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*Notice and Reasons on Appeal.*

**Notice and Reasons on Appeal.**

Filed March 6, 1918.

# New Jersey Supreme Court.

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NEW YORK SWITCH & CROSSING  
COMPANY,  
*Prosecutor-Appellant,*

*vs.*

COURT OF COMMON PLEAS IN  
AND FOR THE COUNTY OF HUD-  
SON, and JOHN J. MCGOVERN,  
Clerk of the said Court of  
Common Pleas, and ROSE  
MULLENBACH (wife), ROSE  
MULLENBACH, BARBARA MUL-  
LENBACH, ANDREW MULLEN-  
BACH, and WILBUR MULLEN-  
BACH,

*Defendants-Respondents.*

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10

*On Appeal.*

*Notice and  
Reasons on  
Appeal.*

20

To DOHERTY & KINKEAD, ESQS.,  
Attorneys for Defendants-Respondents.

30

GENTLEMEN:

PLEASE TAKE NOTICE, that the appellant ap-  
peals from the entire judgment entered in the  
New Jersey Supreme Court in the above entitled  
cause, to the New Jersey Court of Errors and  
Appeals, for the following reasons:

1. Because the New Jersey Supreme Court  
erroneously and improperly affirmed the trial  
court's findings, that a hernia was caused by an  
alleged accident occurring in the course of and

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*Notice and Reasons on Appeal.*

arising out of the employment of the deceased, Andrew Mullenbach.

10 2. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's findings, that the deceased, Andrew Mullenbach, suffered an accident arising out of and in the course of his employment with the prosecutor.

20 3. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's findings, that by reason of "the accident occurring on March 11th, 1916, while the said Andrew Mullenbach was engaged in lifting a heavy steel girder he strained the muscles of his back, aggravating two hernias and as the result of said condition he had to undergo an operation and as the result of said injuries sustained by reason of the said accident, said Andrew Mullenbach afterwards died," the said accident arose out of and in the course of his employment.

30 4. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court in overruling the appellant's application to strike out the answer to the following question:

"Q State how he appeared to you when he got home? A He just came along like this, all bent up, he came home."

5. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court in permitting the following testimony to be made part of the record:

40 "I saw the deceased working and lifting a horse, and he suddenly exclaimed, 'Oh, my back,' and bent down and that it was

*Notice and Reasons on Appeal.*

around ten or eleven o'clock on Saturday morning."

6. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's refusal to dismiss the petition, at the close of the petitioner's case.

7. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's refusal to dismiss the petition, at the close of the entire case.

8. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's findings that the facts in the case supported a conclusion that the deceased suffered an accident arising out of and in the course of his employment with the prosecutor, by reason of which it became necessary to operate and that the deceased's death was connected with such operation.

9. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court in permitting a judgment to be entered against the prosecutor providing for compensation payments to the dependents of the deceased for a period of three hundred weeks.

10. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's refusal to enter judgment in favor of the prosecutor.

11. Because the New Jersey Supreme Court erroneously and improperly affirmed the trial court's findings a judgment which was illegal, improper and oppressive to the appellant.

Respectfully yours,

KALISCH & KALISCH,  
*Attorneys of Prosecutor-Appellant.*

10

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*Writ of Certiorari.*

**Writ of Certiorari.**

Filed October 22, 1917.

NEW JERSEY, ss:

The State of New Jersey to the  
Court of Common Pleas in and for  
[L. s.] the County of Hudson and John J.  
McGovern, Clerk of said Court, and  
Rose Mullenbach (wife), Rose Mul-  
lenbach, Barbarah Mullenbach, Andrew Mullen-  
bach and Wilbur Mullenbach, GREETING:

We being willing for certain reasons to be  
certified of and concerning a certain determina-  
tion of facts and memorandum rendered by the  
Honorable George G. Tennant, one of the judges  
of the said Court of Common Pleas in and for  
the said County of Hudson, in certain proceed-  
ings brought on behalf of Rose Mullenbach  
(wife), Rose Mullenbach, Barbara Mullenbach,  
Andrew Mullenbach and Wilbur Mullenbach,  
petitioners, against the New York Switch and  
Crossing Company, respondent, for the determi-  
nation and recovery of compensation under an  
act of the Legislature of the State of New Jer-  
sey, entitled "An Act prescribing the liability  
of an employer to make compensation for in-  
juries received by an employee in the course of  
employment establishing an elective schedule of  
compensation and regulating procedure for the  
determination of liability and compensation  
thereunder," approved April fourth, nineteen  
hundred and eleven, and the acts amendatory  
thereof and supplemental thereto, we command  
you that the said determination and judgment  
together with all proceedings for the making of

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*Writ of Certiorari.*

the same and all things touching and concerning the same as fully and entirely as before you they remain or are in your custody and control, you do certify and send together with this writ to our Justices of our Supreme Court of Judicature at Trenton, on the first Tuesday of November, nineteen hundred and seventeen, that therein may be caused to be done what of right and according to law ought to be done.

10

WITNESS, the Honorable William S. Gummere, Chief Justice of our said Supreme Court at Trenton, this 18th day of October, nineteen hundred and seventeen.

WILLIAM C. GEBHARDT,  
*Clerk.*

20 KALISCH & KALISCH,  
*Attorneys.*

30

40

*Return.*

**Return.**

The answer of George G. Tennant, Esquire, Judge of the Court of Common Pleas holden in and for the said County of Hudson, and John J. McGovern, Clerk of said County and within named, the record and proceedings of the Plaint whereof mention is within made with all things touching the same. We certify and attest to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed as within we are commanded: 10

GEORGE G. TENNANT,  
*Judge.*

Attest: 20

JOHN J. MCGOVERN,  
*Clerk.*

30

40

*Petition.*

**Petition.**

Filed January 2, 1917.

**Hudson County Court of Common Pleas.**

10

*To the Honorable George G. Tennant, Judge of  
the Hudson County Court of Common Pleas:*

Your petitioner, Rose Mullenbach, widow of Andrew Mullenbach, residing at No. 403 Paterson avenue, in the Township of West Hoboken and State of New Jersey, says:

20

1. The New York Switch and Crossing Company, the employer, have an office at the corner of Fifteenth and Madison streets, in the City of Hoboken, County of Hudson, and State of New Jersey.

30

2. That on the eleventh day of March, nineteen hundred and sixteen, Andrew Mullenbach was employed as a laborer in the respondent's factory at the corner of Fifteenth and Madison streets, Hoboken, New Jersey, and that on that date, while the said Andrew Mullenbach was engaged in lifting a heavy steel girder, he strained the muscles of his back, causing a serious and aggravated condition to develop in two hernias he had previously sustained while in the employ of the respondent; that he had to undergo an operation as a result of said injury sustained, from the effects of which the said Andrew Mullenbach afterward died, to wit, on the fourteenth day of June, 1916.

40

3. The amount of wages received by the employed at the time of the injury was twenty-two (\$22.00) dollars per week.

*Petition.*

4. Respondent had actual knowledge of the said injury.

5. Said Andrew Mullenbach has left surviving him five dependents, a widow and four minor children, as follows: Rose Mullenbach, widow; Rose, Jr., eleven years; Barbara, ten years; Andrew, eight years, and Wilbur, seven years.

10

6. The petitioner alleges that by reason of the facts herein set forth, in and by virtue of the provisions of an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of the liability and compensation thereunder," approved April 4th, 1911, and the supplements thereto and the amendments thereof, she is entitled to receive from the said New York Switch and Crossing Company, the sum of twelve 10/100 dollars (\$12.10) per week for a period of three hundred (300) weeks.

20

WHEREFORE, your petitioner prays that her rights as the widow of the said Andrew Mullenbach in the premises and the liability of the said employer be determined, and that the amount payable periodically may be computed by the Court, and that your petitioner may have judgment therefore and may have such further relief as may be just.

30

And your petitioner will ever pray.

ROSE MULLENBACH.

40

*Petition.*

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

10      Rose Mullenbach, of full age, being duly sworn according to law, upon her oath deposes and says, that she is the petitioner in the foregoing petition mentioned, and that the contents of said petition are true to the best of her knowledge, information and belief.

ROSE MULLENBACH.

Sworn to and subscribed before  
 me this 22nd day of December,  
 1916.

ARTHUR J. BUTLER,  
*Attorney at Law of New Jersey.*

20

30

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*Order fixing Time and Place of Hearing.*

**Order Fixing Time and Place of Hearing.**

Filed December 22, 1916.

HUDSON COUNTY COURT OF COMMON  
PLEAS.

10

ROSE MULLENBACH,

*Plaintiff,*

*vs.*

THE NEW YORK SWITCH AND  
CROSSING COMPANY,

*Defendant.*

*On Petition  
for Compensa-  
tion.*

20

On motion of Doherty & Kinkead, attorneys of the petitioner in the above entitled cause, it is hereby ordered that the 19th day of January, nineteen hundred and sixteen, at 10 o'clock, in the forenoon, be and hereby is fixed as the time, and the Court of Common Pleas before Judge Tennant at the Hudson County Court House, in the County of Hudson and State of New Jersey, as the place for the hearing upon the petition of the said cause.

30

Dated the 22nd day of December, 1916.

GEORGE G. TENNANT,

*J.*

40

*Answer.*

**Answer.**

Filed January 25, 1917.

HUDSON COUNTY COURT COMMON  
PLEAS.

10 *To the Honorable George G. Tennant, Judge of  
the Hudson County Court of Common Pleas:*

The New York Switch and Crossing Company answering the petition of Rose Mullenbach, widow of Andrew Mullenbach, says that:

1. It admits paragraph one of the petition.

2. It denies paragraphs two, three, four and six of the petition.

3. It has not any knowledge or information sufficient to form a belief and leaves the petitioner to her proof of paragraph five of the  
20 petition.

Dated, January 15th, 1917.

KALISCH & KALISCH,  
*Attorneys of Respondent.*

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

30 ISIDOR KALISCH, being duly sworn, upon his oath deposes and says; that he is the attorney of the respondent named in the foregoing answer and its agent in this behalf; that he has read the foregoing answer, and that the matters and things therein contained are true to the best of his knowledge and belief.

ISIDOR KALISCH.

Sworn and subscribed to before  
me this 24th day of January,  
A. D. 1917,

40 EVERETT T. FINDLEY,  
*Attorney at Law of N. J.*

*Aaron Aroozimanian, direct.*

HUDSON COUNTY COURT OF COMMON  
PLEAS.

TENNANT, J.

ROSE MULLENBACH,

*vs.*

NEW YORK SWITCH & CROSS-  
ING COMPANY.

*On Petition  
for Compensa-  
tion Under  
Employers'  
Liability Law.*

10

TRIAL of the above entitled case, April 19,  
1917, before Hon. George G. Tennant, *Judge*.

Appearances:

20

Mr. Doherty (Kinkead & Doherty) for the  
petitioner.

Mr. Isidor Kalisch, for the respondent.

(Statement of agreed facts.)

This is a death case; the date of the death  
was June 14, 1916, the wages, twenty-two dollars  
per week; it is agreed that the deceased was em-  
ployed by the respondent at the time of the in-  
jury alleged, but it is denied by the respondent  
that he suffered any injury while in the employ  
of the respondent, by reason of which he died.

30

AARON AROOZIMANIAN, a witness produced  
on behalf of the petitioner, being sworn, testi-  
fied as follows:

*Direct examination* by Mr. Doherty.

Q You were subpoenaed to appear here this  
morning? A Yes.

40

*Aaron Aroozimanian, direct.*

Q Did you know Andrew Mullenbach in his lifetime? A Yes.

Q You knew him? A Yes, I know.

Q Did you know him on March 11, 1916? A I know.

10 Q Were you working for the New York Switch & Crossing Company at that time? A Yes.

Q On that day did you see Andrew Mullenbach? A Yes, I see.

Q Did you see anything peculiar happen to him on that day? A Yes, I see.

Q Just tell us what happened to him.

*The Court.* And where. Where was it?

A He got a horse, got hurt in the back.

20 Q What was he lifting? A A horse—iron horse.

Q What did this horse look like? A A long horse, big, about two men lift up, on one side is lift up by Andrew Mullenbach.

Q What was this horse, all iron? A All iron; the top is a—foot is iron, all iron.

Q Was this the character of work that Mullenbach was doing all along, lifting these horses?

30 A Not all the time, lift up one time.

Q Was that the kind of work he was doing when he was working there? A Yes.

Q He did nothing else? A I don't know, some people had there, I don't know, about a year ago.

Q Do you know how heavy it is? A Yes, I know, heavy.

40 Q This horse was—do you know how heavy it was? A Sure, heavy, I guess, one thousand pound.

*Aaron Aroozimanian, direct.*

Q How many men lifted it? A All the time two men lift, one on one side, and one on the other.

Q Did you ever lift one of these horses? A Yes.

*By the Court.*

10

Q What did they use these horses for? A Saturday.

Q What did they use these horses for? What were they for—these horses? A The iron horse.

Q What were they for? They didn't ride with them, did they? They didn't ride on them? A I cannot—

Q What language do you speak? A I cannot—Armenian.

20

*By Mr. Doherty.*

Q Were these long iron bars in the car tracks? A Yes, I guess about four or five feet long.

Q What did Mr. Mullenback do when he was lifting this? Explain what movements he went through, what he did, in the course of lifting up this horse. A That horse, some time lift up push over, some time come a rail, and make a pinch, long rail, is come horse this way, and short rail; he take this way, see?

30

Q Was this a short or a long rail? A Long rail?

Q This one that Mullenbach lifted. A I don't know that; Italian man, I don't know.

Q Which way would he shove with that long horse, or the short horse? A Long horse, all iron horse.

40

*Aaron Aroozimanian, direct.*

Q Tell us what he did. Did he have to stoop over, stoop down? A Yes.

Q How far did he have to stoop over? A Why—

Q Was it on the ground? Did he have to get on the ground, to pick it up? A Big horse, push it this way.

Q He was only pushing it? A Yes, only pushing it.

Q Sliding it? A Yes, sliding.

Q Did he have to push? A Lift up like this, push it, like this. (Indicating.)

Q How far did he push it? A I don't know how far.

Q While you were looking at him—how far had he pushed it? A Push it this way, see? This is the horse, see, they push it, Mullenback lift it, push it this way, see.

Q Lift it up and push it. What happened to him when he was lifting it up and pushing it, if anything? Did you see anything happen to him? A I see nothing, that is all, I see lift it up, the horse, hurt in back, that is all.

*Mr. Kalisch.* I move to strike out the answer.

*The Court.* I couldn't hear the last.

*Mr. Kalisch.* He said he lifted it up and then he hurt his back; he put his hand to his back. It is a conclusion.

*The Court.* Strike out the last part of it.

Q Tell us what happened that you saw happen to him when he lifted up this girder and started to push it. Did he say anything? A I see that Mr. Mullenback, he lift up the horse and push it this way, I see touch on back—

*Mr. Kalisch.* I object.

*Aaron Aroozimanian, direct.*

A (Continuing.) See? And I say, "What is matter?" he say, "Sore in my back," that is all.

*Mr. Kalisch.* I object to the conversation on the ground it is not binding upon the respondent, with regard to any acts or circumstances surrounding the accident.

*Mr. Doherty.* I consent it be stricken out. 10

*The Court.* You consent it be struck out. It may be struck out.

Q Could you tell us—show us—just how Mr. Mullenback acted when he put his hand to his back, by getting up from your chair there? Stand down here and show us how he went after he lifted up this girder.

*Mr. Kalisch.* I object to it as being just the same as a statement made by the deceased. 20

*The Court.* He is describing what occurred. He can tell us what the man said.

*Mr. Kalisch.* I maintain that the act of the deceased which characterized what occurred is just the same as a statement by the deceased; therefore I object to it.

*The Court.* It is not illegal testimony. It is an element to be considered. I will not overrule it. 30

*Mr. Kalisch.* I ask an exception.

A This is the horse (indicating) this man touch it that way, lift up the ground, Mullenback this way, and other side lift up the other man, and push it this way, "Sore in my back," that is all.

*The Court.* You may strike out what he said, what the deceased said at that time.

*Mr. Doherty.* I should think it is part of the *res gestae*. 40

*Aaron Aroozimanian, direct.*

*The Court.* I am not so sure about it.

Q How soon after he lifted up the girder did he say, "Oh, my back"?

10 *Mr. Kalisch.* I object to the question on the ground there is no testimony at present, what he said; it has been struck out. Therefore I object to the question.

Q While he was lifting up that girder, or almost at the same time he was lifting up the girder, did he make any exclamation? Did you hear him say anything?

*Mr. Kalisch.* Yes or no.

Q (Question repeated by the Court.) A Not then—

20 Q (*By the Court.*) Did you hear him say anything? Did you or not? When he lifted up this horse? A Lift up this way, push it this way. (*Indicating.*)

Q (*By the Court.*) Did he say anything at that time, while he was sliding it over? A Same time, push it this way.

Q What did he say?

*Mr. Kalisch.* I object.

*The Court.* I will hear you.

30 *Mr. Kalisch.* I maintain that what a person says at a given time is not evidence of any fact; it is merely evidence—there is merely evidence he has made such a statement, and for that reason it would not be binding upon the respondent for the purpose of showing the cause of this accident, or the subsequent condition. That rule especially with regard to death cases would be strictly construed because the person is  
40 not here to be cross examined as to the

*Aaron Aroozimanian, direct.*

statement. I do not think it is any part of the circumstances or conditions surrounding the time of the accident.

*Mr. Doherty.* It is not a question of conversation had between the deceased and this party, it is merely this witness testifying to a matter of fact, the same as any other fact. What was said is part of the *res gestae*. What was said by the deceased at the time he was lifting up this girder; if this is part of my cause of action, what happened at the time and what exclamation he made at that time, can go in as part of the *res gestae*. 10

*The Court.* The case in 5 Atlantic Reporter, cited in Stephens' Digest, is against you, but it is too far back. 20

*Mr. Doherty.* How about the case of *Cooper v. Trenton Railway*, in 70 New Jersey? That was a case where a party was driving, and the horse was shocked by an electric shock, and the driver said, "The horse has an electric shock."

*The Court.* What somebody else said at the time.

*The Court.* What was said or done by by-standers at the time is part of the *res gestae*, and is admissible on that ground. I will take the testimony and you may have an exception. 30

*Mr. Kalisch.* I ask an exception.

Q What did he say at the time he was lifting up that girder?

*Mr. Kalisch.* I object to the form of the question on the ground it is leading.

*The Court.* I will allow it. 40

*Aaron Aroozimanian, direct.*

*Mr. Kalisch.* I ask an exception.

A He said nothing. He said, "Sore my back," that is all—"My back hurt."

Q Just state what he did when he said "Oh my back." A Sure.

Q After that— A Yes, nothing else.

10 Q —did he go back to work? A Monday he not come to work. This is Saturday, Monday he not come to work.

*Mr. Kalisch.* I object to the question. It is suggestive. The witness has indicated he understood just what happened. It is improper and leading.

*The Court.* I will not overrule it.

20 Q Did he work that day any more, after he hurt his back? A That day about 12 o'clock, after that go home.

Q Oh, it was just about 12 o'clock he hurt his back? A I guess at 11 o'clock.

*Mr. Kalisch.* I object to the question—objection withdrawn.

30 Q Did he do any more work that day? A I cannot say sure 11 o'clock; I guess 11, 12 o'clock, eleven, ten o'clock, I guess, "hurt in my back."

*By the Court.*

Q Did he work after that? A Yes.

Q After that? A No, not after that, he is foreman, he not work, he is hurt in back, he don't work, he not work, he go home.

*By Mr. Doherty.*

Q Did you see him between eleven and twelve o'clock? A Yes.

40 Q All the time? A Yes.

*Aaron Aroozimanian, direct.*

Q What was he doing? A He said, "Hurt my back," that is all.

*Mr. Kalisch.* I object, and ask that it be stricken out.

*The Court.* It may be stricken out.

Q Tell us what he was doing, not what he said. Don't tell me what he said; tell me what he was doing. A I don't know what he do; I work, I am laboring man, I am not foreman and the boss, he come tell me nothing; he said "Hurt my back." I ask, "What is trouble?" He said, "Hurt my back," I see, hurt his back.

10

*Mr. Kalisch.* I move it be stricken out.

*The Court.* Yes.

A He lift up the horse.

*By the Court.*

20

Q What did you see him doing between eleven and twelve o'clock, after he was hurt? What did he do after he was hurt? Don't you understand? A Eh—

Q Listen to the question. What did you see him do after he was hurt? A I see, lift up the horse, and hurt in back, about ten, eleven o'clock, I guess, and twelve o'clock, everybody is going home; Monday morning I ask, "Where is Andy?" They say, "Andy go to hospital, sick, hurt in back."

30

*The Court.* That may be stricken out.

Q Did you see him after he was hurt? A Sure, I see.

Q How long after? Just after he dropped this rail or— A Yes.

Q —when he said— A Yes, just I see him lifted up the horse.

40

*Aaron Aroozimanian, direct.*

Q Where did he go just after that? A He is walking around the shop.

Q How long after that? A One hour, that is all.

Q He worked an hour after he was hurt? A Yes, worked an hour.

10 *By Mr. Doherty.*

Q What was he doing between eleven and twelve o'clock? What was he doing? A Doing nothing.

Q You just said he was working? A Do nothing; he was walking around.

Q Oh, walking around? A Yes.

Q Was he working at his job after he was hurt, or walking around? A Me not foreman, me laborer, he is foreman, walking around.

20 Q Do you mean he was walking around, as I am, or working at his job? A No working, no, he is foreman; walking.

Q How long was he walking? A About one hour.

Q How was he walking? A Like this, "hurt my back," he said, and walking around.

30 Q Not what he said.

*Mr. Kalisch.* I ask that it be stricken out.

Q Can you come here and show me how he walked for that hour; give me the position; was he walking straight—stooped over? A He said all the time—

Q Don't tell me what he said. What did he do? A He said, "Hurt my back."

*Aaron Aroozimanian, cross.*

*By the Court.*

Q Never mind what he said. Just walk up and down there and show us what he did. A (Witness walks with his hand at his back.)

Q Show us again. A (Witness again indicates.)

Q Did he walk like that for an hour? A 10  
Yes.

*The Court.* The witness indicates, left hand to the side or middle of waist, slightly bent over, walks up and down.

*Mr. Kalisch.* In the back?

*The Court.* In the back, yes.

*Cross examination by Mr. Kalisch.*

Q When you say he is a foreman— A Yes.

Q —you mean he had no work to do, he used to walk around? A Yes. 20

Q Tell each person what to do? A Yes.

Q That is what he was doing that hour after he was hurt? A Yes, after, he go home.

Q You say he was hurt about ten or eleven o'clock? A Yes.

Q After ten or eleven o'clock you say he walked around? A Yes.

Q What did he do—go to the different men, tell them what to do? A I don't know, he is looking around, I don't know. 30

Q Weren't you there? A He not coming tell me that, walking like this and like that.

Q You weren't there? A Yes, I working.

Q Where did you go after he was hurt? A What?

Q Where did you go after Mullenback said he was hurt? Where did you go? A Me?

Q Yes. A I go home twelve o'clock. 40

*Aaron Aroozimanian, cross.*

Q That hour? A I working, I got measure, I started measuring work.

Q You started to measure? A Yes.

Q Where was Mullenback when you started to measure? A I measure.

10 Q Where did he go? A He went home, one hour.

Q That one hour, where was Mullenback for that hour? A Nobody, then come boss and measure.

Q I cannot understand you. A At this ten or eleven, he hurt in back, he is going home twelve o'clock.

Q You close at twelve o'clock? A Close twelve o'clock.

Q Everybody left? A Everybody go.

20 *By the Court.*

Q What did he do after he was hurt, before he went home? A All I say, he is hurt in back, his back, you know, and one hour walking around, in shop, after, he is going home, Monday morning not coming to work, he don't come to work.

*By Mr. Kalisch.*

30 Q Listen to this question; when he was hurt he stayed another hour, till twelve o'clock, before he went home? A Yes.

Q Where were you for that hour, after he was hurt? Where did you go? A Me?

Q Yes; before you went home where did you go? A I go home, too.

Q Where did you go before you went home? A I work, I said, measuring.

40 Q Where? A In the guy (?) (written phonetically, he said "gy"—Stenog.)

*Aaron Aroozimanian, cross.*

Q Where was Mullenback? Where was he?

A He is walking around in the shop.

Q How far away from you? A Me?

Q How far away from you was Mullenback—  
in another room? A I see shop, this is the  
shop, I see everybody there.

Q Is he in another room? A Yes. 10

Q He was in another room. A He is gone  
the whole shop.

Q All over. Then how do you know where  
he went, and what he was doing if he was in  
the other rooms? A Well, I see all, one hour  
come I measuring job, that is all; not big shop  
there.

Q Who told you? A What?

Q Who told you what he was doing? A  
Nobody. 20

Q Nobody told you? A No.

Q Who told you what he was doing in the  
other rooms? A I see in other room.

Q Can you see all over the shop? A Sure.

Q Isn't there a door from one room to the  
other? A That shop only got one door, I see  
that shop, this shop, too.

Q You saw him go up to these other men and  
tell them what to do? You saw Mullenback that  
hour go to different other men and tell them to  
do different things? 30

*Mr. Doherty.* I object. There is no evi-  
dence he went to other men and told them  
what to do.

*Mr. Kalisch.* It is cross examination.

*The Court.* You can ask him that.

Q That is right? A (No answer).

*Aaron Aroozimanian, cross.*

*By the Court.*

Q Did you see him go up to other men, after he was hurt, and tell them what to do? Was he bossing the men after he was hurt? A Yes.

Q After he was hurt? Did he— A Sure.

10 Q He did boss the men?

*The Court.* I am very frank with you, gentlemen, it is not only placing an undue burden on the Court, it is really taking away the justice we ought to administer, where I am left very much in doubt whether the witness understands the question and whether I understand him—without an interpreter.

20 *Mr. Doherty.* I took the matter up yesterday with Mr. Hanlon (the Sergeant-at-Arms), he said he didn't think he could get an interpreter.

*The Court.* You may go on. I will try and do what I can.

Q So that you saw Mullenback go to the other workmen and boss the job? A Yes.

30 Q All right. A I don't know just—I don't know very well—I don't know who is other workmen.

Q You don't know who the men were? A I don't know, he is gone home, about a week, one week, he work, he go home.

40 *The Court.* I am frank with you, I don't understand from the way the witness testifies, as to whether he understands the question and whether the answer bears relation to the question. I am so much in doubt that I give no value to his testimony.

*Rose Mullenbach, direct.*

*Mr. Doherty.* I have another Armenian here. I suggest I defer the examination of the Armenians until we get an interpreter, put Mrs. Mullenbach on the stand subject to the right to ask further questions on re-direct of this witness, to bring him back again.

10

(Witness withdrawn.)

ROSE MULLENBACK, the petitioner, being sworn on her own behalf, testified as follows:

*Direct examination* by Mr. Doherty.

*Mr. Kalisch.* May it please the Court, there is no question of dependency of Mrs. Mullenbach and four children.

*The Court.* Is that the purpose of calling her? 20

*Mr. Doherty.* No. It is one of the purposes. Do you admit the dependency?

*Mr. Kalisch.* Yes. It is admitted that the dependents are as follows: The witness now called, Mrs. Mullenbach, the widow; Rose, the oldest child, eleven years old; Barbara, ten years; Andrew, eight years; Wilbur, seven years.

30

Q Did you see your husband go to work on the morning of March 11, 1916? A Yes.

Q Was he sick that morning? A No, sir.

Q How long had he been working for this concern? A Well, I believe it is just close to seventeen years.

*Mr. Kalisch.* I object. It is hearsay.

Q (*By the Court.*) Had it been for several years, he had been working there? A Yes, it was close to seventeen years.

40

*Rose Mullenbach, direct.*

*The Court.* They have admitted he was in the employ of the respondent.

10 Q Had your husband been sick before March 11th, immediately before March 11, 1916? A Well, yes; just about the year previous he had a slight cold which disabled him about four days being able to go to work, which the records of the department will show.

*Mr. Kalisch.* Did your Honor rule on that question of the seventeen years?

*The Court.* She said, so far as she knows. Can't you admit he had worked for them for a number of years?

*Mr. Kalisch.* A number of years, but not seventeen years.

20 *The Court.* Put it that way; let the other testimony be stricken out. Can you say how many years? Why spend any time over it?

*Mr. Kalisch.* The superintendent says he can recall the time, 1902 or 1903, he entered their employ.

*The Court.* Take it that way; that would be twelve or fourteen years, anyhow.

30 Q (*By the Court.*) He was only sick in that time once, a year before his death, when he had a little cold? A Yes.

Q Did he go to work every day during that time, for this concern? A Yes.

Q Did your husband have any other sickness before this time? A No, sir.

Q Did he ever complain of hernia before March 11, 1916?

40 *Mr. Kalisch.* I object.

*Rose Mullenbach, direct.*

*The Court.* I will hear you, Mr. Doherty.

*Mr. Doherty.* In this case we set out in our petition that the deceased had an old hernia, but this injury aggravated or accelerated the condition, and an operation was performed; there was a chain of causation, we will try to link one with the other. 10

Q You say you saw your husband go to work that day? A Yes.

Q Did he complain of any sickness? A No, sir.

*Mr. Kalisch.* I object.

*The Court.* She says no.

*Mr. Kalisch.* I think whatever he said would not be binding in this case.

*The Court.* Why isn't that so? It has no legal value. It may be struck out. 20

Q State the physical appearance of your husband that morning as he went to work. A Same as any other day; but he did have that hernia and wore a truss and never complained because the truss helped him do his work without any pain.

Q You say he was the same as any other day; how did he look? A He just looked the same and normal to me, because he had plenty of men to look after. 30

Q Did he look a normal man? A Yes.

Q What time did he come home? A I think he got home about, between, shortly after one o'clock, with his back all bent.

Q State how he appeared to you when he got home. A He just came along like this, all bent up, he came home, had to take off his truss— 40

*Rose Mullenbach, direct.*

*Mr. Kalisch.* I object and ask that it be stricken out.

*The Court.* Why?

10 *Mr. Kalisch.* It is not binding, in the first place, the manner—the designation of the manner in which he came is no different than a statement made by the deceased, it is not part of the *res gestae*, there was plenty of time between the accident and the time he came home to have the idea enter his mind of an action.

20 *The Court.* It may be you can argue that, as to the value of the testimony, but it seems to me it is one of the elements that may be properly put in, to persuade the Court that something happened on that day. I will take it with that in mind. You may have an exception.

*Mr. Kalisch.* I ask an exception. The part, he had to take his truss off, I move it be struck out.

*The Court.* That is her conclusion. It may be struck out.

30 Q Did you see him take his truss off? A Yes, because his back was injured way back here, so that the spring of the truss hurt his back.

*Mr. Kalisch.* I ask that that be struck out.

*The Court.* It may be struck out.

Q State what he did.

*The Court.* She said he took off his truss.

*Rose Mullenbach, direct.*

Q Did he do anything further? A Did he do anything further—no; he told me—(interrupted).

Q Never mind. Did he do anything further? A Asked me for Sloan's liniment because he thought he could straighten up—

*Mr. Kalisch.* I move it be stricken out. 10

*The Court.* It may be stricken out. We are trying to help you all we can. Don't tell us what he said; just answer Mr. Doherty's question briefly and concisely. Don't try to talk too much. Answer the questions he asks.

*By the Court.*

Q After he took the truss off did he do anything else? A No, sir; just lie down. 20

Q He did lie down? A Right home in bed.

Q What time of day did he come home? A It was shortly after one o'clock.

Q What day of the week did he come home?

A On a Saturday.

Q Did he usually work Saturdays continuously—Saturday afternoons? A Yes, I believe he did at that time, but he waited for his salary. 30

*By Mr. Doherty.*

Q How long was he in bed? A All Saturday afternoon and Sunday, and Monday we applied to his lodge physician, Dr. Klaus.

Q Did you call him up? A Yes.

Q Did he come? A He answered he was too busy a man, if he could find the time to come up—

*Mr. Kalisch.* I move to strike out. 40

*Rose Mullenbach, direct.*

Q Did he go to see Dr. Klaus or did he come? A We had to go to him, he had no time.

Q What happened when you went to see him? Did he make an examination of your husband? A Yes.

10 Q Were you present during the time of the examination? A Yes.

Q Did you see the condition of your husband, the physical effects of that hernia, before March 11, 1916? Had you ever seen it? A Well, yes, I did, shortly, a few months before, because he said he thought it was quite healed.

*Mr. Kalisch.* I move to strike that out.

*The Court.* It may be struck out.

Q A couple of months before? A Yes.

20 Q What was the appearance of the hernia at that time? A A good sized marble.

Q During the course of the examination did you observe the same parts of his body, around about that hernia? A No, sir; it looked larger.

Q You observed the part of his body? A Yes.

Q How did it look? A It looked a good deal larger than it had before.

30 Q How much larger? A I should say about the size of a silver dollar.

*By the Court.*

Q Where did it protrude so you could see it? A Right down in the groin.

Q (*By Mr. Doherty.*) What took place during that examination? Did he make a thorough examination?

*Mr. Kalisch.* I object.

40 *The Court.* I will overrule the question in that form.

*Henry Klaus, direct.*

Q The doctor did make an examination, did he? A Yes.

Q Your husband stripped off so he could see this rupture? A Yes.

*By Mr. Doherty.*

Q And was that all that was done at that time? A He said an operation was immediately necessary. 10

*Mr. Kalisch.* I object.

*The Court.* It may be stricken out.

Q As a result of this examination, held by Dr. Klaus, what did you and your husband do?

*Mr. Kalisch.* I object on the ground it is not the proper time to introduce this testimony.

*The Court.* What is your purpose? 20

*Mr. Doherty.* To show that Dr. Klaus had advised an operation, and did so on that morning.

*The Court.* Was he the respondent's doctor?

*Mr. Doherty.* The respondent's doctor.

*Mr. Kalisch.* There is no proof of that at this time.

*The Court.* You had better show that. 30

(Witness excused.)

HENRY KLAUS, a witness called on behalf of the petitioner, being sworn, testified as follows:

*Direct examination by Mr. Doherty.*

Q Have you been subpoenaed here by the respondent in this case to testify? A By the Globe Indemnity Company. 40

*Henry Klaus, direct.*

*Mr. Doherty.* That is all—

Q Are you in the employ of the Globe Indemnity Company? A Not at all.

Q Ever received any compensation in this case?

10 *Mr. Kalisch.* I object. It is immaterial, inasmuch as it would not show—whether he was in the employ or not—he had received compensation.

*The Court.* It hasn't anything to do with the respondent?

*Mr. Kalisch.* No. And I object also, that the Globe Indemnity Company is not a party to this case.

20 *The Court.* I don't know the purpose of the question.

*Mr. Doherty.* He said he is not in the employ. It may be a question whether he is in their employ.

*The Court.* Do you want to prove he is employed by the respondent?

*Mr. Doherty.* Yes; he is a paid employee of the company, for the purpose of this suit.

30 *Mr. Kalisch.* I will withdraw the objection.

Q Are you a paid employee of the respondent company or of the—rather, of the Globe Indemnity Company? A I have been paid to appear in this case.

Q That is all.

*Mr. Doherty.* Mrs. Mullenback recalled.

*Rose Mullenbach, direct.*

*By the Court.*

Q Doctor, do you mean by the respondent, the Globe Indemnity Company or the New York Switch Company? A The Globe Indemnity Company asked me to appear in this case and I told them they would have to pay me for my time.

10

ROSE MULLENBACK, resumed.

*By Mr. Doherty.*

Q As a result of the examination held by Dr. Klaus, what did you and your husband do?

*Mr. Kalisch.* I object to the question.

*The Court.* What do you seek to prove?

*Mr. Doherty.* As a result of this examination, by a paid employee of the Indemnity Company, he advised an operation, and as a result of the operation the deceased died.

20

*The Court.* Suppose he did; why don't you prove he had an operation?

*Mr. Doherty.* And that the operation was necessitated by this injury; that this examination was held two days after the accident—

30

*The Court.* It is not necessary to prove it was done on the advice of this physician. Subsequently he was operated on and died.

*Mr. Doherty.* Quite a period of time elapsed between the operation and the death.

*By the Court.*

Q Did they operate on your husband? A No, sir; not then—

40

*Rose Mullenbach, direct.*

Q Were you there when they operated on him? A No, sir; but Dr. Klaus, we hired him for the operation.

Q Is your husband dead now? A Yes.

Q When did he die? A He died the 14th of June last.

10 Q How long was that after the day that he was hurt? A Well, he was injured on the 11th day of March.

Q What was the date you went to the doctor? A The thirteenth day of March.

Q What was the date of the operation? A The sixteenth day of March.

Q Did he die in the hospital? A No, sir.

Q At home? A At home.

20 *The Court.* Is this the doctor that performed the operation?

*The Witness.* Yes.

*Mr. Doherty.* Dr. Klaus.

*By Mr. Doherty.*

Q Between the date of the accident, March 11th, 1916, and June 14th, the date of his death, did your husband ever do any work? A No, sir.

30 Q Did he ever leave the house? A Just as far as the front porch, where I could assist him from his sick room.

Q What was his condition during the period between March 11 and June 14? A Perfectly helpless.

*Mr. Kalisch.* I ask that that be struck out.

Q What do you mean?

40 *Mr. Kalisch.* I ask that that be struck out.

*Rose Mullenbach, direct.*

*The Court.* It may be struck out.

Q What did he do during that period?  
What could he do? A Nothing at all.

*Mr. Kalisch.* I object to that.

*By the Court.*

Q You may tell what he did do, what was his condition, so far as you could observe, not what he said; but after the operation, during this period of attempted convalescence, so far as you could see, what was his condition? A Well, so helpless that I had to dress and undress him, and just help him from one room to another, because he wasn't able—

10

*The Court.* Strike out the last part.

*By Mr. Doherty.*

20

Q Did you have to dress him and undress him— A Yes.

Q Did you have to dress him and undress him before the date of the accident? A Oh, no, sir.

Q Just state the difference in his manner of acting around the house, after the accident and before the accident. A Before the accident he was capable of dressing himself, going out to business, the same as every other day; after the operation he was completely helpless, not even able half of the time to feed himself.

30

*Mr. Kalisch.* I ask that that be stricken out.

*The Court.* It may be stricken out.

Q Could he walk? A Not without my assistance.

*Mr. Kalisch.* I object.

40

*Rose Mullenbach, cross.*

*The Court.* I will strike it out. She has already testified to what she found about him. She cannot testify to her conclusions.

Q Did he walk? A Not without my assistance.

10 Q Did he lose any weight during that period?  
A Yes.

*Mr. Kalisch.* I object.

Q From your— A Oh, yes, yes, certainly.

Q —observation of him? A Certainly he did.

*Mr. Kalisch.* I object to that.

*The Court.* Yes.

*Mr. Kalisch.* I move to strike it out.

20 *The Court.* It may be struck out.

*Mr. Doherty.* On what ground?

*By the Court.*

Q Did he get thinner? You didn't weigh him on the scales? A No, sir; but I could see by his appearance and I handled him every day.

*Mr. Doherty.* I think that is proper.

*The Court.* She has answered it.

30 *Cross examination by Mr. Kalisch.*

Q What day did he come home? A On the eleventh day of March, the last day he worked.

Q When did he come home from the hospital?

A The first day of April I took him home.

Q He died what day? A The 14th of June.

Q So he died about eleven weeks after he came home from the hospital? (No answer).

40 Q Is that correct? I suppose the calendar will speak for itself.

*Rose Mullenbach, cross.*

*By the Court.*

Q Did you have any other doctor beside this doctor who operated on him? A Yes, I called in Dr. Meyer, after I took him home.

Q After he was home? A The same day I brought him home.

10

*By Mr. Kalisch.*

Q You say your husband a year before had had a cold. What doctor did you have for that?

A Dr. Meyer.

*Mr. Doherty.* I object. It is immaterial.

*The Court.* She said he had. You asked her that.

Q That Dr. Meyer, who has been referred to as treating him a year before, is the same Dr. Meyer you called in after he was brought back from the hospital? A Yes.

20

Q How long was he laid up, that year before? A Just four days.

Q In bed? A No, sir.

Q Not at all in bed? A No, sir.

Q You also said that people work at the New York Switch and Crossing Company on Saturday afternoons. Who told you that? A What is that? I don't quite understand what you mean.

30

Q You testified he usually worked Saturday afternoon at the New York Switch and Crossing Company.

*The Court.* Sometimes, she said. It has no value.

A I said sometimes, in busy times.

*The Court.* What she said in relation to that matter was struck out. I did not consider it of value.

40

*Rose Mullenbach, cross.*

Q You had not noticed particularly whether—where that rupture or hernia was before the examination by Dr. Klaus, had you? A Yes, I had.

Q You merely—in other words, you judged from what you actually saw? A No.

10 Q Is that correct? A I can't say I just judged, but he used to say, when he removed his truss, he thought it healed better, it was getting smaller every day; I can only tell you that—

Q So you base your—

*Mr. Doherty.* I object.

*Mr. Kalisch.* What?

*Mr. Doherty.* Go ahead.

20 Q You base your evidence then to some extent upon what he told you upon taking the truss off; is that correct?

*Mr. Doherty.* I object.

A I base nothing, sir, nothing at all.

*The Court.* It is cross examination.

Q Didn't you say he told you these things about taking the truss off, and how it was getting smaller? A He never walked without his truss.

30 Q Listen to my question. Didn't you say your husband said to you that about taking the truss off, that the rupture appeared to be getting smaller, or something of that sort? Did he or not? A Yes, just the evening, when he took a bath of alcohol, then he thought it looked better to him.

40 Q So that when you told us that about the size of the hernia, you are thinking to some extent of what your husband told you, when he went in to take his bath, rubbed with alcohol; is

*Rose Mullenbach, cross.*

that correct? A I am not thinking, sir, I am saying what I saw; it was the size of a marble before he were injured.

Q What kind of a marble? A Just these ordinary pures that children play with in the street, that you saw shooting marbles.

Q Not a big marble? A No, just those pures. There is all sizes, there is smaller than that, you know. 10

Q You noticed your husband's condition particularly, did you, in March, after he came back?

A From the hospital?

Q Yes.

*Mr. Doherty.* There is no evidence he came back in March. He didn't come back until the first of April. 20

Q Or the first of April? A Why, certainly.

Q You say you noticed that the hernia looked larger? A After the operation.

Q No, when he came back to the house after the accident?

*Mr. Doherty.* I object; the evidence is that—

A Yes.

*The Court.* It is cross examination. 30

*Mr. Doherty.* He is trying to make the situation different than she testified.

*The Court.* That is what cross examination sometimes does, you see.

Q Is this your signature? (Indicating). A Yes, that is my signature.

Q Do you remember writing this letter? A Yes, I thanked the Globe Indemnity— 40

*Rose Mullenbach, cross.*

Q Kindly answer my question. Do you remember writing this letter? A Yes, I remember that.

Q Are you familiar with the contents of that letter? A Yes.

10 Q Better read it, to be sure. Better read the letter? A Yes, I well remember that, sir.

Q You made no mention of the hernia, did you, in that letter, or the operation for the hernia? A No, sir.

*Mr. Kalisch.* I ask that this letter be marked for identification.

(It is marked Exhibit R. 1 for identification.)

20 Q That letter was written April 26th, addressed to the Globe Indemnity Company, 45 William street, New York City. Do you remember writing this letter (indicating) dated May 16, 1916, to Mr. Mehegan? You better look at it, examine it. A Yes, I remember that also.

(It is later marked Exhibit R. 2 for identification.)

Q As a matter of fact, you didn't mention the subject of hernia at all, did you? A Well, I—

30 Q Did you or not? A No, I didn't, because—

*Mr. Kalisch.* I move that anything further than that be stricken out.

*The Court.* She has already said she did not. Strike out the rest of it.

Q You know where Dr. Meyer is, don't you?

A Yes. He is not here.

40 Q Have you subpoenaed him to be here? A No, sir.

*Rose Mullenbach, re-direct.*

*Re-direct examination* by Mr. Doherty.

Q When did Dr. Meyer first start to treat your husband? A The first of April.

Q That was after the operation? A Yes.

Q Have you received any compensation from this company during the time your husband was laid up? A Yes. 10

Q How much? A Seven weeks, at ten dollars per week, and they paid the medical expenses of fifty dollars.

Q That is all you received? A That is all I received.

Q (*By the Court.*) Did they pay that fifty dollars to you or did they pay the doctor? A Your Honor—

Q (*By the Court.*) Answer my question. 20  
You say they paid the medical attendance?  
A Yes, they paid for the operation. They returned the money, because I had borrowed it. That was my letter of thanks I had wrote to them.

Q (*By the Court.*) If you would only talk less and give us the information we want—did they pay the money to you? Did you pay the money to the doctor first? A Yes.

Q Then they paid it back to you? A Yes 30  
—no.

Q Is that right? A I borrowed that money and told them where I borrowed it, from my husband's employer, they paid it with a check.

Q They paid it to the person from whom you borrowed it? A Yes.

Q Was that their doctor who performed the operation? A Yes.

Q They paid him? A I borrowed the money to pay Dr. Klaus. 40

*Rose Mullenbach, re-cross.*

*Mr. Kalisch.* The Court has stated "our doctor." The testimony is that she engaged Dr. Klaus herself.

*The Court.* You subsequently paid for it.

*Mr. Kalisch.* Under the Compensation Act we were bound to.

10

*By Mr. Doherty.*

Q After that Saturday, did your husband ever work again in his life? A No, sir.

*Re-cross examination by Mr. Kalisch.*

Q Would you know your husband's signature if you saw it? A Yes, I certainly do.

Q Is this his signature (indicating)?  
A Yes.

20

Q Is this his signature (indicating)?  
A Yes.

*Mr. Kalisch.* Showing witness two receipts for compensation, one from the 23rd of April to May 14, 1916, consideration, thirty dollars; and the other a compensation receipt of forty dollars, from March 26th to April 23rd.

30

*The Court.* Is there any question about the facts in those receipts? She said she received seven weeks at ten dollars a week.

*Mr. Kalisch.* That is correct. That makes seventy dollars.

Q I showed you a few minutes ago a letter which I asked you to identify having written to Mr. Mehegan. That is the letter you wrote, this letter dated May 16, 1916? A Yes.

Q Your signature? A Yes.

Q You are familiar with the contents?  
40 A Yes.

*Rose Mullenbach, re-cross.*

Q This Dr. Klaus, whom you engaged to operate upon your husband, charged how much?  
A Twenty-five dollars.

Q And the New York Switch & Crossing Company paid that for you, did they? A I went and inquired—

Q Did they pay it or not? A Through a loan, yes. 10

Q Did they pay anything else through a loan? A Yes, two weeks in the hospital at eight dollars a week.

Q That made forty-one dollars? A Yes.

Q In this letter of May 6th, you also make no mention of the hernia, do you? A Well, because—

Q Do you or not? A No, sir, I don't.

Q But you do make mention of the fact, thanking you very much for your kindness and in the way you have rewarded my husband this money and all, my husband would like to know when he goes back, how he can prove that he does not owe the firm the forty-one dollars?  
A Yes, that is what I wrote that letter for. 20

Q He is so worried about it, that is why I write you these few lines? A Yes.

*Mr. Kalisch.* I ask that this letter and the receipts be marked for identification. 30

(Letter of May 16th marked Exhibit R. 2 for identification; receipt "to April 23rd" marked Exhibit R. 3 for identification; receipt "to May 14th" marked Exhibit R. 4 for identification.)

Q These payments started about three weeks after your husband came home on the 11th of March? A Well, that I am not positively sure about, it may be around that time. 40

*Rose Mullenbach, re-cross.*

Q That was the time when he complained about his back? A The payments didn't start until after he was operated on, and had been home.

10 Q The third week didn't start until after he had been operated on, did it? The third week from the 11th of March? A No, sir; I don't believe they did.

Q You say you are sure the only hernia you saw was that small hernia the size of a marble? A Before the accident?

Q Yes. As a matter of fact, he had two hernias, didn't he? A About the second one I knew nothing, nor him either.

Q You didn't know about the second one?

20 The stenographer reads: "Nor him either."

Q Do you remember swearing to the petition that was filed by Doherty & Kinkead in regard to this case? A Yes.

30 Q Do you remember swearing that he strained the muscles of his back, caused serious and aggravated—to develop, and two hernias he had previously sustained, and so forth? A Yes, but I didn't know about the second until after—

Q Why did you swear to that if you didn't know about it?

*The Court.* She has a right to finish her answer.

40 A Because Mr. Doherty questioned me and I told him we knew nothing about the second hernia, because he wore a one-sided truss, until he was examined by Dr. Klaus, we didn't know it, that was why I swore to it, because I couldn't but tell the truth.

*Rose Mullenbach, re-cross.*

Q Why did you swear to the fact of two hernias, when so far as you knew, and so far as you remembered, he had only one?

A Because Dr. Klaus treated him for two. How could I swear he had only one?

Q Is that the way you knew he had one also on the other side, because he operated for it? 10

A No, sir; I told you before, he always wore a one-sided truss for that one.

*By the Court.*

Q When did you first learn he had two hernias instead of one? A In Dr. Klaus' office.

Q How long after the accident of March 11th? A Two days after. That was the thirteenth day.

Q That was two or three days before the operation? A Yes; they operated on him on the sixteenth. 20

Q Were you there when Dr. Klaus found the second hernia? A Yes.

Q Was it the same side as you knew he had. A No, sir; the other side.

*By Mr. Kalisch.*

Q Then why did you testify this morning about the single hernia? 30

*The Court.* About what?

Q About one hernia only? A That I testified this morning?

Q You knew you had sworn you knew of two hernias—that there were two, didn't you?

A At the time I explained my case to Mr. Doherty—

Q Didn't you know this morning, when you were on the stand, you had already sworn to the fact your husband had two hernias? Didn't 40

*Rose Crosetti, direct.*

you know that? A Well, I didn't quite understand your question then, sir.

Q You didn't understand it? A No, I didn't quite understand it then, because I would have explained it to you, the same as I did now.

- 10 ROSE CROSETTI, a witness produced on behalf of the petitioner, being sworn, testified as follows:

*Direct examination* by Mr. Doherty.

Q Did you receive a subpoena *duces tecum* to produce records of St. Mary's Hospital in Hoboken? A Yes.

Q Have you the records with you? A Yes.

- 20 Q In keeping these records, when you made the entry—do you keep the book? A Yes, I keep the books.

Q (*By the Court*). What is your position there? A Assistant secretary.

Q How were these entries made? A When a patient is admitted a history and card are made out, and the diagnosis is filled in by the doctor.

- 30 Q How do you get your information, in making the entries in these books? A You mean the diagnosis?

Q Where do you get your information from? (No answer.)

Q (*By the Court*.) The name and age? A When the patient is admitted the Sister goes around and takes it, then it is entered in a book.

Q (*By the Court*.) From the book you just— A I typewrote it on that card, and this history is made out also.

Q Have you the original entry? A Yes.

- 40 Q With you there? A Yes.

*Rose Crosetti, direct.*

Q Of the records of the hospital, showing the illness or sickness of Mr. Mullenbach? A Yes.

Q Referring to your record, can you tell us the day he entered the hospital?

*Mr. Kalisch.* I object on the ground this witness does not testify she enters those records. 10

*By the Court.*

Q Did you make this original entry? A I enter this record when the patient enters, is admitted—

Q Did you make this entry? A Yes.

Q Is this the first entry? A This is originally entered, given to me, and I copy it from that— 20

Q Where do you get that information? A This is written by the doctor in charge— this diagnosis.

Q Where do you get that card? A This is sent in to the office, when the patient is discharged.

Q Who makes this record? A I do.

Q (*By Mr. Kalisch.*) On the card? A Oh, on the card, the doctor signs the card. 30

*By Mr. Doherty.*

Q From that information you make up your original entries? A We make sort of a double entry.

Q What do you consider your original books in the hospital?

*Mr. Kalisch.* I object.

*Rose Crosetti, cross.*

*By the Court.*

Q What is the book that shows the first entry? A It is just a common ordinary—

Q Who keeps it? A I have it in the office there, but it is just a temporary record.

10 Q You take the man's record, put it on this card? A Yes.

Q That is kept in your card system? A Yes.

Q That is called your hospital record? A Yes.

*Mr. Kalisch.* I would like to cross examine on that.

*Cross examination by Mr. Kalisch (on the records).*

20 Q That card which you showed the Court, which has a mark on it, M. 2, St. Mary's Hospital, C, is not made out by you, is it? A Yes, it is.

Q I understood you to say it is made out by the doctor? A No, I said the diagnosis is filled in by the doctor.

30 Q Who gives you the information on which you base your answers on this card? A One of the Sisters takes the names, and from that I copy on the card.

Q So the Sister comes in and gives you these answers, and you put them on the card? A Yes.

Q The diagnosis on the bottom of the card is made out by the doctor? A Yes.

Q When the Sister comes in and gives you this information, what book do you put it in? A We just have an ordinary common book, don't you know.

40 Q You put it in that book? A For temporary use, don't you know?

*Rose Crosetti, re-direct.*

Q You put it in that book? A Yes.

Q From that book you enter it on this card afterward? A Yes.

Q What other papers do you get or use, on which you write in information obtained from this book? A This ruled sheet is written here. (Indicating.)

10

Q That is made out from the book also? A Yes.

Q So that the first entry, and the original entry, from which you gather the information on which you make the answers on the card, and on the history— A Hmmm, hmmm.

Q —is the books in which the originally enter the information given you by the Sister? A Yes.

20

Q That is correct, is it? A She writes the name in that book, from that book I enter it on the card.

*Re-direct examination by Mr. Doherty.*

Q How soon after are these entries made on the card—on these original certificates? A She goes around in the morning, takes all the names of the patients admitted the previous day.

30

*The Court.* What do you want to prove?

*Mr. Doherty.* I want to prove these are proper records of the hospital.

*The Court.* Assuming they are, what do you want to prove?

*Mr. Doherty.* That he entered there as a patient, was operated on for inguinal double hernia.

*The Court.* Are you willing to admit that? Is there any reason to doubt it?

40

*Ernest Armading, direct.*

*Mr. Kalisch.* Just the diagnosis, you want to admit?

*The Court.* You admit the fact he was operated on for double hernia?

10

*Mr. Kalisch.* For inguinal hernia and undescended testicles on both sides. (Reading from the card.)

*Mr. Doherty.* And the further fact, if he was suffering from anything else it would appear in the diagnosis.

*Mr. Kalisch.* I don't say that.

CHARLEY MONTAGUE, called as a witness for the petitioner.

20

*Mr. Kalisch.* It is admitted that this witness will testify that he saw the deceased working and lifting a horse, and he suddenly exclaimed, "Oh, my back," and bent down, that it was around ten or eleven o'clock on Saturday morning; but reserving, however, my objection to the competency of that exclamation.

(Witness excused.)

DEFENSE.

30

ERNEST ARMARDING, a witness produced on behalf of the respondent, being sworn, testified as follows:

*Direct examination* by Mr. Kalisch.

Q On March 11, 1916, were you in the employ of the New York Switch & Crossing Company? A Yes.

40

Q What was your position? A Superintendent.

*Ernest Armading, direct.*

Q What is your custom there with regard to reporting accidents? A If a man gets hurt, he generally comes to me; if he gets his finger cut—

*Mr. Doherty.* I object.

*Mr. Kalisch.* I maintain the objection comes too late.

*The Court.* I will not strike it out.

10

A (Continuing.) If a man gets hurt, if he is able, he comes to me; if not, I have to go to the place of the accident.

Q Did Mullenback come to you on that day and say he had been hurt? A No, sir.

*Mr. Doherty.* What is the question?

(Question repeated by stenographer.)

Q Did you see Mullenback working that day?

A Oh, yes.

20

Q Did you see him working in the morning?

A Yes.

Q Did you see him working between ten and eleven o'clock? A Well, I couldn't say exactly. I saw him mostly all morning.

Q During the time you saw him did you hear him give any exclamation that he had been hurt or anything of that kind? A No, sir.

Q Were you in a position to see him during that time? A Well, I was at times.

30

*Mr. Doherty.* Fix the time more definitely.

*The Court.* All morning.

Q How often would you be in a position—were you in a position during the morning of March 11, to see him at his work? A Well, I watched him in particular working outside from my office window. I watched the man's

40

*Ernest Armading, direct.*

actions and he seemed to act a little peculiar to me.

Q When did you first notice him acting peculiarly? A When I watched him working outside in the yard.

10 Q About what time? A Well, it was in the morning, between ten and eleven o'clock, maybe.

Q Had you seen him before? A Yes.

Q Did he act peculiarly before that? A No.

Q What peculiarity do you mean? A Well, it was—there was some heavy lifting to be done, and I heard him using some bad language towards these men that made me get up and stop him.

*Mr. Doherty.* I object.

*The Court.* Why should you object?

20 *Mr. Doherty.* It is irrelevant; it is filling up the record with a lot—

*The Court.* If you object on the ground it is irrelevant, I will sustain your objection.

*Mr. Doherty.* I will let it go. I won't press my objection.

*The Court.* Objection is withdrawn.

Q Is that what you mean by "queer"—  
"acting queer?" A Yes.

30 Q You mean he was swearing at his men?  
A Yes.

Q Is that the only thing you mean by that statement, that he was acting queerly? A Yes.

*By the Court.*

Q How did he act? Did you see him do anything? A I just happened to look out of the window; I saw him getting a rail—

40 Q That is this horse, that has been talked about? A This was not on a horse; this was

*Ernest Armading, cross.*

on a car, we have a push car there, and the rail was to be placed on rollers, to be put on a bending machine. From what I observed—I heard him swearing at his men, and he was always a man very ambitious, you know, he would grab hold of things and do it himself; I saw him lifting a heavy—and putting the rail on the rollers, and I went outside and stopped him using that language. 10

Q Did you see him do anything about his back? A No, sir.

Q (*By Mr. Kalisch.*) Did you see him work after that? A Oh, yes.

Q What was there—you say you saw him acting queer, he was all right in the early morning, but he acted queer, beginning about ten or eleven o'clock? A Well, it was just that particular time, when he took this rail off the car, put it on the rollers there. 20

Q Did you see him act as if he got hurt or anything of that kind? A No.

Q What did he act queer about? A My attention—because he was so wild at his men, he had hold of it himself, showing his men how to throw it over.

Q (*By Mr. Kalisch.*) That is what you mean by the word “queer?” A Yes. 30

*Cross examination by Mr. Doherty.*

Q What was there about this man that you were watching so particularly during the morning before the accident? A Well, it is my business to watch every man.

Q What is that? A It is my business to watch every man.

Q Do you watch every man particularly? A Sometimes I do. 40

*Ernest Armading, cross.*

Q Why did you watch this man particularly this morning? A Because he was right in front of me.

Q He was in front of you all the time? A Yes.

10 Q How long was he in front of you—all morning? A No, he might have been there for about ten minutes.

Q Was there ever a time you were away from him during that morning? A Yes.

Q How long were you absent, the greatest length of time when you didn't see him? A I couldn't tell you exactly. I saw him maybe five or six times the whole morning.

Q You saw him five or six times? A Yes.

20 Q How long a period of time, each time you saw him, did you stay with him, watch him particularly? A I didn't exactly stay with him. I was in the office looking out the window, and saw him working.

Q You were up in your office. You don't know all the heavy lifting that was going on during the time you were in your office? A I can see what the men are doing.

30 Q You can see what they are doing, sitting in your office? A Yes.

Q Can you see what they are doing when you are walking to your office? A Walking to the office?

Q Can you see what they are doing when you are walking to your office from the job? A No, sir, not exactly.

Q (*By the Court.*) Did you see him lifting heavy things during that morning? A Yes.

40 Q He might have lifted something when you were away from there? A Yes.

*Valentine Vogt, direct.*

*By Mr. Kalisch.*

Q But you are sure you saw him lifting at this time you heard him swearing at these men? A Just that particular time.

Q You saw him after that to? A No, just then.

10

*Mr. Doherty.* Can you fix the time this man saw this man lifting something—about the time he was swearing at the men, or shortly after?

*Mr. Kalisch.* Yes.

Q How long after he was swearing at the men did he start to lift this girder by himself—almost the same time? A Yes, it happened at the same moment.

20

VALENTINE VOGT, a witness produced on behalf of the respondent, being sworn, testified as follows:

*Direct examination by Mr. Kalisch.*

Q Were you in the employ of the New York Switch & Crossing Company on March 11, 1916? A Yes.

Q Do you remember whether you worked with Mr. Mullenback at that time? A Yes. I had worked with him for a little time.

30

Q Did you see him injured that day? A No, sir.

Q You didn't hear him say anything about having been hurt that day? A No, sir.

Q Were you working with him that morning? A I was with him for a while.

Q He was a foreman, was he? A He was my foreman.

40

*Valentine Vogt, cross.*

Q Did you ever hear him speak of having a rupture?

*Mr. Doherty.* I object.

*Mr. Kalisch.* Yes or no?

A That he had a rupture?

10 Q Rupture. A Well, I heard about it, that is all I know.

Q From him? A No, not from him.

Q Not from him? Did you ever see him wear anything about— A I know he wore a belt.

Q What kind of a belt?

*The Court.* His wife says he wore a truss. It is in the case.

*Cross examination by Mr. Doherty.*

20 Q You say you were with him that morning, March 11, 1916? A I was with him that morning.

Q How long were you with him? A That is, for a while.

Q How long? A Well, I was called out, I was working on my own machine, I got a machine, that morning we were short of men.

30 Q Will you answer my question? You say he was working with you for a while. How long is that while? A How long? Maybe half an hour or three-quarters of an hour.

Q That is all you saw him that morning? A That is all.

Q That is all you saw of him, and worked with him that morning? A Yes.

Q What time was that? A What time?

Q Yes. A We started seven o'clock.

40 Q What time did you work with him half an hour or so? A That was—why, I don't exact-

*Ernest Armading, direct.*

ly know what time that was, but it was between the hours of seven and twelve. I don't know exactly what time it was.

Q You don't know whether it was seven to eight? A It wasn't seven, I am sure of that. It was later than seven.

Q Was it before or after he got hurt? 10

*Mr. Kalisch.* I object. This witness has not testified he was hurt.

*The Court.* I suppose he knows about the time.

Q Do you know that something happened to him? A I didn't know anything about it until Monday.

Q You were not there? A That day I didn't know anything about it. Monday morning he didn't come, that is all I know, they say he got hurt. 20

*Mr. Kalisch.* I move to strike it out as hearsay.

*The Court.* Yes.

Q If anything happened to his back— A Not that I know.

Q —and he exclaimed, you didn't hear it? A No, sir. 30

ERNEST ARMARDING, recalled, on behalf of the respondent.

*Direct examination* by Mr. Kalisch.

Q You knew Mullenback for some years? A Yes.

Q About how many years? A Well, I think from 1902 or 1903, I ain't very sure about it.

Q (*By the Court.*) Worked for the Switch Company all that time, did he? A Yes. 40

*Ernest Armading, direct.*

Q Had he ever told you that he had a rupture on both sides? A No.

*Mr. Doherty.* I object.

*The Court.* He said no.

10 Q Did you ever see him use a truss? A No.

Q Did you know he had a rupture? A Yes.

Q How did you know it? A From hearsay.

Q (*By the Court.*) Not what he told you?

A Not what he told me.

Q Did you ever hear anyone mention rupture in his presence?

*Mr. Doherty.* I object. Any statement made by the deceased is competent—

20 Q Did you ever hear anybody say anything about a rupture when he was present? A No.

Q So it is merely hearsay that you know anything about it; that is all.

*Mr. Kalisch.* My testimony is now medical testimony. I would like to have the petitioner put in his case first.

*Mr. Doherty.* Dr. Arlitz is on his way.

30 *Mr. Kalisch.* I offer in evidence the two letters and the receipts that have been offered for identification.

(The letters and receipts heretofore marked for identification are now marked in evidence, respectively Exhibits R. 1, R. 2, R. 3 and R. 4.)

*William J. Arlitz, direct.*

WILLIAM J. ARLITZ, a witness produced on behalf of the petitioner, being sworn, testified as follows:

*Direct examination* by Mr. Doherty.

Q You are a practicing physician of the State of New Jersey? A I am. 10

Q Have been how long? A Twenty-seven years.

*The Court.* Are his qualifications admitted?

*Mr. Kalisch.* Yes.

Q During your practice have you had any occasion to treat hernias? A Many.

Q About how many? A By treating them, you mean operating?

Q Come under your observation? A A great many; I cannot tell you how many. 20

Q After an operation for hernia, what is the usual result, the condition of the individual operated on, with regard to strength and vitality?

A The same as in all other operations, there is a degree of post-operative shock.

Q In that stage is the man liable to contract a disease he might not otherwise contract?

*Mr. Kalisch.* I object. There is no proof there has been a disease contracted in this case. 30

*The Court.* What is your object?

*Mr. Doherty.* That the man must have died from something, if he did not die from this operation. They deny that he died from this operation. If they are going to set up he died from other disease, I have a right to show the condition of the patient was such that— 40

*William J. Arlitz, direct.*

*The Court.* I will not overrule it.

*Mr. Kalisch.* I ask an exception.

A Following all operations there is a post-operative shock, and in connection with shock the general resistance of the patient is lowered.

10 Q During that period would a man be more apt to contract tuberculosis, nephritis, or some other disease, if that germ were latent?

*Mr. Kalisch.* I object on the same ground, there is no testimony in the case on which this question can be predicated.

*The Court.* Do you want to prove what this man died of?

20 *Mr. Doherty.* I am trying to prove, if he died of some other disease, if that condition were brought on by the lowered vitality, we ought to be able to show it, and prove what he died of. One doctor says he died of nephritis and another of tuberculosis.

*The Court.* I do not see the materiality of it, but I will not overrule it.

*Mr. Kalisch.* I ask an exception.

30 A I would say in response to that, if a man had a latent tuberculosis and an operation was performed on that man, because of the lessening of the general resistance in connection with the operation, the tuberculosis might become an active factor, he might die of tuberculosis. If a man had nephritis—I am assuming it is a chronic condition—it is usually chronic—

Q By reason of the ordinary going down of the power of resistance, if he had a weak spot in his system, it would be attacked there?

40 A That is the spot. If a man had a contusion

*William J. Arlitz, direct.*

of his elbow, and he had a latent tuberculosis, the chances are that that tubercle bacilli would immediately start their fight in the spot where this resistance is below the average. The result would be a tubercular joint. It would hold good in any joint. It is a well recognized law of medicine, because of the weak resistance, the spot is attacked by the army of invasion, and the germs or bacteria there spend their force. 10

Q Assuming that a man has been working steadily and has never complained of any serious ailment, but has had two hernias, one of one year's standing, and another of eleven years' standing, that he had been working every day, lifts a heavy girder, heavy iron horse, and is heard to exclaim, "Oh, my back," go home, be confined to his bed, be assisted about the house by his wife, subsequently operated on, four days later, and finally dies; in your opinion—would the operation in your opinion accelerate his death, or aggravate any condition that was formerly latent? 20

*Mr. Kalisch.* I object. It is hypothetical, it does not state the facts in the case properly. 30

*The Court.* I will allow it.

*Mr. Kalisch.* I ask an exception.

A Yes, the operation would accentuate all these conditions, and might cause speedy death of the individual because of the lessening of the resistance.

*Mr. Kalisch.* I move to strike out the entire testimony of the doctor with regard to the accentuation or acceleration of any disease which has not been proven in this 40

*William J. Arlitz, cross.*

case to have existed previous to the accident.

*The Court.* I will not strike it out.

*Mr. Kalisch.* I ask an exception.

*Cross examination by Mr. Kalisch.*

10 Q How soon would death occur? A It might occur within—immediately following the operation, and the patient might not react.

Q As soon as that? A Yes.

Q In other words, do you mean to say that one of the tests of the fact that there has been the acceleration is the fact that there is an immediate result, that is, a death or a flaring up of the latent condition? A I wouldn't put it that way. I will give an illustration—

20 Q I would prefer you to answer my question. (Question repeated by the stenographer.)

A I would say yes to that. I would say if a man had tuberculosis—

Q Answer the question. A I would have to explain this in a scientific way.

(Question and answer repeated by the stenographer.)

30 *The Court.* I think he should be permitted to answer the question.

*Mr. Kalisch.* He said yes.

*The Court.* But I think in a question of this kind he has a right to modify by such expressions as he wishes, to explain it. I will permit it.

*Mr. Kalisch.* I ask an exception.

A I mean this, if a man had an unrecognized tuberculosis, an operation might be performed under those circumstances without the physician  
40 having knowledge of it. On the other hand, if

*William J. Arlitz, cross.*

the physician did have knowledge of it, the chances are he would not operate in that case. If the resistance is lowered that tubercular process becomes acutely active, and the man might die in three or four or five or six or ten weeks, because of the tuberculosis, because of the lessened resistance. I don't mean he dies immediately from it. 10

Q You would have to know how serious the operation was, would you? A I would have that in mind, yes.

Q So that without knowing how serious the operation was, your answer—(strike that out). Your answer must be modified to the extent of the seriousness of the operation, is that correct?

A I have a knowledge of that in connection with this case. 20

Q You have a knowledge? A Yes, the question as put—the man has had an operation for double hernia, one existing eleven years, and one existing one year.

Q Does that determine the severity of the operation—the number of years it has existed?

A No; but double inguinal operation is never a trivial operation. It is always a major operation.

Q Hernia is a major operation? A I would so consider it, yes. 30

Q But some hernia operations are simple matters, that a man is out and around in a very short time; is that correct? A I would say a successful hernia operation would be followed by the discharge of the patient from the hospital in three weeks' time.

Q And the number of weeks longer than that three weeks, that he would suffer as a result of the operation, would depend entirely upon 40

*William J. Arlitz, cross.*

the seriousness of the operation itself; isn't that correct? A No, I would say that it would depend primarily upon the resistance of that particular individual.

Q The resistance is attacked more by a serious operation than by the ordinary operation; 10 is that right? A No, I would not—that is an eye measurement of the individual who is performing the operation.

Q That is not correct? A Not the way you 20 put it. To illustrate, we know that an operation for hernia in any young person is comparatively free of danger, but we know, when we perform an operation on an individual over fifty years of age for hernia, it becomes a very serious problem because we know that the resistance of that person is very much less than in the other person.

Q That is the general health resistance, isn't it? A Yes.

Q That doesn't mean he has any particular latent condition? A No; that means the general resistance of the individual. We know it is 'way below the standard, in any instance.

Q So it is not your opinion that the seriousness of the operation has any bearing at all 30 upon the question of the resistance? A You repeat that.

Q As the result of the operation? A I don't get that.

Q (Question repeated by the stenographer.) (No answer.)

Q Do you understand that? A I don't think I quite get it.

Q I will withdraw the question. It is not 40 your opinion that the seriousness of the operation plays any part at all with regard to the

*William J. Arlitz, cross.*

amount of resistance necessary to withstand the shock of the operation? A Why, absolutely. Absolutely.

Q It does? A Absolutely; if I am about—

Q It does? A —to perform an operation on an individual, if I knew he had tuberculosis I would not perform a severe operation for hernia—or typhoid fever—if I knew he had typhoid fever, I would not. 10

Q I am not referring to tuberculosis or typhoid fever, or anything else. I am talking about an operation for hernia, and the seriousness of that operation; as to whether that is to be considered, with regard to the necessary resistance to withstand the shock of such operation? A Yes. The seriousness of the operation is in proportion to the expectancy, in its relationship to the resistance. 20

Q The mere fact of one hernia of eleven years' standing, and the other of one year, cannot indicate whether the operation was a simple, or not a simple one? A I know it was not simple.

Q How do you know? A Because I am a practicing surgeon, have done many of them. I would never regard double operation for hernia as a simple thing. 30

Q Do you consider that every hernia of eleven years' standing or one year's standing, or the operation for double hernia, of one year's standing, and eleven years' standing, must necessarily be a serious operation? A I think it is a serious thing, yes.

Q You have performed a lot of them? A Yes, many of them.

*William J. Arlitz, cross.*

Q Many of them lived? A I don't recall any of the younger people dying of that operation.

Q It would depend a great deal, wouldn't it, upon the age of the individual? A That would have much to do with it; I said that before.

10 Q You don't know the age of this man? A I know nothing about the case.

Q Your opinion, then, would be modified according to the age of the person operated on? A I mentioned that before.

Q You say it would strike—for example, a man with an injured knee or ankle, I think some other parts of the body you mentioned, this tuberculosis after such an operation might strike at his injured parts? A If they were injured, yes.

20 Q If there had been an injury? A Yes. If a man had tuberculosis of the kidneys and he had an injury, I would naturally expect that that injury would lessen his resistance, and that tubercular kidney would become more active; peritonitis, the same thing; tuberculosis of the lungs, the same thing.

Q You wouldn't expect, if he had an injury to the ankle, he would subsequently have pulmonary tuberculosis of the lungs, would you? A Because of the injury to the ankle? No.

30 Q So that the only thing you mean is this: you would expect the subsequent tuberculosis to strike the injured parts? A No, I don't say—I didn't say that. I thought I made myself plain. I say this, if a man had an injury—or had an operation, and because of either one of these conditions his resistance was lowered, I would expect, if he had something latent, it would become acutely active, and he might die

40

*William J. Arlitz, cross.*

of that process, whatever it might be. If he had an old nephritis and his resistance was lowered, it would grow worse, he might die of it. Same might apply to tuberculosis of the lungs.

Q If, after such an operation you should examine the man, find there was no acute condition of the tuberculosis, your opinion would not be the tuberculosis was accelerated by the operation, would it? A By the post-operative shock in connection with it? 10

Q Yes. A Yes, I would infer that.

Q If you did not find it greatly accelerated? A Well, didn't find what accelerated?

Q The tubercular condition? A If it wasn't accelerated, and he didn't have—I didn't find it, why should I consider it at all?

Q Assuming the case where the person were operated on, and the condition of the man were the normal condition, with the exception of that tuberculosis, which seemed to be a gradual stage, you wouldn't say that the operation had caused that to be accelerated, would you? A Yes, surely. If a man came before me for an operation, that was apparently normal, and I performed the operation, a double operation for hernia, and if during the course of this man's convalescence from that operation, he developed a tuberculosis and died of it, the only cause I could ascribe for that would be that his resistance had become lessened because of the operation, he died of it. 20

Q So that you would expect a tuberculosis if there were tuberculosis? A Yes. It would hold good for nephritis—anything else—I cannot specify any particular disease. I don't know what this man died of. I don't know anything about it. 30 40

*Motion to dismiss.*

Q You couldn't tell from the hypothetical question asked you, what the conditions were?

A This gentleman here—I don't know his name—

Q You base your answer upon the particular statements made in that question? A That is  
10 all.

*Mr. Doherty.* That is my case, except that I want to introduce a certified copy from the Board of Health, of the death certificate of the deceased, stating that the deceased died from nephritis.

*Mr. Kalisch.* I object on the ground that the petitioner testified she knew where Dr. Meyer was, and did not subpoena him.

*The Court.* Do you mean as to the competency of the certificate?  
20

*Mr. Kalisch.* Yes.

*The Court.* The Act covers that.

*Mr. Kalisch.* He is available, she made no attempt to subpoena him, he is the medical examiner or doctor mentioned in that certificate.

*The Court.* I will admit it.

*Mr. Kalisch.* I ask an exception.  
30

(It is marked Exhibit P. 1 in evidence.)

*Mr. Kalisch.* I move for the dismissal of the petition on the ground there is absolutely no evidence to connect any accident occurring in the course of the employment, or arising out of the employment.

*The Court.* How have you proved, Mr. Doherty, that this man died as the result of the accident?  
40

*Henry Klaus, direct.*

*Mr. Doherty.* We cannot show any direct cause—any connection between the accident and operation and death. Where we can prove and show facts, by which the Court, sitting as a jury—

*The Court.* How can I infer from the testimony thus far? I have followed it very closely, I have leaned, because of the character of the case, towards giving you full opportunity. I had a case, the case of *Hanglin v. Swift*; and the case which I could not recall the name of this morning, the case of *Winters v. Atkinson Frizell Company*; but the testimony you have put in shows he died of nephritis. I will do this: I will not determine this motion now. I will take your testimony, Mr. Kalisch. I understand you have a couple of doctors here. 10 20

*Mr. Kalisch.* Will you Honor rule upon my motion?

*The Court.* I will reserve it. You may have an exception if you think you should have it.

Exception allowed.

GEORGE G. TENNANT, 30  
J.

HENRY KLAUS, a witness produced on behalf of the respondent, (heretofore sworn in this case) recalled, testified as follows:

*Direct examination* by Mr. Kalisch.

Q Are you in any way connected with the New York Switch & Crossing Company or the Globe Indemnity Company? A No. 40

*Henry Klaus, direct.*

Q Are you in the receipt of any periodical payments from them for your services to either of them? A Not at all.

Q Have you been paid for your services before attending court? A Yes.

10 Q Are your services—is the agreement with the New York Switch & Crossing Company or the Globe Indemnity Company that the result of this action shall have any bearing upon the fees you are to obtain? A Not at all.

Q You saw Mr. Mullenback at the hospital? A I saw him first at my office.

Q Who came with him, if anybody? A His wife.

*By the Court.*

20 Q Did he come of his own accord to consult you professionally? A I had an office—

Q Did he come to you to consult you professionally, or did you do work for the Switch Company? A No, he consulted with me professionally.

Q Had he ever consulted with you before? A First time I ever met the man.

Q You examined him when he came to your office? A I did.

30 Q Tell us what you found. A He came to me with a history that on April—March 11th—

Q Tell us what you found. A Not the history?

40 Q You heard from him he had something happen to him. You examined him. What did you find? A On the examination he showed physically no signs whatever of an injury to the back except tenderness over the lumbar region; I made a diagnosis of myositis or overstrain, traumatic myositis or overstrain. During the

*Henry Klaus, direct.*

course of my examination I came upon two hernias, one larger, one smaller, with an undescended testicle on the left side. No mention had been made in the history of these hernias. They were brought out by physical examination.

Q He made no mention of them? A Not in the history of the case. I advised the man the best thing to cure his back would be to rest in bed, and I advised also then, if he wanted—advised also an operation for these two hernias and undescended testicle. I explained some of the complications that might arise from such conditions. He afterward decided to be voluntarily operated on for these conditions— 10

Q Was there anything in your examination of him—anything that you found about the hernia, to indicate how recent they were? 20

A The one on the right side was very large, which indicated it was of long standing; the one on the left side, having an undescended testicle, he may have had it all his life.

Q Do you mean congenital. A Congenital. The large one, of eleven years' duration, and from the size of it, from just looking at it, you would say it was of five, six, seven or eight years' duration, without asking a question. The sack came right into the scrotum, almost—down to the testicle. 30

Q You say the large one appeared to be five or six or seven or eight year old? A Yes—from examination.

*By Mr. Kalisch.*

Q The left one, you said something about its having been congenital. Explain what you mean. A Congenital, is present from birth. 40

*Henry Klaus, direct.*

Q Was there any evidence about either hernia that would indicate there was an acute stage present with regard to either one of them?

A There was no physical sign at all.

Q Was there any evidence of it? A No evidence.

10 Q Did the undescended testicle on the left side indicate anything? A Nothing.

Q You stated that you told him to go to bed for a few weeks? A I advise him to lie about in bed.

Q For what? A For the injury of his back.

Q Injury or strain? A Strain.

20 Q Did you see him at the hospital? A I sent him to the hospital and saw him on the afternoon of the 15th. I make rounds down there around five o'clock, or it may be around four—some time around that.

Q What hospital is this? A St. Mary's Hoboken.

Q How long have you been engaged there?

A I have been on the staff for a little over two years.

Q What particular work? A I do surgical work there.

30 Q How long have you practiced? A I have been in private practice over two years, five years altogether.

Q You do surgical work down at St. Mary's Hospital? A Not all of it; my own cases I send there, and also at the North Hudson Hospital.

Q (*By the Court.*) Did you operate on him? A I operated on him.

40 Q While he was in the hospital, was his disability—what was his disability? What was it caused by? A I don't quite follow you.

*Henry Klaus, direct.*

Q The necessity of his lying in bed in the hospital was due to what, before the operation?

A As the result of the injured back.

Q You say you operated on him; on what day? A On the 16th of March.

*By the Court.*

10

Q When did he go in? A On the afternoon of March 15th.

Q You operated on him the next day? A The next afternoon.

Q After the operation he had to stay in bed? A Naturally.

Q When did you last see him? A You mean before his death?

Q Yes. A I saw him up to the time of his death.

20

Q You visited him at his home? A I visited him once a week at his home.

*By Mr. Kalisch.*

Q Did he or any one in his presence and in your presence state that he had any trouble with the hernias at the time or just after he had strained himself? A No, sir.

*Mr. Doherty.* I object.

30

Q What is your answer? A No.

*The Court.* I think it is objectionable. I will overrule the question. The answer may be struck out.

Q What was said in regard to the hernias when you obtained your history, if you did obtain a history from the injured or his wife, and in the injured's presence?

*Mr. Doherty.* I object.

40

*Henry Klaus, direct.*

A There was no mention made of the hernias in the history of the case; the history of the case pertained just to the injury.

Q What was that? A The lifting of the rail and the pain in the back.

10 Q Could you, either at the time you saw him first or afterward at the hospital, find any causal connection or link between the necessity for the operation for the hernias and the strain of the back?

*Mr. Doherty.* I object. It is a deduction on his part.

*The Court.* I will allow it.

A No, there was no relation between the two conditions at all.

20 Q Was there any relation between the history as told you by the deceased or his wife in his presence—the strain of the back? Were there any causal connections or any connections between such things and his death?

A Just repeat that.

Q (Question repeated by the Stenographer.)

A No, there were none.

Q (*By the Court.*) What caused his death?

A Pulmonary tuberculosis.

30 Q (*By the Court.*) You treated him for that? A I didn't treat him for that.

Q How do you know? A I know he had it.

Q How do you know. A Physical signs.

Q What did you treat him for? A I treated him for his injured back and double inguinal hernia and undescended testicle.

Q Who treated him for his tuberculosis?

A He called in Dr. Meyer as a specialist on that particular line.

40 Q When did that develop? A That developed—I will give you the history—second day

*Henry Klaus, direct.*

after the operation, picked up—the temperature went up to 103, stayed there the following day, for three days fluctuated between 102 and 103, the right side of the chest was completely consolidated, all the signs of a post-operative pneumonia. This thing didn't clear up at all. It was my impression that the man had a regular post-operative pneumonia; the thing didn't clear up, instead of his temperature remaining stationary, as pneumonia does, at 104, you have a parallel line across without coming down, mornings it would drop to 99, evenings, 104; that up and down chart you see in pulmonary tuberculosis. With that came the expectoration of mucus and blood, and the signs never decreased or cleared up. When he went home he began to expectorate blood, pus, and looked emaciated. It is true he developed albumin in the urine, as Dr. Meyer subsequently told me—

*Mr. Kalisch.* Strike out what Dr. Meyer told him.

A (Continuing.) Well, that would be true of the nephritis.

Q Did you find whether the condition of the tuberculosis was acute or chronic? A It was acute pulmonary tuberculosis.

Q Could you find any connection between the tuberculosis and the strain of the back?

A None at all.

Q Could you find any connection between the tuberculosis and the hernias? A None at all.

Q Could you find any connection between the result of the operation for the hernia and the tuberculosis? A Yes, yes.

Q Do you understand? Could you find any connection between the result of the operation

*Henry Klaus, direct.*

and the tuberculosis? A Not the result of the operation, no.

Q That is what I mean. A Not the result of the operation, no.

*By the Court.*

10 Q What did you mean by "yes"? A I meant there are complications that can arise after an operation, such as an anesthetic that will bring on a post-operative pneumonia, things not due to the operation; I didn't mean the result of the operation. Hernias have nothing to do with tuberculosis.

Q It is a post-operative effect that can occur from any sort of an operation; not the peculiar character of the operation, but any sort of an operation will sometimes produce— A —these same complications; it makes no difference whether hernia, appendicitis, or whatever it may be.

20

Q Did you form your conclusion as to the cause of this pulmonary trouble? A Yes.

Q What? A Post-operative pneumonia.

*By Mr. Kalisch.*

Q And the ruptures and the operation for same, did you find any connection between those and the history as given you, or the condition as found? A Repeat that.

30

Q (Question repeated by the Stenographer.) A I don't understand you.

Q I will withdraw the question. In your opinion, from that history and your examination, was there any connection at all between the hernias and the necessity of the operation for same and the accident? A No, there was no relation.

40

*Henry Klaus, cross.*

*Cross examination by Mr. Doherty.*

Q Why did you operate? A I advised an operation.

Q Why? A For these hernias and undescended testicle.

Q You did? A And this operation I explained the seriousness, or the series of possible complications that might arise from such conditions. 10

Q Why did you change your answer from "seriousness"? It was serious; he was in a serious condition when he came to see you? A No, he was not.

Q Why did you advise an operation? A To relieve this man of these two hernias.

Q Yes. You say he contracted post-operative pneumonia? A Yes. 20

Q And there was no causal connection between the contracting of this post-operative pneumonia and the operation? A Not the operation.

*The Court.* See how—there you have two antitheses. He said that in his opinion the tubercular condition was a post-operative condition. That hasn't hurt you a bit. The only question is whether the accident brought out this double hernia or single hernia. This doctor has testified for you more strongly than any witness you have had. I wouldn't, if I were you, try to break him down. 30

Q You had not seen Mr. Mullenback before he came to see you, after the accident? A No, I never saw him before. 40

*Henry Klaus, cross.*

Q You don't know the condition before that, as regards these hernias? A I know he had them, yes, from the history.

Q You knew at that time he had them before, because they were of long standing? A Surely.

Q But you didn't know before the accident?

10 A No, I never saw him before.

Q This lifting and straining of the back may have aggravated those hernias? A He didn't complain of them to me.

Q I am not asking you that. I am asking you to state whether the lifting of the heavy girder is liable to aggravate the condition of that hernia. A Not in this case.

Q Why not? A There was no physical signs pointing to it.

20 Q I am not asking you about physical signs, but to state from your knowledge of medicine whether or not a heavy lifting would aggravate the condition of the hernia.

*Mr. Kalisch.* I object. We are concerned now with a particular case.

*The Court.* I don't think it is cross examination.

30 Q The only reason you say there is no connection with an aggravation, then, is because there were not any physical effects, because you could observe no outward manifestations of the aggravated condition? A No.

Q And because he didn't tell you about that?

A No.

Q What did he say when he came to see you? A He stated he had picked up— (interrupted.)

40 *Mr. Kalisch.* I object. It is not proper cross examination, and it is not material.

*Henry Klaus, cross.*

*The Court.* I think it is cross examination.

*Mr. Kalisch.* What he said is material only because the history is connected with the doctor's opinion for the purpose of connecting that with the actual examination, and what he said would not be evidence. 10

*The Court.* He testified that he gave him some history.

Q (*By the Court.*) You got the history from the man? A Yes, from the man.

*The Court.* I think it is proper.

A He came to me and stated he had picked up a heavy rail, and sustained a pain across the back. I examined his back, and during the process of the examination he directed me to look at his scrotum, and the exact words he used were these—he said: "Doctor, what have I got here?" He had fooled lots of other physicians, and he was trying to fool me, too. 20

*Mr. Doherty.* I object.

A He directed me to look at his scrotum.

*The Court.* There is no necessity of putting into the case something else which ought not to appear. 30

Q (*By the Court.*) You say he directed your attention to the— A To the scrotum.

Q (*By the Court.*) What did he say—scrotum. A What did he say? He just asked me to look at it, to examine it.

Q (*By the Court.*) Did you do that? A I examined it.

Q (*By the Court.*) Go on. A I told him what his condition was. 40

*Henry Klaus, cross.*

Q (*By the Court.*) What did he say? A He asked my advice, what could be done. He had already been advised an operation, one year previous; I advised him the same.

Q (*By the Court.*) How do you know he had been advised? A He told me so.

10 Q (*By the Court.*) He said that? A He said he had been advised one year previously.

Q (*By the Court.*) Did he take off the truss while he was there? A I don't remember.

Q He did mention something about the hernia, didn't he? A He directed me to look at it, not with regard to the injury. That was the point.

Q You want to segregate that. That was afterward? A What?

20 Q When did he start to talk about the hernias—after you had examined him? A After I had examined his injury.

Q Yes. A This was a secondary matter.

Q What did you say? A That he had an inguinal hernia, a large hernia and a small one, and an undescended testicle.

Q And you advised the hospital? A I advised rest in his home. He came back the next day and said he would go to the hospital. He went home to think it over, whether he would be operated on or not.

30 Q When did you mention operation? A On the thirteenth, at my office.

Q Didn't you tell him he was in a serious condition, that an operation was necessary?

A I did not.

Q Do you know Mrs. Fink? A I do.

40 Q Did you make any such statement to her or in her presence? A Never to her.

*Henry Klaus, cross.*

Q Did you say to her that Mr. Mullenback was in a very serious condition, he would have to be operated on for hernia, otherwise he would die? A No.

Q You are sure you didn't say the same words in the presence of Mrs. Mullenback, that an operation was absolutely necessary to save him? A I never did. I can explain the complications, which gave rise to such a condition. 10

Q Answer the question. You say he came to see you, you had never seen him before. You are the lodge physician? A Yes.

Q It was the custom for all the people in the lodge to call on you?

*Mr. Kalisch.* I object.

A Not necessarily. 20

*Mr. Kalisch.* I object on the ground the Doctor is unable to characterize the custom of other people.

*The Court.* He may say his custom in dealing with members of the lodge. Reframe your question.

Q What was your custom in reference to seeing members of the lodge? A If I am called I go there, if they come to my office I see them there. 30

Q The lodge pays you? A Yes.

Q When did he see you—on the 15th? A On the 15th I advised him to rest up for his injured back.

Q (*By the Court.*) The 13th you mean?

A The 13th, he came to my office, the 14th, the hospital on the 15th.

Q When did you advise him? A On the 13th, my first visit—his first call at my office. 40

*Henry Klaus, cross.*

Q You advised him he would have to have an operation? A I advised him, not that he would have to have, of necessity; I advised him to have it operated.

10 Q You told him he was in a serious condition, would have to be operated? A I didn't say he was in a serious condition.

Q Don't you think an operation for hernia is a serious matter? A I don't think it is a serious operation.

Q You don't think it is a serious operation? A It is a major operation, but it is of the lowest type of major operation.

Q Do you know how old Mr. Mullenback was? A I cannot recall now.

20 Q About forty-nine?

*Mr. Kalisch.* I object.

Q Was he a young or old man? A Middle aged man.

Q You didn't think an operation on a middle aged man for double hernia was a serious operation? A It is not a life endangering operation.

30 Q If you didn't see the condition of these hernias before the day he came to your office, how do you know that the lifting of this girder had no effect whatever upon those hernias, to aggravate the condition? A For this reason: The man who has a hernia—old hernia of standing—lifts something, he is bound to have some physical signs in that hernia; usually you see a hemorrhage, the result of the hemorrhage, which is echimosis and pain and swelling.

40 Q (*By the Court.*) In the scrotum? A In the scrotum. None of these signs were present.

*Henry Klaus, cross.*

Q (*By the Court.*) Would the pain in the back be an incident in any way of the pushing through of that gut, on either one of these hernias? A No.

Q (*By the Court.*) Are you sure of that? A I don't see any connection between the two.

Q Would lifting of the heavy girder cause enlargement of the hernia? 10

*Mr. Kalisch.* I object, unless the question relates to these two hernias that this man had.

*The Court.* You can cross examine him on that. I will allow it.

*Mr. Kalisch.* I ask an exception.

Q (*By the Court.*) If he had a hernia before, would the lifting of a heavy girder enlarge the hernia or force the gut further—that is the right way of putting it, isn't it? A It might and it might not. I cannot answer it. 20

Q You don't know anything about that? You say you are not in a position to say whether it would or not? A It can do either. It cannot in one instance, it can in the next instance.

Q What is the general rule? A There is no rule; in one case it might, in another he might lift something and suffer nothing. 30

Q Don't you know if a man has a hernia and lifts a heavy girder it will aggravate the hernia—enlarge it? A Not always.

Q It might? A It might and it might not.

Q If it did, you would say that the lifting had something to do with the enlargement? A But you would get acute signs of the hernia enlargement; you would get pain there.

Q I am asking, if there was enlargement of the hernia after the heavy lifting, would you say 40

*Henry Klaus, re-direct.*

the enlargement was due to the heavy lifting?

A If there was?

Q Yes, if there was. A Yes, I would.

Q Then there would be some connection between the heavy lifting and the enlargement?

A In the case you mention, yes.

10 Q If the man complained also of a strain to the back? A In the case you mention.

Q You say his temperature went up to 103 and 106? A Not 106.

Q 104? A Varied around between those limits.

Q That was almost immediately after the operation? A The second day, I believe.

20 *The Court.* He said the result—the post-operative result; he gives the details of it, you cannot make it any stronger than that. He has filled out your case in that respect; only leaves this open, whether this hernia was the result of this accident. That seems to me to be the—he does not know anything about that, apparently.

Q Are you sure you never made a statement in the presence of anybody, that an operation was absolutely necessary? A No, I did not.

30 *Re-direct examination* by Mr. Kalisch.

Q You say, if after heavy lifting a person's hernia was enlarged, you would say that the lifting had something to do with the enlargement of the hernia; but if that condition were caused by the heavy lifting, would there be any attending conditions? A There would be physical signs accompanying the condition.

40 Q Were such the case here? A There was no signs present.

*Rose Mullenbach, direct.*

*Re-cross examination by Mr. Doherty.*

Q Who did you ever see before with a hernia, where you had seen these physical signs, to determine whether heavy lifting had anything to do with it? A I have seen probably several thousand hernias, and have operated two or three hundred of them. 10

Q Caused by heavy lifting? A Yes, I have seen where people have come in with a history—they all come in with a history, caused by some lifting.

Q Caused by heavy lifting? A Let me think; I cannot remember one where I saw acute hernia where there was any hemorrhage in it, unless it was due to a direct blow over the region. 20

Q You never saw this man before he came to you after the accident? A I never saw him before that.

*Mr. Kalisch.* I close the defense.

ROSE MULLENBACK, the petitioner, recalled.

*Direct examination by Mr. Doherty.*

Q Did Mr. Klaus ever state in your presence that an operation would be absolutely necessary to save your husband's life? A Yes. 30

Q Where was that statement? A Right up in his office.

Q At the time of the first visit? A The first and only visit my husband ever made, the thirteenth day of March.

Q Did you give me his exact words? A He told my husband to remove his clothes, asked him what the trouble was, and my husband said— 40

*Rose Mullenbach, cross.*

*Mr. Kalisch.* I object. The question must be based upon the examination of the doctor, not her statement of everything that occurred in the doctor's office.

10 Q Confine yourself to what the doctor said to you. A He spoke to my husband; he said, to him, "Remove your clothes," he examined him—

*Mr. Kalisch.* I object.

Q (*By the Court.*) What did Dr. Klaus say? You say he made a statement in your presence regarding the necessity of an operation. A He looked at his back and said, "What are you wearing there?"

20 *The Court.* Strike it out. You must answer the question.

Q (*By the Court.*) What did the doctor say? Don't tell us what he did. A He said, "You have two hernias there, you have injured them to this extent, there would be strangulation at any time, you have got to be operated on.

Q (*By the Court.*) When? A The 13th of March.

30 Q (*By the Court.*) When did he say he would have to be operated on? A Immediately, he said, just as soon as possible.

*Cross examination by Mr. Kalisch.*

Q Have you spoken to anybody at the lunch hour, in regard to this statement you now say the doctor made in your presence? A At this lunch hour?

Q Yes. A No, sir.

40 Q When have you spoken about it? A Never spoke about it, but just to my lawyers.

*Rose Mullenbach, cross.*

Q When did you tell your lawyers? A I told the whole case to Kinkead & Doherty.

Q When did you tell him what you have testified to now? A When I signed the petition to have him bring this to court for me, for this compensation.

Q Did your husband say he would think it over? A Yes, he did. 10

Q Did he call to see Dr. Meyer before he determined to have the operation? A No, sir.

Q He spoke it over with you at night— A Ye—

Q — as to whether he would have it or not? A Yes.

Q He decided to have the operation? A Well, he did after two days.

*By the Court.* 20

Q When the doctor was examining these hernias, did anyone point out or indicate anything about the hernia in any way, as to what the condition was? A You mean anybody else?

Q Well, did the doctor? A The doctor, yes, he said he had injured hernia so bad there would be strangulation at any time.

Q Was there anything said about hernia? A Yes, he said it was enlarged a great deal, he announced the other one, which my husband said was a misplaced testicle, and hadn't bothered him before, he said it was a hernia. He said there was an enlargement; it pained him. That was what caused him to take the truss off to show him. 30

*By Mr. Kalisch.*

Q You say the doctor saw it was enlarged, that hernia? A Yes. 40

*Rose Mullenbach, cross.*

Q That was the first time your husband had been there; is that correct? A Yes.

Q He had it before the accident? A Yes.

*By the Court.*

Q Had you seen that hernia before that? A  
10 Yes, he would always buy a new truss and present himself to the lodge some time after. After he came home he removed the truss, it pained him terrible to put it back in place, it got to be the size of a silver dollar, as I stated before.

Q Listen to the question, see if you can fasten your mind on the thing I want to know; did the doctor put his finger or hand on this marble, this hernia, this— A Yes.

Q —try to push it back? A Felt it, tested  
20 his back, just a regular examination.

Q Aside from the “regular examination,” can you tell us whether he put his finger on that ball, this marble, that was pushed out? Did he say anything about the appearance of that at all? A Yes.

Q He said what? A He said: “You have injured that such extent you have got to be operated, you will get strangulation of the intestine.”

30 Q (*By Mr. Kalisch.*) He said it was enlarged? A Yes, so he said.

Q (*By Mr. Kalisch.*) Can you tell us how he could tell if he hadn't seen it before? A I didn't go that far into details with Dr. Klaus.

Q Did he say anything to you or to your husband as to whether it had recently become enlarged or not? A Yes, he said it was enlarged through the injury, he would have to be operated, he would get strangulation, that is all I  
40 can say about it.

*Rose Mullenbach, cross.*

Q Are you sure about that? A Yes, that is all I can say about it.

Q Are you sure that the doctor— A Certainly.

Q —said that this gut, this thing, had been pushing out, it was enlarged through the injury? Are you sure the doctor said that? A Yes, I am sure he said that. 10

*By Mr. Kalisch.*

Q Do you explain how he could determine it was enlarged if that was the first time he had seen it?

*Mr. Doherty.* I object.

*The Court.* It is cross examination.

A I didn't hear, didn't speak so much about it, he just demanded an operation, he said, "The sooner you can go, the sooner you are over it, you are liable to die within two or three days as it is." 20

*Mr. Kalisch.* I move to strike that out.

*The Court.* It may be struck out.

*By the Court.*

Q Did he say that in any way he could tell it had been recently enlarged, by reason of the accident? A Well, only said it was injured so severe it would strangle him; he felt it and examined it. 30

Q Think of the question before you answer it. Mr. Kalisch wants to know whether the doctor said how he knew that the thing had just become enlarged. What was there about he saw—he said he saw—that showed him that it had been larger by reason of this accident? That is what he is asking you. A Well, he asked him, on ac- 40

*Rose Mullenbach, cross.*

count of the pain, when he tried to push it back, he said to him, "Mr. Mullenbach, you will get strangulation." That is as much as I can say. He asked him, did he suffer pain? He said, yes. He removed the truss—

*Mr. Kalisch.* I ask it be struck out.

10

*The Court.* It may be struck out.

Q You don't answer the question at all. We are trying to get you to understand the question, if you would listen. What Mr. Kalisch wants to know is this: Did the doctor explain to you why he knew that this thing had only recently come out larger than it was before? Did he tell you or tell your husband why he knew it was larger than it was before? A Yes, through strain in the muscles of the back, he said, through lifting that heavy girder, it injured him to such an extent it got larger; it had dropped, he said.

20

Q (*By Mr. Kalisch.*) Did he tell you what test he had by which he could determine that the condition was larger, that the hernia was larger than it was before the so-called accident?

*The Court.* Answer yes or no.

30

A I can only say yes, because he examined him, it had dropped.

Q Can you tell us just what he said? Did you understand. A Yes, I understand the question. I am trying to tell you, as much as Dr. Klaus said to me.

Q Tell us. A When I went back, took my husband home, the 14th of March, I said: "He is afraid to be operated on." He said: "He is ruptured, it is strangulated, he must go to the hospital."

40

*Mrs. Fink, direct.*

*Mr. Kalisch.* I move to strike it out.

*The Court.* I will strike it out.

Q So he merely made a statement it was larger, but he didn't tell you how he knew it was larger; is that right? A He said, through injuring his back. He said, through injuring his back. 10

Q He said it was larger? A Yes, he told me it was larger.

Q How did he explain it was larger than it was before— A Because it hurt my husband to adjust the truss back in place, to put the swelling back; he said: "Does it hurt you? Do you feel pain?" He said, "Yes." He said: "You have brought that to such an extent you have got to be operated on and it struck," that is all I know. 20

*Mr. Kalisch.* I ask that that be stricken out.

*Mr. Doherty.* I object.

*The Court.* I will not strike it out.

*Mr. Kalisch.* I ask an exception.

MRS. FINK, a witness produced on behalf of the petitioner, being sworn, testified as follows: 30

*Direct examination* by Mr. Doherty.

Q Did you keep an office alongside of the office of Doctor— A He rented an office—part of an office, yes.

Q Office in your house? A Yes.

Q Did you know the time that Mr. Mullenback came to Dr. Klaus' office? A Yes.

Q Do you remember Dr. Klaus saynig anything to you— A He wasn't in. 40

*Mrs. Fink, cross.*

Q Did he ever tell you an operation would be necessary? A Yes, he told me that.

*Mr. Kalisch.* I object to that question—that an operation would be necessary—that was not the question asked of Dr. Klaus.

10 *The Court.* It is substantially the same.

Q Did you hear Dr. Klaus say an operation was absolutely necessary to save Mr. Mullenback's life?

*The Court.* Yes or no.

A Yes.

Q What did he say? A He said it to me in German; he said the man has to be operated or he die. That he said in the office.

20 Q Did he say to you, further, that Mr. Mullenback had been injured? A I don't understand.

Q That his back had been injured. A No, he said nothing about the back.

Q Merely told you he would have to be operated on or he would die? A He has to be operated or he die.

30 Q What day was that? A I guess it was the day—I don't know—it was, maybe, the same day or the day after. I cannot tell that.

Q Same day or the day after they came to his office? A I don't know. I don't know if it was the day. I guess it was the same day, I don't know, I cannot tell.

*Cross examination by Mr. Kalisch.*

Q How near Mrs. Mullenback do you live?  
A Maybe only one block.

40 Q How long have you known her? A Just the day, I know her, she comes in the office.

*Mrs. Fink, cross.*

Q Never knew her before? A Never I knew her before.

Q (*By the Court.*) The doctor had an office in your house? A Yes.

Q Did he use to talk to you about the different people? A He never talk much, but just that, he said. 10

Q And the first time you knew Mr. or Mrs. Mullenback was the day he came to the doctor's office? A The first day, yes.

Q Did the doctor usually talk to you about the different people who came there? A No, not much, just sometimes.

Q Just this once? A Sometimes.

Q This once he said Mr. Mullenback had to have an operation. Were you there when Mr. Mullenback came in? A Certainly. 20

Q In the room? A I was in the room, I opened the door for them.

Q Did he tell you his name? A I don't remember that. I guess so, because I always take the name of the patient.

Q And the next day after he had been there Dr. Klaus spoke to you and said to you, "Mr. Mullenback has got to be operated on or he is going to die"? A He said that. 30

Q Did he use to do—strike that out—did you know whom he meant—this man that spoke to you the day before? A Certainly.

Q How many people came in that day? A Not much.

Q How many? A Many days not one, many days one or two, that was all.

Q You knew right away it was Mr. Mullenback? A Yes, I knew it right away.

Q You knew Mrs. Mullenback after that? A After that I know her, yes. 40

*Mrs. Fink, cross.*

Q How often would you see her after that?

A Shall I tell how I saw her?

Q How often? A I cannot tell, maybe four or five times.

Q You were subpoenaed to come to court?

A Not at all.

10 Q Who came with you? A Mrs. Mullenback.

Q You didn't come merely because you wanted to help her out? A Not at all, not at all.

Q You say the doctor had a habit of discussing the patients with you, telling you about patients that came? A I cannot understand.

20 Q He used to tell you about the different people that came to his office, what was the matter with them? A Very few; he just told me, from that case, sometimes might another, too.

*By Mr. Doherty.*

Q You have come here to tell the truth, haven't you? A What do you mean?

Q (Question repeated.) A I wouldn't say a lie, no. For what?

30 Q Are you sure, when he said that this Mr. Mullenback had to be operated on, it was this Mr. Mullenback? A Then it was him, certainly.

*Mr. Kalisch.* I move to strike that out.

*The Court.* It may be stricken out. It has all been gone over.

*Motion to dismiss.*

DR. KLAUS, recalled.

*By Mr. Kalisch.*

Q In which office did you make an examination of Mr. Mullenback? A At my residence in West Hoboken. But they called up from my other office in Jersey City. He went to my Jersey City office to see me. 10

Q But you didn't examine him there? A Not at all.

Q Are you in the habit of discussing your patients' business with Mrs.—whatever her name is? A Not at all.

Q Did you do it in this case? A Not at all.

NO CROSS EXAMINATION.

*Mr. Kalisch.* I renew my motion. 20

*The Court.* I will reserve decision. You may send me memorandum briefs. The question in my mind is whether the accident was the cause of the injury, whether the death was the result of the operation. You may discuss those questions Exception allowed.

GEO. G. TENNANT,  
J. 30

*Conclusions.*

**Conclusions.**

HUDSON COUNTY COURT OF COMMON  
PLEAS.

TENNANT, J.

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ROSE MULLENBACH,

*vs.*

NEW YORK SWITCH & CROSSING  
Co.

*On Petition  
for Compensation Under  
Employers'  
Liability Law.  
Conclusions.*

Mr. Doherty and Mr. Jentz, for the petitioner.  
Mr. Isidor Kalisch, for the respondent.

20

*The Court.* (TENNANT, J.) I have been clearly satisfied that the cause of the death of the petitioner's husband was a post-operative pneumonia. The respondent's own physician makes that clear. The operation was to relieve an inguinal hernia; and the real question in the case is one of fact—whether this hernia was caused by the accident. The principal testimony on this question was given by the respondent's physician and the petitioner herself. The impression made on my mind during the trial was that the petitioner was more persuasive in her testimony. A careful reading of the testimony convinces me that the physician's testimony on that question is out-weighted by the petitioner. Finding affirmatively on this question, the *causa causans* rule is applicable. The other facts are undisputed.

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The terms of the order will be fixed on notice under the rules.

Dated June 25, 1917.

40

(Signed) GEORGE G. TENNANT,  
J.

*Determination of Facts and Rule for Judgment.***Determination of Facts and Rule for  
Judgment.**

Filed August 13, 1917.

HUDSON COUNTY COURT OF COMMON  
PLEAS.

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ROSE MULLENBACH,

*Petitioner,**vs.*NEW YORK SWITCH & CROSSING  
COMPANY,*Defendants.**Determina-  
tion of Facts  
and Rule for  
Judgment.*

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The following is a determination of facts in  
the above matter.

1. This proceeding is brought under an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of his employment," approved April 4th, 1911, and the amendments and supplements to said act. The date of service of the petition and order was December 23rd, 1916. The date of the hearing was April 19th, 1917.

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2. The petitioner's decedent, Andrew Mullenbach, was employed as a foreman by the respondent.

3. The amount of wages received by petitioner's decedent was \$22.00 per week.

4. The accident happened on March 11th, 1916, in Hoboken, New Jersey, in the following

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*Determination of Facts and Rule for Judgment.*

manner; while said decedent was engaged in lifting a heavy steel girder he strained the muscles of his back aggravating two hernias and as a result of said condition he had to undergo an operation. As a result of said injuries sustained by reason of the accident said Andrew Mullenbach afterward died. The said accident arose out of and in the course of his employment.

10

5 The defendant had actual knowledge of the happening of said accident.

6. The accident resulted in the death of petitioner's husband, Andrew Mullenbach.

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7. Said Andrew Mullenbach left him surviving five dependents, a wife and four children as follows: Rose Mullenbach, age eleven years; Barbara ten years, Andrew eight years and Wilbur seven years.

8. Compensation was awarded at the rate of \$10.00 per week for 300 weeks.

9. A counsel fee of \$300 dollars was allowed attorney for petitioner.

10. Costs was awarded against the defendant taxed at \$36.49.

30

Whereupon it is ordered that judgment be entered in favor of the petitioner and against the defendnat to conform with the above.

GEORGE G. TENNANT,  
*Judge.*

We consent to the above determination of facts as to form.

KALISCH & KALISCH.

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*Reasons.***Reasons.**

Filed October 22, 1917.

**New Jersey Supreme Court.**

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 NEW YORK SWITCH & CROSSING  
 COMPANY,
*Prosecutor,**vs.*
 COURT OF COMMON PLEAS IN  
 AND FOR THE COUNTY OF  
 HUDSON and JOHN J. MC-  
 GOVERN, Clerk of the Said  
 Court of Common Pleas, and  
 ROSE MULLENBACH (Wife),  
 ROSE MULLENBACH, BARBARA  
 MULLENBACH, ANDREW MUL-  
 LENBACH and WILBUR MUL-  
 LENBACH,
*Defendants.**On Certiorari.**Reasons.*

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The prosecutor presents the following reasons for setting aside the proceedings, determination and statement of facts and judgment brought before this Honorable Court by the writ of certiorari in the above entitled cause:

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1.—Because the trial court erroneously and improperly found that a hernia was caused by an alleged accident occurring in the course of and arising out of the employment of the deceased, Andrew Mullenbach.

2.—Because the trial court erroneously and improperly found that the deceased, Andrew

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*Reasons.*

Mullenbach, suffered an accident arising out of and in the course of his employment with the prosecutor.

10 3.—Because the trial court erroneously and improperly found that by reason of “the accident occurring on March 11th, 1916, while the said Andrew Mullenbach was engaged in lifting a heavy steel girder he strained the muscles of his back, aggravating two hernias and as the result of said condition he had to undergo an operation and as the result of said injuries sustained by reason of the said accident, said Andrew Mullenbach afterwards died,” the said accident arose out of and in the course of his employment.

20 4.—Because the trial court erroneously and improperly overruled the prosecutor’s application to strike out the answer to the following question:

Q State how he appeared to you when he got home? A He just came along like this, all bent up, he came home.

5.—Because the trial court erroneously and improperly permitted the following testimony to be made a part of the record:

30 “I saw the deceased working and lifting a horse, and he suddenly exclaimed, ‘Oh, my back,’ and bent down and that it was around ten or eleven on Saturday morning.”

6.—Because the trial court erroneously and improperly refused to dismiss the petition at the close of petitioner’s case.

7.—Because the trial court erroneously and improperly refused to dismiss the petition at the close of the entire case.

*Reasons.*

8.—Because the trial court erroneously and improperly found that the facts in the case supported a conclusion that the deceased suffered an accident arising out of and in the course of his employment with the prosecutor, by reason of which it became necessary to operate and that the deceased's death was connected with such operation. 10

9.—Because the trial court erroneously and improperly permitted a judgment to be entered against the prosecutor providing for compensation payments to the dependents of the deceased for a period of three hundred weeks.

Because the trial court erroneously and improperly refused to enter judgment in favor of the prosecutor.

Because the trial court's finding and judgment is in divers other respects illegal, improper and oppressive to the prosecutor. 20

KALISCH & KALISCH,  
*Attorneys of Prosecutor.*

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**New Jersey Supreme Court.**

NOVEMBER TERM, 1917.

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NEW YORK SWITCH & CROSSING  
COMPANY,

*Prosecutor,**vs.*

ROSE MULLENBACH, *et als.*,  
*Defendants.*

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*On Cer-  
tiorari.*

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Submitted November term, 1917. Decided  
January 24, 1918.

Before Justices Garrison, Bergen and Black.  
Messrs. Kalisch & Kalisch, attorneys of prose-  
cutor.

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Messrs. Doherty & Kinkead, attorneys for de-  
fendants.

*Per Curiam:*

This is a workmen's compensation case, in  
which judgment was given for the petitioner in  
the Hudson Common Pleas Court. Petitioner's  
decedent, Andrew Mullenbach, was employed by  
the prosecutor, as a foreman, on March 11th,  
1916, while engaged in lifting a heavy steel  
girder he strained the muscles of his back, ag-  
gravating two hernias, as a result, he had to un-  
dergo an operation, he afterwards, on June 4th,  
1916, died of a post operative pneumonia. The  
trial court found as a fact, that the accident  
arose out of and in the course of his employment.  
This is the controverted question in the case.

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*Opinion of Supreme Court.*

Our reading of the testimony satisfied us, that the trial court's findings of fact are supported by the evidence, this is conclusive, *Hulley v. Moosbrugger*, 88 N. J. L. 163. There is no legal merit in the other reasons presented for setting aside the judgment.

10 The judgment of the Court of Common Pleas is affirmed with costs.

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*Rule for Judgment.*

**Rule of Affirmance.**

Filed March 5, 1917.

**New Jersey Supreme Court.**

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NEW YORK SWITCH AND CROSS-  
ING COMPANY,

*Prosecutor,*

*vs.*

ROSE MULLENBACH, *et als.,*

*Defendants.*

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*On  
Certiorari.*

*Rule of  
Affirmance.*

This matter having been submitted to the Court on briefs at the November term thereof and having been duly considered by the said Court, it is on this day of March, 1918, ordered that the proceedings, order and determination and judgment of the Hudson Common Pleas be affirmed in favor of the plaintiff below and against the defendant below with costs to be taxed.

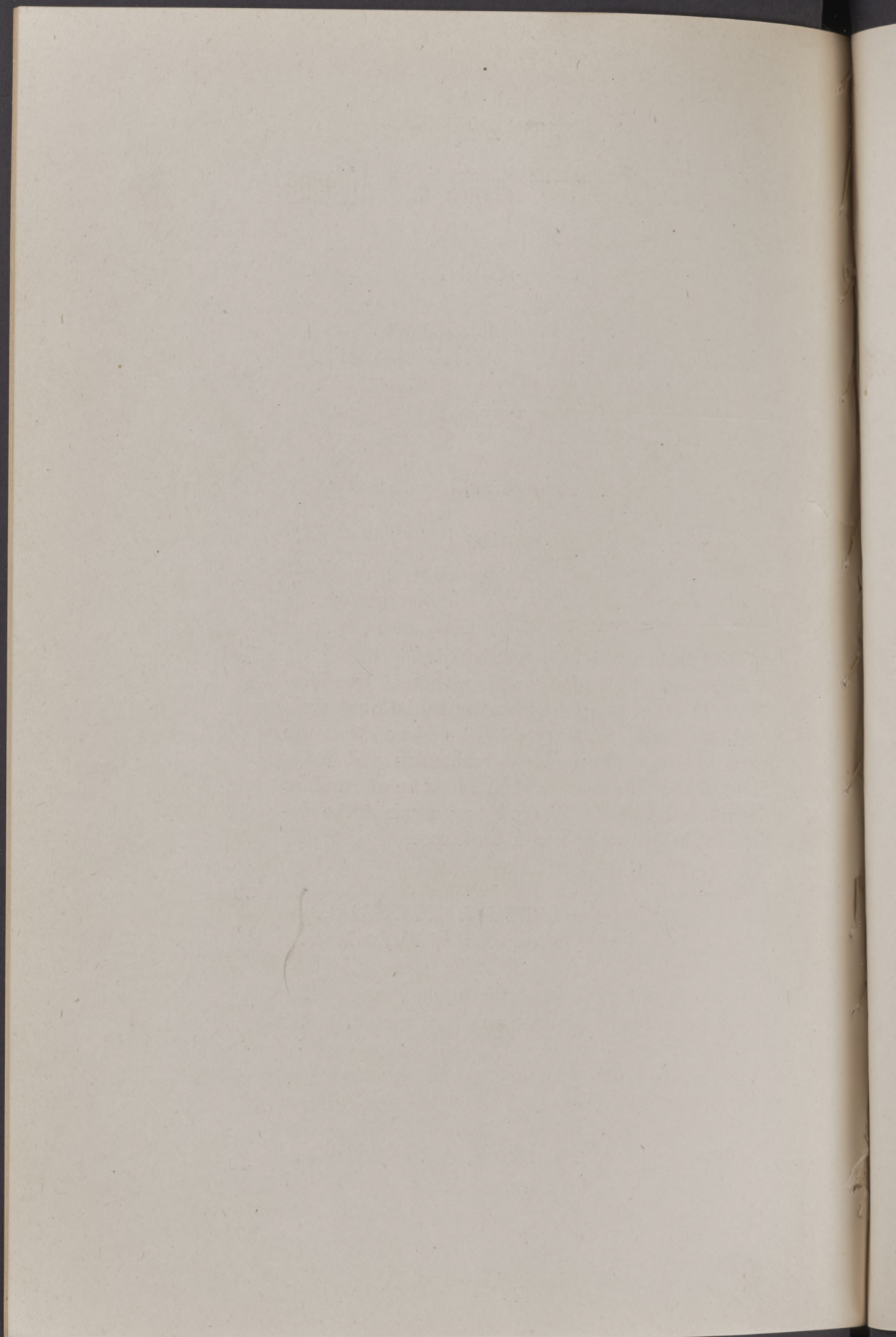
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On motion of:

DOHERTY & KINKEAD,  
*Attorneys of Defendants.*

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## New Jersey Court of Errors and Appeals

NEW YORK SWITCH & CROSSING  
COMPANY,

*Appellant,*

*vs.*

ROSE MULLENBACH, *et als.,*

*Respondent.*

*On Appeal  
from  
Supreme  
Court.*

### **Brief of Appellant.**

#### **The Facts.**

This is an appeal from the New Jersey Supreme Court, wherein the determination of facts and order of the Hudson County Common Pleas Court was affirmed on certiorari.

A petition was filed in the Hudson Common Pleas Court, setting forth that on March 11th, 1916, Andrew Mullenbach, who was the husband of Rose Mullenbach, and father of Rose Mullenbach, Jr., Barbara, Andrew, and Wilbur Mullenbach, while engaged in lifting a heavy steel girder, strained the muscles of his back, causing two previously existing conditions of hernia, to become aggravated, and that an operation, as the result of such injury, was necessary, from the effects of which he died, on June 14th, 1916.

These facts are more fully set out in the second paragraph of the petition (case, p. 4, ll. 23 to 28).

The reasons for reversal of the Common Pleas Court, and the New Jersey Supreme Court, upon which this appeal is based, appear on pages i, ii and iii, and are points upon which the

appellant rests for a reversal of the determination of facts and order of the Common Pleas Court, subsequently affirmed in the New Jersey Supreme Court.

Points one, two, three, eight and nine, should be argued together. These reasons contain, we think, an irresistible attack upon the findings in the determination of facts and order, wherein the nature and character of the accident, and the resultant affects thereof, are set forth. The exact findings are as follows:

“The accident happened on March 11th, 1916, in Hoboken, New Jersey, in the following manner: While said decedent was engaged in lifting a heavy steel girder he strained the muscles of his back, aggravating two hernias and as a result of said condition he had to undergo an operation. As a result of said injuries sustained by reason of the accident, said Andrew Mullenbach afterward died. The said accident arose out of and in the course of his employment.”

This is the seriously controverted question in the case, and of course, the decision, either favorable or unfavorable to either side's contention in respect thereto, is dispositive of that party's rights in the premises. The Supreme Court opinion (case, p. 101), did not deal with this question at all; but set it forth in the beginning of the opinion, as a legally proven fact. We contend, that this statement of facts, appearing in both the determination of facts, and in the Supreme Court opinion, is without a single fact to support it. We admit, giving <sup>eu</sup> certain facts or circumstances pointing to a particular result, that a Court is justified in making certain deductions therefrom, but that situation is not present in this case.

By a careful examination of all of the respondent's case, it will appear that the *necessary facts* upon which the determination of facts and order in favor of the claimant should be based, are not disclosed by the facts.

The first witness produced by the respondent, by the name of Aroozamanian, was rejected as a witness by the Court (case, p. 22, ll. 39-40). The respondent's case is based upon an alleged proof of facts, constituting an unbroken chain of causation, beginning with the date of the alleged accident, and ending with the subsequent operation and death. Mrs. Mullenbach, the wife of the deceased, was called as a witness by the respondent, and upon her uncertain testimony, there was an attempt to lay a foundation for so-called hypothetical questions propounded to Dr. Arlitz, who was produced as an expert by the respondent. *A most careful examination of her testimony discloses no foundation for a conclusion, that the necessity for the operation was created by an accident, March 11, 1916.*

We shall quote the salient parts of her evidence.

“Q Did you see your husband go to work on the morning of March 11th, 1916?  
A Yes” (case, p. 23, ll. 31-32).

“Q You say he was the same as any other day—how did he look? A He just looked the same and normal to me, because he had plenty of men to look after.

Q Did he look a normal man? A Yes” (case, p. 25, ll. 29-33).

Upon his arrival home, after the alleged accident, which occurred on Saturday, the injured went to bed, and on Monday morning, called at the office of his lodge physician, Dr. Klaus.

“Q How long was he in bed? A All Saturday afternoon, and Sunday, and Mon-

day we applied to his lodge physician, Dr. Klaus" (case, p. 27, ll. 32-35).

With regard to the hernias themselves, she testified:

"Q Did you see the condition of your husband—the physical effects of that hernia before March 11th, 1916? Had you ever seen it? A Well, yes, I did, shortly, *a few months before*, because he said he thought it was quite healed.

*Mr. Kalisch.* I move to strike that out.

*The Court.* It may be struck out.

Q A couple of months before? A Yes.

Q What was the appearance of the hernia at that time? A A good sized marble.

Q During the course of the examination, did you observe the same parts of his body, around about that hernia? A No, sir; it looked larger.

Q You observed the part of his body? A Yes.

Q How did it look? A It looked a good deal larger than it had before.

Q How much larger? A I should say about the size of a silver dollar" (case, p. 28, ll. 12-31).

The day of the examination was March 13th, 1916, or two days after the alleged accident (case, p. 32, ll. 13-14).

By a careful reading of the above excerpts of the testimony of Mrs. Mullenbach, it will appear that she noticed the hernia *a few months before March 11th*, and did *not* again notice it until *after the alleged accident*. Of what value, therefore, is her comparison? How can it indicate any change, created by something which occurred on March 11th? Her testimony did not

fix the size of the hernia just before March 11th, 1916; and it is a well-known fact that the failure to constantly use a truss to hold a hernia in place, will result in the enlargement of the hernia. Continuous working might be responsible for the increased size. This explanation of a change in size, is equally as warranted as a conclusion, that something which happened on March 11th, was the cause of the enlargement. As a matter of law, the appellant is entitled to to the benefit of any doubt; and upon the respondent's failure to introduce facts showing the condition just before March 11th, 1916, and a changed condition directly after that day, a conclusion must necessarily result adverse to the respondent's contention. The burden remains, throughout, with the claimant. *Bryant v. Fissell*, 84 N. J. L., p. 72.

As far as the testimony goes, the condition of the hernia, when she saw it at Dr. Klaus' office, may have been identical with its condition the very morning the deceased went to work, on March 11th, 1916. The argument of the extreme necessity for the operation, which is made by our opponents, is not supported, when we consider that two days after this alleged serious accident, the deceased went to the office of Dr. Klaus, his lodge physician. This would not disclose that any hernias had been strangulated by the accident. There is no testimony of any *pain* in the region of the hernias after the accident, or of *any accompanying symptoms, which Dr. Klaus, in his testimony, says must appear in the event that the condition of the hernias had been aggravated.* Dr. Klaus' testimony is set out at length in a later portion of this brief.

We hereinafter refer to the fact, that the medical expert produced by the respondent,

Dr. Arlitz, gives no testimony to throw any light upon this case, and the wife's testimony discloses no facts other than her testimony hereinbefore recited. Her testimony alone, could not possibly support a finding of an aggravated condition caused by any accident; and Dr. Arlitz's testimony, which is summed up in a single hypothetical question, adds nothing to strengthen that of Mrs. Mullenbach.

The most favorable state of facts which possibly could be taken from the testimony, is contained in a single hypothetical question, propounded to Dr. Arlitz by the respondent's counsel:

“Q Assuming that a man has been working steadily, and has never complained of any serious ailment, but has had two hernias, one of one year's standing, and another of eleven years' standing, that he had been working every day, lifts a heavy girder, heavy iron horse, and is heard to exclaim, “Oh, my back,” go home, be confined to his bed, be assisted about the house by his wife, subsequently operated on, four days later, and finally dies, in your opinion—*would the operation in your opinion accelerate his death, or aggravate any condition that was formerly latent?* A Yes, the operation would accentuate all these conditions, and might cause speedy death of the individual because of the lessening of the resistance” (case, p. 59, ll. 13-36).

It needs but a casual examination of the question and answer, to conclude that they do not bear any relation to the question in issue in this case, namely, *was there any causal connection between the alleged accident, and the necessity for an operation?*

The hypothetical question searches for information, as to what results might possibly occur from the operation. The necessary *facts leading up to the operation, do not appear* in any question propounded to this doctor. This doctor was not asked to give an expert opinion as to the possibility of an aggravation of a pre-existing hernia, by the raising, or the exertion necessary to pick up an article of this or that number of pounds. Dr. Klaus, the other doctor in the case, was not asked this question either. The entire examination of Dr. Arlitz appears on page 57 of the case, line 1, to page 66, line 10. We think, however, that we have given all the salient parts of this doctor's testimony.

At this point, we wish to call attention to certain clear mis-statements of our opponents made in the Supreme Court brief in this matter, which we assume will probably be repeated in the brief filed in this Court.

The respondent referred to the weight of the steel horse, the lifting of it, and the length of it, that deceased said his back was sore or hurt. We beg leave, however, to suggest that these statements are *taken* from the testimony of witness Aroozamanian, whose testimony was rejected and therefore respondent should not quote it. The appellant has refrained from the evidence of witness Aroozamanian, because of the fact that the Trial Court rejected his testimony, as we have hereinbefore stated (case, p. 22, ll. 35-40). In addition to this, our opponent suggested an interpreter for this witness, and that he would recall him later in the case (case, p. 23, ll. 1-10), but this was not done.

We, therefore, believe that any testimony appearing between pages 9 and 22 of the case, inclusive, the Trial Court having rejected this

witness' testimony, should not be considered by this Court. Respondent, quoting from same witness said that deceased went home a short time after the accident. In the first place this witness did not say it and second his testimony was rejected by the Court. Mr. Armading said he saw deceased working mostly all morning (case, p. 49, l. 23, l. 28).

After the testimony of Dr. Arlitz, the respondent put in evidence a death certificate which certified that the deceased died of nephritis, which is a disease of the kidneys (case, p. 66, l. 11). Up to this point, we maintain that there is not a single statement in the evidence, showing the alleged accident.

Let us now examine the evidence upon which the respondent bases the allegation of the proof of the accident arising out of and in the course of the deceased's employment. This so-called evidence is contained within a very small compass, and is given by Charles Montague, whom the respondent called as a witness. The appellant stipulated, that this witness, if called, would testify that "he saw the deceased working and lifting a horse, and he suddenly exclaimed, "Oh, my back," and bent down, and that it was around ten or eleven o'clock on Saturday morning"; but reserving, however, objection to the competency of that examination. We maintain this is not part of <sup>any res</sup> ~~any res~~ gestae because there is nothing which the examination tends to characterize. If this objection is not well taken and assuming that the exclamation characterizes a strain of the back, at the time of the bending down, how would that afford a sufficient ground for the Court's conclusion of any satisfactory proof of the aggravation of a pre-existing hernia, necessitating an operation? With-

out some proof of some basis leading up to that conclusion, the motion made by the appellant to dismiss, should have been granted (case, pp. 66 and 67). The claimant's case must do more than show a possibility of the truth of his allegation.

At this point in the action, the respondent's case developed the fact that nephritis was the cause of death. *Montague's testimony is not connected with any event which the statement tends to characterize.* The reception of this statement as part of the *res gestae*, only goes so far as to show that the deceased made the statement; but did not lay a foundation for the Court to conclude from this evidence alone, that some accident had happened causing the deceased to make the statement, and characterizing the kind of accident which had occurred. *Kastner v. Sliker*, 34 L. P. 507. In this case, the Court said:

“The proof (of the words spoken) is only proof of the fact that the words were spoken, and not of the truth of anything as stated in them.”

The respondent depended upon *Trenton Passenger R'y. Company v. Cooper*, 60 L. P. 219. In that case, it was held that the Court properly permitted the driver of a horse to testify to words spoken by himself at the time his horse had put his foot on a trolley track, and thereupon acted peculiarly. In fact, in the Cooper case, the words spoken were, “He has got a shock, Sam, catch hold.” In this case, COLLINS, J., said:

“It did not prove that the horse received a shock, but only, that Cooper said so.”

We maintain, therefore, that at the end of the respondent's case, no proof of an accident having been shown, the exclamation of the deceased could not be accepted as a sufficient foundation for a finding, that the deceased, at the time he made the exclamation, suffered an injury, or rather, an aggravation of the hernia, necessitating the subsequent operation. It is also to be noted that in this exclamation no mention is made of pain or trouble in the region of the hernia. The doctor testifies also that the deceased did not complain of the hernia at the time of the examination, two days after the alleged accident.

The Trial Court plainly indicated, at the close of the respondent's case, that he did not believe a *prima facie* case had been made out (case, p. 66, l. 38, to p. 67, l. 19). In the excerpt of the record just referred to, the Court suggested that the claimant's evidence showed death by nephritis; but determined not to decide on the motion at that time, and thereupon allowed the appellant an exception. The respondent's counsel, on the argument of this motion, admitted that he could not show any connection between the accident, and the subsequent operation. The Trial Court should not have speculated on whether the appellant's case would cure the defects in the claimant's case; and having come to the conclusion that a *prima facie* case had not been made out, should have dismissed the petition upon motion made for that action.

The situation that was developed at the termination of the claimant's case, was similar to that in the case of *Reimers v. Proctor Pub. Company*, 89 Atl. Rep., p. 931. The death certificate, representing nephritis as the cause of death, was in no way connected with any acci-

dent; and, as Justice Swayze said in the Reimers case:

“We think the furthest this testimony goes, is to show a possibility that the death was due to the accident.”

In the cited case, evidence of an accident appeared. Justice Swayze further said:

“Where the doctors refuse to state that death was caused by the accident, there is no basis for an inference to that effect by the court. The burden of proof is, in accordance with the ordinary rule, upon the petitioner.”

At the end of the claimant's case, the nephritis was the only abnormal condition proved, and Dr. Arlitz was not even examined as to whether this condition could have resulted from any accident alleged to have occurred. The nephritis certainly could not be connected with the necessity to operate for the hernia.

Reasons 7 and 10, are perhaps the more important points raised in as much as they bring up all the evidence introduced at the trial. As all the evidence in the case does not sustain the burden which the claimant must bear in actions of this class, then necessarily the Trial Court's conclusion was erroneous.

If our contention is correct that the respondent's main case did not set up a *prima facie* case, and the Trial Court intimated that such was the condition of the testimony before the defense started, then in order to make a finding in favor of the claimant, the necessary facts must have appeared on the defense. We think that the defense did not disclose such facts.

In examining the case, it will be noted that two witnesses were produced by the appellant

with regard to the accident, who were called out of time while awaiting the arrival of Dr. Arlitz. The first was Ernest Armading. His testimony discloses nothing indicative of an accident.

Q Did you see him work after that? A Oh, yes. (Case, p. 51, ll. 15 to 16.)

Q Did you see him act as if he got hurt or anything of that kind? A No. (Case, p. 51, ll. 23 to 24.)

Valentine Vogt, the other witness, testified on cross examination:

Q Do you remember whether you worked with Mr. Mullenbach at that time? A Yes, I had worked with him for a little time.

Q Did you see him injured that day? A No, sir.

Q You didn't hear him say anything about being hurt that day? A No, sir. (Case, p. 53, ll. 30 to 36.)

Q If anything happened to his back— A Not that I know of. (Case, p. 55, ll. 27 to 28.)

As against the testimony of these two witnesses there is testimony merely that the deceased made the exclamation testified to by witness Montague. The latter's testimony we have already commented on.

We come now to the most important witness in the entire case, Dr. Klaus, the attending physician of the deceased, whose testimony will conclusively show that there *was no causal connection between anything that occurred to the deceased on March 11 and the subsequent operation and death.* This doctor's examination was

on March 13, 1916, at his office and this was two days after the alleged accident.

The Court took some part in the examination of the witness:

Q Did he come of his own accord to consult you professionally? A I had an office—

Q Did he come to you to consult you professionally, or did you do work for the Switch Company? A No, he consulted with me professionally.

Q Had he ever consulted with you before? A First time I ever met the man.

Q You examined him when he came to your office? A I did.

Q Tell us what you found. A He came to me with a history that on April—March 11th—

Q Tell us what you found? A Not the history?

Q You heard from him he had something happen to him. You examined him. What did you find? A On the examination he showed physically *no signs whatever of an injury to the back except tenderness over the lumbar region*; I made a diagnosis of myositis or overstrain, traumatic myositis or overstrain. During the course of my examination I came upon two hernias, one larger, one smaller, with an undescended testicle on the left side. *No mention had been made in the history of these hernias. They were brought out by physical examination.*

Q *He made no mention of them?* A *Not in the history of the case.* I advised the man the best thing to cure his back would be to rest in bed, and I advised also then,

if he wanted—advised also an operation for these two hernias and undescended testicle. I explained some of the complications that might arise from such conditions. He afterward decided to be voluntarily operated on for these conditions—

Q Was there anything in your examination of him—anything that you found about the hernia, to indicate how recent they were? A The one on the right side was very large, which indicated it was of long standing; the one on the left side, having an undescended testicle, he may have had it all his life.

Q Do you mean congenital? A Congenital. The large one, of eleven years' duration, and from the size of it, from just looking at it, you would say, it was of five, six, seven or eight years' duration, without asking a question. The sack came right into the serotum, almost—down to the testicle.

Q You say the large one appeared to be five or six or seven or eight years old?

A Yes—from examination. (Case, p. 68, l. 19 to p. 69, l. 36.)

From this testimony, it will appear that the only physical signs of disability was tenderness in lumbar region of the back which this doctor diagnosed as an overstrain; and that during the examination, no mention was made of the hernias which were of long standing.

Mrs. Mullenbach in her testimony described no acute conditions attending the hernias, upon examination at the office of the doctor, and this doctor also testified that there was no indication of an acute stage present.

Q Was there any evidence of it? A No evidence.

Q Did the undescended testicle on the left side indicate anything? A Nothing (Case, p. 70, ll. 4 to 11.)

The doctor upon examination told deceased to rest up for the strain (case, p. 70, ll. 12 to 16). This same witness testified that the only reason requiring the deceased to lie in bed was the strain.

Q While he was in the hospital was his disability—what was his disability, what was it caused by? A I don't quite follow you.

Q The necessity of his lying in the hospital was due to what before the operation? A As a result of the injured back. (Case, p. 70, l. 38, to p. 71, l. 7.)

The operation occurred on March 16, 1916 (case, p. 71, ll. 8 to 9).

It cannot be controverted that this doctor's testimony comes within the rule laid down in the case of (*Reimers v. Proctor Pub. Co.*, 89 Atl. Rep., p. 931). If this doctor is believed by the Court, his testimony is affirmatively favorable to the appellant. If his testimony is disbelieved, then there is absolutely no testimony in the case which satisfies the requirement of proving that the deceased suffered in accident arising out of his employment. The vital question in the case was asked on direct examination:

Q Could you, either at the time you saw him first, or afterward in the hospital, find any causal connection or link between the necessity for the operation for the hernias and the strain of the back? (Objection overruled.) A *No, there was no relation between the two conditions at all.*

Q Was there any relation between the history as told you by the deceased or his

wife in his presence—the strain of the back? Were there any causal connections or any connections between such things and his death? A Just repeat that.

Q (Question repeated by stenographer.)

A *No, there were none.* (Case, p. 72, ll. 9 to 26.)

At this point, the Court examined the witness in regard to conversations between the deceased and Dr. Klaus in the presence of Mrs. Mullenbach:

Q (*By the Court.*) What did he say? A He asked my advice, what could be done. *He had already been advised an operation, one year previous; I advised him the same.*

Q He said that? A He said he had been advised one year previous (case, p. 78, ll. 4 to 12).

The deceased's wife did not deny this in any part of her testimony. This testimony also indicates that the necessity for the operation was not caused by any accident on March 11, 1916. Dr. Klaus also testified that there was no connection between the strain of the back and a subsequent tuberculosis (case, p. 73, ll. 31 to 35).

It is a noteworthy fact that neither the deceased nor his wife mentioned the hernia condition to this doctor (case, p. 72, ll. 28 to 29).

The cause of death as given by this doctor was tubercular post-operative pneumonia (case, p. 74, ll. 24 to 25). That the history given him in his own examination suggested no causal connection between any alleged accident and the operation (case, p. 74, ll. 35 to 40).

At this point, the Trial Court again suggested that the only question was whether the accident

brought the hernias. On cross examination, this witness was *certain* that the *hernias were not affected by the strain of the back*.

Q This lifting and straining of the back may have aggravated those hernias? A *He didn't complain of them to me.*

Q I am not asking you that. I am asking you to state whether the lifting of the heavy girder is liable to aggravate the condition of that hernia. A *Not in this case.*

Q Why not? A *There was no physical signs pointing to it* (case, p. 76, ll. 11 to 19).

This witness is the only one, whose testimony is based upon actual facts. This witness did not state that it was necessary to operate, but merely that an operation was suggested (case, p. 80, ll. 4 to 7). It was Dr. Klaus' opinion that there would be physical signs accompanying the enlargement of the hernia due to heavy lifting, and that such signs were not present in this case (case, p. 82, ll. 23 to 40).

Q (*By the Court.*) Would the pain in the back be an incident in any way of the pushing through of that gut, on either one of these hernias. A No.

Q Are you sure about that? A I don't see any connection between the two (case, p. 81, ll. 4 to 9).

Dr. Klaus therefore gives a different conclusion as to the cause of death and states affirmatively, which evidence is absolutely uncontradicted, that the deceased's operation and death were not brought about in any way by the alleged accident of March 11.

We have hereinbefore referred to the testimony of witness Montague (case, p. 48, ll. 19 to 25). It is very questionable whether this testimony characterizes an accident which had just

occurred, but assuming for the sake of argument that it does, it merely characterizes a strain of the back, and Dr. Klaus, the *only witness testifying on this point*, says the strain had no causal connection with the operation or death.

Where is there a single statement in the evidence which connects the exclamation of the deceased with the hernia condition? One must indeed indulge in a wide speculation to conclude that the statement of the deceased's wife, describing the difference in size of the hernias on a day, several months before March 13, 1916, as compared with the size on March 13, 1916, furnished any foundation for a finding that an accident occurred on March 11, at the time of the deceased's exclamation, which aggravated the previously existing hernial condition.

*The deceased's wife's testimony, with regard to the hernia left a hiatus between a day several months before Dr. Klaus' examination and his examination.*

If the testimony of Dr. Klaus is rejected, then the case is absolutely barren of any evidence which is of any substance in a case under the Workmen's Compensation Act, for the petitioner's case disclosed death by *nephritis*.

At this point, we wish to comment briefly on the cases most likely to be cited by our opponents, such as (*Newcomb v. Albertson*, 85 N. J. L. 435; *Voorhees v. Smith Co.*, 86 N. J. L. 500), and in fact all of the cases referred to in the brief in the Supreme Court which most likely will be mentioned in the brief filed in this court, to this effect: *That in each case cited there is proof of an accident which competent testimony suggested might be the cause of the death or serious injury.*

These cases differ from the one under discussion, because here, there is no evidence that the particular thing causing death, which was found by the Trial Court, to be post operative pneumonia, might have been caused by the alleged accident. In this regard, this Court has said:

“Where the doctors refuse to state that death was caused by the accident, there is no basis for an inference to that affect by the Court.” *Reimers v. Proctor Pub. Co.*, 89 Atl., p. 931.

Did Dr. Arlitz satisfy this requirement? Manifestly, he did not. Dr. Klaus certainly did not, for he strikingly proves that there was not even the possibility that the alleged accident caused an aggravated condition of the hernia.

Should not, therefore, the appellant's motion to dismiss at the end of the case (case, p. 93) have been granted?

Reason 10 covering to some extent the same ground as a previously disclosed reason, should be argued by itself because there is an important addition in subject matter therein.

The Trial Court's conclusions (case, p. 94) indicate the weight he attaches to the witness' testimony and so it is not now necessary to comment upon the weight of the testimony of each witness any further. By the perusal of this memorandum, it will appear that the Trial Court limited the question involved in the case to whether the necessity of an operation was caused by the accident.

The Court based its conclusions upon the testimony of Mrs. Mullenbach and that of Dr. Klaus. The conclusions appearing on page 94 of the case, proves this conclusively. The only

testimony of Dr. Klaus' which was accepted by the Court, is the cause of death.

The memorandum goes on to say that the "*Testimony of the deceased's wife was more persuasive than that of Dr. Klaus.*" We have already shown that the deceased's wife's testimony could not support a finding of an accident arising out of and in the course of the deceased's employment on March 11, 1916. In fact, the Trial Court indicated this at the end of the respondent's main case (case, p. 67, ll. 9 to 12). The Reimers' case was sufficient authority for the Trial Court to have dismissed the petition.

The weight of the testimony of Dr. Klaus is disposed of in a very novel way.

Two witnesses were produced to rebut his testimony; Mrs. Mullenbach and Mrs. Fink, the testimony of the former appearing on page 83, case, to page 89, and that of the second, page 89 to page 92.

The Trial Court having determined the weight of the testimony of Mrs. Mullenbach, on the main case, that it would not support the petition, thereupon considered her testimony on rebuttal wherein she testified that Dr. Klaus had previously told her a different version of the case than that to which he testified at the trial. Of course, Dr. Klaus was under oath only at the time of trial, but in addition, the Trial Court lost sight of the fact that whether Mrs. Mullenbach's testimony on rebuttal outweighed that of Dr. Klaus or not, such testimony could not establish the essential facts in dispute. Her testimony on rebuttal could only neutralize or do away with the doctor's testimony. *It could not be introduced as affirmative evidence of the cause of death. If Dr. Klaus' testimony was*

*held to be rebutted, then nothing remained in the case upon which a judgment in favor of the claimant could be predicated because the Trial Court indicated that the claimant's main case did not disclose a cause of action.*

Mrs. Fink's testimony also touched upon what the doctor had told her upon some other occasion.

The Trial Court erroneously held, that, by believing Mrs. Mullenbach's rebuttal testimony, to the effect that Dr. Klaus, before the trial, had given her an entirely different opinion of the cause of her husband's condition, the existence and truth of these facts stated *on rebuttal was thereby established.*

The *causa causans* rule or the *sine qua non* rule cannot be applied unless you have the condition precedent upon which to apply such rule. This case is barren of the cause and therefore, the conclusion of the Trial Court is without anything to support it.

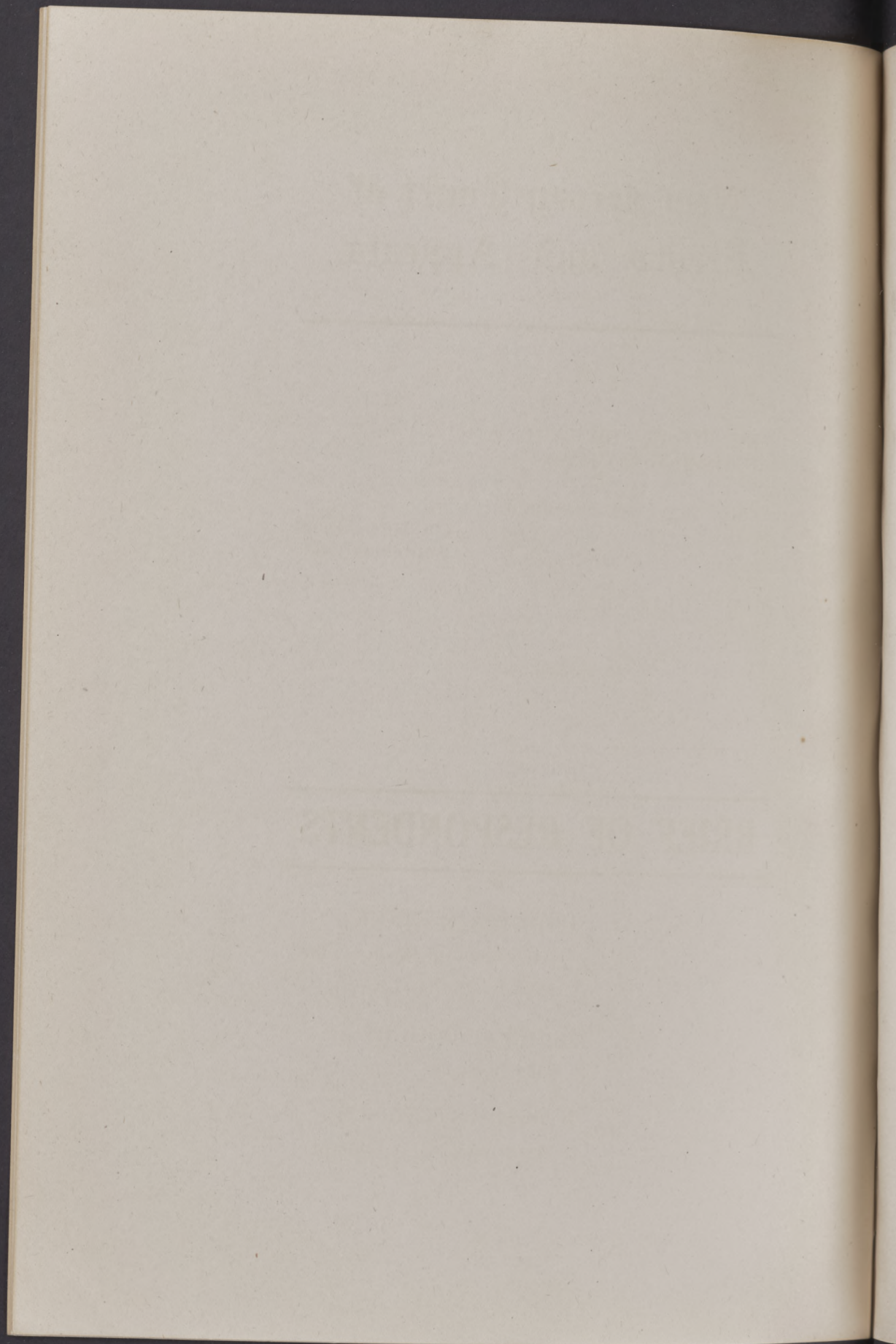
In conclusion, we submit that not only has the respondent failed to prove the allegations of the petition, but on the contrary, the appellant showed that the accident of March 11, had no causal connection with the operation and death.

We therefore request that the judgment under review be reversed, set aside, and for nothing holden.

Respectfully submitted,

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*Attorneys for Appellant.*

ISIDOR KALISCH,  
*On the Brief.*



# New Jersey Court of Errors and Appeals.

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NEW YORK SWITCH & ) )  
CROSSING COMPANY, ) )  
Appellant, ) )  
vs. ) On Appeal from  
ROSE MULLENBACH, ) Supreme Court.  
et als., ) )  
Respondents. ) )  
\_\_\_\_\_) )

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## BRIEF OF RESPONDENTS

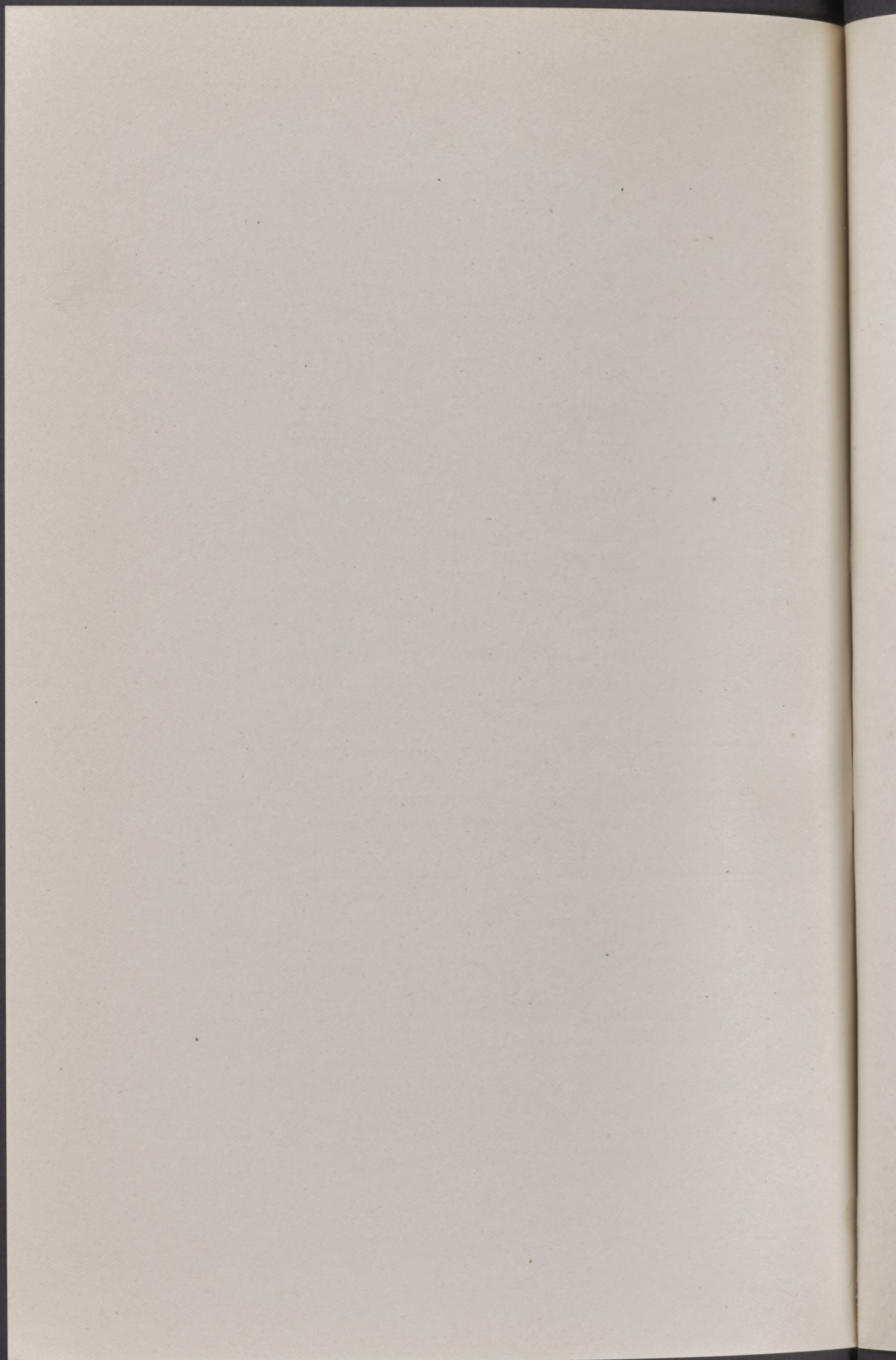
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NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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	)	
NEW YORK SWITCH & )	)	
CROSSING COMPANY, )	)	
	)	
Appellant, )	)	
vs. )	)	On Appeal from
	)	Supreme Court.
ROSE MULLENBACH, )	)	Brief for
et als., )	)	Respondents.
	)	
Respondents. )	)	
	)	
_____ )	)	

Andrew Mullenbach on March 11th, 1916, was employed by Appellant. While engaged in lifting a heavy steel girder he strained the muscles of his back causing two previously existing conditions of hernia to become aggravated so that an operation was necessitated, as a result of his injury, from which he died June 14, 1916.

The Hudson Common Pleas found in favor of the Respondent, and on certiorari the Supreme Court affirmed the order of the Hudson Pleas.

This appeal is taken to test the legality of the Supreme Court's decision.

The Respondent respectfully insists that the action of the Supreme Court in sustaining the award of the Respondent was sanctioned by the facts of the case, and the necessary application of pertinent legal principles.

Unless the case be absolutely devoid of any evidential facts justifying the determination of the trial Court, its finding is unassailable on appeal.

Hully vs. Moosebrugger, 88 N. J. L. 161.

Krause vs. Fitz, 87 N. J. L. 321.

Jackson vs. Erie R. R., 86 N. J. L. 550.

Bryant vs. Fissell, 84 N. J. L. 72.

It is the contention of the Respondents that an inspection of the authorities coupled with a careful perusal of the state of the case, will afford abundant proof that the judgment below was not only founded upon unquestionable legal evidence, but in addition the cases of this State are decisive of the legal aspects of the Appellant's contention. The general rule adopted in cases of certiorari of orders in compensation cases has the sanction not only of antiquity, but is consonant with the notion underlying the investing of subordinate tribunals with the function of deciding matters of fact. If in this case there are any facts proved by legal evidence whereby the trial Court could have found the deceased Mullenbach came to his death from an accident occurring in the course of and arising out of his employment, then no matter how meagre this evidence may be, or no matter from which of the parties the testimony was elicited or the proof emanated, this Court would not alone be reluctant to reverse the Supreme Court and to set aside the order, but would be bound by its oft repeated declarations to consider the finding of fact by the Court below as binding upon this tribunal.

Hully vs. Moosebrugger, 88 N. J. L. 161, 91 A. 1007.

Krause vs. Fritz, 87 N. J. L. 321, 93 A. 578.

Jackson vs. Erie Railroad Company, 86 N. J. L. 550, 91 A. 1035.

Bryant vs. Fissell, 84 N. J. L. 72, 86 A. 458.

No one can read the testimony in this case without being convinced of the meritorious character of the petitioner's case and its establishment. It is clear from the testimony, that while employed in the City of Hoboken at the prosecutor's yard on Saturday, March 11th, 1916, Mullenbach undertook to lift a heavy steel horse, (line 20, page 10), apparently of one thousand pounds, (line 38, page

10) about 4 or 5 feet long, (page 14 and 15) exclaiming that his back was sore or hurt. He went home a short time after the accident occurred and did not return to work the following Monday morning, (page 20, line 20). When Mullenbach returned home he immediately went to bed, where he remained all Saturday afternoon, Sunday and Monday, when Dr. Klaus, the Lodge physician, was called in by Mr. and Mrs. Mullenbach. Dr. Klaus performed an operation for hernia on the 16th day of March and Mullenbach died on the 14th day of June. The hospital records (page 48, line 10) show that Mullenbach was operated on for a double inguinal hernia and undescended testicles on both sides. The defense on (page 51, line 10), has cleared up any doubt as to the occurrence of the accident where Ernest Armanding says, (line 24, page 51, "My attention—

because he was so wild at his men, he had hold of it himself, showing his men how to throw it over.

Q. That is what you mean by queer?

A. Yes, (See line 19, page 53).

Dr. Arlitz (page 59, lines 14 to 34) testified that the operation which Mullenbach underwent either accelerated his death or aggravated any latent condition to which he was subject. The importance to be attached to Dr. Arlitz's testimony can only be adequately estimated by a reading of his cross-examination, wherein the lucidity of his testimony and the impregnable condition underlying his conclusions are so strikingly brought out by the Respondent. Dr. Klaus's testimony, apart from his desire to appear extraordinary impartial, establishes beyond preadventure that Mullenbach was suffering from two hernias and an undescended testicle, which no matter how you view Klaus's relationship, demanded immediate medical attention as a result of his examination of Mullenbach and his exhor-

tation upon the necessity of an operation. Dr. Klaus operated upon Mullenbach on the 15th of March, a few days after the accident, and almost immediately after Dr. Klaus's examination. The celerity of movement by Dr. Klaus can be attributed to no other motive than that of medical necessity which, as Dr. Klaus says (page 71, line 5), was the result of an injured back. To properly ascertain the mental processes of Klaus it is but necessary to recall, that while ostensibly the Lodge physician of Mullenbach he was in some way connected with the Respondent or the Globe Indemnity Company. It is impossible to reconcile his illuminating testimony (page 72, line 28):

Q. What caused his death?

A. Pulmonary Tuberculosis.

Q. You treated him for that?

A. I didn't treat him for that.

Q. How do you know?

A. I know he had it.

Q. How do you know?

A. Physical signs.

Q. What did you treat him for?

A. I treated him for his injured back and double inguinal hernia and undescended testicle.

The cross-examination (page 75) amply shows the hopelessness of attempting to reconcile Klaus's statements.

The two questions to which exceptions were taken are so elementary that it seems that no serious effort can or will be made to insist upon their non-admissibility. It was legally and logically proper to permit Mrs. Mullenbach to testify as to her husband's condition immediately after the accident because the testimony shows that one of the claims of the Defendant was that the accident did not happen as petitioners alleged. His condition or bearing or demeanor certainly were evidential, and with much more vigor were any exclamations of pain or anguish spontaneous-

ly ejaculated by petitioner. They were clearly part of the *res gestae*. *Cooper vs. The Trenton Passenger Railroad* 60 N. J. L. 219.

This resume of the facts is set forth for the purpose of showing that the Court below was justified in finding that the deceased while lifting a heavy steel horse subjected himself to a strain in his back which compelled him to seek his bed and employ a Doctor who advised an operation for inguinal hernia which had troubled Mullenbach for some time but which all the evidence shows was intensified by the lifting on March 11th, as appears by the testimony of Mrs. Mullenbach, (page 28, line 25):

Q. You observed the part of his body?

A. Yes.

Q. How did it look?

A. It looked a good deal larger than it had before.

Q. How much larger?

A. I should say about the size of a silver dollar.

The Superintendent's testimony shows that the accident occurred in the course of and arose out of his employment and the only mooted question that can possibly be advanced is whether the causal connection between the accident, the operation, and its fatal consequences have been so palpably proved as to come within the *Causa Causans* rule announced in *Newcomb vs. Albertson*, 85 N. J. L. 435, 89 A. 928, where Swayze, J., says, following the rule laid down by Lord Loreburn in the House of Lords in a case arising under the English Statute *Clover Clayton & Co. vs. Hughes*: "It seems to me enough if it appears that the employment is one of contributing causes without which the accident which actually happened would not have happened and if the accident is one of the contributing causes without which the injury which actually followed

would not have followed." The Court then continues, "if we were to go into the scholastic distinctions we might say that the injury under section 21 was the cause sine qua non, as distinguished from proximate cause." In the Newcomb case just cited the petitioner's arm was broken while he was in defendant's employ. The fracture properly united, but there developed an abscess on the fleshy part of the thumb which resulted in ankylosis of the thumb, making it permanently useless. Held that the injury of the thumb arose by accident out of and in the course of his employment.

To bear out defendant's contention that accident arose out of and in the course of employment, and that the *causa causans* rule is applicable, defendant submits the following cases:

The Supreme Court will not reverse the findings of fact that the death of an employee was due to injury arising out of and in the course of his employment where the employee died of pneumonia, and there was expert evidence to the effect that the direct cause of the pneumonia was a hurt or strain of the back suffered by the deceased about two weeks before his death, although such expert evidence was flatly contradicted by other expert evidence.

Bayne v. Riverside Storage & Cartage Co.,  
(1914) 181 Mich. 378,  
148 N. W. 413.

Thus, a workman's death may be found to be an accident where, although there was some evidence pointing to cancer, a rupture occurred while the workman was in the very act of doing some heavy work; namely furrowing heavy posts, by pushing them forward against the knives of a machine by pressing his abdomen forcibly against the end thereof.

Voorhess v. Smith Schoonmaker Co.  
(1914) 86 N. J. L. 500,  
92 Atl. 280.

A rupture caused by the effort of separating a plank from one to which it was stuck by ice, formed during the preceding night, may properly be found to have been caused by accident.

Timmins v. Leeds Forge Co. (1900)

16 Times L. R. (Eng.) 521,

83 L. T. N. S. 120.

Compensation is recoverable for incapacity caused by hernia, although the workman had previously suffered from a slight hernia, and the accident in question merely aggravated its consequences.

Brown v. Kemp, (1913)

6 B. W. C. C. (Eng.) 725.

Fulford v. Northfleet Coal & Ballast Co.

(1907 C. C.)

1 B. W. C. C. (Eng.) 222.

Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and the opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment within the meaning of the West Virginia act.

Poccardi v. Public Service Commission,

(1915) W. Va.—post, 299,

84 S. E. 242.

Where a workman suffered an accident which caused a rupture and necessitated an operation, and at the time of the operation an old hernia was also operated upon, and the workman died eight months after, having shown signs of heart failure soon after the operation, the arbitrator may find that the death resulted from the accident, where the medical evidence indicated that in order properly to operate for the second rupture, the first one must be operated for.

Mutter v. Thomson (1913)

W. C. & Ins. Rep. 241  
 (1913) S. C. 619,  
 50 Scot. L. R. 447,  
 6 B. W. C. C. 424.

A man employed as stoker, who had been ruptured three or four years before, and was wearing a truss sufficient to prevent strangulated hernia under ordinary circumstances, who left home well and in excellent spirits, and shortly after his return to work was found to be in great agony, and died shortly afterward from strangulated hernia, may be found to be suffering from injury by accident arising out of the employment, although there was no evidence as to how the hernia came down so as to strangulate, nor of any specially heavy work done by the deceased to account for it.

Scales v. West Norfolk Farmers'  
 Manure & Chemical Co.,  
 (1913) W. C. & Ins. Rep. (Eng.) 165,  
 6 B. W. C. C. 199. W. M. G.

The authorities support the proposition that such an accident is one within the contemplation of the statute. Judge Osborne, in the case of Feldman v. Westinghouse Electric & Manufacturing Company, 36 N. J. L. J. 48, and White v. Lauter, 37 N. J. L. J. 175, refers to numerous authorities.

It is respectfully insisted that the judgment of the Supreme Court be affirmed.

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RICHARD DOHERTY,  
 Of Counsel with Re-  
 spondents.

