

INDEX.

	PAGE
Complaint	1
Answer	5
Reply	7
Postea	8
On Postea	9
On Postea	10
Notice of Appeal and Grounds of Appeal	11
Complaint	19
Answer	22
Reply	25
Postea	26
On Postea	27
On Postea	28
Notice of Appeal and Grounds of Appeal	29
Case	36
Motion for Non-Suit	135
Motion to Direct Verdict	185
Court's Charge to the Jury	186
Defendant's Exceptions	198
Defendant's Requests to Charge	199

TESTIMONY.

Plaintiff's Witnesses:

Dr. Theodore Bender—

Direct	37
Cross	47
Redirect	56
Recross	57

Dr. Morris Joelson—

Direct	59
Cross	68

	PAGE
Dr. Hans Wassing—	
Direct	75
Cross	76
Redirect	77
Recross	89
Abraham Glicksman--	
Direct	93
Cross	102
Redirect	117
Recross	117
Jacob Katz—	
Direct	118
Cross	128
Regina Sussman—	
Direct	131
Cross	133
Herbert Sussman—	
Direct	135
 <i>Defendant's Witnesses:</i>	
Deposition of Dr. S. B. Overlock—	
Direct	138
Cross	140, 142
Redirect	141
Dr. G. W. Finke—	
Direct	143
Cross	152
Redirect	159
Dr. Andrew C. Ruoff—	
Direct	160
Cross	165
Samuel Sussman—	
Direct	168
Cross	181

Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

HYMAN SUSSMAN,
Plaintiff,

vs.

SAMUEL SUSSMAN,
Defendant.

Action
at Law.

10

The plaintiff, by his attorneys, Ward & McGinnis complains of the defendant as follows:

1. The plaintiff is a resident of the City of Paterson, County of Passaic, and State of New Jersey. 20

2. The defendant is a resident of the City of Paterson, County of Passaic, and State of New Jersey.

3. That irrespective of any question of negligence, the automobile in which the plaintiff was a passenger at the time of the accident, was operated by the defendant, Samuel Sussman. 30

4. That irrespective of any question of negligence, the automobile in which the plaintiff was a passenger at the time of the accident, was operated by the defendant, Samuel Sussman, or his duly authorized servant and agent, under his orders and directions. 40

Complaint.

5. That at the time of the committing of the grievances hereinafter mentioned, there was situated a certain public street or highway between the City of Putnam in the State of Massachusetts, and the City of Webster, in the State of Connecticut, which highway ran in a general northerly and southerly direction, and which highway aforesaid
10 extended into the City or Borough of Grovendale in the State of Connecticut.

6. That at the time of the committing of the grievances hereinafter mentioned, irrespective of any question of negligence, the plaintiff was an invitee and guest of the defendant, and was a passenger in the automobile of the defendant, and at the request and invitation of the defendant.

20 7. That on, to wit, the 21st day of April, 1927, the defendant, by himself or his duly authorized servant and agent, under his orders and directions, on his business, at his request, and for his interest and benefit operated the automobile of the defendant in a careless, negligent and reckless manner, and operated the same at a high and excessive rate of speed, and carelessly, negligently, and wrongfully failed to check the speed thereof or steer or guide
30 the same, and carelessly, negligently, and wrongfully operated the same while it was in a defective condition with poor and defective brakes, and carelessly, negligently, and wrongfully operated the same on the wrong side of the highway, and carelessly, negligently, and wrongfully failed to have any headlights or any other visible lights on his automobile, and carelessly, negligently, and wrongfully failed to give any signal or warning of his approach to other automobiles or vehicles on the high-
40

Complaint.

way, and carelessly, negligently, and wrongfully failed to observe motor vehicles in the direction in which he was approaching upon the highway, and carelessly, negligently, and wrongfully failed to observe other motor vehicles on the highway, and carelessly, negligently, and wrongfully permitted an incompetent driver to operate his automobile, and whose incompetency was well-known to him a long time previous to the committing of the grievances herein mentioned, up to and including the time of the committing of the grievances, so that by reason of the aforesaid careless, negligent and improper conduct of the defendant, or his duly authorized servant and agent, his automobile ran into and upon another motor vehicle upon the highway, with such great force and violence that by reason thereof the plaintiff was severely and permanently injured. 10
20

8. The plaintiff suffered cuts, bruises, lacerations, contusions and abrasions over his entire body; he was black and blue over his entire body; he suffered a fracture of the skull; concussion of the brain; his eyesight was impaired; his hearing was impaired; he suffered fractures of both arms, legs, hands and feet; his spine was wrenched; his ankles were twisted and sprained; his internal organs were severely and permanently injured; he suffered a great loss of blood; his nerves, blood vessels, arteries, and veins were severely severed and injured, and he suffered a severe and permanent shock to his nervous system. He also suffered dizzy spells; insomnia, headaches and a stiff neck. He suffered a loss of appetite, and a traumatic ilio-caeca abscess, and was obliged to undergo severe and painful abdominal operations. 30
40

Complaint.

9. The plaintiff has been laid up for a long period of time, and suffered severe and excruciating pain, and has been rendered sick, sore, lame, diseased, disordered, wounded and debilitated, and in the future will be obliged to remain in the same condition.

10 10. The plaintiff has been obliged to lay out and expend large sums of money for doctors, medicines, X-rays, nurses, hospitals and other things to heal and cure himself of the injuries he sustained, and in the future will be obliged to expend sums of money for such purposes.

20 11. The plaintiff has been prevented from carrying on his usual work, business and employment, and in the future will be prevented from carrying on the same, and by reason thereof has lost the gains, earnings and profits which he otherwise would have had, and in the future will be deprived of the same earnings, profits and gains which he otherwise would have had.

By reason of the premises, the plaintiff will demand damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

30

WARD & MCGINNIS,
Attorneys for Plaintiff.

40

Answer.

FIRST SEPARATE DEFENSE.

Defendant was not guilty of any negligence.

SECOND SEPARATE DEFENSE.

10 Defendant, Saumel Sussman, was not guilty of any negligence which was the proximate cause of the accident set forth in the complaint, but the proximate cause of said accident was the negligence of the driver of the automobile bus which collided with the automobile of the defendant.

THIRD SEPARATE DEFENSE.

20 The plaintiff, Hyman Sussman, was guilty of negligence which contributed to the happening of the accident set forth in the complaint.

MCDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant.

30

40

Reply.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

<p style="text-align: center;">HYMAN SUSSMAN, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">SAMUEL SUSSMAN, Defendant.</p>	}	<p>Action at Law.</p>	<p>10</p>
---	---	---------------------------	-----------

The plaintiff denies each and every allegation of the first, second and third separate defenses raised in defendant's answer.

WARD & MCGINNIS, 20
Attorneys of Plaintiff.

30

40

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	REGINA SUSSMAN, Genl. Admrx. &c. of Hyman Sussman, dec., <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> <div style="text-align: left;">SAMUEL SUSSMAN, Defendant.</div>	} Action at law
----	---	--------------------

This case was tried before Judge William B. Mackay, with a jury, at the Passaic Circuit, on October 22nd and 23rd, 1930.

20 At the trial of the above entitled cause, there was noted upon the record, the death of the plaintiff, Hyman Sussman, on November 2nd, 1928, and because of such death, the complaint was amended to read, Regina Sussman, general administratrix of the Estate of Hyman Sussman, deceased, plaintiff, vs. Samuel Sussman, defendant, which amendment was allowed, and is hereby returned with this postea.

30 The jury rendered a general verdict in favor of the plaintiff, Regina Sussman, general administratrix of the Estate of Hyman Sussman, deceased, and against the defendant, Samuel Sussman in the sum of Seven Thousand, Five Hundred Dollars (\$7,500.00).

W. B. MACKAY,
Judge.

A true copy.

FRED L. BLOODGOOD,
Clerk.

On Postea.

NEW JERSEY SUPREME COURT.

REGINA SUSSMAN, Genl. Admrx. &c. of Hyman Sussman, dec., Plaintiff, vs. SAMUEL SUSSMAN, Defendant.	}	Action at law	10
---	---	------------------	----

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of seven thousand five hundred dollars, besides costs to be taxed nisi.

Entered November 8, 1930. 20

On motion of

WARD & MCGINNIS,
Attys.

Damages	\$7,500.00
Costs	71.78
	\$7,571.78

30

A true copy,

FRED L. BLOODGOOD,
Clerk.

40

Notice of Appeal and Grounds of Appeal.

NEW JERSEY SUPREME COURT,

<p>REGINA SUSSMAN, Genl. Admrx. &c. of Hyman Sussman, dec., Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">SAMUEL SUSSMAN, Defendant.</p>	}	<p>Action at law</p>	<p>10</p>
---	---	--------------------------	-----------

To:
WARD & MCGINNIS, ESQS.,
Attorneys for Plaintiff.

TAKE NOTICE that the defendant, Samuel Sussman, hereby appeals to the New Jersey Court of Errors and Appeals, in the last Resort in all Causes, from the whole and every part of the final judgment entered in the above entitled cause in favor of the plaintiff above named and against the defendant for the sum of \$7,571.78, damages and costs. 20

FURTHER TAKE NOTICE that the following are the grounds of appeal that defendant will urge as reasons for reversal of the said verdict: 30

(1) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to grant defendant's motion to nonsuit the plaintiff.

(2) Because the learned Circuit Court Judge before whom said cause was tried erred in denying defendant's motion to nonsuit the plaintiff or direct a verdict for the defendant, which motion was made at the close of the case and before the case was submitted to the jury. 40

Notice of Appeal and Grounds of Appeal.

(3) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to charge the jury defendant's third request to charge, as follows:

10 “(3) Under the undisputed evidence in the case of Hyman Sussman died of cancer of the bowel. In the case of Regina Sussman, administratrix of Hyman Sussman, no damages may be awarded for any of the cost of treating Sussman for his cancerous condition, or for any of the pain and suffering he had that was caused by the cancer, or the operations upon his body for the conditions caused by the cancer, or for loss of earnings caused by the cancer.”

20 (4) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to charge the jury defendant's fourth request to charge, as follows:

 “(4) It appears from the evidence that all the medical expenses proved in this case were incurred after the symptoms were discovered which later proved to be caused by cancer.”

30 (5) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to charge the jury defendant's fifth request to charge, as follows:

40 “(5) It appears from the testimony of Dr. Bender and Dr. Joelson that after the operation of January 2, 1928, Hyman Sussman was unable to do any work because of his condition. Dr. Bender testified that upon the operation of January 2, 1928, he realized that if he did not remove the mass from the abdomen it would ul-

Notice of Appeal and Grounds of Appeal.

timately cause death. At this time the mass was adherent to the wall of the abdomen at the back, indicating that the cancer was then in an advanced stage."

(6) Because the learned Circuit Court Judge before whom said cause was tried erred in charging the jury as follows:

10

"She would also be entitled to recover, as plaintiff in this case, as general administratrix, for the expenses which were incurred for nurses, doctors' bills and hospital bills. There has been evidence produced on the part of the plaintiff regarding certain moneys expended for doctors, nurses and hospitals. I don't know that I have them put down correctly as testified to, but my recollection is that there was a Barnert Hospital bill of \$1,042.90, that there were five payments to the Mt. Sinai Hospital of \$147 each and two of \$119 each. The five at \$147 would amount to \$588; the two at \$119 would amount to \$238, making a total of \$826. There was testimony as to the payment of moneys to nurses, and, of course, you can say, if you find for the plaintiff, what that fair and reasonable sum is. The amounts paid to nurses, as I figured them, was \$979.50. So that the items I have here are \$979.50, \$1,042.90, and \$826, making a total of \$2,847.40 in all, and it is for you to say from the evidence as you have it, which, of course, includes this testimony, as to what that reasonable and fair and just sum is, if you find for the plaintiff in this case. Therefore, if you find for her, you would take these items and put them in one lump sum and render a verdict in her favor in one lump sum against

20

30

40

Notice of Appeal and Grounds of Appeal.

the defendant; or if you find in favor of the defendant, then your verdict is in favor of the defendant and against the general administratrix, no cause for action."

(7) Because the learned Circuit Court Judge before whom said cause was tried erred in charging
10 the jury as follows:

"Now, in order to charge the defendant, Samuel Sussman, for damages in both of these cases, it must appear that they were the natural and proximate effects of his delinquency, if any. Let me put it another way: It is necessary for the plaintiff, in order to recover in this case, or in these cases, to prove that the defendant did an act or omitted to do an act which a
20 person of ordinary prudence could foresee might naturally and probably produce the injury complained of, and that such act or omission did actually cause the injury, or, you might say, in this case, the injury and the cancer finally from which the deceased died."

(8) Because the learned Circuit Court Judge before whom said cause was tried erred in charging
30 the jury as follows:

"So, if you find as a fact from the evidence in this case that the defendant was negligent, that would not be sufficient; you must also find that the negligence was the natural or proximate cause of the accident and injuries and death, and if you do not so find, your verdict must be for the defendant and against the plaintiff, no cause for action."

Notice of Appeal and Grounds of Appeal.

(9) Because the learned Circuit Court Judge before whom said cause was tried erred in charging the jury as follows:

“Now, there was evidence, of course, in this case, that the origin of cancer is unknown. The doctors did not know whether it was congenital, hereditary, whether it was the result of a trauma, that is, a blow, or not; but the doctors for the plaintiff testified, at least one of them, if not more than one, that in their opinion or in his opinion, if it were one, that he would know—I think Dr. Joelson said he would know if he had a cancer; that he could tell the age of a cancer, and that the probabilities were from the facts as he had them, that this cancer was proximate or natural result—he did not use those words, but were the result of this injury or accident occurring on April 21, 1928; and that while the death was due to the cancer, the cancer was caused as the result of this accident, that was the probability or the contributing cause, as he put it.”

(10) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following hypothetical question to be put to the witness, Dr. Theodore Bender:

“Q. Doctor, may I propound this hypothetical question to you: This man was thirty-six years of age, he enjoyed good health, he went for an automobile ride on the morning of April 21, 1927, he was in an Essex coach, riding in the back, the driver of the vehicle in which he was riding was driving that automobile at the rate of forty-five miles an hour, they ap-

Notice of Appeal and Grounds of Appeal.

10 proached a right-hand curve, which curve was practically on a forty-five degree angle, to their right; in the opposite direction there came a bus, traveling at approximately the same rate of speed, and they met in a head-on collision at that curve, with terrific force, throwing the occupants of the car out and pinning Mr. Sussman, the deceased, underneath, who received a blow or injury to his head and a direct hard blow to his abdomen; he was then taken to Day Kimble Hospital in Putnam, and was there for two or three days, when he went to Providence and was later removed to Paterson, remained at Paterson at his home for approximately a month, and complained to his attending physician of continual pains in the abdomen and his head;

20 was advised to go away; did go away; continued to complain of those pains in the abdomen; returned to his home another month and a half and continued to complain of the same pains; was driving his automobile on one day in August, 1927, when he became dizzy and stopped and got out of his car to summon aid, and fell in the roadway; was taken to the hospital, Paterson General Hospital; removed to the Barnert Hospital, at which time his condition was diagnosed as traumatic from the injury to his abdomen; an exploratory operation was made, I think, at that time; he was released a short time thereafter and was returned to the Barnert Hospital on January 2, 1928, when you came in contact with him; and then holding in mind all that you have testified to from that period on, what have you to say, Doctor, that in any probability the direct blow which he received to his abdomen was the contributing

30 cause of the carcinoma of the bowel? * * *

40

Notice of Appeal and Grounds of Appeal.

Q. Doctor, just as his Honor has stated, assuming those facts to be true, and holding in mind what you have testified to, what have you to say whether or not the injury he received on April 21— * * *

Q. What have you to say, Doctor, which was the contributing cause to what you found?"

10

(11) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be put to the witness, Dr. Morris Joelson :

"Q. What history of the case did you get from him."

(12) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be asked of the witness, Dr. Hans Wassing :

20

"Q. Doctor, Mr. Sussman, who is now dead, was thirty-six years of age, he was in good health prior to April 21, 1927, on which date he received an injury to his head and abdomen, received a direct blow to his abdomen; he was taken to the Day Kimball Hospital in Connecticut; a week later he returned to Paterson, remained at home for a month, went away for a month, came back, remained at his home, and in the month of August he fell unconscious on the street, such as you have described; then he underwent—such as you have described to us under your personal supervision—January 2, 1928, he returned to the Barnert Hospital and underwent an operation by Dr. Bender; at that time they found his abdomen full of pus, they could not go further, they could not make an

30

40

Notice of Appeal and Grounds of Appeal.

10 exploration operation because of the pus they found in there, and the only thing they could do was insert a drainage system; he returned in May, another operation was performed at Mt. Sinai Hospital by Dr. Lillienthal, and this carcinoma of the bowel was found there; returned to Barnert Hospital on August 7, 1928, and remained there until November 2, 1928, when he died. The cause of his death is ascribed to carcinoma of the bowel. To what, in your opinion, would you attribute that condition?"

(13) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be put to the witness, Jacob Katz:

20 "Q. Do you remember the amount of the hospital bill in Barnert Hospital?"

(14) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be put to the witness Jacob Katz:

"Q. How much was paid to Dr. Lillienthal for the operation upon Mr. Sussman?"

30 (15) Because the learned Judge of the trial court allowed the plaintiff in each case to prove the amount paid by Jacob Katz, brother-in-law of the deceased, personally, for hospital bills, nurses and surgeons, there being no proof of any request by the deceased to pay the said expenses on his behalf.

Respectfully yours,

40 MCDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Defendant.

Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

<p>REGINA SUSSMAN, Administratrix <i>ad prosequendum</i> of the Estate of Hyman Sussman, deceased, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">SAMUEL SUSSMAN, Defendant.</p>	}	<p>Action at Law.</p>	<p>10</p>
--	---	---------------------------	-----------

The plaintiff, by her attorneys, Ward & McGinnis, complains of the defendant as follows:

1. The plaintiff is a resident of the City of Paterson, County of Passaic, and State of New Jersey, and was, on the 7th day of December, 1928, appointed administratrix *ad prosequendum* of the Estate of Hyman Sussman, deceased, by the Surrogate of the County of Passaic. 20

2. The defendant is a resident of the City of Paterson, County of Passaic, and State of New Jersey. 30

3. That irrespective of any question of negligence, the automobile in which the deceased, Hyman Sussman was a passenger, at the time of the accident, was operated by the defendant, Samuel Sussman.

4. That irrespective of any question of negligence, the automobile in which the deceased, Hyman 40

Complaint.

Sussman was a passenger, at the time of the accident, was owned by the defendant, Samuel Sussman.

5. That at the time of the committing of the grievances hereinafter mentioned, there was situate a certain public street or highway, between the City of Putnam, in the State of Massachusetts, and the City of Webster, in the State of Connecticut, which highway ran in a general northerly and southerly direction, and which highway aforesaid extended into the City or Borough of Grovendale, in the State of Connecticut.

6. That at the time of the committing of the grievances hereinafter mentioned, irrespective of any question of negligence, the deceased, Hyman Sussman, was an invitee and guest of the defendant, and was a passenger in the automobile of the defendant, at the request and invitation of the defendant.

7. That on, to wit, the 21st day of April, 1927, the defendant by himself, or his duly authorized servant or agent, under his orders and directions, on his business, at his request, and for his interest and benefit, operated the automobile of the defendant, in a careless, negligent and reckless manner, and operated the same at a high and excessive rate of speed, and carelessly, negligently and wrongfully failed to check the speed thereof, or steer or guide the same, and carelessly, negligently, and wrongfully operated the same while it was in a defective condition, with poor and defective brakes, and carelessly, negligently, and wrongfully operated the same on the wrong side of the highway, and care-

Complaint.

lessly, negligently and wrongfully failed to have any headlights, or any other visible lights on his automobile, and carelessly, negligently and wrongfully failed to give any signal or warning of his approach, to other automobiles or vehicles on the highway, and carelessly, negligently and wrongfully failed to observe motor vehicles in the direction in which he was approaching upon the highway, and carelessly, negligently, and wrongfully failed to observe other motor vehicles coming towards him on the highway, and carelessly, negligently and wrongfully operated an automobile while he was an incompetent driver, so that by reason of the aforesaid careless, negligent and improper conduct of the defendant, or his duly authorized servant and agent, his automobile ran into and upon another motor vehicle on the highway, with such great force and violence, that the deceased, Hyman Sussman, was thrown from his seat to the ground, and thereafter died.

8. The deceased, Hyman Sussman, left him surviving as heirs-at-law and next of kin, his wife, Regina Sussman, age 35; a son, Herbert Sussman, age 13; and a daughter, Muriel Sussman, age 8.

9. This cause of action has been commenced within 24 calendar months from the date of the accident, and also from the date of death of the deceased, Hyman Sussman.

By reason of the premises, the administratrix *ad prosequendum* will claim damages from the defendant, in the sum of \$25,000.00, for the benefit of the heirs-at-law and next of kin of the deceased, Hyman Sussman.

WARD & MCGINNIS,
Attorneys of Plaintiff. 40

Answer.

NEW JERSEY SUPREME COURT,
 PASSAIC COUNTY.

10	REGINA SUSSMAN, Administratrix <i>ad prosequendum</i> of the Estate of Hyman Sussman, deceased, Plaintiff, vs. SAMUEL SUSSMAN, Defendant.	}	Action at Law.
----	---	---	-------------------

20 The defendant residing in the City of Paterson,
 County of Passaic and State of New Jersey, by way
 of answer to the plaintiff's complaint says that:

1. Defendant admits that the plaintiff is a resi-
 dent of the City of Paterson, County of Passaic and
 State of New Jersey, but has no knowledge or in-
 formation as to the other allegations contained in
 paragraph 1 and calls for the production of said
 Letters of Administration *Ad Prosequendum* at the
 trial of this cause.
- 30 2. Defendant admits each and every allegation
 contained in paragraph 2.
3. Defendant admits that the automobile was
 operated by the defendant Samuel Sussman, but de-
 nies each and every other allegation contained in
 paragraph 3.
- 40 4. Defendant admits that said automobile was
 owned by the Defendant Samuel Sussman, but de-

Answer.

nies each and every other allegation contained in paragraph 4.

5. Defendant admits the location of a certain street or highway as referred to in paragraph 5, but is uncertain as to the direction thereof.

6. Defendant denies each and every allegation contained in paragraph 6. 10

7. Defendant denies each and every allegation contained in paragraph 7.

8. Defendant has no knowledge or information sufficient to form a belief as to the allegation contained in paragraph 8.

9. Defendant admits the allegations contained in paragraph 9. 20

FIRST SEPARATE DEFENSE.

Defendant was not guilty of any negligence.

SECOND SEPARATE DEFENSE.

Defendant, Samuel Sussman, was not guilty of any negligence which was the proximate cause of the accident set forth in the complaint, but the proximate cause of said accident was the negligence of the driver of the automobile bus which collided with the automobile of the defendant. 30

THIRD SEPARATE DEFENSE.

The deceased, Hyman Sussman, was guilty of negligence which contributed to the happening of the accident set forth in the complaint. 40

Answer.

FOURTH SEPARATE DEFENSE.

Hyman Sussman and Samuel Sussman were at the time of the happening of the alleged accident engaged in a joint venture or common enterprise, and if the defendant Samuel Sussman was negligent, said negligence is attributed to the plaintiff,
 10 Hyman Sussman.

FIFTH SEPARATE DEFENSE.

The death of Hyman Sussman was not caused by or in any way related to the alleged accident.

McDERMOTT, ENRIGHT & CARPENTER,
 Attorneys of Defendant.

20

30

40

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	REGINA SUSSMAN, Administratrix <i>ad prosequendum</i> of the Estate of Hyman Sussman, deceased, Plaintiff,	}	Action at Law.
	vs.		
	SAMUEL SUSSMAN, Defendant.		

20 This cause was tried before the Hon. William B. Mackay, with a jury on October 22nd and 23rd, 1930, at the Passaic Circuit.

The jury returned a verdict in favor of the plaintiff, Regina Sussman, Administratrix *ad prosequendum* of the Estate of Hyman Sussman, deceased, and against the defendant, Samuel Sussman, in the sum of Ten Thousand Dollars (\$10,000.00).

W. B. MACKAY,
Judge.

30 A true copy,

FRED L. BLOODGOOD,
Clerk.

On Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

REGINA SUSSMAN, Administratrix
ad prosequendum of the Estate of
 Hyman Sussman, deceased,
 Plaintiff,

vs.

SAMUEL SUSSMAN,
 Defendant.

Action
 at Law.

10

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of ten thousand dollars, besides costs to be taxed *nisi*.

20

Entered November 8, 1930.

On motion of

WARD & MCGINNIS,
 Attorneys.

Damages

\$10,000.00

30

Costs

78.18

 \$10,078.18

A true copy,

FRED L. BLOODGOOD,
 Clerk.

40

On Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10	REGINA SUSSMAN, Administratrix <i>ad prosequendum</i> of the Estate of Hyman Sussman, deceased, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law.
	vs.		
	SAMUEL SUSSMAN, Defendant.		

20	\$10,000.00 78.18 <hr style="width: 10%; margin: 0 auto;"/> \$10,078.18
----	---

WARD & MCGINNIS, Attorneys.

Judgment entered this eighth day of November
 A. D. nineteen hundred and thirty in favor of plain-
 tiff and against the defendant for the sum of ten
 thousand dollars damages and seventy-eight dollars
 and eighteen cents costs.

30

WM. S. GUMMERE,
C. J.

40

Notice of Appeal and Grounds of Appeal.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

REGINA SUSSMAN, Administratrix
ad prosequendum of the Estate of
 Hyman Sussman, deceased,
 Plaintiff,

vs.

SAMUEL SUSSMAN,
 Defendant.

Action
 at Law.

10

To:

WARD & MCGINNIS, ESQS.,
 Attorneys for Plaintiff.

20

TAKE NOTICE that the defendant, Samuel Sussman, hereby appeals to the New Jersey Court of Errors and Appeals, in the last Resort in all Causes, from the whole and every part of the final judgment entered in the above entitled cause in favor of the plaintiff above named and against the defendant for the sum of \$10,078.18, damages and costs.

30

FURTHER TAKE NOTICE that the following are the grounds of appeal that defendant will urge as reasons for reversal of the said verdict:

(1) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to grant defendant's motion to nonsuit the plaintiff.

(2) Because the learned Circuit Court Judge before whom said cause was tried erred in denying

40

Notice of Appeal and Grounds of Appeal.

defendant's motion to nonsuit the plaintiff or direct a verdict for the defendant, which motion was made at the close of the case and before the case was submitted to the jury.

10 (3) Because the learned Circuit Court Judge before whom said cause was tried erred in refusing to charge the jury defendant's second request to charge, as follows:

"(2) The jury must find a verdict for defendant because as a matter of law the death of Hyman Sussman, the deceased, was not the natural and probable result of the accident."

20 (4) Because the learned Circuit Court Judge before whom said cause was tried erred in charging the jury as follows:

30 "Now, in order to charge the defendant, Samuel Sussman, for damages in both of these cases, it must appear that they were the natural and proximate effects of his delinquency, if any. Let me put it another way: 'It is necessary for the plaintiff, in order to recover in this case, or in these cases, to prove that the defendant did an act or omitted to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of, and that such act or omission did actually cause the injury, or, you might say, in this case, the injury and the cancer finally from which the deceased died.'"

40 (5) Because the learned Circuit Court Judge before whom said cause was tried erred in charging the jury as follows:

Notice of Appeal and Grounds of Appeal.

“So, if you find as a fact from the evidence in this case that the defendant was negligent, that would not be sufficient; you must also find that negligence was the natural or proximate cause of the accident and injuries and death, and if you do not so find, your verdict must be for the defendant and against the plaintiff, no cause for action.” 10

(6) Because the learned Circuit Court Judge before whom said cause was tried erred in charging the jury as follows:

“Now, there was evidence, of course, in this case, that the origin of cancer is unknown. The doctors did not know whether it was congenital, hereditary, whether it was the result of a trauma, that is, a blow, or not; but the doctors for the plaintiff testified, at least one of them, if not more than one, that in their opinion or in his opinion, if it were one, that he would know—I think Dr. Joelson said he would know if he had a cancer; that he could tell the age of a cancer, and that the probabilities were from the facts as he had them, that this cancer was the proximate or natural result—he did not use those words, but were the result of this injury or accident occurring on April 21, 1928; and that while the death was due to the cancer, the cancer was caused as the result of this accident, that was the probability or the contributing cause, as he put it.” 20 30

(7) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following hypothetical question to be put to the witness Dr. Theodore Bender: 40

Notice of Appeal and Grounds of Appeal.

10 "Q. Doctor, may I propound this hypothetical question to you: This man was thirty-six years of age, he enjoyed good health, he went for an automobile ride on the morning of April 21, 1927, he was in an Essex coach, riding in the back, the driver of the vehicle in which he was riding was driving that automobile at the rate of forty-five miles an hour, they approached a right-hand curve, which curve was practically on a forty-five degree angle, to their right; in the opposite direction there came a bus, traveling at approximately the same rate of speed, and they met in a head-on collision at that curve, with terrific force, throwing the occupants of the car out and pinning Mr. Sussman, the deceased, underneath, who received a blow or injury to his head and a direct hard blow to his abdomen; he was then taken to Day Kimble Hospital in Putnam, and was there for 20 two or three days, when he went to Providence and was later removed to Paterson, remained at Paterson at his home for approximately a month, and complained to his attending physician of continual pains in the abdomen and his head; was advised to go away; did go away; continued to complain of those pains in the abdomen; returned to his home another month 30 and a half and continued to complain of the same pains; was driving his automobile on one day in August, 1927, when he became dizzy and stopped and got out of his car to summon aid, and fell in the roadway; was taken to the hospital, Paterson General Hospital; removed to the Barnert Hospital, at which time his condition was diagnosed as traumatic from the injury to his abdomen; an exploratory operation 40

Notice of Appeal and Grounds of Appeal.

was made, I think, at that time; he was released a short time thereafter and was returned to the Barnert Hospital on January 2, 1928, when you came in contact with him; and then holding in mind all that you have testified to from that period on, what have you to say, Doctor, that in any probability the direct blow which he received to his abdomen was the contributing cause of the carcinoma of the bowel? 10
* * *

Q. Doctor, just as his Honor has stated, assuming those facts to be true, and holding in mind what you have testified to, what have you to say whether or not the injury he received on April 21— * * *

Q. What have you to say, Doctor, which was the contributing cause to what you found?" 20

(8) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be put to the witness Dr. Morris Joelson:

"Q. What history of the case did you get from him?"

(9) Because the learned Circuit Court Judge before whom said cause was tried erred in allowing the following question to be asked of the witness Dr. Hans Wassing: 30

"Q. Doctor, Mr. Sussman, who is now dead, was thirty-six years of age, he was in good health prior to April 21, 1927, on which date he received an injury to his head and abdomen, received a direct blow to his abdomen; he was taken to the Day Kimball Hospital in Connec- 40

Notice of Appeal and Grounds of Appeal.

10 ticut; a week later he returned to Paterson, re-
 mained at home for a month, went away for
 a month, came back, remained at his home, and
 in the month of August he fell unconscious on
 the street, such as you have described; then he
 underwent—such as you have described to us
 under your personal supervision—January 2,
 1928, he returned to the Barnert Hospital and
 underwent an operation by Dr. Bender; at that
 time they found his abdomen full of pus, they
 could not go further, they could not make an
 exploratory operation because of the pus they
 found in there, and the only thing they could
 do was insert a drainage system; he returned
 in May, another operation was performed at
 20 Mt. Sinai Hospital by Dr. Lillienthal, and this
 carcinoma of the bowel was found there; re-
 turned to Barnert Hospital on August 7, 1928,
 and remained there until November 2, 1928,
 when he died. The cause of his death is as-
 cribed to carcinoma of the bowel. To what, in
 your opinion, would you attribute that condi-
 tion?"

30 (10) Because the learned Circuit Court Judge
 before whom said cause was tried erred in allowing
 the following question to be put to the witness
 Jacob Katz:

"Q. Do you remember the amount of the hos-
 pital bill in Barnert Hospital?"

(11) Because the learned Circuit Court Judge
 before whom said cause was tried erred in allowing
 the following question to be put to the witness
 Jacob Katz:

40

Notice of Appeal and Grounds of Appeal.

“Q. How much was paid to Dr. Lillienthal for the operation upon Mr. Sussman?”

(12) Because the learned Judge of the trial court allowed the plaintiff in each case to prove the amount paid by Jacob Katz, brother-in-law of the deceased, personally, for hospital bills, nurses and surgeons, there being no proof of any request by the deceased to pay the said expenses on his behalf. 10

Respectfully yours,

MCDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Defendant.

20

30

40

Case.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

10 REGINA SUSSMAN, Administratrix
of the Estate of HYMAN SUSS-
MAN, Deceased,
Plaintiff,
vs.
SAMUEL SUSSMAN,
Defendant.

At Law.

20 REGINA SUSSMAN, Administratrix
ad Prosequendum of the Estate
of HYMAN SUSSMAN, Deceased.
Plaintiff,
vs.
SAMUEL SUSSMAN,
Defendant.

Paterson, N. J., October 22, 1930.

30 Before—Hon. WILLIAM B. MACKAY, *J.* and a Jury.

APPEARANCES:

For the Plaintiff: WARD AND MCGINNIS, Esqs.,
by LOUIS SANTORF, Esq.

For the Defendant: McDERMOTT, ENRIGHT and
CARPENTER, Esqs., by JAMES D. CARPEN-
TER, Jr., Esq., and CARL KUEBLER, Esq.

Dr. Theodore Bender. Called by Plaintiff. Direct.

(A jury was called and sworn.)

Mr. Santorf: If your Honor please, may I at this time ask the Court's indulgence in allowing an amendment of the case of Sussman versus Sussman and have it noted upon the record that Hyman Sussman died on November 2, 1928, and by consent of Mr. Carpenter, of the defense, the pleadings are amended substituting the widow, Regina Sussman, as general administratrix of the estate of Hyman Sussman, deceased, as plaintiff. This is a suit for the injuries during the lifetime of Hyman Sussman.

The Court: The amendment will be allowed.

(Counsel for the respective parties opened to the jury.)

Mr. Santorf: If your Honor please, may I at this time ask to call Dr. Bender out of order, subject to his testimony being connected up? He has an operation to perform and I would like to call him.

The Court: Yes.

Dr. THEODORE BENDER, SWORN.

DIRECT EXAMINATION BY MR. SANTORF:

Q. Doctor, of course, you are a member of the medical profession? A. I am.

Q. How long have you been a member of that profession? A. Nineteen years.

Q. Are you a graduate of any institute? A. Columbia University.

Dr. Theodore Bender. Called by Plaintiff. Direct.

Q. A member of any institutions at the present time? A. Barnert Memorial Hospital, Paterson.

Q. How many years do you say you are in the profession? A. I think about eighteen.

Q. During the course of your professional conduct, Doctor, have you come in contact with one Hyman Sussman? A. Yes.

10 Q. When did you first see him, Doctor? A. Professionally?

Q. In his recent illness or since the accident? A. Since the accident? I saw him for the first time on January 2nd, in the evening.

Q. What year, Doctor? A. 1928.

Q. January 2, 1928? A. Yes.

Q. Can you tell us the circumstances under which you were called there or met him, Doctor?
20 A. I saw him in the hospital. He had been referred to the hospital by Dr. L. G. Shapiro, and at the time I saw him he evidently had an acute abdominal proposition and a diagnosis was made of a perforation of a hollow viscus.

Q. Tell us what that is, Doctor. A. Yes. It is the stomach, intestines, appendix—they are classified as the hollow viscera; and in this particular instance we thought that he had a perforation of the base of his appendix, and he was operated upon
30 that same evening. His condition was such at the time that the only operative manoeuvre that was done was placement of drainage within his abdomen.

Q. Placement of drainage in his abdomen? A. Yes.

Q. Was that placed there? A. Yes; that implies that there are certain types of rubber tubing that was placed in there to drain away the pus.

Q. Will you go on from there, Doctor, please? A.
40 He went along fairly well. He made an operative

Dr. Theodore Bender. Called by Plaintiff. Direct.

recovery, but at the time of his operation we noticed that he had quite a hard mass at the base of his caecum, which is the beginning of the small intestine.

Q. Will you tell us what the caecum is? A. The caecum is in the right inferior quadrant of the abdomen. No exploratory manoeuvre was made on account of the fact that we were dealing with a purulent condition that might be affected by spreading in and perforating, causing a disastrous peritonitis. After the operative recovery he had a persistent sinus or place where pus oozed constantly from his side. He was dismissed by the hospital on June 11, when this sinus—or rather, on February 26th. This sinus continued draining until he was re-admitted on May 28, 1928, for further operation. We re-operated upon him and at that time took a section of the mass; the section was examined, I believe, by Dr. Kim, of St. Josephs Hospital. I believe he is their pathologist.

Q. Yes? A. A report came back of adeno carcinoma, which I think someone said was cancer. It is the equivalent. At that time an operation was done. It was simply to short-circuit the growth, on account of its attachment to the vertebral column.

Q. Tell us where that is. A. That is the back bone; and he went along, however, without making any apparent recovery. His tumor mass increased in size. He became progressively weaker, and it was thought advisable at the time to solicit further advice and if necessary further operations; and he was sent out of the hospital at the time, on June 11th, and was transferred to Mt. Sinai Hospital, New York City.

Q. That was 1928? A. 1928. At Mt. Sinai Hospital he was re-operated upon by Dr. Lillienthal,

Dr. Theodore Bender. Called by Plaintiff. Direct.

who, like myself, could do nothing for him. He recovered from his immediate operative proposition again, and then was transferred again to the Barnert Memorial Hospital on August 7, 1928, and his progress from that time on was a downward one, and he died on November 2nd.

10 Q. Died on November 2nd? A. He again returned under my care.

Q. Doctor, can you tell us for what period of time you treated this man? That was from January 2, 1928, to November 2, 1928; is that not so? A. Yes.

20 Q. During that period of time can you tell us approximately how many times you saw him? Not with any degree of exactness, but approximately, if you do not mind. A. Well, I will state this, that between January 2nd, in 1926, I saw him approximately daily.

Q. Daily? A. Between May 28th and June 11th, inclusive, I saw him again daily; and between August 7th and November 2nd, I should say I saw him daily. Between the times of February 26th and June 11th he reported to my office at divers times. He was at that time under the care of Dr. Joelson, I believe, who attended him at infrequent intervals at his home, at his residence.

30 Q. Can you tell the Court and jury what, if any, pain this man suffered? A. Every case of carcinoma that involves bony structure suffers intense pain.

Q. Intense pain, Doctor? I just forgot, how many operations did you say he underwent? A. Two at my hands, one at the hands of Dr. Lillienthal, of New York.

40 Q. You say he died on November 2, 1928? A. Yes.

Dr. Theodore Bender. Called by Plaintiff. Direct.

Q. Did he complain of continual pains in the stomach, Doctor?

Mr. Carpenter: I object to it as leading.

The Court: Yes.

Q. Of what pains did he continually complain, Doctor? A. His pain, of course, was localized at the side of his lesion, his abdomen. He had an intermitten, colicky like pain he complained of at times very bitterly, and even requiring the use of narcotics, sometimes a fairly large dose of morphine was necessary. 10

Q. Why was the administration of narcotics necessary? A. For the alleviation of his pain.

Q. Do you recall offhand the amount of morphine that was administered? A. That would be rather a difficult thing. I think it is in the hospital records. You have the hospital records here. It is asking an awful lot to remember. 20

Q. Doctor, you saw this man before the accident, didn't you? A. Before the accident?

Q. Yes. A. At times.

Q. Did you notice the condition of his health at that time? A. He seemed in fair health. Of course, he did not come to me as a patient. I just casually met him at times. Casually met him in the hospital or outside. 30

Q. Doctor, may I propound this hypothetical question to you: This man was thirty-six years of age, he enjoyed good health, he went for an automobile ride on the morning of April 21, 1927, he was in an Essex coach, riding in the back, the driver of the vehicle in which he was riding was driving that automobile at the rate of forty-five miles an hour, they approached a right-hand curve, which curve was practically on a forty-five degree 40

Dr. Theodore Bender. Called by Plaintiff. Direct.

angle, to their right; in the opposite direction there came a bus, traveling at approximately the same rate of speed, and they met in a head-on collision at that curve, with terrific force, throwing the occupants of the car out, and pinning Mr. Sussman, the deceased, underneath, who received a blow or injury to his head and a direct hard blow to his abdomen; he was then taken to Day Kimble Hospital in Putnam, and was there for two or three days, when he went to Providence and was later moved to Paterson, remained at Paterson at his home for approximately a month, and complained to his attending physician of continual pains in the abdomen and his head; was advised to go away; did go away; continued to complain of those pains in the abdomen; returned to his home another month and a half and continued to complain of the same pains; was driving his automobile on one day in August, 1927, when he became dizzy and stopped and got out of his car to summon aid, and fell in the roadway; was taken to the hospital; Paterson General Hospital; removed to the Barnert Hospital, at which time his condition was diagnosed as traumatic from the injury to his abdomen; an exploratory operation was made, I think, at that time; he was released a short time thereafter and was returned to the Barnert Hospital on January 2, 1928, when you came in contact with him; and then holding in mind all that you have testified to from that period on, what have you to say, Doctor, that in any probability the direct blow which he received to his abdomen was the contributing cause of the carcinoma of the bowel?

Mr. Carpenter: I object on these grounds: First, because there is no evidence to support some of the statements in the question—

Dr. Theodore Bender. Called by Plaintiff. Direct.

The Court: Well, I understood that they would be connected.

Mr. Carpenter: Of course, they must be connected up.

Mr. Santorf: Absolutely so.

The Court: Assuming that those facts are presented, then what is the objection?

Mr. Carpenter: In the second place, the statement of those facts as to the curve of the road, the angle of the curve, the speed of the cars, whether the collision was head-on or not head-on, have nothing to do with it, and in the second place, the Doctor said he saw this plaintiff or this deceased man at times before the accident and his condition seemed to be fair—seemed to be in fair health before the accident, although he had not examined him before. 20

The Court: He said, "Taking into consideration everything you have testified to", which, of course, would include that.

Mr. Carpenter: It does not assume the fact that this man had a carcinoma at the time of the accident, or does not assume that he did not, one or the other, because that so far has not been touched upon. He may have had that at the time. We have nothing to show that he did not have it at the time or before the accident. And I think, finally, that the question itself is improper. It is a conclusion. It directs the witness's attention to one particular thing and calls for that statement in that very leading manner. 30

The Court: That may be. I think perhaps the facts are fully enough stated, if they are going to be connected, because this doctor, as a 40

Dr. Theodore Bender. Called by Plaintiff. Direct.

doctor, may be able to give an expert opinion, having all of those facts given to him, as to what caused the condition when he finally saw him on January 2, 1928.

Mr. Santorf: Is the question allowed?

10 The Court: It is not allowed in the way you put it. I think if you ask him, just consider all these facts you have stated again, what would he say caused the condition that he found on that date, or could he say.

Q. Doctor, just as his Honor has stated, assuming those facts to be true, and holding in mind what you have testified to, what have you to say whether or not the injury he received on April 21—

20 The Court: No, no. Do not put it in his mouth.

Q. What have you to say, Doctor, which was the contributing cause to what you found?

The Court: What can he say? Can he say what caused that condition that he found?

Q. Will you answer that?

30 Mr. Carpenter: I object to that question again, if I may, for the same reasons, and second because it addresses the doctor's attention to that one particular thing. It does not say whether he can with reasonable probability say what was the cause of the cancer.

The Court: Well, put that in.

40 Q. Within reasonable probability, Doctor. A. No one can say within reasonable probability what causes cancer. That is the first statement.

Dr. Theodore Bender. Called by Plaintiff. Direct.

Q. Go on, Doctor. A. Whether an injury is a predisposing factor is a question. This man may have had—

Mr. Carpenter: I object to that. If nobody can say with reasonable probability what causes cancer, then I submit the doctor should not be allowed to speculate. 10

Mr. Santorf: No, the doctor is going to explain that answer. I think he should be permitted to.

The Court: I do not want you to speculate, Doctor.

A. I shall try to be as concrete without being abstract as I can.

The Court: Well, make it what the probabilities are, because if you cannot tell us we do not want you to answer at all. You understand what I mean? 20

The Witness: Yes, your Honor.

Q. Go ahead, Doctor.

The Court: All right, proceed.

A. Any injury to a viscus or any injury to your body in general, weakening your body, will predispose to a more rapid growing of the mass which I found. 30

Q. Go ahead, Doctor. A. An injury may be inflicted locally and induce a local cell change.

Q. That is what I want to know. A. In itself. This local cell change may of itself not be carcinomous, but may in turn be the foundation or on-marker for a carcinomous or cancerous change. 40
That is my answer.

Dr. Theodore Bender. Called by Plaintiff. Direct.

Q. Is that your answer? Then, the injury to his abdomen in some probability may have been the contributing cause of his death?

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

The Court: Yes. Sustain the objection.

10

Q. Doctor, can you tell the Court and jury your bill? A. I do not really know the bill, to be truthful with you. I should say it is well over \$1,000, for two operations and attendance for three months.

Q. Well, \$1,250? A. I guess it is.

Q. That is the bill you gave me.

The Court: How much?

Mr. Santorf: \$1,250.

20

Q. Doctor, for the length of time that you treated this man and for the amount of visits that you made to him and that he made to your office, is that a reasonable charge? A. I think it is, very much.

Q. For the operations that you also made? A. Yes, very much.

30

Q. Very much so? Doctor, as a result of the injuries and these operations, what can you tell us of the condition of the man, how he became as time went on? A. Well, just as I stated in the foregoing testimony, that he became progressively weaker.

Q. Weaker? A. And of course he suffered pain, necessarily so, with the condition of this type; and weakness, of course, manifests itself in the loss of weight, loss of strength and changed condition in his blood.

40

Q. Will you say that all these conditions aggravated and brought on quicker his death?

Dr. Theodore Bender. Called by Plaintiff. Cross.

Mr. Carpenter: I object to that as again leading. He has testified.

The Court: It is leading.

Q. I mean, did they aggravate the condition which he had and did it precipitate his death? A. In itself his weakness and loss of strength was the result of his carcinoma, of this cancer. 10

Q. That is all.

CROSS EXAMINATION BY MR. CARPENTER:

Q. Doctor, is that what is called a visceral cancer? A. A what?

Q. What kind of cancer was it? A. An adeno carcinoma.

Q. Was it a visceral tumor? Is that the same thing as visceral tumor? A. Visceral? 20

Q. Visceral, yes. A. Visceral is referring to a viscus, which is a solid organ or hollow organ.

Q. This particular cancer was right among the man's intestines, wasn't it? A. Yes; it was a cancer that evidently developed from the large bowel.

Q. In the large bowel? A. Yes.

Q. At about the point where this large bowel enters into the small bowel? A. No; where the small bowel enters into the large one. 30

Q. Where the small bowel enters into the large one? A. Yes.

Q. That is the point I was trying to describe, but I put the cart before the horse. That is about the center, as far as between the abdomen and the back, about the center of the body, isn't it? A. I should not think so.

Q. Is it nearer the back or the front? A. It is in the right inferior quadrant of the abdomen. That is in this section, and the bowel lies in the gutter. 40

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. How close to the appendix? A. The appendix originates from the caecum.

10 Q. When you first operated on this man you thought he had appendicitis, didn't you? A. That is your diagnosis on the chart. The diagnosis that I offered the family was a perforation of the hollow viscus. The reason why I made the diagnosis a perforation was the fact that we got certain clinical signs that indicated he had free gas in his abdomen, so we could not very well say he had a perforated appendix or whether he had a perforation of his caecal base or of that portion of his intestines in that locality.

20 Q. But on the chart the diagnosis was entered as appendicitis with perhaps a perforation of the appendix, wasn't it? A. I think that chart was signed by Dr. David Levine, if I am not mistaken, not by myself.

Q. I am not particularly concerned with the chart, but what you really thought he had was appendicitis with a perforation? A. Not I, because at the time I answered the family's inquiry I made the statement that there was a question as to a malignancy at the base of this perforation.

Q. You did, even before the operation? A. No, after the operation.

30 Q. I am speaking of before the operation. A. Before the operation.

Q. You diagnosed him before the operation? A. Dr. L. G. Shapiro diagnosed the case as a perforation of his appendix.

Q. You operated to discover if that was the cause and correct it if possible? A. Yes—no; I operated on the basis that he had a perforation.

40 Q. Of the appendix? A. Not necessarily. There is no question as—

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. Let me put it this way: A perforation in the neighborhood of the appendix? A. Yes, either that or in the neighborhood of—

Q. Now, when you entered his abdomen and reached the side of the appendix isn't it so that you found the appendix was a mass of adhesions? A. Yes, the appendix was bound down in one hard mass. 10

Q. How large was that mass? A. In inches?

Q. Well, the size of a tennis ball, baseball, or what? A. No, hardly. It was about, I should judge it had a gross direct diameter of an inch to an inch and a half. That, of course, is the size of the hard mass itself. The intestines were coiled about it and adherent to it.

Q. Very, very much? A. The extent of the inflammatory zone and the extent of the entire process, I should judge, was over an area of about seven inches, that is, in three directions. 20

Q. Over an area of seven inches in three directions? A. Yes.

Q. That involved practically all of the intestines, didn't? A. No, not necessarily. Involves a cubic dimension of seven inches. That does not mean the mass itself was seven inches, it means the involved area. You have a perforation, you have intestines that coil over the area in order to block whatever exudate you have there; you have an omentum that attempts to block it over, so you have in that area a fairly large inflammatory zone. 30

Q. This was a fairly large inflammatory zone? A. Yes, sir.

Q. What was the date of that operation that you discovered that there? A. I think that was on January 2nd.

Q. Yes? A. That was the evening of January 2nd. Yes, that is right. 40

Dr. Theodoré Bender. Called by Plaintiff. Cross.

Q. At that time what did you do? Did you remove or cut away any of these tissues or the adhesions? A. The adhesions were a plastic adhesion, not a firm adhesion. I did nothing except to open up into this area where the perforation was and insert drainage, making no untoward manoeuvre that would dislodge this wall, for fear of inviting a path through an extensive or a very formulating type of peritonitis.

10

Q. That sort of adhesions will cause a perforation, will it not? A. Adhesions do not cause a perforation. Adhesions will block off a perforation.

Q. Cause a restriction of the intestine? A. Restriction of the inflammatory zone.

Q. That, of course, involves the restriction to the point of closing the intestines themselves, isn't that so? A. It may. It all depends upon the type of adhesion. You might have a form of fibrous adhesions as a result of long-continued process; you might have an adhesion of only a few areas, which result in his lymph exuding into the wall and simply glueing together of the intestinal coils.

20

Q. You left open drains there following that operation, as I understand it? A. Yes; in order that we might drain out this area which was filled with necrotic, purulent matter, some of which were the intestinal contents.

30

Q. How long did those drains remain in his side? A. Those drains remained in until he was discharged from the hospital. That was February 26th.

Q. Were they left in his side then? A. They were removed and replaced and shortened and changed.

Q. As a matter of fact, that wound in his side never did heal until the time of his death, did it?

40

A. The wound in the side never healed.

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. And drains had to be left and were left until his death, weren't they? A. Yes.

Q. Isn't it true that he was unable from the time of that first operation to have any normal movement of the bowels? A. In what way do you think of as a normal movement? What do you mean by that?

Q. Isn't it so that every movement of his bowels had to be through these tubes? A. Oh, no. 10

Q. I gathered that from the chart, that is the reason I asked it. A. No, no. That colotomy opening, that opening in the intestine, was made in New York; Dr. Lillienthal made the colotomy opening, and he made that almost in the mid-line of his abdomen, and from that time he had bowel function through this colotomy opening, or the opening into his colon, which is, in other words, his large intestines. 20

Q. Isn't it so that when you operated the first time, in January, 1928, that you found that this mass was adherent to the back of the abdomen? A. Yes, it was adherent to the posterior wall or the back wall.

Q. Did you not at that time conclude his condition was so serious that if you attempted to remove it that he would not recover from the operation? A. One does not—that has been answered. You wish another answer? 30

Q. Yes. A. I concluded at that time that the safest procedure to maintain his life was simply drainage.

Q. Yes. A. Not breaking up the wall that had been placed there.

Q. Now, you have not yet answered my question. A. Will you restate it? 40

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. Did you not conclude at that time, in the exercise of your best surgical judgment, that if you attempted to remove at that time this mass from his abdomen that the probabilities were he would not recover from the operation? A. The answer to that question is yes.

10 Q. It is extremely serious, isn't it, when a growth in the abdomen gets to the point where it is adherent to the walls of the abdomen, to any portion of the walls of the abdomen, or to the stomach? A. It depends upon what causes the growth to adhere. If it is an extension of the growth into the surrounding area which fixes it in place, then such an operation becomes an extreme hazard. If, however, as often happens, with a growth in the intestines there is an inflammatory zone produced about that
20 growth due to the fact that most of the growths in the intestinal wall are partly infected then it does not become such a hazard to separate those adhesions.

Q. But in this case you thought it was hazardous to attempt to separate it? A. On account of the pus and exudate, on account of the peritonitis; not on account of the fact that this mass may or may not have been removable; but we were dealing with a purulent localized infection.

30 Q. Did you at that time, the date you first operated in January, when you opened him and examined this mass, think it was cancerous? A. No. There is only one way of making a positive diagnosis of cancer.

Q. That is to cut a piece and analyze it? A. Yes.

Q. You did not do that? A. I did not dare.

40 Q. Had you ever treated Mr. Sussman prior to January, 1928? A. I treated him, I think—I am not certain, in 1914.

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. Do you remember what you treated him for?

A. I think it was—

Mr. Santorf: I object as too remote. 1914 to 1927 is thirteen years.

A. I could not have answered him, anyway, truthfully.

10

Mr. Santorf: I am sorry, Doctor.

Q. You described his condition prior to 1927, April, as being fair? A. No, I did not describe his condition.

Q. I understood you to say he seemed to be in fair health before the time of the accident. A. That is a supposition.

Q. Did you give that statement from your general observation of the man as you passed him on the street or saw him in a car or from a car? A. The very word itself explains that—he seemed to be.

20

Q. That was from your observation, wherever you saw him? A. Yes.

Q. Did he come to you in the three or four years before 1927 for an examination? A. I could not say. I hardly think so.

Q. Or for any diagnosis that you might be able to give him? A. No, I hardly think so. He probably went to his medical physician at the time.

30

Q. You are a surgeon, are you? A. Yes.

Q. Doctor, when you performed this second operation in March, 1928—I believe that was the date—you did take a section of this mass? A. Yes.

Q. That you found in his abdomen, and had it examined by Dr. Kim? A. Yes.

40

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. It was possible at that time to remove a section without injury? A. At that time I removed the entire sinus tract and short-circuited the growth through an intestinal enterostenosis, that is, uniting the intestine to intestine, so that the intestinal contents might pass free of this growth and not be impeded.

10 Q. In other words, you passed the intestinal content around the mass without going through it? A. Yes, that is it, without these coils that had become involved, which were at the time of the second operation closing down, narrowing down.

Q. That operation has a name of its own, hasn't it? A. That is enterostomy.

Q. Had the mass increased in size in the meantime between January and March? A. Yes, very appreciably, very much.

20 Q. Had the growth of that mass strangulated some of the intestines in the meantime? A. It had narrowed down the coils in the intestine, so much so that one feared after he saw the mass, on opening the mass, that he was apt to find a complete obstruction to his intestines.

Q. That is the reason the second operation had to be performed at that time? A. It was on account of the pain, the persistent sinus, that the second was performed, not on account of any evidence of intestinal obstruction. At the time the thing was so manifest that we did the manœuvre of which I spoke.

30 Q. This sinus, did you remove that? Where was that? A. The sinus was the track that led down to the caecum or the beginning of the intestines, where the drainage tubes had been. The sinus had persisted over a long period of time, and in order to remedy that you can excise the sinus.

40

Dr. Theodore Bender. Called by Plaintiff. Cross.

Q. Had that formed since the January operation? A. That was the result of his drainage tubing.

Q. That was the result of the drainage tubing? A. Yes.

Q. That had not been there prior to January? A. Prior to his first operation, no.

Q. You did not see Mr. Sussman between the date of his accident, which was in April, 1927, and January, 1928, for treatment? A. Not in any capacity as a physician. 10

Q. The medical profession has not yet discovered the cause of cancer, has it? A. Not within my knowledge; no, it has not.

Q. They don't know whether it is a germ, do they? A. There is no absolute knowledge concerning the cause of it. 20

Q. And millions of dollars and a great many lives of scientists have been given up trying to discover what it is and what causes it and they have not been able to determine; isn't that so? A. Yes, it is so.

Q. They don't even know whether it is hereditary or not, do they? A. No, not even that.

Q. They don't even know whether it is congenital or not? A. That is another question.

Q. In fact, the medical profession knows very little about cancer or the cause of cancer as yet, isn't that so? A. About the direct cause, yes. There are certain fundamental things that they do know. 30

Q. You said Mr. Sussman went to the doctor's office. Did he call at your office at any time between your first and second operation? A. Yes.

Q. Was he able to get out in that interval? A. Fairly well. I think he managed fairly well. He came to my office and seemed rather weak, that was about all. 40

Dr. Theodore Bender. Called by Plaintiff. Redirect.

Q. Was he able to do any work in the meantime?

A. Oh, I hardly think so, unless he was able to sit down and do some work of that type. I doubt very much if he could have managed very well.

Q. That is all.

REDIRECT EXAMINATION BY MR. SANTORF:

10

Q. The medical profession has, however, found out that a direct blow to the breast will precipitate cancer, has it not?

Mr. Carpenter: I object to it, in the first place it is not redirect examination, and in the second place, we are not dealing with a blow on the breast.

20

The Court: I will permit it.

30

Q. Has it not, Doctor? In fact, you have had experience in those cases, have you not? A. A blow to a breast or a blow to a tissue which in itself may develop cancer has been known to be a contributing factor. Whether it has been a direct factor or not we do not know, because the direct factor of cancer is not known, though we do know that it was brought out that following injury to the breast, a number of instances were cited to show that cancer of the breast will follow injury, but whether that breast was in a pre-cancerous state, whether that breast was predisposed to such a thing or whether there were cancerous elements in that breast so minute as not to have been discovered and were simply incited into activity by the injury, is not known.

40

Q. Have you come across cases where anyone fell off a scaffold or hit a plank—

Dr. Theodore Bender. Called by Plaintiff. Recross.

Mr. Carpenter: I object.

Mr. Santorf: An actual case that the doctor came across, in order to explain his theory of what you brought out on cross examination.

The Court: Scaffold or plank?

Q. Did you come across an actual case? A. Well, everyone who comes across— 10

Mr. Carpenter: I object to it as not proper redirect examination.

The Court: The question in that form is objectionable.

Q. Doctor, have you ever in your career as a medical physician come across any case where a blow to the breast precipitated cancer or was a contributing cause to the cancerous condition? 20

Mr. Carpenter: I object to that.

The Court: I think he has answered that.

A. I just answered that question.

Q. That is all.

RE CROSS EXAMINATION BY MR. CARPENTER:

Q. Nelson's Looseleaf "Life of Surgery", do you recognize that as an authority? A. In some instances. That is a compilation. 30

Q. I don't know whether it disagrees with you a bit, but I was going to ask you if you recognize this statement from Nelson as correct, that it is almost impossible to prove the influence of any single direct trauma in carcinoma of the breast? A. I should beg you to read further. 40

Dr. Theodore Bender. Called by Plaintiff. Recross.

Q. I am just asking you that. A. It looks like an isolated quotation. What is the book without the foregoing?

Q. I am asking you if you recognize this as the correct statement, Doctor. A. You were reading from a book. I accept to your reading.

10 The Court: But you say there is something more, Doctor?

Q. I will read the whole clause. A. No, it is not necessary. May I retort? Is it permissible, your Honor?

The Court: I think counsel wants you to answer it.

20 A. All right. If you will look in the section, the recent section of Nelson's Looseleaf Surgery in the article written by Professor Auchencloss, of the College of Surgeons, Columbia University, you will get what the statement exactly is I have made just foregoing. There are some—

Q. Then, when you testified before, you testified basing your conclusion on what Professor Auchencloss wrote? A. Yes; and you must remember that
30 I made the statement that there may have been cancerous elements in that breast before the injury was inflicted.

Q. Yes. A. And that the injury simply invited a traumatized zone in which this growth could extend itself more readily.

Q. In other words, there are innumerable cases, are there not, where women had a blow on the breast and no cancer resulted? A. I should think so. I should think there is quite an exposed propo-

Dr. Morris Joelson. Called by Plaintiff. Direct.

sition, that women occasionally strike their breasts without necessarily causing a change in the breast cortex or breast itself.

Q. In other words, there are cases where women had cancerous breasts with no blows preceding it?

A. Most assuredly. We cannot connect trauma. We cannot say every cancer in the breast arose from a trauma or trauma is a contributing factor. 10

Q. And that fact is one of the things that has

made it almost impossible, you say, up to this time for the medical profession to say what cancer does result from? A. Yes. We don't know what it

comes from. You can only cite this, if you wish,

that Professor Hanley, connected with Guy's Hos-

pital in London, states in his little handbook case

after case of injury to the breast which was fol-

lowed in two or three months by cancerous develop-

ment. He draws no absolute conclusion from that 20

—no other conclusion than what I have given you

just now.

Q. And other doctors can give just as many cases

where women have had blows on the breast with no

cancer following? A. A little child nursing will

strike the breast repeatedly with its little fist and

yet that woman may not develop cancer.

Q. That is all. 30

DR. MORRIS JOELSON, SWORN.

DIRECT EXAMINATION BY MR. SANTORF:

Q. Doctor, you are a member of the medical profession? A. Yes.

Q. How long have you been a member of that profession? A. Twenty-four years. 40

Dr. Morris Joelson. Called by Plaintiff. Direct.

Q. You practice in the City of Paterson? A. Yes, right here in this city.

Q. All during that time? A. All during this time.

Q. Have you graduated from any institution, Doctor? A. Columbia University.

10 Q. Are you a member of any institution? A. Barnert Hospital, Paterson.

Q. You have been for how long, Doctor? A. Since the hospital has been in existence, about sixteen years.

Q. In the course of your professional medical career did you come in contact with one Hyman Sussman? A. Yes, sir.

Q. What was the first time you came in contact with him, Doctor? A. Professionally?

20 Q. Yes. A. Well, the last eighteen years.

Q. Can you tell the Court and jury, Doctor, the condition of this man prior to April 1, 1927? A. Yes, he was in good health.

Mr. Carpenter: What is that?

The Witness: He was in good health.

Q. You, of course, know he received an injury on April 21st? A. Yes.

30 Q. You were his attending physician when he returned from Connecticut? A. Yes.

Q. You first saw him April 28, 1927? A. Yes.

Q. You obtained a history of the case, Doctor? A. Yes.

Q. You were his attending physician, were you not? A. Yes.

Q. What history of the case did you get from him?

Dr. Morris Joelson. Called by Plaintiff. Direct.

Mr. Carpenter: I object to that as irrelevant, immaterial and incompetent at this time.

Mr. Santorf: A statement made by the patient to his attending physician, a history of the case.

The Court: After the accident?

Mr. Santorf: Yes.

The Court: Had he attended him?

10

Mr. Santorf: Yes.

Mr. Carpenter: He was the attending physician, but at this stage of the case I submit it is not competent, nor relevant nor material, and I submit it is hearsay.

The Court: Yes, but this man treated him, as I understand you, Doctor, for those injuries, didn't you?

The Witness: Yes.

20

The Court: Acted as his physician?

The Witness: Yes, sir.

The Court: I will permit it.

Mr. Carpenter: I ask an exception.

Q. What history of the case did you obtain from him? A. He told me while up in Connecticut, while they were in a car, they were hit by a bus and overturned and he sustained injuries during that accident.

30

Q. Did he tell you in what position he was? A. Why, he did not know at all what happened; he was unconscious at the time.

Q. Did he tell you where? A. And he found himself in the hospital after about twelve hours or so, after he came to, found himself in the hospital.

Q. In giving you the history of his case did he tell you where he received his injuries, Doctor? A. He told me that he had pains in his head, and

40

Dr. Morris Joelson. Called by Plaintiff. Direct.

of course he was bruised all over, and also abdominal pain.

Q. Abdominal pain? A. Yes.

Q. Did he tell you he received any injury there?
A. Yes; I treated him for that.

10 Q. I mean, what did he tell you with reference to the injury to the abdomen? A. He told me he had pain inside of his abdomen.

Q. Did he tell you at the accident— A. That it pained after the accident.

Q. Now, did he tell you he received the injury to his abdomen at the time of the accident? A. At the time, yes.

20 Q. Tell us in your own way, Doctor, what treatment you gave this man or what you saw of his condition, if you will, please? A. Well, he suffered a good deal of headaches and vertigo, that is, dizziness, and generalized pains; had stayed in bed for quite a while, and then permitted him to be up and around, and while up and around he came down to the office, and at that time he complained of a good deal of pain. I remember distinctly he had three distinct points of pain.

Q. You are pointing to— A. One was right over the appendix region, and one was opposite to the left, and one about here under the sternum.

30 Q. The doctor pointed to the lower right—

The Court: He mentioned what they were.

A. And there were little nodules to be felt at that time, and on which I did not lay very much stress; I thought probably swollen glands due to the injury he received.

40 Q. Thought they would clear up? A. They did not clear up, no.

Dr. Morris Joelson. Called by Plaintiff. Direct.

BY MR. CARPENTER:

Q. What time was that? A. That was about three months after.

BY MR. SANTORF:

Q. Did anything occur to him during the month of August, 1927? A. No. During that time, while he was on Market Street opposite the General Hospital, he felt dizzy and he stopped his car and he got out and he fell unconscious to the sidewalk, where they took him to the General Hospital and then transferred him to the Barnert Hospital, and at that time they brought in consultants from New York, Foster Kennedy and E. D. Freeman, the neurologist, and Dr. Wassing was attending to him as neurologist at that time. 10 20

Q. After that time? A. He was in the hospital for a while, and I kept treating him until about the 1st of January. That was New Years I was called in to see him, when he had severe pain over his appendix, and during the day he went along until about at night, when he developed severe, sudden pain in his abdomen, and I examined him and I found his abdomen was quite rigid up to about his umbilicus, as if something had ruptured in there, because the abdomen was filled with either fluid or pus, and we decided to open him up, and we took him up to the hospital and opened him up about two o'clock in the morning, which was January 2nd. 30

Q. Three o'clock? A. Two or one o'clock, I don't remember exactly.

Q. I don't want the exact time. A. And we found his abdomen was full of pus, and we just drained him, and after that he developed this sinus, with 40

Dr. Morris Joelson. Called by Plaintiff. Direct.

which he went along for quite a while, and then we decided to remove that sinus, and found this other trouble in there, this carcinoma.

Q. Was he later removed to Mt. Sinai Hospital, New York? A. After that he was removed to Mt. Sinai, where I went to see him several times.

10 Q. What transpired? A. His abdomen was opened and his bowels, which were evacuating through his abdomen—had quite a thick rubber hose stuck through his abdomen, through which his bowels were evacuated.

Q. When was he removed? A. He was brought back to Paterson after that, but I don't remember exactly. He was brought back to Paterson and, of course, we just treated him to alleviate his pain and suffering, from which he suffered excruciating pain.

20 Q. You mean you administered narcotics to ease the pain? A. Yes.

Q. When did he die? A. November 2, 1928.

Q. You were the attending physician at that time? A. Right along, yes.

Q. You signed his death certificate? A. Yes.

Q. Is that a certified copy of it, Doctor?

30 Mr. Carpenter: If you have it, I will admit it.

The Court: Have you offered the letters?

Mr. Santorf: I will when the plaintiff goes on the stand.

A. Yes.

40 Mr. Carpenter: Now, I have here, if you like, the state form, which, if you like, you may put in in the place of this. I think really under the statute it is the state form that is ad-

Dr. Morris Joelson. Called by Plaintiff. Direct.

missible. It is the one required to be recorded in the State Board of Health. This is simply a little fuller, that is all. It is the same as yours, only it is a certified copy, too. The only difference is this gives the date, the length of time that the doctor treated him, from January 1st to November 2nd, that is all. That is the only difference. One shows the time when the doctor treated him as a physician, and this one that is offered does not, as I remember it. 10

BY MR. SANTORF:

Q. Doctor, it has got here—I show you this before I offer it—January 1, 1928, to November 2, 1928. A. That is probably referring to the operation, that is all. 20

Mr. Santorf: May I take advantage of your good offer, and I will offer this?

(Paper marked Exhibit P-1.)

Mr. Santorf: I offer the letters of administration ad prosequendum and the general administration of the estate of Hyman Sussman.

(Papers marked Exhibits P-2 and P-3, respectively.) 30

BY MR. SANTORF:

Q. Doctor, what can you tell us with reference to the pain and suffering of this man during the time that you treated him? A. The man went through a whole lot of pain, excruciating pain at times.

Q. These operations that were performed upon him, were they painful? A. Well, the operation 40

Dr. Morris Joelson. Called by Plaintiff. Direct.

itself is not painful, because it is done under an anesthetic.

Q. The after-effects? A. The after-effects are painful.

Q. Did he have any attending nurses at times? A. Yes.

10 Q. Night and day nurses? A. Night and day nurses, yes.

Q. Doctor, holding in mind what you have testified to and the facts that you have given us, the history of the case as given to you and the treatment that was given to him, to what do you attribute his condition?

20 Mr. Carpenter: Objected to as improper. Condition at what time? When? The question does not state sufficient facts.

Q. At the time you first saw him, Doctor, which would be April 28, 1928. A. 1927.

Q. 27, rather,—or I will withdraw the question. I will put the question in the same form, only as the first time you operated on him or he was operated on. To what do you attribute his condition at that time? A. Well, that could be attributed to the accident that he had.

30 Q. Could it be attributed, also, to the injury he received to his abdomen? A. Well, I mean that, yes.

Q. What is your fee for the services you rendered to Mr. Sussman, Doctor? A. I rendered a total bill of \$1,500. It was much larger, but I thought I would let it go as a total sum.

Q. You treated him from April, 1927, until the time he died, to November, 1928? A. Yes.

Dr. Morris Joelson. Called by Plaintiff. Direct.

Q. Can you tell us how many visits you made?
A. I can't tell, but I was there sometimes all night with him and I saw him many times during the day.

Q. During the time he was at the hospital would you say your visits were daily? A. Yes.

Q. And also in New York? A. I was at New York several times. 10

Q. Came to your office? A. Yes.

BY THE COURT:

Q. What did you say the bill was? A. \$1,500.

Q. \$1,500? A. Yes.

BY MR. SANTORF:

Q. Doctor, in your opinion was that fee a reasonable one for the services you rendered this man and the operations you performed? A. Yes. Total up all the work done it would be much more. 20

BY THE COURT:

Q. That was from April 28, 1927, to November 2, 1928. He died on November 2nd? A. Yes, until then.

Q. I thought some other doctor took care of him? A. I took care of him right along. The other was just for the surgery part. 30

BY MR. SANTORF:

Q. This is his attending physician. A. But I assisted the operations.

Dr. Morris Joelson. Called by Plaintiff. Cross.

CROSS EXAMINATION BY MR. CARPENTER :

Q. Doctor, you said that you could attribute his condition in January to the accident. That was your reply, wasn't it? A. Yes.

10 Q. Now, when you operated or when you were called in to see him in January, 1928, what was the date that you were called? What was the date of the week or month? A. Well, it was New Years; it was a holiday.

Q. New Years Day? A. New Years Day, yes.

Q. About what time of the day? A. I was there right in the morning.

Q. How long before that had you seen him? A. Why, I saw him right along.

20 Q. Well, what was the last day you saw him prior to New Years Day, 1928? A. Well, probably a day or two before that.

Q. What did you give him at that time, what medicine? A. I just gave him something to relieve his pain, that is all, told him to put an ice bag on.

Q. Put an ice bag over the seat of his appendix? A. Yes.

Q. At that time you thought he had appendicitis, didn't you? A. At that time I thought he had appendicitis, yes.

30 Q. When did you first form the opinion that he had appendicitis? A. Well, right along I thought probably it was a chronic appendix.

Q. When did you first form that opinion? A. About three months after the accident.

Q. You thought then that he had a chronic appendix? A. Due to the pain he had over his—

40 Q. Did you advise he be operated on? A. No, I did not, because he always complained of pain on his left side and underneath his sternum.

Dr. Morris Joelson. Called by Plaintiff. Cross.

Q. Is that the first time he ever complained, three months after the accident? A. About—that is when I felt there was nodules there, those little lumps, little hard nodules, little swellings, in other words.

Q. When did you first feel those? A. That is about three months after, as I said before.

Q. About three months after the accident? A. 10
Yes.

Q. And you then thought he had a chronic appendicitis? A. Yes.

Q. If you thought he had that, why didn't you advise that he be operated on? A. Because on account of the other condition he had, the other pain.

Q. What is that? A. We were not quite sure whether it was that pain.

Q. Where was the other pain? A. The other 20
pain was on the left, underneath the appendix, and the other was underneath the sternum. Could not exactly figure that out to be the real appendix.

Q. Is that the first time you ever examined his abdomen? A. No; I examined his abdomen right along.

Q. You said you treated this man for eighteen years? A. That is, I was the family physician, delivered his wife of children, and so forth.

Q. What did you treat him for? A. Oh, just a 30
slight cold once in a while.

Q. What did you treat him for in 1926, that is the year before his death? A. Not that I know of, anything important.

Q. You cannot tell this jury that he did not have a cancer in 1926, with any degree of positiveness, can you? A. Yes, I can.

Q. Can any doctor tell from an examination? A. 40
Yes, certainly.

Dr. Morris Joclon. Called by Plaintiff. Cross.

Q. Just a minute. Isn't it a fact that you might have in your body at this moment a cancer without your knowing it? A. Well, it would not last, though, for two years in there.

10 Q. Just turn to the question. I am not arguing about it at all. Isn't it a fact that you may at this moment have in your body a cancer without your knowing it? A. I would know if I had it. It all depends what you mean. You mean the rudiments or cells, or really have a cancer? If I had a cancer in my body now I would know it—lose weight and feel bad and all that.

20 Q. Hold on. Cancer has to develop quite a while before you know it? A. That is what I am trying to find out, whether you mean the rudiments of the cancer. That we do not know. We might all be subject to it.

Q. There are all kinds of cancer, aren't there, many different kinds? A. Not many, no.

Q. How many different kinds are there? A. Just two kinds.

Q. Only two? A. Scirrhus and the others.

Q. What did you say? A. A lot of different kinds of tumors, but they are benign tumors.

Q. There are various kinds of tumors? A. Tumors, yes.

30 Q. Many kinds of tumors? A. Yes.

Q. Some of them are called benign and some malignant? A. Malignant is called cancer.

Q. Sometimes what you call a benign tumor turns out to be a malignant tumor? A. That depends on what it is.

Q. Sometimes these benign tumors turn into malignant tumors? A. That is a question. It depends what we are alluding to.

Dr. Morris Joelson. Called by Plaintiff. Cross.

Q. Isn't it true that nobody can tell, even the most learned doctors, when a cancer starts in the human body? A. We cannot tell exactly the time when it starts; we can have an idea when it starts. We can have an idea from the time it is full grown just about when it started.

Q. Isn't it true that the medical profession does not know yet what causes cancer? A. It don't know exactly what causes it. There are different theories and different things as to whether it is a fungus or infection or irritation, but we do know that constant irritation or injury like that will excite the cells to proliferation, and they will grow on to become cancer. 10

Q. You say "constant irritation"? A. Either constant or otherwise.

Q. Yet it is also a fact, isn't it, that people may have constant irritation of the particular spot for years and never get a cancer there? A. Yes, that is true. 20

Q. The medical profession does not yet know whether cancer is originated from a germ? A. We don't know, no.

Q. You don't know whether it is hereditary or congenital? A. Well, some say it might be congenital, or the cells lie dormant for a long while until they get some irritation and start up, the same as we have tuberculosis in the lungs constantly, and then if we get a low resistance they start up and we get tuberculosis or pneumonia or some other disease. 30

Q. The medical profession does not know, does it? A. I say, we don't know exactly what it is.

Q. When you say, "exactly," you don't know a thing about it except after you find the cancer, do you? A. Well, we find the cancer, we know it is there. 40

Dr. Morris Joelson. Called by Plaintiff. Cross.

Q. Isn't that really the basis of all the medical profession knows about the origin of them? A. I am telling you the different theories as to it.

Q. There are a lot of theories? A. Yes.

Q. But as to the knowledge? A. As to really what it is we do not know.

10 Q. Until you find one you do not know it is there? A. Oh, we do know by experience, as I told you before, that irritation and injuries to certain parts will waken up the cells to proliferation, otherwise they might lay dormant and never start.

Q. Let us see about that. That does not always follow, does it? A. Does not always follow, no.

20 Q. Isn't it true that many people live—take a hundred different people with precisely the same identical environment, some of them may have cancer and none of them may have cancer; isn't that so? A. That is so. That applies to other diseases as well.

Q. Also applies to tuberculosis? A. Yes.

Q. Nobody can tell a thing about it until after the thing actually is found to be in the system; isn't that so? A. Yes, that is right.

30 Q. Is not the net result of that that the medical profession does not know what does cause those things at all, even after they are found? A. We do not know the origin of it, that is, what it really is, whether it is an infectious disease or anything else or a germ or fungus, but we do know that constant irritation, like, for instance, a fellow smoking pipes, constantly on the lips, we get cancer of the lip or tongue.

Q. Isn't it also so that other men will smoke a pipe— A. We admit that. Oh, we admit that, too.

40 Q. —from eighteen to eighty and never get a cancer? A. Oh, this particular human being might

Dr. Morris Joelson. Called by Plaintiff. Cross.

have had the cells there which would lie dormant and never bother him until he gets some excitation.

Q. Let me take that up with you. You say the particular human being who smokes a pipe, may not get cancers of the lip, but may have cells there?

A. He has an idiosyncrasy to it.

Q. Let's see. Even where a cancer starts from the cell or whether it is taken into the system by the pipe, do you know that? A. We know it is a cell, because we can see under the microscope the cells. 10

Q. That is, after you discover the cancer? A. There must have been a cell to get cells. We are all born from a cell.

Q. The fact is, the whole human body is made up of nothing but cells? A. That is all.

Q. So, no matter what part of the body you speak of, no matter whether the ear or the toe, there are cells? A. This is a different kind of a cell. 20

Q. You don't know what causes the spread of that cell, whether it is cells or germs or a number of other things, or whether it is hereditary or congenital? A. No, we don't know that.

Q. You don't know anything about that cancer until you find it? A. Yes, that we do not get.

Q. That is all. 30

BY THE COURT:

Q. Well, Doctor, on an examination—you say you were present at this operation; is that right? A. Yes, sir.

Q. Well, then, on an examination of this patient did you see the cancerous growth? A. No, sir. We had no right to go into his abdomen, because it was just punched right out of him; the only thing we 40

Dr. Morris Joelson. Called by Plaintiff. Cross.

could do was just to stick drains in there and leave him there.

Q. But you did not see the cancerous growth?

A. We saw it on the second operation.

Q. I understand you to say—maybe I am wrong—but I thought you said that you could tell how old a growth was by seeing it. A. Yes.

10 Q. Is that right? A. Yes, that is right.

Q. Well, now, if you cannot tell when it started or the origin, how could you tell how old it is? A. Just by the size of it and the feel of it.

Q. How do you tell that? What determines that?

A. Well, just from past experience and by seeing the things and knowing just when a person begins to complain of his symptoms, that is all. It is not actual—

20 Q. It is not actual knowledge, then? A. No.

Q. Well, how near is it to being correct? A. Well, all depends sometimes upon the vitality of a person.

Q. Then, when you said that you knew how old this growth was— A. No, I did not say this particular growth.

Q. I presume if you would know generally from other growths of a similar nature you would know this one. A. We have an idea.

30 Q. Assuming you would know this one, if you know others,—because there would not be anything different, would there? A. No.

Q. Then, referring to this particular one, did you or did you not know how old it was? A. Well, I would say that this—now, we operated in January; of course, the cancer was there.

Q. You did not see it? A. We did not go in there and investigate.

40 Q. You saw it when? A. We saw that—

Dr. Hans Wassing. Called by Plaintiff. Direct.

Q. In May? A. The second operation in May.

Q. May 28, 1928? A. Yes.

Q. That is when they took a section of it? A. That is the time they took a section; that is the time we went in and felt the mass and we took a section of it.

Q. Yes. Well, then, if you know how old it was or how long standing, how do you know that? A. We know that on January 1st it was there. 10

Q. That is only a few months? A. Yes. Knew he complained of pain right along for about, say, six months previous to that.

Q. Yes? A. It must have been there; and these other little nodules.

Q. Must have been there six months previous? A. Yes; and these nodules he had before might have been just glandular in substance from that. 20

Q. Yes? A. That is how we figured that out.

Q. All right.

Mr. Carpenter: That is all.

DR. HANS WASSING, sworn.

DIRECT EXAMINATION BY MR. SANTORF: 30

Q. Doctor, you are a member of the medical profession? A. Yes.

Q. Are you a graduate of any institution or college? A. University of Vienna, Austria.

Q. When did you graduate, Doctor? A. In 1912.

Q. How long have you practiced? A. I have done office practice since 1924; from 1912 to 1924 I have done hospital work only. 40

Dr. Hans Wassing. Called by Plaintiff. Cross.

Q. 1912 to 1924 you did hospital work. Have any experience during the last World War? A. Yes.

Q. Cancer cases, doctor? A. Yes, sir.

Q. What experience did you have during the World War? A. I was in charge of one of the hospitals for prisoners of war in Siberia,—Austrian, German and Turkish prisoners of war in Siberia.

10 Q. Over how many? A. That was a hospital of about four hundred beds.

Q. Are you a member of any institution in Paterson? A. Yes.

Q. What institution, Doctor? A. I am director of the laboratory at the Barnert Hospital and at the same time am attending neurologist, which means attending physician for diseases of the nervous system at the same institution.

20 Q. As such or in such capacity, Doctor, did you come in contact with Hyman Sussman? A. Yes.

Q. When, Doctor, for the first time?

Mr. Carpenter: May I ask a question?

CROSS EXAMINATION BY MR. CARPENTER:

Q. Are you admitted to practice in New Jersey? A. Yes.

30 Q. Any other state here? A. No, only New Jersey.

Q. Are you a citizen of this country? A. I am a resident—no, I am not a citizen. I have applied for citizenship; I am not a citizen yet.

Q. When were you admitted in New Jersey? A. In 1924.

40 Q. Where is your office? A. At 695 Broadway, Paterson, New Jersey.

Dr. Hans Wassing. Called by Plaintiff. Redirect.

REDIRECT EXAMINATION BY MR. SANTORF:

Q. That is right, opposite Barnert Hospital? A. Yes.

Q. Been practicing in Paterson since 1924? A. Since 1924.

Q. You told us you came in contact with Hyman Sussman? A. Yes.

10

Q. When for the first time, Doctor? A. On June 13, 1927, he came to my office.

Q. Can you tell us what you found, Doctor? A. When he came to me I took his history; described to me his complaints, and I examined him then and found signs from which you might conclude that he was suffering from increased pressure on his brain.

Q. Increased pressure on his brain? A. Yes; and I concluded his complaints and his suffering was due to this increased pressure on the brain, and I advised him to have a lumbar puncture, a spinal tap done, so as to verify this assumption of increased pressure on the brain, and at the same time to relieve the pressure of the brain.

20

Q. Now, Doctor, will you explain to the Court and jury, please, what a lumbar puncture is? A. When we do a lumbar puncture or spinal tap, which is the same thing, we go with a needle, using an anesthetic, local anesthetic first—we go into the spinal canal between the vertebra and take out that watery fluid in which the brain and the spinal cord are suspended, that is, the watery fluid which covers the brain, which is situated between the meninges, that is, it is the sheath covering the brain, and the brain itself, respectively, between the spine and the meninges.

30

40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

Q. That water is right at the base of the spinal cord? A. That water is the connection between the water in which the brain is embedded and that water which surrounds the spinal cord, and when we go in here between the lumbar vertebra we are able to take out this water, or some of it, without harming the person and very often helping, particularly in conditions of increased pressure on the brain.

Q. Doctor, will you tell the Court and jury, please, what relief that person gets as the result of a spinal tap or a lumbar puncture? A. A person with increased pressure on the brain will get relief from such a spinal tap or lumbar puncture when we take out the fluid—we decrease the pressure on the brain and patients very often are relieved and sometimes permanently cured, depending entirely upon the cause of this increased pressure.

Q. What condition was this man at the time, Doctor, with reference to physical strength? A. When I saw Hyman Sussman June 13th he was in what we might call a run-down condition. He was in a nervous condition; he was shaky; he looked poorly—in poor health, and was pale and seemed under-nourished. He complained of pain in the abdomen and that his appetite had suffered considerably since the accident and he had not even properly explained his under-nourished condition. He complained of headaches and dizziness. I could not verify his headaches, but what I could verify was that there was irritation on the brain by looking into his eye-grounds, I saw that the blood vessels of the eye-grounds were congested, particularly the blood vessels around the optic nerve, which we did see when we looked with a certain instrument into the background of the eye, and I made a nota-

Dr. Hans Wassing. Called by Plaintiff. Redirect.

tion in my book to that effect, that I saw congestion of the vessels, and particularly congestion around the optic nerve, and this was the cause particularly, combined with his complaint, that I advised him to have this lumbar puncture done.

Q. With this machine that you have, Doctor, or this instrument that you have, a physician or a surgeon or pathologist is able to see the background of the person's eye? A. Yes. 10

Q. And find out what is there? A. Of course, this is the nearest approach we have to the brain without cutting open the skull. This is the nearest approach which we have to the brain, because we can look right at the optic nerve and we can look right at the blood vessels which are in the immediate contact with the blood vessels of the meninges; so for practical purposes we might say we can look at the brain through the eye. 20

Q. Did anything transpire later, Doctor? A. He did not seem to like the idea of this operative procedure, if I might call it, at that time, and I gave him what we call nerve sedatives. He had obtained some from Dr. Joelson previously, as he told me, and I do not think I saw him until August, 1927, when he dropped unconscious on the street—I am referring to the history that was given to me—dropped unconscious on the street after having tried for the first time since the accident to drive a machine, drive an automobile. 30

Mr. Carpenter: I object and ask that it be stricken out. How does he know it is the first time?

The Court: Yes.

A. I was told so.

Dr. Hans Wassing. Called by Plaintiff. Redirect.

Mr. Santorf: History of the case, told the attending physician.

Mr. Carpenter: How many attending physicians can a man have?

10 Mr. Santorf: He can have a number of them. One for every different complaint. This man is a pathologist; he specializes in a certain line, and this man had a perfect right to retain him and to tell him the history of his case, so this man would be qualified to look into it.

The Court: Apparently, then, he was not treating him exclusively. One doctor has a bill of \$1,250 and another has a bill of \$1,500. I suppose that this man treated him every day. I don't know how many doctors he had.

20 Q. Aside from that, will you go on? A. I saw him a second time, as I say, in August, when, as the history was given to me, he had dropped unconscious and was taken to the General Hospital, and I was asked by his family with the consent of his doctor, Dr. Joelson, to go and see him, and I did see him then in the General Hospital the second time. He was transferred the same day, I think, to the Barnert Hospital, and there we decided—
30 by we I mean Dr. Joelson and I—we decided to do that lumbar puncture. We told the patient that we thought it was imperative, and we did that—I did that lumbar puncture and measured the pressure with the spinal fluid, which is a definite indication whether the pressure on the brain is increased or not, and found the pressure increased, as I had expected.

Q. You found the pressure increased? A. Increased.

Dr. Hans Wassing. Called by Plaintiff. Redirect.

Q. Go ahead. A. Now, when I saw him in the General Hospital I may say he was not unconscious any more; he was in a somewhat *dozed* condition and he had symptoms, signs, as we say, that go with increased pressure on the brain,—a certain stiffness of the neck, and he complained of severe headaches. Now, we did that lumbar puncture, as I said, and following that lumbar puncture he was somewhat relieved, but still he could not get out of bed, he was confined to the bed at the Barnert Hospital, and when he tried to get up he was dizzy. I saw him trying to get out of bed. He seemed to get very dizzy and to fall. We had to support him. But the pain seemed to decrease—the pain from the head seemed to decrease after that puncture. At that time Dr. Foster Kennedy was called. He is the Professor of Neurology in Bellevue Hospital in New York. He was called in consultation, and I was there, and we gave him the history and he agreed with us—

10

20

Mr. Carpenter: I object to that.

Q. As a result of what transpired at the conference, tell us what you did. A. After the puncture I was not in charge of this man any more, simply took an interest in him, and I do not think I saw him again professionally, and by that I mean I did not attend to him; I simply know that he was a patient in our hospital, and I took interest, and was present at that consultation which I just was speaking of, and was in contact with his physician, at that time Dr. Joelson, if I remember right. Dr. Bender at that time had had nothing to do with him yet.

30

40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

Q. That was January, the following year? A. Yes.

Q. Were you present in the operation, Doctor? A. No, sir.

Q. After that you did not see him professionally? A. I saw him—you mean personally or professionally?

10 Q. I withdraw that question, and say personally. A. I saw him personally, yes.

Q. Can you tell us his condition as you saw him? A. I might say I did not see him professionally. As I said before, I saw him and saw a man who seemed to be failing considerably at that time, a very, very sick man, but I did not give him any more examination. He seemed a very sick man, and then later on, as you have heard, a dying man, and finally died in our hospital.

20 Q. He died in the Barnert Hospital? A. Yes.

Q. Doctor, what experience have you had in cancer cases, cancer of the intestines, carcinoma of the bowels? A. Of course, during hospital work, particularly, many years of hospital work, one comes across a good deal of patients suffering from cancer of all different organs, and this is one field in which I have acquired some experience in cancer, another field is I am in charge here of the laboratory at the

30 Barnert Hospital, examining those specimens which are removed from different people when cancers are operated upon and taken out, what we call excised from the human body, and in certain cases we do post mortem examinations, with the permission of the family or on request of the County Physician, we do post mortem examinations and I am in charge of those examinations, and we come across certain cancer cases who have died because of the

40 operation having been unsuccessful or because they

Dr. Hans Wassing. Called by Plaintiff. Redirect.

at that point were beyond the possibilities of operation.

Q. Then, Doctor, you have had considerable experience in cancer? A. Relatively, yes.

Q. Can you tell us, Doctor, what a cancer is? A. A cancer is a new growth, an out growth, either on the surface of the body or in the inside, in one of the organs of the body of a human being or animal or of a plant—an out growth or new growth, the real cause of which, the final cause, we do not know, but of which we know a good deal of contributory causes, contributory factors. When I say an out growth, a new growth, by that I mean the cancer does not resemble any organ, it is not an organ which forms, but it is a growth, and an out growth of cells without any particular aim, not forming any particular organ, it is not a new eye or a new arm or hand or so much develops; it is an aimless, reasonless growth.

Q. Can you tell us what a cell is, Doctor? A. The living body of a human being or an animal or plant is formed of cells. Cells are those minute structures which can be seen under the microscope only, from which living organisms are made up.

Q. Doctor, from your experience can you tell the Court and jury whether or not you can tell the age of a cancer when it is removed? A. Sometimes we can say—at times we can say with reasonable certainty how old a cancer is. At other times we can only say approximate age of a cancer. By age I mean how long the cancer had existed in that body. We can at times say that this cancer cannot be older than a few months, for instance; at other times, judging from the size of the growth and from the microscopic examination, we can say that this cancer is probably six months or more old. We cannot say exactly how old a cancer is.

10

20

30

40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

10 Q. Doctor, Mr. Sussman, who is now dead, was thirty-six years of age, he was in good health prior to April 21, 1927, on which date he received an injury to his head and abdomen, received a direct blow to his abdomen; he was taken to the Day Kimball Hospital in Connecticut; a week later he returned to Paterson, remained at home for a month, went away for a month, came back, remained at his home, and in the month of August he fell unconscious on the street, such as you have described; then he underwent—such as you have described to us under your personal supervision—January 2, 1928, he returned to the Barnert Hospital and underwent an operation by Dr. Bender; at that time they found his abdomen full of pus, they could not go further, they could not make an exploratory operation because of the pus they found in there, and the only thing they could do was insert a drainage system; he returned in May, another operation was performed at Mt. Sinai Hospital by Dr. Lillienthal, and this carcinoma of the bowel was found there; returned to Barnert Hospital on August 7, 1928, and remained there until November 2, 1928, when he died. The cause of his death is ascribed to carcinoma of the bowel. To what, in your opinion, would you attribute that condition?

30

Mr. Carpenter: I object to that, what that condition is attributed to. In a certain sense in this case it is not proper. It is not a question of what he might attribute it to. The question is, What is the reasonable probability of the origin of the cancer—or I don't know whether he can go that far. It is a question of what is the reasonable probability of the cause of death. Nothing in it as to cancer. But you

40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

cannot speculate. You cannot go into the realm of possibility in this thing.

The Court: He is not speculating; he is saying, "To what would you attribute this condition?"

Mr. Carpenter: I do not think that is proper.

The Court: "A hypothetical question to an expert which assumes the facts in accordance with the theory of the party asking it, and which the evidence tends to prove, is proper where, although the facts are disputed, there is ample testimony tending to support every phase of the question, and sufficient to justify the submission thereof to the jury." 10

Mr. Carpenter: It seems to me there are not enough facts in the case. 20

The Court: Of course, I must agree with you, but counsel wanted to put these doctor on first to let them get away, with the understanding that these facts he is alluding to, while they may be disputed, nevertheless there will be evidence of these facts.

Mr. Carpenter: Yes; I am assuming that they will prove them.

The Court: I understood from the opening, from your opening, that it was admitted that they went to Massachusetts; it was admitted the car was being driven by the defendant; it was admitted the deceased was in the car. 30

Mr. Carpenter: I am not questioning that.

Mr. Santorf: After that, we have the facts already from the mouths of the doctors.

The Court: Of course, the Court says even though they are disputed, if there is evidence to support them on the plaintiff's theory, why, 40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

the question, "To what would you attribute the condition", is proper. That is the case of Daggett versus Public Service, 75 Law.

Mr. Carpenter: I am familiar with that.

10 The Court: In this case the question was: "That before that time she had been in good health—to what would you attribute this condition?"

Mr. Carpenter: And that was allowed?

The Court: That was allowed.

Mr. Carpenter: May I have an exception to the particular question now?

The Court: That was the way the question was put by counsel—I don't know whether that would make a material difference—"To what would you attribute the condition?"

20 Mr. Santorf: I will use the exact words his Honor used:

Q. To what would you attribute the condition, holding in mind what I told you, the blows he received? A. Now, this condition would indicate as if there were one condition only, but in reality we are dealing with two conditions. The one condition, for which I took care of him, for which I saw him in my office, when I saw him at the General Hospital, when the doctors took care of him at the Barnert Hospital by doing that lumbar puncture—this first condition is a condition following brain concussion. It is the typical condition following brain concussion—increased pressure on the brain, causing severe headaches, dizziness, and general ill feeling, weakness, inability to work or, say, to drive a car, as it happened in this case. This is a very characteristic condition as we see it following brain concussions, as we see it following an accident,

30

40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

from which the man was thrown into unconsciousness, as it happened in this case. This is a condition which we can with absolute certainty attribute to the injury.

The head injury was the cause of this disability of his—of this condition of his.

Now, there is another condition which was mentioned, which you spoke of, and that is the cancerous condition. 10

The Court: That is what he asked you about.

The Witness: Your Honor, counsel asked me, "To what would you attribute this condition?"

The Court: Yes. You said you found this carcinoma or cancer. He said, "To what would you attribute this condition," and then you start off with some head injury. 20

Mr. Santorf: The doctor eliminated his own condition first and then is going to the carcinoma.

Q. To what would you attribute the condition of carcinoma of the bowels? A. If I may continue, the second condition, which is carcinoma of the bowel, it is not so easy to connect that condition with his accident. We cannot speak in terms of absolute certainty as we can in the case of his brain concussion and his increased pressure on the brain following that. 30

Q. Only in probabilities? A. We know that general run-down conditions favor the onset of disease, the onset of tuberculosis, the onset of cancer, the onset of heart disease, and so on. General run-down conditions favor the onset of diseases. There 40

Dr. Hans Wassing. Called by Plaintiff. Redirect.

is not doubt about it, and statistics have brought out that a larger percentage of cancer develops in people with general run-down condition. This man, there is no doubt about it, was in a run-down condition through his brain injury, and we can say that with reasonable certainty or with all probability this run-down condition has unfavorably influenced this man as far as the cancer is concerned. By that I mean, this cancer may not have developed at all, or may have developed later in years, only if he had not gotten into that run-down condition.

Secondly, the blow to his abdomen, as it was explained by Dr. Bender and by Dr. Joelson, particularly by Dr. Bender—the blow to his abdomen we can surmise from the description that he was bruised and that he was apparently considerably injured. The blow to his abdomen has with reasonable certainty changed the inside of his abdomen. It has probably caused adhesions—that means like scars, like bands forming inside from inflammation, just as if we get a punch or blow to the outside, as it happens in boxing matches, for instance, the face swells, and if there is sufficient injury, scars are formed.

Now, we know that injuries to organs—injuries in any form in the animal experiments, for instance, bring out cancer in a certain percentage of cases. With continued injury in an animal, for instance, we can produce cancer. We do not claim that cancer is always due to injury. In this particular case, dealing with one blow only and not a continued injury, we must say that the possibility exists that this blow brought out cancer, but there is reasonable certainty that his injury has been a contributory cause. I would not say that it has caused the cancer, but a contributory factor, in one of the

Dr. Hans Wassing. Called by Plaintiff. Recross.

two ways, with his general run-down condition, which we know favors the onset of disease, cancer also, and the blow possibly having injured or surely having injured the inside and possibly having been a contributory factor right here locally.

Q. That is all.

RE CROSS EXAMINATION BY MR. CARPENTER:

10

Q. Well, in your testimony you are assuming, are you not, that the cancer may have been in Mr. Sussman's abdomen at the time of this accident? A. Yes.

Q. Nobody in the world knows whether it was or not, do they? A. No.

Q. No way of telling? A. No.

Q. That cancer may have on the day of that accident been a growing cancer three or six months old? A. How old?

20

Q. Three to six months old? A. At the time of the accident? It may have been. There may have been cancer there, and I would not commit myself as to the duration of that cancer.

Q. Might have even been older than six months, though, at the time of the accident; is that right?

A. It would be very unlikely, because we know that cancer of the intestines runs a relatively unfavorably rapid course. Now, figuring out the time, it would take us too long back, it would take us too far back, the injury having—

30

Q. Isn't it a fact that if a man has cancer of the bowels it is very unlikely to ever get well? A. Beg pardon?

Q. Isn't it a fact that if a man has cancer of the intestines the chances are he cannot get well? Do you understand that? A. Yes, I understand the

40

Dr. Hans Wassing. Called by Plaintiff. Recross.

question, but of course he may get well or may not get well. If he is operated upon, and that operation is successful, then he will get well, as many cases do; or if X-ray-therapy is combined with the operation, as many cases do. If the operation is unsuccessful or if the patient is opened and the operation is not possible, then he will die from the cancerous condition.

10 Q. There is not any possible way of telling how old a cancer is, either? I mean once you discover it.
 A. In very many cases we are able to say how old a cancer is—not to the day exactly, not to the week, but I will say to the month. We do get specimens of cancer removed from the operating table where we can say this cancer surely is not older than a few months. We get other specimens from
 20 the operating table or at post mortem examinations where we can say this cancer surely has existed a considerable length of time, and by that I mean probably more than six months, possibly a year. Depends upon the size of the growth and certain microscopic findings.

Q. That is really all you can tell about it, isn't it? A. I think that is a good deal about the—we cannot say much more about other diseases.

30 Q. Well, now, you cannot be sure within a period of six months when any cancer starts, can you—within about six months? That is about as close as you can tell, isn't it? A. Yes.

Q. And the cause of cancer is not known yet by the profession, is it? A. The cause? The final cause of cancer is not known.

40 Q. And the only cure—well, you are not concerned with cure. How many types of cancer are there? A. There are two main types of cancer—carcinoma and sarcoma. Of course, the carcinoma is sub-divided by many groups.

Dr. Hans Wassing. Called by Plaintiff. Recross.

Q. There are many different kinds? A. Yes.

Q. How many kinds are there of the other type?

A. Of which type? Of the sarcoma? Carcinoma is sub-divided in many—

The Court How many in the sarcoma?

The Witness: The sarcoma is also divided into different groups—not as many as the carcinoma. 10

Q. Does it sometimes happen that a cancer will grow to fair size and then be erased for a time?

A. Yes, that may happen.

Q. Then go on again? A. Yes.

Q. That does sometimes happen? A. Yes.

Q. What are the chances of a person's recovering from a cancer of the bowel when that cancer gets to be large enough to be operated upon or to be discovered first and then operated on? A. If it is operated upon in time, the chances of a person getting well are fairly good. 20

Q. Suppose this: Suppose a cancer gets to the size that it is adherent to the wall of the abdomen at the back, before it is discovered, what are the chances? A. The chances are much poorer.

Q. Almost impossible to affect a cure in a case like that? A. That would depend upon the individual, depend upon the individual case, but surely the outlook is much most unfavorable than in such a case described by you. 30

Q. And a case like that, where a cancer has grown to the point where it forms a mass and the mass has increased to the size where it is adherent to the walls of the abdomen, indicates that it is not a recent cancer, doesn't it? A. Yes.

Q. That indicates a comparatively old cancer, doesn't it? A. Yes. 40

Dr. Hans Wassing. Called by Plaintiff. Recross.

Q. Very difficult, in a case like that, to tell how old it is, isn't it, even as you examine it and look at it in the patient, either before it is cut or as it is cut or after it is cut? A. I should surely say it is older than six months in such a case, but I would not pin myself down to a definite age of that cancer.

10 Q. Then, you said before that even when you say six months that may be six months out of the way at that; isn't that so? A. We can say in some cases that the cancer is only a few months old. We can say in other cases this cancer is most likely older than six months, possibly six months to one year old. A cancerous condition that is operated upon rarely gets much older than one year. We know that cancer cases who are not operated upon successfully usually die within a year or two. We do
20 hardly ever see cases go on longer than, oh, I would say eighteen months. That would be an exceptional case.

Q. By that you mean, eighteen months from the time it has become virulent and rapid growing; isn't that what you mean? A. No; from the first onset, which in some cases we know of and in other cases we do not know of.

30 Q. So that when you don't know when it starts, why, of course, then you don't know the age of the cancer at the time of operation or time of death, do you? A. Except that we are able to say this cancer is only a few months old, with reasonable certainty, or another cancer is surely older than six months, might be a year old.

Q. You say some of them might even be a year and a half old? A. Yes; at the time of death.

40 Q. What is it that tells you the age of a cancer at the time you first discover it upon opening an abdomen and taking a specimen of it to analyze—

Abraham Glicksman. Called by Plaintiff. Direct.

what is it tells you its age? A. The size of the growth as such, when we look into the abdomen, and just what you described before, whether it is adherent to the walls of the abdomen or whether it is a freely movable mass, that will help us in our judgment, and on microscopic examination we can again see whether there is only little growths of cancer cells within the normal tissue. Here is most of the tissue still normal, and only in very small paths cancer cells spreading, or whether we see tissue all infiltrated, as we say, or grown through with the cancerous cells. That would help us in the judgment as to whether cancer is only a few months old or probably of some older duration. 10

Q. When you open an abdomen and find therein a mass and find that the mass is adherent to the wall of the abdomen, that indicates a cancer from six months to a year old, doesn't it? A. Yes, I guess so. 20

Q. The exact age cannot be determined? A. No.

Q. That is all.

(Adjourned to October 23, 1930 at 10 A. M.)

Paterson, N. J., October 23, 1930. 30

(Trial of the Cause Resumed at 10 A. M.)

ABRAHAM GLICKSMAN, sworn.

DIRECT EXAMINATION BY MR. SANTORF:

Q. Mr. Glicksman, where do you reside? A. Where I live? New York.

Q. What Street? A. 136th Street. 40

Abraham Glicksman. Called by Plaintiff. Direct.

Q. What number? A. 672.

Q. 672 East 136th Street, New York? A. 672 East 136th Street, New York.

Q. Did you know Mr. Hyman Sussman in his lifetime? A. I knew him for a long while.

Q. Did you know Mr. Samuel Sussman, the defendant? A. I know him very well, yes.

10 Q. How long have you known him, Mr. Glicksman? A. Oh, a long while, too.

Q. During the year 1927 did you find yourself during the month of April in Providence? A. Yes.

Q. What date was that? A. On April 21.

Q. Who was there at Providence with you? A. Mr. Samuel Sussman and his brother Hyman Sussman.

20 Q. Where were you in Providence? A. We were in the hotel.

Q. What hotel? A. At the Naragansett Hotel.

Q. On the evening of April 20, 1927, did anything take place? A. Yes.

Q. Tell us what took place. A. We were all at the hotel.

Q. Was the defendant there? A. Mr. Sussman, yes.

30 Q. Tell us what took place. A. We were all at the hotel in the evening, and Mr. Sam Sussman said to us, "I have got to take a trip tomorrow morning". He said, "I have got to go to Webster in Massachusetts", and he says, "if you don't mind, would you mind taking a trip with me tomorrow?"

Q. "Would you mind taking a trip with me?" A. Yes.

Q. What was it at that time? A. What was what?

40 Q. What was it with reference to the Jewish calendar? A. Oh, that was a holiday.

Abraham Glicksman. Called by Plaintiff. Direct.

Q. What was it? A. It was the Passover holiday.

Q. What time did you get up the next morning, April 21? A. Oh, I should say about six-thirty.

Q. Did you have breakfast? A. No.

Q. On account of the Passover? A. On account of the Passover.

Q. What time did you start from the Narragansett Hotel, Providence? A. We started around seven-thirty. 10

Q. About seven-thirty? A. Yes.

Q. Going to Webster? A. To Webster, Massachusetts.

Q. Whose car did you ride in? A. In Sam Sussman's car.

The Court: Seven-thirty what?

The Witness: In the morning. 20

Q. In Mr. Sam Sussman's car? A. Yes.

Q. What kind of car was it? A. It was an Essex coach.

Q. You started about seven-thirty? A. We started about seven-thirty.

Q. What time did the accident happen, Mr. Glicksman? A. The accident happened about eight-fifteen.

Q. About eight-fifteen? A. Yes, about quarter after eight. 30

Q. And how many miles was it from the Narragansett Hotel, Providence, to the point of the accident? A. I should say about thirty-five miles.

Q. And the accident happened about three-quarters of an hour after you had started? A. About three-quarters of an hour after we got started.

Q. On the way up there can you tell us the average rate of speed that Mr. Sussman maintained? A. Well, he was going a very fast speed. 40

Abraham Glicksman. Called by Plaintiff. Direct.

Q. I see. A. Between forty and fifty miles an hour.

Q. Will you describe to the Court and jury, if you will, please, the type of road and the countryside?

A. It was a very fine road; it was an open road, but very good.

10 Q. What was it made of, macadam, asphalt, concrete, or what? A. In parts it was asphalt and parts concrete.

Q. Going through cities or country? A. No, all through country.

Q. Many intersections? A. On and off, not very many.

Q. Did you say anything to Mr. Samuel Sussman, the driver of that car, on the way up there? A. I told him several times, I said, "Sam, take it easy. It is a little too fast".

20 Q. Do you remember where the accident occurred, the curve? A. The accident occurred at Grovendale, Connecticut.

Q. Grovendale, Connecticut? A. Grovendale, Connecticut.

Q. What type of curve was it? A. A very sharp curve.

Q. To your left or right? A. Right.

30 Q. What degree? A. Oh, I should say almost—it was almost a right angle.

Q. Right angle? A. A very sharp curve, yes.

Q. Approximately forty-five degrees? A. Forty-five-degree angle, yes.

Q. Did you speak again to Mr. Sussman before you arrived at the curve with reference to speed? A. Yes, I did.

40 Q. What did you say to him? A. Well, I said—you know, in a joking way, I said, "Sam, My God, take it easy; you are going a little too fast".

Abraham Glicksman. Called by Plaintiff. Direct.

Q. What did he say? A. He said how the Essex is just fine, it is broken in nice, and it is going fine now.

Q. How many miles had his Essex gone? A. I couldn't say, but it was broken in just nice.

Q. As you approached the curve, or, rather, as you approached this point of accident, will you please in your own words tell us what happened, Mr. Glicksman? A. As we approached the curve, I should say about seventy-five feet from the curve, suddenly we saw a bus through the—right on the corner there was a grove of trees there, of course. 10

Q. Right at the curve? A. Right at the curve.

Q. This is a rightangle intersection, as you say? A. Yes.

Q. What was there there at the point of the curve? A. Trees on the right side. 20

Q. Could you see through the trees at an angle? A. You could see right through.

Q. You were going to make what kind of a turn? A. Going to make a right turn.

Q. You were seventy-five feet from the curve when you saw the bus? A. I should say about seventy-five feet, yes.

Q. Tell us in your own words what occurred. A. Well, I could not say much, everything was so fast, it was in an instant, almost. 30

Q. What part of the road was Mr. Sussman, the defendant, riding? A. He was riding on the middle of the road.

Q. In the middle of the road? A. Middle of the road.

Q. At the point you just mentioned seventy-five feet from the curve what rate of speed was Mr. Sussman traveling at? A. He was going at that clip or at that fast clip, forty to forty-five miles an hour. 40

Abraham Glicksman. Called by Plaintiff. Direct.

Q. Forty to forty-five? A. Yes.

Q. Now, tell us, Mr. Glicksman, was Mr. Sussman acquainted with this road? A. No, sir.

Q. Tell us what took place on the way up there, if you will. I mean, what makes you say he was unacquainted with the roads? A. Because I am sure Mr. Sussman had never been on that road.

10 Q. What took place on the way up there? A. Well, up until that time we all were—we never were on that road, and I looked at the signs.

Q. You looked at the signs up there? A. Yes.

Q. And you followed the directions on the signs? A. The direction on the sign, yes.

Q. The one indicating Webster? A. Exactly.

Q. What part of the road was Mr. Sussman riding about seventy-five feet from that curve? A. He was on the middle of the road.

20 Q. Now, tell us what happened. Go ahead. A. I couldn't say much what happened. It happened about in one instant. We saw that bus, it was so fast, in the flash of an eye, and I didn't feel the accident, I didn't see nothing, I didn't—you know, it struck us like a flash of lightning.

Q. How far from the curve was the bus? I mean by that, you were seventy-five feet from the curve? A. Yes.

30 Q. Approaching in the direction in which you were going? A. Yes.

Q. This bus was coming in the opposite direction? A. Opposite direction.

Q. How far from the curve in its own direction was it away? A. About the same distance as we were.

Q. About seventy-five? A. Exactly; and we struck right on the point of the curve.

Abraham Glicksman. Called by Plaintiff. Direct.

Q. You struck right at the point of the curve?
A. Yes.

Q. What kind of a collision was it? A. Right.

Q. I mean side to side, face to face, or back to back? A. Face to face.

Q. Face to face collision? A. Face to face collision, head-on.

Q. Head-on collision? A. Yes, sir.

10

Q. Did Mr. Sussman retard his speed any? A. I don't think so. Even if he wanted to, the car was going so fast he could not stop.

Q. Where did the head-on collision take place? You told us the point of the curve, but with reference to what part of the road? A. Well, I did not see. I could not say exactly, but it must have been in the middle of the road.

Q. About the middle? A. I should judge, yes.

20

Q. Was that bus, Mr. Glicksman, at any time on Mr. Sussman's side of the road? A. I could not say that.

Q. That you cannot say? A. It was so fast, I could not say that.

Q. All right. Do you know whether Mr. Sussman did anything to avert the accident? A. I don't know. It was so fast. I don't think it took more than a second.

Q. Did you feel any drawback or any retarding of speed? A. No.

30

Q. It all happened in the flash of a second, you say? A. Yes.

Q. What happened after that? A. I don't know.

Q. Where did you find yourself after that? A. Afterwards I found myself, about evening, about towards evening, I should say, it must have been around seven o'clock, in the hospital.

40

Abraham Glicksman. Called by Plaintiff. Direct.

Q. Found yourself in Day Kimball Hospital? A. Day Kimball Hospital.

Q. Find Mr. Sussman there—I mean the dead man? A. Mr. Sussman, yes, in bed beside me, another bed.

Q. In the same hospital? A. Yes

10 Q. Do you remember Mr. Sussman before the accident, Mr. Glickman? A. Yes.

Q. Remember what kind of a man he was? A. He was a fine man.

Q. Remember his health? A. In perfect health.

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

The Court: Strike it out.

20 Q. From your observation what was he? A. As far as I knew, he was in perfect health.

Q. Did you ever eat a meal with him? A. Yes, very often.

Q. Before the accident with reference to the time of the accident, April 21, 1927, when was your last meal with him? A. Well, that night, previous to the accident.

Q. The night previous? A. Yes.

30 Q. Did you go away together any time before the accident? A. Yes, very often.

Q. When, the last time before the accident, did you go away together on a vacation or anything? A. No; I was away with him about six months prior—once I was away with him all the week.

Q. Went away a whole week? A. A whole week on business, yes.

Q. How did he eat, Mr. Sussman? A. Very well. He had a fine appetite.

Abraham Glicksman. Called by Plaintiff. Direct.

Q. What kind of appetite did he have immediately prior to the accident and before Passover?

A. A very good appetite.

BY THE COURT:

Q. Where were you sitting? A. In the front seat. 10

Q. Alongside— A. Alongside of Mr. Sam Sussman, the driver.

Q. Where was Hyman? A. In the back seat.

BY MR. SANTORF:

Q. You mean the deceased was in the back seat? A. Yes.

Q. Mr. Glickman, did you see Mr. Sussman after the accident? A. Yes. 20

Q. See him at his home? A. Home.

Q. Tell us his condition or what you saw. A. After that accident he was a different man. He was continually telling me he has got awful pains in the stomach.

Mr. Carpenter: I object to what he said.

The Court: Yes.

Q. Never mind what he told you. What did you see on his body, if anything? A. Where? 30

Q. In Paterson or any time after the accident? A. On his body? I could not see anything. On the body I could not see anything on him.

Q. You saw no part of his body, either in the hospital or anywhere? A. In the hospital I did see his body, yes, sir.

Q. Tell us what you saw. A. It was black and blue, black and blue all over. 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. That is all now. If I have omitted anything I will go back. That is all.

CROSS EXAMINATION BY MR. CARPENTER:

Q. What is your business, Mr. Glicksman? A. Silk business.

10

BY MR. SANTORF:

Q. Pardon me. How was the weather that day?
A. Fine weather, nice weather.

Q. Vision clear? A. Yes, sir.

BY MR. CARPENTER:

Q. What part of the silk business are you in? A.
20 I buy and sell silk.

Q. What was Hyman Sussman's business? A. Same business.

Q. Buying and selling silk? A. Yes.

Q. What was Samuel Sussman's business? A. Same business.

Q. Buying and selling silk? A. Yes.

Q. What business were you on there at Providence?

30

Mr. Santorf: I object. I maintain that the doctrine of joint enterprise does not apply to persons who are on that joint enterprise, when one of the joint enterprisors sues another joint enterprisor. (Discussion.)

Mr. Carpenter: I want to find out what the facts are. That is all I am after. What the law will be arising from those facts I cannot attempt to say now.

40

Abraham Glicksman. Called by Plaintiff. Cross.

Mr. Santorf: If the doctrine does not apply, he cannot go into it.

The Court: Then this testimony can do you no harm.

Mr. Santorf: All right.

(Question repeated by the reporter.)

A. We were all on a business transaction together, Mr. Sam Sussman, Mr. Hyman Sussman, and myself. 10

Q. What was the business transaction? A. We were dismantling a mill. We bought a mill up there and we were dismantling it.

Q. Who bought the mill? A. Mr. Sam Sussman and me.

Q. You two bought it? A. We two bought the mill, yes. 20

Q. What was it, a bankruptcy sale?

Mr. Santorf: I object to that as immaterial.

A. Yes, it was a bankruptcy sale.

Q. Now, there was another mill up there which you were going to see? A. We were not.

Q. On that day of the accident? A. Well, Sam Sussman—we were all—we were not together, partners; we were all in this deal in Providence, but when this deal was through we had nothing to do with one another. 30

Q. You were partners? A. In this transaction in Providence. We happened to meet together up there, and we bought this place together.

Q. Did you ride with Mr. Sussman from Paterson to Providence in the car? A. The first time I did, yes, and that particular time, the last time, not. 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. Well, who went with Mr. Sussman, Samuel Sussman, to Providence in the automobile? A. In the automobile the first time we was about two weeks prior to the accident.

Q. I am speaking only about this day in April. A. The car was in Providence all the time.

10 Q. It had stayed in Providence? A. We went up by train or by boat.

Q. You three men went up by boat and train to Providence together? A. Yes.

Q. How many days before did you go to Providence, before the accident? A. At this particular time I was back over here in New York for one day and then I went back alone.

20 Q. You met Hyman and Samuel Sussman in New York? A. I had to do something in New York and then I went back, yes.

Q. Did the three of you own this mill together? A. Three of us owned the mill, yes.

Mr. Santorf: Which mill is that?

The Witness: In Providence, yes.

Q. Did you pay your joint expenses out of the proceeds that you got from the sale of the mill?

A. In this particular thing, yes.

30 Q. That is, including your expenses of going up by train and boat? A. Yes, sir.

Q. Expenses of operation of the car, too, gas and oil? A. Until that day, yes. This mill transaction was all done. We were all through with that transaction. It was all done.

40 Q. You were going up to see another mill, up around Putnam, weren't you? A. I wasn't going to see nothing. I don't know. Mr. Sussman had something in mind, and he asked us to come along.

Abraham Glicksman. Called by Plaintiff. Cross.

Q. He told you what he had in mind, didn't he?
A. He made a remark, he says, "I want to look at a certain mill up there".

Q. That was a mill that was for sale, too, wasn't it? A. I couldn't say exactly; I don't know the name of the mill or whatever it was.

Q. It was a mill that was to be sold by a bankruptcy proceeding, too, wasn't it? A. I don't remember. I don't know. 10

Q. You were interested in looking it over, weren't you? A. No, sir.

Mr. Santorf: He has answered that three times.

Q. It was in your line of business? A. It was in my line of business, yes, but Mr. Sussman got the tip from somewhere that I don't know. 20

Q. Had you frequently been on business deals with him? A. With Mr. Sam Sussman, no.

Q. But with Hyman Sussman? A. With Hyman Sussman not for at least six months prior to that.

Q. But you were frequently in business deals with him, weren't you? A. With Mr. Hyman Sussman, not with Mr. Sam Sussman very often.

Q. Now, you left Providence that morning, you said, about half past seven? A. Yes. 30

Q. How do you know it was about half past seven? A. We looked at the watch. I asked Sam—I says, "Sam, we are starting out about seven-thirty". I knew exactly what time we started.

Q. Did Hyman hear you say the same thing? A. Yes.

Q. You say this accident happened at what time, quarter past eight? A. I should judge it was about quarter past eight, yes. 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. Had you made any stops in the meantime?

A. No.

Q. For gas or oil? A. No.

Q. Or water? A. No.

10 Q. Or food? A. No, sir; we only stopped in Providence for about five minutes or two or three minutes in a place and we bought some eggs and some crackers—matzoths for Mr. Sussman.

Q. Do you recall any other stops from there up to the point of the accident? A. Not at all; we did not make a single stop.

Q. Had plenty of gas and oil before you started? A. Plenty of gas and oil, yes.

Q. You said you went about thirty-five miles up to the point where you had the accident? A. No. More than that.

20 Q. How far? A. Forty-five miles an hour—oh, you mean the distance? About thirty-five miles, I should think.

Q. From Providence? A. From Providence to Putnam is about thirty miles or thirty-one miles, and we switched off at Putnam, I think, about two or three miles out of Putnam or four miles, which makes about thirty-five miles.

Q. About thirty-five miles you ran that morning before the accident? A. Yes.

30 Q. You say none of you had been on that road before? A. No, sir.

Q. Well, did one of you have a road map? A. No road map.

Q. And pick out the road on that? A. No. We looked at the signs.

40 Q. You were able to see the signs, were you, going so fast as that? A. On that curve as soon as we got to Putnam, there is a very wide curve, a very wide curve that, but it is a big place and there

Abraham Glicksman. Called by Plaintiff. Cross.

was a big sign, "Webster", with a big hand to the right.

Q. How fast were you going when you went around that curve? A. Well, we stopped at that curve to look at that sign. I distinctly remember that.

Q. Then, you did stop there, at any rate? A. No; just slowed up to stop for a second to look at the sign. 10

Q. None of you attempted to get out of the car at that point? A. No, sir.

Q. Did you at any time along the road ask to be let out so that you could go back? A. No, sir.

Q. All the time, you say, from Providence up to the point of this accident you were speeding along between forty and fifty miles an hour? A. Going a very fast clip, yes. 20

Q. And Hyman Sussman made no attempt to get out of the car at any time? A. No, sir.

Q. He did not ask to have Sam stop and let him out? A. He didn't say nothing.

Q. Nothing like that? A. Nothing like that.

Mr. Santorf: I object to any conversation with the deceased.

Q. When you stopped there at that point where the road made a turn and you saw the sign, you stopped there for a second, didn't you, and Hyman Sussman did not attempt to get out of the car, did he? A. No, sir. 30

Q. And he did not ask at any time before the car stopped, so he could get out? A. No, sir.

Q. Neither did you? A. No

Q. Now, you say that when you got up to or approached this particular car where the accident happened— A. Yes. 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. —you were then running how fast? A. The same clip. He was going that same speed throughout.

Q. What was that? A. Between forty and forty-five miles an hour.

10 Q. And you saw in the distance that there was a curve at that point? A. No; it came so sudden to us.

Q. How close were you to that curve before you realized there was a curve at that point? A. It didn't take very long; we just saw suddenly the curve coming along and the bus coming around the curve.

20 Q. You saw that bus, didn't you, before it got to the point of the curve? A. Yes; right through the corner of the trees—right through that corner we could see the bus coming down there.

Q. You could see the bus from the right, you could look across the fields? A. Right through that corner we could see the bus, yes.

Q. As you approached that corner didn't you see that bus a considerable distance away to your right, coming across that road that was— A. No.

Q. —cutting toward your road? A. No; then we only saw—it was almost right on top of us.

30 Q. In other words, the bus was almost right on top of you before you saw it at all? A. We saw it through the trees. We saw it come down fast, very fast.

Q. What was? A. The bus was coming down and we were going fast.

Q. Those trees that you say you saw through were in the corner formed by the intersection of the two roads before they got to the turn? A. I should say yes.

40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. Was it a big grove of trees? A. I could not say now, but I saw it through that trees, you know—I saw that bus coming down, but just how big—

Q. The bus was coming from your right, wasn't it? A. The bus was coming from the right around the bend, yes.

Q. When you saw it did you call it to *Simon Sussman's* attention? A. We didn't have time to say a word. 10

Q. Did you? A. I didn't say nothing; I just grabbed—I saw it coming, I knew that we will crash, that is all.

Q. How far away was this bus from you at the time you first saw it? How far in feet? A. Well, judging feet is very hard to tell.

Q. Well, about. Give us your idea. A. Well, we were from that curve just as much as the bus from that curve on the other road. 20

Q. That does not tell the jury anything. We want to know about how far that bus was away from you when you first saw it. A. Well, judging that we were seventy-five feet from the corner, the bus must have been seventy-five feet, too, which makes it altogether 150 feet.

Q. Yes. That is the best estimate you can give? A. That is the best I could give, yes. 30

Q. You are positive that Mr. Sussman did not slow down at all for that curve? A. He couldn't slow down. He saw the curve suddenly and we saw the bus. 30

Q. Did he slow down at all for the curve? A. If he did I don't know it, because I was knocked out and I couldn't say.

Q. In other words, as far as you know, he made no attempt to slow up at all, did he? A. He probably made an attempt, because instinctively a driver would— 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. I object to that. You are just arguing.

Mr. Santorf: He asked that question.

10 Q. I ask you, as far as you know Sussman made no attempt to slow up his car, did he? A. I didn't look at his feet or I didn't look at the brakes, because I know, I am a driver, too, instinct, you know, will tell you to press your feet down.

Mr. Carpenter: I ask to have that answer struck out, and I ask to have the witness answer the question.

The Court: Strike it out. He has answered it. Strike out the last part.

Mr. Carpenter: He has tried to evade it.

20 The Court: He has not tried to evade it at all. Do not make a misstatement to me.

Mr. Carpenter: I did not want to do that. I want to get an answer to that particular question.

The Court: Strike that part out. Better ask him again.

(Question repeated by the reporter as follows:)

30 "Q. I ask you, as far as you know Sussman made no attempt to slow up his car, did he?"

The Court: As far as you know.

A. I don't know, no. I could not tell that.

The Court: What is your remembrance? That is what he wants to know. He wants to know your remembrance. Do you know that

40

Abraham Glicksman. Called by Plaintiff. Cross.

he did or did not, as far as you remember, attempt to stop or slow up his car?

The Witness: He might have—

The Court: No, do you know?

The Witness: I don't remember, no.

The Court: You don't remember?

The Witness: No.

10

Q. Did Hyman Sussman say anything to Samuel Sussman about slowing up, here comes a bus, or there is a bus there, or anything to that effect? A. Not at that time of the bus—it was too fast. Couldn't say nothing, couldn't say a word.

Q. None of you gave any warning to the driver that there was a bus coming to the right, through the trees? A. The only thing I remember is—you know, a crash, and whether I hollered or whether Mr. Sussman hollered, I don't know.

20

Q. Well, the crash was just about to happen at that time, too? A. Yes.

Q. You felt that instinctively? A. Yes, it was very sudden.

Q. You just grabbed onto something and then the crash came? A. Yes, I saw it coming, yes.

Q. That happened all within a fraction of a second, didn't it? A. Just a moment or so.

Q. Within a moment. What was Mr. Sussman doing in the back seat of the car, Hyman Sussman? A. Mr. Sussman was, all this while he was eating his eggs and his matzoths and, you know, making jokes. We had a good time, in other words.

30

Q. You were having a good time together? A. Yes, it was a jolly trip.

Q. And Hyman Sussman was telling jokes to the men, you two in the front seat? A. No; Hyman Sussman wasn't telling jokes, because I don't think

40

Abraham Glicksman. Called by Plaintiff. Cross.

—Sussman couldn't tell jokes very well, but I think I said a few jokes, something like that.

Q. What did you mean a moment ago when you said he was telling jokes in the back seat and you were having a good time? A. We were having a good time, you know, in a jokey way, I mean. I didn't say that Sussman was telling jokes.

10 Q. Do you remember being examined before Mr. Addison Rosenkrans? A. Yes.

Q. On the 6th of October, 1928? A. Yes.

Q. About this accident? A. Yes.

Q. Do you remember—

Mr. Santorf: What page?

20 Q. This page don't seem to be numbered. You can come here and read it beside me. Oh, here it is, I guess it is page 6, right in the middle. "Q. What were you talking to Mr. Sussman about? A. Well, it was more of a sociable trip." I said the same thing now.

Q. Wait until I read it. "Mr. Sussman at the back was telling jokes, and he was eating his breakfast, and we had lots of fun, and we didn't get a chance to talk about anything else in such a short time." Did you give that answer at that time? A.

30 Yes.

Q. Now, you said you were knocked unconscious by this collision? A. Yes.

Q. How long did you remain unconscious? A. I came to towards evening. That makes about eleven or twelve hours I was unconscious.

Q. Then, you at no time saw the position of the car and the bus after the accident, did you? A. No, sir.

40 Q. Did you ever go back to the point of the accident? A. No, sir; I was never there.

Abraham Glicksman. Called by Plaintiff. Cross.

Q. What part of your car first struck the bus?

A. The front side.

Q. What do you mean by the front side? Just square across the front? A. It was a head-on collision, I know that. The bus was coming right on top of us.

Q. What part of the bus did the front of your car hit? A. I don't know. 10

Q. You don't know that? A. The radiator, I know, was in the back seat.

Q. The radiator of your car? A. I saw the car afterwards. Our car I saw afterwards, yes.

Q. You saw the radiator in the back seat? A. It was almost in the back seat, yes.

Q. How about the engine; that was pushed back some, too, wasn't it? A. I mean the engine; the front part of the car was almost in the back seat, yes, all pushed in. 20

Q. How long after the accident did you see that car? A. I saw it in Providence.

Q. How long afterwards? A. Oh, a long while; I don't know.

Q. You don't know whether it had been moved or what happened to it in the meantime? A. No.

Q. You can't tell us what part of the bus the front of your car struck, can you? A. No, I couldn't tell that. 30

Q. You have no recollection about what part of the bus it was you hit? A. I didn't feel no pain; I didn't see anything.

Q. Now, when you were in the hospital at Putnam how close was your bed to Hyman Sussman's bed? A. Right across the way.

Q. Well, how far, indicating from you to the jury here? A. Oh, just about the distance that this woman—lady—is sitting. 40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. Juror number six? A. Yes.

Q. Were there beds in between you—other patients? A. Yes.

Q. Were you both dressed in hospital clothes lying in the bed? A. Yes.

Q. Who left the hospital first, you or Hyman Sussman? A. Both together.

10 Q. Were you in a ward or in a private room?
A. Ward.

Q. When did you first see any of Hyman Sussman's body below his neck, if you did see it? A. That was Thursday—I should say Saturday morning.

Q. Before he left the hospital? A. We left the hospital, I think, on Monday or Tuesday.

20 Q. The following Monday? A. Monday or Tuesday.

Q. You say you saw him a couple of days after the accident? A. On Saturday or Sunday, yes.

Q. You were there altogether about a week, weren't you? A. Not quite a week.

Q. How did you get from the hospital down to Providence? A. Some friends of ours took us in a car from the hospital back to Providence.

30 Q. Well, you dressed yourself in the hospital, didn't you? A. The nurse dressed—you know, the nurses help us dress, yes.

Q. You walked out and got in the car yourself? A. They helped us. We walked out and we went in the car ourselves, yes.

Q. You did not use crutches to get out of the hospital? A. No, sir.

Q. Neither of you was injured in the legs, were you? A. No. We were black and blue in the legs, but not injured enough.

Abraham Glicksman. Called by Plaintiff. Cross.

Q. How long did you stay in Providence? A. I couldn't say exactly, but we stayed there a few days. A few days, that is all.

Q. Finish up some business there? A. No, no business. I did no business whatsoever. Business was all through in Providence.

Q. Staying at the hotel? A. Yes.

Q. Naragansett? A. Same hotel.

10

Q. How did you come from there down to Paterson? A. I believe I was taken with a car.

Q. How about Hyman Sussman? A. Same way.

Q. Both came by automobile? A. Yes, sir.

Q. Together? A. Together, yes.

Q. Make your trip without any stops? I mean, came right straight through? A. Right straight through yes.

Q. Hyman Sussman continued to work for quite a while after that, didn't he? A. Well, not right afterwards. Oh, no.

20

Q. Well, how long was he confined to the house? A. I couldn't say. I was in the house for a long while and so was Hyman Sussman.

Q. How long were you in the house? A. I was in the house for about two weeks, I should say.

Q. Hyman Sussman was in the house about the same time? A. More than that. I think he was more than that.

30

Q. How long is your recollection that Hyman Sussman was in the house? A. Well, I know that when I went out I went up to see him.

Q. Yes? A. And I asked him, "Hyman, how are you?" He said, "Abe, I am not good."

Q. I didn't ask you that. I asked you how long it was before he went out of the house. A. I couldn't say that, because I was up in the third week and he was still in the house.

40

Abraham Glicksman. Called by Plaintiff. Cross.

Q. Was he confined to the house about a month?

A. Probably.

Q. That is about right, isn't it? A. I can't tell exactly how long, because—

Q. After he got out of the house did he go about his usual business affairs for a while? A. In a very haphazard way.

10 Q. Well, he did go about his business affairs? A. Probably down to the bank, that is all.

Q. What business did he have here in Paterson to attend to? A. Well, he had a lot of stockings housed, you know, and I suppose his wife helped him out, and then Mr. Sam Sussman helped him out.

Q. That is his brother, the defendant here? A. Yes.

20 Q. Did he go away that summer on a vacation? A. Yes, he went away.

Q. Where did he go to? A. I don't know.

Q. How long was he away? A. Oh, I can't tell.

Mr. Santorf: Of course, this is all outside of the scope of the direct examination.

The Court: I will permit it. On the question of his condition, at least.

30 Q. When did he return from his vacation, Mr. Glicksman? A. I can't tell the exact time, but I saw him just as soon as he got back.

Q. Where did you see him? A. In the house.

Q. See him out about business? A. No; I never saw him out about business.

Q. See him down at the bank? A. Probably I saw him at the bank. Once or twice he came down.

Q. See him at your club? A. No.

40 Q. At all after the accident did you see him at the club? A. No.

Abraham Glicksman. Called by Plaintiff. Redirect.

Abraham Glicksman. Called by Plaintiff. Recross.

Q. Sure? A. Positively.

Q. I think that is all.

REDIRECT EXAMINATION BY MR. SANTORF:

Q. On the way up from Providence to Webster did you tell Mr. Sussman what road to take at any time? A. No. 10

Q. Did you have any control over that car? A. We had no—

Q. Did you give him directions? A. No.

Q. Did you have anything to do with that car? A. No.

Q. From Providence to Webster? A. No.

Q. Did you have any business in Webster? A. No, sir. 20

RECROSS EXAMINATION BY MR. CARPENTER:

Q. When did you leave Paterson, Mr. Glicksman? A. Which Paterson?

Q. When did you move away from Paterson to New York? A. Three years ago, after this accident.

Q. About what time? A. The accident was in April, and I moved to New York in June or July. 30

Q. So you were not here in Paterson? A. I did business here in Paterson.

Q. You came back here occasionally, but that is all? A. Yes, to do business.

Q. As a matter of fact, you did not have much business to do here, did you? A. I had business in Paterson, yes.

Q. You did in the Fall of 1927? A. Yes. 40

Jacob Katz. Called by Plaintiff. Direct.

Mr. Santorf: This is surely not recross examination.

Mr. Carpenter: All right.

JACOB KATZ, SWORN.

10

DIRECT EXAMINATION BY MR. SANTORF:

Q. Mr. Katz, you are a brother-in-law to the deceased? A. Yes.

Q. Where do you live, Mr. Katz? A. 215 Fordham Avenue.

Q. What are you at the present time with reference to the Barnert Hospital? A. I am the president of Barnert Hospital.

20

Q. Remember your brother-in-law, Mr. Sussman, before the accident? Do you remember your brother-in-law? A. Yes.

Q. Tell us what his condition was immediately prior to the accident? A. Well.

Q. You say well. What kind of man was he? A. He was a very good, quiet man, easy-going.

Q. Was he in business? A. He was in the silk jobbing business.

30

Q. Alone? A. Alone.

Q. Did you ever have any meals with him, Mr. Katz? A. Yes.

Q. How long before the accident, April 21, 1927? A. It was quite often that he used to come to the house or we used to go to his house.

Q. What kind of eater was he? A. Very good eater.

Q. What was his health before the accident? A. Very good.

40

Jacob Katz. Called by Plaintiff. Direct.

Q. What did he appear to you? A. Good health.

Q. Remember the time of the accident? A. Yes, sir.

Q. When did he come out of the Paterson—the accident happened on April 21, 1927; when did he come back to Paterson? A. He came around the 28th of April.

Q. Did he remain at home? A. Yes. 10

Q. For how long? A. For quite some time.

Q. Then where did he go, if any place? A. Well, then, on the advice of the doctor he went away for a vacation.

Q. How long did he stay away? A. I think it was around three to four weeks.

Q. Then he came back? A. Then he came back.

Q. Do you recall anything that happened in August of 1927? A. In August, 1927, yes, I was called up. He was taken to the hospital. He was riding his automobile one night and he felt dizzy and he went— 20

Q. You don't know, of course, what happened? A. I don't know what happened.

Q. Tell us the first time—

Mr. Carpenter: I ask to strike out that he felt dizzy. 30

The Court: Yes, strike it out.

A. The first time I saw him I was called to the General Hospital.

Q. You saw him at the General Hospital? A. I saw him at the General Hospital.

Q. Did you make any arrangements? A. Well, in order to get more assistance by—what I mean by my being there quite often. My position there requires me at least to be there several times a week, 40

Jacob Katz. Called by Plaintiff. Direct.

and if I don't make it in the morning I make it at night.

Q. Where do you mean? A. At Barnert Hospital; so I immediately asked the Barnert Hospital to send the ambulance and transfer him to the Barnert Hospital.

Q. From the General? A. From the General.

10 Q. That was in August of 1927? A. That was in August, 1927, yes.

Q. Dr. Wassing had him at that time? A. Dr. Wassing visited him. He made the arrangement.

Q. How long was he there, about, do you remember? A. Where?

Q. In the Barnert at that time. A. He was there for a week, about a week.

Q. Then he went out? A. Then he went out.

20 Q. When did he return to the Barnert? A. He returned to the Barnert Hospital on New Years night, I think January the 2nd or—yes, he was sent in New Years, when I went to see him we made arrangements to take him to the Barnert Hospital to operate, and he was operated on January 2nd, in the morning, around one o'clock.

Q. By whom? A. By Dr. Bender and Dr. Joelson.

30 Q. How long did he remain in the hospital at that time, approximately? A. I think he remained there until the end of February.

Q. End of February? A. Or a couple of days sooner.

Q. Then where did he go from there? A. He went home.

Q. How long did he stay home? A. He stayed home—I think he was re-admitted to the Barnert Hospital in May.

Q. May of the same year, 1928? A. Yes.

Jacob Katz. Called by Plaintiff. Direct.

Q. How long did he stay at the Barnert at that time? A. I think he stayed until sometime in June, when he was transferred to the Mt. Sinai Hospital.

Q. To where? A. In New York. Am I to proceed?

Q. Yes, go right ahead. A. I tried to get all the best care I could, and I made arrangements with Dr. Lillienthal.

10

Q. Dr. Lillienthal, of New York? A. Of Mt. Sinai Hospital. I talked to him, with my connections with the hospital, and I tried to get the best man, and I finally succeeded, and I had been advised to take Dr. Lillienthal.

Q. Did Dr. Lillienthal make the operation in Mt. Sinai? A. Yes. He did not want to come here to operate him, so he said we should take him there.

Q. How long did he remain in Mt. Sinai? A. I think he remained there till about August.

20

Q. Then where did he go? A. We transferred him back to the Barnert Hospital.

Q. There he remained until he died on November 2, 1928? A. He remained there until he died, November 2nd.

Q. How often did you visit him there in that time, from the time he came back, April 28, 1927, to the date of his death on November 2, 1928? A. I should say that I have visited him every day, sometimes twice and three times a day, but—unless sometimes when I was away for a couple of days on a week-end, that is the only time I missed, otherwise I was there every day without fail.

30

Q. In New York how often did you visit him? A. In New York I seen him every afternoon.

Q. At Mt. Sinai? A. Mt. Sinai Hospital.

Q. Can you tell us anything with reference to his condition, Mr. Katz?

40

Jacob Katz. Called by Plaintiff. Direct.

Mr. Carpenter: That is a medical matter. We had the doctors here.

Mr. Santorf: I will withdraw the question.

Q. I think you were the one that made all the arrangements just as you have stated, for hospitals and so forth? A. Yes.

10 Q. What did you do with reference to the bills, if anything? A. Well, when the bills were presented they were presented to Hyman Sussman at the time when he was able to, he used to make his own checks, so I just saw that he paid, so I stayed off.

Q. Then, when he was not able to? A. When he was not able to, either my sister paid or I paid.

20 Q. At whose request? A. Well, always the bill—at his request.

Q. You mean at Hyman's request? A. At Hyman's request, and sometimes when he could not do it I saw to it that either she paid or I paid.

Q. Do you remember the amount of the hospital bill in Barnert Hospital? A. Well, this was the last bill. That was paid after death.

30 Mr. Carpenter: I want to object to that, if your Honor please, for this reason, that it appears at this time that this man was suffering from cancer, and cancer is not a natural and probable result of this accident, and therefore it is improper to attempt to prove or to prove that this amount of expenditures was made necessary by reason of the cancerous condition.

The Court: Is that the only ground?

40 Mr. Carpenter: That is the only reason—and furthermore, any payments made by this man, his brother-in-law, Mr. Katz, I submit are not recoverable in the case of the administratrix.

Jacob Katz. Called by Plaintiff. Direct.

The Court: Well, I do not think that was the question. I think the question was what the hospital bills were, the amount.

Mr. Santorf: That is the question, what was the amount of the hospital bill.

The Court: Yes. I will overrule the objection and allow you an exception.

Mr. Carpenter: Thank you. 10

Q. Do you remember what the amount of the hospital bill was? A. This was the last item of \$1,042.90, but there were other items which the bills and checks will prove there.

Q. The last bill was \$1,042.90? A. Yes.

Q. Was that paid by you? A. Yes.

Q. At whose request, if any? A. My sister's. He was dead at the time this was paid. 20

Mr. Santorf: I offer that check.

Mr. Carpenter: I object.

Q. This is your check, isn't it, of course, in payment of the bill? A. Yes.

Mr. Santorf: I offer the check—a bill actually paid by this person at the request of the administratrix. 30

The Court: I don't know whether the check itself is evidential.

Mr. Santorf: If there is any doubt about it I will withdraw it. I have got the amount. Here is the check.

The Court: I won't admit the check.

Q. Do you remember the amount of the Mt. Sinai bill? A. I don't remember the amount, but they were all paid. 40

Jacob Katz. Called by Plaintiff. Direct.

Q. If I show you the bill (handing witness a paper)? A. Yes; these are all mine.

Q. How much is the first one? A. \$147.

Q. When? A. July 31, 1928.

Q. The next one? A. July 24, 1928, \$147.

Mr. Carpenter: Same objection.

10 The Court: Yes.

Q. Give the Judge the date of the second one. A. July 24, 1928, Mt. Sinai Hospital, \$147.

July 16, 1928, Mt. Sinai Hospital, \$147.

July 9, Mt. Sinai Hospital, \$147.

July 3, 1928, Mt. Sinai Hospital, \$147.

June 25, 1928, Mt. Sinai Hospital, \$119.

June 18—well, that is Dr. Howard Lillienthal.

20 Q. Never mind that. A. We do not want that. June 18, Mt. Sinai Hospital, \$119. Want me to leave Dr. Lillienthal's check out?

Q. I guess that is all with reference to Mt. Sinai. A. Yes.

Q. Dr. Lillienthal, how much was paid to him for the operation upon Mr. Sussman?

30 Mr. Carpenter: Same objection; that is an operation for cancer and no proximate or probable cause between that and the accident.

The Court: Well, I suppose when we argue that matter you prefer to do it privately, won't you?

40 Mr. Carpenter: I have submitted my authority to you, and it is on the basis of that authority that I am making the objection to save the record. If you want to hold it off to the end of the case, that is all right. (Side bar discussion, not taken by reporter.)

Jacob Katz. Called by Plaintiff. Direct.

Mr. Carpenter: The same question will arise later. The Court says the question will be allowed and an exception given to not only this but all bills on the same line.

The Court: Yes, on the grounds on which you have already stated.

Mr. Carpenter: Yes, under the Maglioni case.

10

Q. Give us the amount of Dr. Lillienthal's bill.
A. June 18, 1928, Dr. Howard Lillienthal, \$285.

Mr. Santorf: I offer the checks. I assume there will be the same objection.

Mr. Carpenter: Same objection, and there will be the same ruling?

The Court: Yes.

Mr. Santorf: I ask an exception.

20

Q. Did you ever see Mr. Sussman's signature, Mr. Katz? A. Yes.

Q. I show you a certain paper writing; is that Mr. Sussman's writing and his signature? A. Yes.

Q. They are checks for what? A. Edith Seaman, \$42. This girl was a nurse.

Q. In fact, all those checks are for nurses? A. Yes. Ellen S. Jones, \$42, January 28.

30

The Court: What is the date, now? What is the first one?

A. First one was January 9, 1928, Edith Seaman, \$42.

That is the first one.

This has no date but January, 1928, Ellen S. Jones, \$42.

January 23, 1928, Edith Seaman, \$42.

40

Jacob Katz. Called by Plaintiff. Direct.

- January 17, 1928, Edith Seaman, \$42.
 January 23, 1928, Ellen S. Jones, \$42.
 January 30, 1928, Edith Seaman, \$42.
 January 17, 1928, Miss Jones, \$42.
 February 15, 1928, Edith Seaman, \$36.
 June 4, 1928, Edith Seaman, \$42.
 June 11, 1928, Edith Seaman, \$42.
 10 June 11, 1928, Margaret McDonald, \$36.
 June 5, 1928, to Margaret M. Dogels, \$42.
 August 20, 1928, E. Seaman, \$19.
 August 30, 1928, L. Esterman, \$42.
 August 30, 1927—must have been a mistake.

Mr. Carpenter: Is this perforated stamp, "Paid," in 1928?

The Witness: No, 1927.

- 20 A. Well, August 30, 1927, Mrs. Harvey, \$7. Must have been a note.

Mr. Carpenter: You don't know what it is for?

The Witness: No. Maybe a day nurse or a night nurse.

Mr. Carpenter: Let us find out what that is.

- 30 Mr. Santorf: We will take it out. Will your Honor cross that last item out?

The Court: Cross the \$7 item out?

Mr. Santorf: Yes, cross it out. He says he doesn't recall the person.

- 40 A. August 24, 1928, Ethel Eleanor, \$42; August 30, 1927, Viola S. Provost, \$14 (that is a nurse—one of our nurses); August 30, 1927, E. Benshoff, \$14; August 21, 1928, Miss L. Estherman, \$42; August 18, 1928, Libbie Estherman, \$42; September

Jacob Katz. Called by Plaintiff. Direct.

3, 1928, L. Estherman, \$18; September 7, 1928, Ethel Eleanor or Ellens, \$72; September 21, 1928, Ethel Ellens, \$84; September 22, 1928, Miss Provost, \$42; September 7, 1928, Miss Hartley, \$12.

Q. Here is one more of your own, Mr. Katz. A. August 16, 1928, Edith Seaman, \$44.50.

Mr. Santorf: I offer the checks. 10

Mr. Carpenter: Same objection to the lot of them.

Mr. Santorf: Same objection noted.

(Bundle of check marked Exhibit P-4.)

Q. You have the checks of Mr. Sussman? A. Yes.

Q. Do you recognize the signature? A. Yes.

Q. What are they for? A. For various items. 20

Q. Who are they to? A. Barnert Hospital, Dr. Roemer, Dr. Schulman, Dr. L. G. Shapiro, Dr. H. Wassing.

Q. Now, itemize them for his Honor and the jury. A. June 1, 1927, Dr. Roemer, 10; July 10, 1927, Paterson General Hospital, \$3; September 13, 1927, Barnert Hospital, \$89; Dr. H. Wassing—oh, October 8, 1927—Dr. H. Wassing, \$30; March 12, 1928, Barnert Hospital, \$500; March 26, 1928, Dr. Schulman, \$48; September 11, 1928, Dr. L. G. Shapiro, \$10. 30

(Bundle of checks offered in evidence and marked Exhibit P-5.)

Q. Immediately when he came back from Connecticut, Mr. Katz, on April 28, 1927, did you see him at his house? A. Yes.

Q. Did he complain of any pains? A. Yes. 40

Q. Where?

Jacob Katz. Called by Plaintiff. Cross.

Mr. Carpenter: I object. That is hearsay, if your Honor please.

Mr. Santorf: I will withdraw it. That is all.

CROSS EXAMINATION BY MR. CARPENTER:

10 Q. Mr. Katz, when you arranged for your brother-in-law at Mt. Sinai Hospital I see you arranged a private room for him. He had private ward B? A. Yes.

Q. You paid all or practically all of these bills over there, didn't you? I mean, at that hospital. A. Yes.

Q. Did you make the arrangement yourself with Dr. Lillienthal? A. Yes.

20 Q. You paid his bill yourself? A. I paid.

Q. Did you recognize that hospital bill in New York as your own obligation? A. Well, the question of obligation did not enter with me. I want him to get well.

Q. Did you tell him you were going to pay the bills yourself over there? A. Who.

Q. Did you? A. The doctor?

30 Q. Did you tell your brother-in-law that you were going to have him go over there and be cured and you were going to pay the bills? A. I never conferred with him on that subject.

Q. But as the bills came in I notice you gave your own check in payment of them? A. Not all. Some of them he paid.

Mr. Santorf: This batch.

A. Not to the Mt. Sinai Hospital.

40 Q. I am speaking of Mt. Sinai. A. No; I paid it.

Jacob Katz. Called by Plaintiff. Cross.

Q. I am only speaking about Mt. Sinai. A. At Mt. Sinai I paid everything.

Q. You never asked your sister to repay that, did you? A. No; I have not taken this matter up.

Q. You never asked your brother-in-law to pay that? A. No; I have not taken this matter up with him at all.

Q. Are you still president of the board of trustees of Barnert Memorial Hospital? A. Yes. 10

Q. You have been for a long while, haven't you? A. Yes.

Q. How many years? A. Three years. I have been on the board long before.

Q. Do you know when your brother-in-law went on his vacation that he took in the summer after this accident? A. I don't know. Somewheres up in the mountains. 20

Q. He was away about how long, three or four weeks? A. I don't know.

Q. Well, between April, when the accident happened, and the time he went away on his vacation, did he look after his business at all? A. Well, I really don't know, because as far as the business, I have not looked after his business.

Q. No. I mean, did he look after his own business between the date of the accident and this time he went away on his vacation in 1927? A. Oh, no, he had not attended to any business. I just told him to look after himself. 30

Q. I am referring now— A. After the accident.

Q. Right after the accident. After he came back from the vacation that he went to the mountains to take—do you know what month it was? Was that July or August, 1927? A. Must have been the latter part of July. 40

Jacob Katz. Called by Plaintiff. Cross.

Q. It was shortly after he came back from that vacation, within a few weeks, that he went to the Barnert Hospital for the first time? A. Well, he was taken to the Barnert Hospital.

Q. Yes. A. From the General.

Q. From the General. How long was that occasion after his return from his vacation? A. I don't remember. Must have been a couple of weeks—
10 three weeks. I couldn't remember the exact time.

Q. What was he doing during that three weeks, do you know? A. He was home.

Q. Not all the time, was he? A. As far as I know, he was home all the time, because whenever I came up he was home. He said he could not go out.

Q. You did not go up to his house during business hours? A. I used to run up in the morning.
20

Q. You are a pretty busy man? A. That is true, but I took the time. He was not feeling well. That was not every day.

Q. Don't you know that following his return from that vacation he did attend to some of his business affairs, until he had that occasion to go to Barnert Hospital on August 28? A. Well, I suppose he attended to most through the telephone, that is as far as I know.

Q. He did not do any manual labor, anyhow? A. Not after the accident.
30

Q. His business was this general yarn house, wasn't it? A. Yes.

Q. Was he the owner of that? A. Yes.

Q. That was not a corporation, was it—trade name, wasn't it? A. I don't know.

Q. You were not interested in that at all? A. I was not interested in that.

Q. I guess that is all.
40

Regina Sussman. Called by Plaintiff. Direct.

MRS. REGINA SUSSMAN, sworn.

DIRECT EXAMINATION BY MR. SANTORF:

Q. Hyman Sussman was your husband, was he not, Mrs. Sussman? A. Yes, sir.

Q. How was he before the accident, Mrs. Sussman? A. Very healthy. 10

Q. Was he a good eater? A. Good eater, and very good man.

Q. How did he appear to you, good health? A. Good health, never be sick, never any doctor, never hurt himself much.

Q. After the accident? A. After the accident I have got too much trouble, all sick.

Q. Did he suffer pain? A. Oh, yes.

Q. How long was he home after the accident before he went away? A. Four weeks. 20

Q. Then he went away? A. Yes.

Q. When did he come back? A. I can't tell the date.

Q. Do you remember when he was operated on by Dr. Bender? A. By Dr. Bender, yes.

Q. Did you visit him in the hospital? A. Oh, every day—a whole day, not every day.

Q. Did he suffer much pain? A. Oh, I can't see the pain, so— 30

Q. Mrs. Sussman, there were certain items that you paid in cash? A. Yes.

Q. Do you remember them, without showing them to you? A. Yes, sure.

Mr. Carpenter. You have the receipts there. I am not going to make it necessary for you to go through all them.

Mr. Santorf: Just those few that were receipted. 40

Regina Sussman. Called by Plaintiff. Direct.

Mr. Carpenter: I will take a look at them and save you that trouble. These show for themselves, don't they? These are all nurses.

Mr. Santorf: I will just offer these with the consent of Mr. Carpenter, without having Mrs. Sussman testify to them.

(Bundle of checks marked Exhibit P-6.)

10

The Court: What is the total?

Mr. Santorf: \$186.

The Court: What were they for, generally?

Mr. Santorf: Nurses.

Q. Just before the accident, Mrs. Sussman, did your husband lose appetite? A. No.

Q. Did he eat good? A. Very good; a big eater. After the accident don't eat so much good.

20

BY THE COURT:

Q. How old are you? A. Me? Forty.

Q. How old was your husband? A. Thirty-eight.

Q. Are there any children? A. Two.

Q. Who are they? A. Herbert Sussman.

Q. How old is he? A. Fifteen, but the little one ten.

30

Q. How old is she? A. Muriel, ten.

Q. Are they living now? A. Yes.

BY MR. SANTORF:

Q. Mrs. Sussman, just before the accident, prior to the accident, did your husband give you any money each week? A. Oh, yes.

Q. How much did he give you each week? A. \$100 a week.

40

Regina Sussman. Called by Plaintiff. Cross.

Q. How long before the accident did he give you \$100 each week, for one year or two years? A. Oh, a few years.

CROSS EXAMINATION BY MR. CARPENTER:

Q. Just talking business, that \$100 a week was to pay all the expenses of running the family, wasn't it? A. What? 10

Q. That \$100 a week paid the expenses of the running of the house? A. The house, the family.

Q. That was for the board of your husband as well as yourself, his food and his room, as well as for the rest of you? A. Yes.

Q. Were any of his clothing purchased out of that \$100 a week? A. What did you say?

Q. Was any of his clothing purchased out of that \$100 a week? A. His clothing? 20

Q. Yes. A. Well, sometimes I bought him something; I can't say all.

Q. You can't say what they are? A. Pardon me?

Q. You don't know how much that amounted to a week? A. Well, I got \$100; my husband gave me \$100 and I—

Q. You don't know how much of that money you spent for him? A. No, I can't tell.

Q. Are your two children in school now? A. Yes. 30

Q. Public schools in Paterson? A. The boy is in the high school.

Q. And the girl? A. The girl in public.

Q. What grade is she in? A. 4-B.

Q. What grade is the boy in? A. The second year.

Q. Second year high school? A. Yes.

Q. Is it your intention to put him to work when he graduates from high school or is he going to some trade school or what? A. I can't tell. 40

Regina Sussman. Called by Plaintiff. Cross.

Q. No plans for him? A. I am not planning now.

Q. Is he a good student? A. Oh, he is a good boy.

Q. Is he a good student? I know he is a good boy. A. Well, sometimes.

Q. Part of the time he is a good student and part not? A. Well, you know, the boy. If the father
10 was here he would be better.

BY THE COURT:

Q. What clothing did you buy for your husband? Did you buy him any suits of clothes out of that \$100 or did you buy him an overcoat? A. I buy him an overcoat and I buy a suit.

Q. Out of the \$100? A. Yes.

Q. How often would you buy him a suit out of that \$100 a week? A. Well, I can't tell.
20

Q. Once a year or twice a year or three times a year? A. I can't tell. Sometimes I buy every year, every few months, and sometimes I get \$100 and I pick out.

Q. Buy him shirts and neckties? A. Yes.

Q. And socks and shoes? Buy him shoes, too, out of that? A. Yes.

BY MR. CARPENTER:

Q. By the way, out of that \$100 did you pay any
30 money into a building and loan association or any life insurance? A. Well, believe me, I don't pay building and loan.

Q. He paid that out of his own pocket? A. Yes.

Q. Did you pay any insurance out of this \$100 a week? A. No, I can't. I don't know—no.

Q. I mean, only what you did. I am only asking what you did yourself. You did not pay anything like that? A. No. Some time my husband is not
40 home I pay. The bills come.

*Herbert Sussman. Called by Plaintiff. Direct.
Motion for Non-Suit.*

HERBERT SUSSMAN, sworn.

DIRECT EXAMINATION BY MR. SANTORF:

- Q. You are a son of Hyman Sussman? A. Yes.
 Q. That was your mother just on the stand? A. Yes. 10
 Q. How old are you, Herbert? A. Fifteen.
 Q. Go to school? A. Yes.
 Q. What school? A. Eastside High.
 Q. Paterson? A. Yes.
 Q. How was your father before the accident on April 21, 1927, with reference to what you observed about his health? A. He was in perfect health.
 Q. Ever complain of any pains? A. No, sir.
 Q. What kind of an eater was he, Herbert? A. He ate all right. 20
 Q. Did he eat good? A. Yes, sir.
 Q. Did he ever lose any appetite prior to the accident? A. No, sir.
 Q. After the accident how was he? A. Well, sometimes he did not eat at all and other times he did not eat much.
 Q. That is all.

Mr. Carpenter: No cross examination. 30
 Plaintiff rests.

MOTION FOR NON-SUIT.

Mr. Carpenter: If the Court please, I respectfully move for a non-suit in both these cases for the following reasons:

First, the death of the deceased, Hyman Sussman, was not the natural and proximate

40

Motion for Non-Suit.

result of the accident mentioned in the complaint.

10 Second, the natural and proximate cause of the death of Hyman Sussman was cancer. The proofs show it is impossible to determine either the cause of cancer or when it originates in the body or when it originated in the body of Hyman Sussman or what caused it in this case to originate in his body.

Third, Hyman Sussman was on a joint venture with the defendant at the time the accident happened, and any negligence of the defendant, if any was proved, is attributed to the plaintiff.

20 Fourth, the defendant was not guilty of any negligence which was the proximate cause of the accident or the death of Hyman Sussman.

30 Fifth, because it now appears from the testimony of Mr. Glicksman that the deceased, Hyman Sussman, was himself guilty of negligence which contributed to the happening of the accident, because he remained in the car while it was driven for thirty-five miles or thereabouts, from Providence to the scene of this accident, running all the time between forty and fifty miles an hour; he made no attempt to get out of the car; he made no attempt, apparently, to protest in a way that was effective, despite the fact that a few miles before, according to the undisputed testimony, his car stopped, momentarily, it is true, at a place where they looked at a sign-board to get the direction toward the destination they were going.

40 (Discussion.)

The Court: Well, of course, there is great doubt in my mind, and for the present I am going to deny the motion. You may proceed with the defense and then you can renew your motion later and I will give it further consideration in the meantime. I will allow you an exception, Mr. Carpenter.

Mr. Carpenter: Thank you very much.

(Recess to 1:40 o'clock, P. M.)

10

Afternoon Session, 1:40 P. M.

DEFENDANT'S TESTIMONY.

Mr. Kuebler: I would like to read the testimony of Dr. S. B. Overlock, of Putnam, Connecticut, taken before M. H. Geissler, Commissioner of the Superior Court of Windham County, Connecticut, by consent of the other side.

20

(The testimony of Dr. Overlock was then read to the jury as follows:)

"Deposition of S. B. OVERLOCK, M. D.

"APPEARANCES:

30

"For the plaintiff: LOUIS SANTORF of WARD AND MCGINNIS:

"For the defendant: CARL S. KUEBLER of MC-
DERMOTT, ENRIGHT & CARPENTER.

40

Deposition of Dr. S. B. Overlock. Direct.

"In accordance with a stipulation in the above entitled causes, entered into by the attorneys therein, at Putnam, Connecticut, on Saturday, May 17, 1930, before me, the undersigned, M. H. Geissler, a Commissioner of the Superior Court of Windham County, within and for the State of Connecticut, S. B. OVERLOCK, M. D., did appear and being duly
 10 sworn, did depose and say:

"DIRECT EXAMINATION BY MR. KUEBLER:

"Q. Doctor, you are a practicing physician in the State of Connecticut? A. Yes.

"Q. And have been for how many years? A. I have been in Connecticut for thirty-six years.

"Q. You are associated with any hospitals? A. The Day-Kimball at Putnam, as surgeon in chief.
 20

"Q. Did you have occasion to examine Hyman Sussman on April 21, 1927? A. I did.

"Q. And did you see him when he first came into the hospital? A. Yes, immediately afterwards.

"Q. You made a physical examination of him at that time? A. Yes.

"Q. Can you tell what injuries he had? A. A moderate shock and various contusions and abrasions over various parts of his body, all superficial.

30 "Q. Any other visible conditions? A. No.

"Q. What were his subjective symptoms at that time? A. His subjective symptoms were complaining of pain in no definite location.

"Q. In examining him, Doctor, can you tell us what parts of his body the abrasions were on in particular? A. I cannot at this date tell the particulars. I remember the extremities.

"Q. By that you mean his arms and legs? A. His arms and leg. He had various scratches and
 40 abrasions.

Deposition of Dr. S. B. Overlock. Direct.

"Q. Was he confined to his bed in the hospital?

A. I think he was, for about three days.

"Q. What did you do for him? A. There was nothing. He was given tetanus antitoxin as a prophylactic, which is always given for a man in his condition.

"Q. What was the purpose of that? A. It is a routine procedure to prevent lockjaw, if there are superficial wounds. 10

"Q. Any wounds large enough to require suture? A. No.

"Q. Anything else administered to him? A. Nothing except something for his bowels. Cascara for his bowels.

"Q. Were any X-rays taken? A. His subjective symptoms did not warrant the supposition that there were any injuries except those apparent on the surface of the body. 20

"Q. Did you take X-rays? A. Yes.

"Q. Of what parts? A. April 22, X-rays were taken of the spine and lower ribs.

"Q. Were the X-rays of the lower ribs taken of both sides? A. Yes, according to the statement on this record. The large X-ray picture would cover the ribs and spine on both sides.

"Q. Did you take the picture, Doctor? A. No.

"Q. Were they taken under your direction? A. Yes. 30

"Q. And were you present when they were taken? A. Yes.

"Q. The X-rays, are they in the hospital now? A. It has been two years. I don't know. We keep all those things two years and then throw them away unless something comes up. I don't know whether they are kept or not. You will have to ask them out there. 40

Deposition of Dr. S. B. Overlock. Cross.

"Q. Did you look at the X-rays? A. Yes.

"Q. What were the findings on the X-rays, Doctor. A. All negative.

"Q. Is that all the X-rays that were taken? A. Yes.

"Q. When was he discharged from the hospital? A. April 26.

10 "Q. What was his condition at that time? A. Except for being lame and sore, there was nothing showing.

"Q. Was there any injury at this time to any part of the abdomen? A. No, he had no injuries except what were included in that general statement. He had no such injuries.

"Q. In your opinion, the injuries received were of a superficial nature? A. Yes.

20 "Q. Did you get a history of him when he came to the hospital, Doctor? A. I don't think so by the looks of this here.

"Q. You did not, personally, get a history of him? A. No.

"CROSS EXAMINATION BY MR. SANTORF:

"Q. How long did you examine him? A. What do you mean? When he came in?

30 "Q. Yes. A. Probably half an hour.

"Q. Do you know anything about an ilio-caecal abscess? A. Where?

"Q. On him? A. No.

"Q. Do you know whether or not he had one? A. No. I know he did not have one at that time.

"Q. Do you know anything about bruises on his abdomen? A. He had various bruises on his body, but he had nothing which amounted to a traumatic abdomen.

Deposition of Dr. S. B. Overlock. Redirect.

"Q. Did he have anything which pointed to a traumatic abscess to the ilio-caecal? A. No.

"Q. I suppose you mean saying having bruises over his entire body would cover it? A. That would cover the whole thing.

"Q. He was pretty well banged up? A. Yes. He had a concussion when he came in, but that cleared up immediately.

10

"Q. When he left the hospital he was still lame, wasn't he? A. He was still stiff and sore.

"Q. Doctor, of course you don't know what the result was of these injuries, after he left the hospital? A. I know nothing about it.

"Q. What you are testifying to is what you knew when he entered this hospital? A. All I am testifying to is what his condition was, as confirmed by the X-ray, which was to examine his frame, his spine and pelvis, which was entirely negative.

20

"Q. You don't know what the result of his injuries was after he left here? A. No.

"Q. They may have resulted in something you know nothing of? A. No, but I don't know what they could have resulted in.

"REDIRECT EXAMINATION BY MR. KUEBLER:

"Q. Doctor, as a result of his examination, was there anything to lead you to believe that this man had suffered a fracture of the skull? A. No. Nothing more than a concussion.

30

"Q. Did he show any symptoms of any injuries to his eyes? A. No.

"Q. To his hearing? A. No.

"Q. Fractures of his arms or legs? A.No.

"Q. Fractures of his hands or feet? A. No.

"Q. Show any injury to his spine? A. No.

40

Deposition of Dr. S. B. Overlock: Cross.

"Q. Did he complain of any pain in his spinal region? A. Complained only of pain in general.

"Q. Any evidence of any injury to his internal organs? A. No.

"Q. Any indication of injury to his ankles, in regard to spraining or spreading? A. No, nothing at all.

10 "Q. Did he suffer from any marked loss of blood? A. No.

"Q. Was there any bleeding at all? A. Only the superficial bleeding from the contusions and abrasions where skin was broken in various places.

"Q. Did you find any trace, in your examination, of any traumatic ilio-caecal abscess? A. No.

20 "Q. Assuming that this man died on November 2, 1928, which would be the year after the accident, and the cause of his death was pronounced to be due to carcinoma of the bowel at the cecum, is there anything in your knowledge of this case and experience that you had with it that would lead you to believe that the accident could have caused the carcinoma of the bowel? A. No.

"CROSS EXAMINATION BY MR. SANTORF:

30 "Q. Doctor, do you recall the man distinctly? A. Yes, fairly well, after looking him up. He was one of scores that drift in here.

"Q. There was nothing to call your attention particularly to him? A. No, but I remember distinctly. I refreshed my memory by the chart. I remember he was in the men's ward and was one of those fellows who are awfully frightened and worried about himself all the time.

40 "Q. You would not want to say that everything that you have told us here was the only thing that

Dr. G. W. Finke. Called by Defendant. Direct.

was the matter with him? A. The only thing that was apparent, yes.

“Q. Couldn’t there have been something else? A. Why, keep the man here a month and go over him every day, you might find some chronic disorder, but nothing that had to do with this accident.

“Q. He was suffering from quite a bit of shock? A. Yes, he had a moderate shock. 10

“Q. And he had a concussion of the brain? A. Yes.

“Attest,

“(Signed) M. H. GEISSLER,
“Commissioner of the Superior Court of
Windham County, within and for the
State of Connecticut.”

20

Mr. Santorf: By consent of counsel the deposition of the nurse is not being read, because it is negative. The deposition was taken up there, but she said she did not know anything about it.

Mr. Kuebler: She remembered nothing, so we did not call her.

30

DR. GEORGE WILLIAM FINKE, SWORN.

DIRECT EXAMINATION BY MR. KUEBLER:

Q. Doctor, you are a practicing physician of the State of New Jersey? A. I am, sir.

Q. You are a graduate of what medical institution? A. New York University and Bellevue Hospital Medical College. 40

Dr. G. W. Finke. Called by Defendant. Direct.

Q. When were you admitted to practice in the State of New Jersey? A. 1904.

Q. You are now connected with some institutions? A. I am, sir.

Q. What institution or institutions? A. I am connected with the Hackensack Hospital and with the Bergen County Isolation Hospital.

10 Q. What is your position in the Hackensack Hospital? A. As the chief surgeon of the Hackensack Hospital and director of the surgical division.

Q. Since your admission to the practice of medicine have you taken any post-graduate work? A. I have.

Q. Where have you taken post-graduate work? A. I have been in Europe, I have been with the Medical Center, that is, the Presbyterian Hospital of New York City, I have been with the Mayo Foundation, Rochester, Minnesota.

20

Mr. Santorf: If it will save time, I will admit the doctor's qualifications.

Mr. Kuebler: I would like them on the record.

Q. What kind of medical work have you been specializing in in this period of time? A. My work is solely surgical work.

30

Q. When you were in Europe what institution or what university were you connected with? A. I was in Edinburgh, or in the France and American Hospital.

Q. What did you study there, Doctor? A. Surgery.

Q. You have been the chief surgeon of the Hackensack Hospital for how long a period of time? A. For six years.

40

Dr. G. W. Finke. Called by Defendant. Direct.

Q. Prior to that were you also connected with the hospital? A. I was attending surgeon at that time.

Q. How long were you attending surgeon? A. Fifteen or sixteen years.

Q. During that period of time, Doctor, in your work in the hospital, have you had contact with cancer cases? A. I have, sir. 10

Q. Did you have contact with cancer cases in your studies? A. I did, sir.

Q. Did you lecture in any medical school, Doctor? A. I was connected with the Columbia University, that is, as a teacher of surgical diagnosis, to the students of Columbia University.

Q. Are you so connected now? A. No, sir, I am not.

Q. You were for how long a period of time? A. I was there for a period of two years in post-graduate work directly with the institution. 20

Q. Instructor in what subject? A. Surgical diagnosis.

Q. Doctor, in your position as chief surgeon of Hackensack Hospital do you come in contact with many cases of traumatism? A. We see many cases of traumatism.

Q. Just what is traumatism, Doctor? A. Well, traumatism may be defined as injury; blows, bruises, abrasions are traumatic. Fractures are traumatic—covering any injuries, practically, is traumatism. 30

Q. Now, Doctor, assuming that the deceased in this case, Hyman Sussman, was in an automobile accident on April 21, 1927, and received injuries consisting of a shock, concussion, bruises and lacerations to various parts of his body, particularly his extremities, that is, his hands and legs, and that 40

Dr. G. W. Finke. Called by Defendant. Direct.

according to the testimony of the doctors who treated him at the hospital in Putnam, Connecticut, where he was taken the day of the accident and where he remained from April 21 to April 26, he did not have traumatic abdomen or any evidence of injury to his abdomen; that he returned to his home after leaving the hospital, rode in an automobile from Providence, Rhode Island, to his home in Paterson; that on April 28, a week after the accident happened, he was seen by his doctor, Dr. Joelson; that he complained of pains in his head, pains in his back and abdominal pains, and complained of dizziness; that he was in bed for a period of time, confined to his home; that then he visited the doctor's and that at the doctor's office he complained of pains in his appendix area, pains on the left side of his abdomen, and pains at the end of the sternum, and that the doctor felt little nodules in his abdomen about three or four months after the date of April 21, 1927, and that on January 1st or New Year's Day he developed what appeared to his attending doctor, Dr. Joelson, to be an acute attack of appendicitis; that he was taken to the hospital and operated on on January 2nd, that the operation developed that the appendix was bound down by dense adhesions, that the adhesions were an inch to an inch and a half in diameter and covered a cubical space of about seven inches, that is, figuring in three directions, and that the appendix was adherent to the back of the abdomen; that when they operated the pus oozed out, and that the abdomen was in such a condition of pus that it was impossible to remove the appendix, according to the testimony of Dr. Bender who performed the operation, and that a tube was inserted for drainage, which was changed from time to time; that he developed

Dr. G. W. Finke. Called by Defendant. Direct.

a foescal fistula; that he was readmitted to the hospital on May 28, 1928, was operated upon, and at which time a tumor-like mass was found in the region near the appendix and upon pathological examination it proved to be an adeno carcinoma; that on June 11, 1928, he was taken to Mt. Sinai Hospital in New York where ilio-colostomy and an osteomosis was performed; that the patient was removed to the Barnert Hospital and died on November 2, 1928, from carcinoma of the bowel at the coecum. 10

Assuming all these facts, Doctor, in your opinion, is it probable that any trauma he complained of on April 21, 1927, caused the condition from which he died? A. I feel that no mention of traumatism, that is, directly to his abdomen, and taking everything into consideration, I do not feel that it was the causative factor of his death, that is, traumatism. 20

Q. Now, Doctor, what causes cancer? A. We don't know the cause of cancer. Cancer has many theories, that is, as to cause, but the exact cause is not known, it is unknown.

Q. How many years have they been working on cancer, do you know, Doctor, to determine the causes? A. Cancer dates back ever since it was discovered, you may say, from the time as far back as Adam and Eve they found cancer and they have been working on it, especially so during the last twenty or twenty-five years, more so than ever before. 30

Q. What part of the body does cancer affect? A. It can affect practically all parts of the body.

Q. Well, it is a cellular condition? A. Yes.

Q. And results in some sort of abnormal cellular condition? A. Growth of new cells.

Dr. G. W. Finke. Called by Defendant. Direct.

Q. How do you discover, in the light of medical science, that a person has cancer, for instance, cancer of the caecum, such as this one? A. Let us state—can I state regarding a cancer of the caecum particularly?

10 Q. Yes. A. Rather a mass you can find in the abdomen, the mass confined to the right side, or at exploration, that is, at the time you open the abdomen, you can get a certain line on whether that is a cancer by its microscopic—that is, by looking at the particular tumor, that is, mass, present, and then what we do, we take a specimen of it and this specimen is sent to the laboratory, and our report we receive from the pathological laboratory, that is, a laboratory that takes that particular type of work.

20 Q. And that is the only way you have of definitely diagnosing a cancer? A. Yes. That is, by microscopic appearance, that is, by looking at it under a microscope directly.

30 Q. What is it that first makes you suspect a man has a cancer, Doctor? A. You ask me a question whereby a train of symptoms or things that it is rather hard to state. I have opened, that is, I have operated on patients who have given no symptoms of cancer whatsoever, and opened up their abdomen and found it had a great involvement, but have had no symptoms whatsoever—no loss of weight, nothing of that sort—and opened them up and have found that marked cancerous condition that has been going along for a period of time. Then we have the other patient who has pain—pain may be slight, pain may be severe, and we have to depend on its pressure directly on nerves and depend upon its location entirely.

40

Dr. G. W. Finke. Called by Defendant. Direct.

Q. You open up an abdomen in a case such as you have described, where there has been no definite diagnosis of cancer or no suspicion of it either, can you tell, when you open a cancer, how long that condition has existed? A. It is very difficult indeed to state how long a cancer has been actually present. Many of the cancers are insidious, that is, have been growing for a considerable period of time, then all of a sudden there is something acute comes, whereby they have some symptoms that should have immediate attention. For instance, we will take this cancer of the bowel, and gradually the lumen grows around, gradually and gradually, no symptoms whatsoever, and all of a sudden the man gets up an intestinal obstruction; we open his abdomen and find that he has a complete obstruction. What has happened? That circular growth on the inside of his bowel has gradually closed down until there is no lumen whatsoever and the result is his intestinal obstruction, and we operate on him and find his condition. 10 20

Q. Do you notice anything, Doctor, concerning the appetite of people who have cancer? A. The appetite in some of them is not affected at all, that is, they will eat perfectly well, they look perfectly all right, and eat well and have no trouble whatsoever, until something acute happens, and then they will have their troubles, but the appetite in a number of the cases is not altered at all. 30

Q. Now, is the caecum a common place for cancer to occur or is it an unusual place for it to occur? A. Cancer of the coecum is the most frequent cancer that we have of the gastro-intestinal tract, with the exception of the stomach. By that I mean starting at the mouth and going on down, we come to the stomach. The stomach is the only organ that we 40

Dr. G. W. Finke. Called by Defendant. Direct.

10 have probably more cancers than what we do of any other part of the gastro-intestinal tract. Let us go on with that. We come to the small intestines and have these cancers, and you come to the large intestines and have these cancers, and come down to the rectum. The most common cancer we have is cancer of the caecum, that is, cancer on the right side of the large intestine is the most frequent, with the exception of the stomach.

20 Q. Just where is the caecum? A. The caecum? Now, let us state the small intestine is where the fluid content of the bowel empties into the large intestine. The large intestine starts on the right side, goes up this way, across the abdomen, and then down. It is approximately five and a half feet in length. This large intestine, that is, the lumen of that intestine is large, as compared to the small intestine, I should say probably four to five times in diameter, and it is the starting of the large intestine. It is at that point where the small intestine empties its liquid content into the large bowel.

30 Q. How far would you say it is from the wall of the abdomen, from the exterior wall of the abdomen, or the outside? A. That, of course, depends upon the stoutness of the particular individual, some individuals having probably four to five inches in thickness; then we come to the muscular wall, and then there is several other small walls beneath, and I should say probably the distance of about four or four and a half inches in the average individual.

40 Q. How is it suspended there? A. It is suspended rather loosely, for instance—that is, the entire intestinal tract is suspended loosely. You take and you hit the abdomen, the natural tendency of the

Dr. G. W. Finke. Called by Defendant. Direct.

intestine is to jump out of the way. It is lubricated, you might say, by a fluid that is naturally in the intestinal tract, that is, naturally in the abdominal cavity, I meant to say.

Q. Doctor, referring to the question which I gave you in my long hypothetical question, can you tell us from your experience, your knowledge of surgery, whether in your opinion that cancer may have existed before April 21, 1927, or after April 21, 1927, or how it started? A. Taking a rather long hypothetical question that you put up before me, there is several things that I think possibly do impress me, and there was a possibility, that is, that this man may have had a cancerous condition at that time; there was a possibility that he may have had an acute appendicitis, then developed a cancerous condition on top of that acute appendicitis; and then comes the possibility—these are possibilities, that is, he may have had—

10

20

Mr. Santorf: I object. Of course, they are all objectionable.

The Court: Well, they do not hurt you if they are only possibilities, do they?

Mr. Santorf: Not in the least.

A. And there is the possibility it may have been an ulcerating cancer, anyhow, inside the abscess that was present.

30

Q. Now, it is possible that it started a month or two after the accident? A. Yes, it certainly could have.

Q. Is there any way of telling with any degree of probability when the cancer started? A. Absolutely not. You cannot tell.

40

Dr. G. W. Finke. Called by Defendant. Cross.

Q. Then, you cannot tell whether the cancer preceded the appendix condition or whether the appendix condition preceded the cancer? A. No, sir.

Q. Why is that? That is, why is it you cannot tell? A. In the first place, we do not know the cause of cancer. Cancer itself is rather insidious in many individuals, that is, insidious—it starts up and it will get along fairly well before they have any symptoms of it, and in that way symptoms are very important factors.

BY THE COURT:

Q. But you say they have it without any symptoms? A. Without any symptoms whatsoever, and at times symptoms are very important.

Q. That is all.

CROSS EXAMINATION BY MR. SANTORF:

Q. Doctor, is it not so that the best medical minds in the world differ on cancer? A. They do.

Q. Some of the most intelligent doctors and the best surgical men have differed on cancer? A. Yes, sir.

Q. Get very few doctors to agree, don't you, Doctor? A. Well, I would not say very few do, but I usually agree—the majority of them usually agree.

Q. You remember the example that surgeons hold before their classes of the ten women with reference to cancer cases, and they will point out that a blow to the breast of each one of those women, a certain number will not get cancer and a certain number will? A. I don't know that particular story, but that is possible.

Q. I mean, that is possible, isn't it? A. Yes.

Dr. G. W. Finke. Called by Defendant. Cross.

Q. Have you ever heard the example given a surgeon— A. This example you have stated? No.

Q. Yes. They use ten different persons? A. Yes.

Q. Compared ten different people? You have heard that done? A. Yes.

Q. In fact, you have done that in your class? A. Not particularly.

Q. With reference to cancer? 10

(Interruption.)

Q. In other words, Doctor, I can take ten women and give each and every one of those a severe blow upon the breast; some of them may get cancer from that blow; isn't that so? A. There is a possibility they may.

Q. And there is a probability, too, isn't there? A. No; I would not say there is a probability. 20

Q. Well, let's see if we cannot get it, Doctor. As you state, cancer is cellular? A. Yes, sir.

Q. A severe blow to an abdomen will start the cell, won't it? A. Well, it starts the cells on a certain amount of work, yes.

Q. It starts them off, doesn't it? A. Yet—not cancer cells.

Q. I mean, it starts cells that may eventually lead into cancer? A. No; I wouldn't say so. 30

Q. Then, we will say it starts cells off? A. I would say it starts the cells, dependent upon the blow, if it is a severe blow.

Q. Severe blow? A. Yes.

Q. Directly to the abdomen, would start the cells, wouldn't it? A. Well, I don't know exactly what you mean, start the cells.

Q. I mean it would start the cells working or enlarging? A. No, not directly. 40

Dr. G. W. Finke. Called by Defendant. Cross.

Q. What happens to a cell when it first begins, I mean with reference to cancer? A. What happens to it?

Q. Yes. A. It enlarges.

Q. It enlarges, doesn't it? A. Yes.

Q. This severe blow, a direct severe blow to an abdomen may do that? A. Well, the cell itself, if
 10 I can explain this—for instance, you are hit on the abdomen, you are hit anywheres, what takes place? There is a little bleeding out into the tissues or the tissues may become black and blue, and nature throws out certain cells in its reparation process, that is, naturally—the natural thing for nature to do is to throw out these repair cells, that is, this tissue itself exudates, throws out a hemorrhage and then gradually begins to absorb again.

Q. If it does not expel those cells and they remain in there, then what? I mean, suppose there is no opening and no bleeding? A. They do not remain in there. A reparative process takes place.

Q. Of itself? A. Of itself, naturally so.

Q. Of itself? A. Yes.

Q. In other words, take this hypothetical question: The man involved in this case was thirty-six, Doctor, very good health before, good health, never lost any weight, never lost his appetite, good eater,
 30 was riding in an automobile forty miles an hour and they approached a right angle curve and there is a bus coming in the opposite direction approaching that same curve, going at approximately the same rate of speed, and they both come together in a head-on collision at that rate of speed, at that curve, and this man in that accident receives a severe injury to his head, a direct severe blow to his abdomen. His attending physician said he could not have had cancer before—and I will tell you
 40

Dr. G. W. Finke. Called by Defendant. Cross:

the reason why later—he was taken to Day Kimball Hospital in Connecticut; he was removed to Paterson, I will say, a week later; he complained of these pains in the abdomen, continually so, the doctor advised him to go away; he was sort of a wreck at the time; he did go away, and he came back, and one day in August he was driving his automobile and he attempted to drive his automobile and became dizzy, and stopped it and got out, and he collapsed on the road and he was taken to the hospital, and there at that time the particular man who examined him was Dr. Wassing, the pathologist, and he found that there was pressure on the brain and gave him a lumbar puncture, relieved him a little bit temporarily, but did not do any good, gradually became worse and kept continually complaining of the pain in his abdomen, so much so that he became so bad on New Year's Eve, 1928, that he was taken to the hospital and by Dr. Wassing of Paterson, operated on. At the moment they cut him up he was so filled with pus that Dr. Bender told us he would not dare go any further, he could not go any further, the only thing they could do was insert a drainage system and sew him up again; they did that and he went back and he continued to complain of the pains in his abdomen, so much so that in May he was re-admitted to the hospital, operated on again, and they found this condition. He was taken to Mt. Sinai in New York and was operated on by Dr. Lillienthal; he returned to Paterson and died November 2, 1928, nineteen months after the injury, Doctor.

Before asking you to answer that question, may I ask you this: What is the longest duration of a cancer? A. What is the longest duration of a cancer? That is in my own personal experience, hav-

10

20

30

40

Dr. G. W. Finke. Called by Defendant. Cross.

ing seen, I remember a patient that had a cancer for four years, five years, that is, of the stomach; and another one had a cancer of the breast and went over about eight years.

Q. Cancer of the breast for eight years? A. Yes.

10 Q. Now, Doctor, it was not a continual cancer—I mean, a cancer cannot last eight years? A continual cancer of the breast does not last eight years? A. This case here did.

Q. Does not that remain dormant? A. It does not keep spreading rapidly.

Q. It is not always active, is it? A. No.

20 Q. Now, the answer to my hypothetical question. Do you think the accident had anything to do with it? Do you think it was probably one of the contributing causes to it or aggravated it or precipitated it? A. I do not think it was probable. I think there was a possibility of it.

Q. It may have precipitated it? A. What is that?

Q. It may have precipitated it or aggravated it? A. No; I would say still the possibility. I would not say it is probability, not at all.

BY THE COURT:

30 Q. Possibility of what? A. That is the possibility of the accident being the causative factor. That was your question, wasn't it?

BY MR. SANTORF:

Q. Yes. Would you say there was a probability of it being one of the contributing causes or contributing factors? A. No; I would say be a possibility.

40

Dr. G. W. Finke. Called by Defendant. Cross.

Q. Would you say there was a probability of it being any factor—this direct, severe injury, blow to the abdomen? A. No; I would say the possibility still.

Q. Exists? A. Yes.

BY THE COURT:

10

Q. Doctor, what did you mean when you were asked the hypothetical question by the defendant's attorney and you said in answer, "the fact that there was no traumatism to the abdomen and the other facts as you have given them to me, do not feel that the accident caused the cancer", or words to that effect? What did you mean, the fact that there was no traumatism to the abdomen? Why did you— A. I inferred—

20

Q. Did I understand you to say that? A. Yes. I inferred that in criticism to what Mr. Kuebler here and this gentleman read off these notes, that there was nothing there referable to any blow that he had directly in the abdomen.

Q. Then, if it happened there was a blow in the abdomen would that change your opinion? A. No—that is, I would say the possibility still—that is, not a probability at all.

30

BY MR. SANTORF:

Q. Doctor, conceding this blow to the abdomen and that on January 22nd it was diagnosed as traumatic in the abdomen, would that change it any? A. No, it would not.

Q. Even though it was a traumatism? A. Well, the possibility—I still stick to the possibility of things, but not the probability.

40

Dr. G. W. Finke. Called by Defendant. Cross.

Q. First you answered that without the traumatism, you said that there was a possibility? A. Yes.

Q. Now, with this traumatism being diagnosed—
A. I would say that still it is a possibility.

Q. It would increase that possibility in your mind? A. About the same.

Q. With it, though? A. Yes.

10 Q. Wouldn't it increase it a bit? A. No, sir.

Q. You would not? A. No.

Q. A traumatic blow? A. No. I say still the possibility, and I say it from this standpoint, that is, look at the number of blows we receive, that is, on a football squad.

Q. But you differentiate—

Mr. Carpenter: Let him answer.

20 A. For instance, on the football squad, you take our men that are banged around, that are kicked around and everything, those fellows do not develop cancers at all—that is, it is occasional.

Q. But they do? A. They do occasionally. It is rare. But they do not develop cancers. They say probable. All blows, you see, probably—women, just as you have said, the blows they receive on their breasts, and yet they do not develop cancer at all.

30 Q. Probably one out of ten would develop cancer? A. Well, in the natural course of life it seems that someone has to develop cancer, and it may fall to one of those individuals, just as you have mentioned.

Q. And it may be that one of those individuals on that football team, just as you have said, rare cases, but one of them may get it? A. There is a possibility of it.

40

Dr. G. W. Finke. Called by Defendant. Redirect.

Q. This man— A. We are all liable to it, sir, absolutely.

Q. That is all, Doctor.

REDIRECT EXAMINATION BY MR. KUEBLER:

Q. Doctor, a blow on a man's head causing a concussion, would that have any effect upon your opinion; in other words, would a blow to his head have any influence upon whether or not cancer developing in his caecum could come from that blow? A. I think there is no association there whatsoever, a blow on the head and a cancer of the caecum. 10

Q. A man had a blow to his head causing a concussion, if a cancer was to come in his system and there was a probability of the cancer coming from the blow, wouldn't it be more probable that the cancer would come on his head? A. That is probable, yes. 20

Q. Assuming that the blow was sufficient enough to cause a concussion? A. Yes.

BY THE COURT:

Q. Then, a blow would probably cause cancer in the head; is that your answer? A. No; I wouldn't say the blow would cause— 30

Q. You said probably? A. Yes; if the blow would cause cancer of the head at all.

Q. Then, I didn't understand your answer. A. Now, here, for instance, a man has a blow to the head, there is a possibility that he may—the big chance here and the majority of things in most everyone, that is, he would not have a cancer, but nevertheless if he did happen to get a blow on the head a year or two before, they would say that possibility exists, but it is not a probability. 40

Dr. Andrew C. Ruoff. Called by Defendant. Direct.

Q. I thought you said probability in your last answer, that is all. A. No.

Q. You said it is probable and I was wondering if that is what you meant.

Mr. Kuebler That is all.

10

DR. ANDREW C. RUOFF, SWORN.

DIRECT EXAMINATION BY MR. KUEBLER :

Q. Doctor, you are a practicing physician in the State of New Jersey? A. I am, sir.

Q. What medical school are you a graduate of, Doctor? A. I am a graduate from the Fordham University Medical College.

20 Q. When did you graduate? A. Back in 1917.

Q. When were you admitted to practice in the State of New Jersey? A. Why, I was admitted in the State of New York in the same month of my graduation, and I was admitted to practice medicine in the State of New Jersey in December of the same year, and I am also a member of the Medical Society of the State of New Hampshire, where I am admitted to practice.

30 Q. Where do you practice at the present time, Doctor? A. Union City, New Jersey.

Mr. Santorf: I will admit his qualifications.

Mr. Kuebler: I would like to qualify him.

Q. Are you connected with any institution, Doctor? A. Why, I am a graduate from Christ Hospital, Jersey City, also the Jersey City Hospital, and I am on the auxiliary staff of the North Hudson Hospital.

40

Dr. Andrew C. Ruoff. Called by Defendant. Direct.

Q. What kind of medical work do you specialize in, Doctor? A. Since 1918 I have devoted my time to the examination, diagnosis, and treatment of traumatic injuries.

Q. Doctor, during that period of time have you any idea how many cases of traumatic injuries you have received or examined? A. Why, during the first ten years of my practice I kept tabs on a number of cases I saw, and in that period I saw over thirty thousand traumatic injuries.

10

Q. Now, Doctor, during your period of practice have you had experience with cancer cases? A. In so far as they are related to trauma, no, because in all of the cases of trauma that I have treated, and at present I have seen over forty thousand, I have never been able to trace directly the relationship of cancer to the traumas sustained. I might say that the traumatic cases that I have treated involve every part, portion of the body.

20

Q. Doctor, did you hear the hypothetical question that I asked Dr. Finke a few minutes ago? A. I did, sir.

Q. Were you in the court-room? A. I was.

Q. Did you get the entire question or don't you prefer that I repeat the question to you? A. I think I have the substance of the question in my mind.

30

Q. Well, as long as you are satisfied, if you have all the points, otherwise I prefer to read it again.

The Court : He says he has.

A. I have the substance.

Q. Doctor, just assuming that state of facts, can you tell us in your opinion is it probable that any trauma he sustained on April 21, 1927, caused the condition from which he died? A. I would say that it is not probable.

40

Dr. Andrew C. Ruoff. Called by Defendant. Direct.

10 Q. Why do you say that, Doctor? A. Because in my own experience I have seen traumas to every portion of the human anatomy; I have seen compound fractures of very severe types, I have seen abdomens so traumatized that they required the removal, for instance, of the spleen, which is deeply seated in the left side of the upper abdomen; I have seen cases that required suturing of the intestines, for ruptured intestines following trauma, and in all my cases I have never yet been called upon to decide whether or not trauma was related with that, because none of them came to developing cancer.

20 Q. Now, Doctor, what is cancer? A. Cancer is what we normally describe as an insidious condition of the tissues of the body, either of the soft tissues or of the bony tissues, the cause of which is not known. There are innumerable theories that have been evolved as to causative factors.

30 Q. Have you explored on the hereditary theory? A. They have gone into the hereditary theory, and for a time folks thought they had discovered the hereditary trace. The reason for that was that in many instances it was found that numerous persons of the same family or family tree developed cancer. It was then decided that that was probably a coincidence. They went on a theory further of so-called embryotic origin, meaning that in the initial growth of the human being, the first nine months of formation of the human being, some cells of the body, for some reason or other, did not keep track with the normal evolution of the body development and that at some time during the lifetime of the individual these cells, of their own initiative, started to develop, so that we now had cells of an entirely different type than the tissue in which they were growing, so that the cancer cell invariably is

40

Dr. Andrew C. Ruoff. Called by Defendant. Direct.

of a different type of structure than the surrounding tissues where it is found. Then we had what was known as the chemical theory. The chemical theory worked on the principle of an irritation, on the theory that an individual would, for instance, burn a finger or a portion of the soft tissues of the body, and as a result of this burn or irritation a cancer developed. Experiments were made in reference to that, and that theory fell flat, because it was found that it was not tenable. Then, the other theory that evolved itself was the accident or trauma, and thousands of traumatic cases were studied, and it was there again found that where a trauma was supposedly related to the disturbance, it was usually by way of coincidence. The latest theory that has been evolved is that it is an infectious disturbance. They have not isolated all germs, but recently I have had occasion to talk to Dr. Colie of the Hospital for the Ruptured and Crippled in New York State. Dr. Colie has a series of about fifteen hundred cases. He has developed a serum known as the Colie serum, this serum works on the theory that there is some infectious organism in the human anatomy that for some reason or other sets up the disturbance known as cancer, and I saw one of Dr. Colie's end results following the injection of this Colie serum. The result was nothing short of marvelous with the serum, but Dr. Colie himself does not believe that he has discovered a cure, and the medical profession generally is not inclined to believe that he has, either. We are confronted with a disturbance that medical science does not know the cause of.

Q. Doctor, what is cancer age? A. The age of cancer is usually past middle life. However, I have seen a cell in the liver of a nine-months-old baby, from a malignant cancer that killed the baby.

Dr. Andrew C. Ruoff. Called by Defendant. Direct.

10 Q. About how long do they run, Doctor? A. How long does it take for a cancer to develop? So far as my research has led me into the subject of cancer, cancer being such a malignant condition, it has never been attempted to inoculate an individual with so-called cancer cells. The experiments, the best they have done, is to go to guinea pigs and small animals, and the results there are highly unsatisfactory, because in many instances cancer did not develop, and since the tissues of a low-type animal are entirely different from those of the human mechanism, it would not be a reliable index.

20 Q. From your own experience, is it possible to tell, looking at a cancer in an individual, how long that cancer has been in process of development? A. No. I know of one instance where an individual was never ill a day, was taken ill at two a. m. while seated at a card table playing cards, he was rushed to the hospital with an acute abdomen. It was thought that he had a rupture of a gastric ulcer, ulcer of the stomach, and his abdomen was opened up and they found a cancer of the pancreas. That man was known to me, and I knew that he had never made any complaints so far as I know of, and it was considered rather an odd situation. I know 30 another case where a man had had symptoms referable to the stomach, who became a vegetarian, who for a period of eight years was a vegetarian, who claimed he had never been ill one day in the eight-year period, who developed an acute abdomen with profound constipation and vomiting. After three days his abdomen was opened up. A cancer was found the size of two full-sized fists—cancer of the stomach—the cancer was so weighty it bore down to the lower abdomen, whereas the stomach is usually 40 in the upper abdomen, and the man was fed per rectum for six months, and died.

Dr. Andrew C. Ruoff. Called by Defendant. Cross.

Q. Doctor, in opening up an abdomen such as this, is there any way of telling how long that cancer has been in development? A. There is no way that I know of, nor that I have ever read of, of knowing.

Q. Could you, in the hypothetical case here, as depicted in the question which I asked Dr. Finke, and which you heard and answered, tell how long that cancerous growth, which they found in his intestines, had been there? A. I have no means of telling, sir. 10

Q. Have you made any observations, Doctor, as to a person's appetite who is subsequently taken down with cancer? A. We find that individuals who have cancer of the stomach, that is, cancer of the portion of the stomach that gets the food initially after it enters the intestinal tract—folks with cancer of the stomach, as a general rule, will have some type of disturbance with their appetites, and the reason there is that there is usually an unbalance of the normal gastric secretions; but when you go low down into your intestinal tract you are entering the portion of the intestinal anatomy where the gastric secretions have no part in the question of appetite. 20

Q. When you get in the caecum? A. That is correct. 30

Q. Then, does that affect the appetite? Would a cancer of the caecum in the process of development, before it became acute, affect the appetite? A. Physiologically there is no reason why it should.

CROSS EXAMINATION BY MR. SANTORF:

Q. Actually, Doctor? A. Not in my experience. 40

Dr. Andrew C. Ruoff. Called by Defendant. Cross.

Q. Did you ever hear of a case where it affected the appetite? A. Where it affected the abdomen?

Q. Appetite, in any degree? A. No.

Q. Never heard of a cancer case— A. Of the caecum?

Q. Carcinoma of the bowels. A. Of the lower bowel?

10 Q. Carcinoma of the bowel which at any time affected the appetite of the patient? A. Merely as a terminal stage.

Q. As a terminal stage? A. Yes.

Q. In its preliminary stages it never bothers them? A. No; in its preliminary stages it is usually insidious; but there are some forms of cancer that are extremely painful from the outset. Those are the fortunate type.

20 Q. Doctor, do you teach to any medical school now? A. I am not, sir.

Q. As teacher? A. No; never taught in any medical school.

Q. Do you know the definition between possibility and probability? A. Oh, I know it well. I studied law.

Q. You studied law, did you, Doctor? A. Yes.

30 Q. You know what I mean by probability and what I mean by possibility? A. I do, sir, medically and legally.

Q. Traumatism has never had any effect or any contributing effect to cancer? A. Not in my experience.

Q. Have you ever heard of it? A. Trauma is—

Q. From other doctors? A. I want to answer that, sir. Trauma is mentioned in conjunction with all of the other theories simply because we don't know what is producing the condition itself.

40 Q. Yes. So you cannot say as a positive fact that it has nothing to do with it?

Dr. Andrew C. Ruoff. Called by Defendant. Cross.

Mr. Kuebler: I object to that. We are dealing with probabilities.

Mr. Santorf: I have a right to cross examine him.

The Court: I will permit it.

A. I would say in my experience it has not had any casual relationship to cancer. 10

Q. Well, then, Doctor, having studied law, in answer to Mr. Kuebler's hypothetical question you said, "In my opinion there is no probability." Remember saying that, Doctor? A. Yes.

Q. What you say positively, Doctor? A. That what?

Q. Your answer to that question. A. Would I say positively?

Q. Yes. A. There is nothing in medicine that is absolutely positive. 20

Q. That is what I want to know. There is nothing in medicine that is absolutely positive? A. There is nothing that is impossible in medicine.

Q. So it can be possible. Wait a minute, Doctor. A. Is that the question?

Q. No. So it can be that a severe blow to the abdomen may be a contributing factor to cancer?

A. I have already—

Q. It can be, can't it? A. Only in so far as in the realm of medicine nothing is certain. In my experience I would say no. 30

Q. But it could be? A. Anything in medicine is possible.

Q. Have you read Nelson's Looseleaf? A. On this question?

Q. Yes. A. You mean Nelson's Encyclopedia or Nelson's Medicine? I have not read Nelson's Encyclopedia. 40

Samuel Sussman. Called by Defendant. Direct.

Q. You have read textbooks on cancer? A. I have.

Q. They have given you an example of a traumatic blow with reference to cancer, haven't they, Doctor? A. No. Most of my readings—

10 Q. Is your answer "No" to that exclusively? A. What has come to my attention, yes, I would say no.

Q. You do not mean to your attention and experience? A. My dear sir, if there are things I have not read in books, I am not here to represent things I know nothing of, sir.

The Court: You asked about reading books.

Q. Textbooks.

20 The Court: Reading your book did you come to any such case?

Q. Did you, Doctor? A. I have not, sir. You see—I want to make myself clear here—

Q. All right. A. There is not anyone that knows anything about cancer.

Q. That is all, Doctor.

30 Mr. Kuebler: That is all.

SAMUEL SUSSMAN, sworn.

DIRECT EXAMINATION BY MR. KUEBLER:

Q. Mr. Sussman, where do you live? A. Paterson.

40 Q. Did you live in Paterson in April of 1927?
A. Yes.

Samuel Sussman. Called by Defendant. Direct.

Q. You are a brother of Hyman Sussman? A. Yes.

Q. In April of 1927 did you own an automobile?
A. I did.

Q. In April of that year did you go to Providence, Rhode Island? A. I did.

Q. When did you go to Providence, Rhode Island? How long before April 21, approximately? 10
A. About ten days before.

Q. When you went up there did you drive up in your automobile? A. I did.

Q. Were you there all the time from that time on to April 21st? A. I was there.

Q. Did anyone go up in the automobile with you?
A. Mr. Glicksman was there.

Q. Mr. Glicksman went with you? A. Yes, sir.

Q. Did Mr. Glicksman stay up there all those ten days? A. He was there with me. 20

Q. How did your brother get up there? A. I bought a plant up there.

Q. When did your brother come up? A. After I bought it.

Q. About what did you buy it? How many days after you had been up there? A. About ten days before.

Q. Do you mean ten days? A. Before that accident happened. 30

Q. Well, then, you mean you bought the plant just after you went up there? A. I went up there for business and I bought that place.

Q. That was the object that you went up there for? A. Yes.

Q. And Glicksman went up there with you? A. Yes.

Q. Did he buy the business with you? A. Yes.

Q. And then your brother came up later? A. Yes. 40

Samuel Sussman. Called by Defendant. Direct.

Q. On April the 21st were you going somewhere in your automobile? A. I was going, yes.

Q. When did you decide to go to this place? A. On April the 20th.

Q. Where is the place you were going? A. To Webster, Massachusetts.

10 Q. Why were you going to Webster? A. I was going there for business.

Q. What business were you going there on? A. I was going there to look over a place, another mill that was put up to me.

Q. What plant was it, do you recall? A. It was some kind of looms.

Q. Looms? A. Looms and silk.

Q. Who was with you at that time that you went to Webster? A. Glicksman and also my brother.

20 Q. When did you decide to go to Webster? A. On the 20th.

Q. Did you talk with Glicksman and your brother about it? A. Well, I bought that place and it was practically all through.

The Court: No; did you talk to them about it the night before?

The Witness: Yes.

30 Q. About going to Webster? A. I asked them to come along with me, to look over a place.

Q. Well, did you ask them to come along to look over it with you? A. No; I asked them to come along, being that the next day was a holiday and they were all through, to go home, so I begged them to come along with me.

40 Q. Were they interested in it with you? Were they interested in going there to look over this place with you? A. No, they were not. It was put up to me alone.

Samuel Sussman. Called by Defendant. Direct.

Q. Did they have any money in it? A. No.

Q. Had they ever intended to put any money in it? A. No, not on that.

Q. They both had money in that place in Providence? A. Well, that was a big proposition; I could not handle that myself.

Q. Which was the big proposition? A. The one that we handled and we were practically through with. 10

Q. You are in the silk business, aren't you? A. Yes.

Q. What did you buy up, the stock of a bankrupt firm at Providence?

Mr. Santorf: I object.

The Court: How is that material?

Mr. Kuebler: To find out what the facts are and what they were doing up there at the time. 20

Mr. Santorf: He is not trying to show joint enterprise.

The Court: This would not show it.

Q. What kind of business was it at Webster that you were going to? A. It was looms and silk. That was my business.

Q. Now, what time on the morning on the 21st of April did you leave Providence? A. Oh, I should say about seven o'clock. 30

Q. Do you know the exact time you left? A. We got up about six-thirty that morning.

Q. You are sure you got up at six-thirty? A. I did not look just at the minute or second. About.

Q. Well, Glicksman said you got up six o'clock. A. Well, I don't remember exactly the time, but it was early in the morning, very early.

Q. May it have been six o'clock when you got up? A. It might have. 40

Samuel Sussman. Called by Defendant. Direct.

Q. Did Glicksman say to you when you left, it was now 6:30 and we are leaving, or seven-thirty? Did Glicksman say, "It is now seven-thirty and we are leaving"? A. Well, I don't remember that he told me.

Q. You don't remember. Well, may it have been six o'clock, though, that you got up that morning?

10 A. It might.

Q. You did not have your breakfast at the hotel that morning, did you? A. No.

Q. You did not have any breakfast before you started, did you? A. No.

Q. You got up and dressed and you went right out to your car? A. Yes.

Q. And you were driving the automobile? A. I did.

20 Q. What kind of an automobile was it? A. Essex.

Q. What type of car was it, a sedan? A. I believe it was a coach.

Q. How far had the car been driven; how many miles did you have on the car at that time? A. About thirty miles.

30 Q. I mean, how many miles had this car been driven since you first got it, since you first bought the car, how many miles had you driven? A. About five thousand.

Q. Well, now, did you stop anywhere on the road between Providence and the point where this accident occurred? A. We did stop there.

Q. Where did you stop? A. We stopped in some place to get some eggs, because of the Passover at that time.

Q. Those were for your brother? A. For all of us.

Samuel Sussman. Called by Defendant. Direct.

Q. After you stopped to get the eggs how far had you gone before this accident occurred? A. Well, quite a few miles.

Q. About how many miles, approximately—three, five, ten? A. No. More than that. Went about ten miles.

Q. Had you been driving all of the way that morning? A. I did. 10

Q. At any time while you were driving this car up to the time this accident occurred did Mr. Glicksman say anything to you about the speed of the automobile? A. Well, I remember that he said, "Sam, you are going fast", but I answered to him, "I don't go too fast at all".

Q. How fast were you driving that morning? A. Well, it was an open road; I was going about thirty-five miles. 20

Q. Did you go faster than that at any time? A. Well, I did not look at the speedometer; I know I was going around thirty-five miles.

Q. It was all open country, wasn't it? A. Yes.

Q. Did your brother at any time say anything to you about your driving fast? A. Don't remember saying that.

Q. Now, as you came up to the point just before this accident occurred, about how fast were you going then? A. Well, it was an open road, and while I was driving I have seen a right curve and it was not much noticeable at all, but while I was driving I seen it was—this road was strange to me. Of course, I slowed down my car. 30

Q. How far were you from the curve when you started to slow down your car? A. I noticed it about sixty foot.

Q. Sixty feet? A. Sixty feet. 40

Samuel Sussman. Called by Defendant. Direct.

Q. At that point where were you driving on the road, what portion of the road were you on? A. On the right-hand side.

Q. You are sure you were on the right-hand side of the road? A. Well—I imagine that I was on the right-hand side, because, you know, the road was not too wide, but I was on my right-hand side.

10 Q. Glicksman said you were in the center of the road. Are you right or is Glicksman right?

Mr. Santorf: I object. Witness's testimony cannot be compared.

The Court: No; I will sustain it.

Q. Your recollection is that you were on the right of the road? A. Oh, my imagination, I was on the right-hand side of the road.

20 Q. Before you slowed down your car how fast were you going? A. About thirty-five.

Q. When you slowed down your car how did you slow it down? A. Well, I took my foot off from the gas feeder and I tried to get hold of the emergency, but it was too late.

Q. Did you put your feet on the brakes? A. I did.

30 Q. Then you used the foot brakes and tried to get hold of the emergency? A. That is right.

Q. Now, will you tell us what happened at that point? A. Well, I hardly noticed that bus, and I have done everything I can to stop that car, and I was going on the right-hand side, and the bus coming the opposite way, coming around that corner, and came right all the way around and knocked the car all the way down.

40 Q. When you first saw this bus what side of the road was the bus on? A. On his right.

Samuel Sussman. Called by Defendant. Direct.

Q. His right. What course did the bus take from the time you—I withdraw that. When you first saw this bus how far would you say the bus was ahead of you? A. Also about sixty feet.

Q. What course did the bus take from that time on? A. What?

Q. What course did the bus take? In other word

Q. What course did the bus take? In other words, how did the bus proceed from the time you first saw it until the time of the accident? A. Well, it was a very sharp curve and went a complete turn and came over to my side. 10

Q. Do you know where the bus was after the accident? A. Well, the part of the bus was standing, went up this way and hit me right in the left and knocked all my radiator down from the car.

Q. Did any part of the bus strike your car? A. My left-hand side. 20

Q. What did it do to your car? A. Smashed it all up.

Q. What damage was done to your car? A. Total loss.

Q. Well, now, will you just describe some of the damaged parts on your car? Was it damaged in the front or back of the car? A. Mostly in the front.

Q. What part of the car in front was damaged? A. Steering gear, radiator, and the whole motor was knocked out. 30

Q. You say the bus struck your car? A. Yes

Q. Where did it strike your car first? A. On the left-hand side.

Q. After the accident was the bus on your side of the road or on its side of the road? A. After the accident?

Q. Yes. A. On my side of the road. They were both together. 40

Samuel Sussman. Called by Defendant. Direct.

Q. Together. Well, just describe to us how your car stood in relation to the bus. A. Well, my car was standing on the right-hand side.

Q. Facing which way? A. Facing.

Q. The way you were going? A. The way I was going.

10 Q. Yes? A. The bus came and it knocked out my car this way (indicating).

Q. This way? Which do you mean, your right or left? A. When the bus—it was a right curve, and the bus came around to my left, in other words, my car was standing straight and the bus was standing this way (indicating).

Q. Did the bus strike anything besides your car? A. Well, I don't think it did.

20 Q. After the accident was the bus at an angle on the road, was it crosswise of the road, or was it parallel with the road? A. She was in the middle of the road, the bus.

Q. Pointing which way, to the edge of the road? A. All the way through to the middle of the road.

Q. Well, about where was the front of the bus after the accident? A. The front of the bus?

Q. Yes. A. Close to the sidewalk.

30 Q. What sidewalk was it on, on your right-hand side? A. Right-hand side.

Q. What would have been your right-hand side if you kept on going? A. Yes.

Q. Was there a flag sidewalk there or just a dirt sidewalk? A. I believe it was a dirt sidewalk.

Q. How close to that sidewalk was the front of the bus? A. Very close.

40 Q. Well, was it within a foot or two off of the sidewalk? Can you tell us in feet or in your opinion? A. That I couldn't say, because I had my hands full that time with those two people, and I can't make a statement like that.

Samuel Sussman. Called by Defendant. Direct.

Q. Can you say approximately how far the front was—you say it was very close? A. Very close, because, you know, I was on my righ-hand side and this bus came around and both got in collision.

Q. After you got out of your car was the front of the bus or what would be the front of the mud-guard of the bus, further to the right of the road than your car was after the accident? A. I don't understand that. 10

Q. Say this is the road. Of course, there is a curve in it, but your car, you say, was on the right-hand side of the road? A. Yes.

Q. After the accident was the front of your bus further to the right of the road than your car was, or was it even with your car? A. It was even with my car. It went right into my left.

Q. Did it stay inside of your car? A. Yes. 20

Q. Then, after you got out of your car the front of the bus was still into the left front of your car? A. (No answer.)

Q. When you first saw this bus you said it was about sixty feet from you? A. Yes.

Q. It was on what side of the road? A. He was coming the opposite direction.

Q. On his own side of the road? A. On his own side of the road.

Q. How fast was the bus coming? A. It was going quite fast, too. 30

Q. Was it going about the same speed you were or slower or faster? A. Well, that I can't say. I know he was coming like a streak of lightning.

Q. Did you examine the bus at all after the accident? A. I did not.

Q. Did you say anything to the driver about the accident?

Samuel Sussman. Called by Defendant. Direct.

Mr. Santorf: I object to that—the driver of the bus.

The Court: Sustain it.

Q. Do you know whether that bus had become disabled on the road? A. I don't know.

10 Q. When this bus came around that corner did it make a sharp turn or not? A. He did make a sharp turn.

Q. If the bus had stayed on its own side of the road would there have been a collision? A. I do not think so.

Q. Now, after this accident occurred did you go to the hospital? A. I did.

20 Q. How did you go to the hospital,—in another automobile? A. Somebody took me there, I don't remember who it was.

Q. Were Mr. Glicksman and your brother in the car with you when you went to the hospital? A. No.

Q. They got another car? A. They were taken with an ambulance.

Q. Then, were you conscious after the accident? A. I was out for about a minute or two, then I came to, like.

30 Q. Then you came to. You went back to Providence about the 26th of April, didn't you? A. I did.

Q. About five days later? A. Yes.

Q. Did you drive them back to Paterson? A. No.

Q. Did you go back to Paterson with them? A. No.

Q. Had you gone back to Paterson before that time? A. No

Samuel Sussman. Called by Defendant. Direct.

Q. When did you go back to Paterson? A. I went back quite a few days—I had some more things to be straightened out then, very small things, and I was taking care of that.

Q. Who took them back to Paterson? A. I don't remember. Somebody—some of the friends went down from Providence, and I don't remember who took them back.

10

Q. Now, what part of the bus did your car come in contact with?

Mr. Santorf: We have had that four times already, if your Honor please.

A. They both came together at the head.

Q. What did you say? A. You know, both fronts of the cars.

20

Q. That is your left front and the right front of the bus? A. Yes, that is right.

Q. How far back on the bus?

The Court: Front, he says.

Q. You mean around the right front mudguard?

A. My left-hand mudguard.

Q. Your left front mudguard? A. Yes, the left side of my car.

30

Q. And the right front of the bus? A. Yes.

Q. The right front or the left front of the bus? A. It would be the left front.

Q. Left front. Are you sure about that? Was it the side of the bus which had been driving the center of the road, or towards its righthand side of the road?

Mr. Santorf: I object. I think he is going too far.

40

Samuel Sussman. Called by Defendant. Direct.

The Court: He said the left front. I don't know. Do you mean the left front or don't you?

Q. Well, after the accident which side of the bus was up against the left side of your car? A. I know it was the left front, the left side.

10 Q. Left front. Was the bus in front of you or behind you or alongside of you after the accident? A. Alongside of me.

Q. Along what side of your car?

The Court: To the right of your car or—

A. To the left of my car.

20 Q. Was your car then between the bus and Providence or between the bus and Webster? A. Was my car where?

Q. Was your car after the accident nearer Providence, the way it had been coming from, or nearer Webster, than the bus? A. Nearer Webster.

Q. Then, you were beyond the bus? A. What do you mean, beyond the bus?

30 Q. After the accident occurred was your car beyond the bus toward Webster or was it in back of the bus towards Providence? A. The bus was in the back towards Webster.

Q. Now, when did you first see your brother after you first came back from Providence? A. The first day I came.

Q. Did your brother do any work when he came back, or when did your brother return to work after he came back? A. I know he was very sick.

Q. Were you in business with your brother? A. No.

40 Q. What line of silk work were you in? A. I was in the same line he was in.

Samuel Sussman. Called by Defendant. Cross.

Q. Did you work together? A. No. Occasionally when I saw something big I took him in.

Q. Up to the time your brother went on his vacation had he gone back to his work? A. No.

Q. Do you know when he went on his vacation?
A. About a month that he came back from the accident.

Q. How long was he away? A. About three weeks. 10

Q. Know where he went? A. Somewheres in the country; I don't remember the place.

Q. Who went with him? Anybody?

Mr. Santorf: I object, if your Honor please. I think we are wasting time. What do we care who went with him to the country?

A. I don't remember. 20

The Court: I don't think anybody cares, but he may answer it if he wants to.

Q. After he came back did he do any work? A. I don't think so.

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

CROSS EXAMINATION BY MR. SANTORF: 30

Q. Mr. Sussman, this was a bad curve, wasn't it?
A. Very bad curve.

Q. And for sixty feet before that curve you were going thirty-five miles an hour, weren't you, Mr. Sussman? A. I never expected that curve.

Q. Were you or weren't you? You were going thirty-five miles an hour sixty feet from that curve, weren't you? Yes or no. A. I went by that speed. 40

Samuel Sussman. Called by Defendant. Cross.

Q. Your brother was sitting in the back of your car? A. Yes.

Q. You approached the curve at thirty-five miles an hour; is that right? A. Yes.

Q. When did you first see the bus? A. About sixty foot.

Q. From the curve? A. From the curve.

10 Q. You meant to take the curve on its own side? A. Facing ahead.

Q. What did you do after you saw the bus? A. Tried to avoid the accident.

Q. Well, if you were sixty feet away from the curve and the bus was sixty feet away from it, that made 120 feet, didn't it? A. Yes.

Q. Approximately? A. Approximately.

20 Q. What did you do to stop? A. I got hold of the emergency.

Q. It all happened in a fraction— A. In a fraction like lightning. There was no change to do anything.

Q. You are sure that bus was over on your side of the road? A. Yes, sure.

Q. Where did the accident happen? A. At Glovendale.

30 Q. With reference to the curve, did it happen right at the curve, back of it, or before it? A. About a complete turn.

Q. About a complete turn? A. Yes.

Q. You say the bus was over on your side? A. Yes.

Q. Isn't this what happened, you could not make the turn on that curve and you went away over on his side and he, in order to avoid hitting you, had to go over on his left? Didn't he have to do that? A. I didn't remember what happened.

40 Q. It all happened so quick? A. It went very fast. I know, the only thing I tried to avoid it.

Samuel Sussman. Called by Defendant. Cross.

BY THE COURT:

Q. How did you try to avoid it? A. By letting the gas go, took my foot off the gas panel and I got hold of the emergency.

Q. Yes. What did you do with the emergency?

A. I got hold of it.

Q. What did you do with it? After you got hold of it what did you do with it? A. I pulled it up. 10

Q. You pulled it up within those sixty feet? A. Well, as soon as I noticed that this car is coming.

Q. That is when the bus was 120 feet away from you, wasn't it? A. Yes.

Q. You pulled the emergency? A. Pulled the emergency.

Q. Then your car must have slowed down? A. Well, no doubt about it. 20

Q. What did it slow down to? A. I don't remember that, how it slowed.

Q. About? A. Considerable speed.

Q. Did you put your foot on the foot brake? A. I did.

Q. Took it off the gas pedal and put it on the foot brake; is that it? A. Yes, sir.

Q. Press down on it? A. I did press down on it.

Q. Pressed down on it and pulled your emergency? A. I did everything that a driver could possibly do to avoid the accident. 30

Q. Yes. Then you traveled sixty feet while the bus traveled sixty feet; is that it? A. Yes.

Q. So that you met at the turn; is that right? A. Yes.

Q. Had the bus turned or had you turned the corner? A. The bus turned.

Q. The bus had turned the corner? A. Yes.

Q. So the bus got to the corner first? A. Yes. 40

Samuel Sussman. Called by Defendant. Cross.

Q. And had turned? A. And had turned.

Q. And you had not turned? A. I had not turned.

Q. Had you started to turn? Had you started to turn? A. Just started, but it was right on the—

Q. Just started to turn? A. Just started to turn.

10 Q. When the accident happened? A. Yes.

Q. Of course, you are related to the plaintiff in this case, aren't you. A. I am a brother to the deceased.

Q. You are a brother of the deceased and the deceased's wife is suing? A. Well, she is.

Q. That is right, isn't it? A. Yes.

Q. All right.

20 BY MR. SANTORF:

Q. I thought you said the accident occurred around the corner—around the curve? A. At the complete turn.

Q. After you had made the complete turn? A. Yes.

Q. Is that right? A. It was just starting to go around.

30 Q. You just started to go around when the accident happened? A. Yes.

Q. Just before, to his Honor, you said the bus had made this turn. A. Well, the bus came over on my side.

Q. Well, that was after you had made the turn? A. After I made—about to make the turn.

Q. As you were about to make the turn? A. Yes, at the right turn.

Q. That is all.

40

DEFENDANT RESTS.

Motion to Direct Verdict.

Mr. Carpenter: If your Honor please, may I renew the motion that I made before?

The Court: Yes.

Mr. Carpenter: And have precisely the same motion refer to the additional facts that have been put in evidence?

The Court: Yes.

Mr. Carpenter: If you like, I would be glad to argue it, because I think the case is even stronger now, because we have in the record the deposition of Dr. Overlock who took care of this man at the hospital. 10

(Discussion.)

Mr. Carpenter: I therefore respectfully submit that the motion made at that time and now renewed and held by your Honor to the end of the case should be granted on that point and that a verdict should now be directed for defendant in each case. 20

The Court: No. I think I will deny the motion and allow you an exception.

Mr. Carpenter: We take an exception.

The Court: Yes.

(Counsel for the respective parties summed up to the jury.)

(The Court charged the jury as follows): 30

Court's Charge to the Jury.

MACKAY, J.:

Members of the Jury:

10 The plaintiff, Regina Sussman, administratrix ad
prosequendum of the Estate of Hyman Sussman,
deceased, is seeking to recover damages from
Samuel Sussman, the defendant, for the death of
Hyman Sussman, alleged to have been caused by
the negligence of the defendant by reason of an
accident occurring April 21, 1927, sometime be-
tween eight and eight thirty A. M., as near as I can
recall, on a public street or highway between Put-
nam, Massachusetts, and Webster, Connecticut, and
I think the accident happened at a place which was
known as Glovendale, or something like that, in
Connecticut. That is one case. You see, you have
two cases to deal with here, two separate cases.

20 The other case is the plaintiff, Regina Sussman,
as general administratrix of the Estate of Hyman
Sussman, deceased, who is seeking to recover com-
pensation from the defendant, Samuel Sussman, he
being the same defendant, for pain and suffering
and for hospital and medical expenses and for ex-
penses for nurses by reason of this same accident ;
seeking to recover for that pain and suffering and
those expenses I have mentioned between April 21,
1927, and November 2, 1928, the date of death.

30 In giving you the facts as I recall them, if you
are of the opinion or if you believe that I misstate
any of the evidence or testimony that was given by
the witnesses, you will disregard what I say that
you believe is incorrect and be governed entirely
by your recollection of what the testimony actually
was in the case.

40 On the plaintiff's part, as I recall it, there is tes-
timony to the effect that Samuel Sussman was the
owner and operator of the car which was being

Court's Charge to the Jury.

driven by him along the highway already mentioned, and that, I understand, is not disputed in this case. That prior to starting out the defendant invited the deceased and Mr. Glicksman, I think his name was, to visit a factory at Webster; that they started out some time between seven and seven-thirty, that they had been traveling for three-quarters of an hour or longer when the accident happened at this turn in the road to Webster; that while driving along this highway Glicksman said the defendant was traveling at forty or forty-five miles an hour. I think there was other testimony of forty or fifty miles an hour. I am not sure, but that is for you to say. The defendant himself said he was traveling at only thirty-five miles an hour. It was a clear day, no traffic, and good, hard, concrete or asphalt pavement. That Glicksman said something to the defendant about driving too fast, and that the defendant answered to the effect that it was all right, that the car was broken in—whatever the language is you must remember—and that shortly thereafter, as they neared this right-hand turn, at about a forty-five degree angle, so it was testified,—shortly before that Glicksman mentioned the matter to him again, and that then, the testimony is, as I recall it that the defendant slowed down somewhat. The defendant says when he reached a point about sixty feet from the turn, and the bus was also sixty feet from the turn, which was a distance between the bus and the defendant's car of about 120 feet, that he took his foot off the gas, put it on the foot brake, took hold of the emergency brake, and slowed down, but it was too late to avoid an accident, and he did not know exactly to what speed he did slow down; that the bus in turning the corner came over onto the defend-

10

20

30

40

Court's Charge to the Jury.

ant's side of the road, and that if it had not come over on his side of the road the accident would not have happened; that the defendant tried to avoid this bus, but came in contact with it, and the deceased was thrown out and struck on his head, and my recollection is that there was some testimony to the effect that he struck his abdomen. There was
10 testimony to the effect that he had bruises on his body, and then, of course, there is evidence on the part of the doctor who testified for the defendant and who treated the deceased at this hospital outside of the State of New Jersey, in which it was testified that there were no injuries to the abdomen, and I believe that testimony was read to you by counsel, so you will recall what that testimony is. That the deceased was treated for his injuries before coming back to New Jersey, and upon his arrival
20 in New Jersey he was treated first by a family physician by the name of Dr. Joelson, then by a Dr. Wassing; that on January 2, 1928, Hyman Sussman was taken to the Barnert Memorial Hospital—I think he was taken first to the Paterson General Hospital and then to the Barnert Memorial Hospital from there almost immediately; and that an operation was commenced, but it was found, on operating, that there was considerable pus there, so
30 much so that no operation could be had, and I believe drains were put in and the cuts or incisions that had been made in operating were sewed up; that after this draining process Hyman Sussman was dismissed from the hospital, I think on February 26, 1928, that he was readmitted on May 28, 1928, and a section of a mass which was found in the abdomen, I think near the appendix region, was taken and sent over to the laboratory for examination and report, and the report came back that
40

Court's Charge to the Jury.

it was, I think they called it, an adeno carcinoma or cancer; and I think the deceased was then taken to the hospital in New York, Mt. Sinai Hospital, some time in June, and was there operated on and this cancerous growth removed. I am not quite sure about these dates, but you will remember what they are. Hyman Sussman died on November 2, 1928.

10

There is also testimony on the part of the plaintiffs to the effect that the deceased was in good health prior to the happening of the accident, that he always ate well, and was in a good, healthy condition as far as observation was concerned and so far as the fact that he was eating and going about his business was concerned.

Now, there was evidence, of course, in this case, that the origin of cancer is unknown. The doctors did not know whether it was congenital, hereditary, whether it was the result of a trauma, that is, a blow, or not; but the doctors for the plaintiff testified, at least one of them, if not more than one, that in their opinion or in his opinion, if it were one, that he would know—I think Dr. Joelson said he would know if he had a cancer; that he could tell the age of a cancer, and that the probabilities were from the facts as he had them, that this cancer was the proximate or natural result—he did not use those words, but were the result of this injury or while the death was due to the cancer, the cancer was caused as the result of this accident, that was the probability or the contributing cause, as he put it.

20

30

Now, the defendant in this case has offered evidence to show that there was no negligence on the part of the defendant himself, and then they say, also, that the deceased was guilty of contributory negligence at this particular time, that is, at the

40

Court's Charge to the Jury.

time of or just prior, shortly prior, to the happening of the accident, and, of course, they say, too, that the negligence of the bus driver was the proximate or natural cause of the accident and injury, and that there was no negligence on the part of the defendant.

10 Now, the administratrix ad prosequendum—just keep those words in mind and keep in mind general administratrix—that is the second case—the administratrix ad prosequendum is asking for compensation for the benefit of the next of kin for the pecuniary loss, and the next of kin are the widow, who is the administratrix in this case, and the two children, one fifteen and the other ten years of age; and the general administratrix is asking for damages for the pain and suffering, for the medical and hospital expenses incurred by the deceased after
20 the accident and as a result of the accident and prior to his death, between April 21, 1927, and November 2, 1928.

Now, the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the testimony that the defendant was negligent and that his negligence was the proximate or natural cause of the accident and injuries and death; and that means by the greater and weightier evidence, it
30 means by the more convincing testimony. If you find on that score that the testimony is evenly balanced, or that it preponderates in favor of the defendant, then your verdict must be in favor of the defendant and against the plaintiff, in both cases, because I am speaking about both cases, no cause of action.

Now, our Courts have defined negligence to be—
and I will give you the definition as it is—to be
40 the omission to do something which a reasonable

Court's Charge to the Jury.

man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do. Of course, the negligence complained of by the plaintiff in this case in operating this car—the defendant operating his car at an excessive rate of speed and not using reasonable care in the operation and control of it at the time of and just prior to the happening of the accident. 10

Now, as I told you before, the defendant in this case contends that the deceased was guilty of contributory negligence, that is, that there was an act or an omission on his part which was careless, and that therefore, because of that, he cannot recover. You will recall that the questions were asked, "Did the deceased or did Hyman Sussman say anything to the driver about going at such a high speed; did he attempt to get out or ask to get out, or say anything about getting out of the car under those conditions," and, of course, the defendant claims that those acts on his part, or omissions on his part, to do what a reasonably prudent person should have done under the circumstances, contributed to his accident and injury. 20

Now, the law on that is, and I so charge you, that if the deceased, Hyman Sussman, was guilty of any act of negligence which directly contributed to his injury, or was guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances, and such lack of care, act, or omission contributed to the accident, and without which the accident would not have happened, then you cannot render a verdict in favor of the plaintiff in this case, but your verdict must be in favor of the defendant and against the plaintiffs, no cause for action. 30 40

Court's Charge to the Jury.

Now, that defense of contributory negligence on the part of the defendant is what we call in law an affirmative defense on the defendant's part, and therefore the burden of proving contributory negligence is upon the defendant, to prove it by a fair preponderance of the testimony.

10 Now, in order to charge the defendant, Samuel Sussman, for damages in both of these cases, it must appear that they were the natural and proximate efforts of his delinquency, if any. Let me put it another way: "It is necessary for the plaintiff, in order to recover in this case, or in these cases, to prove that the defendant did an act or omitted to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of, and that such act or omission did actually cause the injury, or, you
20 might, say, in this case, the injury and the cancer finally from which the deceased died."

So, if you find as a fact from the evidence in this case that the defendant was negligent, that would not be sufficient; you must also find that the negligence was the natural or proximate cause of the accident and injuries and death, and if you do not so find, your verdict must be for the defendant and against the plaintiff, no cause for action.

30 If you find as a fact from the evidence that the deceased died from cancer, and that the cancer was not caused by the accident, but by some other cause, or that he had it prior to the time of the accident, or even if he developed it after the accident and it was not a result of the accident, then your verdict must be for the defendant and against the plaintiffs, no cause for action.

40 Now, if you find that the plaintiff has sustained the burden of proof by the fair preponderance of

Court's Charge to the Jury.

the testimony and that the defendant was negligent and that his negligence was the proximate and natural cause of the accident and injuries and the death, and that the deceased was not guilty of contributory negligence, you would come to the question of the plaintiff's damages.

I will take up first the damages of the administratrix ad prosequendum. If you should find in her favor, she would be entitled to recover damages by reason of the Statute or State Law known to us as the "Death Act" for the benefit of the next of kin; and they in this case are the widow, Regina Sussman, and the two children, Herbert and Muriel, Herbert fifteen years of age and Muriel ten years of age. There is testimony that the deceased gave his wife for herself and the children \$100 per week, but that out of that she bought for her husband, the deceased, sometimes suits of clothes, coats, shirts, different kinds of wearing apparel, so that some portion of that, we don't know how much, was used for his own personal benefit; also that some portion of it was used for his food and for his living in the premises where they lived, or, you might say, for the board and lodging. That he was thirty-eight years of age, according to Mrs. Sussman, and that she was forty years of age.

Now, the damages to be allowed to the administratrix ad prosequendum for the benefit of the next of kin are damages in money and money only. This action, as I have told you, is created by the Statute Law of the State of New Jersey, and it is needless to say it must conform strictly to it. What was the value of his services which have been lost? What those services might reasonably have been expected to have been worth, the plaintiff would be entitled to recover for the benefit of the next of kin. If he

Court's Charge to the Jury.

had lived he might have met with another accident that might have resulted in his death; he might have been taken ill with some illness; he might have suffered financial reverses. Nothing can be allowed for mental anguish which the next of kin are supposed to have suffered; nothing for the loss of satisfaction and comfort of having the deceased; nothing for the loss of society or association or funeral expenses; nothing for the bodily injuries. In other words, the administratrix ad prosequendum, who brings this action for the benefit of the next of kin, is entitled to recover for nothing more than a deprivation of a reasonable expectation of the pecuniary advantage—that means money advantage—which would have resulted to the next of kin, the widow and the two children, by a continuance of the life of the deceased. It is upon that principal that our Statute is to be applied. You must weigh the probabilities, and to a large extent form your estimate of the damages on conjectures and uncertainties. Your work is a difficult one; many times errors are apt to be committed. By the word “pecuniary” is meant relating or pertaining to money; therefore, a pecuniary loss is a money loss—what did the next of kin lose in money in this case?

In this case there is testimony, as I told you before, that the deceased was thirty-eight years of age, that his wife was forty years of age, that he appeared to be in good health before the accident. You may take into consideration whether the good health would have continued even if there had been no accident. So, you see, it is a difficult question for you to estimate in case you find for the administratrix ad prosequendum in this case.

Court's Charge to the Jury.

Now, this is a case that may appeal to your sympathy, but sympathy has no place in the trial of a lawsuit, and you must not let it enter into your deliberations.

A motion was made for a non-suit and for a direction of a verdict. With that you have nothing to do. That is no concern of yours at all. That you must eliminate entirely from your minds. They were purely questions of law addressed to me as the Judge of the Court. 10

Now, in the case of Regina Sussman, general administratrix of the estate of Hyman Sussman, deceased—that is, the second case—if you find that the plaintiff has sustained the burden of proof by the fair preponderance of the testimony that the defendant was negligent and his negligence was the proximate cause of the accident, injuries, and death, and that the deceased was not himself guilty of contributory negligence, as I have already given it to you, you will come to the question of damages of the general administratrix. She would be entitled to recover such sum as you believe to be fair and reasonable for the pain and suffering endured by the deceased in his lifetime as a result of this accident. If you should find as a fact that this cancer was not caused by the accident, then the pain and suffering to which she would be entitled as the plaintiff in this case would only be such pain and suffering as he endured as a result of these injuries; but if the cancer was caused by this accident, then, of course, you could consider the pain and suffering which he endured until the time of his death. On the question of pain and suffering, the plaintiff would be entitled to such sum as you find to be fair and reasonable. If you find for her you cannot just arbitrarily fix an amount; you must 20 30 40

Court's Charge to the Jury.

take into consideration what that pain and suffering consisted of, what the extent of it was, whether it was severe or whether it was very slight. That you must determine in fixing that amount, if you find for her. She would also be entitled to recover, as plaintiff in this case, as general administratrix, for the expenses which were incurred for nurses, doctors' bills and hospital bills. There has been evidence produced on the part of the plaintiff regarding certain moneys expended for doctors, nurses, and hospitals. I don't know that I have them put down correctly as testified to, but my recollection is that there was a Barnert Hospital bill of \$1,042.90, that there were five payments to the Mt. Sinai Hospital of \$147 each and two of \$119 each. The five at \$147 would amount to \$588; the two at \$119 would amount to \$238, making a total of \$826. There was testimony as to the payment of moneys to nurses, and, of course, you can say, if you find for the plaintiff, what that fair and reasonable sum is. The amounts paid to nurses, as I figured them, was \$979.50. So that the items I have here are \$979.50, \$1,042.90, and \$826, making a total of \$2,847.40 in all, and it is for you to say from the evidence as you have it, which, of course, includes this testimony, as to what that reasonable and fair and just sum is, if you find for the plaintiff in this case. Therefore, if you find for her, you would take these items and put them in one lump sum and render a verdict in her favor in one lump sum against the defendant; or if you find in favor of the defendant, then your verdict is in favor of the defendant and against the general administratrix, no cause for action.

Mr. Carpenter: Your Honor forgot two items, Dr. Bender and Dr. Joelson, \$1,500 and \$1,250.

Court's Charge to the Jury.

The Court: Yes, there was testimony as to two doctors' bills of \$1,500 and \$1,250, and Dr. Lillienthal at \$285.

Now, if you find for the plaintiff you take that evidence, together with the other evidence, into consideration.

Now, remember, members of the jury, there are two cases. You take up the consideration of those two cases, and for convenience I will say that case No. 1 is the case of Regina Sussman as administratrix ad prosequendum against Samuel Sussman, and case No. 2 is Regina Sussman, general administratrix, against Samuel Sussman. Now, for convenience counsel have agreed that the clerk may write down those names upon a piece of paper for you. Those are the two cases that you have to consider.

Now, as I said before, and I want to repeat it, you are the sole judges of all of the disputed questions of fact in this case. You disregard anything that I have said that you think does not correspond with the testimony and be governed by your own recollection, and you must determine who is telling the truth in the case, you must find out where the truth lies.

Now, take the case, give it your very careful and thorough attention and render a verdict that will do justice to the parties before you.

(The jury retires.)

Defendant's Exceptions.

Mr. Carpenter: I take exception to the Court's refusal to charge each of my requests to charge as submitted.

10 Second, I also except to the Court's leaving to the jury the question of the defendant's negligence and leaving it to them to say whether under the facts as proved the defendant was guilty of negligence.

Third, I except to the Court's leaving to the jury the question of the contributory negligence of Hyman Sussman, which I contend as a matter of law was established.

20 Fourth, I except to the Court leaving to the jury the question whether or not from the evidence Hyman Sussman's cancer was the natural and proximate result of the accident, but I claim under the facts as proved as a matter of law that it could not have been found by the jury except by guesswork, and the Court should have taken that question from the jury.

30 Fifth, I except to that portion of the Court's charge which, as to the general administratrix case, the Court said that the doctors testified in their opinion, or his opinion, it was Dr. Joelson, that he would know if he had cancer prior to the accident, that he could tell the age of the cancer, that this cancer was the proximate or natural result in his opinion of this injury that was received April 21, 1927, and that while the death was due to the cancer the cancer in his opinion was probably due to the accident. I except to that as being, first, an
40 incorrect statement of the fact, and, second, that

Defendant's Requests to Charge.

even if he did say that, that still did not raise a question of fact for the jury, and that on all the facts in the case the Court should not have left that question to the jury.

Sixth, I except to the Court, in the general administratrix case, leaving to the jury the question of damages as to the operations for cancer, the operations for appendicitis, because there is no evidence that those were the result of the accident. 10

Seventh, I except to what the Court said to the jury as to damages in the suit of the administratrix ad prosequendum, since I claim the question of damages should not have been left to the jury, because the proximate cause of the accident was negligence on the part of the deceased, also because the cancer was not proximately caused or the proximate result of the accident. 20

Eighth, I except to the Court leaving to the jury to fix the various elements of damage in the general administratrix case.

Defendant's Requests to Charge. 30

“(1) The jury must find a verdict for the defendant because as a matter of law the defendant was not guilty of negligence which was the proximate cause of the accident complained of.

“(2) The jury must find a verdict for defendant because as a matter of law the death of Hyman Sussman, the deceased, was not the natural and probable result of the accident. 40

Defendant's Requests to Charge.

10 “(3) Under the undisputed evidence in the case Hyman Sussman died of cancer of the bowel. In the case of Regina Sussman, administratrix of Hyman Sussman, no damages may be awarded for any of the cost of treating Hyman Sussman for his cancerous condition, or for any of the pain and suffering he had that was caused by the cancer, or the operations upon his body for the conditions caused by the cancer, or for loss of earnings caused by the cancer.

“(4) It appears from the evidence that all the medical expenses proved in this case were incurred after the symptoms were discovered which later proved to be caused by cancer.

20 “(5) It appears from the testimony of Dr. Bender and Dr. Joelson that after the operation of January 2, 1928, Hyman Sussman was unable to do any work because of his condition. Dr. Bender testified that upon the operation of January 2, 1928, he realized that if he did not remove the mass from the abdomen it would ultimately cause death. At this time the mass was adherent to the wall of the abdomen at the back, indicating that the cancer was then in an advanced stage.

30 Therefore, no verdict the jury may render for plaintiff as administratrix may include any damages for any loss of earnings, expenses, pain or suffering from or after January 1, 1928.

40
41

New Jersey Court of Errors and Appeals

REGINA SUSSMAN, Administratrix *ad
prosequendum* of the Estate of
HYMAN SUSSMAN, deceased,
Plaintiff-Respondent,

vs.

SAMUEL SUSSMAN,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

REGINA SUSSMAN, General Administra-
trix of the Estate of HYMAN SUSS-
MAN,

Plaintiff-Respondent,

vs.

SAMUEL SUSSMAN,
Defendant-Appellant.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER, FOR APPELLANT.

These appeals are from final judgments entered against the defendant in the Supreme Court. The administratrix *ad prosequendum* recovered judgment for \$10,000 (Record, p. 27), and the general administratrix recovered a judgment for \$7,500 (Record, p. 10). The cases were tried together before Judge Mackay and a jury at the Passaic Circuit on October 27, 1930.

Hyman Sussman, the deceased, and the defendant were brothers. On April 21, 1927, defendant was driving his automobile from Providence, Rhode Island, and at the time of the accident in question he was traveling on a public highway between Putnam, Massachusetts, and Webster, Con-

necticut. Defendant's brother Hyman, the deceased, was riding in the back seat of the car, an Essex, and Abraham Glicksman in the front seat beside the defendant.

Defendant's car, according to Glicksman, left Providence about 7:30 A. M., and at 8:15 A. M. it collided with a bus on a curve of the road. In this forty-five minutes Glicksman said defendant's car had traveled about thirty-five miles from Providence (Record, p. 95). Glicksman said that it was a head-on collision and "it happened awful quick because of the speed of the car". He felt no retarding of the speed (p. 99, line 30). Glicksman said the car was traveling all the time between forty and fifty miles an hour. The deceased, Hyman Sussman, made no attempt to get out of the car and did not ask his brother, the defendant, to let him out of the car, "nothing like that" (p. 107). Glicksman said that Hyman Sussman "was all this while eating his eggs and his matzoths and, you know, making jokes. We had a good time in other words. Q. You were having a good time together? A. Yes, it was a jolly trip" (p. 111, lines 30 to 40).

In the collision with the bus Hyman Sussman sustained "moderate shock and various contusions and abrasions over various parts of his body, all superficial", according to Dr. Overlock who attended him at the Putnam Hospital (p. 138). Deceased was at the Hospital in Putnam about three days and was then taken by automobile to Providence and thence to Paterson.

Although this accident happened April 21, 1927, the deceased died of cancer of the coecum on November 2, 1928.

About three months after the accident Dr. Joelson concluded that Mr. Sussman had a case of chronic appendicitis.

June 13, 1927, Hyman Sussman consulted Dr. Wassing, who after a thorough examination concluded he had pressure on the brain and advised him to submit to a lumbar puncture, which Mr. Sussman refused. In August, 1927, Mr. Sussman had a fainting spell on the street. Dr. Wassing then found that he had increased pressure on the brain, again recommended a lumbar puncture, which he made.

January 1, 1928, Mr. Sussman had acute pains in his abdomen; his condition was diagnosed as acute appendicitis with a perforation, and he was operated upon 2 A. M. January 2, 1928, and a large purulent mass was found in his abdomen, which was adherent to the posterior walls of the abdomen and his condition was such that this could not be removed. Drains were put in and left.

The following May he was operated upon again and a section of the mass was removed and analyzed and found to be cancerous.

Another operation was performed in New York by Dr. Lillienthal in June, 1928, which did not give more than temporary relief, and he died November 2, 1928.

Every one of the plaintiff's Doctors testified that the cause of cancer is unknown, although Dr. Joelson, the family physician, testified that the condition for which Mr. Sussman was operated upon in April, 1928, "*could* be attributed to the accident that he had".

"Q. Could it be attributed, also, to the injury he received to his abdomen? A. Well, I mean that, yes" (p. 66, lines 28 to 32).

Every one of the plaintiff's physician's, including Dr. Joelson, testified that the cause of cancer is not known; that the medical profession does not know whether cancer is due to a germ, or

whether it is congenital or hereditary, and they do not really know its cause. Dr. Joelson admitted that nobody can tell a thing about cancer until it is actually found in the system (p. 72).

Dr. Joelson also said that they did not know until the operation in May, 1928, that Mr. Sussman had a cancer, and from his discovery at that time he concluded it must have been there in January, and that in January it must have been there six months previous (p. 75).

The Questions Involved.

The questions involved in this case are:

(1) Whether there is any ~~casual~~ connection between the accident suffered by Hyman Sussman April 21, 1927, and his death from cancer November 2, 1928; and

(2) Whether the deceased was guilty of contributory negligence in continuing to ride with the defendant, his brother, some thirty-five miles over unfamiliar roads in a period of forty-five minutes, in a car running between forty and fifty miles per hour, where the deceased made no protests at the speed, made no attempt to leave the car, although he had ample opportunities to do so.

(3) Whether deceased and his brother were on a joint venture, and if defendant was negligent may plaintiffs recover damages?

These questions are raised by a number of exceptions, which will be indicated under the respective points of this brief.

Grounds of Appeal Relied Upon.

The grounds of appeal are all relied upon, and they fall under these classifications:

- (1) The refusal of the Court to grant defendant's motion for a non-suit.
- (2) The refusal of the Court to direct a verdict in favor of defendant.
- (3) Exceptions to the charge of the Court.
- (4) Refusal of the Court to charge the jury as requested by the defendant.
- (5) Exceptions to the admission of evidence.

Concise Statement of Facts.

(a) Deceased's condition after returning home.

After returning to Paterson Dr. Joelson was called in to examine the deceased, who complained of pains in his head, bruises, and abdominal pains.

After deceased had been home about four weeks he went away for a vacation (p. 131, line 20).

On June 13, 1927, deceased called on Dr. Wassing, who made an examination of him, "and found signs from which you might conclude that he was suffering from increased pressure on his brain. . . . and I advised him to have a lumbar puncture, a spinal tap done, so as to verify this assumption of increased pressure on the brain, and at the same time to relieve the pressure on the brain" (p. 77). At that time Dr. Wassing says that the deceased "was in what we might call a run-down condition. He was in a nervous

condition; he was shaky, he looked poorly—in poor health, and was pale and seemed under-nourished. He complained of pain in the abdomen and that his appetite had suffered considerably since the accident and he had not even properly explained his under-nourished condition. He complained of headaches and dizziness. I could not verify his headaches, but what I could verify was that there was irritation on the brain by looking into his eye-grounds, I saw that the blood vessels of the eye-grounds were congested, particularly the blood vessels around the optic nerve, which we did see when we looked with a certain instrument into the background of the eye” (p. 78, lines 25 to 40).

In August, 1927, deceased dropped unconscious on a street in Paterson (p. 79, line 25).

Dr. Wassing saw him after this occasion and he again advised a lumbar puncture, which was made August 27th, by Dr. Wassing, and he found the pressure on the brain increased (p. 80). After the lumbar puncture Dr. Foster Kennedy, Professor of Neurology in Bellevue Hospital, was called in consultation (p. 81, line 20). He did not testify.

After that, deceased was kept in the hospital for awhile and he was then treated off and on by Dr. Joelson until January.

Dr. Joelson was called in to see the deceased on January 1, 1928, when he had severe pain over his appendix. That night he developed a severe sudden pain in his abdomen, Dr. Joelson examined him, found his abdomen was quite rigid up to about his umbilicus, as if something had ruptured in there, because the abdomen was filled with either fluid or pus, and it was decided to open him up, and they took him to the hospital and operated about two A. M. January 2nd (p. 63).

In this operation they found that the abdomen was full of pus and they just drained him (bottom p. 63).

Dr. Joelson testified that when he was called in to see Mr. Sussman on New Year's Day, 1928, he gave him something to relieve the pain, and told him to put an ice bag over the seat of the appendix. At that time Dr. Joelson thought he had appendicitis.

“Q. When did you first form the opinion that he had appendicitis? A. Well, right along I thought probably it was a chronic appendix.

Q. When did you first form that opinion? A. About three months after the accident.

Q. You thought then that he had a chronic appendix? A. Due to the pain he had over his—

Q. Did you advise he be operated on? A. No, I did not, because he always complained of pain on his life side and underneath his sternum.

Q. Is that the first time he ever complained, three months after the accident? A. About—that is when I felt there was nodules there, those little lumps, little hard nodules, little swellings, in other words.

Q. When did you first feel those? A. That is about three months after, as I said before.

Q. About three months after the accident? A. Yes.

Q. And you then thought he had a chronic appendicitis? A. Yes” (p. 68, line 20, to p. 69, line 12).

Dr. Bender of Paterson performed the operation on the morning of January 2nd, 1928, and he testified that Hyman Sussman had been referred to the hospital by Dr. L. G. Shapiro (who was not called as a witness), “and at the time I saw him he evidently had an acute abdominal proposition and a diagnosis was made of a perforation of a hollow viscus; . . . and in this particular instance we thought that he had a perforation of the base of his appendix, and he was operated upon that same evening. His condition was such at the time

that the only operative manoeuvre that was done was placement of drainage within his abdomen” (p. 38, lines 20 to 35).

On cross-examination Dr. Bender said that Dr. Shapiro had diagnosed the case as a perforation of his appendix and he operated on the assumption that Sussman had a perforation either of the appendix or in the neighborhood of the appendix. When the abdomen was opened it was found that the appendix was bound down in one hard mass of a gross diameter of an inch or an inch and a half. Dr. Bender said:

“That, of course, is the size of the hard mass itself. The intestines were coiled about it and adherent to it. . . . The extent of the inflammatory zone and the extent of the entire process, I should judge, was over an area of about seven inches, that is, in three directions. . . . That does not mean the mass itself was seven inches, it means the involved area. You have a perforation, you have intestines that coil over the area in order to block whatever exudate you have there; you have an omentum that attempts to block it over, so you have in that area a fairly large inflammatory zone” (p. 49, lines 16 to 35).

Dr. Bender said:

“The adhesions were a plastic adhesion, not a firm adhesion. I did nothing except to open up into this area where the perforation was and insert drainage, making no untoward manoeuvre that would dislodge this wall, for fear of inviting a path through an extensive or a very formulating type of peritonitis” (p. 50, lines 1 to 10).

Dr. Bender further testified on cross-examination that at the time of this operation on January 2nd, it was found that the mass was adherent to the posterior wall of the abdomen. He concluded at that time that the safest procedure to maintain

his life was simply drainage, not breaking up the wall that had been placed there (p. 51, lines 20 to 40). These drains remained in Mr. Sussman's side until he left the hospital February 26, 1928 (p. 50, line 34), when the drains were removed and replaced.

The wound in Mr. Sussman's side never healed (p. 50, line 40), and the drains had to be left and were left until his death (p. 51, lines 1-2).

At the time of this operation, January 2nd, Dr. Bender did not think that this mass was cancerous. He said the only way of making a positive diagnosis of cancer is to cut a piece and analyze it, and at that time he did not dare because of Mr. Sussman's condition (p. 52). Dr. Bender said that "on account of the pus and exudate, on account of the peritonitis; not on account of the fact that this mass may or may not have been removable; but we were dealing with a purulent localized infection", which made it hazardous to cut to separate the mass (p. 52, lines 20 to 30).

After Mr. Sussman left the hospital, February 26, 1928, rubber tubing was left in his side as a drain, and he went along fairly well. He made an operative recovery (Dr. Bender, bottom p. 38)

Dr. Bender on his direct examination said after the operative recovery Sussman had a persistent sinus or place where pus oozed constantly from his side. This sinus continued draining until he was readmitted to the hospital on May 28, 1928, for further operation. He operated upon him and at that time took a section of the mass. The section was examined and "a report came back of adeno carcinoma, which I think someone said was cancer. It is the equivalent. At that time an operation was done. It was simply to short-circuit the growth, on account of its attachment to the vertebral column". He went along without making any apparent recovery. His tumor mass increased

in size. He became progressively weaker, and it was thought advisable at the time to solicit further advice, and he was sent on June 11, 1928, to Mt. Sinai Hospital, New York City, where he was operated upon by Dr. Lillienthal, who like Dr. Bender could do nothing for him. He recovered from the immediate operation and was transferred again to Barnert Memorial Hospital on August 7, 1928, and his progress from that time on was a downward one, and he died November 2, 1928 (pp. 39-40).

(b) Motion for non-suit.

At the close of the plaintiff's case defendant moved for a non-suit on the ground:

(1) That the death of Hyman Sussman was not the natural and proximate result of the accident mentioned in the complaint;

(2) The natural and proximate cause of the death of Hyman Sussman was cancer;

(3) Hyman Sussman was on a joint venture with the defendant at the time of the accident, and any negligence of the defendant, if any was proved, is attributed to the plaintiff;

(4) The defendant was not guilty of any negligence which was the proximate cause of the accident or the death of Hyman Sussman;

(5) Because from the testimony of Mr. Glicksman the deceased was himself guilty of negligence which contributed to the happening of the accident, because he remained in the car while it was being driven for thirty-five miles from Providence to the scene of this accident, during all the time between forty and fifty miles an hour; he made no attempt to get out of the car; he made no attempt, apparently, to protest in a way that was

effective, despite the fact that a few miles before, according to the undisputed testimony, defendant's car stopped at a place where the deceased could have alighted.

Judge Mackay said that there was great doubt in his mind and he denied the motion, with permission to defendant to renew it at the close of the case, and he allowed an exception to the ruling (Record, p. 135 to p. 137).

(c) The defense.

In defense it was proved by Dr. Overlock, Chief Surgeon of the Putnam Hospital, that when he examined the deceased after his accident at the Putnam Hospital, and after examining X-rays that were taken of Mr. Sussman, he found there was nothing except superficial injuries. Dr. Overlock said that Mr. Sussman did not have an ilio-caecal abscess at that time. When asked on cross-examination:

“Q. Do you know anything about bruises on his abdomen?”

Dr. Overlock said:

“He had various bruises on his body, but he had nothing which amounted to a traumatic abdomen.

Q. Did he have anything which pointed to a traumatic abscess to the ilio-caecal? A. No.”

He said that the deceased had a concussion of the brain when he entered the hospital, but that cleared up immediately. Dr. Overlock also said that there was no evidence of any injury to Mr. Sussman's internal organs. He did not suffer from any marked loss of blood, “only the superficial bleeding from the contusions and abrasions where skin was broken in various places”.

“Q. Did you find any trace, in your examination, of any traumatic ilio-caecal abscess?
A. No.

Q. Assuming that this man died on November 2, 1928, which would be the year after the accident, and the cause of his death was pronounced to be due to carcinoma of the bowel at the cecum, is there anything in your knowledge of this case and experience that you had with it that would lead you to believe that the accident could have caused the carcinoma of the bowel? A. No.”

Dr. Overlock said that Mr. Sussman was “one of those fellows who was awfully frightened and worried about himself at the time”.

On re-cross-examination Dr. Overlock was asked:

“You would not want to say that everything that you have told us here was the only thing that was the matter with him? A. The only thing that was apparent, yes.

Q. Couldn't there have been something else? A. Why, keep the man here a month and go over him every day, you might find some chronic disorder, but nothing that had to do with this accident” (pp. 140 to 143).

Defendant proved by Dr. G. W. Finke, Chief Surgeon of the Hackensack Hospital and director of the surgical division, who has had great experience in cancer work, that in his opinion the traumatism was not the cause of the cancer. He said that cancer of the caecum is the most frequent cancer in the gastro-intestinal tract, with the exception of the stomach (p. 149). Dr. Finke gave the location of the caecum as follows:

“Now, let us state the small intestine is where the fluid content of the bowel empties into the large intestine. The large intestine starts on the right side, goes up this way, across the abdomen, and then down. It is ap-

proximately five and a half feet in length. This large intestine, that is, the lumen of that intestine is large, as compared to the small intestine, I should say probably four to five times in diameter, and it is the starting of the large intestine. It is at that point where the small intestine empties its liquid content into the large bowel.

Q. How far would you say it is from the wall of the abdomen, from the exterior wall of the abdomen, or the outside? A. That, of course, depends upon the stoutness of the particular individual, some individuals having probably four to five inches in thickness; then we come to the muscular wall, and then there is several other small walls beneath, and I should say probably the distance of about four or four and a half inches in the average individual. . . . It is suspended rather loosely, for instance—that is, the entire intestinal tract is suspended loosely. You take and you hit the abdomen, the natural tendency of the intestine is to jump out of the way. It is lubricated, you might say, by a fluid that is naturally in the intestinal tract, that is, naturally in the abdominal cavity, I meant to say.”

Dr. Finke testified that in his opinion the cancer may have formed inside of the abscess that was present in Mr. Sussman's abdomen. It is possible that it started a month or two after the accident. He said there was no way of telling with any degree of probability when the cancer started (pp. 150 and 151).

Dr. Finke also testified that cancer is insidious—it starts up and it will get along fairly well before patients have any symptoms of it. He said that he has seen many cancers without any symptoms whatsoever, and at times symptoms are very important (p. 152).

Dr. Ruoff who has specialized in the examination, diagnosis and treatment of traumatic in-

juries, and who had seen over forty thousand cases, said that he had never been able to trace directly the relationship of cancer to the traumas sustained, and traumas he has treated have involved every portion of the body (p. 161, lines 15 to 22). He gave as his opinion that in this case the cancer from which Mr. Sussman died was probably not the result of his accident (p. 161, line 40). Dr. Ruoff said:

“In my own experience I have seen traumas to every portion of the human anatomy; I have seen compound fractures of very severe types, I have seen abdomens so traumatized that they required the removal, for instance, of the spleen, which is deeply seated in the left side of the upper abdomen; I have seen cases that required suturing of the intestines, for ruptured intestines following trauma, and in all my cases I have never yet been called upon to decide whether or not trauma was related with that, because none of them came to developing cancer” (p. 162, lines 1 to 15).

Dr. Ruoff testified that:

“Cancer is what we normally describe as an insidious condition of the tissues of the body, either of the soft tissues or of the bony tissues, the cause of which is not known. There are innumerable theories that have been evolved as to causative factors” (p. 162, lines 15 to 20).

He explained the theories. There is the hereditary theory, “they went on a theory further of so-called embryotic origin”; then there is the chemical theory; the traumatic theory; and “the latest theory that has been evolved is that it is an infectious disturbance”. Dr. Ruoff said: “We are confronted with a disturbance that medical science does not know the cause of” (pp. 162-163).

Dr. Ruoff said that there was no way of telling the origin of a cancer. He also said that cancer of the caecum could not have any effect in its process of development upon the appetite (p. 165).

The defendant, Samuel Sussman, testified that he was on an open road, going about thirty-five miles an hour, although he did not look at the speedometer, and that the collision with the bus was due to the fact that the bus came around a curve onto his side of the road (p. 173).

POINT I.

No causal connection was proved between the cancer whereof Hyman Sussman died November 2, 1928, and the injuries sustained by him at the time of the collision April 21, 1927.

Plaintiff failed to prove that the injuries received by Hyman Sussman April 21, 1927, had any causal connection with the cancer of which Hyman Sussman died November 2, 1928.

In *Houston vs. Traphagen*, 47 N. J. L., p. 23, Mr. Justice Magie said:

“The question presented is whether the evidence shows a causal connection between the fall and the disease which undoubtedly produced plaintiff’s deformity.

Upon such a question much reliance must be placed on the evidence of experts. Those who were called as experts in this case all agree that the disease in question—a form of scrofula—may be developed by a fall, a blow or other violence, but may also be developed by other causes, and sometimes without apparent cause. But it was obvious that plaintiff was bound to make out, not merely that it was possible that the fall caused the disease,

but that, looking at all the circumstances, it was reasonable to infer that it was the cause.”

Three physicians were called by the plaintiff, Dr. Bender, Dr. Joelson and Dr. Wassing. All testified that the medical profession has not yet discovered the cause of cancer (Dr. Bender, p. 55, line 15; Dr. Joelson, p. 71; Dr. Wassing, p. 90, line 35). Although millions of dollars and a great many lives of scientists have been given to discovering what cancer is and what causes it, they have not been able to determine. It is not known whether it is hereditary or congenital (Dr. Bender, p. 55, lines 20 to 30; Dr. Joelson, p. 71; Dr. Wassing, p. 83).

Although Mr. Sussman's condition was diagnosed by his family physician as an acute appendicitis on January 1, 1928, and he was operated upon January 2, 1928, and a mass was discovered in his abdomen, this was not diagnosed as cancer. Cancer was not discovered until he was operated upon the second time on May 28, 1928 (Dr. Bender, p. 39, line 20).

The deceased had been examined at the Putnam Hospital by Dr. Overlock, Surgeon-in-Chief of the Day-Kimball Hospital at Putnam, immediately after the accident (p. 138, lines 20 to 25). He said that Mr. Sussman was suffering from nervous shock and various contusions and abrasions over various parts of his body, all superficial. He also testified that X-Rays were taken and they were negative. He said that Mr. Sussman had nothing which amounted to a traumatic abdomen (p. 140, line 38). He had nothing that pointed to a traumatic abscess to the iliocaecal (p. 141, line 1).

Doctors Finke and Ruoff, called by the defendant, testified corroborating the physicians called by the plaintiff that the cause of cancer is not known, despite many theories that have been advanced, and in their opinion there was no causal

relationship between the accident and Mr. Sussman's death of cancer.

Dr. Bender was asked a hypothetical question which assumed that Mr. Sussman "received a blow or injury to his head and a *direct hard blow to his abdomen*" (Record, p. 42, line 10), and on that hypothesis answered: "Any injury to a viscus, or any injury to your body in general, weakening your body, will predispose to a more rapid growing of the mass which I found."

"Q. Go ahead, Doctor. A. An injury may be inflicted locally and induce a local cell change.

Q. That is what I want to know. A. In itself. This local cell change may of itself not be carcinomous, but may in turn be the foundation or onmarker for a carcinomous or cancerous change" (p. 45, lines 30 to 40).

Objection was made to the hypothetical question above mentioned on the ground that there was no evidence to support the statement of fact and it was admitted by the Court subject to being connected up and proved. It was never connected up or proved.

Dr. Joelson, who examined Mr. Sussman after his return from Providence, Rhode Island, did not testify to discovering any evidence of injury to the abdomen; he simply testified that Mr. Sussman complained of pain in that vicinity (p. 62, lines 20 to 30).

Dr. Joelson testified that Mr. Sussman's condition at the time of the operation, January 2, 1928, "*could be attributed to the accident that he had*" (p. 66, line 28).

It is submitted that this concerns a possibility and not a probability.

At that time it must be remembered that Dr. Joelson and Dr. Wassing had been treating Mr. Sussman off and on since about the first of May,

1927, and it was not discovered that Mr. Sussman had a cancer until May, 1928. It was Dr. Joelson's opinion that he had chronic appendicitis.

The only doctor who testified to having made a careful examination of Mr. Sussman's abdomen was Dr. Overlock immediately after the accident, and he stated positively that Mr. Sussman did not have a traumatic abdomen, so that there is in the evidence nothing to support the supposition that Mr. Sussman had a direct hard blow to his abdomen.

Dr. Wassing was asked a hypothetical question which contained the statement that on "April 21, 1927, on which date he received an injury to his head and abdomen, received a direct blow to his abdomen" (p. 84, line 5). This question was also objected to, but allowed by the Court, and the Doctor said that he could say with certainty that the pressure on the brain, which he discovered in the summer of 1927, was due to the accident. Regarding the carcinoma he said that the medical profession cannot speak in terms of certainty.

Dr. Wassing said:

"We know that general run-down conditions favor the onset of disease, the onset of heart disease, and so on. General run-down conditions favor the onset of diseases. There is no doubt about it, and statistics have brought out that a larger percentage of cancer develops in people with general run-down condition. . . . In this particular case, dealing with one blow only and not a continued injury, we must say that the possibility exists that this blow brought out cancer, but there is reasonable certainty that his injury has been a contributory cause. I would not say that it has caused the cancer, but a contributory factor, in one of two ways, with his general run-down condition, which we know favors the onset of disease, cancer also, and the blow possibly having injured or surely having injured the inside and possibly having

been a contributory factor right here locally” (p. 87, line 35, to p. 89, line 5, inclusive).

We submit that this testimony on the part of the plaintiff brings this case within the rule laid down by this Court in *Migliaccio vs. Public Service Ry. Co.*, 101 N. J. L., 496, in which the plaintiff's intestate was injured in a collision between an automobile, in which he was riding as a passenger, and a car of the defendant. More than a year after the accident he contracted tuberculosis, from which he died three months later. At the trial it was contended that the accident caused a lowering of the vitality by which he more readily contracted the disease from which his death resulted, and expert testimony was given to that effect. Mr. Justice Katzenbach writing the opinion of the Court said:

“The law requires that the damages chargeable to the wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term ‘natural’ imports that they are such as might reasonably have been foreseen and such as occur in an ordinary state of things” (p. 500).

This Court held that assuming that the deceased became infected with tuberculosis because of a lowered vitality due to the accident, such a result could not reasonably have been foreseen, and was not the natural and probable consequence of the wrongful act. Further, that to enable the plaintiff to recover it was necessary to exclude the idea that the death of the deceased was due to a cause with which the defendant was unconnected, which the plaintiff failed to do. Mr. Justice Katzenbach in the course of his opinion said:

“To permit the recovery of a judgment upon the testimony of the present case would be to permit a jury's guess or speculation to

deprive a defendant of its property. Such a result can only be obtained by a logical deduction from proven facts. To hold otherwise would throw wide open the door of recovery in many cases where illness and death have occurred long after an injury has been inflicted upon the theory that the illness would not have taken place if the person's vitality had not been lowered as a result of the accident. Physicians may be honest in being willing to testify that the illness would probably not have resulted if the injury had not occurred. But it is impossible for such an opinion to be much more than a guess because in no case would it be possible to frame a hypothetical question which would embody all the facts relative to the person of whom it is asked. No person knows to what disease he may be subjected to in a day's travel or business. It may be that the application of the principles above enunciated may in the present case seem harsh, but the letting down of the bars and departing from settled and well-established principles always results in worse evils.

In the present case we see no testimony which establishes a causal connection between the injury and death. In this state of the testimony it was error to have failed to either grant the motion to nonsuit or direct a verdict for the defendant" (at p. 502).

Tuberculosis, which was considered by the Court in the Migliaccio case has been proved by science to be a germ disease.

Dr. Finke testified that Mr. Sussman may have had a cancerous condition at the time of the accident; there was a possibility that he may have had an acute appendicitis, then developed a cancerous condition on top of the acute appendicitis; it may have been an ulcerating cancer inside the abscess that was present; it may have started after the accident.

“Q. Is there any way of telling with any degree of probability when the cancer started?
A. Absolutely not. You cannot tell” (p. 151, lines 10 to 40).

The testimony in the case at bar shows that science has not yet discovered what causes cancer, and despite the numerous theories that have been advanced as to its cause, the medical profession is still in the dark on the subject.

In view of the fact, as shown by the testimony in this case, that the medical profession knows almost nothing about cancer, we submit it was error for the Court below to let the jury speculate as to whether or not the cancer of which Mr. Sussman died November 2, 1928, was caused by his accident of April 21, 1927.

It was therefore error for the Court to deny the defendant's motion for a non-suit (Record, pp. 136, 137), and to deny the defendant's motion for a non-suit or the direction of a verdict at the close of the case (Record, p. 185; Grounds of Appeal 1 and 2, p. 11, and 1 and 2, p. 29).

The same question of law was likewise raised by the exception taken to that portion of Judge Mackay's charge which left to the jury the question whether or not defendant's alleged negligence was the natural or proximate cause of the injuries and death (Charge, p. 192, lines 10 to 30; Exceptions 4, 7 and 7, pp. 198-199; Grounds of Appeal 7 and 8, p. 14, and 4 and 5, p. 30).

The question was also raised by defendant's requests to charge (Nos. 2 and 3, pp. 199 and 200; Exception, p. 198, lines 1 to 3; Grounds of Appeal 3 and 4, p. 12; number 3, p. 30).

POINT II.

Upon the weight of authority Hyman Sussman, the deceased, was guilty of contributory negligence in riding mile after mile at high speed.

There is a line of cases of undoubted authority which hold that an invitee in an automobile driven by the owner at an obviously dangerous speed must exercise ordinary care for his safety, and if he fails to warn the driver, remonstrate or demand that he be given an opportunity to leave the car and does not take any precautions for his own safety, he cannot recover for the negligent operation of the car by the driver. This, of course, assumes that speed, or the manner of driving, was the proximate cause of the accident.

In *Brommer vs. Pennsylvania R. Co.*, 179 Fed. 577, Judge Buffington, in the United States Circuit Court of Appeals for the Third Circuit, said:

“Under the facts of this case the relation that the plaintiff sustained to his companion Pfeutze did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger”, (driving on a railroad track in front of an oncoming train) “permitting Pfeutze to drive into a pitfall or on a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. It is now the better recognized rule of law that, as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon mutual adventure, it is as much his duty as that of the driver to take observation of dangers and to avoid them if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury.”

See also

Phillips vs. Davis, 3 Fed. (2nd), 798;
Parramore vs. Railway Co., 5 Fed. (2nd),
 912.

The rule in New York is the same.

“If it was negligent for the defendant to drive at the rate of speed which he was driving it was equally negligent for the plaintiff, who was familiar with the road and its dangers, and was in every respect as able to judge what was a dangerous speed as was the defendant, to sit without protest and thrust all responsibility upon the driver; and to allow a jury to speculate whether, upon such facts, the defendant was guilty or the plaintiff was not, is to permit them to find a verdict solely upon conjecture. *McGuire vs. N. Y. Ry. Co.*, 230 N. Y. 23, 130 N. E. 905. We think the conclusion inevitable, either that defendant was not negligent, or if he were, that plaintiff was guilty of contributory negligence.”

Joyce vs. Brockett, 200 N. Y. Supp. 394;
 205 App. Div. 770.

The Court of Appeals of Maryland in *Lavine vs. Abramson*, 120 Atl. Rep. 523, held that a guest could not recover from an owner of an automobile driven at a negligent rate of speed which was caused to leave the roadway and collide with a wall. The Court quoted *Berry on Automobiles* (3rd Ed.), 527, with approval as follows:

“When dangers, which are either reasonably manifest or known to an invited guest, confront the driver of a vehicle, and the guest has an adequate and proper opportunity to control or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery.”

See also

Bower vs. Tugo, 224 Pac. 20 (Wash.);
Morris vs. C. B. & Q. Ry. Co., 163 N. W.
 799 (Supreme Court Nebraska).

“If the driver runs his car at a reckless rate of speed, and thus encounters an obvious danger, it is the duty of the invitee, when the danger becomes apparent, to take precautions for his own safety. He must remonstrate, and if necessary, ask for an opportunity to leave the car. If he sits silent and permits the driver to rush recklessly on at a dangerous rate of speed, knowing the danger, and fails to protest or remonstrate, he takes the chances of injury, and cannot recover for one which results from the manifest negligence of the driver.”

Naglo vs. Jones, decided by the Supreme Court of Kansas (1924), 222 Pac. 116.

See also

Kirby vs. K. C. & C. Ry. Co. (Kansas Supreme Court), 186 Pac. 744.

In *Stephenson's Administratrix vs. Sharp's Executors*, 1 S. W. (2nd), 957 (Ky.), where the Court said:

“The duty imposed by law upon Stephenson as a guest in the automobile was the exercise of ordinary care for his own safety. . . . He cannot ignore obvious dangers or intrust his safety absolutely to the driver when the same knowledge or means of knowledge of obvious or threatened dangers is possessed by both. He cannot idly sit by, close his eyes and ears to such dangers, and, in the event of an accident, hold his host liable in damages.”

Also

Milner's Administrator vs. Evansville Rys. Co., 221 S. W. 207.

The Supreme Court of Missouri in *Burton vs. Pryor*, 198 S. W. 1117, in the case of a collision between a buggy and a railroad train, said of a guest riding in the buggy:

“As in the exercise of common prudence, he knew or should have known of the danger and that the driver was apparently taking no cognizance of it or was taking no precautions in regard thereto, it was plaintiff’s duty to warn him or to call his attention to it in some way. He could not negligently abandon the exercise of his own faculties and, without taking any precautions of his own or without making any effort whatever, resign himself absolutely to the driver’s care regardless of the visible lack of ordinary caution on the latter’s part, and relieve himself of the consequences of his own negligence by hiding behind the fact that the other man was driving.”

In *Sackett vs. Chicago, Great Western R. Co.*, 174 N. W. 658, the Supreme Court of Iowa considered a case where the plaintiff was riding in a rear seat of a motorcycle as a guest of the owner, and the motorcycle collided with one of defendant’s trains. The Iowa Court held:

“Conceding that the driver’s negligence may not be imputed to plaintiff, still, under the circumstances, plaintiff was as much under the duty of lookout and discovery as was the driver. Under the record, plaintiff did nothing, and exercised no care for his own safety. . . . We think that, under the undisputed evidence, plaintiff was guilty of contributory negligence, and that the trial court rightly directed a verdict.”

The Supreme Court of Wisconsin in *Howe vs. Corey*, 179 N. W. 791, said:

“Negligence of a guest may be inferred from action or omission to act, speaking or omitting to speak respecting the duty under

all the circumstances. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under the circumstances. *White vs. Port Co.*, 84 Ore. 643, 165 Pac. 1005; *Brommer vs. Railway Co.*, 179 Fed. 577, 29 L. R. A. (N. S.) 924; *Avery vs. Thompson*, 117 Me. 120, 103 Atl. 4."

On plaintiff's case the only evidence as to the accident was given by Mr. Glicksman, who was riding in the same automobile with the deceased and his brother, the defendant.

The three, who were all Paterson business men engaged in the silk business, had gone to Providence on a joint business transaction (p. 103, line 10). They had bought as partners a mill which they were dismantling (p. 103, lines 10 to 30). The evening before the accident the defendant said to his two partners in the deal:

"I have got to take a trip tomorrow morning. I have got to go to Webster in Massachusetts, and if you don't mind, would you mind taking a trip with me tomorrow" (p. 94, line 30).

The next day, the day of the accident, being the Passover, the three started in defendant's Essex coach about 7:30 A. M. and about 8:15 A. M., about thirty-five miles from Providence the accident happened (pp. 94-95).

Mr. Glicksman said when asked about the rate of speed:

"Well, he was going a very fast speed" (p. 95, line 40).

If this testimony is believed, and it was uncontradicted at the close of the plaintiff's case, the defendant was making an average speed of $46\frac{2}{3}$ miles per hour in this thirty-five miles that he traveled in forty-five minutes.

At the top of page 96 Mr. Glicksman said that Sussman was traveling "between forty and fifty miles an hour". He said:

"It was a very fine road; it was an open road, but very good. In parts it was asphalt and parts concrete. All through country, with intersections off and on, not very many" (p. 96).

Glicksman said that he several times told the defendant: "Sam, take it easy. It is a little too fast". Glicksman says that the accident took place on a very sharp curve of the road, almost a triangle. Before reaching this curve Glicksman said to the defendant, "Sam, my God, take it easy; you are going it a little too fast" (p. 96). He said defendant replied: "The Essex is just fine, it is broken in nice, and it is going fine now" (p. 97, line 1). As they approached the curve in the road Sussman was traveling in the middle of the road forty to fifty miles an hour (p. 97, lines 30 to 40). Glicksman said that the defendant was not acquainted with this road, and that he Glicksman, looked at the signs. When they were about seventy-five feet from the curve in the road Glicksman says:

"I could not say much what happened. It happened about in one instant. We saw that bus, it was so fast, in the flash of an eye, and I didn't feel the accident, I didn't see nothing, I didn't—you know, it struck us like a flash of lightning" (p. 98, lines 20 to 30).

Glicksman said that it was a head-on collision. He felt no draw-back or any retarding of the speed (p. 99, line 30).

On cross-examination Mr. Glicksman testified that when they got to Putnam there was a very wide curve with a big sign pointing to Webster; that "we stopped at that curve to look at that

sign" (p. 107, lines 1 to 5). Glicksman gave this testimony:

"Q. None of you attempted to get out of the car at that point? A. No, sir.

Q. Did you at any time along the road ask to be let out so that you could go back? A. No, sir.

Q. All the time, you say, from Providence up to the point of this accident you were speeding along between forty and fifty miles an hour? A. Going a very fast clip, yes.

Q. And Hyman Sussman made no attempt to get out of the car at any time? A. No, sir.

Q. He did not ask to have Sam stop and let him out? A. He didn't say nothing.

Q. Nothing like that? A. Nothing like that" (p. 107, lines 10 to 30).

We respectfully submit that this testimony on behalf of Mr. Glicksman establishes contributory negligence on the part of Hyman Sussman. He permitted himself to be driven in an automobile over roads that were unfamiliar to himself, as well as to the driver, at high speed, over long distances, without making any protest to the driver and without attempting to get out when the car stopped and he could have gotten out if he did not consent to the speed and thereby assume the risk of an accident.

According to Glicksman's testimony, as well as that of Samuel Glicksman in defense, the car was going so fast that on a curve of the road they collided with a bus as it came around the curve. Had the car been driven at a reasonable rate of speed there probably would have been no accident.

We submit therefore that it was error for the Court not to non-suit and direct a verdict in favor of the defendant because of the contributory negligence of Hyman Sussman.

Moreover the defendant, Hyman Sussman, and Glicksman were on a joint venture and the neg-

ligence of one under the circumstances was the negligence of all.

It was therefore error for the Court to leave to the jury the question of defendant's negligence, and also to leave to the jury the question of the contributory negligence of Hyman Sussman, which as a matter of law was established (Exceptions 1 and 2, p. 198; Charge of the Court, p. 192, pars. 1 and 2; Grounds of Appeal 1 and 2, both cases; Grounds of Appeal 7 and 8, p. 14; Nos. 4 and 5, p. 30).

POINT III.

The Trial Court erred in refusing to charge the jury that in the case of the general administratrix no damages could be awarded for any cost of treating deceased for his cancerous condition, or for any of the pain and suffering caused by the cancer.

Defendant requested the Court to charge the jury as follows:

“(3) Under the undisputed evidence in the case Hyman Sussman died of cancer of the bowel. In the case of Regina Sussman, administratrix of Hyman Sussman, no damages may be awarded for any of the cost of treating Hyman Sussman for his cancerous condition, or for any of the pain and suffering he had that was caused by the cancer, or the operations upon his body for the conditions caused by the cancer, or for loss of earnings caused by the cancer” (Record, p. 200).

Defendant also requested the Court to charge request No. 4, as follows:

“(4) It appears from the evidence that all the medical expenses proved in this case were incurred after the symptoms were discovered

which later proved to be caused by cancer” (p. 200).

Defendant also requested the Court to charge request No. 5, as follows:

“(5) It appears from the testimony of Dr. Bender and Dr. Joelson that after the operation of January 2, 1928, Hyman Sussman was unable to do any work because of his condition. Dr. Bender testified that upon the operation of January 2, 1928, he realized that if he did not remove the mass from the abdomen it would ultimately cause death. At this time the mass was adherent to the wall of the abdomen at the back, indicating that the cancer was then in an advanced stage” (p. 200; exception, p. 198, lines 1 and 2).

On the contrary, the Court charged the jury that the general administratrix:

“would be entitled to recover such sum as you believe to be fair and reasonable for the pain and suffering endured by the deceased in his lifetime as a result of this accident. If you should find as a fact that this cancer was not caused by the accident, then the pain and suffering to which she would be entitled as the plaintiff in this case would only be such pain and suffering as he endured as a result of these injuries; but if the cancer was caused by this accident, then, of course, you could consider the pain and suffering which he endured until the time of his death” (p. 195, lines 23 to 36; exceptions 6 and 7, p. 199).

It is submitted that we have shown under Point I that the cancer was not the natural and proximate result of the accident.

Should the Court hold that the deceased might have recovered damages for the injuries that were the natural and proximate cause of the accident, then we submit that it was error for the

Court to refuse to charge the defendant's requests as above enumerated. The Court on the contrary left it to the jury to assess damages in favor of the general administratrix not only for the minor injuries that the deceased sustained in the accident (from which he was discharged from the Putnam Hospital after three days), but also for damages for the pain and suffering caused by the numerous operations that followed the appendicitis and cancer.

We submit that this clearly was error.

This error was harmful because the verdict in favor of the general administratrix was \$7,500 (pp. 8-9).

There certainly would have been no such verdict had defendant's requests been charged.

POINT IV.

The Court erred in permitting the jury to include in their verdict money expended by Mr. Katz for his brother-in-law, the deceased.

After it was discovered that Hyman Sussman had cancer his brother-in-law, Jacob Katz of Paterson, had him removed to New York and operated upon by Dr. Lillienthal, and Mr. Katz personally paid a large part of Mr. Sussman's expenses for hospital and nurses. Hyman Sussman paid his bills as long as he was able to (p. 122, line 12). When he was not able to take care of them himself either Mrs. Sussman or Mr. Katz paid them.

“Q. You mean at Hyman's request? A. At Hyman's request, and sometimes when he could not do it I saw to it that either she paid or I paid” (p. 122, line 21).

The last bill was for \$1,042.90, which was paid by Mr. Katz after Mr. Sussman's death at the re-

quest of Mrs. Sussman (p. 123, lines 10 to 20). A list of bills paid by Mr. Katz and the dates appears on pages 124 to 127 inclusive.

On cross-examination Mr. Katz testified that he paid practically all the bills for the treatment in New York, and he said, "Well, the question of obligation did not enter with me. I wanted him to get well". He never conferred with his brother-in-law on the subject. He never asked either his brother-in-law or sister to pay the bills (pp. 128-129).

The Court expressly left to the jury the amounts of these bills, and charged the jury:

"Therefore, if you find for her, you would take these items and put them in one lump sum and render a verdict in her favor" (p. 196, lines 30 to 35; exceptions 6 and 7, p. 199; ground of appeal 6, p. 13).

The question was also raised by exception to the allowance of questions to Mr. Katz regarding the amount of the bills. This question was allowed over objection and an exception was taken:

"Q. Do you remember the amount of the hospital bill in Barnert Hospital? A. Well, this was the last bill. That was paid after death" (p. 122, line 25; exception, p. 125, line 10; ground of appeal 10, p. 34).

CONCLUSION.

It is respectfully submitted that the judgment under review should be reversed for the reasons aforesaid.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

Exhibit P-1.

STATE OF NEW JERSEY

STATE DEPARTMENT OF HEALTH
BUREAU OF VITAL STATISTICS

Registered No. 1521

1. Place of Death: County—Passaic; State—New Jersey; City—Paterson; No.—Barnert Hospital.
2. Full Name—Hyman Sussman.
3. Residence—No. 485 E. 27th St. Length of residence in city or town where death occurred 18 yrs.

PERSONAL AND STATISTICAL PARTICULARS

4. Sex—Male.
5. Color or Race—White.
6. Single, Married, Widowed or Divorced (write the word)—Married.
7. If married, widowed or divorced—Husband of Regina Sussman.
8. Date of Birth—May 1, 1892.
9. Age—36 years.
10. Occupation of Deceased:
 - (a) Trade, profession or particular kind of work—Silk dealer.

(b) General nature of industry, business, or establishment in which employed (or employer)—Raw silk.

11. Birthplace—Poland.
12. Name of Father—Jacob Sussman.
13. Birthplace of Father—Poland.
14. Maiden Name of Mother—Feiga Kuyafsky.
13. (a) Birthplace of Mother—Poland.
15. Signature of Informant—Jacob Sussman, Paterson, N. J. •
16. Received—Nov. 3, 1928. James A. Young, Local Registrar.

MEDICAL CERTIFICATE OF DEATH

17. Date of Death—Nov. 2, 1928.
18. I HEREBY CERTIFY That I attended deceased from Jan. 1, 1928, to Nov. 2, 1928. I last saw him alive on Nov. 2, 1928, and death occurred on date stated above, at 10 A. M. The cause of death was (see over)—Carcinoma of bowel at cecum. Duration—10 mos.
19. Where was disease contracted, if not at place of death? If an operation preceded death give date—Jan. 1 & July, 1928. Was there an autopsy?—No. What test confirmed diagnosis?—Operation.

M. S. Joelson, M.D.,
Paterson, N. J.

20. Place of Burial—Passaic Junction Cemetery. Date of Burial—Nov. 4, 1928.
21. Undertaker—J. M. Blauvelt, Paterson, N. J. New Jersey License Number—366.

DEPARTMENT OF HEALTH
OF THE
STATE OF NEW JERSEY
BUREAU OF VITAL STATISTICS

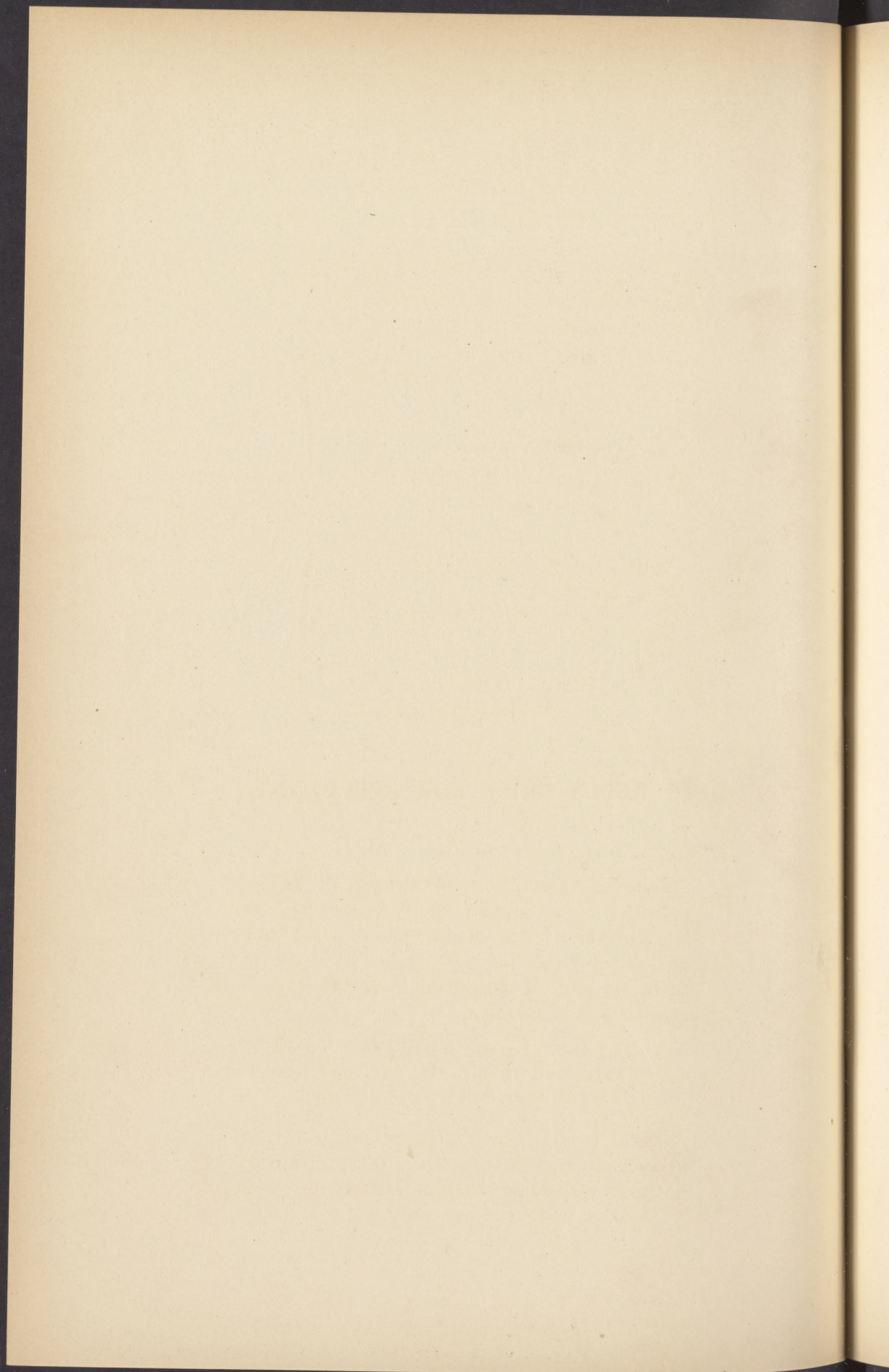
I, D. C. BOWEN, Superintendent of the Bureau of Vital Statistics of the State of New Jersey, do hereby Certify that the foregoing and annexed is a true copy of a certain Certificate of Death, as taken from and compared with the original remaining on file in my office.

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the
Official Seal of said Bureau, at Tren-
(Seal) ton, this twenty-sixth day of Janu-
ary A. D. 1929.

D. C. BOWEN
Superintendent.

Attest:

DAVID S. SOUTH
State Registrar of Vital Statistics.



40 MAY.T 1931

41 MAY.T.1931

*Filed after the Oral Argument
by leave of Court.*

New Jersey Court of Errors and Appeals

REGINA SUSSMAN, Administratrix *ad
prosequendum* of the Estate of HY-
MAN SUSSMAN, Deceased,
Plaintiff-Respondent,

vs.

SAMUEL SUSSMAN,
Defendant-Appellant.

REGINA SUSSMAN, General Adminis-
tratrix of the Estate of HYMAN
SUSSMAN,

Plaintiff-Respondent,

vs.

SAMUEL SUSSMAN,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

REPLY BRIEF FOR APPELLANT.

I.

We regret that we are obliged to call the Court's attention to a serious repetition in respondent's brief of positive mis-statements of what this record shows.

On page 4 of respondent's brief, last paragraph, is the statement:

“but we do know that Hyman Sussman was pinned underneath the car, and received a terrific direct blow to his abdomen.”

There is not a word in the record to this effect, and on the contrary Dr. Overlock, Chief Surgeon at the Day-Kimball Hospital at Putnam, Connecti-

cut said that Mr. Sussman received "a moderate shock and various contusions and abrasions over various parts of his body, all superficial".

"His subjective symptoms were complaining of pain in no definite location" (record, p. 138, lines 25 to 35).

Dr. Overlock said that X-rays were taken. He said:

"His subjective symptoms did not warrant the supposition that there were any injuries except those apparent on the surface of the body" (p. 139, line 20).

Dr. Overlock also said in response to this question:

"Q. Was there any injury at this time to any part of the abdomen? A. No, he had no injuries except what were included in that general statement. He had no such injuries.

Q. In your opinion, the injuries received were of a superficial nature? A. Yes" (p. 140, lines 12 to 20).

With this testimony by the surgeon who treated Mr. Sussman immediately after the accident, we find the respondent in his brief saying:

"that he received a direct injury to his abdomen" (state of case, p. 62, lines 4-5).

This refers to the testimony of Dr. Joelson, who relating the history told him by Mr. Sussman (bottom p. 61 and top p. 62) said he complained when Joelson saw him of abdominal pain.

"He told me he had pain inside of his abdomen.

Q. Did he tell you at the accident— A. That it pained after the accident.

Q. Now, did he tell you he received the injury to his abdomen at the time of the accident? A. At the time, yes" (p. 62, lines 9 to 15).

The answer to this very leading question is absolutely the only evidence in this case that the deceased had any injury at all to his abdomen. It does not show a severe blow, or the nature or extent of the alleged injury to his abdomen.

On page 5 of respondent's brief is contained this totally unwarranted statement:

"being pinned underneath the car and receiving this terrible injury to his abdomen, which was practically punched out."

The Court will not find in the record a single word justifying any statement that in the accident Sussman had any blow whatsoever to his abdomen.

At the bottom of page 73, lines 38 to 40, the Court will find this testimony given by Dr. Joelson:

"By the Court:

Q. Well, Doctor, on an examination—you say you were present at this operation; is that right? A. Yes, sir.

Q. Well, then, on an examination of this patient did you see the cancerous growth? A. No, sir. We had no right to go into his abdomen, because it was just punched right out of him; the only thing we could do was just to stick drains in there and leave him there.

Q. But you did not see the cancerous growth? A. We saw it on the second operation" (p. 73, line 30 to p. 74, line 4).

What Dr. Joelson was testifying to was concerning the operation of January 2, 1928, regarding his abdomen being just punched right out.

We do not know what Dr. Joelson could have had in mind when he used the language quoted, unless he was referring to the pus condition and the inflamed area about the appendix, which was discovered in the operation of January 2, 1928.

Certainly there was nothing connected with the accident in April, 1927, that justified any such language on the part of anyone.

It was Dr. Joelson's opinion, formed about three months after the accident, that Mr. Sussman had a chronic appendicitis, because he first began to complain about that time (p. 68, line 30 to p. 69, line 12).

On page 6 respondent states that:

“Our theory is that this direct blow to the deceased's abdomen, which caused the cancer in his abdomen, or to begin in his abdomen, resulted in his death”.

Objection cannot be made to the respondent having a theory. The question here is was that theory proved by the evidence.

Top page 7 of respondent's brief is the statement:

“That this cancer was caused by the terrific blow to the deceased, cannot be doubted because Dr. Joelson testified (S. of C., p. 69, ll. 2-5) that about three months after the accident, he began to feel little hard nodules, little swellings”.

Evidently the “little hard nodules” did not indicate cancer for Dr. Joelson and the other doctors who examined deceased would have made a diagnosis from them.

The last sentence in the first paragraph on page 7 of respondent's brief says:

“This again goes to show that the deceased did receive this direct injury to his abdomen”.

If the record contained a statement that deceased sustained a terrific blow to his abdomen in the accident, it would not be necessary to argue the fact.

On pages 14 and 15 of respondent's brief it is argued that Dr. Finke while on the stand testified that it was probable for cancer to come from a blow.

Dr. Finke testified positively that in his opinion traumatism was not the causative factor of death (p. 147, line 20).

Dr. Finke testified in so many words that it was not probable that deceased came to his death because of the accident (p. 147, line 20).

The question asked of Dr. Finke on cross-examination, which is printed at the bottom of page 14 of respondent's brief, had nothing to do with the facts of this case.

On page 15 of respondent's brief respondent says:

"We know positively that this man did not have cancer in his system before the accident for Dr. Joelson testified to that effect (S. of C., p. 69, l. 38)".

The question referred to at this point is:

"You cannot tell this jury that he did not have a cancer in 1926, with any degree of positiveness, can you? A. Yes, I can.

Q. Can any doctor tell from an examination? A. Yes, certainly".

The proof that Dr. Joelson was only testifying to a conclusion is shown by his testimony, page 72:

"Q. Nobody can tell a thing about it until after the thing actually is found to be in the system; isn't that so? A. Yes, that is right" (lines 23 to 26),

and again by his answer to this question:

"Q. You don't know anything about that cancer until you find it? A. Yes, that we do not get" (p. 73, lines 28 to 30).

The strongest argument for saying that Dr. Joelson and the numerous doctors who saw him could not tell whether Mr. Sussman had a cancer or not is that it was not diagnosed as cancer until the second operation in May, 1928. Dr. Joelson argues that from the fact that the cancer was found in the second operation May 28, 1928, that it must have been there at the operation of January 2nd, and from that fact plus the fact that Sussman had been complaining for six months previous to that, he argues that it must have been there six months previous to January 2, 1928 (p. 75, lines 1 to 25). Yet in the death certificate (annexed to our main brief) Dr. Joelson certified November 2, 1928, that the duration of the cancer was ten months!

How then could Dr. Joelson say that in 1926, or at any other time, this man did not have a cancer?

Dr. Finke on the contrary says that this cancer may have grown inside the abscess that was present (p. 151, line 30). It may have been caused by constipation due to over eating; and may have started from various causes before or after the accident.

At the top of page 16 of respondent's brief is this quotation from the testimony of Dr. Wassing reading:

“the blow to his abdomen we can surmise from the description that he was bruised and that he was apparently considerably injured”.

This was not a statement of a fact. It was an answer given to a hypothetical question which contained the erroneous assumption that there was a direct blow to the abdomen.

The hypothetical question containing this statement is found on page 84, and the statement therein “he received a direct blow to his abdomen” is found on page 84, lines 4 and 5.

Practically every hypothetical question that was asked of plaintiff's experts assumed that the evidence would show "a direct blow to the abdomen". These questions were admitted, over objection, subject to the fact being proved, and the fact was not proved.

In the face of the fact that no witness testifies to seeing an injury to Hyman Sussman's abdomen; when the only physician who examined the deceased after the accident testifies on the contrary that he did not have an injury to his abdomen, we submit that the repetition of the statements to the effect that Sussman did have a "terrific blow to his abdomen"; the statement that his abdomen was "practically punched out", were inserted in the brief for the purpose of leading the Court away from the facts as actually proved.

II.

The extensive quotations from medical books (pages 8 to 14 inclusive of respondent's brief) are improper.

As we stated at the argument of this case, we shall not attempt to answer or reply to the quotations of medical authorities that are contained in respondent's brief. It occurs to us that they are not proper to be inserted in a brief for this Court when they were not called to the attention of the Court below. The authors quoted were not called as witnesses in the Court below, and what they have written was not subject to cross-examination. Their writings are based upon hearsay.

If it be said that such quotations are put in the brief by way of argument, we object to them for the reason that an answering argument would compel a study not of authorities of law, but authorities in medicine.

If such argument is proper, then briefs in the future in such cases may be expected to contain extensive quotations from medical authorities and encyclopedias of all kinds. Some necessarily will be plausible, but not authoritative.

We therefore shall not attempt to answer the quotations from medical books, but rely upon our contention that it is improper to quote them when they were not quoted or referred to in the Court below.

We submit this case should be heard and decided on the record below, and not what may be found in various books gleaned from libraries and other sources.

We respectfully request the Court to check all references to the record.

It is submitted the judgments below should be reversed.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

40 MAY.T.1931

41 MAY.T.1931

*Filed after the Oral Arguments
by leave of Court.*

New Jersey Court of Errors and Appeals

Regina Sussman, Administra-
trix ad prosequendum of the
Estate of Hyman Sussman,
deceased,

Plaintiff-Respondent,

vs.

Samuel Sussman,
Defendant-appellant.

Regina Sussman, General Ad-
ministratrix of the Estate
of Hyman Sussman, de-
ceased,

Plaintiff-Respondent,

vs.

Samuel Sussman,
Defendant-appellant.

Action at Law
On Appeal
from Supreme
Court

Brief of Plaintiff-Appellee

The above appeals are from final judgments of the Supreme Court, the causes having been tried before the Supreme Court Circuit at Passaic County, and a jury, on October 22nd and 23rd, 1930.

STATEMENT OF FACTS

The plaintiff, Regina Sussman, in both cases, is the wife of Hyman Sussman, the deceased. On April 20th, 1927, defendant, Samuel Sussman, the deceased, Hyman Sussman, and a mutual friend, Abraham Glicksman, had gone to Provi-

dence, Rhode Island, and stayed over at the Naragansett Hotel, (S. of C., p. 94, l. 19-21). On the evening of April 20th, 1927, the defendant turned to the deceased and his friend and said:—"I have got to take a trip tomorrow morning. I have got to go to Webster in Massachusetts, if you don't mind, would you mind taking a trip with me tomorrow?" (S. of C., p. 94, l. 30.) The following morning the three parties got up about 6:30 A. M., (S. of C., p. 95, l. 4). They did not have breakfast, because it was the Jewish Passover Holiday, and they started for Webster, Massachusetts, from their hotel at about 7:30, (S. of C., p. 95, l. 12); that they rode in the defendant's car, which was an Essex Coach, and that the accident happened about 8:15 A. M., (S. of C., p. 95, l. 21-22-28). That the accident happened between Putnam, Connecticut, and Webster, Massachusetts, (appellant's brief has the reverse). That on the way up from Providence, to the point of the accident, the defendant was going about forty and fifty miles an hour, (S. of C., p. 96, l. 1); that it was open country and the road was part concrete and part asphalt, and all open road, (S. of C., p. 96, l. 7-12). That the exact point where the accident occurred was in Grovendale, Connecticut; that it happened at a very sharp curve, which curve was approximately a forty-five degree one; that before they arrived at Grovendale, Mr. Glicksman, the friend, said:—"Sam, take it easy. It is a little too fast." (S. of C., p. 96, l. 18.) That just before they arrived at the curve where the accident took place, the friend said to the defendant:—"Sam, my God, take it easy; you are going a little too

fast." That the defendant's answer was that the car was just broken in nice, and was going along fine, (S. of C., bottom of p. 96 and top of p. 97); that at the curve, the defendant collided with a bus coming in the opposite direction around the curve; that the point of contact was right at the point of the curve, and was a face to face collision, (S. of C., p. 99, l. 6) and that the defendant never retarded his speed. That all were immediately taken to the Day Kimball Hospital at Putnam, Connecticut (S. of C., p. 100, top).

ANSWER TO POINT I.

The first point made by the appellant in his brief, is that there is no casual connection between the injury Hyman Sussman sustained on April 21st, 1927, and the cancer of which he died on November 2nd, 1928. This entire point narrows down to one thing—the relationship between Trauma and Cancer.

Hyman Sussman, prior to the accident, was a very healthy man (S. of C., p. 131, l. 10). He was a good eater; never was sick (S. of C., p. 131, l. 12-14). His wife testified (S. of C., p. 131) to his condition prior to the accident. Herbert Sussman, the deceased's son (S. of C., p. 135) said that his father was in perfect health prior to the accident (S. of C., p. 135, l. 18); that he never complained of pains, and was a good eater, and never lost his appetite before the accident (S. of C., p. 135, l. 24). Jacob Katz, president of the Barnert Hospital at Paterson, testified (S. of C., p. 118) that he had many meals

with Mr. Sussman, and that he was a very good eater, and was in very good health prior to the accident (S. of C., p. 118, bottom). All this was prior to the injury sustained by the deceased. After he was brought home from the Day Kimball Hospital at Putnam, Connecticut, his wife says (S. of C., p. 131, l. 17) that after the accident there was always trouble. He was always sick and that he suffered pain. Herbert testified (S. of C., p. 135) that after the accident sometimes he did not eat at all, and at other times he did not eat much. We have mentioned this to show his condition before and after, and to show his appetite before and after, for the reasons that we will hereinafter argue.

We then come to the date of the accident—April 21st, 1927. The deceased was riding in the back seat when the crash occurred.

Abraham Glicksman, a friend of both of the parties, who was riding in the automobile, testified, as the Court has already seen from the statements of facts, that the crash occurred at a forty-five degree angle, and that the defendant ran head-on into the bus, going at the rate of about forty to forty-five miles per hour. There was a terrific impact. Of course, Glicksman was knocked out, and couldn't say exactly what happened to the deceased, (S. of C., p. 109, l. 36), but we do know that Hyman Sussman was pinned underneath the car, and received a terrific direct blow to his abdomen; also other parts of his body. We have, from the testimony of his attending physician, his history; that he received a direct

injury to his abdomen, (S. of C., p. 62, l. 4-5). In fact, if the Court will look at the cross-examination of Dr. Joelson, who was the deceased's attending physician (S. of C., p. 3, l. 38-40) it will find the following:—

“We had no right to go into his abdomen, because it was just punched right out of him . . .”

In consequence of the above, we have the deceased involved in an accident, riding in an automobile; crashing into a bus at the rate of forty-five miles an hour; being pinned underneath the car, and receiving this terrible injury to his abdomen, which was practically punched out. Now let us see his condition immediately after the accident.

Dr. Joelson says that he continually complained of pain after the accident (S. of C., p. 62, l. 12). Dr. Wassing said (S. of C., p. 78, l. 28) that he complained of pain in the abdomen; that his appetite suffered considerably since the accident. He was pale, undernourished, shaky, nervous, complained of headaches and dizziness, and that he had irritation on the brain; that his eye-grounds were congested (S. of C., p. 78, l. 25-40). Dr. Bender, who operated upon him said (S. of C., p. 41, l. 10):

“A. His pain, of course, was at the side of his lesion, his abdomen. He had an intermittent, colicky like pain he complained of at times very bitterly, and even requiring

the use of narcotics, sometimes a fairly large dose of morphine was necessary.

Q. Why was the administration of narcotics necessary? A. For the alleviation of his pain."

Again Dr. Joelson said he complained of abdominal pain, (S. of C., top of p. 62). The wife also testified as to his pains (S. of C., p. 131, l. 19).

The contention of the defendant under Point I, is that there is no casual connection between the injury and the cancer. They rely greatly upon the case of *Migliaccio vs. Public Service*, 101 N. J. L., p. 496.

The only question in the case now before the Court is whether there is any relation between trauma and cancer. If a direct blow to the abdomen could cause cancer, then it was proper for the trial Court to have submitted it to the jury. Our theory is that this direct blow to the deceased's abdomen, which caused the cancer in his abdomen, or to begin in his abdomen, resulted in his death. At this point we will cite one line from the *Migliaccio* case, which is the basis of our theory. Justice Katzenbach said at p. 500, last sentence:

"It may seem somewhat strange to say that death resulting from a direct injury to the lungs by accident is a natural and proximate result which could be reasonably foreseen and anticipated . . ."

That this cancer was caused by the terrific blow to the deceased, cannot be doubted because Dr. Joelson testified (S. of C., p. 69, l. 2-5) that about three months after the accident, he began to feel little hard nodules, little swellings. The Court will find from the text we will cite hereinafter, that this is one of the signs of the beginning of cancer. When one can start feeling those little nodules at the abdominal wall, that is one of the indications of the beginning of cancer. He also testified to the nodules on direct examination (S. of C., p. 62, l. 34) and Dr. Joelson says that the reason much attention wasn't paid to it at that time, was because of the fact that he thought they were probably swollen glands due to the injury he received. This again goes to show that the deceased did receive this direct injury to his abdomen.

The defense's entire contention in this case, is that there is no relation between trauma and cancer or carcinoma. They produced two experts—Dr. Fink of Hackensack and Dr. Ruoff, who testified that there was absolutely no relationship between trauma and cancer, and that one had nothing to do with the other, except through mere possibilities. The plaintiff's experts—Dr. Bender, Dr. Joelson and Dr. Wassing testified to the probabilities of trauma causing cancer. This, of course, raised a jury question.

Because of the importance of the causative factor of this trauma to the cancer, and later to his death, counsel has gone to quite some trouble in obtaining and preparing for this brief,

as much of the authorities on cancer, as could be gotten. We have investigated the various text books upon neoplastic diseases, and we now desire to argue the probabilities of the connecting chain between trauma and cancer.

Probably one of the most noted authorities on neoplastic diseases is Dr. James Ewing, Professor of Pathology at Cornell University and Pathologist to the Memorial Hospital, New York. His book, published in 1928, gives highly important features of the theories of the nature of cancer. We may say, at the outset of this brief, there is no doubt that the medical profession does not know, as a positive fact, the cause or origin of cancer, which is carcinoma or sarcoma. They have, however, in their experiments, and in their actual practice, found that cancer has been caused by certain things—for example trauma, irritation, constant burning, and at times from pipes continually smoked by a man, which causes cancer of the lip. At the very beginning of his book (p. 116) Dr. Ewing goes into the causative factors between carcinoma (cancer) and trauma. He said on page 116 of his book on neoplastic diseases, third edition, printed 1928:

“Mechanical trauma is an important factor in the causation of tumors
By trauma is here understood, a single or repeated more or less contusing, crushing, or lacerating mechanical injury.”

Thus we see what he means by trauma. At the bottom of page 117 he says:

“Many cancers have appeared after single injuries. (Citing Ziegler, Lowenthal, Jordan and Segmond.) Cancer has been attributed to lacerations by rough instruments, rusty nails and pains, thorn pricks, insect bites, surgical wounds, *and to blows without visible destruction of tissue.*”

On page 668 there is cited:—

“Many observers have endeavored to establish a definite relation between trauma and gastric cancer. Menne cites a series of cases designed to illustrate a direct or indirect relation to trauma, and concludes that the trauma may be the effective etiological factor, or may excite malignant growth in a latent and quiescent focus, or may accelerate the growth of an existing carcinoma. *He also describes various traumatic lesions of the stomach of benign course which might serve as sources of carcinoma. The legal verdict in these cases strongly favored the victim, on the ground that the evidence created a probability approaching certainty that the carcinoma resulted from the trauma.*”

The above quotation is Dr. Ewing's text on carcinoma of the stomach. On page 852 he says:—

“Curran reported a rapidly progressive carcinoma of the lung in a boy of 10 years, fatal 141 days after the receipt of a mod-

erate injury to the chest wall. Lepine has described an acanthoma, involving the lung and the chest wall at the point of injury and appearing 1 year after the trauma."

And on page 118, the following:

"Most traumatic sarcomas arise from the bones, usually after single severe traumas, when they develop from the periosteum and show a spindle-cell structure."

It will be recalled from Dr. Bender's testimony that upon his operation he found this growth at the periosteum, and that it was a spindle-cell structure.

Fraser on Trauma Disease Compensation, printed 1930, (Dr. Fraser is Chief Medical Officer, Workmen's Compensation Board at Winnipeg) cites on p. 470:

"In this case a man of twenty-eight developed a rodent ulcer on the lower part of the face, on an area which had been repeatedly struck by the recoil of a rifle."

At the bottom of page 470, Dr. Fraser cites:

"Stelwagon-Gaskill note that the cause of cancer is still an undetermined question. Among the adjuvant or contributory causative factors is included local irritation as a recognized exciting agent. They hold this relation to be shown by the fact that

an accident knock or other often trifling injury on an ordinary wart, fleshy mole or pigmented naevus of long duration, may cause epithelial development to begin. They note that a cancerous growth in the skin *may start at the site of* a cut, scratch, or other *accidental traumatism.*"

On page 209 of Dr. Fraser's work, we find:

"Martin cites the experience of Boas, who, in a series of sixty-two cases of *cancer* of the intestinal tract, found nine *with a clear history of antecedent trauma.*"

At the bottom of p. 209, we have:

"Segond points out that in Germany four conditions obtain for internal cancer of supposed traumatic origin: (1) That the accident has been of a nature to provoke an internal lesion such as a laceration or contusion of the mucous surface of the stomach or intestine, which may favour the later development of cancer. (2) That the victim has had the appearance of perfect health before the accident. (3) That since the accident up to the time of death the victim has had symptoms of disease, proving the steady progression of the inflammation of the mucous membrane gradually transforming the condition into cancerous disease. (4) That the autopsy has revealed the presence of a cancer in the region of the traumatism."

It may not be amiss to cite to this Court, the requirements of the French Statutes for recovery for death or injury caused by cancer, which it is alleged was the result of a direct blow. Dr. Ewing on page 119 says:

“To establish the relation of trauma several classes of evidence are necessary, as is recognized especially by the French statutes: (1) The authenticity and sufficient importance of the trauma. (2) Previous integrity of the wounded part. (3) A reasonable time relation, three weeks to three years or more in certain cases. (4) Continuity of pathological changes or symptoms in the wounded part and the appearance of the tumor. (5) Microscopical proof of the existence of a tumor.”

Looking at the requirements of the French statutes and the conditions that Dr. Segond points to as prevalent in the courts of Germany, the Court will find that we have complied with them all. Every requirement cited above under the French and German statutes, can be found in the state of case in this case.

Dr. Lowenstein has reported to the medical bureau, that in the statistics of the German Army and Navy in the years 1899 to 1907, two hundred and forty-one malignant tumors were observed in subjects under constant medical attention, free from mental bias, and that thirty-nine or 16.5% of these were attributed to cancer.

On page 487 of Dr. Fraser's work, the Court will find:

"Discussing cancer of the male breast, Cumston states the only other etiologic factor *worth considering is trauma*, which is really of remarkable frequency in the antecedents of these patients. *He affirms the conviction that trauma is probably the foremost factor in the production of malignant growths not only of the mamary gland but in all other viscera.*"

"He cited the study of over nineteen hundred cases of all kinds of neoplasms by Geinatz who found that in twenty per cent of sarcomata there was a history of traumatic violence; also Diehmann's statistics of over two hundred cases of sarcoma, thirteen per cent of which had traumatism as a starting point."

Dr. Fraser says that Dr. Coley cites his analysis of a series of two hundred and fifty cases of carcinoma coming under his personal observation. In the series he found a history of *antecedent trauma in thirty-two per cent*. Nearly half of the series of cases were carcinoma of the breast, and in these there was a history of a *single antecedent trauma* in fifty per cent. Dr. Fraser further says:

"Coley quotes the opinion of Von Bergmann that a single contusion of the muscles or glands may be the predisposing cause for all types of malignant disease, and his explanation that an injury pro-

duces an extravasation of blood which remains as a focus and later forms a favourable nidus for the development of cancer, Coley accepts as reasonable as any that has been offered."

"In a series of nearly one thousand cases of sarcoma coming under his observation there was found a *definite history of trauma in twenty-three per cent.*"

We also have from Dr. Ewing, the relationship between trauma and cancer, with reference to brain tumors. He says on page 424:

"The frequency of traumatic origin of brain tumors has been variously estimated by different observers, but, as a rule, the estimates are notably high. Gerhardt accepted the traumatic origin of 10 among 60 reported cases of glioma, and 4 of 11 cases of his own."

Even from the defense we have substantiation. Dr. Fink, while on the stand, testified (S. of C., p. 159), that it was probable for cancer to come from a blow, for he testified:

"Q. A man had a blow to his head causing a concussion, if a cancer was to come in his system and there was a probability of the cancer coming from that blow, wouldn't it be more probable that the cancer would come on his head? A. That is probable, yes.

Q. Assuming that the blow was sufficient enough to cause a concussion? A. Yes."

This bit of testimony on the part of Dr. Fink is important, because he had just been thoroughly examined, and he said that only the possibility exists of the relationship between trauma and cancer. Then suddenly, upon re-direct examination by defendant's counsel, he testifies that if a man received a blow on the head, the probabilities are that the cancer would come at that point. Of course, when his attention was called to it, that he had said "probability" he then changed it to "possibility."

From the above we think that we have given to the Court, citations sufficient to gather the medical side of the inquiry we are endeavoring to present to the Court. From the above and from the plaintiff's doctors, we can gather that there is the probability of trauma causing cancer. We know positively that this man did not have cancer in his system before the accident for Dr. Joelson testified to that effect (S. of C., p. 69, l. 38). Dr. Joelson attributes the cancer to the injury he received to his abdomen (S. of C., p. 66, l. 28-32). Dr. Bender says that an injury inflicted locally may induce a local cell change, which may, in turn be the foundation or onmarker for a carcinomous or cancerous change, (S. of C., p. 45, bottom). Dr. Wassing said (S. of C., p. 88):

"Secondly, the blow to his abdomen, as it was explained by Dr. Bender and by Dr.

Joelson, particularly by Dr. Bender—the blow to his abdomen we can surmise from the description that he was bruised and that he was apparently considerably injured. The blow to his abdomen has with reasonable certainty changed the inside of his abdomen. It has probably caused adhesions—that means like scars, like bands forming inside from inflammation, just as if we get a punch or blow to the outside, as it happens in boxing matches, for instance, the face swells, and if there is sufficient injury, scars are formed.”

“Now, we know that injuries to organs—injuries in any form in the animal experiments, for instance, bring out cancer in a certain percentage of cases. With continued injury in an animal, for instance, we can produce cancer.”

In the Migliaccio case, which counsel for the defendant greatly relies upon, we find this difference. *First*, and most important, is that the Migliaccio case is one of tuberculosis. It was pointed out in the opinion (101 N. J. L., p. 501) that “tuberculosis was admittedly a germ disease”. Therefore, the physicians in the Magliaccio case and the medical world did know the origin of tuberculosis. In other words—a germ. Cancer, as we have before us, comes from a source that the medical world knows nothing about, except their experiments and actual cases of trauma. *Secondly*, in the Migliaccio case, the disease came, not from the direct injury, but from a general run-down condition or lowered vitality. The case

at bar is just the reverse, for Dr. Bender testified (S. of C., p. 47):

“In itself his weakness and loss of strength was the result of his carcinoma, of this cancer.”

From this bit of testimony we find that the cancer was not a result of his weakened condition, but that the weakened condition and the loss of his strength, was the result of his cancer, which is absolutely contrary to the facts in the Magliaccio case.

Thirdly, the Migliaccio case says that during a period of time after the accident:

“The deceased worked as an assistant embalmer in an undertaking establishment, where he probably came in contact with the bodies of those who had died of tuberculosis. The testimony further showed that during this period the deceased was seen riding on the hearse, standing for an hour in slushy weather with his hat off, shoveling snow and coal. Under such circumstances persons who have never been injured have contracted pulmonary tuberculosis. Any one of the acts mentioned might have caused the contraction of the fatal disease had no accident occurred.”

Certainly, if Migliaccio was out in this damp weather, with his hat off, riding on hearses and shoveling snow and coal, he could contract pul-

monary tuberculosis. That happens every day, but the doctors will not say that of cancer.

We desire to use the Migliaccio case as part of the foundation of our contention in the present case at bar, and we quote from Justice Katzenbach's opinion, the following:

"It may seem somewhat strange to say that death resulting from a direct injury to the lungs by accident is a natural and proximate result which could be reasonably foreseen and anticipated****."

Has our theory any substantial support from the reported cases? We found no cases in our own State with reference to cancers arising from traumas to a place on the human body where the cancer developed.

We know of the case of Wingert vs. Danson, reported in 8 Misc., p. 345. We have thoroughly read the state of case in that case, and the briefs of counsel for both sides. A nonsuit was granted in the Wingert case, on the death count, but the Court will find that in the Wingert case, the doctor who operated upon Wingert (Dr. Bolling) testified on page sixty-nine of the state of case in that case, that the cancer had existed in Wingert's body eight to twelve months before the injury, and that it was a natural growth, and that this was the sole cause of his illness. (S. of C., p. 70, l. 30, Wingert vs. Danson; also p. 71, l. 30.) Therefore, the Wingert case has no analogy and does not apply to the case at bar. However, the

Court, on the pain and suffering count, allowed aggravation for the cancerous condition, (8 Misc., p. 345).

We have found one case in our State of carcinoma in a workmen's compensation case. In the case of *Wilhelmi vs. American Railway Express Co.*, 6 Misc., p. 674; 142 Atl., p. 555 (affirmed Court of Errors, 7 Adv. Rep. 870; 146 Atl., p. 198) we find that *Wilhelmi* was a harness maker. From the evidence in the state of case, in the *Wilhelmi* case, and partly from the opinion of the Supreme Court, this Court will find that *Wilhelmi*, using a harness needle, pricked his umbilicus and sustained an injury therefrom; that a carcinoma developed at that point from which *Wilhelmi* died. It was determined that the accident arose out of and in the course of the employment, and that as the result of that injury, carcinoma developed from which he died. Therefore, the decedent's widow was compensated for his death. The relationship between the injury and the cancer must have been in dispute in that case, and we find that this Court was equally divided.

Because of the lack of cases in this jurisdiction, counsel has made an examination of cases from our sister states, and we find the following:

In the case of *Atlantic Coast Line Railway Co. vs. Thompson*, 211 Fed. Rep. 889; 128 Cir. Ct. of Appeals, 267, this Court will find the following:

"Where plaintiff claimed that cancer of the foot developed as the result of his in-

jury, and there was direct evidence from attending physicians that, while the primary cause of cancer is unknown, the cause of its development is usually irritation, and in their opinion the cancerous condition of plaintiff's foot was due to the injury he had received, the jury were authorized to infer that the injury was the proximate cause of such condition."

On page 892 of the opinion the Court said:

"The railroad company assigns error in the submission of the second issue, contending that the only reasonable inference to be drawn from the testimony is that the cause of sarcoma is unknown. In the record there is direct evidence from attending physicians that, while the primary cause of cancer is unknown, the cause of its development is usually irritation, and that in their opinion the cancerous condition of Sturgeon's foot was due to the injury he had received. From this evidence it was not beyond reason for the jury to infer that the cancer developed because of the injury, and that in this direct sense the injury was the proximate cause. In *Texas & Pacific R. Co. v. Howell*, 224 U. S. 577, 32 Sup. Ct. 601, 56 L. Ed. 892, the court held that the jury was warranted in finding that tuberculosis of the spine had developed in the plaintiff as a direct result of his being struck by a piece of falling timber, al-

though the accident happened a year before the disease appeared."

In the case of *Texas & Pacific Railway Co. vs. Howell*, 224 U. S. 577; 32 Sup. Ct. 601; 56 Law Ed. 892, Mr. Justice Holmes, speaking for the Supreme Court of the United States said:

"A jury is warranted in finding that tuberculosis of the spine is the direct result of an injury from a falling timber, where there was ample evidence that the blow occasioned the development of the disease, though it was not discovered to be such for over a year."

In the United States Supreme Court decision, *Howell* was hit with a piece of timber, which fell about twelve feet from above him.

The next case we have found, is that of *Colquhoun vs. City of Hoquian*, Supreme Court of Washington, 120 Washington, 391; 207 Pac. Rep. 664, where the Court said at p. 666:

"The testimony is that the doctors discovered that she was suffering from bone cancer, which the jury had a right to believe from the testimony was the result of this injury. Operations have been performed for the removing of portions of the bone, and she is still undergoing radium treatment, looking to a cure. There was testimony of reputable doctors to the effect that bone cancer such as this is not

only apt to, but is very liable to, spread to other portions of the body, and that in such event death is practically certain to result, and there was some testimony that already the malignancy is spreading. Doctors appointed by the court and testifying for the appellant disputed these findings, but a question was presented for the jury to determine as to what the true situation was, and they must have found that it was very serious, with a reasonably sure prospect of fatal event."

The Court of Appeals of Kentucky in Louisville & Nashville Railroad Co. vs. Kemp's Administrator, 149 Ky. 344; 149 S. W. 835, allowed the question of the connection between the injury and cancer and the death to go to the jury, the Court saying at p. 836:

"The jury were probably allowed to hear all the proof as to her condition after the fall, that they might intelligently determine the extent of her injuries therefrom. There was evidence that the cancer set in after the injury and was the result of it. Such questions are from their nature largely problematical, but they are nevertheless for the jury, where the evidence is conflicting."

In the same case, syllabus two reads:

"Where, in an action for injuries to a female passenger, thrown on the floor by the

violent jerk of the train, there was evidence that as she fell she received a violent internal jar, that the brakeman assisted her up, that she was taken to another town, where she was met by the carrier's physician, that two days later she had a miscarriage, that later a cancer developed, and that she died the following winter, the court properly permitted evidence as to her condition after the fall, to enable the jury to determine the extent of the injuries and award proper damages for her pain and suffering."

In this Kemp case, the Court will find from page 835, that up to the time of the accident, the woman was healthy, rosy-cheeked, was thirty-nine years of age, and was not ill at all, and immediately after the injury or some days later, she suffered a miscarriage. That fall a cancer developed from which she died the following winter. This is practically on all fours with our case.

An important case is that of Shaw vs. Chicago, Rock Island & Pacific Ry. Co. 173 Ill. Appeals, p. 107, decided October 3rd, 1912. The facts in the case were:

"The plaintiff at the time of the accident was sitting in a chair car, the fourth from the engine. When the truck wheels struck the sound ties, after running through the rotten ones, the forward pulling of the engine and the momentum of the cars to the

rear, produced a succession of the backward and forward jerks, throwing plaintiff alternately forward, with her breast against the upward and back edge of the reclining chair in front of her, then back again and against the back of her own seat; and as each truck of the train came up to this point the operation would be repeated. She became partly unconscious. The plaintiff is a married woman, and at the time of the accident was 43 years of age. She weighed 212 pounds, and the evidence tends to show that she was a woman of unusual physical strength and endurance. She did her own housework in a nine-room house, washing, ironing and baking, and in addition, did many other things, indicating that she was a person of great physical ability. After the accident and her return home she remained in bed for two weeks, receiving medical attention; suffered pain in the spinal region, and her weight had diminished greatly. At the time of the trial, which was three years after the accident, she weighed 102 pounds, a loss in weight of 110 pounds. She has suffered with what was called a cancerous lump in the left breast, and has had constant medical attention since the accident."

The trial Court in this case permitted the question to go to the jury, and the submission to the jury was affirmed by the Appellate Court on page 111.

In the New Jersey Law Journal, we find Kramer vs. Littel, 38 N. J. Law Journal, p. 82, where the Court will find:

“Where an employee pricked his thumb with a tack which he held in his mouth while putting up window shades, and thereafter a cancer developed at said point, necessitating an operation from which he died, it was held that the death was due to the accidental injury.”

The defendant in his brief says that they submit it was error for the Court below to let the jury speculate as to whether or not the cancer was caused by the accident, because *the medical profession knows almost nothing about cancer*. That statement is not true for the reason that the medical profession knows something about cancer. They have found out that it can be caused by a direct blow or trauma. The plaintiff's doctors testified that that can be so. The defendant's doctors said that it could not, and we submit that this presented a jury question, and that that determination on appeal to this Court, should not be set aside. There is evidence in the plaintiff's case from which the jury based its conclusion and verdict, and which justifies that verdict. This Court, of course, on appeal, cannot consider the weight of the evidence. Dr. Bender (S. of C., p. 47) testified that the carcinoma was at the right inferior quadrant of the abdomen. The injury was sustained at this point, and the cancer developed at this point.

Therefore, and in conclusion, we submit that on the plaintiff's case, there was proof that the decedent was a healthy man prior to the accident, ate well and never complained of pain; that on April 21st, 1927, the deceased was involved in an accident, when an automobile in which he was riding, crashed with a bus, while going at about forty to forty-five miles an hour; that in this accident he received an injury to his abdomen; that he was taken to the Day Kimball Hospital and then to Paterson; that his attending physician, Dr. Joelson, said that the deceased positively did not have cancer in his body prior to the accident; that three months after the accident he began to feel nodules; that between April 21st, 1927, and the date of his operation, January 2nd, 1928, the deceased was involved in no other accident or received no other injury; that on January 2nd, 1928, he was operated upon but nothing could be done, for the reason that he was full of pus; that on May 28th, 1928, he was operated on again, at which time Dr. Bender (S. of C., p. 39, l. 20) took a section of the mass out and that they then found that it was adeno carcinoma, which was cancer; that the mass or cancer was at the right inferior quadrant of the abdomen, and that there was later, another operation in New York by Dr. Lillienthal, and that on November 2nd, 1928, he died, as a result of the cancer. We further contend, that in view of this evidence, part of which was contradicted, and which was therefore submitted to the jury for determination, we come within every rule or requirement laid down in the Migliaccio case, or any other case.

ANSWER TO POINT 2.

Under this point, the defendant contends that by reason of the fact that the deceased, Hyman Sussman, rode with the defendant, Samuel Sussman, mile after mile, at the rate of speed at which the defendant operated his automobile, he (the deceased) was guilty of contributory negligence.

The first rule of elementary law which the defendant overlooks in his brief, is the fact that contributory negligence, under our present practice is a matter of defense. The defendant must prove, by a fair preponderance of the evidence affirmatively, that the plaintiff was guilty of such acts as would constitute, under the law, contributory negligence. *Baker vs. Fogg & Hires Co.*, 95 N. J. L., p. 230.

There is no testimony in the defense at all which can point to contributory negligence, with the exception of one fact which the defendant testified to (S. of C., p. 172, l. 35 to 40), when he said that he stopped for eggs because of the Pass-over. We assume from this bit of testimony, that the defense contends that the plaintiff was under a legal duty to get out of the car. We contend that having been invited by the defendant to ride to Webster, the defendant was under a duty to use reasonable care not to increase the hazard of the deceased's travel. We further contend that it was not the legal duty of the deceased to get out of the car when it was stopped,

and there be left out in the country, not knowing the roads, not knowing the vicinity, and not knowing how to get back to Providence.

The matter was properly left to the jury by the trial Court, who charged clearly on the law, and who brought the question of contributory negligence to the jury, (S. of C., p. 191, l. 12-40 and p. 192, l. 1-8). *Zito vs. Ingersoll*, 7 Misc., p. 893.

ANSWER TO POINT 3.

Under point three, the defendant contends that the trial court erred in refusing to charge the jury, that the plaintiff could not recover for treating the cancerous condition or for the pain and suffering caused by the cancer. The argument concerning this point is that involved in point one. The disposition of point one, disposes of point three, to the extent that if the chain of causation is complete, then the administratrix is entitled to damages, for the treating of the cancerous condition.

However, the jury was entitled to assess damages for the pain and suffering of the cancerous condition, even though it is found to be only an aggravation of a pre-existing condition. *Wingert vs. Danson*, 8 Misc., p. 345.

ANSWER TO POINT 4.

Under this head the defendant contends that a plaintiff cannot recover for expenditures in

treating himself, because of injuries inflicted upon him by a tort feisor, because they are paid by a third person, with whom the defendant has no relationship.

Jacob Katz, president of the Barnert Memorial Hospital at Paterson, testified (S. of C., p. 122):

“Q. What did you do with reference to the bills, if anything? A. Well, when the bills were presented they were presented to Hyman Sussman at the time when he was able to, he used to make his own checks, so I just saw that he paid, so I stayed off.

Q. Then, when he was not able to? A. When he was not able to, either my sister paid or I paid.

Q. At whose request? A. Well, always the bill—at his request.

Q. You mean at Hyman's request? A. At Hyman's request, and sometimes when he could not do it I saw to it that either she paid or I paid.”

From this, the Court will see that the expenses were paid, partly by the deceased, and partly by the witness (Jacob Katz). It will also be noted from the above, that whatever expenditures Mr. Katz made on behalf of the deceased, were made at his request. The law has already been determined adversely to the contention of the defendant.

The recent case of Skillen vs. Eagle Motor Co., reported in 9 Adv. Rep. p. 18, is exactly on all

fours, where Mr. Justice Trenchard, speaking for the Supreme Court, said:

“The defendant’s sole objection was that the bill, which was rendered to the plaintiff, was paid by her brother and sister. But that was immaterial in the circumstances of the present case. The only reasonable inference from the evidence was that the bill rendered to her was paid with her assent. One who inflicts an injury upon another is bound to restore her as nearly as possible to her former condition, and such liability includes necessary and reasonable hospital bills. The fact that the brother and sister of a person, injured by the negligence of another, pay, with her assent, the hospital bill which had been rendered to her, does not prevent her from recovering the value of the services represented by the bill from the one responsible for the injury. That view harmonizes with the underlying principle of our decisions upon this general topic in *Sharkey v. Herman Bros.*, 3 N. J. Mis. R. 126, affirmed, 102 N. J. L. 224; *Cornish v. North Jersey Street Railway Co.*, 73 Id. 273; *Weber v. Morris and Essex Railroad Co.*, 36 Id. 213.”

The first case cited by Justice Trenchard, that of *Sharkey vs. Herman Bros.*, 3 Misc. 126 (affirmed Court of Errors & Appeals, 102 N. J. L., 224) seems to adequately dispose of the point. The contention made by the defendant in this

case, is the same made by the defendant in the present appeal. The conclusion of the court was:

“The objection to the expenses of the father, because his wife paid the expenses with his money seems rather frivolous.”

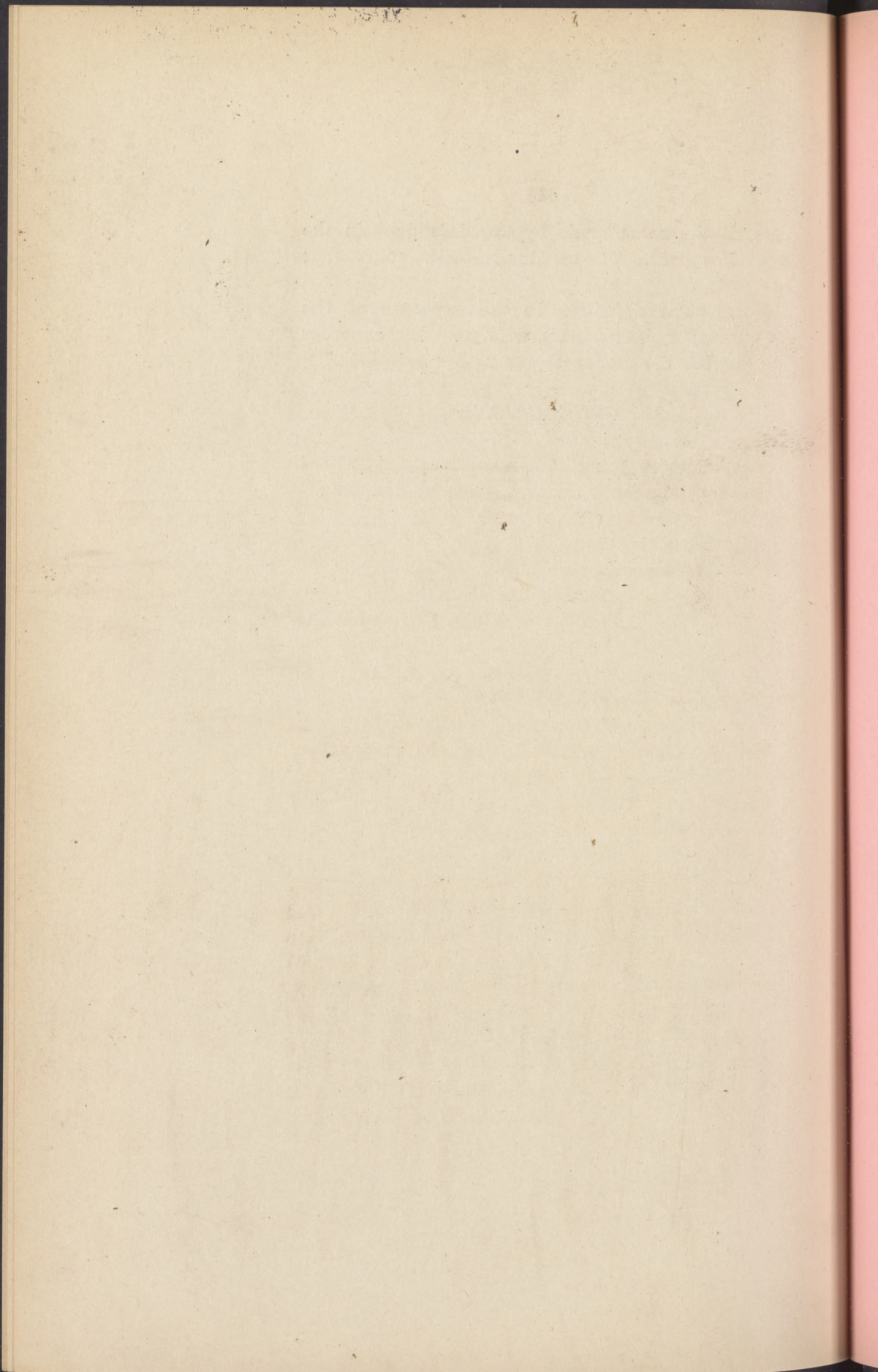
CONCLUSION

From the foregoing, it is respectfully submitted that the judgments under review, should be affirmed.

May Term, 1931.

WARD & MCGINNIS,
Attorneys of Plaintiff-Respondents

Peter J. McGinnis.
Of Counsel.



INDEX

	PAGE
Bill of Complaint	3
Answer	7
Application	10
COMPLAINANT'S TESTIMONY:	
Samuel J. Edwards—Direct	12
Hild Gardner—Direct	17
Cross	18
Arthur D. Wilson—Direct	20
Cross	22
Harold Parrots—Direct	22
Charles A. Joy—Direct	30
Cross	31
DEFENDANT'S TESTIMONY:	
Eugene F. White—Direct	32
Cross	37
Eugene A. Mergy—Direct	40
Cross	46
Helen G. White—Direct	49
Cross	51
Mrs. May White Conway—Direct	59
Cross	60

