

Robert H. Jackson and the Forbes Family Dairy

by Mary Dee Martoche

In July 1923, a typhoid epidemic broke out in the city of Jamestown. Along a particular dairy route, a growing number of people became ill and it soon became apparent they were suffering from typhoid fever.¹ Of course, typhoid fever was and is a very dangerous disease, both because of its ability to spread throughout a population and because it can cause severe injury, including death.² Thus the public health officer for Jamestown, Dr. John J. Mahoney, acted promptly to discover the source of the infection, and to contain and correct it. He was quickly able to identify the most likely source of the epidemic as contaminated milk being sold along particular delivery routes in Jamestown by the G. A. Forbes & Sons Dairy.³ What took much longer to resolve was the cause of the milk contamination. The subsequent extensive litigation was destined to become a key building block of the legal career of Robert H. Jackson.

Grant A. Forbes was a dairy farmer who owned 100 acres of farmland along the Cassadaga Creek just outside Jamestown; he had lived on the property his entire life. His son Merle owned an adjoining 64 acres. Father and son, together with another son,

¹ In all, 35 people were infected, 2 of whom died.

² Typhoid fever is recognized as a life-threatening illness. It was not until the late 1800's that scientists began to identify the bacteria which causes the infection.

³ The typhoid bacillus affects only humans. It is spread by contact with human feces infected with the bacteria, usually through water or food which has been contaminated. Milk is recognized as a particularly fertile breeding ground for the bacteria.

Ray, ran a successful dairy which supplied milk to residents of the city of Jamestown and had for many years.

The Cassadaga Creek bordered this farmland and provided one source of water for the property. In 1895, the city of Jamestown established a sewer outlet into the creek a short distance upstream from the Forbes farm. Over the years, as the population of the city grew, it dumped increasing amounts of raw sewage into the creek. By 1923, the population of Jamestown was estimated at 40,000 residents, all of whose sewage was deposited into the creek near Forbes' farm. Forbes continued to operate his dairy alongside this creek without apparent problem until that year.

1923 was a very dry year in Chautauqua County and the creek, which ran at varying levels depending on the amount of precipitation, was at a very low level. On the Forbes property, it meandered through at least two "oxbows" or curves, which slowed the already slow current and created ideal spots for debris and sewage to collect. As a result of the low precipitation that year, the sewer outlet was open, raw sewage was visible both in and along the creek and the flow of the creek was unusually sluggish.

Dr. Mahoney paid a visit to the Forbes farm on July 17, 1923, and informed Grant Forbes of the typhoid outbreak and his suspicion that the Forbes milk was the source. Living on the Forbes farm at that time were Grant A. Forbes and his wife; Merle Forbes and his wife Ida; Theodora Horton, a nurse from Buffalo; and Ray Forbes.⁴ It is Ida's residency on the farm which played a particular role in the events of that summer and fall. Dr. Mahoney asked all members of the Forbes family to provide fecal samples to

⁴ Theodora Horton was apparently brought into the home to care for Ida, who was in the late stages of a difficult pregnancy. Nurse Horton later married Ray Forbes.

determine whether any of them was infected with the typhoid bacillus.⁵ He also took other steps to limit the epidemic, including briefly halting the sale of Forbes milk, asking the family to cease contact with the dairy operation, and directing that the Forbes Dairy begin pasteurizing its milk.

Eventually lab reports of the feces testing began to come back. Ida Forbes, who delivered a baby at home on July 16, 1923, was the only member of the household who tested positive, meaning that the bacteria was found in her feces. Over the next several months, numerous samples were supplied by the family to various testing facilities and only Ida tested positive. But her feces also tested negative on occasion and this became the subject of much evidence at the trials in 1924 and 1925. She denied ever having had typhoid fever although between 1917 - 1920, she had worked as a nurse caring for typhoid patients.⁶

It is no surprise that the epidemic and the identity of the Forbes Dairy as the source of the typhoid bacillus was of great interest to the residents of Jamestown and the surrounding area. There was a lot of publicity about the events, including statements by the Jamestown Board of Public Welfare in the *Jamestown Morning Post*, identifying the Forbes Dairy as the source of the epidemic. As a result, Grant Forbes claimed there was considerable damage to the Forbes Dairy as a going business and to the value of the farm. This led him to the offices of Jackson, Manley & Herrick, attorneys at law, and to representation by its first-named partner, Robert H. Jackson.

⁵ Testing of feces, urine and blood is the standard for detecting the typhoid bacillus.

⁶ During the litigation, she was identified by the defendant as a “typhoid carrier,” that is a person who never succumbs to the illness but nevertheless carries the bacteria in her body.

In November, 1923, five members of the Forbes family, Grant, Velma, Merle, Ida and Ray, sued the city of Jamestown, alleging that its actions created a nuisance which caused damages to them all.⁷ The complaint stated in graphic and detailed language the defendant's claimed misdeeds.⁸ They were based on the discharge of "sewage ... without any manner of chemical treatment or neutralization whatever" upstream from their property.⁹ Further, the complaint stated:

that at all times ... the said sewage gives off noxious odors, attracts vermin and rodents ... kills fish ... pollutes the stream and is unsightly and repulsive... and renders the water and the land ... unfit for any purpose or use whatsoever.¹⁰

The complaint sought monetary damages for the loss of value to the dairy operation and the plaintiffs' property, as well as punitive damages in the total amount of \$50,000.¹¹

The defendant city of Jamestown served an amended answer denying all of the allegations of the complaint.¹² In addition, the city alleged that the sewer was both properly functioning and legal, and that it was not the source of the typhoid epidemic. Further, the answer stated that the source of the infection was Ida Forbes and the unsatisfactory handling of milk on the Forbes Dairy. Finally, the defendant asserted that

⁷ Velma and Ida Forbes were later discontinued as parties to the proceeding on technical legal grounds.

⁸ A "complaint" is the legal term for the written document which gives first notice to a defendant of the plaintiff's claims of wrongdoing.

⁹ Plaintiffs' complaint.

¹⁰ Plaintiffs' complaint.

¹¹ This is almost \$700,000 in 2015 dollars. Punitive damages are sought to punish the defendant for especially egregious and improper actions and are rarely awarded by New York state courts.

¹² An "answer" is the legal term for the first written document which responds to the complaint.

Jamestown could not be held responsible for any damages because of governmental immunity.

Robert H. Jackson tried *Forbes v City of Jamestown* for the plaintiffs twice and he prevailed in both trials. The verdicts he secured on behalf of his clients, modest even for the time, do not fully reflect the significance of his victories. Jackson's opponent for both trials was C. A. Pickard, retained by the city to represent it in this litigation. At the time of this trial, Jackson was a relatively young lawyer, having practiced for only 10 years. He was the former Corporation Counsel for Jamestown.¹³ Pickard was an attorney of considerably more experience, having been admitted to the New York State bar in 1898, and apparently a prominent Jamestown citizen.¹⁴

It is worth noting that there was at least one prior occasion on which Jackson and Pickard clashed. Before the *Forbes* case was tried twice by the two men, they litigated the case captioned *Moller v Pickard*, 232 NY 271 (Court of Appeals 1921), a case with a long procedural history which was finally resolved only by New York State's highest court. In that case, Jackson represented parties who felt they had been wronged by Pickard in business dealings involving the Monarch Stationery Paper Co. of Jamestown. As their attorney, Jackson argued all the way to the state's highest court that Pickard had acted in bad faith and betrayed the trust of his clients. The Court of Appeals disagreed with Jackson and his clients lost. These are very strong allegations to make about an attorney and one can be sure they were very much in both men's minds during the *Forbes* case.

¹³ The corporation counsel for a municipality is the formally designated attorney for that entity.

¹⁴ *History of Chautauqua County NY and Its People*, John Phillips Downs.

The first trial began on May 6, 1924, in Supreme Court for Chautauqua County, before Hon. Wesley C. Dudley, and culminated in a verdict for the plaintiffs in the amount of \$12,000.00.¹⁵ The defendant made every legal attack on the verdict, moving for a new trial, which was denied, and then appealing the verdict to the Appellate Division, Fourth Department.¹⁶ The Appellate Division reviewed the evidence at trial and would have upheld the verdict but for two errors in the judge's charge.¹⁷ Thus, it sent the case back for a new trial.¹⁸ Of course, to Jackson's great advantage, it also provided an excellent road map for a successful outcome in the second trial.

That trial was held before Hon. George A. Larkin, beginning on May 18, 1925, and ending with a verdict in favor of the plaintiffs in the amount of \$13,735.95. Again, the defendant took every possible legal objection to the verdict. However, its motion for a new trial was denied, and the Appellate Division affirmed the judgment and refused to grant leave to appeal to the Court of Appeals, New York State's highest court.¹⁹ Thus the verdict stood.

The Chautauqua County Courthouse where the case was tried sits on a rise in the middle of the small village of Mayville, New York, and is a commanding presence in

¹⁵ An interesting side note is the speed with which this case when from occurrence to trial. The events which prompted the lawsuit began in July 1923, the case was sued in November 1923 and the first trial began in May 1924. Less than one year from occurrence to trial must have been very quick even then. It would be unheard of today.

¹⁶ There are four appellate divisions in New York State, all of which are designated to hear appeals from New York's various trial courts. The Fourth Department, where this appeal was heard, is located in Rochester.

¹⁷ The "charge" is the term for the instructions on the law given to a jury by the judge at the conclusion of the evidence.

¹⁸ *Forbes v City of Jamestown*, 212 AD 332 (4th Dept. 1925).

¹⁹ *Forbes v City of Jamestown*, 217 AD 714 (4th Dept. 1926), 217 AD 787 (4th Dept 1926).

the community. The courthouse was built in 1907 and on its second floor is a large, formal courtroom with prominent windows. It is indeed impressive space even today and adds an aura of importance to proceedings there. The twelve male jurors who were impaneled to hear the case must have been a bit awestruck by their surroundings.²⁰

According to the minutes of the second trial, it began May 18, 1925, Judge Larkin presiding. A civil trial generally begins with motions by the defendant to dismiss the complaint which are usually denied, which is what happened then. The judge then makes general introductory remarks to instruct the jury. The next step is to allow the plaintiff's and defendant's attorneys the opportunity to make opening statements. There are certain restrictions in what can be said during an opening statement. It is generally regarded as the party's opportunity to lay out a roadmap for the jury, that is to tell the jury what counsel expects to prove and, more importantly, to begin to persuade the jury of the correctness of that party's position in the lawsuit. Most trial attorneys regard the opening statement as a crucial part of a successful outcome. It is used to establish rapport with the jury and to foster the jury's trust in the attorney and thus, the client. As is the practice today, the opening statements of Jackson and Pickard were not recorded. Thus, we do not know what roadmap each laid out for the jury.

Over the next five days, the plaintiffs called ten witnesses to the witness stand in support of their case. In addition, pursuant to a stipulation between Jackson and Pickard, the testimony of seven witnesses who testified for the plaintiffs in the previous

²⁰ Women were not allowed to serve on juries in New York State until 1937. Today in New York, a jury in a civil case is comprised of six jurors.

trial was read to the jury.²¹ The defendant called 21 witnesses and read the testimony of one witness. Sixty exhibits were entered into evidence. They were mostly photographs of the creek and the farm, maps and various reports. This was a great deal of evidence, both witnesses and exhibits, for a five day trial.

There were three main areas of contention on which proof was offered during the trial. The first was the condition of the creek and surrounding area, both at the time of the epidemic and the trial. Second was the most hotly contested issue, the cause of the typhoid epidemic. The plaintiffs maintained that the source of the infection was the presence and transmission of the typhoid bacillus in human feces in the creek to the milk supply. The defendant, however, asserted that the source of the infection was Ida Forbes, a household member who was alleged to be a typhoid carrier and to have handled utensils and other items in the milk house which then infected the milk. Finally was the issue of damages, both to the Forbes father and sons and to their dairy operation.

In order for Jackson to prove his case, he had to establish that the Cassadaga Creek was polluted, that the city of Jamestown was the source of the pollution, that typhoid bacillus was present in the pollution, that it was transmitted to the milk distributed by the Forbes Dairy and that the plaintiffs had sustained monetary damages as a result. To do that, he called witnesses to testify about their observations of the creek; these are what is known as “fact witnesses.” Their testimony described what

²¹ The Civil Practice Act, which governed civil cases in New York State courts at the time, provided for the reading of previously taken testimony during a trial for several reasons, including agreement between the parties.

they saw in response to counsel's questions. They could not offer opinions, except about the most mundane things.

Witnesses both for the plaintiffs and the defendant described the condition of the creek over a period of time, including as recently as the week before the trial began. Of course, their testimony conflicted, with plaintiffs' descriptions much more dire and defendant's bland and even bucolic. Jackson made effective use of cross-examining defendants' witnesses about the fact that the week before the trial had been very rainy and therefore the creek was running higher than usual. The fact that the witnesses were allowed to testify as to the current condition of the creek may be attributed to Jackson's careful drafting of the complaint. By alleging that the creek continued to be a nuisance after the epidemic and requesting damages therefor, he made its current condition relevant and thus a proper subject of proof for the jury. The fact that its condition at the time of trial was apparently better than in the summer of 1923 could have been a stumbling block for Jackson, but he was able to overcome that by cross-examining witnesses about the rainy weather and high water condition of the creek at the time of the trial.

The more challenging part for Jackson was to find and call the appropriate expert witnesses, who would be allowed to offer opinions. Because of the microscopic nature of the bacteria which cause typhoid, Jackson could not call to the stand fact witnesses who had seen the bacteria in the feces, on the cows or equipment, or in the milk. Rather, he had to rely on circumstantial evidence to prove how it was transmitted to the milk.²² And in this case, this required expert testimony. The opinions of the experts

²² Circumstantial evidence is information and testimony which do not prove a fact directly but which allow a conclusion to be drawn proving that fact.

would provide proof as to the presence of typhoid bacteria in the creek and the manner of transmission to the Forbes milk.

Today, opinion testimony is frequently given in civil cases by retained experts, that is individuals who possess the necessary expertise and are paid to review records and to testify. The reasoning for this practice is that some elements of proof in trials are beyond the knowledge of most people and proof can be put before a jury only by experts who must be qualified as such and asked the appropriate questions. This can be a very expensive proposition and there were no doubt some costs associated with the practice when the *Forbes* case was tried.

Another important element of expert testimony has been, until rather recently, the use of the “hypothetical question.” And hypothetical questions were required at the time of the *Forbes* trial. A hypothetical question does not ask about the specific issues for the jury’s consideration based on the testimony of the witnesses in the courtroom. Rather, it asks the expert to assume a number of facts to be true and to express an opinion, if the witness has one, based on those facts. Thus, in the *Forbes* trial, plaintiffs’ witnesses were asked 4 lengthy hypothetical questions. The first question takes up more than two pages of the type-written transcript and asked whether the witness had an opinion about the source of the infection by typhoid bacillus. Each witness stated the source was the creek. The next three hypothetical questions, each about one-half page in length, were constructed to be answered by the witness in such a way that Ida Forbes was eliminated as a source of the infection. Each time these questions were propounded, they were objected to by Pickard and each time his objections were overruled.

The plaintiffs called several witnesses on the question of the source of the typhoid infection. Some of them testified live in the second trial and some witnesses' testimony was read. These witnesses were mostly physicians and/or bacteriologists who testified about the typhoid bacillus, particularly its life span under various conditions, how it is transmitted to humans and the consequences of a typhoid infection. It is unclear which, if any of these witnesses, were retained as expert witnesses to give opinion testimony and which were responding to a subpoena to produce records. We know, for example, about Dr. Charles A. Bentz, a physician and bacteriologist from Buffalo, who stated he was testifying pursuant to a subpoena; his testimony was read at the second trial. He examined feces of members of the Forbes family for the typhoid bacillus. He was also the health officer at Chautauqua Institution. Bentz's testimony upon cross-examination and redirect-examination by Jackson is filled with opinions, most of which were helpful to the plaintiffs.

The proof offered by the plaintiffs showed that Forbes had operated a dairy farm with an increasing number of cows over the years leading up to 1923. Milk produced on his farm and on many farms was sold "raw" at that time. That is, it was not pasteurized, as is required today. Pasteurization was not uniformly required and indeed did not become official U.S. policy until 1924. It was an additional expense to the farmer and some customers objected that the process produced a "cooked" milk taste.

Milk is a particularly fertile breeding ground for the typhoid bacillus and meticulous cleanliness is required to minimize the possibility of contamination. How the typhoid bacillus gets from its source into the milk has been the subject of much debate and was vigorously contested during this trial. Although typhoid bacteria thrive in milk,

they do not inside the cow. Thus, a cow may drink from a contaminated stream, ingest typhoid and that action will not infect the milk because the bacteria is killed in the cow's stomach. Jackson claimed, however, that contamination of the cow's hide, particularly her udder, was another matter. He argued and his expert witnesses supported his argument that a cow which has been in contact with contaminated human feces may carry the typhoid bacteria on her body. Then if the bacteria manages to get from her body into her milk during milking, the potential for infection begins. Jackson also argued that flies touching on contaminated human feces and then on the cow or milking supplies can give rise to contamination. Four of plaintiffs' experts, Dr. Charles A. Bentz, Carl O. Lathrop, Dr. Francis J. McCulla and Dr. William H. Marcy, testified that either of both of these were the routes of contamination of the milk.

Pickard, on the other hand, produced several expert witnesses, three with national reputations as experts on typhoid, that such a method of contamination was impossible. Pickard repeatedly challenged the plaintiffs' witnesses to provide prior examples of such contamination and they were mostly unable to do so. He also argued that the source of the contamination was Ida Forbes, a typhoid carrier.

Dr. William O. Smith was an interesting witness for the plaintiffs who was called largely to contest the notion that Ida Forbes was a typhoid carrier. Dr. Smith was a physician and the health officer for the towns of Falconer and Ellicott. He collected and submitted a number of fecal samples from the Forbes family for testing. For the samples which he sent to the New York state testing laboratory in Albany, he used false names on the samples. It is clear from the questioning which followed, the objections of Pickard and the colloquy among counsel and the court, that this was regarded by the

defendant with great suspicion. Dr. Smith attempted to explain what he believed was his innocuous reason for doing this. By the time he was submitting the samples he collected, Ida Forbes had already been identified by testing done at the laboratory in Albany as a typhoid carrier; Dr. Smith didn't believe that was true and he didn't want testing of her feces to be prejudiced by that finding. Pickard conducted a vigorous cross-examination of Dr. Smith, attacking his character and credibility. Jackson's redirect on this point was brief but deft, giving the witness the opportunity, over Pickard's objection which was overruled, to offer a coherent explanation for his actions.

The practice of reading previously given testimony is not unusual in civil trials in New York State and continues today for a variety of reasons, such as the unavailability of the witness at the time of the trial. In addition, counsel for the parties can agree to allow the reading of testimony. Although this is an acceptable way to offer evidence for a jury's consideration, it is by no means ideal. The act of reading itself can be boring, causing jurors' attention to drift. It lacks the appeal of live question-and-answer in the courtroom. Some trial practitioners believe that jurors may conclude that such testimony is less important than live testimony given in a courtroom.

Nevertheless, in the second trial, the testimony of seven witnesses for the plaintiffs was read to the jury. And some of the testimony was from very important witnesses for the plaintiffs. We may speculate about why this was done. It could have been a question of unavailability of the witness. It could also have been a question of the cost of bringing in witnesses. For example, Dr. Charles E. Abbott, whom Jackson qualified as an expert bacteriologist, was from Buffalo. At that time, travel to and from Buffalo was at least an all day venture. Dr. Abbott offered his expert opinion that the

cause of the infection was the polluted Cassadaga Creek, as a result of cows wading in the creek and contamination from flies lighting on feces and then infecting milk and/or utensils.

One of the most colorful witnesses to testify for the plaintiffs was Homer M. Preston, the supervisor of Kiantone, who agreed that he was a farmer “in a small way,” which included farms in Chautauqua County, Pennsylvania, Minneapolis and Florida.²³ He testified in graphic language about the condition of the creek, that the “fecal matter from the city of Jamestown ... would gather itself together in bunches.... [T]here were spots ... near the Forbes farm 16 feet in length by 2 to 10 feet in width of nothing but human manure in which you could put a stick down three feet” He went on to testify that the “odor was abhorrent The flies were thick.”²⁴

After setting this scene for the jury, Preston then testified as an expert on the value of farmland in this part of Chautauqua County and the value of the Forbes farm in particular. Pickard, of course, objected to his qualifications but to no avail. The pollution, he stated, had “ruined” the salability of the property. The value of the farm as a dairy operation diminished from \$45,000 to \$20,000 as a result of the epidemic. Pickard unwisely objected to Jackson’s first question on this topic and the court sustained the objection. This required that Jackson ask a hypothetical question as to the value of the farm which allowed him to restate all of the essential elements of damages for the benefit of the jury. Finally, Preston was allowed to testify that the value of the farm, but for the pollution and prior to the epidemic, would have been \$60,000.

²³ Trial transcript.

²⁴ Trial transcript.

As to the damages to the dairy, Jackson relied primarily on the testimony of Grant Forbes. The epidemic, Forbes testified, had caused the profits to the dairy to be diminished by about 50%. That is, they had gone from \$5000 - \$6000 yearly to about \$2500 - \$3000. To attack this, Pickard relied on so-called score cards which were yearly records of the dairy's milk production kept by the city of Jamestown going back a number of years. The score cards did indeed call into question Forbes' testimony, because they portrayed a smaller loss. This is not an atypical exaggeration for a party, but certainly did not help the plaintiffs' cause.

After Jackson rested for the plaintiffs, Pickard again moved for dismissal of the complaint on various bases and the court denied his motion. It appears that all of these motions, as well as numerous arguments between counsel over various objections to testimony were in the presence and hearing of the jury. Assuming that to be true, a skillful trial attorney would have used these opportunities to argue his case and to make points for the jury's benefit. Both trial counsel appear to have employed that technique during the trial.

The defendant's first witness was Dr. John J. Mahoney, the Superintendent of Health for the city of Jamestown. Dr. Mahoney was an eager witness who was clearly motivated to tell the jury his side of the story. Based on open-ended questioning by Pickard, he was allowed to give long, narrative answers which no doubt had the jury's attention. In fact, there are numerous examples throughout the transcript when witnesses were allowed to give long, narrative answers to questions without objection from opposing counsel. This is a practice which is discouraged today and the skillful trial lawyer will rightly object. The same observation may be made about the extensive

use of leading questions on direct testimony by both attorneys which were largely not objected to. Again, this is a practice which would not be allowed today, assuming prompt and appropriate objections thereto. One must assume that Jackson and Pickard knew the sorts of questions the court would allow and crafted their examinations accordingly.

Jackson's cross-examination of this witness was meticulous and devastating. He challenged Dr. Mahoney on every salient point of his direct testimony with great effect. There is an interesting exchange on cross-examination between Dr. Mahoney and Jackson, which can now be seen as a harbinger of things to come for Jackson. He began the exchange by pinning the witness down about the condition of the creek, asking several questions as a result of which Dr. Mahoney agreed that the creek was "perfectly harmless," not a nuisance or "obnoxious."²⁵ Having gotten his testimony on that point in some detail, Jackson then cross-examined him about the contents of a report published in the *Jamestown Morning Post* on December 7, 1923. In an exchange that goes on over several pages in the transcript, Jackson questioned Dr. Mahoney closely and aggressively about statements he made in the report, specifically that "Cassadaga Creek down from the outlet of the Jamestown sewer ... is grossly polluted." Dr. Mahoney attempted to back away from the statement, but Jackson pursued the point and discredited the doctor's testimony. In a later exchange, Jackson again used a statement Dr. Mahoney made at a public welfare board meeting about the cows carrying "typhoid germs" to the dairy farm to discredit his testimony at trial on that point.²⁶

²⁵ Trial transcript.

²⁶ Trial transcript.

The significance of Jackson's cross-examination cannot be overstated in discrediting Dr. Mahoney's entire testimony.

On the question of damages, the defendant called two witnesses who testified that the value of the farm in 1923 was between \$32,650 and \$35,000. One witness stated that the presence of the creek did not affect the property's value. The other stated that, if its value was diminished by the "appearance" of the creek, the diminished value was \$30,000.²⁷

The defendant also went to some lengths during the trial to establish that Jamestown was not the only entity putting sewage into the Cassadaga Creek. So was Falconer, albeit in a much smaller amount and several miles upstream. Thus, the defendant contended, if the creek was polluted, the plaintiffs could not prove whether the contamination came from Jamestown, Falconer or one of several businesses along the creek. Jamestown, of course, was the only party sued by the plaintiffs. It appears, in light of the verdict, this tactic was a mistake. In effect, the defendant was arguing "There's no problem with the creek, but if there is, we didn't cause it." Obviously, the jury didn't agree.

The importance to the defendant of this case may be gauged by the stature of the expert witnesses who came in to testify. Two witnesses from the New York State Department of Health in Albany testified as to the propriety of the testing methods of the fecal samples. One, Dr. H. F. Senftner, also testified as an expert on the cause of the typhoid contamination of plaintiffs' milk. Dr. Oliver W. H. Mitchell, a physician and bacteriologist, came from Syracuse. Dr. Edwin O. Jordan, bacteriologist from Chicago,

²⁷ Trial transcript.

testified. Dr. Allen W. Freeman, physician and epidemiologist from Johns Hopkins University in Baltimore, testified. Finally, Dr. Milton J. Rosenau, from Harvard University, testified. Dr. Rosenau was identified by other witnesses at the trial and in the literature of the time as the leading expert in the United States and possibly the world on epidemic diseases and what he described as “sanitation hygiene.”²⁸

We must remember that this trial took place in 1925, when travel from distant places was an entirely different matter than it is today. To travel to and from Chicago or Baltimore or Boston to Mayville, New York, must have taken two days in each direction. One adds to that the time spent in preparation for testifying and testifying itself and the total must be five or six days for each of these witnesses to commit to this trial. We do not know what compensation, if any, each received. However, surely at least travel expenses, including room and board, must have been paid for each witness. It is a measure of the importance the city of Jamestown attached to this case that it spent so much to defend itself. The defendant no doubt was more concerned if it lost this case about the cost of correcting a dangerous nuisance than of paying any verdict the Forbes family might be awarded.

Each of defendant’s expert witnesses testified about his training and qualifications, which were stellar. Testimony about the typhoid bacillus, infections, diseases and transmissions was given in varying ways by each witness. Finally, Pickard asked each witness other than Dr. Jordan another long, hypothetical question, laying out the case in its most advantageous light from the defendant’s perspective.

²⁸ Trial transcript.

Each witness was then asked to offer an opinion of the source of the epidemic. Each witness stated it was Ida Forbes.

Jackson must have known that the cross examination of these experts had to be carefully thought out and executed. He could not afford to conduct a cross examination which gave the witness the opportunity to expound on earlier testimony, to buff his credentials and to show off his expertise with the jury. Yet Jackson could not ignore these witnesses; the effect on the jury would likely have been deadly. He needed to get these witnesses off the witness stand in the shortest possible time while inflicting as much damage as possible to their testimony. His tactic was both brilliant and daring. He engaged in no cross examination with any of these witnesses other than Dr. Jordan. Of the other three witnesses who testified as to the means of transmission of the typhoid bacillus, he asked one question: each witness was asked whether his answer to the hypothetical questions naming Ida Forbes as the source of the infection was based on assuming the truth of all of the elements of that question. Each witness answered that it was. Jackson had no more questions. This was an all-or-nothing tactic which proved to be absolutely the right thing to do.

When the defendant rested, Pickard made yet one more motion for a directed verdict. The court denied his motion. At that point, first Pickard and then Jackson made their closing arguments to the jury. As was custom then and is now, closing arguments in civil cases are generally not recorded. So we don't know what either counsel said. However, the closing argument is an attorney's final opportunity to have interaction with the jury and may be used to tell the jury what counsel thinks the proof has shown and

why he should prevail. Closing statements are highly prized by trial attorneys as a vehicle to make one final appeal to the jury on the rightness of the party's position.

Finally came Judge Larkin's charge to the jury. Today, what a judge says during a charge to the jury is quite controlled by rules and case law. Judge Larkin's charge appears to be one of his own making. He instructed the jury by giving a brief factual background, reciting the claims of the plaintiffs and defendant and laying out the principles of law to be used in reaching a verdict. At the close of the charge, Judge Larkin asked counsel if either had any further requests to be charged to the jury. Significantly, Jackson did. He wanted the jury told that "in considering evidence of experts, [it] may disregard the answer given by any expert witness to a hypothetical question if they find the facts stated in the hypothesis are untrue."²⁹ The court restated the charge slightly but did so instruct the jury over Pickard's exception.

The jury deliberated just under four hours, not very long, and returned a verdict in favor of the plaintiffs, awarding Grant and Merle Forbes \$9000.00 for damages to their farms and Grant, Merle and Ray Forbes \$4500.00, \$3000.00 to Grant and Merle Forbes and \$1500.00 to Ray Forbes, for damages to the milk business. Today's trial practitioner would call this a compromise verdict, the reasons for which are not always known. The amount of monetary damages awarded by the jury is not easily explained. It is likely that both the plaintiffs and Jackson were disappointed. One must conclude that the jury agreed completely with the plaintiffs that the Cassadaga Creek was the source of the epidemic. However, the jury clearly did not agree with the plaintiffs on damages. If it had, the verdict should have been at least \$25,000, if not more, for the

²⁹ Trial transcript.

loss to the value of the farm. Additionally, the award for damages to the dairy operation should have been \$2500 - \$3000 per year for the number of years the jury found plaintiffs had been damaged by defendant's actions.

No doubt *Forbes v City of Jamestown* was an expensive case to prosecute. There were two trials, two trips to the Appellate Division, numerous exhibits to prepare, numerous witnesses to subpoena, and expert witnesses who must have been paid at least travel expenses and perhaps for their time. And, of course, there was Jackson's fee for services. What was left for the plaintiffs must have been very modest indeed.³⁰

This was also an expensive case for Jamestown, entirely apart from the verdict. It was no doubt an impetus to Jamestown to develop a sewage treatment plan and, ultimately, to install it. After this lawsuit, several towns and a number of individuals also sued Jamestown for the contamination of Cassadaga Creek. Although Mayor Samuel Carlson, who testified at the trial, vigorously denied it, it appears that these lawsuits provided the final push to get Jamestown to plan for proper sewage treatment for the growing community and its residents.

But perhaps the most important benefit of this lawsuit was more esoteric and would reap rewards in the decades to come. As laid out by the Fourth Department after the first trial, plaintiffs' case relied on circumstantial evidence. Because typhoid bacteria are microscopic in size, there was and could be no direct proof that the epidemic was caused by typhoid bacteria in sewage from Jamestown. It was up to the plaintiffs to present the best proof available and for the jury to draw the inferences from the proof

³⁰ Many of the office records from Jackson's time as an attorney practicing in Jamestown were destroyed when he ascended to the United States Supreme Court, according to John Q. Barrett, professor of law and Elizabeth S. Lenna Fellow at the Jackson Center. Records for the *Forbes* case were apparently among those destroyed.

and reach a verdict accordingly. Jackson was able to assemble sufficient facts and to establish liability through his experts to prove his case.

Although he couldn't have known how valuable this experience was in 1925, he must have thought about lessons learned from it when he undertook the most important professional legal assignment of his career as lead prosecutor at Nuremberg. There he prosecuted individuals accused of some of the most heinous acts in the history of mankind and was compelled to rely a great deal on circumstantial evidence to convict them. While there was ample testimony to prove the outcome of their acts, proof of each individual defendant's participation was harder to show. Jackson did so, in part with circumstantial evidence, and we know the verdicts rendered by that court. Thus, the Forbes family dairy became part of history.

Author's note: Thank you to Thomas W. Schmidt, Executive Director, and Jennifer Champ, Archives and Exhibits Manager, for making available original documents regarding this case. As is not unexpected, many documents which might provide important insight into Jackson's handling of this case have been lost to time. I have concentrated on the transcript of the second and final trial in some detail in order to understand the dynamics of the courtroom, always a matter of special interest to trial lawyers. The opinions expressed and the conclusions drawn are mine and I take full responsibility for any errors others might discern.