall asleep again and later on, and perhaps in periods of half an hour or three-quarters of an hour she would arouse again and drop off to sleep again. That would continue in the afternoon if the operation was over say at ten o'clock. I would say it would be from five to five-thirty or six o'clock before it would be over, and even during the evening she would be drowsy.

40

James H. Brothers—for defendants—direct.

Q Then the reaction is a sort of relapsing and lapsing into consciousness after a half hour or so?

A No, it is a mechanical process; the ether goes into the blood through the lungs and it goes out through the lungs and not all of it is exhaled and the patient takes it into the lungs again. They gain by inspiration some they partially exhaled and they are semi-relaxed by inhaling the ether brought to the lungs by the blood.

10

Q Would a patient five minutes after such an operation as I have described be sufficiently conscious to experience pain from a hot water bottle under her shoulder or to express herself intelligently even to a doctor or surgeon so as to make known the fact that she was experiencing pain there? A Not if the anesthetic had been kept up the usual period and stopped as it usually is, about ten minutes before the patient leaves the table.

20

Q Assuming that the operation was as I have stated, would it have been possible to have cut off the anesthetic before that period? A It is usually done when we start to suture the superficial tissues. When I say usual I mean under the usual conditions she would not know anything for at least half an hour after she had returned to the bed.

30

Q Would she be able to remember or relate the conversations that took place or the things she said five minutes— A (Interrupting.) No, she would be remembering things that she remembered when she went under the anesthetic.

Q What is the normal reaction of a patient coming out of anesthesia as to the appearance of the eyes and speech? A They go through the same processes in the reverse order as when they go under. When they come out it is usually

40

James H. Brothers—for defendants—direct.

10 accompanied by vomiting. That is a state of excitement; then there is the second stage where they breathe the same as a drunken person because the ether and chloroform and gas are the same as taking too much alcohol; their eyes are usually rolled up showing the whites of the sclera and they have a pale expression and a flush the same as an intoxicated person, then usually a pale face with some sweating on the upper lid and forehead.

Q When would they have the bright eyes and staring? A In the second and in the third or complete stage.

20 Q In the second stage are they still unconscious so as not to be able to— A (Interrupting.) They are semi-conscious, but in the stage of excitement they do not know what is going on, they thrash their hands around and turn from side to side and may or may not vomit.

Q Do they talk? A They talk, but that is about things that they remember when they were under anesthesia.

Q Do they swear? A Yes.

Q Or use profane language? A Yes.

30 Q That is frequent, isn't it? A With certain people; ministers and the rest of them included.

40 Q When they are in that condition when they start to use all these foreign words, are they in a condition to know that they are suffering any pain? A They are not; they don't remember about it afterwards. That is the best proof that when you tell them about the things they said when they ask the nurse, for instance, "Did I call anybody by name?" And the nurse says, no, they don't remember it even if they have.

James H. Brothers—for defendants—direct.

Q If you saw a patient apparently restless with the eyes wild, apparently uneasy and restless, who kept saying, "Get me out of this" five minutes after she had been returned from the operating room from an operation which I previously described, would that put you on notice that she was lying on a hot water bottle? A 10
Certainly not.

Q Suppose she said, indicating her abdomen and then her shoulder, "I expected this but not this," would that put you on notice—

Mr. Coult: I object to this.

Objection sustained.

Q Would that put any physician on notice within five minutes after the patient had returned 20
from the operating room that she was lying on a hot water bottle? A Not in my opinion.

Mr. Coult: I object to this.

Objection sustained and answer stricken out.

Mr. Braun: If the Court please, this is purely a professional proposition now. They are charging a doctor in the second count with not recognizing symptoms. I think this 30
doctor is qualified to say whether this would indicate a condition which existed.

The Court: That is a matter of argument. He says they are not conscious and do not know what they are doing.

Mr. Coult: How can anybody by a sign or grimace that the patient may make know that she was lying on a hot water bottle?

The Court: I say it is a matter of argu- 40
ment.

James H. Brothers—for defendants—direct.

Mr. Coult: It might be an indication that something is happening to her. It is absurd for a person standing in the doorway to say that a person has a hot water bottle, that is ridiculous.

10 Mr. Braun: That is what they say in the complaint.

The Court: I have ruled on the question.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20 Q Would that statement, that the patient, if she made it five minutes after her return from the operating room that she did expect this, indicating her abdomen, and then indicating her shoulder say, "But not this" would that be any indication or symptom from which you or any other physician would assume that she was hurt or injured or suffering pain in her shoulder? A No, sir, it would indicate to my mind if I had the case that she was going through the usual reprogession of excitement which the patients usually go through.

30 Q Doctor, whose duty is it to prepare an ether bed? A The nurse's.

Q Is there any duty on a surgeon to inspect or prepare the ether bed for the reception of the patient after the operation? A The surgeon has nothing to do with it; it is a matter of hospital discipline as to which way an ether bed shall be prepared and which time before the operation it shall be prepared. He has nothing to do with it.

40

James H. Brothers—for defendants—direct.

Q Has the anesthetist anything to do with the ether bed either as to inspection or preparation or anything?

Mr. Coult: As far as I am concerned I admitted it in my opening. We are wasting time now. 10

The Court: I don't think it has any place in the case.

Mr. Colie: I don't think we are bound by anything that was brought out on cross examination.

The Court: What I mean to say is that there is no claim that it is the duty of the anesthetist to place the patient on the bed, but the charge is that she did it with a hot water bottle in plain view. 20

Mr. Colie: I understand.

The Court: There is no claim it was her duty.

Mr. Coult: This does not go to refute anything in my case. In other words, it isn't a defense. I take the same position this witness does.

The Court: Answer the question. 30

A An anesthetist's duty is to see that the patient comes out of the anesthetic. They are to see that she does not swallow her tongue or get her mouth full of pillows and bed clothing until she is conscious and can be left to herself or left in charge of the nurse on the case.

Q Whose duty is it to transport the patient from the carrier to the bed? A Usually the nurse in the ward or the private nurse goes. Someone assists her transmittal and another 40

James H. Brothers—for defendants—direct.

nurse from the operating staff and an orderly. They take the patient to the bed and the patient is put into the bed and the private nurse is in charge of the case after the patient is relinquished by the anesthetist.

10 Q Where a patient is taken by the operating room supervising nurse from the operating room to the room, where there was a private nurse on duty, even though the anesthetist and the assistant surgeon were to accompany the patient and assist in wheeling the carriage or look after the patient in the hall from a physician's standpoint, whose duty would it be to lift the patient to the bed? A People supplied by the hospital, nurses or orderlies. In this case the private nurse stands in lieu of the ordinary ward nurse; where
20 there was no private nurse the ward attendant would stand in place of the private nurse. One nurse cannot lift the patient herself, so usually someone from the operating staff, the nurse or an orderly, is sent there with the patient on a draw sheet, and that is used in lifting the patient. The anesthetist may do that or not; usually does. The patient is put in the bed which has been prepared by the private nurse; the anesthetist takes the head.

30 Q The anesthetist takes the head? A Yes.

Q What for? A To see that the patient does not swallow her tongue. That is what she is there for. I say she because we usually use female anesthetists in our hospital. I don't know whether this was a woman or a man.

Q Was there any duty upon the part of the assistant at the operation—the assistant surgeon—to conduct and lift the patient in the bed? A
40 None whatsoever.

Allton L. Sherman—for defendants—direct.

Q Any duty as to examination or inspection of the bed before the patient was lifted in? A No, the bed is presumed to be in the condition it is meant to be to receive the patient.

Cross examination waived by plaintiffs' counsel. 10

ALLTON L. SHERMAN, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q Doctor, you are a practicing physician? A Yes, sir. 20

Q Practicing where? A West Orange.

Q Do you know Mrs. Haring? A I do.

Q You had occasion to treat her? A I had.

Q When did you treat her last, doctor? A January, 1928.

Q And for what did you treat her? A She was very nervous at that time.

Q How long had you known her? A I had known her for a long time.

Q Well, for about how long? A Well, we were in high school together. 30

Q When did you treat her before January, 1928? A Well, not for possibly a year or two.

Q What did you treat her for then? A Well, I had seen her considerably and she, I believe, was in the office several times over a period of time, about two years before this operation.

Q Do you know what her condition was prior to March 9, 1927, as to nervousness? A She was nervous. 40

Allton L. Sherman—for defendants—cross.

Q Do you know how long that condition existed? A Well, she was always rather nervous; that is, since I have known her as a patient. That is all I am able to speak of.

Q How did she exhibit that nervousness? A She said she was nervous.

10 Q When did she say anything about it? A Why, she said she was nervous and got tired easily and was unable to do her work.

Q And that was prior to— A (Interrupting.) That was, I should say, approximately two years before the date of the operation.

Q Was she nervous as a girl when you knew her in high school? A That I couldn't say.

20 *Cross examination by Mr. Coult.*

Q Doctor, you say that you saw her at your office? A Yes.

Q Had you ever attended any other member of the family besides Mrs. Haring? A Yes.

Q Whom did you attend? A Mr. Haring and the children.

Q What was the matter with them? A Well—

30

Mr. Braun: I object.

(Question withdrawn.)

Q You attended the family generally, did you? A Yes.

Q And the only occasion when you saw Mrs. Haring professionally was when she was at your office? A As far as I remember.

40 Q How many times did you see her in the office? A Possibly three.

Allton L. Sherman—for defendants—cross.

Q And you have known her since you have been practicing? A Practically, yes.

Q And your experience in treating the family extends over how many years? A Possibly five years.

Q And during all that time Mrs. Haring has on three occasions called at your office and that is all the attention she has had from you? A As far as I know. 10

Q That is a pretty good record for anybody, isn't it? A Yes.

Q What did she come to see you about, do you remember? A Yes, she said she felt nervous and tired and it was hard for her to do her work.

Q Were these on consecutive occasions or were they separated by some space of time? A They were separated by some space of time. 20

Q So that when she came once and you prescribed for her— A Yes.

Q What did you give her? A tonic? A I don't remember what I gave her.

Q Then that apparently cured her, as far as you know? A As far as I know.

Q Then after some space of time she was in again? A Yes.

Q And then she came a third time? A Yes, I remember we had a specimen of urine examined and it showed some nephritis. 30

Q But you never treated her for that. A Yes, I prescribed for it.

Q On one of those occasions? A Yes, sir.

Q In January you were called out to her house? A Yes.

Q In what condition did you find her? A Very nervous.

Q Was she prostrated? A You mean in bed? 40

Allton L. Sherman—for defendants—cross.

Q Yes. A Not the first time.

Q Did she cry? A Yes.

Q You had never seen her do that before, had you? A No.

Q She had an entirely different condition from any condition of hers that you had ever
10 seen before, isn't that so? A Well, she was still nervous.

Q How long did you treat her? A I saw her only possibly for a week.

Q Continuously? A Several days during the week.

Q Was she in bed for any part of the time? A Yes.

Q How long did you have her in bed? A I think she was in bed for about three days.

20 Q Did you take a look at her back? A I did.

Q Did you learn how she got that trouble with her back?

Mr. Braun: I object to that as not cross-examination.

(Question withdrawn.)

Q You did examine her back, didn't you? A Yes, sir.

30 *By Mr. Braun.*

Q You haven't seen her professionally since then, have you? A No.

Albert S. Harden—for defendants—direct.

ALBERT S. HARDEN, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q Doctor, you are a practicing physician and surgeon in the State of New Jersey? A Yes, 10
sir.

Q For how long have you been such? A
Twenty-five years.

Q Have you been connected with any hospitals or institutions in this State? A Yes.

Q What hospitals? A I am on the surgical staff of the City Hospital, St. Michael's, St. Barnabas' Hospital, Presbyterian Hospital, St. James' Hospital, consulting surgeon at Soho; surgeon for the Lackawanna and surgeon for 20
the Essex County Park Commission.

Q During the late war did you hold any rank or commission? A Yes, sir, I was active in the Medical Corps.

Q What commission did you hold? A Captain.

Q Where were you stationed? A At Oglethorpe at the Base Hospital. From there I was transferred to the Base Hospital at Augusta; from there to Polonia; from there I was sent to 30
the Rockefeller Institute for a special course and then back to Polonia.

Q What was the nature of your work at Polonia? A Bone and skin grafting.

Q In the course of your experience have you had occasion to witness and perform many operations on patients under anesthesia? A Yes.

Q And are you more or less familiar with the actions of patients from that anesthesia? A Yes. 40

Albert S. Harden—for defendants—direct.

Q Doctor, assuming a woman thirty-seven years of age was operated upon for removal of her appendix and removal of a fibroid tumor, the operation taking fifty minutes, during which time she was under anesthesia, which was first an injection of morphine followed by nitrous oxide and oxygen, which was then followed by ether, how much time would expire from the time of the completion of the operation until that patient had sufficiently recovered consciousness to experience and understand any sensation of pain so as to be able to express it or intelligently transmit that information to a physician or a surgeon? A It all depends upon the amount of ether she has had, to begin with. The ordinary cases generally, within a half hour, they start to what we call come out of ether. Then they go to sleep again and a little later on they are more out of ether, then they relax again—it is a gradual transition. By three or four hours they ought to be completely out. As regards the sensation it is very difficult for me to say because I would not be able to do any more than guess at it.

Q Would a patient be conscious enough five minutes after returning from the operating room to experience pain from a hot water bottle that was under her shoulder? A I don't think so, sir.

Q Would she be able to express anything intelligible that would convey the fact that she was suffering in an entirely different part of her body than that on which she had been operated? A I don't think so, sir.

Q Is an operation on the abdomen for the removal of the appendix and the tumor painful? A Very.

Albert S. Harden—for defendants—direct.

Q What is the reaction after the anesthesia has worn off at the site of the wound? A They generally complain of pain at the site of the incision.

Q Would that pain be any more acute than the pain from the burn of the hot water bottle? A I don't think so. 10

Q Is the region around the shoulder blades and across the back any more sensitive than the abdomen? A I don't think so.

Q Doctor, assuming that a woman has had a third degree burn across the back which has dried and parchmented the skin, would the cutting away of the dead skin with whatever surgical tool you use, holding the loose ends with forceps be a very painful operation? A No, sir.

Q Would it necessitate anesthesia? A No, sir. 20

Q Would you recommend anesthetizing a person for such an operation or cutting? A No, sir.

Q Why not? A It isn't necessary.

Q Assuming that the patient insisted that she did not want to stand any pain at all, would you anesthetize her? A I don't think so.

Q Would there be any danger in anesthetizing a patient who is even in normal health? A There is always a certain amount of danger to anesthesia even among the most skillful. 30

Q What is that danger? A Death.

Q From what? A From the action on the respiratory centers and from the action upon the heart. Some cases look perfectly normal and when they take two or three whiffs of ether they are dead. It is what we call a status lymphaticus case. There are many on record. 40

Albert S. Harden—for defendants—direct.

Q Is the duty of an anesthetist a specialized field? A Yes.

Q And the duties of a surgeon, are they more or less specialized? A Yes, sir.

Q Operations are becoming more and more complicated as new machinery has been developed for the safety of the patient? A I wouldn't say they were becoming any more complicated.

Q I mean the duties are more defined and is resolved itself more into team work, especially since the use of general anesthetics? A Yes, sir.

Q And it is impossible, is it not, for one man to perform a major operation under general anesthesia without assistance? A Yes.

Q And after the patient is under the ether duties of great care devolve upon the anesthetist for the safety of the patient, do they not? A Yes, sir.

Q What duty, if any, has the anesthetist to inspect or prepare or see that the ether bed is in proper condition for placing the patient in the bed? A None.

Q Whose duty is that? A The nurse in charge.

Q Where the patient is accompanied by a nurse from the operating room and delivered in the presence of her own room nurse whose duty is to lift the patient into the bed? A Well, I don't think there is any special party designated. Anybody that is around helps put them in the bed.

Q Is it a recognized part of the duties of the anesthetist to assist the patient into the bed? A That might be in some of the hospitals, but in the majority of the hospitals I work in, no.

Q What should she be doing if she is accompanying the patient to the bed? A If she is

Albert S. Harden—for defendants—direct.

accompanying the patient to the bed she should be at the head of the patient to watch that the tongue does not get back into the throat; to wipe the mucous away from the mouth, and watch to see that they breathe easily.

Q Does that require constant watchfulness? Is it an engrossing occupation? A Yes, surely. 10

By the Court.

Q Doctor, on the completion of an operation, am I right in saying that the patient is limp and the only sign of life is breathing? A That is correct.

Q How long afterwards do they begin to show signs of consciousness? A That depends on the amount of ether and some patients recover quite rapidly. When men who do nothing but ether work anesthetize them they shoot oxygen into them and get them out rather rapidly. 20

Q What do you mean by rather rapidly? A Say half an hour. Some take a quantity of ether. I have seen them where they take a can of ether and stay under a long time; some take a very small quantity.

Q The more ether they give them the longer they stay under? A Yes, sir. 30

Cross examination waived by counsel for the plaintiffs.

Herman C. Cassini—for defendants—direct.

HERMAN C. CASSINI, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

10 Q Doctor, you are a practicing physician and surgeon? A I am, yes, sir.

Q Are you connected with any institutions? A I am connected with St. Mary's Hospital.

Q Are you familiar with the hospital rules and regulations? A I am, yes, sir.

Q Whose duty is it to provide the necessary equipment and preparation and inspection of the ether bed where there is a private nurse on duty? A The private nurse.

20 Q Is there any duty on the part of the anesthetist to see or inspect or supervise the preparation of that bed? A No, sir.

Q Is there any duty to do likewise on the part of the assistant at the operation? A No, sir.

Q Are you familiar with ether as an anesthetic? A I am, yes, sir.

30 Q Can you say how long after an operation a woman thirty-seven years of age, for removal of the appendix and a tumor, which consumed fifty minutes, during which time the patient was under the influence of morphine followed by nitrous oxide and oxygen, followed by ether sufficient to make a complete relaxation for the performance of such a major operation, she would regain consciousness sufficiently to experience pain from a hot water bottle under her shoulder? A It all depends upon the length of the operation and the amount of ether given.

40 Q Fifty minutes. A I should say it would take two or three hours before that patient would be out of the ether to experience pain.

Herman C. Cassini—for defendants—direct.

Q Would she within five minutes after returning from the operating room be conscious enough to experience pain and able to express herself intelligibly to a physician? A Positively not.

Q The mere fact that the patient was wild-eyed and swore and said, "Get me out of here" and "I expected this," pointing to the abdomen, "But not this," pointing to the shoulders, within five minutes after she came out of the operating room, be any indication to the physician that anything unusual had been going on to the patient? A Certainly not. 10

Q Is it or is it not quite common for patients who have been under ether to use profane language to make all sorts of remarks? A That is quite usual. 20

Q Do they ever have hallucinations while they are under ether? A They do.

Q And nightmares? A I wouldn't express it that way, but they do have hallucinations.

Q What sort of hallucinations? A They have wild ideas.

Q Do they have ideas that they have a pain when they have no cause for it? A No.

Q Do they ever have hallucinations as something having happened to them, accidents or something of that sort? A Well, sometimes they express themselves that way, making believe that they might have had an accident, but of course, their ideas are not consistent at all. 30

Q Are they able to recall what was said either by them or in their presence five minutes after such an operation? A Usually not.

Q What do the recollections usually consist of? A Some of the things they have usually remembered before going under ether. 40

Herman C. Cassini—for defendants—direct.

Q Doctor, would cutting the dried or parched skin from a burn with the use of a sharp surgical instrument for the purpose of cutting and the use of forceps to hold the loose ends be a very painful operation? A Usually without any pain; dead skin usually has no sensation.

10 Q Would you recommend the use of an anesthetic for such a proposition? A Positively not.

Q Why not? A We try to get away from the idea of giving a general anesthetic at any time because we believe there is always an attendant danger in giving anesthesia.

Q Danger of what? A Danger of death, a complication of the lungs, pneumonia is even a complication after ether which sometimes terminates fatally.

20 Q What must be done by an anesthetist to prevent such danger as much as possible? A Why, to keep the patient as lightly under as possible, not to shock the system with ether, not to saturate the system with ether.

Q Does it require any special application and attention to the patient by the anesthetist? A While the anesthetist is giving the ether she watches the pulse, the color and the pupils of the patient as required.

30 Q How about after anesthesia in a case where a patient is accompanied to the bedside by the anesthetist; what if anything in connection with the anesthetist's duties would be required? A To see that the patient does not get suffocated and is breathing normally.

Q Does that require any observation of any particular part of the patient's body? A The head.

40

Herman C. Cassini—for defendants—cross.

Cross examination by Mr. Coult.

Q You say that under the circumstances which were embodied in the hypothetical question that was given you about the administration of ether that the patient would be unconscious even to pain for a couple of hours, is that right? 10

A Absolutely.

Q And then you say, as I understand it, that if such a patient within five minutes after coming out of the operating room begins to make certain signs and says, "I expected this but not this" and talked about getting her out of the room, that that would not mean anything to the doctor? A No, neither they do, they all make these little signs.

Q I thought you said she would be unconscious for two hours? A As far as pain is concerned; only the subsidiary functions are working. 20

Q Would it be a very strange and unusual thing if within five minutes a patient who ought to be unconscious for two hours began to talk and make motions? A I have never seen a patient come out and talk and speak coherently after five minutes.

Q Did you ever see them unconscious? A After the ether, yes. 30

Q In this case you say the patient would be unconscious for two hours? A I say unconscious as to the major faculties.

Q When would they begin to talk? A Within two to six or seven hours.

Q If within five minutes a patient should begin to talk you say it would be unusual. Do you mean that? A You don't expect that from patients. How do you expect the impossible for 40

Herman C. Cassini—for defendants—cross.

a patient who has been under ether for fifty minutes? How can she come out in five minutes? I can't answer that question.

Q But you did answer it. A Not the way you wanted me to.

Q But it is not my question. I said to you:
 10 If such a patient after five minutes after coming from the operating room should make certain motions and say certain things would that indicate anything unusual to the doctor? A They don't do that.

Q But it would be unusual, wouldn't it? A I have never seen a patient act like that.

Q But it would be unusual, wouldn't it? A But I have never seen a patient act like that.

Q Do you recall being asked whether or not
 20 if a patient within five minutes after coming out of the operating room under those circumstances should make certain motions and say certain things, whether that would indicate anything unusual to the doctor and you said, "No." Do you remember that? A Those are very strange questions for you to ask because they do not take place.

Q I am asking you whether such a question as that was asked you and whether you answered
 30 no—

By the Court.

Q You are only asked as to what you testified to on direct examination and if you remember testifying that way. A I must have misunderstood the question, then, your Honor.

Agnes Grant—for defendants—direct.

AGNES GRANT, recalled in her own behalf.

Direct examination by Mr. Horner.

Q Miss Grant, you have already testified concerning the preparation of the ether bed. Will you tell us who was in the room at the time the patient was placed in the bed and their positions in the room? A Mrs. Baigrie— 10

The Court: Just a minute. I think that that was all testified to and if you asked her that on cross examination I do not think you have a right to put it in on direct. She testified that Mrs. Baigrie immediately preceded the carriage and stood in the northeast corner; that Dr. Winifred Banks was on the east side and the other doctor on the west side. If there is anything that has been omitted you may ask her. 20

Q How many beds were in this room? A Two.

Q In which bed was the patient placed immediately on coming in from the operating room?

A In the bed nearest to the east wall.

Q That is the bed farthest from the windows? 30

A Farthest from the windows.

Q When you entered the room was the bed in condition to receive the patient? A It was too near the door to allow our entrance.

Q What was done? A It was pushed into a slanting position, the foot nearest to the windows.

Q What was the condition of the bed itself, not with reference to its position in the room, but the bed itself? A The bed was ready for the reception of the patient. 40

Charles W. Banks—for defendants—direct.

Q And on which side of the bed, wherever it may be, were the covers rolled? A On the west near the windows.

Q That is the side where Dr. Anuario was standing? A Yes.

10 Q Were they or were they not at the bottom of the bed? A They were not.

Cross examination by Mr. Coult.

Q And you came down with the carriage? A I did.

Q And you went back with the carriage? A I did.

Q And you didn't take any part in putting the lady on the bed? A No, I did not.

20 Q You had no particular interest, then, in the position of the bed, did you? A Yes.

At one o'clock P. M. the Court takes a recess of one hour.

AFTER RECESS.

30 Mr. Braun: I would like the Court's permission to recall Dr. Charles W. Banks for one question.

The Court: Very well.

CHARLES W. BANKS, recalled in his own behalf.

Direct examination by Mr. Braun.

40 Q Doctor, it has been testified that you completed Mrs. Haring's operation at 10:40, but I

Clara J. McCann—for defendants—direct.

don't think you gave us the time that you started the next operation. A 10:55.

Q You also testified, doctor, that you had taken Mrs. Haring to a card party in your car when you happened to be stopping there and found that she was going out. A Yes.

Q When was that? A I don't remember the exact date, but I think it was some time in the month of August. 10

Q What year? A 1927.

Q Was there any conversation between you at that time about her attending any other social function? A Yes.

Q What did she say? A She belonged to a card club which met each week.

Q You took her to a card party on that occasion, didn't you? A Yes, sir. 20

Cross examination waived.

CLARA J. McCANN, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q Miss McCann, you are connected with St. Mary's Hospital at the present time? A Yes, sir. 30

Q In what capacity? A I am Director of the School of Nursing.

Q Would it or would it not be common practice for a nurse who found her patient was cold or found that the room was cold, to introduce a hot water bottle in the bed for the purpose of warming the patient and preventing pneumonia?

A Are you speaking of a graduate nurse? 40

Abraham L. Reich—for defendants—direct.

Q A graduate nurse. A I think she can use her own discretion about that.

Q And would she do that without consulting the attending physician if he were actually engaged at the time in another operation? A I see no reason why she couldn't do it.

10

Cross examination by Mr. Quaglia.

Q You say you are the Director of the School of Nursing? A That is correct.

Q Isn't it the practice before a patient is brought to the operating room, being prepared for the operation, to put on what are known as leggings on the legs almost to the thigh?

20

Mr. Braun: I object to that as being beyond the scope of the direct examination.

Objection sustained.

ABRAHAM L. REICH, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

30

Q Doctor, are you a licensed physician and surgeon in the State of New Jersey? A I am.

Q Do you hold any official position with any hospital or hospitals in the State? A I do.

Q What connections have you and with what institutions? A I am the Director of the Department of Anesthesia of the Newark Beth Israel Hospital.

Q As such are you accustomed to attending operations or to the administration of anesthesia?

40

A Yes, sir.

Abraham L. Reich—for defendants—direct.

Q Are you familiar with the various duties of surgeons and anesthetists and assistant surgeons? A Yes, sir.

Q What have you to say as to whether or not the duties of an anesthetist are or are not clearly defined in the practice of surgery? A The duties of an anesthetist are clearly defined. 10

Q Is it or is it not a specific or special branch of surgery? A It is.

Q What are the general duties of an anesthetist during and following an operation? A During an operation—it really is a little free-operative; it is the duty of the anesthetist to administer the anesthesia. After physical examination it is the anesthetist's duty to suggest the best anesthetic for the welfare of that patient; during the operation to administer the anesthesia continuously and keep that patient in a proper state for the surgeon to do his work, at the same time bearing in mind the condition for the welfare of the patient. After the operation it is the duty of the anesthetist to see that his patient is properly transported to the bed—or assigned to one who is capable of taking care of the patient and seeing that the patient is properly transported to the bed. 20

Q Are the duties of the anesthetist performed with or without the supervision of the surgeon as to their details? A The actual details are not under the supervision of the surgeon. Pardon me, if I may add, a surgeon may suggest to the anesthetist that his patient perhaps is not relaxed enough or he may notice something that he thinks he could call to the attention of the anesthetist, or vice versa, the anesthetist may take the suggestion of the surgeon and may state whether or not the patient should have anesthesia 30 40

Abraham L. Reich—for defendants—direct.

or not, according to his findings, and in that way there is relationship between the anesthetist and the surgeon.

10 Q Who has the final control as to whether or not the patient should get more or less anesthesia? A It should be the anesthetist's duty to inform the surgeon as to the condition of the patient.

20 Q What about the duties of the anesthetist following the operation? A After the operation is over and the anesthetist is satisfied with the condition of the patient; that is, as to pulse, color, free air passage, and if they are satisfactory to him his duties are over, provided he has himself seen that that patient is properly transported to the bed or one assigned by him to see that the patient en route, rather, is taken care of.

Q You said that the anesthetist watches the patient for respiratory purposes, doctor. A That is one of the conditions. By that I mean that one who is trained to watch the patient, either the anesthetist himself or his assistant should watch the head to see that the tongue is not swallowed; that the pulse remains within proper range; that the patient's head is properly supported, and that the color is all right.

30 Q What condition, if any, is created by the use of such a general anesthetic as ether which might cause danger to the patient and requires this observation and care that you enumerate?

40 A Ether causes a complete anesthesia, a complete relaxation. The patient has lost consciousness; all the reflexes are lost to the patient; they will not respond to reflexes. Therefore, the patient must be watched as to the head because the reflexes being lost, the tongue and head, if not watched, will drop back and cause suffocation.

Abraham L. Reich—for defendants—direct.

Q What other effect will it have? A Carrying the narcosis too far might cause complete cessation of the respiratory center; it would stop breathing or it would be so shallow as to cause the patient to have her general physiology embarrassed, and going a step farther, of course, there is the danger of death.

10

Q Does the giving of this attention require careful observation, or does it necessitate the engrossing of the attention of the anesthetist? A Yes, the anesthetist has to watch that.

Q How carefully does it have to be watched? A So much so that he has no other duty except to watch the patient's head. By that I mean that by the head he can watch the entire physiology—the entire body.

Q Does it require the complete attention to the head? A The anesthetist should give his entire attention to his duties.

20

Q What duties, if any, does the anesthetist owe with respect to the preparation or inspection of the ether bed in order to be sure that it is in proper condition to receive the patient upon the patient's return from the operating room?

A The anesthetist may suggest to the surgeon that he thinks this patient's bed ought to be warm and instructions may be left, or if it is accepted as routine that the patient's bed will be kept warm—but it is not the anesthetist's duty to leave his patient to see that the bed is properly prepared for him.

30

Q Is there any duty upon the anesthetist to accompany the patient to the room to see that the bed is warm? A It is not his duty to see that the orders are carried out.

Q Whose duty is it? A If it has a general nursing staff, it would be the supervision of the

40

Abraham L. Reich—for defendants—direct.

nurses' training school to see that the orders were carried out, or more specifically it would be the nurse's duty to carry out the orders.

10 Q If there was a private nurse on duty? A The usual practice is that the private nurse assumes all responsibility for the preparation of that patient.

Q What would you say as to the assistant surgeon's supervising the preparation of the bed?

A My idea of an assistant is exactly what the words imply. I don't understand what relationship he may have to the bed in the ward or in the room.

Q Would there be any duty on him to inspect or examine the bed before the patient is put into it? A It would not be his duty.

20 Q Assuming that a woman thirty-seven years of age was operated upon—a major operation consisting of practically a double operation, one for the removal of the appendix and the other for the removal of a fibroid tumor of the womb—which operation consumed fifty minutes and the anesthesia given was first morphine followed by nitrous oxide and oxygen, which in turn was followed by the general anesthetic of ether, what
30 would that woman's condition be five minutes after her return from the operating room as to consciousness? A If she were returned—that is, five minutes after her return from the operating room—that is, assuming she returned immediately after the conclusion of the operation, her condition, to the best of my knowledge and experience, is that her condition would be a deep narcosis.

40 Q What is a deep narcosis? A A complete general anesthesia.

Abraham L. Reich—for defendants—direct.

Q Would she be conscious of pain? A She would not be conscious of pain. Of course, it depends on the anesthetist as to how deep the anesthesia was carried with the ether. Ordinarily she would be conscious of no pain and her reflexes would absolutely be lost.

Q Would she be conscious of the presence of a hot water bottle under her shoulder that was burning her? A She would not. 10

Q Would she be able to express herself so as to be able to indicate she was suffering from pain in a location that was not operated upon? A Absolutely not.

Q Would she be able to remember anything that was said or anything that you might have said under that condition? A No, sir.

Q Do patients ever talk or swear while they are under the influence of ether? A A patient may be very unruly in the period of induction. That is when a patient is being induced at the very start of the anesthesia. Oftentimes that is more or less voluntary on the part of the patient. If this patient had a period of gas oxygen induction, the period of excitement would be eliminated. That is the advantage of it. During the period when the deep narcosis is going on it would be sad if the patient could talk, and in coming back she may say some things which are incoherent and have absolutely no relationship to things about her. 20

Q What about moving her head and arms? A She may toss her body or arms or head. Very often they do that. 30

Q Would she be conscious enough to realize what she was saying or remember it? A Not at all. 40

Abraham L. Reich—for defendants—direct.

Q Would she be conscious enough in that stage to remember anything that was said to her by someone else? A No, because I have tried that myself many, many times in trying to see how soon a patient after a deep anesthesia would come to, and I have called them trying to get
10 them to respond, chiefly to put out the tongue, and sometimes after a great deal of effort and time I would barely get them to put the tongue out, and then it would be only on impulse, I think.

Q Within how long a time, would you say? A With fifty minutes for the operation, and assuming five or ten minutes for the induction, and an hour of anesthesia, and if it were carried through until the abdomen was closed, I think an hour or
20 an hour and a half before the patient would be able to respond, I think would be all right.

Q After a major operation when the patient has finally returned to consciousness, do they or do they not frequently complain of pain in the back? A That has been one of the questions of surgery. It has been a hard thing to eliminate; that is, pain in the back. That is due to their position on the operating table. That table is not the most comfortable place. We have tried to
30 eliminate it, but they often complain of pain in the back.

Q What causes that? A The position on the table. The complete relaxation is the cause, and very often the patient is more arched in the back than usual. In being operated where they are not under complete anesthesia they ask for a pillow to be put under the back.

Q Would it be so unusual or extraordinary to indicate to a surgeon or physician that anything was particularly wrong? A No, it is a common
40 complaint for the patient to complain of pain in

Abraham L. Reich—for defendants—direct.

the back. It is due to the complete relaxation on the table.

Q How far does that pain extend in the back or does it include the entire back? A It might include the entire back. It might be the lumbar region, which is the hollow of the back, but they complain of pain in the back and we accept it as such. 10

Q Would that extend over the region of the shoulders?

Objected to as leading.

Q Would it or would it not extend as far as the region of the shoulders?

Mr. Coult: I object. 20

The Court: I will allow it.

A It may extend to the whole shoulder. Very often an operation as you have described it to me for the removal of the fibroid uterus, the patient is put on the head in the Trendelenberg position, with the head down and the legs up, and they often complain of pain in the back from that position.

Q In a treatment which consisted of cutting off pieces of dried or parchmented skin over a burn by the use of a sharp surgical instrument for cutting and the use of a forceps to hold the loose ends, would there be any extensive pain attendant to the cutting of that skin? A The cutting of skin from the patient? 30

Q Dried, parchmented skin. Cutting the loose skin off. A From the area of the wound? From the edges of the burn?

Q Yes. A No, that is usually painless. 40

Abraham L. Reich—for defendants—direct.

Q Why painless? A Because the skin is dead skin; it is skin that is thrown off. It is dead because the blood supply and the nerve supply to that part is gone. If I interpret your question properly.

10 Q This is skin that has dried from the burn of a hot water bottle; it is parchmented, I believe, is the description of it. A Yes.

Q And it was removed by taking the loose ends with the forceps and cutting the tissue with a sharp surgical instrument. A If the cut were limited to the dead skin it would lack sense, but if it included live skin it would be painful.

20 Q Would you in either event give a general anesthetic? A In either event? You mean if it was carried beyond the field of the outer borders of the dead skin to cause bleeding?

Q Yes. A Some form of anesthetic, I think, would be proper. If it were to freshen the outer border or done generally to loosen the granulation, it would be all right. I am afraid I am going a little too far in this case.

30 Q In this instance the dead skin was cut out in order to permit the free exudation of any serum that formed underneath to escape, and the ends of the dead skin were held with forceps and a sharp instrument was used to cut off the dead skin and remove it in small pieces. A For that it is not the practice to give an anesthetic.

40 Q Doctor, would it be customary or common practice if the room were cold and if the private nurse were fearful that her patient who had just been operated on for a serious operation might contract pneumonia, without securing instructions from the surgeon who is then engaged on another operation, to place a hot water bottle in the bed? A I think it would be good practice.

Abraham L. Reich—for defendants—cross.

It would be observing on the part of the nurse, I think.

Cross examination by Mr. Coult.

Q Doctor, I show you Exhibit P. 1 and Exhibit P. 2. I ask you to direct your attention particularly to the lower right-hand side of the burn which appears in those pictures. If the skin that was cut off of that burn was removed from an area of about six by eight inches over the burn for the purpose of allowing pus to exudate, would you say that that would be painful? 10

Mr. Braun: I object. There is no testimony that the pus was permitted to escape. He said there was no infection at all. He said it was for the purpose of permitting the lymph and other liquids to exudate. 20

The Court: But there is testimony on behalf of the plaintiffs that there was pus there, so I suppose he is entitled to ask him that.

Mr. Braun: He ought also to include that it was not all done at one time; that there were two separate periods. 30

Q Suppose it was removed from an area of six by eight inches and it took two occasions to remove, would you say it would hurt? A What do you mean six by eight inches?

Q The lower end. A Would that extend down to here or across here?

The Court: The doctor testified he cut nothing but dead skin.

The Witness: It would be painless. 40

Abraham L. Reich—for defendants—cross.

Q Suppose instead of taking off nothing but dead skin that he took off tissue and that it came off in pieces large enough to look like codfish steaks, would you say that would hurt? A If it was as thick as codfish steaks.

10 Q Would you say that that would signify anything if there was blood and pus with it? A Pus is an infection but blood would not be unusual. It is done so that granulations may form and the new skin heal over.

Cross examination by Mr. Horner.

Q Assuming there was a private nurse in the room to which the patient was being returned to the ether bed, would there be any obligation on the part of the persons returning the patient to the bed to make any examination of that bed? A None at all.

20

Cross examination by Mr. Quagia.

Q Assuming that the private nurse was not there and the patient were brought by the anesthetist and by the assistant surgeon and the supervising nurse of the operating room and brought into that room and in that bed there was a hot water bag, would you say in that case the hot water bag should not have been removed and the patient placed on it?

30

Mr. Braun: I object to that.

The Court: He has only asked whether it should be removed or not. We all agree on that. I will allow it.

40 A Of course, it should be removed.

Joseph Bove—for defendants—direct.

By Mr. Braun.

Q By whom, doctor? A By whoever sees it first.

JOSEPH BOVE, sworn in behalf of the defendant, Charles W. Banks. 10

Direct examination by Mr. Braun.

Q Doctor, you are licensed to practice medicine and surgery in the State of New Jersey? A I am.

Q Are you connected with any institutions in this State? A St. Mary's, Orange, New Jersey, and St. Vincent's Hospital in Montclair, New Jersey. 20

Q In connection with your practice and in connection with these institutions are you familiar with the duties of the surgeon, the assistant surgeon and the anesthetist during an operation? A I am.

Q And are you familiar with the duties of a private nurse? A I think I am.

Q What have you to say as to the duties of an anesthetist during an operation and following the operation, if any? A In my estimation the primary duty of an anesthetist is to keep the patient alive; secondarily, it is to give the patient as smooth an anesthetic as possible and make the operation as easy as possible for the surgeon, but the chief thing is to keep the patient alive. 30

Q In the course of following these duties is the anesthetist subject to the orders of the surgeon or does the anesthetist follow his or her own best judgment as to the method of adminis- 40

Joseph Bove—for defendants—direct.

10 tering the anesthetic and the amount of the anesthesia and the after treatment? A The anesthetist is usually employed by the surgeon and, of course, the surgeon does not employ an anesthetist unless he thinks he is competent, and he usually leaves the type of anesthesia to the anesthetist, depending upon the condition of the patient, and any condition which may arise before, during or after the operation.

Q After the operation, what duty, if any, is there upon the anesthetist to see that the bed in which the patient is to be placed has been properly prepared and is in proper condition to receive the patient? A None whatsoever.

Q Whose duty is that? A The nurse who has charge of that patient.

20 Q What duty is there on the part of the assistant surgeon as far as the bed is concerned? A He has absolutely nothing to say about it at all; he is just an assistant.

Q Has the surgeon himself any duty with respect to the bed? A I think the surgeon takes it for granted that the bed is properly prepared for the reception of the patient.

30 Q When I say "assistant" do you understand that I mean assistant surgeon? A Assistant to the surgeon, yes.

40 Q Doctor, assuming that a woman thirty-seven years of age was operated upon for a major double operation consisting of the removal of the appendix and the removal of a fibroid uterine tumor, the operation taking fifty minutes to complete and the anesthesia being morphine, followed by nitrous oxide and oxygen, followed by ether, what have you to say as to the condition of that patient as to consciousness within five minutes after the patient is returned from

Joseph Bove—for defendants—direct.

the operating room? A The anesthesia preceded by a primary injection of morphine and induced by nitrous oxide and oxygen and then ether, the patient would be unconscious five minutes after the operation.

Q What effect has the morphine on the prolongation of the anesthetic? A The morphine prolongs the recovery from the stage of anesthesia. 10

Q And how long would it be before the patient would be sufficiently conscious to experience and understand that she was suffering pain from a burn in the shoulder? A Do you mean how long it might be before she was conscious and remembered or before she might allude to it?

Q Before she would know she was experiencing pain. A At least a half hour, and usually longer. 20

Q How long afterward would the period arrive when she would be able to experience anything in the way of pain that she would afterward remember? A About three hours.

Q Why is there a difference in those two periods, doctor? A Well, because remembering is one function of the brain and feeling is another. We have reflexes in the body, of course. It is the same as you have a person sleeping and you hit him on the head and he would give evidences of pain; if he has not been hit hard enough he will not remember it. Each stage of the recovery from anesthesia is different. The reflexes return differently. They might start by moving their hands and sometimes the last parts to be anesthetized would be the lower extremities. 30

Q Would it be possible for such a woman as I have described, having had such an operation, to feel a sensation of pain from a hot water 40

Joseph Bove—for defendants—direct.

bottle burn or be able to express the fact; that is, would she be able to express intelligibly that she was suffering pain, to a doctor or anyone else five minutes after an operation? A I don't think so; I have never seen it happen.

10 Q What are the stages of recovery from a complete anesthesia? A The stages of a recovery from a complete anesthesia are the complete opposites of the stages of induction. In going under there is the primary stage, then the secondary stage, known as the excitation, then the stage of anesthesia. Recovery is in the opposite manner. They start to recover and first they sing or shout, pray or swear, give away secrets, which they wish they had not stated, saying things they did not want to say, then they gradually become conscious.

20 Q During that stage they know what is said to them? A During the stage of excitation?

Q During the stage of excitation. A Very seldom.

Q Do they know what they are talking about? A They do not.

30 Q For what would you interpret the actions of a patient who on coming out of the operating room, being placed in a bed, began to talk and swear and use repeatedly expressions of a desire to be taken out of there and indicating that they expected something in their abdomen but not in their back? A To me that is ordinarily an everyday experience and ordinarily I would not pay any attention to it at all.

40 Q But would there be anything in those symptoms which would indicate to the ordinary surgeon or physician that the patient had suffered a burn or had had some injury to the back which required inspection or investigation?

Joseph Bove—for defendants—cross.

A No, sir, there would not be any reason for investigation.

Q What have you to say as to whether or not patients ever complain of a pain in the back after an operation which does not involve the back? A Most patients do complain of that pain. 10

Q Do you know what causes that pain? A Probably because of the position they are in on the table. They have complete relaxation and they are on a rather hard table and pressure itself might be one of the causes. Secondly, it might depend on the type of operation. Any operation on the pelvic cavity is performed in what is known as the Trendelenburg position and the patient is standing almost on his or her head and this position might give pain in the back and shoulders. 20

Q It has also been testified that this lady after being brought back to the room had her fingers in a sort of claw-like position and at times was also opening and closing the fingers. What have you to say as to the probable cause of that? A Well, I wouldn't want to give any cause for it, but a lot of them do it. It is part of the process of coming out of the deep anesthesia. They are apt to do anything and move in every way. 30

Q How about the eyes? Do they ever have a staring, wild appearance? A Eyes always have a staring, wild expression in coming out of an anesthetic. When I say an anesthetic I mean, of course, ether anesthesia.

Cross examination by Mr. Coult.

Q What would you say would be the earliest moment at which after the administration of 40

Joseph Bove—for defendants—cross.

ether had concluded that you would expect any patient to complain of pain? A Well, I can only answer that from my experience. I have been doing anesthesia work—

10 Q You can answer it in your own words. A From my experience I never heard of any of them complaining of pain and remembering what they said after an anesthesia of the type described.

Q Did you ever hear them complain of pain in the back when you thought they were not in a condition to remember what they said? A Yes.

Q How soon would that be after the administration of ether had ceased? A From a half hour to an hour.

20 Q Of course, you assume that at that time that they are able to complain of pain; they are able to feel pain? A Presumably.

Q Otherwise they wouldn't complain? A Otherwise they wouldn't complain.

Q You say that the selection of the anesthetist is left to the surgeon? A In most hospitals, yes, sir.

Q And a surgeon would not employ one unless he was reliable? A I doubt if he would.

30 Q Of course, if this anesthetist happened to be his wife there wouldn't be much question as to whether she was reliable or not.

Mr. Braun: I object to that.
Objection sustained.

William J. Davis—for defendants—direct.

WILLIAM J. DAVIS, sworn in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q Doctor, you are a licensed practicing physician in this State? A I am. 19

Q How long have you been practicing? A Ten years.

Q Are you connected with any hospitals or other institutions in this State? A Yes.

Q Name them, please. A New Jersey Orthopedic Hospital and the Essex County Homeopathic Hospital.

Q In connection with your duties at these institutions and your experience in private practice, are you familiar with the duties of a surgeon and the assistant surgeon and the anesthetist and the private nurse in connection with operations? A Yes. 20

Q And the treatment and taking care of the patient? A Yes.

Q What have you to say as to whether or not the duties of an anesthetist are more or less defined?

Mr. Coult: If the Court please, I wonder if so far as I am concerned I can concede that this testimony will be the same as that of the previous doctors or any of the doctors who have testified as to what I suppose would be the same circumstances. 30

The Court: Do you want to accept the concession?

Mr. Braun: What would you concede?

Mr. Coult: That the same thing applies to any one of the sets of the questions you 40

William J. Davis—for defendants—direct.

have asked of any of these other doctors you have produced.

By the Court.

10 Q Doctor, you have heard the previous answers to the questions that the last and previous doctors have been asked? A I just heard the last one.

Mr. Braun: I only have this one doctor.

The Court: Very well, go ahead.

Q What have you to say as to whether or not the duties of an anesthetist are more or less defined? A Yes, they are.

20 Q It has been testified that anesthesia is a more or less specialized branch of surgery. A It is nowadays, yes.

Q What are the duties of an anesthetist during and after an operation? A During and after an operation the duties are to conduct the patient safely through your part of the operation and to keep the patient in good operating condition and carry him safely to the best of your judgment, safely through the operation until he is ready to leave the operating room.

30 Q In connection with those duties is there any duty on the part of the anesthetist to see that the bed in which the patient has been placed has been properly prepared and that it is free from obstructions? A The duty of the anesthetist is to see that the patient is all right and he does not have anything to do with the bed at all.

40 Q How about the assistant surgeon? A The assistant surgeon very seldom is—after the oper-

William J. Davis—for defendants—direct.

ation is over he and the surgeon leave it to the anesthetist and the nurse.

Q What have you to say as to whether or not the cutting of dried or parchmented skin over a burn with a sharp instrument, holding the loose ends of the skin with a forceps, is painful? A It would depend on how far out you cut. If you just cut dead skin it would not be painful, certainly not. 10

Q Would a woman that is thirty-seven years of age and who has been operated upon for two purposes, one for the removal of the appendix and one for the removal of a fibroid uterine tumor, which operation consumed fifty minutes of elapsed time and where the anesthetic was morphine, followed by nitrous oxide and oxygen, followed by ether, be sufficiently conscious within five minutes of her return from the operating room, fifty or seventy-five feet away from her room, to experience pain or the sensation of pain from a hot water bottle? A No. 20

Q Would she be sufficiently recovered to know and understand what she was saying if she could talk or what others were saying to her? A No.

Q How long after the discontinuance of the ether would she be able to experience pain from a hot water bottle burning her back? A Of course, different persons react differently, but I would say not under an hour would she be able to consciously remember anything; not under an hour and possibly a great deal longer than that. 30

Q Doctor, if a patient on her return from the operating room is restless and threw her arms around and used an oath and said, "Get me out of here. I expected this," indicating her abdomen, "but not this," pointing to the shoulders; her eyes were wild and staring; would these symp- 40

William J. Davis—for defendants—cross.

toms indicate to a doctor that there was anything unusual wrong with the patient or put him on notice—would he ordinarily examine a patient on the back where he had not operated to see whether there was anything wrong there? A How long afterward?

10 Q Within five minutes after the return from the operating room? A No.

Q Is it or is it not common for a patient to complain of pain in the back for an abdominal operation or pelvic operation? A Not after five minutes.

Q Is it unusual for them to begin to complain of pain at any time after regaining consciousness? A Yes, from the shoulders, in an operation of this kind in a position they have them
20 from these things that keep them from sliding down.

Cross examination by Mr. Coult.

Q How soon after the anesthetic had been administered would you expect a patient to begin to complain of pain in the back or shoulder? A I said about one hour.

Q You mean that is the earliest you would
30 expect any complaint of pain? A That would be very early.

Q You would assume if such a complaint was made that the patient experienced such pain complained of? A Not definitely, no.

Q You say that a pain in the back is the usual thing after an operation? A I didn't say it was usual. It happens.

Q And if a person complained of pain in the back would you say there was after such an
40 operation? A Not as early as that because he

James H. Brothers—for defendants—direct.

sees these things every day and they become commonplace and you know he would not pay any particular attention.

Q Then would you think in your judgment that it would be justifiable to put a hot water bag in a bed under a patient who had complained of pain in the back? 10

Mr. Braun: I object. There is nothing in the testimony to justify such a question as that.

The Court: I will sustain the objection.

Mr. Braun: I would like to recall Dr. Brothers.

The Court: Very well.

20

JAMES H. BROTHERS, recalled in behalf of the defendant, Charles W. Banks.

Direct examination by Mr. Braun.

Q Doctor, is it or is it not usual for patients who have been operated upon in the abdominal region or the pelvic region to complain of pain in the back after being on the operating table for fifty minutes? A Yes. 30

Q What is the cause of that? A When a person stands erect there is an arch in the back; when they are under a general anesthetic that curve straightens out and they produce a curve in the opposite direction and it becomes slightly hump-backed or straight. That puts a strain on the interspinous ligaments which hold the spine together which are in the nature of a string of beads. When the patient recovers consciousness 40

Charles Anuario—for defendants—direct.

they do not return to their normal posture at once; they cannot get back altogether. They then have conscious pain due to the pull on the periosteum or covering of the bone and that produces pain. It is the tearing of the periosteum that produces the pain.

- 10 Q Where does the pain extend with respect to the shoulders? A All the way down the back.

Cross examination by Mr. Coult.

Q How soon would you expect at the earliest to hear complaints of pain from a patient after an anesthetic? A When they recover consciousness. If the operation has been performed in the morning they complain at night.

- 20 Q How soon would you expect it? A Not before they had recovered consciousness.

Q How long does it take? A Anywhere from one to two to six hours.

CHARLES ANUARIO, sworn in his own behalf.

- 30 *Direct examination by Mr. Horner.*

Q Dr. Anuario, you are a practicing physician of the State of New Jersey? A Yes.

Q How long have you been practicing in the State of New Jersey? A About a year and a half.

Q On March 8th, 1928, did you see Mrs. Haring, the plaintiff in this case, at St. Mary's Hospital? A I did.

- 40 Q You took her history? A I did.

Charles Anuario—for defendants—direct.

Q At that time were you connected with the hospital in any way? A I was acting house physician.

Q On the following day, the morning of March 9th, did you assist Dr. Banks in performing this operation upon Mrs. Haring? A I did.

Q After the operation, did you, in company with Miss Grant and Dr. Winifred Banks, accompany the patient to the private room of the patient? A Yes, sir. 10

Q When you got to the room where the patient was to be received, what did you find? A You mean in the room?

Q Yes. A Why, Mrs. Baigrie was in there as we pulled in with the carriage. We couldn't make any room for the carriage so I just came to the foot of the bed and pushed the bed over so we could get the carriage between the bed and the east wall, and the bed was completely exposed. 20

Q How many beds were in this room at the time? A Two.

Q How were they placed? A They were placed with the heads facing toward the north and the feet toward the south parallel to each other.

By the Court.

30

Q The heads to the north, you say? A Yes, sir.

By Mr. Horner.

Q Where were the windows in that room? On which side? A On the west side of the room.

Q Do I understand you to say that the bed was placed between the carriage and the bed in which you placed the patient? A At the east wall. 40

Charles Anuario—for defendants—direct.

Q What was the condition of the bed itself when you arrived in the room with the carriage and the patient on it? A The bed was completely exposed; that is, the portion on which the patient was to be placed, and the blankets rolled on the east side of the bed.

10 Q How were they placed? A They were rolled over to the east edge of the bed; the roll made a diameter of about eight inches.

Q Was there anything else on the bed? A No, sir.

Q Was there or was there not a pillow? A Yes, there was a pillow at the head of the bed in an upright position.

20 Q Was there anything at all on that bed outside of the roll of covers which was along the east side of the bed? A Absolutely not.

Q Were there any hot water bottles on that bed? A No, sir.

Q In what position did you stand just prior to the time that the patient was transferred from the carriage to the bed? A I was on the west side of the bed.

Q And Dr. Winifred Banks? A She was between the wall and the carriage.

Q That is, the east side? A The east side.

30 Q That is the east side of the carriage? A Yes, sir.

Q And Miss Grant? A She was at the foot of the bed.

Q Where was Mrs. Baigrie at that time? A She was in the northeast corner of the room at the head of the patient.

Q At the head of the patient? A Yes, sir.

40 Q How does the height of the carriage compare with the height of the bed? A They are almost flush with each other. Of course, we have

Charles Anuario—for defendants—direct.

two carriages up there and one is about two inches higher than the other and I don't know which one was used.

Q Do you know the size of the bed? A Yes, sir.

Q What is the size of that bed? A It is six and a half feet long by three feet wide. 10

Q And you know the size of the carriage? A Yes, sir.

Q What is the size of that? A Six and a half feet by twenty-six inches.

Q When you brought the patient in, how was she covered? A She was covered by a blanket that she came from the operating room with, and then the warm blanket that is put on in the operating room, and then the edges of the lifter pushed over on top of those. 20

Q What is the lifter? A A hammock affair placed underneath the patient so that in moving her from the carriage to the bed she can be easily lifted.

Q Where is that placed? Under the patient? A It is placed on the operating table and the patient is lifted from the operating table right onto the carriage.

Q With the lifter? A Yes, sir. 30

Q That is the same lifter that is on the operating table? A Yes, sir.

Q How wide is that lifter? A About two feet.

Q In lifting the patient from the carriage to the bed, what do you do? A It all depends on how many people are there.

Q What did you do in this instance? A I grabbed the lifter with my left hand and placed my forearm under her thighs and lifted her over, 40

Charles Anuario—for defendants—direct.

and Dr. Winifred had the lifter on the other side and we lifted her off the carriage onto the bed.

Q Where was Mrs. Baigrie at that time? A In the northeast corner of the room at the head of the patient and she assisted to lift the patient's head off.

10 Q How did you do that? An expression has been used here that she was dragged over. Do you lift her or drag her or what do you do? A We lift her at least five inches over the carriage and lift her over the bed and lower her gradually to the bed.

Q Is she dragged in any way? A Absolutely not.

Q Is that carefully done or not? A Positively.

20 Q Why is it necessary to use care? A In order that there may be no undue stress on the wound and for the welfare of the patient.

Q Is the patient's head placed upon the pillow at that time? A No, sir.

Q How long a time was consumed in the transfer of the patient from the carriage to the bed? A I don't think it took more than two minutes.

30 Q What happened to the lifter? A I don't know, I think Miss Grant or Dr. Winifred, I don't know which one, pulled it out from under the patient.

Q You don't know anything about that? A No, sir, I left the room as soon as the patient was in the bed.

Q Who was in the room when you left? A Miss Grant, Dr. Winifred Banks and Mrs. Baigrie.

40 Q Did you precede the carriage out? A I didn't precede it out; I left the carriage there.

Charles Anuario—for defendants—direct.

Q The carriage was there when you went out of the room? A Yes, sir.

Q Where did you go from the room? A I went back to the operating room and took off my gown.

Q What for? A So that I could go down and see the next patient that we were to operate on. 10

Q Was that the same patient that Dr. Banks operated on about which he has spoken? A Yes, sir.

Q What is the purpose of the pillow at the head of the bed, doctor? A When the patient reacts from an anesthetic the patient usually jumps about with the head and that is there to prevent the head from striking the bars at the head of the bed.

Q When you started to lift the patient from the carriage to the bed did you have a full view of that bed from side to side and from end to end. A Yes, sir. 20

Q And you are sure there was nothing in it? A No, sir.

Q Do you have a hot water bottle similar to what is used in ether beds? A Yes, I think Miss Sitnesky has one.

By the Court. 30

Q It is no different from any other hot water bottle, is it? A No, sir, it is standard.

By Mr. Horner.

Q Is that the kind of bottle that was used at St. Mary's Hospital? A Yes, sir.

Q Is that the kind that was used at the time Mrs. Haring was operated upon? A I don't know. 40

Charles Anuario—for defendants—direct.

Q Is that the only kind of a bottle you have ever seen used there? A Yes, sir.

Q How was the underneath blanket drawn at the time just before the patient was placed on the bed? A It was drawn taut; no wrinkles in it.

10 Q If the hot water bottle had been underneath the blanket by any chance, would you have observed it?

Mr. Coult: I object to that.

The Court: I will allow it. That is, if he can say whether he could observe it or not.

Q Had a hot water bottle been under her would it have been observable the way the cover was drawn? A Yes, sir.

20 Q Have you experimented with that since that time? A Yes, sir.

Mr. Coult: I object to that.

Mr. Horner: Is it leading?

Mr. Coult: No, but evidence of experiments made at a later time are not admissible.

30 The Court: Oh, I don't know. If the bed was made in the regular way and if you put a hot water bottle on it—

Mr. Coult: That is entirely apart from this issue.

The Court: I will let it stand.

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

Exception noted as ground of appeal.

40 Q Was that experiment made in a bed of the same character as that in which Mrs. Haring was placed? A Yes, sir.

Charles Anuario—for defendants—direct.

Mr. Coult: I object to it.

The Court: I will allow it.

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

Exception noted as ground of appeal.

Q Was it observable? A Yes, sir.

10

Mr. Coult: I object to it.

The Court: I will let it stand.

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

Exception noted as ground of appeal.

Q How plain was it?

Mr. Coult: I object to that on the same ground.

20

The Court: I will allow it.

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

Exception noted as ground of appeal.

A Well, I tried it out with an empty hot water bottle and put it under the blanket, the rubber sheet, and the draw sheet, and the impress and the curve of the hot water bottle could be easily seen protruding through those thicknesses.

30

Mr. Coult: I ask that it be stricken out.

The Court: I will let it stand.

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

Exception noted as ground of appeal.

40

Charles Anuario—for defendants—cross.

Cross examination by Mr. Quaglia.

Q Did I understand you to say at the time you were wheeling or helped to wheel the carriage on which Mrs. Haring was that Mrs. Baigrie was already in that room? A I didn't say that.

10

Q What did you say? A The question was asked me whom I saw in the room when I had the carriage in the room.

Q That is what I am asking. Was Mrs. Baigrie in the room when you got in there with the carriage? A Yes.

Q Did you at any time see Mrs. Baigrie from the time you left the operating room until the time that you reached the room in which Mrs. Haring was going to be placed? A Yes, sir.

20

Q When? A Just preceding—about ten feet from where we were to arrive at the door. I saw her come out of the nurses' room diagonally opposite the room in which Mrs. Haring was to be placed.

Q Did she get into the room before you did? A Yes, sir, she got in before the carriage was wheeled in.

30 *Cross examination by Mr. Coult.*

Q Doctor, how long had you been practicing in this State at the time the accident occurred? A A year and a half.

Q You had officiated as an assistant operating surgeon before? A Yes, sir.

Q Had you had anything to do with the preparation of beds in a hospital? A Never.

Q Or anything to do with the inspection of beds? A No, sir.

40

Charles Anuario—for defendants—cross.

Q Or anything to do with the placing of patients in the bed? A I had done that quite frequently.

Q You know what your duties were as an assistant surgeon, don't you? A Yes, sir.

Q Did your duties extend to going to the room—the private room—with the patient? A It was purely voluntary on my part. 10

Q You were under no obligation to put the patient in the bed? A No, sir.

Q And you had nothing whatever to do with the inspection of the bed? A No, sir.

Q Did you inspect the bed? A I couldn't help looking at it; I was leaning right over it.

Q Did you inspect the bed? A I looked at it.

Q There was no duty on your part to look at it? A It was just human nature to look at the bed. 20

Q You say that the nurse who was in attendance on Mrs. Haring; that is to say, Mrs. Baigrie, was there? That is the fact, isn't it? A Yes, sir.

Q And she is the person who is charged with the duty of preparing that bed, isn't she? A Yes.

Q And as you have said, that was no concern of yours? A Right. 30

Q Did you have the slightest idea that there was anything wrong with the bed? A No, sir.

Q You had every reason to believe that Mrs. Baigrie had taken care of the bed properly? A Correct.

Q Was there any reason to look for a hot water bottle? A No, sir.

Q And you say moving people from the carriage into the bed must be done with a great deal of care? A Yes, sir. 40

Charles Anuario—for defendants—cross.

Q And the reason you say that is because the movement might disturb the wound? A Yes.

Q Is there any reason for getting them there quickly? A She has to be moved so as not to lose the body heat; to do it as soon as possible.

10 Q This draw sheet is what? A Just an ordinary sheet.

Q Has it a handle? A No.

Q You just take hold of the sheet and grab the limbs of the patient and move her over? A Yes, sir.

Q Who took care of the sheet? A I don't know; I left and went right out.

Q You left and went right out because you had another operation to perform immediately? A Yes.

20 Q You were in a hurry? A Yes.

Q Things were moving along pretty rapidly that morning? A For me.

Q Dr. Banks had other operations to perform, didn't he? A Yes.

Q Your haste was to accomplish all you could with due care? A Yes, sir.

Q You had all you could take care of with your own duties without taking care of other people's? A With reasonable care.

30

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

The Court: I will let it stand.

Q You had at that time all that you could do, considering the hurry that you were in, to take care of your own duties, didn't you? A As I said, with reasonable care.

Q But you had no reason to undertake the duties of anybody else? A This was voluntary.

40 Q Mrs. Baigrie was in the room? A Right.

Charles Anuario—for defendants—re-cross.

Q She was taking care of the bed? A Right.

Q It was her duty? A Right.

Q It was your duty to take care of the patient but it was a duty you had assumed to put her on the bed as rapidly as possible with due care for her condition? A Yes, sir.

Q You did that as quickly as possible? A 10
Yes, sir.

Q And then you got away as rapidly as possible? A Yes.

Re-cross examination by Mr. Quaglia.

Q Did you say that with one hand you drew the sheet and with one hand you held the thigh of the patient? A I said I had the lifter in one hand and put the other forearm under the 20
patient.

Q Did you notice whether that patient had any stockings on? A No, because they are removed in the operating room.

Q When are the stockings put on? A Before they go to the operating room.

Q And they are removed when? A Right before putting them on the carriage.

Q What is the purpose of removing them? A 30
I don't know that.

Q Are they removed after the operating has been performed? A Yes.

Mr. Braun: I have two more experts.

The Court: I don't think you need any more doctors to testify to the same set of questions that you have asked.

Winifred Banks—for defendants—direct.

WINIFRED BANKS, one of the defendants,
sworn in her own behalf.

Direct examination by Mr. Colie.

10 Q Mrs. Banks, you are one of the defendants
in this case? A Yes, sir.

Q And you are the wife of Dr. Charles Banks
who is also a defendant here, is that right? A
I am.

Q How long have you been practicing medi-
cine? A Since 1899.

Q Where did you study medicine? A I
graduated from Cornell University Medical Col-
lege.

20 Q Where did you begin practicing? A In
Port Jervis.

Q How long have you been practicing in East
Orange where you are now? A Twenty-five
years.

Q You acted as anesthetist at this operation
of Mrs. Haring? A I did.

Q And who engaged you to act as anesthetist?
A Dr. Charles Banks.

Q At how many operations have you acted as
anesthetist? A Hundreds.

30 Q Exclusive of those with Dr. Banks? A
Many times not his.

Q How deep an anesthesia was it that this
lady was put under? A What we call complete
anesthesia because it was a major operation.

Q Two major operations, weren't there? A
Yes.

40 Q In the language of the doctors who were on
the stand, it was so deep that she lost all her
reflexes? A That is what a complete anesthesia
is.

Winifred Banks—for defendants—direct.

Q After the anesthesia and the completion of the operation Mrs. Haring was put on the carriage? A She was.

Q Who accompanied her to her private room?

A Miss Grant, Dr. Anuario and myself.

Q After a patient has undergone an operation in which such an anesthesia has been given, what are the matters to be guarded against by the anesthetist in relation to the patient? A Her respiration must be watched continuously because under that amount of narcosis her pulse must be watched continuously. 10

Q And the anesthetist goes to the private room, if the patient has a private room, with the patient? A If there is no one else delegated to do that.

Q In this case you went? A In this case I went. 20

Q When you went to that room your position with reference to the carriage was toward the head of the patient? A Yes.

Q And when you got into the room who were in the party? A Miss Grant, Dr. Anuario and Mrs. Baigrie were in the room.

Q Who were in the party that took the patient down? A Miss Grant, Dr. Anuario and myself.

Q When you got into the room did you see Mrs. Baigrie there or not? A Yes, she was there. 30

Q And when you were in the room you were where with reference to the head of the carriage?

A I stood at the head of the carriage.

Q How far was Mrs. Baigrie from you? A I can't say the number of feet, I don't know. She was not many feet from me, but I don't know exactly.

Q Opposite you was who? A Dr. Anuario. 40

Winifred Banks—for defendants—direct.

Q Where was Miss Grant? A She was at the foot.

Q Did you see the bed in which the patient was put? A I did.

Q Was there anything in that bed excepting the materials of which it was made up? A No.

10 Q Did you see it? A I saw the bed and saw that there was nothing there but what should be there.

Q Did you see the bed from the head to foot? A I did.

Q What was there, if anything, on that bed? A Just the regulation bed with a blanket drawn taut.

Q And what was there on the bed at the top of it? A The roll of bed clothes at the side—

20 Q Was there a pillow on this bed? A At the top standing on its end.

Q What was done with the patient? A She was lifted in the carriage with the lifter onto the bed.

Q And you and Dr. Anuario did the lifting? A We did the principal lifting.

Q What? A We did the lifting.

Q How long did you stay after the patient was in bed? A Just long enough to take out the things required to go on the stretcher, feel her pulse, and go back to the operating room.

30 Q How long did it take? A Two or three minutes.

Q Whom did you leave in that room when you left? A Mrs. Baigrie.

Q Anybody else? A I didn't see anyone else.

Q Where was Miss Grant? A She took the carriage and went out.

40 Q So that the carriage went out by Miss Grant before you left? A Yes.

Winifred Banks—for defendants—cross.

Q This bed in which the patient was put, was it at the wall side or the window side of that room? A It was at the wall side nearest the door.

Cross examination by Mr. Coult.

10

Q You have had considerable experience as an anesthetist, have you not? A I have, yes.

Q And you know the duties of a person undertaking to act as an anesthetist, don't you? A I do.

Q And it is quite common for the anesthetist to go to the room with the patient? A Yes.

Q And that is for the purpose of looking at the patient's head? A One of the duties.

Q Isn't it your duty to stand at the head of the patient to see that she does not swallow her tongue? A I certainly did. 20

Q And you did this until you put the patient into the bed? A Yes.

Q In putting the patient into the bed under ordinary conditions the private nurse handles the draw sheet? A Not necessarily.

Q Suppose the nurse happens to be out, don't you do it then? A If there are not enough people around we wait until the nurse comes who takes charge of the patient. 30

Q So ordinarily if you get there when the nurse isn't there you wait for the nurse to come back, don't you? A That's right.

Q And if you waited for the nurse to come back you would still remain at the head of the patient and watch the patient's tongue, wouldn't you? A Right.

Q Is it not a fact that it was the absence of Mrs. Baigrie that caused you to leave your duties 40

Winifred Banks—for defendants—cross.

at the head of the patient and go to the other side and watch the head of the patient? A No, sir.

Q Did you shift positions with Mrs. Baigrie?

A I did not.

10 Q Ordinarily you would stand at the head of the bed, you say? A I was standing at the head of the patient.

Q Isn't it important for the anesthetist to watch the head of the patient? A Most important.

Q When you put Mrs. Haring into the bed you say Mrs. Baigrie was there? A Mrs. Haring fortunately was a very light weight patient and it was no task for any two people to lift her.

20 Q What did Mrs. Baigrie do all this time? A She was standing at the head of the bed.

Q And she didn't take any part in the process at all? A That I don't recall.

Q She didn't help lift, did she? A I don't recall that part.

Q She had not assumed your duties so far as the watching of the patient's head and tongue of the patient were concerned, had she? A She probably was doing that.

30 Q Then neither you nor she was doing what you ought to have done? A We were both doing what we ought to have done. Her responsibility began the minute the patient left the operating room and my own ended the minute she entered the bed, and we were both attending to our duties.

Q But as I understand it your particular duty was to watch the patient's breathing. A Yes, sir.

40 Q And her particular duty was to look after the bed? A That was her particular duty.

Winifred Banks—for defendants—cross.

Q And it was her particular duty to move the patient into the bed; if she needed help you helped her? A Yes.

Q And in the ordinary case the anesthetist would stand at the head of the bed— A The head of the patient.

Q Just a minute. It is the ordinary thing for the anesthetist to watch the patient? A Exactly. 10

Q And for the private nurse to attend to the moving of the patient with the assistance of the assistant surgeon or the operating nurse, isn't that so? A That might be so.

Q Were you going to have any part in the operation that your husband was next about to perform? A I was.

Q You were to be the anesthetist in that case, too? A Yes. 20

Q And you saw Dr. Anuario hurry out before you?

Mr. Horner: I object to that. She didn't say hurry out.

A He didn't hurry out; he went out after the patient was properly put into the bed.

Q When did you go out? A When the patient was comfortably in the bed and I had taken her pulse. 30

Q How soon after he went out did you go out?

A It might have been three or four minutes.

Mr. Horner: I forgot to ask Dr. Anuario one question. May I ask it now?

The Court: Yes.

Edith M. Baigrie—for defendants—direct.

CHARLES ANUARIO, recalled.

By Mr. Horner.

Q Doctor, when did you next see Mrs. Haring after you placed her in the bed? A About a week and a half later.

10 Q When did you first learn that any claim for any injuries to Mrs. Haring was made against you? A I got a notification of the fact from the lawyers.

Q What do you mean by "notification"? A I don't know the technical term.

Mr. Coult: Summons and complaint.

Q In August, 1927? A Yes, sir.

20

DEFENDANT CHARLES W. BANKS RESTS.

DEFENDANT WINIFRED BANKS RESTS.

DEFENDANT CHARLES ANUARIO RESTS.

EDITH M. BAIGRIE, recalled in her own behalf.

30 *Direct examination by Mr. Quaglia.*

Q Mrs. Baigrie, will you tell us at what time you placed the hot water bottle in the ether bed? A After it was made up.

Mr. Braun: I object to that as having been testified to.

The Court: She testified to that on the previous examination and said she put one hot water bottle in the bed when she made

40

Edith M. Baigrie—for defendants—cross.

it up and covered three-quarters of it with a towel.

Cross examination by Mr. Coult.

Q Did you after the operation and after Dr. Banks had come to the room the first time and gone away place a hot water bottle in Mrs. Haring's bed? A I did not. 10

Adjourned to Friday, June 15, 1928, at ten o'clock A. M.

FOURTH DAY.

20

Friday, June 28, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

EDITH M. BAIGRIE, resumes stand.

Cross examination by Mr. Colie.

Q Who took down the lifter and the carriage? 30
A I don't know.

Q Whose duty was it to take it down? A I don't know.

Q Whose duty was it to take it down? A Why, I guess Miss Grant's.

Q Don't you know? A I think it is Miss Grant's duty.

Q The carriage did go down and the lifter did, too; it didn't stay in the room? A No, the carriage was taken out of the room. 40

Mary P. Sullivan—in rebuttal—direct.

Q Did you see Miss Grant take it? A I don't remember.

Q According to your memory, who of the three, Dr. Anuario, Miss Grant and Dr. Winifred Banks, was last in the room? A I don't remember.

10 Q You don't remember? A I don't remember.

Q When they had all gone, those three, there was nobody in the room but you and the patient, is that right? A That's right.

Q Have you any recollection now, you were asked about it before, what you did with that hot water bottle after you took it out of the bed?

20 Mr. Quaglia: I object. We have been all over this and it is not proper cross examination.

The Court: I think it has all been covered; she was not put on for that purpose.

DEFENDANT EDITH M. BAIGRIE RESTS.

30 MARY P. SULLIVAN, sworn in behalf of the plaintiff in rebuttal.

Direct examination by Mr. Coult.

Q Mrs. Sullivan, you are a sister of Mrs. Haring? A Yes.

Q And you were one of the party which was in the room after the operation? A I was.

Q Do you recall going in? A I do.

Q Where did you go? A You mean when I first went into the hospital?

40 Q No, when did you go into the room? A After Dr. Banks motioned for us to go in.

Mary P. Sullivan—in rebuttal—direct.

Q Into what part of the room did you go? A
A short distance from the door.

Q After you got in there did you see the patient? A I did.

Q Was she conscious or unconscious? A I
would say she was—

10

Mr. Braun: It seems to me this is cumulative.

The Court: It seems to me this is part of the main case.

Mr. Coult: I did not produce these two witnesses because they were cumulative. Since then a defense has been specifically raised here; that is, that this lady was unconscious or should have been unconscious. Your Honor will recall this expert testimony, to put it very baldly, that my witnesses are not telling the truth. I want to rebut that fact only. I am only going to ask her whether she heard her talk, and that is all.

20

The Court: If you confine it to the conversation—

Mr. Braun: I have no objection to that.

Mr. Coult: Your Honor understands my position?

30

The Court: Yes, I understand that that was your position at that time.

Mr. Coult: I am now rebutting the proposition of unconsciousness.

Q Did you hear your sister talk? A I did.

Q To whom did she talk? A To Dr. Banks.

Q Did Dr. Banks speak to her? A He did.

40

Helena P. Opp—in rebuttal—direct-cross.

Cross examination by Mr. Braun.

Q How many times were you there that day?

A I was there just once that day.

Q How many times were you in the room?

A Just once.

10 Q When did you call again? A I don't think I was there a day or two after that.

Q When did you first learn of this burn? A Friday night.

HELEN P. OPP, sworn in behalf of the plaintiff in rebuttal.

20 *Direct examination by Mr. Coult.*

Q Mrs. Opp, you are a sister of Mrs. Haring?

A I am.

Q And also a sister of the last witness? A I am.

Q And you were one of the party who went into the room at Dr. Banks' suggestion after the operation? A Yes.

Q Did you hear Mrs. Haring speak? A Yes, sir.

30 Q To whom did she talk? A To Dr. Banks.

Q Did you hear the talk? A Yes.

Cross examination by Mr. Braun.

Q How many times were you there that day?

A Once.

Q How many times were you in the room? A Once.

40 Q Were you there after that? A Not that day.

Louise P. Haring—in rebuttal—direct-cross.

Q That week? A Not until Sunday.

Q When did you learn of the burn? A Friday night.

LOUISE P. HARING, one of the plaintiffs, recalled in rebuttal. 10

Direct examination by Mr. Coult.

Q Mrs. Haring, did you tell Miss Sitnesky that Dr. Banks had told you that you had a burn on your shoulder and that he had said he was telling you because Mrs. Baigrie asked him to?

Mr. Braun: I object to that because the witness already answered that question on my cross examination and said she did not remember. 20

The Court: I will allow it.

A No, she did not—I did not, I mean.

Cross examination by Mr. Braun.

Q Do you remember the last time you were on the stand and answered that question by saying you did not remember? A I might have misunderstood the question; I knew I was burned. 30

Q You never told her who told you? A I did not.

Q You are positive of that? A Positive.

Q When did you tell her you knew you were burned? A I don't remember when I told her.

Q You don't remember when you told her? A No, I knew I was burned and I told her I was burned. 40

Motions for Direction of a Verdict.

Q You did have a conversation with her? A I might have had.

Q Didn't Dr. Banks tell you? A Dr. Banks told me I was burned, yes, at my request. I asked him myself what was the matter with me.

10 Q You did have a conversation with him about it in Mrs. Baigrie's presence? A I don't recall whether Mrs. Baigrie was there at the time that I asked Dr. Banks what was the matter with me.

Q Wasn't she there all the time? A She might have been there but I don't recall.

Q Do you recall when Mrs. Baigrie was not in your room on her duty? A She gave me very good care.

20 Q Wasn't it Mrs. Baigrie's turn on duty when Dr. Banks told you that you had been burned? A Yes.

PLAINTIFFS REST IN REBUTTAL.

Mr. Braun: I offer in evidence the two hospital sheets marked for identification.

(The same are received in evidence and marked Exhibits D C W B 1. and D C W B 2.)

30 Counsel for the defendant Winifred Banks moves for the direction of a verdict on the same grounds as in his motion for non-suit and on the ground that there is no liability shown on the part of Dr. Winifred Banks and Dr. Anuario.

The Court: I will deny the motion.

Counsel for the defendant Winifred Banks prays an exception to this ruling of the Court.

40 Exception noted as ground of appeal.

Motions for Direction of a Verdict.

Mr. Braun: I would like to make a motion for the direction of a verdict on the ground that there is no evidence in the case of any negligence on the part of Dr. Banks which would hold him on the second count or fifth count, particularly in the face of the expert testimony which held that all the testimony that was given about this woman's actions could not put him on any notice and that the symptoms were not indicative of any undue or unusual situation. On the first count and the fourth count I move for the direction of a verdict on the ground that there is no evidence of any negligence on the part of anyone in the case who was acting as the agent or servant of Dr. Banks in the scope of their authority or anything that possibly could be classed as negligence. I also move for the direction of a verdict on the general ground that there is no evidence in the case on any count to hold Dr. Charles Banks.

10

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The Court: I will deny the motion.

Counsel for the defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

The Court: Each counsel may have the benefit of the grounds of the motion made by other counsel and exception will be granted to each defendant.

Mr. Horner: I also move for a direction of a verdict on the same grounds as covered by counsel for the defendants Charles Banks and Winifred Banks on behalf of the defendant Anuario.

The Court: I will deny the motion.

40

Motions for Direction of a Verdict.

Counsel for defendant Anuario prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Coult: I move for a voluntary nonsuit as to the defendant Edith M. Baigrie.

10 The Court: I will grant the motion.

Exceptions to all sides as indicated by the Court are noted as ground of appeal.

Mr. Horner sums up for the defendant, Charles Anuario.

Mr. Braun sums up for the defendant, Charles W. Banks.

Mr. Colie sums up for the defendant, Winifred Banks.

Mr. Coult sums up for the plaintiffs.

20 Mr. Braun: If the Court please, in view of Judge Coult's remarks in the summation I would like to add two requests to my requests to charge; namely, that under the Harrison Act Dr. Banks was obligated to make any entries of any morphine injections in his presence; also the fact that the defendants are limited in the number of physicians they can have examine the plaintiff physically.

30 The Court: I will deny your second request; as to the first request I might as well tell the jury now that that is the law. I have not looked it up, but I think the doctor is required to record it.

Counsel for defendant Charles W. Banks prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CHARGE TO JURY.

The Court charges the jury as follows:

SMITH, *J.*

Gentlemen, I suppose this concludes your services as jurors in this case. It has taken considerable time and you have given close attention to it. I hope you will give it the same attention when you get to the jury room, because it is there that a very important part of your duty begins, and one over which I have practically no control. There you become the active persons in the case and, primarily, that is where justice will be done or will not be done, depending upon the way in which you handle the facts, because it is for you to determine the facts in the case and that is what you do in the jury room.

10

20

It is an important case involving the charge of negligence against trained people in their care of a patient who was still unconscious following an operation.

The plaintiff, Louise P. Haring, went to this hospital under the advice of Dr. Charles W. Banks to be operated upon for the removal of a fibroid tumor and to have her appendix removed at the same time, an operation which they say is serious. She went there on the eighth day of March and the operation was to be performed on the following day. She was operated on and it is the occurrences following that operation around which this case revolves.

30

As I say, the case is brought by Mrs. Haring and her husband on a charge of negligence following the operation; negligence in placing the patient upon a hot water bag as a result of which her back was burned, and negligence is one of the charges against Dr. Charles W. Banks in not

40

Charge to Jury.

heeding her complaints and making an examination of her at the time she made the complaints. That, generally, is the charge made by the plaintiffs.

10 The law, as you have probably heard me define it before, is that negligence is the failure to observe for the protection of another that degree of care, precaution and vigilance which the circumstances justly demand; namely, reasonable care. Where by reason of such failure such other person suffers injury or damage, the negligence must be the natural and the proximate cause of the injury and damage.

20 Reasonable care is such care as a reasonable person exercises in view of all the circumstances presented to him; such care as an ordinarily prudent person would exercise under the conditions at the time he is called upon to act.

Proximate cause is that cause which naturally and probably led to and which might have been expected to produce the result; namely, the efficient cause; the one which necessarily sets the other causes in operation.

30 The suit was originally brought against Dr. Charles W. Banks, who was the operating surgeon and who performed the operation. He was also one of the doctors that had treated the patient. I say treated; I mean that he examined her before the operation and I assume he was going to treat her after the operation; that is, he was not just called in as a surgeon to perform the operation in the operating room while she was under the care of her own doctor, but he was her doctor to carry her through the after-effects of the operation.

40 It was also brought against Dr. Winifred Banks, the wife of Dr. Charles W. Banks, who

Charge to Jury.

was employed to administer the anesthetic and prepare her for the operation; also against Dr. Charles Anuario, who was called in by Dr. Charles W. Banks to assist in the performance of the operation, it being necessary or proper for a surgeon in performing an operation to have another doctor to aid him and help him while he is performing his work, largely, I suppose, due to a matter of speed. 10

It was also brought against Agnes Grant, who was the supervising nurse in the operating room and assisting in that respect; and also against Mrs. Edith M. Baigrie, who was the nurse employed by the plaintiff, or employed for her to look after her in the hospital; that is, she was her private nurse.

As I say, the suit was brought against all of these. After Miss Grant's testimony counsel for the plaintiffs submitted to a voluntary non-suit as to her, so she is out of the case as a party but not, of course, out of the case with regard to her testimony. You have to consider her actions in the case; that is, as to what she did. 20

Now Mrs. Baigrie has also been let out of the case on motion of counsel for the plaintiffs to take a voluntary non-suit as to her, and the position that he takes is this: He claims that her version of what took place, or as he proved what took place, is the true version for you to adopt. 30

This leaves for your consideration therefore the case against the three remaining defendants: Charles W. Banks, the operating surgeon; Dr. Winifred Banks, the anesthetist; and Dr. Charles Anuario, the assistant surgeon.

Now, as I said before as to Miss Grant I will say as to Mrs. Baigrie; that while she is out of the case her testimony is not out nor are her ac- 40

Charge to Jury.

tions; and if you find that the negligence in this case was hers and that that was the proximate cause of the plaintiff's injury, then of course you will have to find a verdict for the other defendants. She is in the case in that respect, of course, but she is out of the case in the sense that
 10 you cannot render a verdict either for her or against her. In other words, she is no longer a party to the suit.

Now, as to the remaining defendants: I will consider the case of Dr. Winifred Banks and Dr. Charles Anuario. They are charged in the third count of the complaint with negligence on their own part; something that they did. Also in the fifth count, I might say, which is the husband's
 20 count. The charge is that they were negligent or guilty of lack of reasonable care in putting this patient on what is called the "ether bed," the bed in her room on which she was going to lie after the operation; and that in doing this they put her on top of a hot water bottle by their own act, leaving her on it; and in failing to see the hot water bottle that could be discerned on the bed. These are the specific charges of negligence which the plaintiffs make against the defendants.

30 The duty of the defendants, whether voluntarily assumed or required by their services, calls upon them to use ordinary care in the task of moving the patient. They did attend the patient in being moved from the operating room to the patient's room and they admit that they assisted in moving the patient from the carriage on which she was brought from the operating room onto the bed. The duty devolved upon them where they were doing an active thing such as that, to
 40 look and see where they were putting the patient,

Charge to Jury.

and if there was a hot water bottle there, to either remove it or call attention to it and not to put the patient upon it.

You will say whether it is so or not, but I think it is conceded that it is improper to place the patient upon a hot water bottle. Of course, if they knew it was very hot it would certainly be improper. The plaintiff, as I have said, claims that that is what was done. The witnesses to what was done when this patient was transferred from the carriage to the bed are the two defendants I have named, Dr. Winifred Banks and Dr. Anuario; and Miss Grant and Mrs. Baigrie, although it is disputed as to what Mrs. Baigrie saw. 10

Mrs. Baigrie's testimony is to the effect that she made up the ether bed and then placed a hot water bottle in the bed, after which she left the room; that when she returned to the room the transfer of the patient from the carriage to the bed had been practically accomplished; and that she assumed that the hot water bottle had been removed. On behalf of the defendants it is testified that she went in ahead of the carriage and saw this act of transferring the patient to the bed. 20

We therefore have these three witnesses as to what actually happened in the placing of this patient on the bed. All three were defendants; that is, Dr. Winifred Banks, Dr. Anuario and Miss Grant. Miss Grant is not a defendant now, but they are the three who admit they actually saw what took place. They say Mrs. Baigrie was there and she testified that she came in before it was all completed but after it had been practically accomplished. Of course, you are not limited to their testimony, but it is to their testi- 30 40

Charge to Jury.

mony that you have largely to direct your attention as to whether or not that hot water bottle was there and whether or not the patient was placed upon it.

10 Now, as to Dr. Charles W. Banks; there are two general claims made against him. They are made under the first and fourth counts of the complaint. They charge that he is responsible for the acts of the three defendants who went with the carriage to the room. There was a non-suit voluntarily taken as to Miss Grant; and the plaintiff has abandoned a claim against Dr. Charles W. Banks for the actions of Dr. Anu-
 20 ario. So we now have on the first and fourth counts the charge that Dr. Charles W. Banks should be held responsible for the negligence of his wife, Dr. Winifred Banks, in placing the patient upon the ether bed; that is, that she was his agent or servant acting under his general direction and within the scope of her agency or her service.

In order for him to be liable for her actions, her actions must have been the proximate cause of the injury to the plaintiff. As to his liability for her actions, the general rule, I think, is very clear.

30 The master or principal is liable for the act of his servant or agent done within the scope of his employment, and if a servant is acting in the execution of his master's orders, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master or was even contrary to his master's orders.

40 The application of the rule *respondeat superior* does not depend upon the obedience of the ser-

Charge to Jury.

vant or agent to his master's orders, nor upon the legality of the servant's conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do. 10

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

For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible. 20

That, gentlemen, should guide you in your determination as to whether or not Dr. Winifred Banks was the agent or servant of her husband in the doing of what she did, if you find she did a negligent act which was the proximate cause of the plaintiff's injury. 30

Now, the second and fifth counts against Dr. Charles W. Banks are that he himself failed in his duty to the plaintiff. As to the duty of a surgeon or doctor, he is required to give the patient the skill and care that is ordinarily possessed and exercised by others in the profession. He is not 40

Charge to Jury.

a guarantor of results and only undertakes to do what can ordinarily be done under similar circumstances. The plaintiffs claim here under the second and fifth counts that the doctor failed in that duty which he owed to his patient.

10 The charge principally is this: That upon going to the room following the operation he failed to heed the complaints of the plaintiff or to give proper attention to her actions, and that he failed to examine her. It is further charged that had he done this the hot water bottle would have been discovered and the burn might have been lessened or might have been prevented.

20 I do not think I need to go over the facts in detail. The plaintiffs claim that directly or very shortly after the patient was brought down the doctor permitted Mr. Haring and his sisters-in-law to come into the room and while they were in there and while the doctor was present Mrs. Haring made certain remarks to the doctor such as to get her out of this; that she couldn't stand it; or something like that; that she said she expected this, pointing to her abdomen, but not this, pointing to her shoulder. You will remember the statements that it is claimed were made. They were testified to by the plaintiff, her husband and
30 by her sisters, and I think some of them were referred to by Mrs. Baigrie.

Now, the defendant disputes that this took place. He says that the plaintiff was unconscious and he denies that these statements were made at that time. It is also claimed on his part that a patient could not have done these things so soon after coming out of ether. You have heard the testimony of the doctors that a patient put under ether in the way that this patient is said to have
40 been, and being moved from the operating room

Charge to Jury.

so soon after the completion of the operation, would be entirely relaxed and would not be able to signify or do these things which it is claimed that she did do; that she would not have gotten to the stage of being coherent; I mean, where she would do things even abnormally, and certainly not to a stage when she would be able to intelligently inform a surgeon or doctor as to her condition or wants. 10

It is further shown in the doctor's favor that if the patient did these things a doctor would not be expected to pay attention to them with any particularity; that they would be naturally passed over by an attending doctor or surgeon as being things which were incoherent and which had no special significance; things which might be expected to happen and have no application to anything that he should give attention to. 20

These, gentlemen, are the respective claims made by the parties. I do not intend to detail the testimony to you or line it up one way or the other. Counsel have had ample opportunity to refer to it and I think that they have brought out the various phases of the testimony and the deductions which they think you ought to draw from it.

It is not my duty to determine the facts. The facts are for you to determine; that is your province in the case. You are the judges of the facts, and in determining the case you will rely upon your own recollection of the evidence as you have heard it here on the witness stand in this court room and not as I might repeat it to you or refer to it. My duty is to charge you the legal rules which should govern you in your determination. 30

You, as judges of the facts, are to pass upon the credibility of the witnesses. You may con- 40

Charge to Jury.

sider their relationship to the other parties to the action, their interest in the outcome of the issue, the way they impressed you in giving their testimony, and the way that their story impressed you. You may also consider the probability of the truth of what they say.

10 You will see, gentlemen, that there is a sharp dispute here between the testimony of the defendants Dr. Winifred Banks and Dr. Charles Anuario, and that of Mrs. Baigrie.

In determining and passing upon the facts in this case you may also consider the probability of trained people such as Dr. Anuario and Dr. Winifred Banks treating a patient and placing her upon a hot water bottle if it was plainly visible. They were not charged with the preparation of this bed; neither were they charged with the duty of inspecting it in the sense of passing upon it as to whether it was a properly made-up bed. They were charged, however, with the duty of looking to see where they placed their patient and if by observation, by looking upon the bed as they were doing that, either before they did it or as they were doing it, it could be plainly seen that the hot water bottle was there, of course that raises a question for your determination.

20
30 Sympathy should not play a part in your verdict in this case. You are to be just and fair in your determination. Some of the defendants have been let out of the case and if you should think they should be held responsible you cannot hold them now. That does not mean that you should return a verdict against the remaining defendants in order that the plaintiff here should recover for her injury.

40 If she is entitled to recover she is entitled to recover against such defendant or defendants as

Charge to Jury.

were negligent and whose negligence was the proximate cause of her injury and damage. If the defendant or defendants guilty of this negligence are out of the case you should not bring in a verdict against the remaining defendants just because they are in the case.

In other words, you are to decide where the guilt is and render your verdict accordingly. If, as I say, Mrs. Baigrie is the responsible person, or if her negligence is the negligence which caused the injury, why then you should let the others out even though the plaintiff go without obtaining damages. The importance of the case requires that you gentlemen do not find anybody here guilty and make them responsible in damages unless they are guilty and their guilt is shown to be the proximate cause of the plaintiffs' loss.

The burden of proof is upon the plaintiffs. They must sustain their case by a fair preponderance of the evidence; that is, the evidence must weigh in their favor; if they fail in this they are not entitled to your verdict. If the evidence is evenly balanced as between these remaining defendants and the plaintiffs, then your verdict should be in favor of the remaining defendants because, as I say, they must prove their right to your verdict by the preponderance of the evidence.

You cannot divide the damages. If they have suffered damage they may recover against such of the defendants as you find guilty, and it would be a verdict against that defendant or those defendants in one sum for the wife and one sum for the husband. In other words, whatever you award as your verdict you do not apportion as

Charge to Jury.

between the defendants; you bring it against such defendant or defendants as you find guilty.

In this case I disposed of motions for a non-suit and for a direction of a verdict. My ruling on those motions should not play any part in your deliberations or be considered by you as any indication of what I may think in reference to this case. I might have one idea as to what the facts show and another as to what the law is. What I rule on as to those motions is whether I should dispose of the case as a matter of law or whether there is a question of fact for you to pass on. I have ruled here that there is a question of fact for you to decide.

Now, as to the question of damages. The plaintiff wife, if entitled to your verdict, would be entitled to compensation in money damages insofar as money can compensate, for the bodily injuries that she has sustained; for the pain and suffering that she has undergone; and for the effect upon her health according to its degree and probable duration, which may be partially temporary and as to one item, I think, may be permanent.

She claims that she had the burn upon her back produced by this hot water bottle. It is claimed it left a bad scar; that it is partially adherent; that it causes limitation of motion; and that it causes some pain in motion and some irritation. She was in the hospital from March 8th to May 28th. Two weeks of this time, the doctors said, would be a normal time for her to recover from her operation sufficiently to be removed from the hospital. The last dressing for this burn was applied on October 11, 1927. It is also claimed that she has been rendered nervous and is now nervous, and that she cannot do the things she could do before this happened.

Charge to Jury.

The husband if entitled to your verdict would be entitled to compensation for the loss of association, companionship, aid and assistance of his wife which was proximately due to this burn. The husband is entitled to his wife's consortium, as it is called, and if that has been interfered with, diminished, or taken away by the negligent act of a defendant, he is entitled to compensation for it. He is also entitled to the expenses to which he has been put for the care and treatment of his wife and the expenses in the doing of things in the household which she did theretofore. I am not going to detail these expenses to you. You have heard the testimony in regard to it. I think the extra help was about \$435.00, the medicines \$25.00, and Dr. Sherman \$12.00.

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As to Mrs. Baigrie, I do not think it appears that she has been paid and I do not know whether she is going to put in any claim; there is no proof of the hospital bill; and it is testified that Dr. Banks' bill is \$250.00, which is a proper item of damage on her claim.

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I have been requested to charge a number of requests to charge, some of which I will charge and some of which I will deny.

30

On behalf of Dr. Winifred Banks I am asked to charge certain requests.

The first I will charge: "If the jury find from the evidence in the case that there is no duty on the part of the anesthetist to see that the ether bed is properly prepared for the placing of the patient therein, they cannot find a verdict against Dr. Winifred Banks."

The second I will deny.

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Charge to Jury.

The third I will charge: "If you find that plaintiff, Louise Haring, was burned by a hot water bottle which was placed in the bed subsequent to the time when the patient was placed therein, then you must find a verdict in favor of defendant Winifred Banks."

10 The fourth I will charge: "If you find that defendant Edith Baigrie was negligent and that such negligence alone was the proximate cause of the alleged injury to plaintiff Louise Haring, you must find a verdict in favor of the defendant Dr. Winifred Banks."

The fifth I will charge: "It is a general rule of law that negligence cannot be predicated on an act or omission which would not lead an ordinarily prudent man to apprehend danger from it."

20 The sixth I will charge: "The defendant Winifred Banks had a right to rely upon the proper preparation of the ether bed, including the removal of any hot water bottle, by defendant Baigrie, unless there was something which plainly indicated that she had failed in the performance of such duty."

30 The seventh I will charge: "When one assumes to act outside of the scope of his designated duties he will only be liable for an act of affirmative or wilful negligence in connection with the performance of such assumed duties."

The eighth I will charge: "If defendant Winifred Banks is to be taken as a volunteer aiding in the removal of the patient from the operating room to and in the ether bed, then she is only liable for an act of affirmative or wilful negligence."

40 The ninth I will charge: "If you find that notwithstanding the conduct of defendant Dr.

Charge to Jury.

Winifred Banks, the plaintiff Louise Haring would not have sustained the injuries and damages complained of except for some subsequent independent act of negligence on the part of one of the other defendants, your verdict must be in favor of defendant Dr. Winifred Banks."

The tenth I will charge: "Defendant Dr. Winifred Banks cannot be held responsible for any negligent or improper act performed by any one other than herself." 10

The eleventh I will charge: "The plaintiffs cannot recover against defendant Dr. Winifred Banks unless they have convinced you by a fair preponderance of the evidence that said defendant was negligent and that the injuries and damages sustained by plaintiff Louise Haring were the natural and proximate result of such negligence." 20

The twelfth I will charge: "If you find that the defendant Dr. Winifred Banks, in performing her duties, exercised that degree of care which was ordinarily exercised by one acting in the capacity in which she was acting, then you must find a verdict in favor of defendant Dr. Winifred Banks."

The thirteenth I will charge: "Even if you find from the evidence that someone was negligent but you are unable to identify the negligent person or fix the responsibility for the negligent act, then your verdict must be for all of the defendants, as it would be illegal to bring in a verdict against the innocent as well as the guilty in order to bring in a verdict against the guilty." 30

The fourteenth I will deny.

The fifteenth I will charge: "If the plaintiffs fail to prove that the injury in question was 40

Charge to Jury.

caused by acts or failure to act for which Dr. Winifred Banks was legally responsible, or if it is just as probable that it was caused by acts or a failure to act for which she was not responsible, then the plaintiffs cannot recover from her."

10 The sixteenth I will charge: "If you find that it is just as probable that the hot water bottle that burned Mrs. Haring was placed in the bed by Mrs. Baigrie after Mrs. Haring was already in bed, as that Mrs. Baigrie placed it there before Mrs. Haring was put to bed, then your verdict must be for the defendants."

The seventeenth request on behalf of all the defendants I will deny.

As to the defendant Charles W. Banks:

20 The first I will charge: "The right of the defendants to have the plaintiffs bear the burden of the affirmative is a substantial one and not a mere matter of form; and this burden, insofar as negligence on the part of the defendants is concerned, never shifts to the defendants."

30 The second I will charge: "If you find that Dr. Charles Banks possessed and exercised the skill and care ordinarily possessed and exercised by others in the medical profession, the plaintiffs cannot recover under the second count of the complaint."

The third I will deny.

40 The fourth I will charge: "Defendant Charles Banks cannot be held responsible for the negligent or improper acts of any person who follows a distinct or independent occupation of his or her own, if such negligent or improper acts are performed in connection with such independent occupation."

Charge to Jury.

The fifth I will charge: "Defendant Charles Banks cannot be held responsible for the negligent or improper acts performed by anyone other than himself, unless such acts were performed by Dr. Winifred Banks acting as the agent or servant of Dr. Charles Banks within the scope of such relationship of principal and agent or master and servant." 10

The sixth I will charge: "If an agent or servant performs an act outside the scope of his authority or duties, his principal or master is not responsible for such action; so that Dr. Charles Banks would not be responsible if Dr. Winifred Banks voluntarily undertook to perform any act which she would ordinarily not be called upon to perform in the capacity in which she was originally called upon to act in connection with Mrs. Haring's operation, even if she were the agent or servant of Dr. Banks." 20

The seventh I will charge: "Even if Dr. Winifred Banks were acting as the agent or servant of Dr. Charles Banks when she assisted in placing Mrs. Haring in the bed, unless she failed to possess and exercise the skill and care ordinarily possessed and exercised by others in the medical profession the plaintiffs cannot recover against Dr. Charles Banks." 30

The eighth I will deny.

The ninth I will deny.

The tenth I will charge: "If the plaintiffs fail to prove that the injury in question was caused by acts or failure to act, for which Dr. Charles Banks was legally responsible, or if it is just as probable that it was caused by acts or failure to act for which he was not responsible, then the plaintiffs cannot recover from him." 40

Charge to Jury.

The eleventh I believe I have already charged.

The twelfth I will charge: "On the plaintiffs' admission on the record you cannot find Dr. Charles Banks responsible for any negligent act complained of or proved on the part of the defendant Dr. Anuario."

10 The thirteenth I think I have already covered.

The fourteenth I have also covered in my charge.

The fifteenth I will charge: "Dr. Charles Banks is not responsible for the acts of Dr. Winifred Banks because of their relationship as husband and wife unless such acts of Dr. Winifred Banks were voluntary torts and did not grow out of the conduct by her of her own business or profession."

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And now as to the defendant Anuario: I think I have covered the first; I have also covered the second and third requests in the requests in behalf of the defendant Dr. Winifred Banks. The fourth I have also covered.

The fifth I will charge: "Defendant Anuario cannot be held responsible for any negligent or improper act performed by any one other than himself."

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The sixth I have covered in the requests I charged in behalf of the other defendants; the same with the seventh; the same with the eighth; the same with the ninth; the same with the tenth.

The eleventh I think I have covered, but I will charge it: "If you find that defendant Edith Baigrie was negligent and that such negligence alone was the proximate cause of the alleged injury to plaintiff Louise Haring, you must find a verdict in favor of defendant Anuario."

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Exceptions to Charge.

The twelfth, thirteenth, fourteenth, fifteenth and sixteenth requests I have already covered in the requests to charge in behalf of the other defendants.

Mr. Horner: May I have your Honor say to the jury that those are the same requests—

The Court: Yes, they are the same with the exception of the transposition of names as in those requests, to Dr. Anuario; but they cover the same principles as those I have charged as to the other defendants.

10

(Jury retires.)

Counsel for the defendant Charles Anuario prays an exception to that portion of the Court's charge wherein the Court stated that it was the duty to Dr. Anuario and Dr. Winifred Banks to use ordinary care in removing the patient from the carriage to the bed.

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Exception noted as ground of appeal.

Counsel for the defendant Charles Anuario prays an exception to that portion of the Court's charge wherein the Court stated that the duty devolved upon the defendants Anuario and Winifred Banks to look and see where they were putting the patient.

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Exception noted as ground of appeal.

Counsel for the defendant Anuario prays an exception to that portion of the Court's charge wherein the Court referred to the liability assumed on doing a voluntary act.

Exception noted as ground of appeal.

Counsel for the defendant Anuario prays an exception to that portion of the Court's charge wherein the Court stated that it is conceded in

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Exceptions to Charge.

this case that it would be improper to place a patient on a hot water bottle.

Exception noted as ground of appeal.

10 Counsel for the defendant Anuario prays exceptions to the Court's refusal to charge the various requests to charge which the Court declined to charge in behalf of the defendant Anuario.

Exceptions noted as ground of appeal.

Counsel for the defendant Winifred Banks prays an exception to that portion of the Court's charge wherein the Court stated that it was the duty of Dr. Winifred Banks and Dr. Anuario to use ordinary care in removing the patient from the carriage to the bed.

20 Exception noted as ground of appeal.

Counsel for the defendant Winifred Banks prays an exception to that portion of the Court's charge wherein the Court stated that the duty devolved upon the defendants Winifred Banks and Anuario to look and see where they were putting the patient.

Exception noted as ground of appeal.

30 Counsel for the defendant Winifred Banks prays an exception to that portion of the Court's charge wherein the Court referred to the liability assumed on doing a voluntary act.

Exception noted as ground of appeal.

Counsel for the defendant Winifred Banks prays an exception to that portion of the Court's charge wherein the Court stated that it is conceded in this case that it would be improper to place a patient on a hot water bottle.

Exception noted as ground of appeal.

Exceptions to Charge.

Counsel for the defendant Winifred Banks prays exceptions to the Court's refusal to charge the various requests to charge which the Court declined to charge in behalf of the defendant Winifred Banks.

Exceptions noted as ground of appeal.

Counsel for the defendant Charles W. Banks prays an exception to that portion of the Court's charge wherein the Court referred to the liability assumed on doing a voluntary act.

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Exception noted as ground of appeal.

Counsel for the defendant Charles W. Banks prays an exception to that portion of the Court's charge wherein the Court stated that it is conceded in this case that it would be improper to place a patient on a hot water bottle.

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Exception noted as ground of appeal.

Counsel for the defendant Charles W. Banks prays exceptions to the Court's refusal to charge the third, eighth and ninth requests of the defendant Charles W. Banks, and the seventeenth request as to all defendants.

Exceptions noted as ground of appeal.

Counsel for the plaintiffs prays exceptions to the Court's charging the various requests in behalf of each of the defendants.

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Exceptions noted as ground of appeal.

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*Requests to Charge—Winifred Banks.*REQUESTS TO CHARGE OF DEFENDANT
WINIFRED BANKS.

1. If the jury find from the evidence in the case that there is no duty on the part of the anesthetist to see that the ether bed is properly prepared for the placing of the patient therein, they cannot find a verdict against Dr. Winifred Banks.

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2. If the jury find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the patient therein, then they cannot find a verdict against Dr. Winifred Banks, the anesthetist.

3. If you find that plaintiff Louise Haring was burned by a hot water bottle which was placed in the bed subsequent to the time when the patient was placed therein, then you must find a verdict in favor of defendant Winifred Banks.

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4. If you find that defendant Edith M. Baigrie was negligent and that such negligence alone was the proximate cause of the alleged injury to plaintiff Louise Haring, you must find a verdict in favor of the defendant Dr. Winifred Banks.

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5. It is a general rule of law that negligence cannot be predicated on an act or omission which would not lead an ordinarily prudent man to apprehend danger from it.

6. The defendant Winifred Banks had a right to rely upon the proper preparation of the ether bed, including the removal of any hot water bottle, by defendant Baigrie, unless there was something which plainly indicated that she had failed in the performance of such duty.

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Requests to Charge—Winifred Banks.

7. When one assumes to act outside of the scope of his designated duties he will only be liable for an act of affirmative or wilful negligence in connection with the performance of such assumed duties.

8. If defendant Winifred Banks is to be taken as a volunteer aiding in the removal of the patient from the operating room to and in the ether bed, then she is only liable for an act of affirmative or wilful negligence. 10

9. If you find that notwithstanding the conduct of defendant Dr. Winifred Banks, the plaintiff Louise Haring would not have sustained the injuries and damages complained of except for some subsequent independent act of negligence on the part of one of the other defendants, your verdict must be in favor of defendant Dr. Winifred Banks. 20

10. Defendant Dr. Winifred Banks cannot be held responsible for any negligent or improper act performed by any one other than herself.

11. The plaintiffs cannot recover against defendant Dr. Winifred Banks unless they have convinced you by a fair preponderance of the evidence that said defendant was negligent and that the injuries and damages sustained by plaintiff Louise Haring were the natural and proximate result of such negligence. 30

12. If you find that the defendant Dr. Winifred Banks in performing her duties exercised that degree of care which was ordinarily exercised by one acting in the capacity in which she was acting then you must find a verdict in favor of defendant Dr. Winifred Banks. 40

Requests to Charge—Winifred Banks.

13. Even if you find from the evidence that someone was negligent, but you are unable to identify the negligent person or fix the responsibility for the negligent act, then your verdict must be for all of the defendants, as it would be illegal to bring in a verdict against the innocent
 10 as well as the guilty in order to bring in a verdict against the guilty.

14. The burden of proving negligence on the part of the defendants is upon the plaintiffs and if you are in doubt as to whether defendant Dr. Winifred Banks was negligent or not your verdict must be in favor of that defendant.

15. If the plaintiffs fail to prove that the injury in question was caused by acts or failure to act for which Dr. Winifred Banks was legally responsible, or if it is just as probable that it was caused by acts or a failure to act, for which she was not responsible, then the plaintiffs cannot recover from her.
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16. If you find that it is just as probable that the hot water bottle that burned Mrs. Haring was placed in the bed by Mrs. Baigrie after Mrs. Haring was already in bed, as that Mrs. Baigrie placed it there before Mrs. Haring was put to bed, then your verdict must be for the defendants.
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REQUEST TO CHARGE IN BEHALF OF
 ALL DEFENDANTS.

17. If you find that defendant Baigrie, Mrs. Haring's private nurse, was in the room where patient was received after the operation while the patient was being transferred from the carriage to the ether bed, then under the testimony
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Requests to Charge—Charles W. Banks.

in the case you cannot find a verdict against defendants Charles W. Banks, Winifred Banks or Charles B, Anuario.

REQUESTS TO CHARGE OF DEFENDANT
CHARLES W. BANKS.

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1. The right of the defendants to have the plaintiffs bear the burden of the affirmative is a substantial one and not a mere matter of form; and this burden, insofar as negligence on the part of the defendants is concerned, never shifts to the defendants.

2. If you find that Dr. Charles Banks possessed and exercised the skill and care ordinarily possessed and exercised by others in the medical profession, the plaintiffs cannot recover under the second count of the complaint.

20

3. If you find from the evidence of the case that there is no duty on the part of Dr. Charles Banks to see that the ether bed was properly prepared or inspected for the placing of the patient, you must find in favor of defendant Dr. Charles Banks.

4. Defendant Charles Banks cannot be held responsible for the negligent or improper acts of any person who follows a distinct or independent occupation of his or her own, if such negligent or improper acts are performed in connection with such independent occupation.

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5. Defendant Charles Banks cannot be held responsible for the negligent or improper acts performed by anyone other than himself, unless such acts were performed by Dr. Winifred Banks acting as the agent or servant of Dr. Charles

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Requests to Charge—Charles W. Banks.

Banks within the scope of such relationship of principal and agent, or master and servant.

10 6. If an agent or servant performs an act outside the scope of his authority or duties, his principal or master is not responsible for such action; so that Dr. Charles Banks would not be responsible if Dr. Winifred Banks voluntarily undertook to perform any act which she would ordinarily not be called upon to perform in the capacity in which she was originally called upon to act in connection with Mrs. Haring's operation, even if she were the agent or servant of Dr. Banks.

20 7. Even if Dr. Winifred Banks were acting as the agent or servant of Dr. Charles Banks, when she assisted in placing Mrs. Haring in the bed, unless she failed to possess and exercise the skill and care ordinarily possessed and exercised by others in the medical profession, the plaintiffs cannot recover against Dr. Charles Banks.

30 8. If you find from the evidence of the case that there is no duty on the part of Dr. Charles Banks, or Dr. Winifred Banks, to see that the ether bed was properly prepared or inspected for the placing of the patient therein, you must find in favor of defendant Dr. Charles Banks.

9. If you find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the patient therein, you cannot find a verdict against Dr. Charles Banks.

40 10. If the plaintiffs fail to prove that the injury in question was caused by acts or failure to act for which Dr. Charles Banks was legally responsible, or if it is just as probable that it

Requests to Charge—Charles W. Banks.

was caused by acts or a failure to act for which he was not responsible, then the plaintiffs cannot recover from him.

11. If you find that it is just as probable that the hot water bottle that burned Mrs. Haring was placed in the bed by Mrs. Baigrie after Mrs. Haring was already in bed, as that Mrs. Baigrie placed it there before Mrs. Haring was put to bed, then your verdict must be for the defendant Dr. Charles Banks. 10

12. On the plaintiffs' admission on the record you cannot find Dr. Charles Banks responsible for any negligent act complained of or proven on the part of the defendant Dr. Anuario.

13. If you find that the defendant Edith M. Baigrie was negligent and that such negligence alone was the proximate cause of the alleged injuries to the plaintiff Louise Haring, you must find a verdict in favor of the defendant Charles Banks. 20

14. Even if you find from the evidence that someone was negligent, but you are unable to identify the negligent person or fix the responsibility for the negligent act, then your verdict must be for all of the defendants, as it would be illegal to bring in a verdict against the innocent as well as the guilty in order to bring in a verdict against the guilty. 30

15. Dr. Charles Banks is not responsible for the acts of Dr. Winifred Banks because of their relationship as husband and wife, unless such acts of Dr. Winifred Banks were voluntary torts and did not grow out of the conduct by her of her own business or profession. 40

*Requests to Charge—Charles Anuario.*REQUESTS TO CHARGE OF DEFENDANT
CHARLES ANUARIO.

1. The burden of proving negligence on the part of the defendants is upon the plaintiffs and if you are in doubt as to whether defendant
10 ANUARIO was negligent or not your verdict must be in favor of that defendant.

2. If you find that the defendant Anuario in performing his duties, exercised that degree of care which was ordinarily exercised by men acting in the capacity in which he was acting then you must find a verdict in favor of defendant Anuario.

3. If the plaintiffs fail to prove that the injury in question was caused by acts or failure to act for which Dr. Charles Anuario was legally responsible, or if it is just as probable that it was caused by acts or a failure to act for which he was not responsible, then the plaintiffs cannot recover from him.
20

4. The plaintiffs cannot recover against defendant Anuario unless they have convinced you by a fair preponderance of the evidence that said defendant was negligent and that the injuries and damages sustained by plaintiff Louise Haring were the natural and proximate result of such negligence.
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5. Defendant Anuario cannot be held responsible for any negligent or improper act performed by anyone other than himself.

6. If you find that notwithstanding the conduct of defendant Anuario the plaintiff Louise Haring would have sustained the injuries and damages complained of except for some subse-
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Requests to Charge—Charles Anuario.

quent independent act of negligence on the part of one of the other defendants, your verdict must be in favor of defendant Anuario.

7. If defendant Anuario is to be taken as a volunteer aiding in the removal of the patient from the operating room to and in the ether bed, then he is only liable for an act of affirmative or wilful negligence. 10

8. When one assumes to act outside of the scope of his designated duties he will only be liable for an act of affirmative or wilful negligence in connection with the performance of such assumed duties.

9. The defendant Anuario had a right to rely upon the proper preparation of the other bed, including the removal of any hot water bottle, by defendant Baigrie, unless there was something which plainly indicated that she had failed in the performance of such duty. 20

10. It is a general rule of law that negligence cannot be predicated on an act or omission which would not lead an ordinarily prudent man to apprehend danger from it.

11. If you find that defendant Edith M. Baigrie was negligent and that such negligence alone was the proximate cause of the alleged injury to plaintiff Louise Haring, you must find a verdict in favor of the defendant Anuario. 30

12. If you find that plaintiff Louise Haring was burned by a hot water bottle which was placed in the bed subsequent to the time when the patient was placed therein, then you must find a verdict in favor of defendant Anuario.

13. If the jury finds from the evidence that it was the duty of the room nurse to have the 40

Requests to Charge—Charles Anuario.

ether bed properly prepared for the placing of the patient therein, then they cannot find a verdict against defendant Anuario.

10 14. If the jury finds from the evidence of the case that there is no duty on the part of the assistant physician to see that the ether bed was properly prepared for the placing of the patient therein, they cannot find a verdict against defendant Anuario.

20 15. If you find that it is just as probable that the hot water bottle that burned Mrs. Haring, was placed in the bed by Mrs. Baigrie after Mrs. Haring was already in bed, as that Mrs. Baigrie placed it there before Mrs. Haring was put to bed, then your verdict must be for the defendant Dr. Charles Anuario.

30 16. Even if you find from the evidence that someone was negligent, but you are unable to identify the negligent person or fix the responsibility for the negligent act, then your verdict must be for all of the defendants as it would be illegal to bring in a verdict against the innocent as well as the guilty in order to bring in a verdict against the guilty.

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OPINION OF SUPREME COURT.

Filed July 3, 1929.

NEW JERSEY SUPREME COURT.

No. 79, Oct. T., 1928.

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LOUISE P. HARING, *et ux.*,

vs.

CHARLES W. BANKS.

Appeal from Essex Circuit Court.

Argued before Gummere, Chief Justice, and
Justice Parker.

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For the appellant, William P. Braun.

For the respondents, Joseph Coult.

PER CURIAM.

This action was brought to recover compensation for personal injuries sustained by the plaintiff Louise Haring resulting, as she claimed, from the negligence of the defendant, and also compensation for the consequential damage suffered by her husband therefrom. The trial resulted in the rendition of verdicts in favor of the plaintiffs, and the defendant has appealed from the judgment entered thereon.

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Mrs. Haring was suffering from a diseased appendix and a fibroid tumor. Her family physician recommended an operation, and Dr. Banks, the present appellant, was employed to perform it. By his advice, Mrs. Haring was taken to St. Mary's Hospital, in Orange, and he arranged for her reception there. The operation having been

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Opinion of Supreme Court.

completed, Mrs. Haring was put upon a carrier used to transfer patients from the operating room, and was taken to another room in the hospital assigned for her use, and was there placed upon a bed. This bed had a hot water bottle lying in it at about the point where her shoulders would rest. This bottle had apparently been used for the purpose of warming the bed, and the person who had been doing that work had negligently left it there. Mrs. Haring was placed upon her back in the bed in such a position that the hot water bottle lay between her shoulders, and as a result thereof she was severely burned. These facts are undisputed.

According to the testimony submitted on the part of the plaintiffs, shortly after Mrs. Haring began to recover from the effects of the anaesthetic that had been administered to her, Dr. Banks came into the room to see how she was getting along. She then seemed to be in great pain, crying a good deal, and told the doctor that she felt terrible, saying "I expected this" (pointing to the place where the operation had been performed), "but not this" (pointing to her shoulder); and then said, "Get me out of this. I feel terrible. My shoulders are all cut."

Dr. Banks paid no attention to this statement, merely saying that the patient had a fine jag on, and then walked out of the room.

At the close of the plaintiffs' case the defendant moved for a non-suit on the ground that the testimony submitted failed to show any negligence on his part; and afterward, and when both sides had rested, he moved for the direction of a verdict in his favor upon the same ground. Both of these motions were denied, and the principal reason argued for a reversal of the present

Opinion of Supreme Court.

judgment is that there was error in the refusal to grant these motions. We are not impressed with this contention. Whether or not when his patient made the complaint to him above set out Dr. Banks owed her the duty of making an examination for the purpose of ascertaining whether the patient really was suffering pain between her shoulders, and, if so, what was the cause of it, and, if he did owe her that duty, whether his failure to perform it was at least to some extent the cause of her injury, were each of them questions for the jury and not for the Court to determine; and, therefore, the refusal of the Court to take away from the jury the decision of these questions was proper.

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We are also asked to reverse this judgment because, as it is alleged, the Court improperly admitted a photograph taken of Mrs. Haring's back some little time after the injury resulting from the burn. This photograph showed the location and character of the wound. Counsel for the appellant argued that it ought not to have been admitted unless the photographer who took it was first called to prove its identity. It appeared from the testimony, however, that Mrs. Haring's husband was present when the photograph was taken, and he testified that it was a correct depiction of the then condition of his wife's shoulders. This, in our opinion, justified its admission in evidence.

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Other grounds for reversal are directed at alleged errors in rulings upon the admissibility of testimony and in the charge to the jury. They are not of sufficient importance to require discussion. We deem it sufficient to say that our examination of them leads us to the conclusion that each one of them is without legal merit.

The judgment under review will be affirmed.

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ORDER OF AFFIRMANCE.

NEW JERSEY SUPREME COURT.

10	LOUISE P. HARING and EDWARD H. HARING, <i>Plaintiffs-Appellees,</i> <i>vs.</i> CHARLES W. BANKS, <i>Defendant-Appellant.</i>	}	<i>Action at Law. On Appeal from Essex Circuit Court. Order of Affirmance.</i>
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20 This cause having been duly submitted on briefs at the October Term, 1928, of this court, by Messrs. Coult and Satz, of counsel for plaintiffs-appellees and William P. Braun, of counsel with defendant-appellant, and the Court having inspected the record and judgment below and considered the causes assigned for error and the grounds of appeal therein and finding no error in the judgment or proceedings in the Essex Circuit Court,

30 It is thereupon, on this 11th day of July, 1929, ORDERED, that the judgment of the Essex County Circuit Court be affirmed with costs and that the record and proceedings be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

Entered July 11, 1929.

On motion of,

COULT, SATZ & TOMLINSON,
Attys. for Respondents.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

LOUISE P. HARING and EDWARD
H. HARING, her husband,
Plaintiffs-Appellees,

vs.

CHARLES W. BANKS, WINIFRED
BANKS, CHARLES B. ANUARIO,
AGNES GRANT, EDITH BAIGRIE,
Defendants,

CHARLES W. BANKS,
Defendant-Appellant.

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*Action
at Law.*

*Notice and
Grounds of
Appeal.*

To Coult, Satz & Tomlinson, Esquires, attor- 20
neys of plaintiffs.

SIRS:

PLEASE TAKE NOTICE that the defendant,
Charles W. Banks, appeals to the New Jersey
Court of Errors and Appeals, court of last re-
sort, from the whole judgment entered in this
cause on the following grounds:

1. The New Jersey Supreme Court erred in
affirming the judgment under review on appeal 30
from the Essex County Circuit Court.

Yours truly,

WILLIAM P. BRAUN,
Attorney for Defendant-Appellant.

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

10	LOUISE P. HARING and EDWARD H. HARING, her husband, <i>Plaintiffs-Appellees,</i> <i>vs.</i> CHARLES W. BANKS, <i>Defendant-Appellant.</i>	<i>Action at Law.</i> <i>On Appeal from Supreme Court.</i> <i>Grounds of Appeal.</i>
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To Coult & Satz, Esqs., attorneys of appellees.

SIRS:

20 TAKE NOTICE that the following are the grounds upon which the appellant, Charles W. Banks, appeals to the Court of Errors and Appeals (the court of last resort in the State of New Jersey) from the whole of the judgment entered in this cause in the Essex County Circuit Court and affirmed on appeal to the New Jersey Supreme Court.

30 1. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the First Count at the conclusion of the plaintiffs' opening although it was error so to do.

2. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the Second Count at the conclusion of the plaintiffs' opening although it was error so to do.

40 3. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant

Grounds of Appeal.

a non-suit on the Fourth Count at the conclusion of the plaintiffs' opening although it was error so to do.

4. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the Fifth Count at the conclusion of the plaintiffs' opening although it was error so to do. 10

5. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court and the ruling of said last-mentioned court in refusing to permit the following question to be asked on cross-examination on behalf of defendant Charles W. Banks of plaintiffs' witness Edith M. Baigrie, "How did he say it?".

6. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court and the ruling of said last-mentioned court in refusing to permit the following question to be asked on cross examination on behalf of defendant Charles W. Banks, "What tone of voice did he use?". 20

7. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the First Count at the conclusion of plaintiffs' case although it was error so to do. 30

8. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the Second Count at the conclusion of plaintiffs' case although it was error so to do.

9. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant 40

Grounds of Appeal.

a non-suit on the Fourth Count at the conclusion of the plaintiffs' case although it was error so to do.

10 10. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the Fifth Count at the conclusion of the plaintiffs' case although it was error so to do.

20 11. Because the Supreme Court affirmed the rule of the Essex County Circuit Court in sustaining the objection to question asked of Dr. James H. Brothers, one of the witnesses in behalf of the defendants, and struck out the answer thereto, which question and answer were as follows: Ques. "Suppose she had indicated her abdomen and then her shoulder and said, 'I expected this but not this', would that put you on notice—"Would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot water bottle". Ans. "Not in my opinion", —although it was error so to do.

30 12. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the First Count.

13. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the Second Count.

14. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the Fourth Count.

Grounds of Appeal.

15. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the Fifth Count.

16. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows: 10

“If you find from the evidence of the case that there was no duty on the part of Charles W. Banks to see that the ether bed was properly prepared or inspected for the placing of the patient, you must find in favor of Dr. Charles W. Banks.”

17. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows: 20

“If you find from the evidence of the case that there is no duty on the part of Dr. Charles Banks or Dr. Winifred Banks to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of Dr. Charles W. Banks.” 30

18. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the 40

Grounds of Appeal.

patient therein, you cannot find a verdict against Dr. Charles W. Banks.”

10 19. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence of the case that there is no duty on the part of Dr. Charles W. Banks or Dr. Winifred Banks to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of Dr. Charles W. Banks.”

20 WILLIAM P. BRAUN,
Attorney of Defendant-Appellant.

Due service of a copy of the within grounds of Appeal is hereby acknowledged this 25th day of July, 1929.

COULT, SATZ & TOMLINSON,
Attorneys of Plaintiffs.

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New Jersey Court of Errors and Appeals

LOUISE P. HARING and EDWARD HARING,

Plaintiffs-Appellees,

vs.

CHARLES W. BANKS, WINIFRED BANKS, CHARLES B. ANUARIO, AGNES GRANT, EDITH BAIGRIE,
Defendants,

CHARLES W. BANKS,
Defendant-Appellant.

Action at Law.

On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

This is an appeal from a judgment entered on July 11, 1929, by virtue of an order of affirmance made by the New Jersey Supreme Court, affirming the judgment originally entered in the Essex County Circuit Court, June 15, 1928, in favor of the plaintiffs and against defendant-appellant, Charles W. Banks, in the sum of Five Thousand (\$5,000) Dollars damages, together with costs, in favor of plaintiff, Louise P. Haring, and Two Thousand (\$2,000) Dollars damages, together with costs, in favor of plaintiff, Edward H. Haring.

The action in the Circuit Court was brought to recover damages sustained by the plaintiff Louise P. Haring by reason of being burned by a hot water bottle after an operation performed by the appellant, and the consequential damages suffered by the husband.

Plaintiff, Louise P. Haring, was suffering from a diseased appendix and a fibroid tumor. An

operation having been recommended by her family physician, who is not a party to this action, defendant, Charles W. Banks, was called in to perform the double operation. It was agreed by the parties that the operation was to be performed at St. Mary's Hospital, Orange, New Jersey. Dr. Charles W. Banks arranged for Mrs. Haring's reception at the hospital, and also for the presence of Dr. Charles B. Anuario, acting intern at the hospital to act as assistant surgeon, and Dr. Winifred Banks, wife of Dr. Charles W. Banks, to act as anesthetist.

Mrs. Haring was received at the hospital March 8, 1927, and was placed in charge of Edith Baigrie, a trained nurse, called by the hospital from their registry list, to act as the private nurse on the case. The hospital also called from their registry a trained nurse, Miss Blanche Sitnesky, who was to act as private night nurse. Miss Sitnesky is not a party to this suit. It was understood that plaintiffs were to pay the hospital and nurses direct. Dr. Charles W. Banks selected and paid Dr. Anuario for his services as assistant surgeon, but it does not appear in the record through what channels Dr. Winifred Banks was to be reimbursed for her services.

On March 9th, Mrs. Haring was prepared for the operation by the private day nurse, Mrs. Baigrie, who accompanied her to the operating room on a cart or carrier, and remained with her until she was under the anaesthetic. The anaesthetic given was an injection of morphine, followed by nitrous oxide, and oxygen, which in turn was followed by ether, and the operation began at 9:50 and concluded at 10:40 A. M.

In addition to Dr. Charles W. Banks, surgeon, Dr. Winifred Banks, anaesthetist, and Dr. Anuario, the assistant surgeon, the operation was attended by Agnes Grant, a trained nurse, acting as operating room supervisor, and another trained nurse who acted as sterile nurse, the latter two being furnished by the hospital.

At the conclusion of the operation, Dr. Charles W. Banks left the operating room and went into the surgeon's room to clean up. Mrs. Haring was placed upon the carriage and conveyed to her room, accompanied by defendants, Agnes Grant, Dr. Anuario and Dr. Winifred Banks. There is conflict of testimony as to who was present when the patient first arrived in the room, the three accompanying her from the operating room testifying that Mrs. Baigrie, the private nurse, was present, and she denying that she was in the room until the patient was actually being lifted into the bed. It is not denied that Drs. Anuario and Winifred Banks participated in lifting the patient from the carriage to the bed by means of a folded draw sheet.

According to the testimony of Mrs. Baigrie, after leaving the operating room (Mrs. Haring having been anaesthetized) she prepared the bed for the reception of her patient, folding all of the covers to the foot, and the room being cold, she decided to place a hot water bottle at about a point where the patient's shoulders would rest, in order to warm the bed and prevent pneumonia. After making these preparations, she left the room, closed the door and going out into the corridor, which was much warmer, wandered around until, on looking into the room, she found the patient being *dragged*

across the bed by defendants Anuario, Winifred Banks and Agnes Grant. She claims to have made no protest to this procedure, or any comment on the fact that she had placed the hot water bottle in the bed, claiming that she assumed that it had been removed by one of the three mentioned. The presence of the hot water bottle at the time the patient was lifted from the carrier was emphatically denied by the other three defendants who were present.

After Mrs. Haring had been placed in bed, defendant Anuario returned to the operating room, where he had another operation scheduled to take place, defendant Winifred Banks, on noting that the patient's pulse, respiration and condition were satisfactory, also returned to the operating room, and defendant, Agnes Grant conveyed the carrier and blankets, which were the property of the operating room, back to their proper place, leaving the patient in charge of Mrs. Baigrie.

A short while later, Dr. Charles Banks, having cleaned up and put on a clean gown, came from the operating room and beckoned to the husband and four sisters of Mrs. Haring to come to her room. There is a sharp conflict between the testimony of Dr. Banks and the testimony of the plaintiffs and their witnesses as to what took place at that time, Dr. Banks testifying that the patient was unconscious; and both she and her relatives testifying that she was conscious and describing her actions and conversations. This visit lasted but a few minutes, Dr. Banks returning to the operating room and the husband and relatives of Mrs. Haring returning to the corridor, until they were subsequently advised by Dr. Banks to go home as the patient was all right.

It subsequently developed that Mrs. Haring had sustained a burn in the region of the right shoulder blade about the size and shape of a hot water bottle. The burn was a third degree burn and together with the effects of the operation, necessitated Mrs. Haring's remaining at the hospital until May 28, 1927, and she was subsequently treated at her home by both Dr. Banks and Mrs. Baigrie until approximately the 15th of October, 1927.

Mrs. Baigrie, personally, paid for the services of Miss Sitnesky, the night nurse, and also contributed toward the wages of a woman engaged by Mrs. Haring to perform housework.

Suit was instituted against the defendants named in the caption of the case, and charged the appellant, Charles W. Banks, with personally, and "by his agents, and servants thereunto duly authorized, causing, suffering and procuring Louise P. Haring, while still unconscious, to be laid upon a hot water bottle, a dangerous instrumentality, although the water bottle was lying in open view on the bed," and also charging the appellant with negligence in that "while Louise P. Haring was under the influence of an anaesthetic and unconscious she had been placed upon the bed containing a hot water bottle which, because of its extreme and dangerous heat caused her to be burned, and when she was recovering from the effects of the anaesthetic and regaining consciousness, she made outcry and complained to appellant of the pain and agony, but the appellant failed to use and exercise reasonable and ordinary care, intelligence and exertion of his skill in the application of his knowledge in that he failed to discover the presence of the hot water bottle and caused, suffered and permitted

Louise Haring to lie and rest upon the hot water bottle for a long space of time.”

During the course of the trial, the plaintiffs took voluntary non-suits as to defendants, Agnes Grant and Edith Baigrie. The plaintiffs also narrowed the issue insofar as appellant is concerned by conceding that Dr. Anuario was not acting as agent for the appellant at the time he assisted in placing the patient in bed (see Case, p. 216, l. 10) which in effect limited plaintiffs' claim on the first and fourth counts to such responsibility as appellant would have for the acts of defendant, Dr. Winifred Banks.

In addition to the verdict in favor of the plaintiffs and against the appellant, the jury brought in a verdict in favor of defendants Charles B. Anuario and Winifred Banks, against the plaintiffs exonerating these last two named defendants from any negligence.

The Circuit Court judgment was appealed to the Supreme Court on the errors alleged as follows:

At the close of plaintiffs' opening, defendant, Charles W. Banks, moved for non-suit on the first and fourth counts on the ground that plaintiffs' opening did not alleged the violation of any duty on the part of defendants, Winifred Banks, Charles Anuario and Agnes Grant, acting as agents for the defendant, Charles W. Banks, plaintiff having conceded in the opening that Mrs. Baigrie, the other defendant, was acting as agent for the hospital.

Plaintiffs in their opening said, “Mrs. Haring was put on a cart and was taken down to the ether bed by Dr. Winifred Banks, Dr. Charles Anuario and Agnes Grant. It was no part of their duty whatever to put this patient in the

bed, that rested upon the hospital acting through Edith M. Baigrie, but when they got down there, Mrs. Baigrie was not there, and instead of waiting for her to complete the preparation of the bed and herself to move the patient into this bed, they undertook to do it themselves, although it was no part of their duty to do so" (Case, p. 24, l. 36; p. 25, l. 1).

The defendant, Charles W. Banks, also moved for a non-suit as to the second and fifth counts on the plaintiffs' opening on the ground that the mere fact that a woman was talking and having hallucinations when coming out of ether was no notice to the defendant, Charles W. Banks, of any untoward condition, nor would it indicate that the burn would have been averted had he known of it then; nor is there any negligence insofar as plaintiffs' opening on these two counts are concerned.

Plaintiffs, in their opening, said "She was just about coming out of the anaesthetic at that time, and she will tell you that instantly, upon coming to her senses, she was conscious of terrific pain in her back, and she made an outcry about it. About that time Dr. Charles W. Banks came down and came into the room where she was and she, as best she could, tried to tell him about it, and she will tell you that she expected pain here (indicating) but not here (indicating), and that she made the complaint that something was cutting her in the back. The doctor said, 'You will be all right.' " And then the doctor said, "She's got a beaut." These motions were denied and an exception noted (Case, p. 31, l. 3).

The trial court permitted the introduction in evidence of a photograph (Exhibit P. 2) over the objection of defendant, Charles W. Banks,

although there was no legal evidence as to who took the photograph and as to whether or not the photograph was a reproduction of the untouched negative, the Court permitting the photograph to be received as evidence on the theory that they can properly be received if a person testifying that he was present at the taking of the pictures recognizes the photographs as a true representation of the object (Case, p. 45, l. 10).

On cross examination of Edith M. Baigrie, the witness testified that Dr. Banks had told her to do what Mrs. Haring wanted her to do so that she could stay on the registry. The witness was then asked whether or not Dr. Banks was not advising her to which she replied, "I don't know what he did it for." She was then asked, "How did he say it?" "What tone of voice did he use?" which questions were objected to, the objections sustained, and the objections noted as grounds of appeal (p. 164, ll. 10-34).

At the conclusion of the plaintiffs' case, defendant, Charles W. Banks, moved for non-suit on the first and fourth counts on the ground that there was no evidence of any negligence on the part of anyone acting in such a capacity as to establish agency for Dr. Banks, and even if there was any agency established, there was nothing committed in the scope of that agency which would constitute negligence.

A motion was also made in behalf of the defendant, Charles W. Banks, for a non-suit on the second and fifth counts on the ground that there was no evidence in the case to show that Mrs. Haring's actions should put Dr. Banks on notice that there was any hot water bottle

under the patient, particularly in view of the fact that Dr. Banks had a right to assume that the nurse had fully performed the duties for which she was responsible, and would do them in a proper manner.

These motions were denied by the Court and exceptions noted (Case, p. 217, l. 32).

During the direct examination of Dr. James H. Brothers, one of the witnesses in behalf of the defense, he was asked, "Suppose she indicated her abdomen and then her shoulder and said, 'I expected this, but not this,' would that put you on notice * * * would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot water bottle," to which he answered, "Not in my opinion," which answer was stricken out by the Court (p. 267, l. 12).

At the conclusion of the case, defendant, Charles W. Banks, moved for direction of verdict on the first and fourth counts on the ground that there was no evidence of negligence on the part of anyone in the case who was acting as the agent or servant of Dr. Charles W. Banks, in the scope of their authority or anything that could possibly be classed as negligence.

Defendant Charles W. Banks, also moved for direction of verdict on the second and fifth counts on the ground that there was no evidence in the case of any negligence on the part of Dr. Banks, particularly in the face of the expert testimony, to the effect that Mrs. Haring's actions could not put him on any notice, and that her symptoms were not indicative of any undue or unusual situation.

A motion was also made in behalf of defendant, Charles W. Banks, for direction of verdict

on the general ground that there was no evidence in the case on any count to hold Dr. Charles W. Banks.

These motions were denied and exceptions noted as grounds for appeal (p. 335, l. 1).

The trial court refused to charge the third, eighth and ninth requests of the defendant, Charles W. Banks, and the seventeenth request as to all defendants to which exceptions were noted as grounds for appeal (Case, p. 357, l. 22).

The opinion of affirmance returned by the Supreme Court (State of Case, pages ~~3, 5, 6, 7,~~ ^{367,} 8, 9), consisted primarily of affirming the ruling of the original trial court in denying motions for non-suit and direction of verdict on the theory that whether or not, when the patient complained to the appellant, he owed her the duty of making an examination for the purpose of ascertaining whether the patient really was suffering the pain between the shoulders, and, if so, what was the cause of it; and if he did owe her that duty, whether his failure to perform it was at least to some extent the cause of her injuries, and that these questions were questions for the jury (Case, 368, ll. 33-40; Case, p. 369, ll. 1-18).

The only other ground of appeal considered by the Court was that raising the question of the propriety of admitting the photograph of the plaintiff, Louise P. Haring's, back, all the other grounds being dismissed without comment (Case, p. 369, ll. 19-40).

ERRORS ALLEGED.

The following grounds of appeal are relied upon in connection with the present appeal:

1. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the first count at the conclusion of the plaintiffs' opening although it was error to do so.

2. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the second count at the conclusion of the plaintiffs' opening although it was error so to do.

3. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the fourth count at the conclusion of the plaintiffs' opening although it was error so to do.

4. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the fifth count at the conclusion of the plaintiffs' opening although it was error so to do.

5. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court and the ruling of said last-mentioned court in refusing to permit the following question to be asked on cross examination on behalf of defendant Charles W. Banks of plaintiffs' witness Edith M. Baigrie, "How did he say it?"

6. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court and the ruling of said last-mentioned court in refusing to permit the following question to be asked on cross examination on behalf of de-

fendant Charles W. Banks, "What tone of voice did he use?"

7. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the first count at the conclusion of plaintiffs' case although it was error so to do.

8. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the second count at the conclusion of plaintiffs' case although it was error so to do.

9. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the fourth count at the conclusion of the plaintiffs' case although it was error so to do.

10. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a non-suit on the fifth count at the conclusion of the plaintiffs' case although it was error so to do.

11. Because the Supreme Court affirmed the rule of the Essex County Circuit Court in sustaining the objection to question asked of Dr. James H. Brothers, one of the witnesses in behalf of the defendants, and struck out the answer thereto which question and answer were as follows: Q "Suppose she had indicated her abdomen and then her shoulder and said, 'I expected this but not this,' " would that put you on notice—"Would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot water bottle?" A "Not in my opinion,"—although it was error so to do.

12. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the first count.

13. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the second count.

14. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of the defendant Charles W. Banks on the fourth count.

15. Because the Supreme Court affirmed the refusal of the Essex County Circuit Court to grant a direction of verdict in favor of defendant Charles W. Banks on the fifth count.

16. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence of the case that there was no duty on the part of Charles W. Banks, to see that the ether bed was properly prepared or inspected for the placing of the patient, you must find in favor of Dr. Charles W. Banks.”

17. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence of the case that there is no duty on the part of Dr. Charles Banks or Dr. Winifred Banks to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of Dr. Charles W. Banks.”

18. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the patient therein, you cannot find a verdict against Dr. Charles W. Banks.”

19. Because the Supreme Court affirmed the judgment of the Essex County Circuit Court on the ruling of said last-mentioned Court in refusing to charge the jury in behalf of the defendant Charles W. Banks as follows:

“If you find from the evidence of the case that there is no duty on the part of Dr. Charles W. Banks or Dr. Winifred Banks to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of Dr. Charles W. Banks.”

Case, pp. 372-373-374-375-376.

ARGUMENT.

For the convenience of the Court, some of the grounds will be consolidated, because by reason of the fact that the plaintiffs are husband and wife, the complaint contains separate counts based upon acts of negligence in respect to which separate motions were made upon the same grounds, and it is upon the ruling of the trial court upon these motions, and the affirmance of said rulings, that this appeal is largely based.

The first, third, seventh and ninth grounds of appeal will be argued as Point One.

Grounds two, four, eight and ten will be argued as Point Two.

The fifth and sixth grounds will be argued as Point Three.

Grounds twelve and fourteen will be argued as Point Five.

Grounds thirteen and fifteen will be argued as Point Six.

POINT ONE.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to grant the motion on behalf of the defendant, **Charles W. Banks**, for non-suit of the first and fourth counts at the conclusion of the plaintiffs' opening, and at the conclusion of the plaintiffs' case.

The counts involved in this point charge the defendant **Charles W. Banks**, with negligently, by his agent or servants, placing the plaintiff **Louise Haring** on a hot water bottle while she was still unconscious following an operation.

This question was unquestionably resolved by the jury in favor of the appellant, they having rendered a verdict in favor of the defendant, **Winifred Banks** (Case, p. 20, ll. 7-9), the only other possible agent of **Dr. Charles Banks** upon whose acts a judgment against him could be predicated under the plaintiffs' own theory of the case (Case, 216, ll. 10-16). Indeed, had there been no separate count charging personal negligence on the part of the appellant and no attempt to prove such, the Court would have undoubtedly refused to accept a verdict, based upon the negligence of the agent, in favor of the agent and against the principal (see *Drew v. Cregar*, 98 L. 115-118, At. 144).

This point, however, cannot be abandoned, not only for the reason that the Court might hold

otherwise regarding the dispositions of the questions involved by the nature of the jury's verdict, but also because the Court may desire to comment on questions so vital to the medical profession and enlarge upon the already existing decisions.

The chief questions raised by the motions upon which this point is founded are whether or not Dr. Winifred Banks was negligent when she assisted in placing Mrs. Haring in the ether bed, and if so, whether or no such acts were committed as the agent of Dr. Charles W. Banks. While Dr. Anuario, who also assisted in the transfer of Mrs. Haring from the carriage to the bed was also mentioned in plaintiffs' opening as a possible agent of the appellant, he was later voluntarily eliminated by the plaintiffs (Case, p. 216, ll. 10-16), but in any event, the same rules would apply to both, as both were practising physicians engaged in distinct and specialized duties in connection with the operation as anaesthetist and assistant surgeon, respectively (Case, p. 91, ll. 8-25; p. 89, ll. 3-6; p. 89, ll. 20-40; p. 90, ll. 1-40).

Some mention was also made in plaintiffs' opening to the effect that Dr. Charles W. Banks was responsible for the acts of his wife, Dr. Winifred Banks, if she were guilty of a tort or wrong (Case, p. 23, ll. 23-24). This question cannot become part of the case, not only because it was not raised by the pleading, which invoke only the doctrine of *respondeat superior*, but also because neither in the allegations nor in the proofs does it appear that any of the actions complained of on the part of Dr. Winifred Banks were voluntary torts and not growing out of conduct by her of her own business or arising out of the management by her of her separate prop-

erty (Case, p. 88, ll. 26-32). The last mentioned requirements would have been essential to the plaintiffs' case if it were based upon the common law liability of the husband for the voluntary torts of his wife (see *Sargeant v. Fedor*, 3 N. J. Misc. 832, 130 At. 207). Under these circumstances, even an amendment at this time would not avail.

The question of whether or not Dr. Winifred Banks (and/or Dr. Anuario) had been guilty of negligence when lifting Mrs. Haring into bed was, as has already been stated, decided in the negative by the jury, but was it properly submitted to them as a question of fact? There was no duty upon either of them to prepare or inspect the ether bed. That was the duty of the private nurse (defendant, Edith Baigrie) and they had the right to assume that these duties had been assumed and followed out (Case, p. 89, ll. 10-14; p. 91, ll. 26-30). Furthermore, insofar as Dr. Winifred Banks was concerned, her duties required such close supervision of the patient as to preclude even normal observation outside of that of her patient (Case, p. 91, ll. 11-25).

But even granting that a jury question was raised as to the negligence of any of those who participated in transferring the unfortunate plaintiff to the ether bed, what agency existed which would implicate Dr. Charles Banks? Dr. Charles B. Anuario, and Dr. Winifred Banks were licensed physicians independently practicing their professions, and under the law as laid down by this court (see *Miles v. Holborn*, 58 L. 193, 33 Atl. 389) Dr. Charles Banks could not be held responsible for any negligent or wrongful act on their part. In the case cited it was held that one employing a person who follows

a distinct and independent occupation of his own is not responsible for the negligent or improper acts of the other and that, therefore, the defendant physician was not liable for the neglect or misconduct of a substitute employed to perform during his temporary absence the things he himself had contracted to perform.

The case at bar presents an even stronger reason for applying this rule, for Dr. Charles Banks employed independent practitioners to act in a specialized field and perform services that he himself had not contracted to perform, namely, to administer anaesthesia and act as assistant surgeon. In the case of *Brennan v. Parsonnet*, 83 L. 20, 83 Atl., 948, the Court recognized the fact that major surgery has materially developed since the common law originally laid down the rules regarding a surgeon's responsibilities and also the fact that a surgical operation cannot be contracted for according to plans and specifications. Dr. Charles Banks was employed to operate, and in the light of his testimony as a witness for the plaintiff, describing the mechanics and personnel required for an operation in the light of present-day surgery (facts which are common knowledge) it would be ridiculous to assume that he undertook to perform everything necessary in connection with the operation himself. Had either of the two other doctors been in his regular and continuous employ or affiliated with him in a partnership, or had they been performing some service under his supervision, which he himself contracted to perform, he might have been responsible, but such were not the facts.

It was not contended by the plaintiffs that the two other defendants, Agnes Grant and Edith Baigrie, were employed by the appellant or were

acting for anyone but the hospital (Case, p. 23, ll. 34-37; p. 24, ll. 2-3) but in any event under the leading cases, the appellant is not liable for the acts of any of those present at the time Mrs. Haring was placed in the ether bed, all of which persons were parties to this suit.

The following is a digest of the decisions on the point in question:

A physician is not responsible for the acts of nurses and interns in dressing the wound of a person there operated on by the physician, where they are not his employees, unless he is negligent in permitting them to do so.

Reynolds v. Smith, 148 Iowa, 264, 127 N. W. 192;

Baker v. Wentworth, 155 Mass. 338, 29 N. E. 589.

An operating surgeon who operated at a number of hospitals was not responsible for the negligence of hospital surgeons, nurses, etc., in dressing a wound on a patient on whom such surgeon had operated at a reputable hospital if he had no knowledge of their negligent acts. (*Hummer v. Stevenson*, 122 Maryland 40, 89 Atlantic 418.)

Where a hospital patient is treated by a physician not managing or controlling the hospital, he is not liable for negligence of nurses or interns if he has no connection with any negligent act. (*Broz v. Omaha Maternity and General Hospital*, 96, Nebraska, 648; 148 N. W. 575; L. R. A. 1915 D. 334.)

A surgeon who advised hot applications was not liable for negligence of a hospital nurse in applying hot water bottles or irons in the absence of evidence that his reliance of the nurse made him responsible for the acts. (*Wright v. Conway*, 241 P. 369.)

A physician who told patient's attendant, a woman (not a nurse), to get patient warm

by placing hot irons in bed with her, was not liable if patient is burned by negligent use of the irons. (*Malikowski v. Graham*, 172 N. W. 785; 4 A. L. R. 1524.)

If the surroundings of a patient are those of a modern hospital with experienced nurses and attendants, the doctor should be entitled to take for granted that they will attend to their ordinary customary duties without instructions. (f. n. 4 A. L. R. 1528.)

Surgeons performing an operation at a hospital were held not liable for permitting a patient to be attended after an operation by the hospital nurses who put a hot water bottle in his bed, burning him, there being nothing to show that the nurses were incompetent or that the surgeons knew of it. (*Morris v. Henke*, 165 Wisconsin 166; 160 N. W. 173; f. n. 4 A. L. R. 1528.)

Where in an action against a physician for injuries for being burnt by a hot water bottle left by a nurse in the bed to which the plaintiff was removed after an operation performed by the chief hospital surgeon, assisted by the defendant, it was shown that though the defendant had arranged for the operation to be performed at the hospital, the hospital expenses were to be paid by the plaintiff, and the duty of preparing the beds and applying the patient therein rested entirely with the directress and hospital nurses, over whom defendant had no supervision and for whose negligence he was not responsible, the Court properly entered a non-suit notwithstanding the fact that defendant was present when the plaintiff was placed in the bed. (*Stewart v. Manasses*, 90 Atl. 574.)

Where a defendant, a private practitioner, performed an operation in a hospital where he was assisted by trained resident nurses presumably in the employ of the hospital and familiar with their duties, and the testimony is meagre as to the precise nature of these duties, although it is inferable from

the evidence and from the terms "operator" and "assistant," that it was the duty of the latter at or just before the close of the operation to count the sponges in use, which at that critical stage the operator himself cannot do without jeopardy to his patient, there was no burden on the defendant operator to show that the gauze sponge which was left in the abdomen of the plaintiff when the incision was sewed up or was allowed to heal up over it, was not left there by any carelessness or negligence of his. (*Neibel v. Winslow*, 88 L. 190, 9 Atl. 995; *Miles v. Holborn*, *supra*, 58 L. 193, 33 Atl. 389; *Parkes v. Seasongood*, 152 Federal 583.)

Even if it should be decided that the plaintiffs are correct in their contentions that Dr. Winifred Banks was the agent of Dr. Charles W. Banks for the purposes for which she was engaged, namely, to administer the anaesthetic, the negligent act complained of was clearly out of the scope of the agency on the admission of plaintiffs in their opening (Case, p. 25, ll. 8-10) and also on the only testimony in their case (Case, 9, 91, ll. 31-33.)

The doctrine of *respondeat superior* holding the principal liable only for such acts of his agents as are within the scope of the authority conferred is so well settled in this State, and so familiar to this Court, that a citation of decisions would be superfluous.

POINT TWO.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to grant motions on behalf of the defendant, **Charles W. Banks**, for non-suit of the second and fifth counts at the conclusion of the plaintiffs' opening and the conclusion of the plaintiffs' case.

The second and fifth counts of the complaint are based upon alleged personal negligence on the part of the appellant because he failed to discover the fact that Mrs. Haring was lying on a hot water bottle and have it removed sooner, and the evidence or symptoms upon which it is charged he should have been put on notice of this fact are as follows:

Plaintiffs' counsel in his opening, after describing how Mrs. Haring while still unconscious was placed on a hot water bottle said,

"She was just about coming out of the anesthetic at that time and she will tell you that instantly upon coming to her senses she was conscious of a most terrific pain in her back and that she made an outcry about it. About that time Dr. Charles W. Banks came down and came into the room where she was and she, as best she could, tried to tell him about it, and she will tell you that she expected pain here (indicating) but not here (indicating), and she made the complaint that something was cutting her in the back. The doctor said 'you will be all right.' And then the doctor said, 'She's got a beaut.'

"And the poor lady was left alive on that bottle we don't know exactly how long. We will try to find out before the case is concluded."

In the plaintiffs' case there was testimony on the part of Mr. Haring, Mrs. Haring, and Mrs. Haring's sisters, Mrs. Hunter and Mrs. English, to the effect that shortly after Mrs. Haring was

brought back from the operating room, in fact within five to seven minutes, they were permitted to enter the room with Dr. Charles W. Banks when he came down from the operating room after the operation, and that during that visit which lasted but a few minutes, in their presence and in the presence of Dr. Banks, Mrs. Haring appeared to be in great pain, was crying and talking about how badly she felt (Case, p. 36, ll. 20-25). She said, "Doctor, I feel terrible; get me out of this;" "I expected this, but not this," pointing to her operation and then to her shoulders (Case, p. 36, ll. 30-35) that she kept insisting on getting out of that room and said, "Get me out of this, I feel terrible. My shoulders are all cut" (Case, p. 37, l. 46); that she finally said in a strenuous way, using an oath, "Doctor, you have got to help me out of this," and that Dr. Banks said to her relatives, "She's got a fine jag on" (Case, p. 37, ll. 13-18): That her eyes were wide open staring; that she looked as if in great pain; her eyes looked wild when she opened them (Case, p. 175, ll. 13, 20-22 and 38-40); that she looked in great pain, seemed to stare with a rather wild expression, said, "Get me out of this," and that Dr. Banks said, "She has an old-fashioned jag on" (Case, p. 192, ll. 20-28).

Assuming all of this testimony to be true, what *prima facie* right of recovery in law has the plaintiff established against the appellant? It is interesting to note the basis of the claims alleged in the counts involved, and compare the allegations with the evidence and the law applicable to the situation.

The complaint charges (Case, 10, ll. 12-34) "that while the said Louise P. Haring was under the influence of said anaesthesia and unconscious, she was placed or laid upon a bed in said hospital

which contained a certain heating apparatus commonly called a hot water bottle, which, because of its extreme and dangerous heat, caused her to be burned on and about the back and shoulders, and when said Louise P. Haring was recovering from the effects of said anesthetic and regaining consciousness, she made outcry and complained to the defendant of the pain and agony which she was then suffering because of the presence of said water bottle under her back and shoulders, but the said defendant failed to use and exercise reasonable and ordinary care and intelligence and exertion of his skill and in the application of his knowledge in that he failed to discover the presence of the said hot water bottle, and caused, suffered and permitted the said Louise P. Haring to lie and rest upon said hot water bottle for a long space of time."

Now the facts show that Mrs. Haring had just undergone a serious, double, major operation for the removal of a fibroid tumor and a diseased appendix (Case, 78, ll. 517); that said operation necessitated complete anesthesia for fifty minutes (Case, 93, ll. 20-24) and that patients undergoing such operations usually have pain after the operation, which pain and any expressions thereof varies in accordance with the temperament of the individual (Case, 99, ll. 35-38). Dr. Banks was under a duty, it is conceded, to possess and exercise the skill and care ordinarily possessed and exercised by others in the profession (*Lolli v. Gray*, 101 Law 337, 128 Atl. 256). The charge that he failed to use and exercise reasonable and ordinary care and intelligence in the exercise of his skill and application of his knowledge in that he failed to discover the presence of the hot water bottle implies that he failed to diagnose the situation from the appearance and

remarks of the patient in a manner such as one possessing and exercising the ordinary skill and care possessed and exercised by others in the profession would have done; and further that he failed to take such steps as such reasonably prudent and competent physician or surgeon would have taken to alleviate the condition. The situation, therefore, resolves itself into a question of; first, improper diagnosis, or, second; improper treatment.

The mere fact that his diagnosis may have been mistakenly or improperly made, which inference might have been properly inferred or deduced from the evidence in the case, would not necessarily make him guilty of malpractice. It has been held that, even a mistaken diagnosis is not malpractice, unless it is below the standard of that skill and knowledge of the profession, and that a physician is entitled to recover for his services, even though he erroneously diagnosed the situation and treated for the wrong disease (*Ely v. Wilbur*, 49 Law 685). There was absolutely no medical testimony adduced on the part of the plaintiffs to show where Dr. Banks failed to exercise the care and skill ordinarily possessed and exercised by others in the profession, and this it is respectfully contended was absolutely essential before the case could be properly submitted to the jury.

Chief Justice Taft, when sitting as United States Circuit Court laid down a rule in malpractice cases which has been quoted with approval in text books and leading cases on the subject. *Ewing v. Goode*, 78 Fed. Rep. p. 442, at p. 444.

“When a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the Court and jury

must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

Professor Wigmore, in his work on Evidence (second edition) Volume 4—paragraphs 2090, says,

"Generally, the topics on which only an expert witness can be received form usually but one element in the main issuable fact. Moreover, generally, the parties are eager enough to produce such expert testimony without any rule to require them. It happens, however, that in one class of cases, viz.: *actions for malpractice against a physician or surgeon*, the main issue of the defendant's use of suitable professional skill is generally a topic calling for expert testimony only; and also that the plaintiff in such an action often prefers to rest his case on the mere facts of his sufferings, and to rely upon the jury's untutored sympathies, without attempting specifically to evidence the defendant's unskilfulness as the cause of those sufferings. Here the courts have been obliged to insist on the dictate of simple logic, resulting from the principal above cited (of 555, ante) that expert testimony on the main fact in issue must somewhere appear in the plaintiff's whole evidence; and for lack of it the Court may rule in its general power to pass upon the sufficiency of evidence (post, 2551) that there is not sufficient evidence to go to the jury." (Italics in text.) (See also *Snearly v. McCarthy*, 180 Iowa 81, 161 N. W. 108, at page 110.)

In the case at bar, as previously pointed out, we find that Dr. Banks was dealing with a patient not in a normal, natural, rational state of mind or health, but one whose mind and senses had been dulled and even obliterated for a con-

siderable period of time, and it can hardly be said that a lay jury would have sufficient knowledge of the actions and re-actions of an individual coming out of ether to be able to pass upon the question of what import, if any, should be placed upon, or what diagnosis or interpretation should be made of the actions and expressions and appearance of one whose sense of reasoning and expression were not only affected by an extensive anaesthesia, but also unquestionably by a returning consciousness of pain from a serious double, major operation.

It must also appear as a reasonable and logical proposition that the insistence of medical testimony would be necessary for a further reason in view of the physical condition of Mrs. Haring at the time of the alleged negligent failure of Dr. Banks to discover, or to take steps to remedy, her unfortunate condition as a result of the hot water bottle.

Even though Dr. Banks might have made an examination, there is nothing in the case to show that the disturbance or moving of a patient in the condition in which Mrs. Haring was naturally as a result of the anaesthesia and operation, would have been a proper practise under the recognized standards of medicine and surgery. Even a layman knows that, frequently, a physician or surgeon is faced with the duty of choosing between the lesser of two evils, where he is confronted with more than one separate and distinct malady, illness or injury.

A jury must have some yardstick or standard, with which to test and measure the actions of a doctor charged with malpractice under such circumstances. Indeed, even some medical testimony on the part of the plaintiffs in this case

might not have been sufficient if the rule laid down in the case of *Grimaldi v. Ziglio*, 3 N. J. Misc. 669, 129 Atl. 475) is to be followed. In the last cited case, the Court held that it takes more than the opinion of one or more physicians or surgeons that the treatment followed in a given case should have been different to lay a foundation of malpractice.

Another most important factor which the trial court, and evidently, the Supreme Court, failed to consider is the fact that, *the only evidence regarding the time when the hot water bottle was discovered and removed is the testimony of Mrs. Baigrie, that she discovered and removed the bottle before Dr. Banks made his first visit following the operation* (Case 126, ll. 36-37, page 146, ll. 7-20). This witness was the only witness in the case who testified to ever having seen the offending bottle, or what is presumed to be the offending bottle, and was one of the few facts about which she was definite and positive. Obviously, Dr. Banks could not be charged with Mrs. Haring's injuries, even had he failed in his duty by not investigating the alleged symptoms, if the bottle had already been removed and Mrs. Haring's back dressed (Case, p. 127, ll. 8-20). The counsel for the respondent may argue as heretofore, that the testimony of Mr. Haring (Case 37, ll. 35-40, ll. 1-10):

“Q Did anything happen between that time and the time Dr. Banks came back?
A Yes, Mrs. Baigrie had gone in and closed the door and ten or fifteen minutes after that she came out and walked very hurriedly down the hall. She came back with Miss McCarrick, I believe it is, and both of them closed the door. Then Miss McCarrick came out and walked down the hall and when she came back she came with a hypodermic needle in her hand and walked hurriedly into the room with it and closed the door.”

And Mrs. Hunter's testimony (S. C. p. 179, ll. 10-25):

“Q In between that time and the time you saw Mrs. Baigrie come out of the room did you see her go into the room? A No, she came in just as we were going out the first time.

Q What did she do when she came out of the room afterward? A She went hurriedly up the hall and came back in a few minutes with Miss McCarrick.

Q Do you know Miss McCarrick? A Yes.

Q What did Miss McCarrick do? A They both went into the room and closed the door.

Q Then what happened? A Miss McCarrick came out in about two minutes and went hurriedly up the hall and came back with a hypodermic in her hand.”

represents a jury question as to whether or not the discovery of the bottle by Mrs. Baigrie and her call for Miss McCarrick for assistance which immediately followed, does not raise an inference that Mrs. Baigrie was mistaken in the time. This would be true were it not for the fact that, when these witnesses saw Miss McCarrick, she had a hypodermic needle in her hand and not K. Y. Lubricant referred to in Mrs. Baigrie's testimony (Case, p. 127, ll. 5-20) wherein she testified among other things “and Miss McCarrick went out and got me some K. Y. Lubricant, and I applied it on the back.” Unquestionably the visit of Miss McCarrick to the patient observed by the plaintiffs' witness was a subsequent visit, when she returned with a hypodermic needle for the purpose of alleviating the pain, and not for the purpose of dressing the burn.

It will also be noticed that the observations of these witnesses are necessarily unreliable for

fixing or eliminating the presence of any of the participants in Mrs. Haring's room, as it will be noticed that none of them observed the exit of Drs. Winifred Banks, Charles B. Anuario and Agnes Grant, nor the original entrance into the room of Mrs. Baigrie when the patient was first brought from the operating room, uncontradicted evidence of which appears in the testimony of all of these defendants as well as that of Mrs. Baigrie herself.

There is a further angle to the situation: It would appear that some duty lay on the plaintiffs to establish Mrs. Haring's burn and the resulting injuries were approximately caused in whole, or at least in part, by negligence on the part of Dr. Banks. Even if it could be conceded that, at the time Dr. Banks made his first visit, the hot water bottle was still present, there is no evidence from which the jury could reasonably infer that its removal at that time would have prevented the resulting injuries, or any part of them. A verdict must be based on evidence, and not on speculation. (*Flemming v. Lobel*, 59 A. R. 28); (*Barton v. Erie R. R.*, 73 L. 12); (*Loun v. Public Service*, 80 L. 252).

Even where an injury is caused by one of two causes for ~~which~~ one of which the defendant is responsible and for the other not, the plaintiff must fail if his evidence does not show that it was produced by the former; or if it is just as probable that it was caused by one as by the other (*Cheste v. Cape May Real Estate*, 78 Law 131; 78 Atl. 836).

POINT THREE.

The Supreme Court erred in affirming the ruling of the **Essex County Circuit Court** in refusing to permit the following questions to be asked on the cross examination of the plaintiffs' witness, **Edith M. Baigrie**: "How did he say it?" "What tone of voice did he use?"

Defendant Baigrie was called as a witness for the plaintiffs, and in explanation, or in mitigation of the possible admissions inferable from the fact that she not only paid the night nurse, but also contributed toward the expenses of a houseworker at the Haring home, endeavored to show that these payments were made under coercion on the part of Dr. Banks (see Case, p. 163, ll. 40-41) "Dr. Banks told me I could not work in the hospital, if I did not come to terms." An effort was made on cross examination in behalf of Dr. Banks to show that this was not a mandate, but merely kindly advice, and the witness was questioned regarding Dr. Banks' manner and tone of voice, but these questions were excluded by the Court (Case, p. 164, ll. 10-30).

Mere words, without some indication of the inflection or accent used, permit interpretations running the entire gamut from passive acquiescence to tyrannical mandate. Left without the assistance which the answers to these questions would have afforded, the jury might well have interpreted Dr. Banks' remarks as the efforts of a guilty man to shield himself at the expense of an innocent woman by threatening her livelihood, instead of interpreting them as the kindly advice of one who had reason to have a friendly feeling and desired to help an unfortunate member of Mrs. Baigrie's profession.

It is respectfully contended that the exclusion of these questions was error.

POINT FOUR.

The Supreme Court erred in affirming the ruling of the Essex County Circuit Court in sustaining the objection to the following question asked of Dr. Brothers in behalf of the defense, and struck out the answer thereto: "Q Supposing she had indicated her abdomen and then her shoulder, and said, 'I expected this, but not this,' would that put you on notice * * * would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot water bottle? A Not in my opinion."

In attempting to establish negligence on the part of Dr. Charles Banks, personally, under the second and fifth counts of the complaint, the testimony of Mrs. Haring was introduced to show that among her first recollections while coming out of the anaesthetic was a conversation with Dr. Charles Banks in which she said, "Doctor, I expected this, but not this" (indicating), (Case, p. 203, ll. 21-22) and this was to prove the charge in the second count (Case, p. 10) that by reason of appellant's failure to exercise his skill and knowledge with regard to Mrs. Haring's outcry and complaint to him, he failed to discover the hot water bottle.

Now, if Dr. Banks was negligent in this respect, it was because he failed to diagnose a condition which others would have recognized, and for that reason, Dr. Brothers was called by the defense and asked the question to which he gave the answer which was stricken out (Case, p. 267, ll. 12-22). It is respectfully submitted

that this was error, especially under the law as laid down in *Lolli v. Gray, supra*.

POINT FIVE.

The Supreme Court erred in affirming the refusal of the Essex County Circuit Court to grant the motions for directions of verdict in favor of defendant, Charles W. Banks, on the first and fourth counts.

In addition to the argument and cases cited under Point One, which are also relied upon for this point, it is respectfully contended that it was error to deny the above motions in the face of overwhelming expert testimony introduced by the defense on all of the vital points involved, namely; the duties and responsibilities of each of the parties connected with the operation. This testimony was not only overwhelming as to weight, but it was absolutely uncontradicted, as it will be noted from the record that the only expert testimony in the case was either the testimony elicited by the plaintiffs by calling some of the defendants in their behalf, but the testimony of the defendants and the various experts called in their behalf as part of the defense case.

POINT SIX.

The Supreme Court erred in affirming the refusal of the Essex County Circuit Court to grant a motion for direction of verdict in favor of Dr. Charles W. Banks on the second and fifth counts.

When making the motions upon which this point is based, the facts as set forth in Point Two were augmented by the following testimony:

Dr. William J. Davis, called as an expert in behalf of the defendants testified as follows:

Q Would a woman that is thirty-seven years of age and who has been operated upon for two purposes, one for the removal of the appendix and one for the removal of a fibroid uterine tumor, which operation consumed fifty minutes of elapsed time and where the anaesthetic was morphine, followed by nitrous oxide and oxygen, followed by ether, be sufficiently conscious within five minutes of her return from the operating room, fifty or seventy-five feet away from her room, to experience pain or the sensation of pain from a hot water bottle? A No.

Q Would she be sufficiently recovered to know and understand what she was saying if she could talk or what others were saying to her? A No.

Q How long after the discontinuance of the ether would she be able to experience pain from a hot water bottle burning her back? A Of course, different persons react differently, but I would say not under an hour would she be able to consciously remember anything; not under an hour and possibly a great deal longer than that.

Q Doctor, if a patient on her return from the operating room is restless and threw her arms around and used an oath, and said, "Get me out of here. I expected this," indicating her abdomen, "but not this," pointing to the shoulders; her eyes were wild and staring; would these symptoms indicate to a doctor that there was anything unusual wrong with the patient or put him on notice—would he ordinarily examine a patient on the back where he had not operated to see whether there was anything wrong there? A How long afterward?

Q Within five minutes after the return from the operating room? A No.

Q Is it or is it not common for a patient to complain of pain in the back for an abdominal or pelvic operation? A Not after five minutes.

Q Is it unusual for them to begin to complain of pain at any time after regaining consciousness? A Yes, from the shoulders, in an operation of this kind in a position they have them from these things that keep them from sliding down. Case, p. 307, ll. 13-40; Case, p. 308, ll. 1-21.

Dr. Joseph Bove testified as follows:

Q What are the stages of recovery from a complete anesthesia? A The stages of a recovery from a complete anesthesia are the complete opposites of the stages of induction. In going under there is the primary stage, then the secondary stage, known as the excitation, then the stage of anesthesia. Recovery is in the opposite manner. They start to recover and first they sing or shout, pray or swear, give away secrets, which they wish they had not stated, saying things they did not want to say, then they gradually become conscious.

Q During that stage they know what is said to them? A During the stage of excitation?

Q During the stage of excitation. A Very seldom.

Q Do they know what they are talking about? A They do not.

Q For what would you interpret the actions of a patient who on coming out of the operating room, being placed in a bed, began to talk and swear and use repeatedly expressions of a desire to be taken out of there and indicating that they expected something in their abdomen but not in their back?

A To me that is ordinarily an everyday experience and ordinarily I would not pay any attention to it at all (Case, p. 302, ll. 10-40).

Dr. Reich testified as follows:

Q After a major operation when the patient has finally returned to consciousness, do they or do they not frequently complain of pain in the back? A That has been one of the questions of surgery. It has been a hard thing to eliminate; that is, pain in

the back. That is due to their position on the operating table. That table is not the most comfortable place. We have tried to eliminate it, but they often complain of pain in the back.

Q What causes that? A The position on the table. The complete relaxation is the cause, and very often the patient is more arched in the back than usual. In being operated where they are not under complete anesthesia they ask for a pillow to be put under the back.

Q Would it be so unusual or extraordinary to indicate to a surgeon or physician that anything was particularly wrong? A No, it is a common complaint for the patient to complain of pain in the back. It is due to the complete relaxation on the table.

Q How far does that pain extend in the back, or does it include the entire back? A It might include the entire back. It might be the lumbar region, which is the hollow of the back, but they complain of pain in the back and we accept it as such.

Q Would that extend over the region of the shoulders?

Objected to as leading.

Q Would it or would it not extend as far as the region of the shoulders?

Mr. Coult: I object.

The Court: I will allow it.

A It may extend to the whole shoulder. Very often an operation as you have described it to me for the removal of the fibroid uterus, the patient is put on the head in the Trendelenberg position, with the head down and the legs up, and they often complain of pain in the back from that position (Case, p. 294, ll. 21-40; p. 295, ll. 1-29).

Dr. Albert S. Harden testified as follows:

Q Doctor, assuming a woman thirty-seven years of age was operated upon for removal of her appendix and removal of a fibroid tumor, the operation taking fifty minutes,

during which time she was under anesthesia, which was first an injection of morphine followed by nitrous ether, how much time would expire from the time of the completion of the operation until the patient has sufficiently recovered consciousness to experience and understand any sensation of pain so as to be able to express it or intelligently transmit that information to a physician or a surgeon? A It all depends upon the amount of ether she has had, to begin with. The ordinary cases generally, within a half hour, they start to what we call come out of ether. Then they go to sleep again and a little later on they are more out of ether, then they relax again—it is a gradual transition. By three or four hours they ought to be completely out. As regards the sensation it is very difficult for me to say because I would not be able to do any more than guess at it.

Q Would a patient be conscious enough five minutes after returning from the operating room to experience pain from a hot water bottle that was under her shoulder?

A I don't think so, sir.

Q Would she be able to express anything intelligible that would convey the fact that she was suffering in an entirely different part of her body than that on which she had been operated? A I don't think so, sir.

Q Is an operation on the abdomen for the removal of the appendix and the tumor painful? A Very (Case, 276, ll. 1-40).

Dr. James H. Brothers testified as follows:

Q Would that statement, that the patient, if she made it five minutes after her return from the operating room that she did expect this, indicating her abdomen, and then indicating her shoulder say, "But not this," would that be any indication or symptom from which you or any other physician would assume that she was hurt or injured or suffering pain in her shoulder?

A No, sir, it would indicate to my mind

if I had the case that she was going through the usual reprogession of excitement which the patients usually go through.

This testimony clearly illustrates and explains the actions or reactions of Mrs. Haring as described by the plaintiffs' witnesses at the time Dr. Banks is alleged to have negligently failed to recognize, diagnose and inspect the condition existing on her back. Certainly, every bit of the testimony adduced by the plaintiffs illustrates a normal reaction of a patient recovering from the effects of general anaesthetization by ether. The restlessness, wild expression of the eyes, position of the hands, profanity, are all frequently experienced. Even the complaint of pain in the shoulders or back is explained to be a common and frequent occurrence. How then can it be said that, in the face of such testimony and the absence of any expert testimony on the part of the plaintiff, there was any question of fact within the province of a jury. As pointed out under Point Two, under the rule laid down in *Grimaldi v. Zigleo*, even had the physicians who testified in behalf of the defense disagreed in some matters of practice, it would not have been sufficient to permit a jury to pass upon the alleged negligence of the appellant, because it must manifestly appear that a definite and distinct rule of procedure or practice under medicine or surgery must be established before a jury of laymen can reasonably function. The case and argument under Point Two are likewise relied upon in support of this point but without specifically repeating them.

POINT SEVEN.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to charge the jury in behalf of the defendant, **Charles W. Banks**, as follows: If you find from the evidence of the case that there was no duty on the part of **Charles W. Banks** to see that the ether bed was properly prepared or inspected for the placing of the patient, you must find in favor of **Dr. Charles W. Banks**.

Under the argument and cases cited under Points One and Two, it was error for the Court to refuse the above request to charge.

POINT EIGHT.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to charge the jury in behalf of the defendant, **Charles W. Banks**, as follows: If you find from the evidence of the case that there is no duty on the part of **Dr. Charles Banks** or **Dr. Winifred Banks** to see that the ether bed was properly prepared for the placing of the patient therein, you must find in favor of **Dr. Charles W. Banks**.

Under the argument and cases cited under Points One and Two, it was error for the Court to refuse the above request to charge.

POINT NINE.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to charge the jury on behalf of the defendant, **Charles W. Banks**, as follows: If you find from the evidence that it was the duty of the room nurse to have the ether bed properly prepared for the placing of the patient therein, you cannot find a verdict against **Dr. Charles W. Banks**.

Under the argument and cases cited under Points One and Two, it was error for the Court to refuse the above request to charge.

POINT TEN.

The Supreme Court erred in affirming the refusal of the **Essex County Circuit Court** to charge the jury in behalf of the defendant, **Charles W. Banks**, as follows: If you find that defendant, **Baigrie**, **Mrs. Haring's** private nurse, was in the room where patient was received after the operation, while the patient was being transferred from the carriage to the ether bed, you cannot find a verdict against defendant, **Charles W. Banks**, **Winifred Banks**, or **Charles B. Anuario**.

Under the argument and cases cited under Points One and Two, it was error for the Court to refuse the above request to charge.

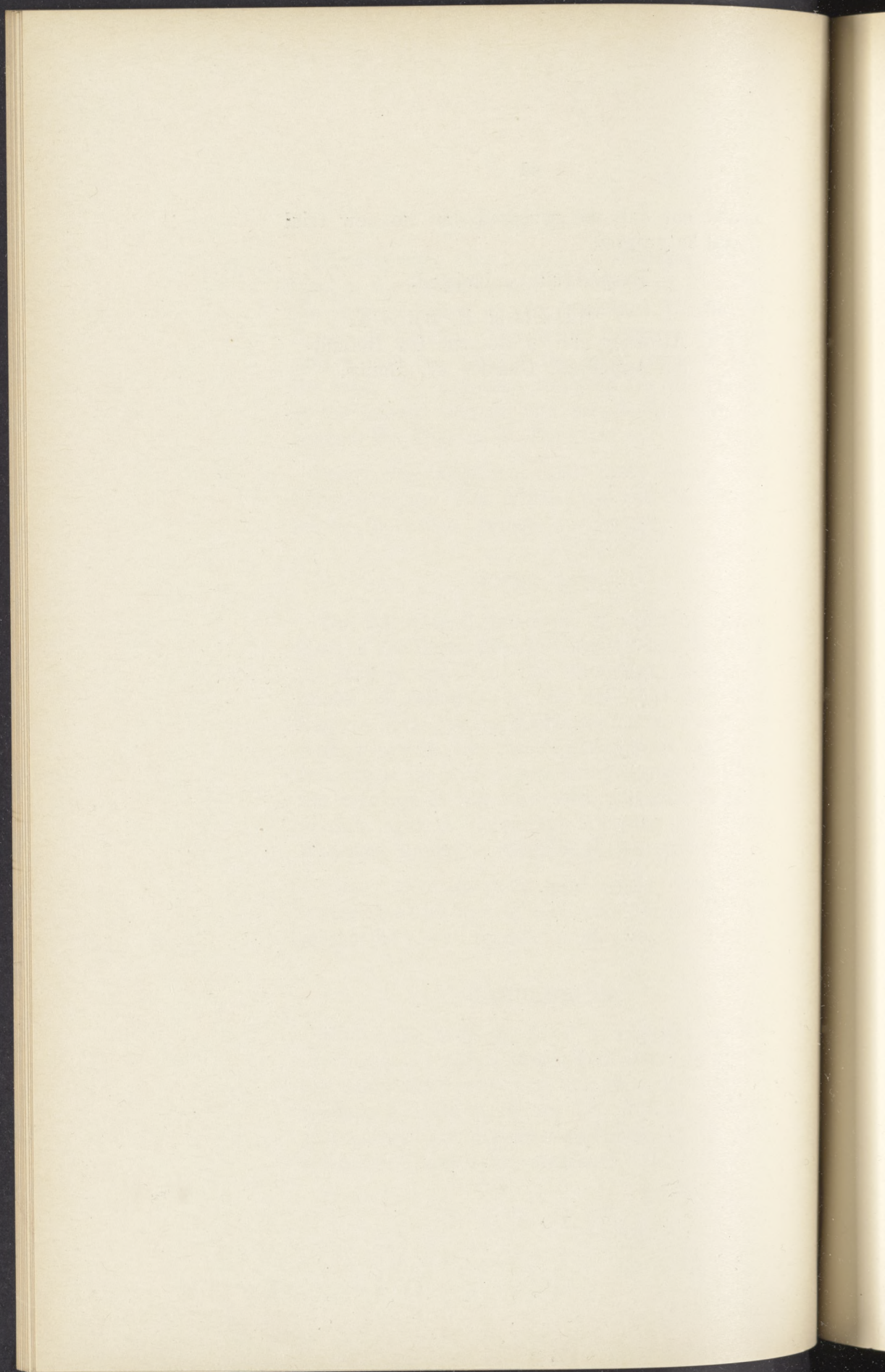
CONCLUSION.

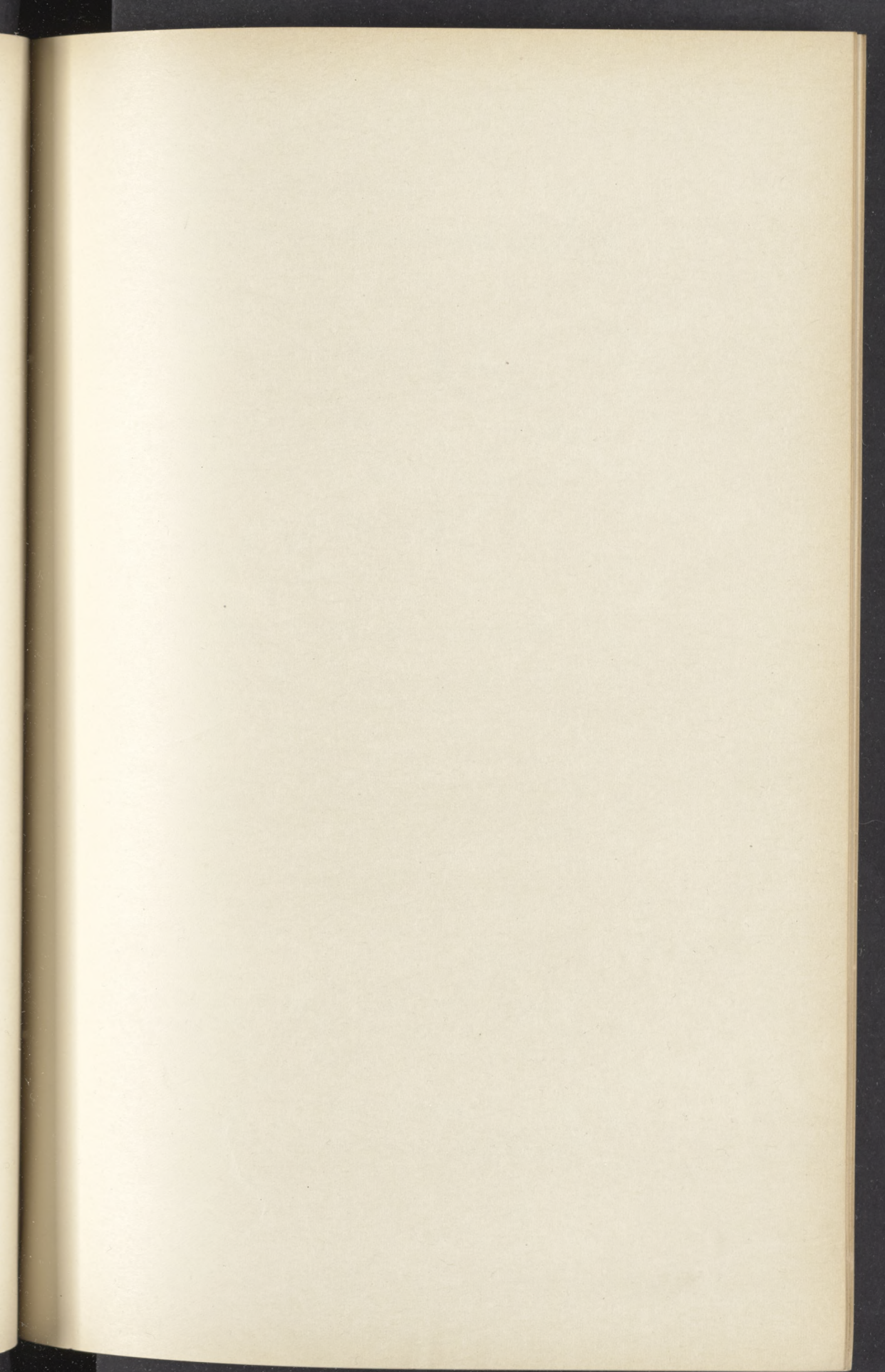
Under the laws set forth in support of all of the foregoing points, and particularly in view of the plaintiffs' voluntary non-suit as to the defendant **Baigrie** (Case, p. 336, ll. 8-9) after her responsibility had been established by the overwhelming weight of evidence, this judgment

should not only be reversed, but no new trial should be granted.

Respectfully submitted,

WILLIAM P. BRAUN,
Attorney and of Counsel for Defend-
ant-Appellant, Charles W. Banks.





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New Jersey Court of Errors and Appeals

LOUISE P. HARING and EDWARD

H. HARING,

Plaintiffs-Appellees,

vs.

CHARLES W. BANKS, WINIFRED

BANKS, CHARLES B. ANUARIO,

AGNES GRANT and EDITH

BAIGRIE,

Defendants,

CHARLES W. BANKS,

Defendant-Appellant.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF FOR PLAINTIFFS-APPELLEES.

Plaintiffs-appellees, Louise P. Haring and Edward H. Haring (hereinafter called the plaintiffs), obtained judgment in the above issue in the Essex Circuit Court against the defendant-appellant, Charles W. Banks (hereinafter called the defendant). Plaintiffs consented to voluntary non-suits as to Agnes Grant and Edith Baigrie. There were judgments on verdicts rendered in favor of the other defendants, Winifred Banks and Charles B. Anuario. Defendant Charles W. Banks took an appeal from the judgments in the Essex Circuit to the New Jersey Supreme Court. This appeal resulted in a judgment of affirmance, from which judgment defendant now appeals to this court. The ground of appeal included in the notice of appeal is as follows:

"1. The New Jersey Supreme Court erred in affirming the judgment under review on appeal from the Essex County Circuit Court."

The defendant, after filing the notice and ground of appeal, filed in this court nineteen other grounds of appeal, which included all but four of the grounds of appeal filed in the Supreme Court.

As we understand the practice, the only ground of appeal which can be urged here is the one contained in the notice. The other nineteen will probably be treated as surplusage. Since the defendant's brief has referred entirely to the nineteen so-called grounds of appeal filed in this court and not to the grounds of appeal filed in the Supreme Court and has grouped them under the various points argued in the Brief, and, since ground of appeal No. 19 in this court is a repetition of ground No. 17 in this court and not a restatement of No. 23 in the Supreme Court as was no doubt intended, we shall in this brief first point out what grounds of appeal in the Supreme Court are argued under the various points in the defendant's brief.

Under Point I defendant has evidently intended to argue grounds of appeal in the Supreme Court Nos. 1, 3, 9 and 11.

Under Point II, grounds Nos. 2, 4, 10 and 12.

Under Point III, grounds Nos. 7 and 8.

Under Point IV, ground No. 13.

Under Point V, grounds Nos. 14 and 16.

Under Point VI, grounds Nos. 15 and 17.

Under Point VII, ground No. 20.

Under Point VIII, ground No. 21.

Under Point IX, ground No. 22.

Under Point X, ground No. 23.

Grounds Nos. 5, 6, 18 and 19 are apparently abandoned.

Of the above-mentioned ten points, Nos. 1, 5, 7, 8, 9 and 10 relate to judicial action by the trial court in relation to counts one and four of the plaintiffs' complaint.

POINTS I, V, VII, VIII, IX AND X.

Point I argues error on the part of the trial judge in refusing to grant motions for non-suit of the first and fourth counts in the complaint, both at the conclusion of the opening and at the conclusion of the plaintiffs' case. Point V, error in refusing a directed verdict on the same counts; Points VII, VIII, IX and X argue error in refusal to charge that Dr. Banks should be exonerated if the jury found certain facts as to the preparation of the ether bed in which Mrs. Haring was placed after the operation.

The first and fourth counts charge that Charles W. Banks by himself and his agents and servants suffered Mrs. Haring to be laid on a hot water bottle causing her to be burned. There was no evidence in the case to show that the defendant had any part in putting Mrs. Haring on the bottle. The plaintiffs relied upon establishing a privity between Dr. Banks and his wife which would result in vicarious responsibility on his part for her negligence. There was not at the trial or in the Supreme Court, and there is not now any claim that he can be made to answer as principal for the negligence of the hospital nurses. The law of the case on these two counts was settled by the trial judge in his charge when he said (S. C., p. 342, l. 17):

"So we now have on the first and fourth counts the charge that Dr. Charles W. Banks should be held responsible for the negligence of his wife, Dr. Winifred Banks, in placing the patient upon the ether bed; that is, that

she was his agent or servant acting under his general direction and within the scope of her agency or her service."

The jury having found in favor of Winifred Banks, all the discussion under defendant's Point I and repetition and reference to it under Points V, VII, VIII, IX and X are academic.

POINTS II, VI, VII, VIII, IX AND X.

Point II argues error on the part of the trial judge in refusing to grant motions for non-suit of second and fifth counts of the complaint; Point VI failure to direct a verdict for defendant on the same counts.

The requests to charge quoted under Points VII, VIII, IX and X would also be requests for a directed verdict on these two counts, though they may not have been so intended.

The second count alleges that while Mrs. Haring was under the anaesthetic and unconscious she was placed upon a hot water bottle which was burning her; that as she came out of the anaesthetic she made an outcry and complaint to Dr. Banks of her pains and agony, but that he negligently failed to use reasonable and ordinary care and intelligence in the exertion of his skill and the application of his knowledge in that he failed to discover the presence of the hot water bottle and caused, suffered and permitted Mrs. Haring to rest upon it for a long space of time (S. C., p. 10, ll. 14-34).

The fifth count repeats the above allegations in a claim by Mr. Haring for his damages.

The sole question to be argued is whether the plaintiffs made proof of any negligence to support the verdicts which were rendered on these two counts.

That Mrs. Haring was permitted to lie upon a hot water bottle long enough to receive a severe burn on her back and shoulders is not disputed. That this burn was inflicted shortly after an operation at St. Mary's Hospital in Orange, while she was lying in an ether bed and while she was more or less under the influence of anaesthetic, is not disputed. That Dr. Charles Banks, together with Mr. Haring and Mrs. Haring's four sisters, Ada G. Hunter, Adele English, Mary P. Sullivan and Helen P. Opp, went into the room where Mrs. Haring was lying in the ether bed shortly after she had been placed there is also undisputed. Here, however, there comes into the case a conflict in the testimony. Dr. Banks testified that when he went into the room Mrs. Haring was lying very quietly asleep (S. C., p. 223, l. 20); that he beckoned to the family and permitted them to look at her, allowing them to stay not more than two minutes (S. C., p. 223, ll. 28-38); that he recalled no conversation between the patient and her family; he would not have permitted it; very bad practice.

Mr. Haring testified that while he was waiting in the corridor of the hospital he saw the carriage on which his wife was being taken from the operating room to the ether bed go into her room at about 10:15 (S. C., p. 35, l. 10). In about 5 to 7 minutes Dr. Banks came downstairs (S. C., p. 35, l. 30). He beckoned with his finger and said "You can go in." Mr. Haring and the four sisters then went into the room. There was nobody there but Dr. Banks and his patient (S. C., p. 36, ll. 5-15). Then follows this testimony:

"Q What did you observe with regard to your wife at that time? A She seemed to be in a great deal of pain; I would describe it as agony rather than pain.

Q What did she do? A She was crying a great deal and she was talking about how badly she felt.

Q Did she have any conversation with Dr. Banks at that time? A Yes, she did.

Q Can you recall what was said by her? A She said, 'Doctor, I feel terrible; get me out of this.'

Q Can you remember anything else she said to him? A She said, 'I expected this but not this,' pointing to her operation and then to her shoulders.

Q So, when she said, 'I expected this' she pointed to where she had had the operation? A Yes, sir.

Q And when she said, 'But not this,' she pointed to her shoulders? A Yes, sir.

Q Did he say anything? A He said, 'You will be all right, Louise.'

Q Did Mrs. Haring say anything else? A Yes, she kept insisting on getting out of that room. She said, 'Get me out of this; I feel terrible. My shoulders are all cut.'

Q Did Dr. Banks say anything when she said, 'My shoulders are all cut'? A Nothing that I remember.

Q What did she do? A Mrs. Haring finally said in a strenuous way—she used an oath I had never heard her use before. She said, 'Doctor, you have got to help me out of this.' And Dr. Banks turned to us and said, 'She's got a fine jag on.'

Q Did she say anything else? A No. I knew she must be in terrible agony when I heard that oath and I walked out and her sisters came out of the room after me."

Mrs. Ada G. Hunter testified that Dr. Banks came about 5 minutes after the carriage went to the door of the room and called the family, telling them they could come in for a few minutes (S. C., p. 175, ll. 1-10). Then follows her testimony as follows:

"Q What did you find when you got in?
A I found Mrs. Haring in bed. We asked her

how she was and she said, 'I am awful; I am terrible.'

Q Who was there then? A Dr. Banks, my three sisters and myself.

Q Was there a nurse in there at that time? A I couldn't say.

Q Where were you? A About three feet from the bed.

Q What did she look like? A I thought she looked awful. Her eyes were wide open and she was staring. * * *

Then again (S. C., p. 176, ll. 1-20):

“Q Was Dr. Banks in the room then? A Yes.

Q Where was he? A Standing nearer the head of the bed than I was.

Q Where were you? A On the same side as Dr. Banks, nearer the foot.

Q How far was Dr. Banks from you? A A foot or two feet.

Q What else did your sister say? A She said, 'Get me out of this.'

Q Did anybody say anything to her in response to that? A Dr. Banks said she had a beautiful jag on.

Q Did she say anything to Dr. Banks?

A Nothing except, 'Get me out of this.' She said that to him.”

Adele English testified (S. C., p. 192, ll. 1-15) she went in the room when Dr. Banks told them they could go in about five or six minutes after Mrs. Haring; stood on the far side of the bed towards the window; Dr. Banks was there. She was asked to describe the appearance of her sister, how she looked and acted and she testified as follows:

“A She looked as if she was in great pain. When she opened her eyes she seemed to stare. It was a rather wild expression. Her skin was sort of green and her hands were clutched resting on top of the covers.

Q Did you hear her say anything? A Yes, I heard her say, 'Get me out of this.'

Q Did you hear Dr. Banks say anything?
 A I heard him say, 'She has an old-fashioned jag on.'

Q Did you hear your sister say anything else? A She spoke to me when I was going out.

Mr. Braun: I object.

Q Was Dr. Banks there? A Yes.

Q What did your sister say? A I asked her how she was. I said, 'Be brave. We are praying for you.' She said, 'Adele, I am all cut.'

Q Did she say anything more as to where she was cut? A No, she did not.

Q Did you hear her have any conversation with Dr. Banks? A Just to have her say, 'Get me out of this.' "

The other two sisters of Mrs. Haring were not called in the plaintiffs' main case. They were offered for cross examination (S. C., p. 198, l. 35) with the statement that their testimony as to what happened at the hospital and the condition of health of Mrs. Haring would be merely cumulative. In the defendant's case, however, there was expert testimony produced to show that Mrs. Haring could not have been conscious at the time when these conversations were alleged to have taken place. The Court permitted the plaintiffs to call Mary P. Sullivan (S. C., p. 330) and Helen P. Opp (S. C., p. 332). The Court confined the testimony of these witnesses to the single fact as to whether or not they had heard Mrs. Haring speak on the occasion of their visit to her room (S. C., p. 331, ll. 15-25). Both witnesses testified that they heard a conversation between Mrs. Haring and Dr. Banks (S. C., p. 331, ll. 35-40; p. 332, ll. 25-32).

Mrs. Haring testified as follows (S. C., p. 203, ll. 15-40; p. 204, ll. 1-20):

"Q After that what is the first recollection you have? A I can remember myself

moaning and I can remember Dr. Banks talking very loud to me, saying, 'Hello, Louise. How are you?' I said, 'Dr. Banks, I am terrible.' And he stood and looked at me in the doorway like this (indicating), which is very characteristic of Dr. Banks. I said, 'Doctor, I expected this, but not this' (indicating).

Q When you say you 'expected this but not this' you are putting your right and on your abdomen and your left hand on your shoulder. Is that what you did at that time?

A Yes.

Q What did he say to that? Anything?

A He didn't say anything. He just looked at me.

Q What happened after that? A Well, I kept moaning all the time, 'Get me out of this; get me out of this.' And nobody seemed to pay any attention to me and as Dr. Banks turned to leave the room I swore.

Q Was your family in the room at that time? A I don't recall that, Mr. Coult.

Q Do you remember having a conversation with any of your family? A My sister, Mrs. English, after I had said that.

Q Can you tell us how long it was between the time you spoke to Dr. Banks and the time you had the conversation with your sister? A It seems to me that it was at the same time.

Q What did you say to her and what did she say to you? A She leaned over and kissed me and she said, 'It will be all right, Louise; we are praying hard.' And I said, 'Dell, I am all cut. My shoulders are all cut.'

Q Why did you say your shoulders were cut, do you recall? A Because I had a terrible pain from my shoulders; I thought they were bleeding.

Q Did you make any other complaints?

A Not that I can recall other than to keep crying for them to get me out of it."

After this visit to the patient Dr. Banks returned to the operating room to perform another operation. The nurse, Mrs. Baigrie, had not been in the room when the family first went in but came in later. Mr. Haring and the four sisters of Mrs. Haring sat down on the window seat in the hall and waited there for about three-quarters of an hour before Dr. Banks came back (S. C., p. 37, l. 30). Mr. Haring being asked what happened during that period testified as follows (S. C., p. 37, ll. 35-40; p. 38, ll. 1-10):

“Q Did anything happen between that time and the time Dr. Banks came back? A Yes, Mrs. Baigrie had gone in and closed the door and ten or fifteen minutes after that she came out and walked very hurriedly down the hall. She came back with Miss McCarrick, I believe it is, and both of them closed the door. Then Miss McCarrick came out and walked down the hall and when she came back she came with a hypodermic needle in her hand and walked hurriedly into the room with it and closed the door.”

Mrs. Hunter testified (S. C., p. 179, ll. 10-25):

“Q In between that time and the time you saw Mrs. Baigrie come out of the room did you see her go into the room? A No, she came in just as we were going out the first time.

Q What did she do when she came out of the room afterward? A She went hurriedly up the hall and came back in a few minutes with Miss McCarrick.

Q Do you know Miss McCarrick? A Yes.

Q What did Miss McCarrick do? A They both went into the room and closed the door.

Q Then what happened? A Miss McCarrick came out in about two minutes and went hurriedly up the hall and came back with a hypodermic in her hand.”

Mrs. Baigrie testified as to the finding of the hot water bottle as follows (S. C., p. 127, ll, 5-20):

“Q What did you do for her then? A Well, I went to the door and I called one of the girls, and I asked her to go for Miss McCarrick and Miss McCarrick came into the room and she said, ‘What’s the matter, Baigrie?’ I said, ‘The patient has a hot water burn.’ She said, ‘A hot water burn?’ I said, ‘Yes.’ She said, ‘You are crazy; that’s pressure from the table.’ I said, ‘Don’t tell me that because I took the bottle out.’ And Miss McCarrick went out and got me some K-Y lubricant and I applied it on the back.”

From the foregoing, the jury could find that Mrs. Haring came out of the effects of the ether suffering pains in her shoulders which she said were “cut” and suffering such agony that the members of her family could not bear to look at her but were compelled, some of them, to leave the room immediately; that she did her best to call to the doctor for help. That she was then still lying on the bag which was burning her is clearly inferable from the testimony of Mrs. Baigrie to the effect that upon the discovery of the bottle she sent out to get Miss McCarrick and the testimony of Mr. Haring, Mrs. Hunter and Mrs. English that Miss McCarrick came into the room after they and Dr. Banks had left it and while the doctor was in the operating room on another operation; they saw Miss McCarrick come into the room, saw her go out and come back with a hypodermic. It is true that Mrs. Baigrie testified (S. C., p. 126, l. 36) that she could not say how long it was that the family had been out; that she did not think they had been in the room before she took out the bottle. And again (S. C., p. 146, l. 15) when she said that it was before Dr. Banks came in with his

gown on that she took out the hot water bottle. In so testifying she was unquestionably mistaken, since her definite recollection that she went for Miss McCarrick and that she and Miss McCarrick together undertook to give first aid to the patient, coupled with the testimony of Mr. Haring and the other members of the family who were present, that Miss McCarrick came into the room after Dr. Banks had been there is far more reliable for the purpose of fixing the time of the discovery of the bottle than Mrs. Baigrie's rather vague statement that she thought that the doctor had not yet come in when she discovered the burn. It is to be noted in this connection also that Mrs. Baigrie was not in the room when the family went in there; that she came in after the conversations between the patient and Dr. Banks that have been referred to, and that one witness, Mrs. English, testified that Mrs. Baigrie came in just "as we were going out the first time" (S. C., p. 179, l. 15). If this last witness is correct and the jury had a right to believe her, Mrs. Baigrie might never have seen Dr. Banks in the room with the family at all.

When counsel for this defendant on page 28 of the brief says in italics that "the only evidence regarding the time when the hot water bottle was discovered and removed is the testimony of Mrs. Baigrie that she discovered and removed the bottle before Dr. Banks made his first visit following the operation," he evidently overlooks the very strong circumstantial evidence based upon the testimony of other witnesses that the time of the discovery of the hot water bottle was during the period when Dr. Banks had left the family, gone back to the operating room and before he returned for his second visit to his patient.

It is argued that if the plaintiffs' testimony can be assumed as true, the case against Dr. Banks on the two counts under discussion should not have been permitted to go to a jury because of the absence of expert testimony in the plaintiffs' case to show that Dr. Banks failed in the exercise of his skill and judgment as a physician. Defendant refers in this connection to the cases of *Grimaldi v. Ziglio*, 129 Atl. 475; 3 N. J. Misc. 669, and *Lolli v. Gray*, 101 Law 337; 128 Atl. 256 and quotes from the opinion of *Ewing v. Goode*, 78 Fed. Rep. 442 and Wigmore on Evidence, Vol. 4, Paragraph 2090, and attempts to make the reasoning contained in these authorities applicable to the present case. Both of the two New Jersey opinions referred to deal with the responsibility of a physician in matters of diagnosis and treatment of his patient, holding that he cannot be held liable because the result of his case is unfortunate and in the opinion of some other physician the treatment might have been different and perhaps more efficacious, and that a difference of judgment in diagnosis and treatment between physicians does not prove that the failure to use a certain course amounts to malpractice. *Ewing v. Goode* deals with the treatment by a physician of a case of glaucoma. Without going into the opinion in length, we have to say only that an examination of it will disclose that there was nothing more to show an improper treatment than an unfortunate result to the plaintiff whose eyes continued in an inflamed and sore condition after the conclusion of the doctor's services.

Wigmore in the citation referred to states the general rule that where matters of diagnosis and treatment are involved, there must be expert opinion to show that the diagnosis was unskillful

or the treatment improper and that a plaintiff cannot, in such an action, rest his case "on the mere facts of his sufferings and to rely upon the jury's untutored sympathies, without attempting specifically to evidence the defendant's unskillfulness as the cause of those sufferings."

In the authorities collected and appended to this section in Wigmore appear many exceptions to this general rule.

But it is submitted that these authorities cited by defendant do not apply to the facts in hand. The situation here is similar to that where a doctor through carelessness, allows a sponge to remain in the body of his patient, or where, by mistake, he amputates a sound member instead of a diseased one. Expert testimony is not required to show the absence of care where the negligence is not a matter touching diagnosis and treatment.

It was the doctor's failure to make an examination of his patient when the exercise of ordinary care required such examination, that gives rise to the plaintiffs' right of recovery. This is clearly pointed out in the opinion of the Supreme Court (S. C., p. 389, ll. 33-40; p. 369, l. 20) as follows:

"At the close of the plaintiffs' case the defendant moved for a non-suit on the ground that the testimony submitted failed to show any negligence on his part; and afterward, and when both sides had rested, he moved for the direction of a verdict in his favor upon the same ground. Both of these motions were denied, and the principal reason argued for a reversal of the present judgment is that there was error in the refusal to grant these motions. We are not impressed with this contention. Whether or not when his patient made the complaint to him above set out Dr. Banks owed her the duty of making an examination for the pur-

pose of ascertaining whether the patient really was suffering pain between her shoulders, and, if so, what was the cause of it, and, if he did owe her that duty, whether his failure to perform it was at least to some extent the cause of her injury, were each of them questions for the jury and not for the court to determine; and, therefore, the refusal of the court to take away from the jury the decision of these questions was proper."

There was much testimony produced by the defendant to the effect that a patient who had been anesthetized as Mrs. Haring was, must have remained under the ether in an unconscious condition for two hours or more. Many physicians were called in support of this opinion who testified in answer to hypothetical questions, that in the normal course of things, assuming the correctness of the hypothesis advanced to them, Mrs. Haring could not have been other than unconscious at the time she and her witnesses say she made her outcry to the doctor.

Dr. Banks when called for the defendants testified on direct examination (S. C., p. 222, l. 38, to p. 223, l. 21.):

"Q How long would that unconscious period normally last? A Well, it varies in different cases. Of course it depends upon the nature of the operation and the amount of anesthesia they had.

Q In this case? A In this case, I would expect that period to extend two or three hours.

Q And during that period would a patient be able to experience a sensation of pain sufficient to know and understand that it was pain and to be able to intelligibly express or describe the sensation to anyone else? A I don't think so.

Q Were there any symptoms on the part of Mrs. Haring, or evidenced by her while

you were there at the first visit that could be interpreted by you in any way as a manifestation of pain at the shoulders caused by anything outside of what she had gone through in the operating room? A There were none.

Q What manifestations, if any, did you notice? A Why, she was lying very quietly at the first visit, asleep."

On cross examination he testified (p. 35, ll. 15-30):

"Q Do you think if you anesthetized a person and rendered him unconscious and then put him on a hot water bag so heated that it would give him a third degree burn, that that would not make him a little more lively in coming out of the ether than otherwise? A I hardly think so at that time.

Q Do you think you could heat a hot water bottle as this was heated up so that a person coming out of the anesthesia would feel the pain there first? A *It might help the return to consciousness.*"

If, in the normal course of events, Mrs. Haring should have been unconscious and sleeping as Dr. Banks said she was, and if it is a fact that the application of a water bottle sufficiently heated would accelerate a return to consciousness as he admits it might, and if it is a fact as testified to by Mr. Haring and Mrs. Haring's four sisters that Mrs. Haring regained consciousness, made outcry, complained of pain in her shoulders, told the doctor and others that she was cut on her shoulders—all this within five or seven minutes after she was returned from the operating room, how can it be said that the doctor was justified in ignoring this abnormal acceleration of returning consciousness and the accompanying complaints and in jesting about her condition and returning to another operation? Obviously his conduct not only evinces lack of ordinary care

but a callous disregard of his patient's welfare which is manifested throughout the whole case.

His conduct after the discovery of the burn evidences a consciousness of his own culpability. He did not notify Mr. Haring of the trouble with his wife's shoulders until Friday night following the operation (S. C., p. 41, l. 30). (The operation was on Wednesday.) At that time Mr. Haring called up Dr. Banks by telephone and told him he could not find out what was the trouble and Dr. Banks said she had been burned (S. C., p. 42, l. 4); that the Baigrie woman had left a hot water bag in the bed; that the burn was a second degree burn; she (Mrs. Haring) would be out in a few days, "maybe a few days longer than she otherwise would have been" (S. C., p. 42, ll. 5-20). Defendant testified he was not informed of the burn until the 10th of March, yet he made an entry in the hospital record under date of March 9th of these injuries as follows (S. C., p. 236, ll. 1-11):

"March 9th. When patient came out of the anesthetic complained of pain between shoulders particularly over the right shoulder. Examination showed that she had been burned by hot water bottle. Degree of burn not known at this time."

He explained this entry saying that it had actually been made on the 10th. He was then shown another entry under date of March 10th as follows:

"Large area over dorsal back about the dimensions of hot water bottle; very red; it looks like a third degree burn. Pain continuous; general condition as good as expected."

This entry he said was also made on the 10th. Though they were separate entries, separately signed, they were, if he is to be believed, both

made on the same date and the first one antedated. He must have known the degree of burn and that he believed it to be a third degree burn when he told Mr. Haring that it was only a second degree burn and that the patient would be out in two or three days. He performed two operations for the removal of burnt skin and tissue on Mrs. Haring's back. These took place in a private room in the hospital, not in an operating room and without an anesthetic. He testified (S. C., p. 219, l. 3) that the cutting operation was simply lifting off parched skin and shaving it away, pieces about a 32nd of an inch thick, some subcutaneous tissue—the loose tissue beneath the skin (S. C., p. 219, l. 20). It was not a painful operation though the patient expressed pain (S. C., p. 219, l. 38.) A few days later he performed another cutting operation for the removal of what had not been taken off the first time (S. C., p. 221, l. 5).

Mrs. Haring testified (S. C., p. 205, ll. 19-40; p. 206, ll. 1-25):

“About a week after the operation or rather the burn, Dr. Banks cut me, that is, cut the flesh off my back on two different occasions. I sat up in bed as I am suffering now—

Q Can you recall when the first time was that Dr. Banks cut the flesh off your back?

A I think it was about a week later, or perhaps four or five days later, and while he was cutting it I said, ‘Dr. Banks, I can't stand it.’ He said, ‘Yes, you can.’ I said, ‘I can't stand it.’ He said, ‘Louise, you are good stuff and you have got to stand it.’ I said, ‘Dr. Banks, you will kill me.’ He said, ‘If I don't do it it will kill you.’ He said, ‘If I don't cut this off you will die.’

Q Did you see what he took off your back? A Yes.

Q What did it look like? A Like elephant hide; like thick leather.

Q How thick? A The stuff that came off was like codfish steaks, about a half inch thick, with flesh and pus and blood. It was a horrible sight.

Q How long did the first operation last? A Perhaps about a half hour.

Q Where was it performed? A In the room that I was changed to, in room 36.

Q In the room you were taken to from the operating room? A No.

Q How long was it between the first time your back was cut and the second time? A Perhaps a few days.

Q On the second occasion what was taken off? A Some more of that hide, I believe the doctor called it. It had to be taken away to make a vent for the pus to come out.

Q How did you know that? A He told me that.

Q Who told you that? A Dr. Charles Banks.

Q That the pus could come from where? A Well, from the sore.

Q Did that hurt? A I don't like to think about it."

Mrs Hunter said that Dr. Banks had told her that the burn was so deep the lungs were exposed and that he had not expected Mrs. Haring would live because he thought empyema would develop (S.C., p. 180, l. 25). This conversation Dr. Banks denied (S. C., p. 221, l. 32).

There was no entry upon the hospital records of either of these cutting operations. The doctor said they were not of sufficient importance to note.

Mrs. Baigrie testified from the hospital chart that she made no entry of the burn on her records and that this was done because Dr. Banks told her not to chart it (S. C., p. 108, ll. 5-33).

These are a few of the circumstances which went to the jury on the trial of this issue from which the jury might legitimately infer that after the accident Dr. Banks had done many things to the end that Mrs. Haring's condition and the course of treatment should be made a matter of secrecy and while it was possible that he may have been hushing the affair for the benefit of others, it was reasonable for the jury to conclude that his own guilty conscience was prompting him.

Under all these circumstances we submit there was a question of fact for the jury as to whether Dr. Banks exercised ordinary care and that neither non-suit or direction of verdict would have been justified.

POINT III.

It is urged by defendant under this point that the Court erred in refusing to permit the witness, Edith M. Baigrie, to answer the question, "How did he say it? What tone of voice did he use?" This was in connection with a conversation which was had between this witness and Dr. Banks. Taking it in connection with line of questions immediately preceeding it, which were excluded by the Court (S. C., p. 163, l. 25; p. 164, l. 30) it is clear that counsel was requiring the witness to testify to her conclusions as to whether Dr. Banks "was laying down a mandate" or whether he was "advising" her. We submit that such conclusions were improper and that the whole matter was immaterial and could not possibly have had any effect on the result of the issue.

If every witness who is called upon to give the matters contained in an alleged conversation

should be permitted to characterize the force and effect of the conversation by describing his opinion as to the mode of expression and the tone of voice used, the practice would lead to interminable trials and a lapse into the continental methods of conducting them.

POINT IV.

Under Point IV, the defendant attacks the ruling of the trial court in striking out the answer to the following question asked of Dr. Brothers (S. C., p. 267, ll. 12-22):

“Q Suppose she said, indicating her abdomen and then her shoulder, ‘I expected this but not this’ would that put you on notice—would that put any physician on notice within five minutes after the patient had returned from the operating room that she was lying on a hot-water bottle?”

This question was clearly objectionable for the reason that it assumes that the obligation of the doctor to investigate his patient's condition when he was appealed to would not be created unless the plaintiff's outcries and manifestations were such as to indicate that she was lying on a hot water bottle and the question itself was a fruitless one since the only answer possible could be “no,” since it would be difficult to conceive how the words “I expected this but not this” with the accompanying motions, would convey to even the most acute perception the presence of a hot water bottle under the patient's back, though, as we have pointed out, this abnormal return to consciousness and vigorous outcries and complaint ought to have convinced any reasonable man, physician or other, that there was something wrong. The whole matter was cleared up

in the following question and answer (S. C., p. 268; ll. 16-29):

“Q Would that statement, that the patient, if she made it five minutes after her return from the operating room that she did expect this, indicating her abdomen, and then indicating her shoulder say, ‘But not this’ would that be any indication or symptom from which you or any other physician would assume that she was hurt or injured or suffering pain in her shoulder? A No, sir, it would indicate to my mind if I had the case that she was going through the usual re-progression of excitement which the patients usually go through.”

It is submitted that the judgment of the Supreme Court should be affirmed.

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