

New Jersey Court of Errors and Appeals.

CHARLES V. MARSHALL,
Defendant in Error,

AGAINST

BURT & MITCHELL COMPANY,
Plaintiff in Error.

On Error to Hudson
Circuit Court.

BRIEF OF COLLINS & CORBIN IN BE- HALF OF PLAINTIFF IN ERROR.

The writ of error in this case is sued out to review a judgment recovered in the Hudson Circuit Court, for the sum of \$2,500 as compensation for personal injuries sustained by the plaintiff on May 12, 1906, while in the employ of the defendant.

The defendant is the owner and operator of a dry dock at the foot of Morris street, Jersey City, and at the time of the accident the plaintiff was employed by it as a ship carpenter. The workshop of the defendant adjoins the dock; in the shop were various machines used in defendant's business, and among them was a circular or "buzz" saw (see cut, Ex. D-3, p. 117 of case). The table on which this saw is fastened is about two feet eight inches high (p. 13, line 24). The diameter of the saw is twenty inches (p. 47, line 15). It passes through a slot in the table about half an inch to three-fourths of an inch wide (p. 66, lines 1-15). At the time of the accident the saw was so placed in

the slot as to project four or five inches above the top of the table (p. 35, line 20 ; p. 72, line 20). The saw was operated by means of a belt and pulley connected with shafting which was run by electric power. When the power was turned on, the saw was started by shifting a belt from a loose to a tight pulley (p. 59, line 28 ; p. 63, line 25). This shafting is also connected with a *band* saw located about thirty feet from the buzz saw (p. 59, line 15).

About 7 o'clock on the morning of the accident plaintiff reported for work and was assigned to the duty of making repairs on a boat then lying in the dry dock. About an hour later he found that he needed some strips to fix a window on the boat, and he went to the shop, found the piece of wood from which the required strips could be made and looked around for the "saw-master," in order that the latter might saw the strips. At that moment the defendant's superintendent, Mr. Gerhardt, happened to come into the shop ; an employee by the name of Sacks—an extra sawyer (p. 73, line 20)—asked him to unlock the switch box, as he (Sacks) wanted to saw some lumber on the band saw. Gerhardt did so, and after turning on the power (p. 59, lines 10-25 ; p. 70, lines 10-20) told Sacks to go ahead and saw his plank (p. 59, line 30), and Sacks then started to use the *band* saw. Plaintiff was standing near with some strips of wood in his hand (p. 59, line 40). It is not quite clear from the evidence how the belt connecting the buzz saw was shifted from the tight to the loose pulley so as to start that saw running. Plaintiff denied that he started it, and said that when he went to that saw it was in motion (p. 18, lines 10-15). No one else, however, was near it and the power had only been on five or ten minutes when the accident happened (p. 60, line 10). Moreover, the superintendent testified that the buzz saw did not start when the switch was turned on (p. 71, line 15). Plaintiff says that he shoved his strip of wood through the buzz saw in the way he had seen the other men do and it passed through once ; he then started to cut the

second strip, and when he had gone about eighteen inches "the saw snapped and kicked" and he thought he would have to shove hard, so he gave a shove, his foot went out from under him and his hand was caught in the saw, cutting it and severing ~~the~~ the fingers (p. 13, lines 1-10). According to an account of an eyewitness, the accident happened as follows :

"When he (plaintiff) was getting pretty close up to the circular saw ; when he got pretty near there ; the end of the stick as I thought ; he let the stick go with his right hand ; he had hold of it with both hands ; he let go with his right hand and he made a kind of a hitch for it with his left hand ; and just as he got landed, I could not see him very clear, but when he reached with the right hand, I heard the saw ripping three times, like three rips through ; he turned around his back to the saw and had hold of his hand like that (showing) and I noticed his fingers all off" (p. 81, lines 1-20).

During the course of the trial the trial Judge announced, before the case was summed up, that he had concluded that the jury were not entitled to consider the allegation of the slippery floor, nor the allegation that the saw was out of order. That eliminated from consideration two of the three causes of the accident and left "one sole possible ground," to wit, the putting of the plaintiff to work without instructions as to the inherent dangers of the work, after he had notified the employer that he was ignorant of the work itself (p. 99). In the charge to the jury, however, still another possible ground of liability was suggested (see Point I.).

I.

It was error for the trial Judge to submit to the jury the question of defendant's liability on an issue not raised by the pleadings.

The declaration has two counts. In the first count the breach of duty charged against the defendant is that it permitted the saw to become out of repair, failed to provide proper guards, permitted the floor where plaintiff stood to become slippery, allowed said floor to become obstructed and covered with sawdust and pieces of wood, and failed to instruct the plaintiff as to the dangers attendant on the use of the buzz-saw (p. 4, line 20, to p. 5, line 10). In the second count the breach of duty charged against the defendant is that it did not take reasonable care to have the saw reasonably safe for plaintiff's use, did not take reasonable care to provide a reasonably safe place for plaintiff to work in, permitted the saw to become out of repair, failed to provide guards, and permitted the floor to become slippery and obstructed with sawdust and pieces of wood (p. 7, lines 10-35). The trial Judge permitted the jury to find negligence on a theory which was not even hinted at in the declaration, or by plaintiff's counsel, viz., that he was commanded by the defendant's president to use the buzz-saw, and that thereupon when he undertook to use it he was injured because of some danger inherent in the operation of the saw of which he did not know, to wit—"If the saw was too high above the table, and he undertook to use a thin strip of wood on it, such as this one which he was using at the time, then when the strip should be pushed so far up against the saw as to extend the entire length of that portion of the saw which rose above the table, the rising teeth on the other side of the saw were liable, if the wood had a tendency to spring together, were liable to

catch the wood, throw it upward and over back against the plaintiff as he was pushing it, and this is what happened and that as a result of that in combination with the slippery floor, or slipping on the floor as he claims he was injured" (p. 103, lines 1 to 15). No such element of negligence was charged in the declaration or suggested by plaintiff's counsel. The Court charged that the proposition above quoted must be established by the plaintiff before he could recover (p. 103, lines 15 to 20). The trial Judge seemed to think that such action on the part of the saw might be considered as one of the inherent dangers of the work of which plaintiff should have been warned (p. 99, lines 30 to 40). When such reason was suggested by the Judge as a basis of submitting the case to the jury defendant's counsel requested a direction of verdict on the ground that there was a variance between the proof and the declaration (pp. 99, 100). Exception was duly taken to that part of the charge (p. 109).

We submit that it was error for the trial Judge to submit to the jury an issue not raised by the pleadings; certainly this must be so in the absence of any application to amend. In the case of *Excelsior Electric Co. vs. Sweet*, 30 Vr., 441, it was held to be error to submit to the jury questions which were not within the issues raised by the pleading; and that if at the trial the parties have confined their controversy to the issues raised by the pleadings, the pleadings should not after verdict be amended so as to present a different issue which was first suggested in the charge of the trial Judge and submitted to the jury, against the objection of the plaintiff in error. This decision has been followed in the case of *Murphy vs. North Jersey Street R. R. Co.*, 42 Vr., 5, in which GUMMERE, C. J., says:

"It is a cardinal rule for the control of the trial Court that only those questions which are within the issues raised by the pleadings should be submitted to the jury, and a failure to observe this rule is legal error."

In that case writ of error was taken from the Essex

Circuit Court to the New Jersey Supreme Court and judgment in favor of the plaintiff was reversed on the ground that the plaintiff had failed to establish the claim of negligence set up in the declaration.

This is sufficient ground to require the Court to reverse the judgment in the case in hand, but in order that the issues between the parties may be disposed of we respectfully urge that this Court in its decision determine the merits of the controversy.

II.

There was no sufficient proof to justify the trial Judge in submitting to the jury the question of the defendant's negligence with respect to the claim suggested in the charge.

(a) Even if the question submitted to the jury could by any possibility be said to be within the issues of the pleadings, we, nevertheless, submit that there was no evidence to justify the submission of such question to the jury. We have quoted under Point I. that part of the charge in which the Court permitted the jury to find negligence against the defendant on the theory that the saw might have been "too high above the table" (p. 103, lines 1 to 20). The saw was twenty inches in diameter (p. 47, line 15). At the time of the accident it was four or five inches above the level of the table (p. 35, line 22, p. 72, line 20). The trial Judge, in submitting this possible element of negligence to the jury, evidently had in mind the testimony of the defendant's witness Coger, who stated that it would be exceedingly dangerous to cut a piece of wood such as plaintiff had with the saw set four or five inches above the table—the danger being that the

teeth of the saw would catch in the wood at the back and throw it off the table (p. 85, lines 10 to 30), but it does not follow from this that there was any negligence on the part of the defendant. The claim that the saw was out of order was removed from the consideration of the jury (p. 99, lines 10 to 20). Hence if the trial Judge was correct in permitting the jury to find negligence against the defendant because the saw was "too high" it could only be on the theory that the mere fact that the saw was four or five inches above the level of the table was in itself evidence of negligence on the part of the defendant. But it did not appear that the defendant or any of its servants set the saw in that position for the purpose of having the plaintiff use it for the purpose of sawing a small strip of wood, or that the defendant instructed him to use it while in that position, and even if it were so set by defendant, the danger of using it while in that position was obvious; and, finally, plaintiff himself admits that before the accident he had already sawed one strip of wood with the saw in the same position; the accident happened while he was cutting the *second strip* (p. 13, lines 1 to 10). Either the saw was not dangerous; or if it was, plaintiff had full opportunity to observe such danger before the accident and hence assumed the risk.

(b) Furthermore, there is no evidence to show that the fact (if it be a fact) that the rising teeth of the saw caught the wood in the back was the proximate cause of the accident. Plaintiff did not claim that the teeth caught the saw. His explanation of the accident is that *the saw snapped and kicked* and he gave it a shove and his foot went out from under him (p. 13, lines 1 to 10).

Exception was duly taken to this part of the charge (p. 109, line 20, to p. 110, line 30). We submit there was no evidence in the case to justify the submission of such question to the jury.

III.

The evidence did not justify the trial Judge in submitting to the jury the question of whether the plaintiff had been ordered by the defendant to use the saw.

The trial Judge charged the jury that there could be no recovery unless it was satisfactorily shown that plaintiff had been ordered to go and use the saw by defendant's president, Mr. Brown (p. 102, lines 10 to 30). The trial Judge frankly admitted that this was a very slender ground on which to permit the jury to take the case (p. 99, line 40). We agree that it was a *very* slender ground—so slender that we think that if the trial Judge had had all the evidence written out before him, in black and white, the case would not have been submitted to the jury at all. The evidence shows without contradiction that plaintiff was not ordered by Brown or anybody else to use that saw; in fact plaintiff's own witness, King, admitted that it was against the rules for any of the men (except certain ones specified—of whom plaintiff was not one) to use the saw. King says: "I would not be allowed to use it; it was against the rules" (p. 25, line 15). "I was told not to do it"—*i. e.*, not to use the saw (p. 27, line 29). "There was a rule that nobody was to touch it; the foreman had a lock and key on the motor" (p. 30, lines 1 to 15).

(a) The following is a summary of the evidence with respect to the conversation with Brown on which the trial Judge permitted the jury to take the case:

MARSHALL, plaintiff.

"Brown told me *the day before* not to wait, to go ahead and saw" (p. 12, line 18). The witness then stated in answer to the question "Did he tell you to use the saw?" "He told me to go ahead and saw; he opened the box and started the motor. I didn't

know how to start the saw. This was about twenty minutes past eight" (p. 12, lines 20 to 30). (The context shows clearly that the witness in making this answer was referring not to Brown but to the superintendent, Gerhardt, who unlocked the motor box on the morning of the accident.) Then, in answer to the question as to how long before the accident Brown told him to use the saw, he answers: "*Two days before that* I was supposed to do a job on a boat, and I stood waiting for the saw-master, and he wasn't there. Brown saw me and asked me why I didn't go ahead with the work. I told him I didn't know how to use the saw, and he said, anybody can do that and *he walked away*. Then I asked a young man named Sacks to come and saw for me; I was afraid of the saw, and he done the sawing that day for me" (p. 14, lines 10 to 20). Brown died before the trial (p. 16, line 22). "Q. What was it Brown said to you the day before? A. Told me not to stand around looking at it but to go ahead and do the work, when I was waiting for Mr. Betz, the saw-master." "Q. Did you go ahead and do the work? A. *No, sir; I watched until Mr. Brown went away*. I was afraid to saw, and I watched for Mr. Sacks to come" (p. 19, lines 1 to 15).

It is apparent that this testimony did not prove that Brown ordered the plaintiff to use that saw. Brown simply remarked, "anybody can do that," and then told plaintiff not to stand around, but to go ahead and do the work. This did not mean that plaintiff was to go ahead and use the saw. At most, it was simply a direction by Brown to get the work done as soon as he could, and if necessary, to get the saw-master. That the remarks of Brown were not regarded by the plaintiff himself as an order is shown by the very fact that he did not actually use the saw at that time. He says that he "watched" until Brown went away (p. 19, line 10), and even then he did not use the saw, but called upon Sacks to saw for him (p. 16, line 5; p. 19, line 15). Moreover, it

will be observed that plaintiff did not tell Brown that he did not know how to use the saw. Plaintiff says that he was afraid of the saw, but he did not claim that he told Brown anything about it (p. 14, line 25).

(b) But even if the cursory remarks of Brown two days before the accident could by any possibility be understood by plaintiff as a command to use that saw, there is no evidence whatsoever to justify the plaintiff in assuming that any command to use the saw was given to him at the time of the accident. Following is the evidence on this point :

MARSHALL, plaintiff. "Saw Gerhardt on morning of the accident while I was upstairs getting that piece of wood. Saw him come down. I asked him where Frank was (referring to Frank Betz, the saw-master). He shook his shoulders; I don't know, he said. That's all he said, then he walked away. He said, 'go ahead'; he called Mr. Sacks and he says 'go ahead,' and he started the motor box. Sacks was about thirty-five or forty feet from where I sawed. Gerhardt was between us and said, go ahead." "Q. Did he call you by name? A. No, sir" (p. 18, lines 20 to 35). (NOTE. There is evidently a clerical error on page 18, line 34, in that the words "I said" should be "He said").

FRANK SACKS, ship carpenter. "Q. Did Gerhardt say anything that you heard after he turned on the power? A. He told me to go ahead and saw my plank; he said 'go ahead, Frank.' That is all that I remember. Marshall was standing a little way from me" (p. 59, lines 30 to 40). On cross-examination: "Q. What was it the Superintendent said? A. He told me to go ahead and saw my plank, and he opened the door for me (meaning, of course, the door of the motor box). He said, 'go ahead, Frank.' I am sure of what he said" (p. 62, line 30, to p. 63, line 10). "I didn't hear Gerhardt say anything to anybody else, only he opened the lock of the motor and told me to go ahead *with mine*" (p. 66, lines 35-40).

GERHARDT, Superintendent. "On the morning of the accident I unlocked the switch box. Sacks asked me to unlock it for him; he wanted to saw a piece of lumber. Said he wanted to use the *band* saw. I unlocked the box and told him to go ahead. Do not remember seeing Marshall. *I did not say anything to anybody except to Sacks.* I was standing near the switch box when I spoke to him. The box is kept locked to keep the men away from the saw" (p. 70, line 10, to p. 71, line 5). "Two or three days after the accident saw Marshall and he said that he had run around the yard looking for Betz and couldn't find him, and went in and started the saw and sawed the strip himself" (p. 72, lines 35 to 40). On cross-examination: "When I turned on the power I said go ahead, Frank, or go ahead, I don't know which. I think my face was toward the box. I did not see Sacks do the sawing, I went right out" (p. 75, lines 10 to 30). "Did not see Marshall" (p. 76, lines 20 to 30).

From this evidence it is clear that Marshall was not directed by the superintendent to use the circular saw. The superintendent opened the box at the request of Sacks, and it was undisputed that the superintendent said "Go ahead, Frank" (except that plaintiff said that he did not *hear* the superintendent mention any names (p. 91, line 10). Gerhardt did not speak to the plaintiff at all, and did not even see him in the room, or know that he was there.

Finally, according to the plaintiff's own statement, made before trial, Gerhardt told "*the other man*" to go ahead and saw his piece of wood, but did not tell plaintiff to do it (p. 114, lines 20 to 30). It is very significant that plaintiff was recalled to explain this statement, and his attention was directed to it in detail, and he denied certain parts of it, but his counsel took the utmost pains not to ask him whether he has said that Gerhardt told "*the other man*" to go ahead (pp. 90, 91). It cannot be that plaintiff's counsel overlooked a point so vital as this to plaintiff's case, and he is entitled to credit in not giving plaintiff an opportunity

to commit perjury by denying this part of the statement. By comparing the statement on page 114 with the denials of plaintiff on pages 90 and 91, it will be observed that plaintiff denies all of the statement except this particular part on which he was not questioned. The inference is obvious.

We submit that under this evidence the trial Judge was not justified in submitting to the jury the question of whether plaintiff had been ordered to use this saw at the time of the accident. The trial Judge charged the jury on this point as follows :

“ You will recollect that the plaintiff testified
 “ about that. That Mr. Brown had, a day or two
 “ before that, told him not to saw these things by
 “ hand, but go and use the saw ; and the plaintiff
 “ claims that he said to Mr. Brown at that time
 “ that he didn't know anything about the buzz
 “ saw, didn't like to do it, and that in effect Mr.
 “ Brown told him to go and do it anyhow ; what-
 “ ever the evidence was in that regard. If that is
 “ not satisfactorily shown to you by the plaintiff,
 “ there can be no recovery in this case, because
 “ the plaintiff must show you that he was told to
 “ use that saw by somebody who had authority to
 “ make him do it or to decide whether he should
 “ do it or be discharged. *It all rests on this con-*
 “ *versation with Mr. Brown.* That is the first
 “ proposition that the plaintiff must establish
 “ before he can pass any further on the road to a
 “ recovery in this case.”

The trial Judge was mistaken in stating that the plaintiff told Brown that he did not know anything about such claim. Perhaps we ought not to insist on this strictly as defendant's counsel seems to have been under the same misapprehension as the Judge (p. 108, line 20). This, however, does not affect the point that the evidence did not justify the Judge in charging that plaintiff protested to Brown against using the saw ;

and this being so, the plaintiff's case, under this charge, necessarily fails. Of course, the verdict cannot be sustained on any theory except that on which the question of liability was submitted to the jury. As there was no evidence to sustain such a finding of negligence, we respectfully submit that a verdict should have been directed for the defendant.

IV.

There was no duty on the part of the defendant to warn the plaintiff of the dangers incident to the use of a buzz-saw.

Plaintiff was forty-four years old, and had been a carpenter about eight months. He had worked for defendant four or five weeks repairing boats (p. 15, line 30).

In *Smith vs. Irwin*, 51 N. J. L., 507, plaintiff was injured while working on a circular saw, and the defendant was held liable, but solely on the ground that plaintiff was an "inexperienced boy, less than seventeen years old," and had not been warned or instructed. The cases are clear that the defendant under the circumstances of this case was not legally bound to warn plaintiff not "to monkey with the buzz-saw." The question of the master's duty to warn the servant has recently been under consideration in a case in the Supreme Court :

"Must an employer assume without actual notice that an adult, employed as a laborer around machinery, is ignorant of the dangers naturally attendant upon his work, so that if one of those dangers escapes the observation of the employee while engaged in a particular act and thus

causes injury to him, the employer is responsible?" (Murphy vs. Rockwell Engineering Co., 70 N. J. Law, 374, 375).

In that case the plaintiff was employed as a laborer in a machine shop, and on one occasion was directed to clean a drill press. He took a piece of waste and was wiping the oil off the outside of the machine when cog wheels inside of it caught the waste and drew it in and his finger. The wheels were revolving and the plaintiff knew that the machine was in operation while he was cleaning it, but did not notice the hole through which the waste and his finger were drawn, as the machine stood in a dark corner. It was claimed that the employer should have warned him of the danger. The case was argued before the Chief Justice and Justices DIXON, HENDRICKSON and SWAYZE, and in the opinion (written by Justice DIXON) the Court says, in answer to the question quoted above :

" Under the authorities in this State there is no such obligation resting on the employer. By the contract of hiring the employee represents that he understands and assumes the ordinary risks of the service. In *Harrison vs. Central Railroad Co.*, 2 *Vroom*, 293, 298, Chief Justice BEASLEY said : ' The only view consistent with reason is that the servant undertakes to bear the risks naturally attendant on the business he assumes.' In *Foley vs. Jersey City Electric Light Co.*, 25 *Id.*, 411, 414, Justice VAN SYCKEL stated the matter thus : ' The immunity of the master rests upon the contract of hiring. The master says to the servant : ' You understand fully the nature of the employment and the dangers attending it ; will you enter upon it ? ' The servant says : ' I accept it.' And the law implies that he accepts it with all the risks incident to it, without regard to the magnitude of the danger.' Language to the same effect is found

in *Electric Co. vs. Kelly*, 28 *Id.*, 100 ; *Conway vs. Furst*, *Id.*, 645 ; *Western Union Telegraph Co. vs. McMullen*, 29 *Id.*, 155 ; *Johnson vs. Devoe Snuff Co.*, 33 *Id.*, 417 ; *Coyle vs. Griffing Iron Co.*, 34 *Id.*, 609 ; *Smith vs. Erie Railroad Co.*, 38 *Id.*, 636 ; *McDonald vs. Standard Oil Co.*, 40 *Id.*, 445.

“ A doctrine, limiting the adult workman’s assumption of ordinary risks to such as his experience had taught him to anticipate, would cast upon the employer the duty of probing the previous life of every such employe, and be utterly impracticable as a rule of responsibility. The law places upon every adult the duty of first ascertaining the nature of the occupation in which he proposes to engage, and then determining for himself whether his experience is adequate for his security against the dangers ordinarily incident thereto. This duty rests upon him not only when he enters into employment, but also at every stage of his service, requiring him to refuse to act in matters beyond the range of his experience or else to take the risk of the dangers naturally incident to his act. The employer cannot be held responsible for such dangers in the absence of notice that the experience of the workmen was less than his contract implied.”

In the case in hand there is no evidence to charge defendant with notice that the plaintiff lacked experience or did not know how to run the saw. Plaintiff said he was afraid of the saw (p. 14, line 22), but he does not claim that he informed defendant of his fear or protested to defendant against using the saw.

The cases are discussed and the general rule stated as follows, in *Vol. 1, Labatt Master & Servant*, p. 531, *et seq.* :

“ The master is not required to point out dangers which are readily ascertainable by the servant himself, if he makes an ordinarily careful use of

such knowledge, experience and judgment as he possesses. The failure to give instruction, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger, or as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions and there was no concealed danger which could not be discovered. The principle upon which the absence of any obligation to instruct is thus predicated is applicable whether the risk in question arises from the intrinsic qualities of the material substances by which the safety of the servant may be affected while he is engaged in the performance of his duties, or those which are due to using or arranging those substances in some way which renders them more than ordinarily dangerous for a longer or shorter period, or those which result from the operation of natural loss upon those substances."

In *Carrington vs. Mueller*, 65 N. J. L., 244, it is said that the duty to instruct is secondary and does not arise if the danger is obvious (p. 247).

"There is no duty on the part of the master to instruct the servant when the latter is mature, intelligent and experienced, and the master has no notice or reason to believe that the servant is not thoroughly competent and acquainted with the dangers of his employment" (*King vs. Morgan*, 109 Fed., 446).

An employee of mature years is presumed to be acquainted with the dangers attending the service in which he engages (*Kohn vs. McNulta*, 147 U. S., 238. *Peterson vs. Coke Co.*, 149 Ind., 260; 49 N. E., 8. *Fletcher vs. Traction Co.*, 190 Pa., 117; 42 Atl., 527).

In the case of *Cracraft vs. Bessemer Co.*, 59 Atl., 432 (Penna.), plaintiff was injured by allowing his hand to come in contact with a buzz-saw, and brought suit on the theory that he had not been sufficiently warned of the danger of cleaning out the box which surrounded the saw. The Supreme Court of Pennsylvania

said that the Court below erred in not directing a verdict for the defendant, and on the question of warning remarked as follows :

“ If there is any piece of machinery which is
 “ obviously dangerous, and which carries its own
 “ warning to keep away from it, it is a circular
 “ saw. To the ordinary mind it stands as a sym-
 “ bol of danger. Nothing is more proverbially
 “ dangerous to those who come in contact with it.
 “ Surely the plaintiff, who was of an age and a
 “ degree of physical and mental capacity to war-
 “ rant the presumption that he could perform the
 “ simple duties required of him, did not need to
 “ be warned against touching the saw with his
 “ hand. That he appreciated the danger is shown
 “ by the fact that he used the stick with which to
 “ clear out the obstructions in the box. As the
 “ trial judge said to the jury, the defendant was
 “ not bound to tell the plaintiff that if he put his
 “ hand against a buzz-saw it would cut it off. Nor
 “ was it required to point out to him the number-
 “ less ways in which it would be possible for him
 “ to come in contact with the saw and receive
 “ injury. ”

(a) The danger of using the buzz-saw was obvious and the risk thereof was assumed by the plaintiff.

It is difficult to imagine a case where the danger would be more obvious than the case in hand. There was nothing concealed about the buzz-saw or its method of operation. Even if the plaintiff was not a carpenter, and even if he never had any experience, nevertheless his case, we submit, must fail under the doctrine of the assumption of an obvious risk.

The authorities in this State are very clear on this subject.

“ The servant must use his eyes to see that
 “ which is open and apparent, and if he fails to

“do so, he cannot charge the consequences upon
“his master.”

Dillenberger vs. Weingartner, 64 N. J. L.,
292.

We also refer to the following New Jersey cases:
Tompkins vs. Machine Co., 70 N. J. L., 330; *McDon-*
ald vs. Standard Oil Co., 69 N. J. L., 445; *McAn-*
drews vs. Burns, 39 N. J. L., 117; *O'Brien vs. Ameri-*
can Dredging Co., 53 N. J. L., 391; *Foley vs. Jersey*
City Electric Light Co., 54 N. J. L., 411; *Conway vs.*
Furst, 57 N. J. L., 645; *Smith vs. Irwin*, 51 N. J. L.,
507; *Western Union Co. vs. McMullen*, 58 N. J. L.,
155; *Johnson vs. DeVoe Snuff Co.*, 62 N. J. L., 417;
Coyle vs. Griffin Iron Co., 63 N. J. L., 609.

For application of this principle to cases of a slip-
pery floor, see: *Bender vs. N. Y. Glucose Co.*, 72 N. J.
L., 218; *Feeley vs. Pierce Co.*, 161 Mass., 426; *Mur-*
phy vs. American Rubber Co., 159 Mass., 266; *Klein-*
est vs. Kunhardt, 160 Mass., 230.

For application to “buzz-saw” cases, see:

Cracroft vs. Bessemer Co., *supra*; *Hazen vs. West*
Superior Co., 64 N. W. (Wis.), 857; *Prentiss vs. Kent*
Co., 63 Mich., 478, 30 N. W., 109; *Luckey vs. Sofield*,
57 Atl., 870 (N. J. Supreme Court); *Peterson vs. Sherry*
Lumber Co., 90 Wes., 83, 62 N. W., 948; *Tenonty vs.*
Boston Mfg. Co., 170 Mass., 323; *U. S. Rolling Co. vs.*
Chadwick, 35 Ill. App., 474; *Hagele vs. Wilson*, 5
Wash., 160, 31 Pac., 469; *Burke vs. Thompson Meter*
Co., 18 N. Y. Supp., 463 (*affirmed* 135 N. Y., 651).

Even if the servant undertakes the work under the
direction of his superior, he nevertheless assumes the
risk, if he appreciates the danger of the work (*Chicago,*
etc., R. Co. vs. Crotty, 4 L. R. A. (N. S.), 832, and
cases cited).

So here plaintiff says he was “afraid” of the saw,
and even when Brown told him a day or two before
the accident to go ahead and do the work, he says he
watched until Brown left and then asked one of the
other men to saw for him.

(b) If plaintiff did not know of the danger of using the buzz-saw, it was his duty to inquire.

If it is conceivable that the danger of having one's hand come in contact with a buzz-saw is not obvious, and that plaintiff did not appreciate the danger or understand how to run the saw, then he should have made inquiry. The failure to make inquiry, under such circumstances, will bar him from recovering (*1 Labatt on Master and Servant*, p. 1298, citing *Millar vs. Madison Car Co.*, 130 Mo., 517, 31 S. W., 574).

(c) Plaintiff in fact knew of the danger because he had used the buzz-saw before the accident and had seen others use it.

Betz says that he had seen Marshall use the saw when he (Betz) was using the band saw. He was sawing a board and got along all right (p. 37, lines 10 to 20). This was not the only time that he had seen plaintiff use the saw. He used it more than once (p. 45, lines 20 to 35). Plaintiff admits that he had looked at men who were working on such a saw (p. 14, line 28), although he claims he had never run the saw himself (p. 13, line 20). He also admits that when Sacks used the saw a day or two before the accident, he stood around and watched him (p. 19, line 15). In his statement he says, "I have worked on this saw a number of times in the past four weeks" (p. 115, line 5). He denies this indirectly, but explains it by saying that he worked around the saws with Betz (p. 91, line 35).

Even, if plaintiff had never used the saw before, its operation is not so intricate or difficult that he could not readily learn how to use it by watching others.

He was adult, with several months' experience as a carpenter. If he undertook to use the saw, without objection, the master is not liable, as he had sufficient knowledge and experience to comprehend the danger. *Reed vs. Stockmyer*, 74 Fed., 186; *Hanson vs. Ham-mell*, 107 Iowa, 171, 77 N. W., 839; *Connolly vs. Eldredge*, 160 Mass., 566.

(d) *The trial Judge erred in charging the jury that it was the duty of defendant's president to warn plaintiff of the dangers that were natural to the use of the buzz-saw.*

This part of the charge reads as follows :

"The case here is modified a little by the fact, as the plaintiff alleges, that he was told to do something that was outside of his employment as a ship carpenter, to go and work this saw. Even then, if he did it without any complaint; if he didn't say to the employer that he was ignorant of the buzz saw, there was no duty on the part of the employer to warn him of the danger. If he told the employer, Mr. Brown, that he was ignorant of the buzz saw and didn't like it, as he claims to have done, and if Mr. Brown insisted that he should go to work on it whenever he had work of this kind to do, then it would be the duty of Mr. Brown to warn him of any dangers which were natural to the use of that buzz saw, and which were not naturally and reasonably obvious to a reasonable man in the position of the plaintiff" (p. 104, lines 18-35).

Exception was duly taken thereto.

Page 111, line 15 to page 112, line 30.

We submit that this charge was erroneous for several reasons :

(1) Plaintiff did not testify that he had told Brown that he was ignorant of the buzz-saw.

(2) The evidence did not show that plaintiff was told to work the saw or that Brown insisted that plaintiff should work on the saw.

(3) There were no dangers incident to the use of that saw which were not "reasonably obvious" to a man of plaintiff's experience.

(4) The charge enlarged the measure of defendant's duty "to take *reasonable care*" to warn plaintiff to that of an absolute obligation so to do.

(5) The declaration does not allege that plaintiff had been told to do something "outside of his employment."

(6) According to plaintiff's own testimony the work of sawing was not part of his duty, and if he undertook it without orders to do so, he cannot hold defendant liable for the resulting injury.

V.

The evidence did not justify the trial Judge in leaving to the jury the question whether there was any danger inherent in the operation of the saw, which the plaintiff could not discover by the exercise of reasonable observation.

The part of the charge to which this exception was taken will be found on page 102, line 32, to page 103, line 20. Exception was noted thereto (pp. 109, 110).

We submit that on several grounds it was error for the trial Judge to leave this question to the jury:

(1) There was no inherent danger in the operation of the saw. The evidence to which we have already referred shows plainly that there was nothing peculiar about the saw. Nothing was concealed. There was plenty of light. Plaintiff admits that he had often seen the saw in operation.

(2) Whatever danger there might have been, plaintiff *could* easily have discovered by observation.

We have shown under Point IV. (a) that the danger was obvious—so obvious that any person of common sense could not have failed to observe it. Hence there was no question for the jury to pass on as to whether or not plaintiff could or could not have discovered the

danger by "reasonable observation." This question was for the Court and not for the jury to determine.

(3) Plaintiff had, in fact, discovered any danger that might have existed. He admits that he had frequently seen the saw in operation, and if there was anything peculiar about it he had full opportunity to learn it. He was an experienced carpenter and could not have failed to observe how the saw was operated while he was watching the saw-master use it.

VI.

The element of negligence on which the trial Judge permitted the jury to base its verdict was not the proximate cause of the accident.

The direct cause of the accident, according to plaintiff's evidence, was the fact that his foot slipped on the floor (p. 13, line 10). But the Court eliminated from the consideration of the jury the question of the slippery floor (p. 103, line 20). This was put on the ground that the fact that the floor was slippery was just as obvious to the plaintiff as it was to anybody, and, therefore, the defendant could not be held accountable because of such fact (p. 99, lines 10 to 15).

The trial Judge, however, permitted the jury to find negligence against the defendant on a theory that the saw was "too high," but according to plaintiff's own evidence, that fact (if it be a fact) was not the proximate cause of the accident. The trial Judge suggested that the plaintiff's injury may have been caused by a combination of both the slippery floor and the fact that the board was thrown against him by the action of the saw (p. 103, lines 20 to 30). The difficulty, however, with this charge we respectfully submit is,

that the plaintiff's case was based solely on the theory that the accident was *caused by the slippery floor*; that is the explanation that he himself gave of the cause of the accident. There is nothing in the evidence to justify the speculation of the trial Judge that the injury may have been produced by a combination of a slippery floor with some other cause.

VII.

It was error to leave to the jury the question whether the boards produced by the plaintiff were those that were in use near the saw table at the time of the accident.

In order to meet plaintiff's claim that the boards were slippery, defendant took up the boards that had been in front and on the side of the table at the time of the accident, and offered them in evidence. That they were the identical boards then in use was conclusively proved (Betz, pp. 36 to 38; Strong, p. 57; Haley, p. 67). Plaintiff himself admitted that the boards under the saw table looked like those produced in Court, except that the former were worn smooth (p. 93, line 18).

It was conceded by plaintiff's counsel that if they were the right boards, it could not be claimed that they were slippery (p. 107, lines 1-5). The trial Judge then permitted the jury to decide the question whether they were the right boards (p. 107, line 5), notwithstanding the positive evidence of several witnesses that they were such. Permitting the jury to find that they were not, could not have failed to prejudice defendant, notwithstanding the charge that the slippery floor of itself would not entitle plaintiff to a verdict.

If the jury thought that defendant was attempting to deceive them by producing the wrong boards, that afforded a sufficient reason to disbelieve defendant's other testimony, and provided a ready excuse to find in favor of the plaintiff, notwithstanding the overwhelming evidence in favor of defendant on other points.

VIII.

The evidence shows that the accident was caused by the contributory negligence of the plaintiff.

According to McLaughlin—an eyewitness—plaintiff “made a kind of a hitch with his left hand;” he dropped his right hand off the stick and then kind of lurched over that way.” Witness was twenty feet away; there was a good light. Plaintiff's foot did not slip (p. 81). Plaintiff himself admits that “he gave a shove” (p. 13, line 5). It is quite evident that plaintiff's hand was caught while he was leaning over the saw—perhaps for the purpose of holding the stick more firmly on the saw table—and the accident was due simply to the fact that he did not realize how close to the saw his hand was. He may have momentarily forgot the danger, but, if so, that does not excuse him from suffering the penalty of his own negligence.

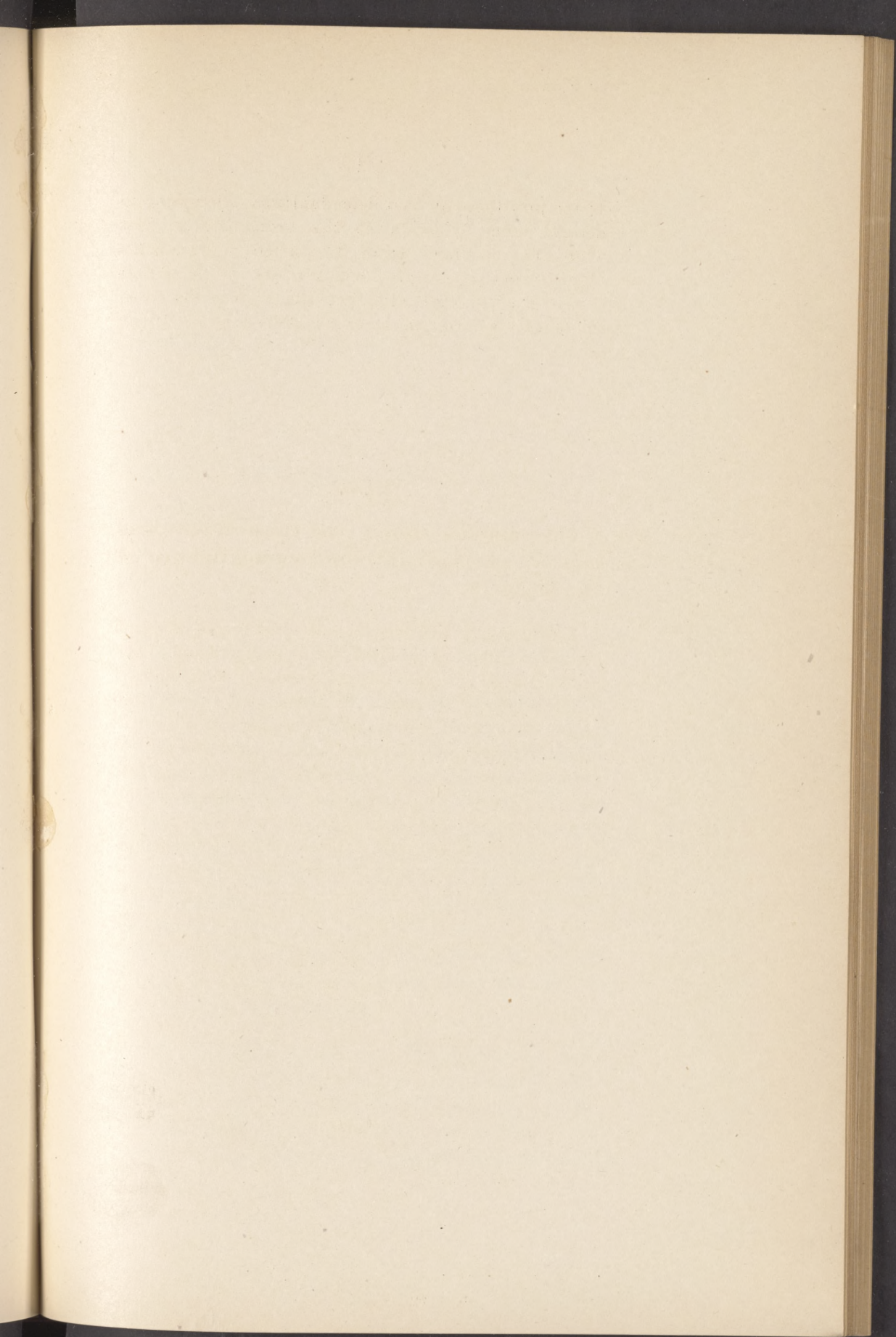
COLLINS & CORBIN,

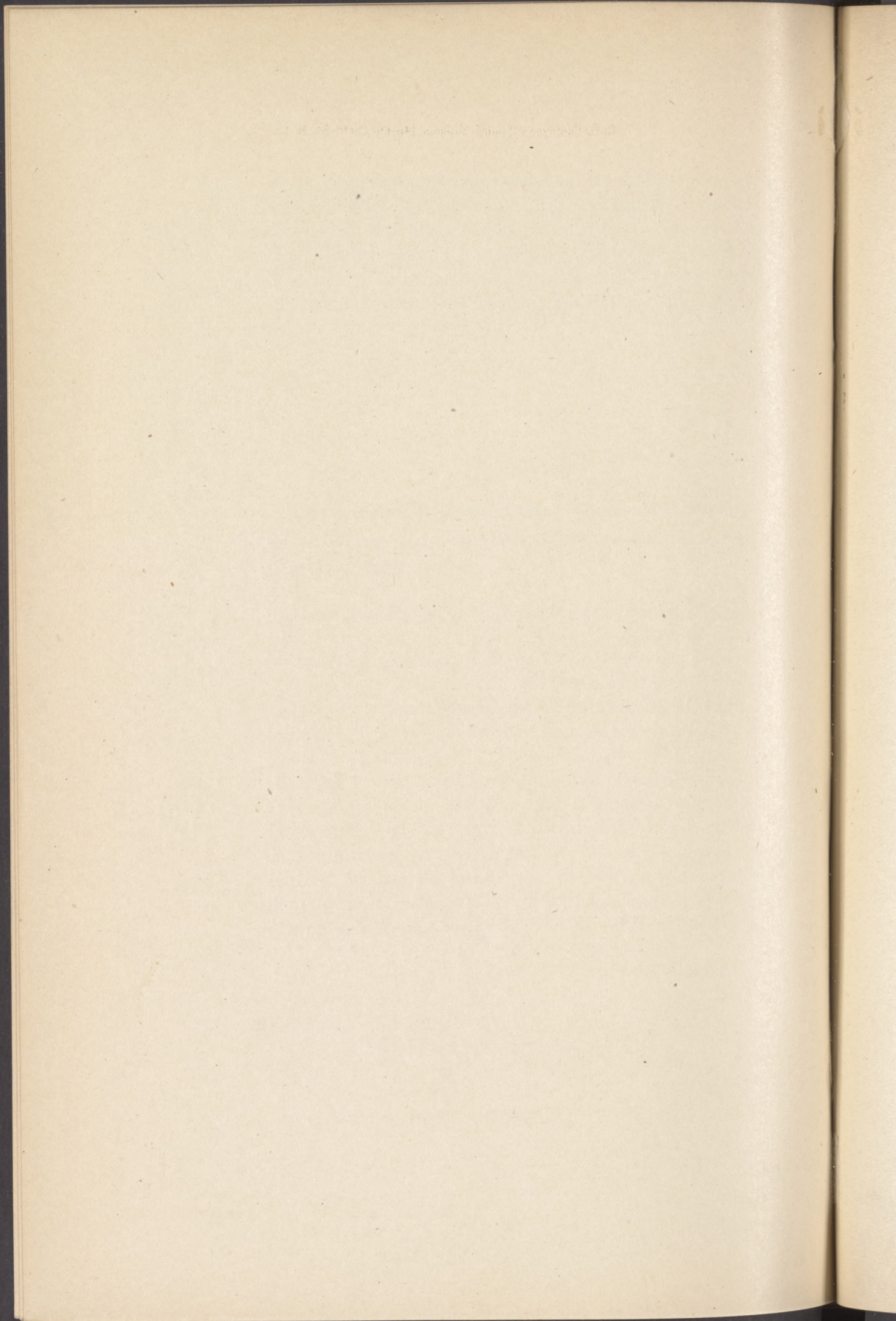
Attorneys of Plaintiff in Error.

GILBERT COLLINS,

GEO. S. HOBART,

Of Counsel.





NEW JERSEY COURT OF ERRORS AND
APPEALS.

CHARLES V. MARSHALL,)		
Defendant in Error,)	In Tort.	10
vs.)	On Error to	
BURT & MITCHELL COM-)	Hudson County	
PANY,)	Circuit Court.	
Plaintiff in Error.)		

BRIEF FOR DEFENDANT IN ERROR. 20

Plaintiff had been employed by defendant company in its ship-yard, at Jersey City, as a carpenter for four or five weeks, and on May 12th, 1906, the date of the injury for which this suit was brought, was making repairs on the "Burmese," (p. 11). At about eight o'clock in the forenoon plaintiff needed some strips to fix a window on the "Burmese," and went to the buzz-saw in defendant's factory to have 30 the saw-master cut the strips. The saw-master was frequently absent, and was absent on this occasion. Plaintiff knew nothing about using the saw, had had no experience with a buzz-saw, and was not instructed how to use the saw.

The day before the accident Mr. Brown, the president of the defendant company, saw plaintiff waiting at the saw for the saw-master, who was absent; and the president told plaintiff not to wait, to go ahead and saw. Whereupon plaintiff told him he did 40

not know how to do it; and on the day of the accident William Gerhardt, the superintendent of the defendant company, opened the switch-box and turned on the electric motor, starting the saw, and told plaintiff to go ahead and saw (p. 12).

Two days previous to the accident plaintiff was working on a boat on the dry dock and came to the
 10 saw and was standing there waiting for the saw-
 master. Mr. Brown, the president of the defendant company, same to plaintiff and asked him what he was standing there for, and why didn't he go ahead with the work. Plaintiff said he did not know how to use the saw, and Mr. Brown replied: "Anybody can do that," and walked away (p. 14).

Plaintiff was not allowed to use the hand-saw, as it took too long, and he was told to hurry up and get
 20 out the work; that defendant wanted it out right away.

The saw-master, whose duty it was to do the sawing, was one Betz. He was frequently absent from his duty, and on the day of the accident was absent and could not be found by the plaintiff, who looked for him.

Plaintiff sawed one strip and started to saw a sec-
 30 ond, and when he got about eighteen inches sawed the saw snapped and kicked. Plaintiff shoved the wood up against the saw and it made twice as many revolutions, and plaintiff's foot slipped on the slippery, glassy floor (covered with sawdust), on which he was standing, and his hand came down on the saw, cutting off his fingers.

Plaintiff started to use the saw just as he found it, without raising or lowering it. He did not know how to raise or lower it, and did not know when it
 40 was necessary so to do (p. 17).

Plaintiff did not start the saw; he did not know how to start it (p. 18).

The saw, at the time of the accident, was raised between four and five inches above the top of the table. The floor at the saw, where the person who used it was obliged to stand, had, through long usage, become slippery, like glass, and was covered with sawdust and sticks, so its slippery, glassy condition could not be observed.

10

Mr. Betz testifies for the defendant (pp. 35, 36):

“Q. What is meant by a saw kicking?”

“A. When you saw a piece and the saw is set too high for the piece, as the teeth come up it is bound to catch the piece and throw it up, the same as this: Here is my saw coming and the teeth is up too high; it will catch that and throw that piece, raise it up from the table; that is when the saw is too high.

“Q. Look at this piece of wood, which the plaintiff²⁰ says is the one he was sawing at the time; what would you say is the thickness of that?”

“A. Half an inch.

“Q. How high should the saw be for that piece of wood?”

“A. That saw should be no more than half an inch above the table.

“Q. Why so?”

“A. The only thing I can see is to protect yourself; keep it from kicking.³⁰

“Q. Is there any such thing as a saw, when it starts to cut through the wood, stopping or arresting its speed, and starting up again?”

“A. It is according to the speed you have; if you have a heavy stick and shove heavy on the stick, you are bound to stop the saw; if you feed the saw too heavy by hand, you will stop her; that is because you feed it too fast; pushing faster than the saw can go through it.”

The case is one for the consideration of the jury: 40

I.

The defendant company (the master) knew, or should have known, of the existence of the perils concerning which it was its duty to enlighten the servant. It knew that a saw set up too high, as the saw was when plaintiff used it, would catch the wood and throw it up; the saw should not have more than a half
 10 inch above the tabel. (Mr. Betz, p. 35).

This is not an obvious risk.

Hanson v. Ludlow, 162 Mass. 187.

II.

The defendant company, through its president, knew that the plaintiff was excusably ignorant of the danger to which his injury was due, and by reason
 20 of such ignorance was exposed to an abnormal risk over and above that which he was presumed to contemplate as incidental to his employment as a carpenter. The defendant would not allow plaintiff to use a hand-saw, as it would take too long, and thus decrease defendant's profits. Defendant ordered plaintiff to use the buzz-saw, which placed upon plaintiff a risk of injury, which he was not presumed to contemplate as incidental to his employment. If
 30 plaintiff had not used the buzz-saw, Mr. Brown, the president, who gave the order, could and undoubtedly would, have discharged plaintiff.

III.

Plaintiff did not know of the perils incident to the operation of the buzz-saw, and was not instructed by his master.

Plaintiff had never used a buzz-saw or circular saw, and had no experience or knowledge concerning its use. Neither the president nor superintendent, in ordering plaintiff to use the saw, instructed
 40

him as to its use. He did not know how to raise or lower it, nor did he know that it should have been lowered to do the kind of work which he was attempting to do upon it; nor did he know that it would kick unless lowered for that work:

IV.

The defendant, knowing that plaintiff was ignorant of the use of the buzz-saw, and was ignorant of the perils incidental to its use, ordered him to operate it. Plaintiff informed the president of the defendant company that he did not know how to use the saw. The defendant is liable.

Tompkins v. Marine Co., 41 Vr. 330.
Smith v. Ciferando 13 Vr. 474
 V.

The floor on which plaintiff had to stand while using the saw was slippery and glassy. Plaintiff's foot slipped on this slippery floor when the saw kicked. The floor was covered with sawdust, and its condition could not be observed. The defendant was negligent in maintaining a floor of this dangerous character where anyone standing on it was likely to be precipitated against a buzz-saw around which there were no guards or protection. Outside of its duty to instruct the plaintiff in the operation and use of the saw, defendant owed the duty of using reasonable care in furnishing plaintiff a reasonably safe place to work.

The motions for non-suit and direction of verdict were properly denied.

In *Nelson Mfg. Co., v. Stolzenburg*, 59 Ill., App. 628, an employe was instructed by defendant's superintendent to place a belt on the pulley of a circular saw while in motion. The plaintiff was not accustomed to working with rapidly moving machinery, 40

and was not warned by the superintendent of the danger incident to such work.

It was held that the plaintiff could recover for injuries sustained while so engaged.

In *Bibjian v. Woonsocket Rubber Company*, 41
 10 N. E. Rep. 265, it was held that an employer who
 knows that a need of warning an inexperienced ser-
 vant working on a dangerous machine has arisen, is
 bound to give it though the danger arise from the
 negligence of a fellow-servant. One just commenc-
 ing to operate a machine for compounding rubber,
 under the charge of an experienced man, cannot be
 held, as a matter of law, negligent for continuing to
 feed the rubber to it in the usual manner, with his
 hands, notwithstanding the sudden falling through
 20 the cylinders of the machine of pieces of rubber,
 where this would indicate to an experienced man,
 but not to plaintiff, that the cylinders were too far
 apart and that there was increased danger there-
 from; and the evidence authorized a finding that on
 the falling through of the rubber, he, by a look, ap-
 pealed to the one in charge of him for advice, and
 the latter, by merely laughing, in effect, instructed
 him to go on as before.

30 In *James vs. Rapids Lumber Company*, 44 L. R.
 A. 36, plaintiff was working in the employ of the de-
 fendant company as a watchman and lumber grader;
 and while so employed he was ordered to go to work
 on a machine known as an edger, and upon going to
 work at the edger and taking hold of the first piece
 of lumber from it, his left hand was cut off at the
 wrist. The Court held that it is the duty of the mas-
 ter to give warning of danger to an inexperienced
 employee not informed of the danger, who is placed
 40 in charge of dangerous machinery.

When defendant's president was notified that plain-
 tiff did not know how to use the saw, he did not instruct
 him but deceived the plaintiff and led him to believe there
 were no obscure dangers by saying, "Anybody can do that."

When an employer engages one to perform a dangerous service which requires caution and the exercise of peculiar skill knowing that he is without experience and ignorant of its dangers, it is the duty of the employer to give the employee suitable instructions and warnings as to the dangers he is likely to meet in the performance of the service he is engaged in and is required by the employer to perform.

Reynolds vs. B. & M. Co., 64 Vt., 66.

10.

An employee engaged in work new to him should be instructed in it, and if he is not acquainted with the latent dangers incident to it, they should be explained to him that he may, so far as is consistent with the proper performance of it, avoid them; and in such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not charged with the assumption of the risks involved in the failure to provide them.

20.

Bannon vs. Lutz, 158 Pa., 166.

In *Hanson v. Ludlow Mfg. Co.*, 162 Mass., 187, (38 North Eastern Reporter, 363), Justice Barker says:

'The particular danger of which the plaintiff contends that he should have been warned, arose from the fact that objects which come in contact with the rear of a circular saw when it is in operation may be suddenly and forcibly thrown upward and forward. The saw-teeth which at a given instant are just above the table at the back of the saw, have a rapid upward and forward motion which tends to carry with them objects which they touch and such objects may be so thrown as to fall upon the front of the saw. The plaintiff was sawing boxwood logs into blocks about one inch and a quarter thick and some of the logs were so large that the saw would not entirely sever them. These he took from the table by moving

30.

40.

them transversely upon it behind the saw until he could bring them forward, when, with a hatchet, he detached the partially severed block. A log which he was thus manipulating behind the saw suddenly touched it and was thrown suddenly forward carrying the plaintiff's hand which fell upon the saw and was hurt. While there may have been other and perhaps safer ways of doing his work, the evidence
10 tended to show that he had but little experience in cutting the blocks, and we cannot, as a matter of law, say that in using it, the plaintiff was not in the exercise of due care. The general danger of contact with a circular saw in operation is of course obvious. But the particular danger by which the plaintiff was hurt is not one which is apparent. The saw-teeth
20 move with such velocity that they are indistinguishable. Objects which come in contact with the front of the saw in its ordinary use are not thrown upward, but by its action are held in contact with the table. The fact that objects which touch the opposite side of the saw will be affected in a different manner, and one attended with danger, although easily understood from explanation, and readily learned by experience, is not of itself plain and obvious, but is one of those obscure dangers of which an employer should give warning, if he has reason to suppose that a workman who may encounter it in his work does not
30 know of this action of the saw, and is ignorant of this particular danger. The plaintiff was of sufficient age and experience to understand and appreciate all the obvious dangers of his work, having been employed for more than two years in the defendant's mills as a spare hand in the weave-room and otherwise; and for four months he had worked in the room where he was hurt, much of that time sawing boards upon the table upon which this saw was, and using it in sawing boards, and he had been sawing the boxwood logs for a day and a half when the acci-
40 dent occurred. But there was no direct evidence

that his previous work had required him to move objects back of the saw, or that he had before seen such operations; and he testified that no one had told him of this particular danger, that he did not know of it, and that he was ignorant that if he hit the saw with the log as he moved it on the table behind the saw, the log might be thrown and his hand thrown off it and be liable to fall upon the saw. He also said that he did not like to draw the log back of the saw, and that he was afraid of the saw all the time, and afraid he should be hurt. While he could not contend that he did not know that his hand would be injured by contact with the saw, nor that he was engaged in work that he did not know was more than ordinarily dangerous, there was room for the jury to find that he did not voluntarily place his hand upon the saw, and that he was ignorant, and, in the exercise of due care and forethought, might not have known that the log, if it hit the saw, might carry his hand upon it. It was a question for the jury, whether the defendant ought to have warned him of this danger."

An employer is bound to warn and instruct his employees concerning dangers known to him, or which he should have known in the exercise of reasonable care for their safety, and which are unknown to them, or are not discernable by them in the exercise of such ordinary and reasonable care as in their situation they may be expected and required to take for their own safety; or concerning such dangers as are not properly appreciated by them, by reason of their lack of experience, their youth or their general incompetency or ignorance; and unless the servant is so warned or instructed he does not assume the risk of such dangers; but if he receives an injury without fault on his part in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor.

4 Thompson on Negligence, 279.

The first error assigned is the refusal of the Court to order a judgment of non-suit. This motion was properly denied as the testimony showed negligence on the part of the defendant.

The negligence of the defendant was the proximate cause of the accident.

There was no contributory negligence on the part of the plaintiff.

The danger was not obvious and the risk was not assumed by the plaintiff.

The operator of a buzz-saw does not assume the risk of the saw kicking and throwing the wood against him.

McLean vs. Paine, 63 N. E. Rep. 883.

The plaintiff was ordered to do the work by his master. If the master directs the servant to perform work outside of the scope of his employment, he is under the same obligation to warn and instruct him as to dangers incident thereto as though the work were within the servant's regular employment. If the master knows that the employment is dangerous, or ought to know it, and also knows that the servant is ignorant and inexperienced in the employment and has no knowledge of the dangers incident thereto, it is his duty to warn the servant as to the dangers and instruct him to avoid them. This is an imperative duty, and if the failure to perform it results in injury, the master is liable.

20 Am. & Eng. Ency. of Law, 2nd Ed. 97.

Even where the danger is patent or open to observation, it is the duty of the master to warn and instruct with regard to it, if, through inexperience or

from any other cause, the servant is incompetent to understand fully and appreciate the nature or extent of the dangers.

20 Am. & Eng. Ency. of Law 2nd Ed. 98.

The second error assigned is the refusal to direct a verdict. This motion is on the same ground as the motion for non-suit with the additional ground that there was a variance between the proof and the declaration.¹⁰

There is no variance between the proof and the declaration.

This motion was properly denied as the whole case presented a question for the jury.

The third error assigned is to the charge of the court the gist of which charge is: "Plaintiff must show that he was told to use that saw by somebody who had authority to make him do it, or decide whether he should do it or be discharged. It all rests on this conversation with Mr. Brown.²⁰

That is the first proposition that the plaintiff must establish before he can pass any further on the road to a recovery in this case."

There was no error or injury to the defendant in this part of the charge.³⁰ The proof was that the plaintiff had been instructed by the president of the company, and it was for the jury to consider the conversation between Mr. Brown, the president, and the plaintiff.

The fourth error assigned is to that part of the charge which reads: "The second proposition that he must establish is that he was injured because of some danger inherent in the operation of this saw of which he did not know and which he could not⁴⁰

discover by use of his reasonable powers of observation."

There was nothing illegal or injurious to the defendant in this part of the charge.

The fifth error assigned is to that part of the charge which requires plaintiff to establish that the saw was too high above the table and he undertook to use a thin strip of wood on it, such as the one he
10 was using at the time, and that when the strip should be pushed so far up against the entire length of that portion of the saw which rose above the table, the rising teeth on the other side of the saw were liable, if the wood had a tendency to spring together, to catch the wood, throw it upwards and over back against the plaintiff as he was pushing it, and that this happened and that as a result of that, in combination with the slippery floor, or slipping on the floor, as he claims, he was injured.

20

There was nothing illegal or injurious to the defendant in this part of the charge.

The evidence on behalf of the plaintiff was to the effect that the floor was in a slippery condition and was covered with saw-dust so its condition could not be observed; and the defendants proved that with the saw five inches above the table, used in cutting a strip such as the plaintiff was cutting, the saw would
30 kick and throw the wood back against the plaintiff.

The sixth error assigned was to that part of the charge which reads: "It may have been that the plaintiff's injury was caused by a combination of these two causes—first, that there was a slippery floor and that he slipped; and secondly, that the board was thrown against him by this action on the part of the saw, of which he was not aware, and which he could not appreciate by using his powers of observation and with regard to which he was not in-
40 structed.;"

There is nothing illegal or injurious to the defendant in this part of the charge.

The seventh error assigned by the defendant was to that part of the charge covering the risks assumed by the plaintiff and the duty of the employer or master to instruct the ignorant servant when the master has knowledge of the servant's ignorance.

This part of the charge was legal and not injurious to the defendant. 10

The eighth error is assigned to a part of the charge which is legal and not injurious to the defendant.

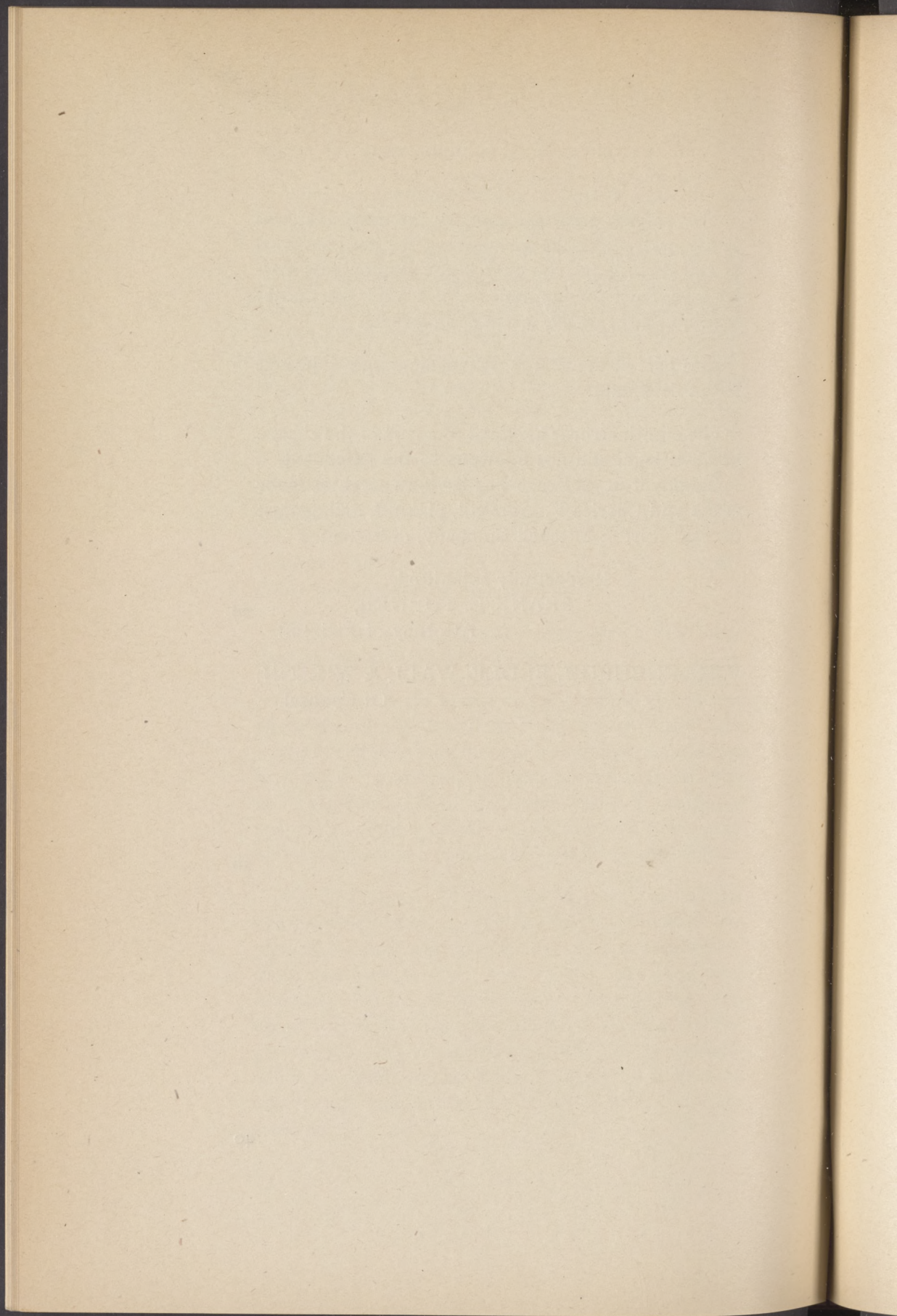
Judgment in said case was lawfully given in favor of the said Charles V. Marshall, plaintiff, and against the said Burt & Mitchell Company, defendant.

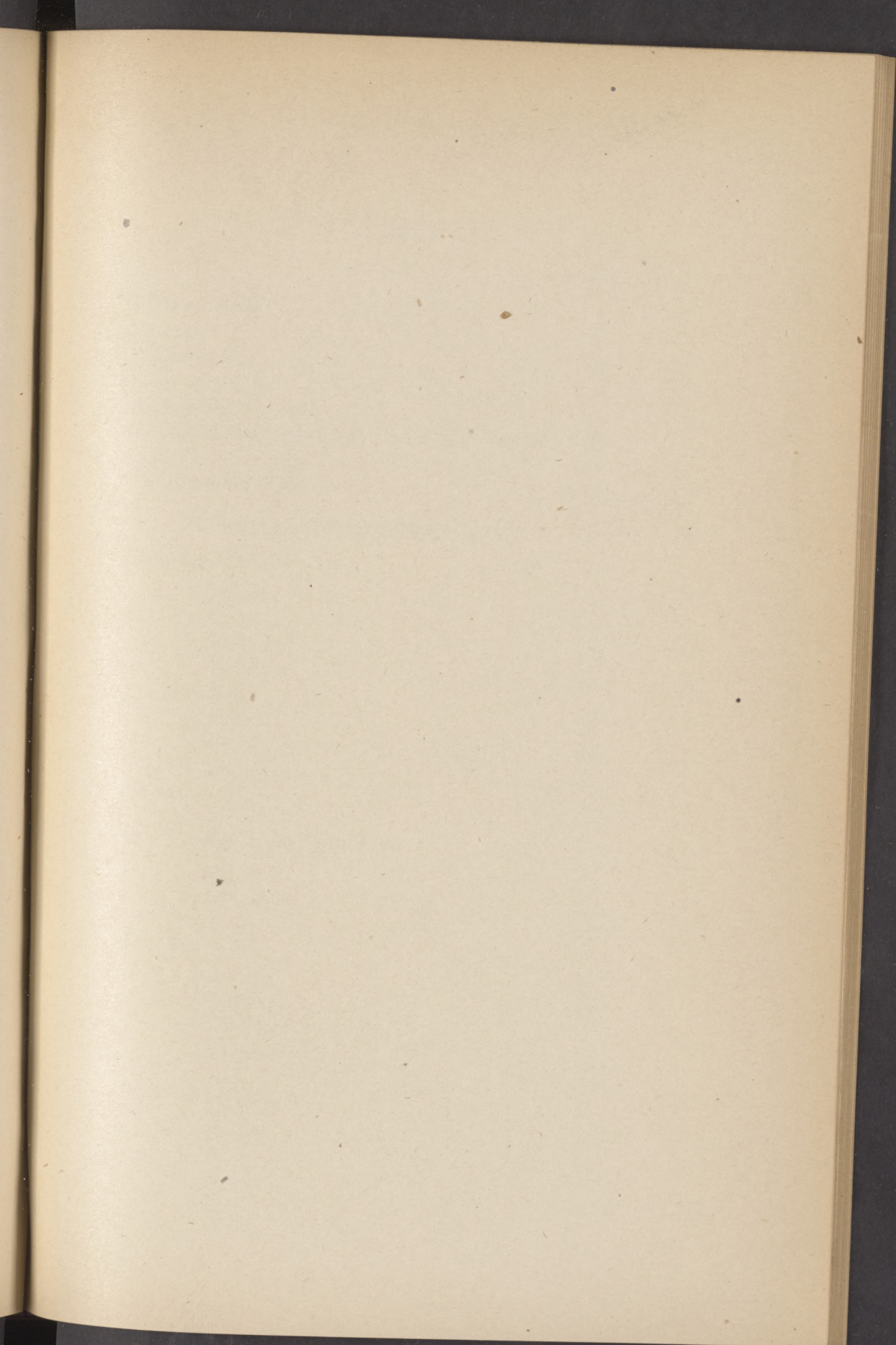
Respectfully submitted,

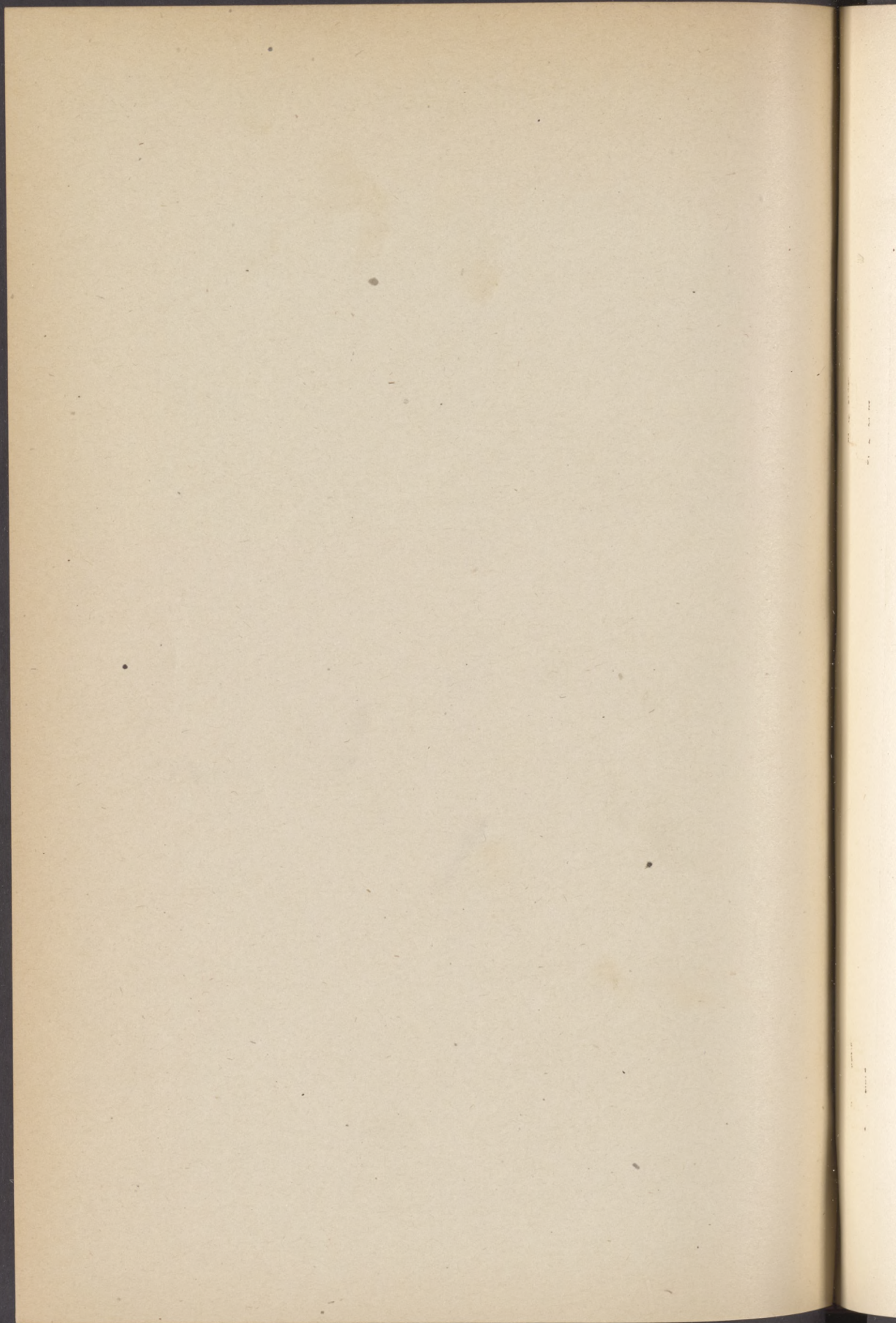
FRANK G. TURNER,

Attorney of Plaintiff. 20

VREDENBURGH, BEDLE, WALL & WILSON,
Of Counsel.







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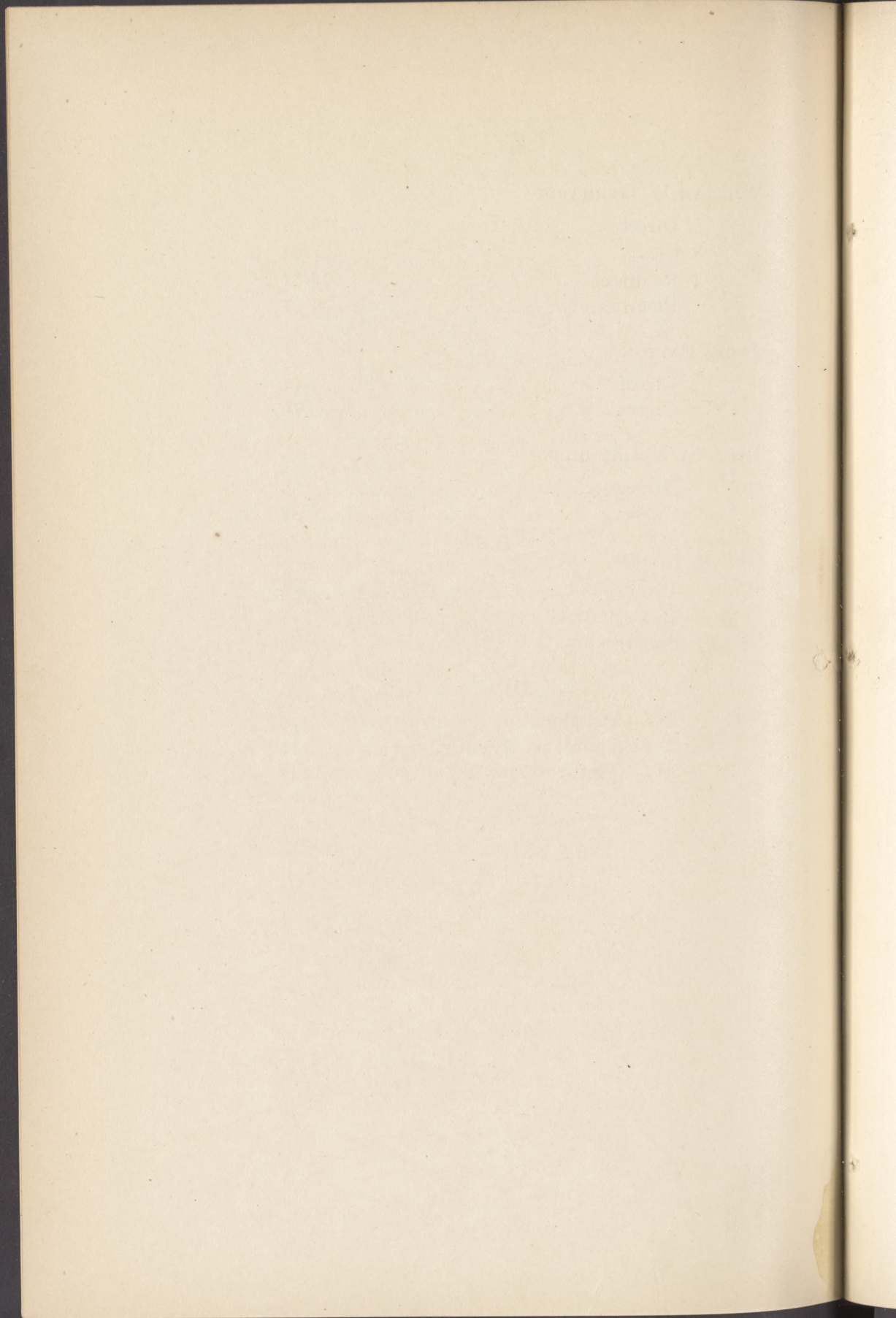
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WRIT OF ERROR.

(RETURNABLE DEC. 11, 1906).

STATE OF NEW JERSEY:

The State of New Jersey to the Judge
of the Circuit Court in and for the
County of Hudson,

GREETING:

For as much as in the record and proceedings,
and also in the giving of judgment in a certain 10
plaint which was in our said Circuit Court before
you, between Charles V. Marshall, plaintiff, and the
Burt and Mitchell Company, defendant, in an
action of tort, manifest error hath intervened, to
the great damage of the said defendant, as it is
said; we being willing that the error, if any there
be, should in due manner be corrected and full
and speedy justice done to the parties aforesaid in
this behalf, do command you that if judgment be 20
thereupon given and affirmed, that you distinctly
and openly send, under your seal, the record and
proceedings aforesaid, with all things touching
the same, to our Justices of our Court of Errors
and Appeals in the last resort in all causes, at
Trenton, on the eleventh day of December, nine-
teen hundred and six, together with this writ, that
the record and proceedings aforesaid being in-
spected we may cause to be further done thereupon
for correcting that error what of right and accord- 30
ing to law ought to be done.

WITNESS, William J. Magie, Esquire, our
Chancellor and President Judge of our
said Court of Errors and Appeals, at
Trenton aforesaid, the twenty-second
day of November, nineteen hundred and
six.

COLLINS & CORBIN,
Attorneys.

S. D. DICKINSON,
Clerk.

RETURN.

The answer of Charles W. Parker, Esquire, the Judge of the Circuit Court holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made, with all things touching and concerning the same, I send to the Judges of the Court
 10 of Errors and Appeals in the last resort in all causes, at Trenton, at the day and year within commanded, in a certain schedule to this writ annexed as within I am commanded.

CHARLES W. PARKER,
 Judge.

DECLARATION.

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Hudson County Circuit Court, of the fourteenth day of July, in the year of our Lord one thousand nine hundred and six.

HUDSON COUNTY, SS.

The Burt & Mitchell Co., a corporation, the defendant in this action, was summoned to answer unto Charles V. Marshall, the plaintiff herein, in
 30 an action in tort, and thereupon the said plaintiff, by Frank G. Turner, his attorney, complains:

For that whereas, the said defendant at all times hereinafter mentioned was, and is now, a corporation engaged, among other things, in the building and repairing of boats, vessels and water craft, and heretofore, to wit, on the twelfth day of May, 1906, at Jersey City, in the County of Hudson and State of New Jersey, the said defendant was so engaged, among other things, as aforesaid, in the building
 40 and repairing of boats, vessels and water craft;

and the said plaintiff was hired and employed by the said defendant, and was working for the said defendant as a carpenter and joiner in and about the building and repairing of boats, vessels and water craft being built or repaired by the defendant at its place of business in Jersey City aforesaid, and on the day aforesaid the said defendant, by its agents in authority over the plaintiff, requested and directed the said plaintiff to operate and use a certain dangerous machine or appliance, to wit, a buzz saw or circular saw driven or propelled at great speed and velocity by steam or electrical power, and owned and controlled by the said defendant, with the use of which said buzz saw or circular saw the said plaintiff was then and there inexperienced, and was then and there ignorant of the dangers attendant upon the use thereof, although the said defendant, and its agents in authority over the plaintiff, then and there well knew the dangers attendant upon the use of the said buzz saw or circular saw to the said plaintiff, who was inexperienced in the use of the same; and it then and there became and was the duty of the said defendant, and its agents in authority over the plaintiff, to take reasonable care that the said buzz saw or circular saw was reasonably safe for the use of the said plaintiff; and it then and there became and was the duty of the said defendant, and its agents in authority over the plaintiff, to take reasonable care to make reasonably safe the place in which the plaintiff was requested and directed to work, as aforesaid; and it then and there became and was the duty of the said defendant, and its agents in authority over the plaintiff, to instruct the plaintiff as to the dangers attendant upon the use of the said buzz saw or circular saw, the dangers of which the defendant and its agents well knew, as aforesaid; nevertheless, the said defend-

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ant, and its agents, did not take reasonable care that the said buzz or circular saw was reasonably safe for the use of the said plaintiff while in the lawful discharge of the work which he was requested and directed to do, as aforesaid; and did not take reasonable care to make reasonably safe the place wherein the said plaintiff was requested
10 and directed to work, as aforesaid; and did not instruct the plaintiff of the dangers of which the plaintiff was ignorant, and the defendant well knew, attendant upon the use of the said buzz saw or circular saw, but then and there wholly failed and neglected so to do; and the said defendant, on the day and year aforesaid, carelessly and negligently allowed and permitted, with its knowledge and consent, and without the knowledge or consent of the said plaintiff, the said buzz saw or circular
20 saw to become out of repair, and dangerous to persons using the same, and dangerous to the said plaintiff while using the same as he was requested and directed to do, as aforesaid; and carelessly and negligently and without the knowledge of the plaintiff, failed to provide the proper and necessary guards to protect the said plaintiff while lawfully using the same, from injuries by the said buzz saw or circular saw, although the same was well known to the said defendant; and the said defendant care-
30 lessly and negligently permitted and allowed the floor where the said plaintiff was obliged to stand while lawfully using the said buzz saw or circular saw as requested and directed by the said defendant, to become smooth, glassy and slippery and in a dangerous condition to one lawfully using the same, and to the said plaintiff, all of which was well known to the said defendant, and was unknown and not patent to the said plaintiff; and the said defendant permitted and allowed the floor
40 where the plaintiff was obliged to stand while law-

fully using the said buzz saw or circular saw, as aforesaid, to become obstructed and covered with saw dust and pieces of wood and other obstructions, and to be in a dangerous condition to the said plaintiff and other persons lawfully using the same, all of which was well known to the said defendant, and was not known to the said plaintiff; and the said defendant carelessly and negligently, and without fault or neglect on the part of the plaintiff, failed to instruct the said plaintiff as to the dangers attendant upon the use of the said buzz saw or circular saw by the plaintiff, as aforesaid; and by reason of the carelessness and negligence of the said defendant, on the day and year aforesaid, to wit, at Jersey City, aforesaid, in carelessly and negligently allowing the said buzz saw or circular saw to be out of repair and to be dangerous for use by the said plaintiff, and to be unguarded without the proper and necessary guards, and in allowing the floor where the plaintiff was obliged to stand to do the work which he was requested and directed to do, as aforesaid, to be smooth, glassy and slippery, and in a dangerous condition for use by the said plaintiff, as aforesaid, and to be covered with saw dust and pieces of wood and other obstructions, and in failing to instruct the plaintiff as to the dangers attendant upon the use of the said buzz saw or circular saw, the said plaintiff, without any negligence or fault on his part, was hurled and thrown against, and caught upon the said buzz saw or circular saw while the same was in motion, and being used by him as requested and directed by the said defendant, and by reason thereof the said plaintiff was cut, hurt, wounded and injured and had the fingers of his left hand, and part of the thumb of his left hand severed and cut off, and was otherwise injured and bruised, cut and wounded, and so remained for a long space of time, from thence hitherto, during

all of which time the said plaintiff suffered and underwent great pain and anguish of body and mind, and was then and there hindered and prevented from performing and transacting his lawful and ordinary business and affairs by him during that time to be performed and transacted, and by reason thereof the said plaintiff has been compelled
 10 to lay out and expend, and has laid out and expended for medical service and attendance in an effort to be cured of his said injuries, a large sum of money, to wit, the sum of three hundred dollars, and by reason of the aforesaid injuries the said plaintiff has become and is permanently injured and prevented from performing and transacting his lawful business and affairs by him to be done and performed, to wit, at Jersey City, in the County of Hudson, aforesaid.

20 *Wherefore*, the said plaintiff saith he is injured and has sustained damages in the sum of twenty thousand dollars, and therefore he brings his suit, etc.

And for that Whereas, the said defendant heretofore, to wit, on the twelfth day of May, 1906, was the owner and possessor of a certain cutting machine or appliance known as a buzz saw or circular saw used in and about the business of the said defendant for the purpose of cutting wood, which
 30 said buzz saw or circular saw was then and there driven by power, to wit, by electricity, at great speed and velocity, and was under the control of the said defendant; and the said plaintiff was then and there in the service and employ of the said defendant in and about the building and repairing of boats, vessels and water craft being built and repaired by the said defendant at its place of business in Jersey City, aforesaid; and the said plaintiff,
 40 iff, on the date aforesaid, was then and there re-

quired by the said defendant to use and operate the said buzz saw or circular saw; and it then and there became and was the duty of the said defendant to take reasonable care that the said buzz saw or circular saw was reasonably safe for the use of the said plaintiff, and it then and there became and was the duty of the said defendant to take reasonable care to provide a reasonably safe place for the plaintiff to work in; yet the said defendant, disregarding its duty in that behalf, did not take reasonable care that the said buzz saw or circular saw was reasonably safe for the use of the said plaintiff while in the lawful discharge of his work as aforesaid, and did not take reasonable care to provide a reasonably safe place for the said plaintiff to work in while lawfully engaged, as aforesaid, but then and there wholly failed and neglected so to do; and the said defendant, by its agents, on the day and year aforesaid, carelessly and negligently allowed and permitted, with its knowledge and consent, and unknown to the said plaintiff, the said buzz saw or circular saw to become out of repair, and dangerous to the use of the said plaintiff, and carelessly and negligently, and unknown to the plaintiff, failed to provide the proper and necessary guards to protect the plaintiff from injury by the said buzz saw or circular saw, all of which was well known by the said defendant, and with its knowledge and consent, and unknown to the plaintiff, permitted and allowed the floor in front of said buzz saw or circular saw, where the plaintiff was obliged to stand in order to use the same, to become smooth, glassy and slippery, and obstructed with saw dust and pieces of wood and other obstructions, all of which was known to the said defendant, and by reason of the carelessness and negligence of the said defendant, and its agents, on the day and year aforesaid, to wit, at Jersey City afore-

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said, in carelessly and negligently allowing the said buzz saw or circular saw to be out of repair and dangerous for use, and unguarded and without the proper and necessary guards, and in allowing the floor where the plaintiff was obliged to stand to use the said buzz saw or circular saw to become smooth, glassy and slippery, and in a dangerous
10 condition, and obstructed with saw dust and pieces of wood and other obstructions, and said plaintiff, without any fault or negligence on his part, was hurled and thrown against and caught upon the said buzz saw or circular saw while the same was in motion, and by reason whereof was cut, hurt, wounded and injured, and had the fingers of his left hand, and part of the thumb of his left hand severed and cut off, and was otherwise injured and bruised, cut and wounded, and has so remained for
20 a long space of time, from thence hitherto, during all of which time the said plaintiff suffered and underwent great pain and anguish of body and mind, and was then and there hindered and prevented from performing and transacting his lawful and ordinary business and affairs by him during that time to be performed and transacted, and by reason thereof the said plaintiff has been compelled to lay out and expend, and has laid out and expended, for medical attendance in an effort to be cured
30 of his said injuries, a large sum of money, to wit, the sum of three hundred dollars, and by reason of the aforesaid injuries the said plaintiff has become and is permanently injured and prevented from performing and transacting his lawful business and affairs by him to be done and performed, to wit, at Jersey City, in the County of Hudson aforesaid.

Wherefore, the said plaintiff saith he is injured and hath sustained damages in the sum of twenty thousand dollars, and therefore he brings his suit.
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PLEA.

And the said defendant, Burt & Mitchell Company, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof complained 10
against it, and of this it puts itself upon the country, &c.

Therefore, to try the issue above joined, let a jury come before the said Circuit Court, at Jersey City aforesaid, on the fourteenth day of November, A. D. 1906, as yet of the Term of September, in the year of our Lord one thousand nine hundred and six, who neither, &c., by whom, &c., to recognize, &c., because as well, &c., the same day is 20
given to the parties aforesaid, at which day before the said Circuit Court comes the said parties by their attorneys aforesaid, and the jurors of the jury above mentioned also come, who to speak the truth of the matters aforesaid, being chosen, tried and sworn, say upon their oath that the said defendant is guilty as the said plaintiff hath thereof above complained against it, and that they find in favor of the plaintiff and against the defendant, and they assess the damages of the plaintiff on 30
occasion of the premises at two thousand five hundred dollars and cents, over and above his costs and charges by the said plaintiff about his suit in this behalf expended.

Therefore, it is considered that the said plaintiff do recover against the said defendant his damages aforesaid in manner aforesaid found, and also
dollars and cents for his said
costs and charges by the said Court now here ad- 40

Hudson County Circuit Court.

SEPTEMBER TERM, 1906.

CHARLES V. MARSHALL,

vs.

BURT & MITCHELL COMPANY.

10

} *Tort.*

FRANK G. TURNER, for plaintiff.

MR. HOBART, for defendant.

This cause was tried at the Hudson Circuit, 20
November 14, 1906, before Parker, J., with a jury.

CHARLES V. MARSHALL, called for plaintiff and
sworn, testifies as follows:

Direct examination by Mr. Turner.

Q. Where do you reside? A. 587 Garfield ave-
nue, Jersey City.

Q. You are the plaintiff in this case? A. Yes.

Q. On the 12th of May, 1906, where were you 30
employed? A. The Burt & Mitchell Dry Dock
Company, Jersey City, foot of Morris street.

Q. What was your employment there? A. Car-
penter, I suppose; ship carpenter or helper.

Q. On May 12th, on what were you working? A.
I reported there at seven o'clock in the morning;
the superintendent told me to get on the job, on
the "Burmese," to see to getting the repairs done
to it; also the saw-master reported with me on the
same dock to help get the repairs done; about half- 40

past seven the saw-master was called away and I didn't see any more of him that day; about eight o'clock I needed some strips to fix a window on the "Burmese;" I went up and inquired for the saw-master, but I could not find him; I went and got a piece of wood to saw the strips out of, waiting for the saw-master; I could not see him; the superintendent opened the motor box and started the saw going; a man by the name of Sacks and another man sawed on one saw and I came down with the strip and I went to work; I didn't know anything about the saw, and I started on the other saw to shove that piece of wood— (interrupted.)

10 Q. Did anybody tell you to start the other saw?

A. Mr. Brown, the superintendent, the day before, told me not to wait, to go ahead and saw.

20 Q. Who was Mr. Brown? A. The president of the company.

Q. Who was the superintendent? A. William —; I don't know his name.

Q. Did he instruct you how to use the saw? A. No, I was never instructed.

Q. Did he tell you to use the saw? A. He told me to go ahead and saw; he opened the box and started the motor. I didn't know how to start the saw.

30 Q. What time in the morning was this? A. About twenty minutes past eight.

Q. Mr. Gerhardt, the superintendent, is the one that turned on the power to run the saw? A. He opened the box; nobody could get at that except the saw-master and Mr. Gerhardt. The power is inside the box and there is a lock to it, and nobody can get to it without a key.

Q. Is it run by electricity? A. Yes, and inside the box he turned on the electricity.

40 Q. After you had started the saw what happened?
A. The way I seen the other men do I shoved the

strip of wood through the saw and it run through once, then I started to cut the second strip and when I got about eighteen inches the saw snapped and kicked, and I thought I may have to shove hard on the wood, so I gave it a shove, and when I did the saw went the same to me as if it made about twice as many revolutions as it ought to, and my foot went out from under me and my hand caught the saw. 10

Q. How many times did the saw kick? A. I could not tell you; there was a kind of cracking noise underneath; I didn't know what was the matter with the saw; I never worked at it before.

Q. It run faster after it kicked? A. It seemed to me it come all in jumps the same as something held it, and then it started.

Q. Ever had any experience in running the buzz saw before? A. Never run a buzz saw before in my life. 20

Q. Did you notice any guards or irons round the saw? A. No, a straight table like this, about two feet eight inches high, a little lower than this, I would judge.

Q. How big is the platform on which you stand when you are sawing? A. I think that platform there was, the way I looked at it afterwards, about twelve feet long and five or six feet wide.

Q. Was there anything on top of the platform? A. Sawdust and pieces of wood, what I seen afterwards. 30

Q. You run your left hand against the saw, what happened then? A. I come with both hands, but this hand slipped into the saw, then I seen blood, and a man standing there he hollers and says, "You are cut." I looked at my hand, I didn't know my fingers was gone, and I ran to the corner of Washington street and Morris street to a drug store; I asked him if he could tie my hand up for fear I 40

would bleed to death. He says, "No, go to the doctor." I went to Dr. Wilson, he was not in, so I went home and asked my wife to help me get my clothes off; I took a trolley car to St. Francis Hospital; they dressed my hand; a young man there tied my hand up to stop the bleeding; I was sent up stairs; at half-past four Dr. McLoughlin came, and
 10 in the operating room Dr. McLaughlin and Dr. ; I was put under ether, and they dressed my hand; ether and chloroform, or whatever they gave me.

Q. How long before the accident was it that you were told by Dr. Brown, the president, to use the saw? A. Two days before that, I was supposed to do a job on a boat, on the dry dock, and I stood there waiting for the saw-master; the saw-master wasn't there; he had been sent away to some work; I didn't see the saw-master, and Mr. Brown saw me
 20 standing there; he asked me what I was standing there for; why didn't I go ahead with the work; I told him I didn't know how to use the saw; he says, "Anybody can do that," and he walked away; a young man named Sacks was there; I asked him to come and saw for me; I was a'raid of the saw, and he done the sawing that day for me.

Q. You didn't know how to saw before that time?

A. No, never was on a steam saw before in my life; only looking at men working at them.

30 Q. When you fell did you notice anything about the condition of the floor under the sawdust? A. Not at that time; I didn't stop to look for anything; I run right out, but four or five days afterwards—(interrupted by objection).

Q. State the condition you found there three or four days afterwards?

Question objected to.

40 Q. I mean the condition of the floor under the

sawdust? A. I didn't notice at the time, but four or five days after, when I could walk there, I went and looked at the floor, scraped the dust away, the sawdust, took a piece of board and scraped it away, and I saw the floor was wore, and on account of the rosin in the sawdust the floor was as smooth as glass; that is the first I seen it was; there was rosin in the pitch pine wood.

Q. You don't know what kind of wood the platform itself was made of? A. No; I saw the ends of the planks had been rough wood when it was placed there, and through the wear and tear it got smooth; I was laid up three weeks; this last couple of weeks I have been in the insurance business for the Prudential Company; I made, when working for the defendant, forty-one cents an hour—three dollars and twenty-eight cents a day—about nineteen dollars and some odd cents a week; now I make two or three dollars a week some weeks— just what I pick up; no pain in the hand at the time of injury, but it is paining now all the time; was at St. Francis Hospital every day for twelve weeks; I have paid a good deal; suppose I will have to pay more.

Q. Are you able to say why the saw kicked? A. No; I don't know enough about them saws, why they kick or why they don't kick.

Cross-examination by Mr. Hobart.

I am forty-four years old; been a carpenter about eight months; had worked for the defendant about four or five weeks at repairing work on boats.

Q. You sometimes had to saw a board? A. No; I always let the saw-master saw them; I always asked the saw-master, Mr. Betz; he instructed me, when first I began to work there, that he was saw-master, and he had to do the sawing except I got

orders from somebody else, and Mr. Betz did that work for me all the time he was there.

Q. The day before the accident he sawed some wood for you? A. No; Mr. Sacks sawed some for me the day before the accident.

Q. When you went to work that morning of the accident, you were intending to do some work on the tug Burmese. A. Yes.

Q. Part of that work was making window strips? A. Yes; making window strips.

Q. In order to do that you had to saw some strips? A. Yes; had to make them myself or have them made.

Q. You had hand saws? A. Yes; the boss would not allow that; it would take too long; told us to hurry up with that work; they wanted to get it out right away.

20 Q. You had a hand saw? A. Yes.

Q. Do you know how to use a hand saw? A. Yes.

Q. Mr. Brown is dead now? A. Yes; I heard so.

Q. Is this stick which I have in my hand, which I show you, like the kind of stick that you were sawing? A. Yes.

Q. Look at it closely and see if it is not the identical stick that you were sawing when this accident happened? A. It looks the same stick.

30 Q. There are blood marks on it? A. Yes.

Q. That is as far as you had gone—this portion that is cut through with the saw? A. Yes.

Q. You had sawed one strip just before you started on this one? A. I think I sawed one out before that—got one through on the saw.

Q. Got along all right with that? A. I believe I did; I didn't get hurt until the second one.

Q. You didn't have any trouble with the first one? A. No; the saw jerked a little bit, but I kept on pushing it through; it went through all right;

with the second strip the saw snapped as if something was underneath—kind of a rattle sound.

Q. When you speak of it snapping you refer to the sound? A. Yes; so that the saw went kind of slow.

Q. The same kind of motion as the first one? A. No; the first strip went all right.

Q. It jerked the first time? A. Didn't jerk; 10 kind of kicked a little bit underneath.

Q. The second time it not only kicked, but there was a snapping sound and the saw went slower.

Q. Do you know how fast that saw goes at full speed? A. No, sir—very fast.

Q. So fast you cannot see the teeth? A. I never looked at it so close.

Q. How high above the table was the saw when you started to work? A. If I remember right it must have been about four or five or six inches 20 above the table; it goes through the centre of the table—I have seen them rising and lowering it, but I don't know how they do it.

Q. I will show you a picture—does that look like the saw? A. Yes, it is just like it?

Q. On the right hand side, as you face it, is a guide, isn't there? A. Do you mean where the wood runs up against?

Q. Yes; so as to regulate the width? A. Yes.

Q. Wasn't that guide in place? A. I don't 30 know—I don't remember—it was there but I don't know whether it was in its right place or not.

Q. Did you shift it? A. I didn't know how to shift it.

Q. You started to use the saw as you found it? A. I started to use the saw the way I found it.

Q. You know how the saw started; how the power is thrown on? A. No, sir; the boss throws the power on in the box—I don't know how it makes the saw go.

Q. You know there is gearing there? A. There is a belt there like it shows in the picture.

Q. There is a loose pulley and a tight pulley? A. I don't know.

Q. Do you know what they mean by a loose pulley and a tight pulley? A. Pulleys they call them.

10 Q. Do you know what I mean by a loose pulley and a tight pulley? A. No.

Q. When you went to the saw was it in motion? A. The saw was going.

Q. You didn't pull the lever out to start it? A. No, sir.

Q. When you went there that morning you looked around for the sawyer? A. The saw-master, yes; I asked for him and he was not there.

20 Q. Did you see Mr. Gerhardt that morning? A. Yes, I seen him while I was upstairs getting that piece of wood—I saw Mr. Gerhardt down there starting the saw; I asked him where Frank was, he shook his shoulders, "I don't know," he said; that's all he said; then he walked away. He says, "Go ahead," he called Mr. Sacks, and he says "Go ahead," and he started the motor box.

Q. He said that to Mr. Sacks? A. Mr. Sacks sawed on the other saw, and I sawed on this saw.

30 Q. You were standing there together and Mr. Gerhardt said "Go ahead?" A. We were not standing together, Mr. Sacks was about thirty-five or forty feet away from the saw where I sawed, Gerhardt was standing between us, he started the box to going, and I said "Go ahead."

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

Q. You had some wood sawed there the day before? A. Yes; by Mr. Sacks.

Q. This time, when you sawed this strip, on the day of the accident was the only time you started

to saw yourself? A. That is the only time I ever sawed on a buzz saw in my life.

Q. What was it Mr. Brown said to you the day before? A. Told me not to stand round looking at it, but to go ahead and do the work, when I was waiting for Mr. Betz, the saw-master.

Q. Did you go ahead and do the work? A. No, sir; I watched until Mr. Brown went away; I was 10 afraid to saw, and I watched for Mr. Sacks to come; I thought Mr. Sacks would come and show me how or would help me saw.

Q. Did he show you how? A. No; he sawed it for me. I stood round there and watched him; he sawed on both saws for me that day; one of the saws was on this saw where I was hurt.

Q. Is this your signature to this paper? A. Yes, that is my signature.

Marked D 1, for identification.

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Q. It is dated May 16th, 1906? A. I didn't date it; I don't know Mr. Hamilton. (Stands up.) I don't know him. Somebody called at my house to see me; I don't recollect it myself, but my wife told me.

Q. When you were there three or four days afterward to look at the floor, was anybody with you when you examined the floor? A. No, sir; I 30 walked around; I spoke to Mr. Gerhardt; I spoke to the foreman. They asked me how I felt. I walked right round to have a look at the floor; the surface of the boards were very smooth; a space of two feet wide and four or five feet long, I would get; the slippery part was just where the men always walked round to hold the wood, six inches away from the foot, and about two feet in width, and about five feet in length, as near as I can guess.

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Q. When you slipped, were you standing in front of the saw or to one side? A. When I slipped I was standing on the side shoving the piece of wood through; standing on the side where I seen other men stand shoving the wood through; put it up that way (showing) with my hand.

10 Q. Let us have that illustrated so we will understand it; this is the saw—right where I hold this paper? A. Yes; I was standing here; I was standing on the left hand side of the saw table; I was shoving the wood that way (shows); shoving it with the right hand toward the left, and my left hand was right here (shows); my two hands was close together, keeping them from the saw.

Q. How far apart were your two hands? A. About seven or eight inches.

20 Q. Your left hand was nearest to the saw? A. Yes; because I was standing on the side.

Q. How close to the saw was your left hand? A. I couldn't tell; about eight or ten inches away from the saw.

Q. The saw revolves in the direction of the front of the table? A. Yes; the top of the saw is always coming towards me; revolving from left to right as I was standing at the side.

30 The examination of this witness is suspended in order to let Dr. McLoughlin go away.

DR. THOMAS J. McLOUGHLIN, sworn on the part of the plaintiff, testifies as follows:

Direct examination by Mr. Turner.

The qualifications of the witness are admitted.

40 Q. You are connected with St. Francis Hospital? A. Yes.

Q. Do you remember having the plaintiff in this case for a patient in May, 1906? A. I do.

Q. State the condition in which the patient came to you? A. He came in the regular course, on or about the 12th of May, and all his five fingers were gone; the little finger a little in advance of the last joint; these two fingers (showing), very close to the joint, and the flesh was flushed, the thumb a little longer; there was nothing removed from the hand; where the bone was sawed it was trimmed so the flesh would cover it; there was just barely enough taken off so the flesh would cover the ends of the bone, so as to make a small flap not more than one third of an inch, so there would be sufficient flesh to cover the bone; nothing radical; very conservative, as we always do in cases of that kind. 10

The Court.

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Q. He made a good recovery? A. Yes; he made a good recovery.

CHARLES V. MARSHALL takes the stand for further examination.

Re-direct examination by Mr. Turner.

Q. This paper that was shown you, do you remember any of its contents? A. No; I only saw the name. 30

Q. What was your condition on the 16th of May? A. I don't know; I was walking around with my hand over my head that night and the day before; I was not myself with pains.

Q. The matter in that paper, is that your handwriting? A. No, sir.

Q. Did you learn where this man came from you understood was there? A. My wife told me the

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next day I had signed my name to a paper and that an insurance man was there.

Recross-examination by Mr. Hobart.

Q. Can you fix the exact date when you went to the shop to look at these boards? A. No; it was five or six or seven days after; as soon as I could
10 get out I went.

Q. Was it after you signed the paper? A. After.

Q. How long? A. I don't know.

ADJOURNED FOR THE DAY.

SECOND DAY'S PROCEEDINGS.

November 15, 1906.

20

EDWARD KING, sworn on the part of the plaintiff, testifies as follows:

Direct examination by Mr. Turner.

Q. Where are you now employed? A. In Brown's Mills.

Q. Were you formerly in the employ of the Burt & Mitchell Company? A. Yes, sir.

Q. In what capacity? A. Ship carpenter.

30 Q. How long had you been with the Burt & Mitchell Company? A. Three or four years since I went there.

Q. Are you familiar with this buzz saw on which the plaintiff was hurt? A. I know the saw; I ought to know it.

Q. How long previous to the accident to the plaintiff did you observe the saw? A. At any moment that saw might be out of order, at any time, there is no mistake about that; I saw it wobbling
40 many a time, and it wasn't quite right.

Q. That was before the plaintiff was injured? A. Yes.

Q. What made it wobble?

Defendant objects unless the time is fixed with sufficient accuracy to indicate that it had something to do with this accident.

10

Q. Did you see this saw on the date of the accident? A. I did.

Q. What was its condition? A. I didn't go near the saw at that time; I just passed through.

Q. What did you notice? A. I noticed the blood and stuff all round, combustibles, all sawed off there.

Q. What do you mean by combustibles? A. The sawings and fragments of the sawing, portions of wood all thrown round.

20

Q. Did you see the saw when it was first put in? A. Yes, it took quite a little time to get it all right. It was put in about March.

Q. Did you see the saw a week before the accident? A. Yes.

Q. Was it loose? A. I wouldn't say loose, but I saw it wobbling many a time.

Q. What makes it wobble? A. If the shaft is not tightened up with the screw it would wobble.

30

Q. What will it do when it wobbles? A. You can't cut nothing with it. It is a very dangerous weapon to use if it is not in condition.

Q. What does the saw do when it is loose? A. Wobbles, shaky, it will not cut nothing unless you drive it with force.

Q. What does it do to the wood? A. It makes it so fine it is not worth looking at.

Q. Did you see it running the day of the acci-

40

dent? A. No, I just heard of the accident as I passed by, that is all.

Q. Did you see it wobble when it was first put in? A. It did, we had quite a little time to get it in there too.

Q. When you say the saw is loose where do you mean? A. When it shakes like that (shakes his
10 hand) I seen it. It is bound with a nut, and there is a key, and if that is not tightened up it is liable to get loose if it is not looked after. It is a very dangerous weapon all right, if it is not in right.

Q. What is the last time previous to this accident that you noticed the saw? A. I could not exactly say as to that; I saw it many a time.

Q. How long before? A. A couple of weeks maybe.

Q. Was it in the same condition as it had been
20 before? A. I could not say as to that.

Q. Did it wobble the same as you saw it wobble before? A. I saw it wobbling many a time.

Q. What makes a saw kick? A. If it is not in condition; if it is not filed right; if it is not filed sharp; if it is not right on the axle; if the screw is not there.

Q. You mean it will kick if it is not tight? A. If it is not tight it will kick every time.

30 *Cross-examination by Mr. Hobart.*

Q. You are a carpenter? A. Yes.

Q. How long have you followed that trade? A. Going on forty years.

Q. During this forty years you have often run a buzz saw? A. I have seen it from my childhood, I know how to run it, but I wouldn't bother to go near it.

Q. Never run it? A. I did run it, but I wouldn't
40 go near it.

Q. This particular saw, you know how it is started, don't you? A. I don't know anything about it; how it is started; I don't know who started the saw.

Q. You know the saw? A. Certainly I know the saw. I know it is run by electricity.

Q. Attached to a belt? A. Yes.

Q. You know how it is raised and lowered, don't you? A. I saw them raising it and lowering it; I have seen the boss doing it, but I wouldn't do it. 10

Q. Did you never use this saw? A. No, I would not be allowed to do it, it was against the rules.

Q. The boss sawyer was Mr. Betz? A. Yes, he was the boss sawyer.

Q. For how long a time did you work for the Burt & Mitchell Company? A. Since they went there, whatever number of years that is, I worked there all right through; about three or four years. 20

Q. When did you leave the employ of the company? A. I left the company because I had a rabble—a bit of a rabble with the boiler maker; I couldn't tell his name; McLaughlin or Barney; I don't his name.

Q. You were discharged? A. No.

Q. You resigned? A. No.

Q. You left? A. No.

Q. You didn't work there any more? A. No, I didn't.

Q. How long before the accident did you stop working for the Burt & Mitchell Company? A. I should say a couple of weeks; I didn't keep a record. 30

Q. Nearer a couple of months? A. No, I don't think so; I think it was in April; I couldn't tell you what part of April.

Q. Do you know when the accident happened? A. Yes, in May some time; about 1900, I suppose it was; I think this year, isn't it? 40

Q. Don't you know? A. I know; I think it was 1906; in May, I think it was; I don't know the day of the month; it didn't bother me nothing; I know it was the first part of the month all right; I know when my rent is due all right; that's the way I keep the time.

10 Q. Do you know how long this saw had been in place where it was when the accident happened? A. That saw was put in the first of the year there; I was there when it was put in; I was looking at it when it was put in; I helped to put it there; I guess it was in February; I can't tell you the date; I don't know if it was February; I know it was the first part of the year—this year, 1906.

Q. Had you ever seen Marshall use the saw? A. No, not to my knowledge.

20 Q. Ever see him without your knowledge? A. No, I didn't see him do it; I didn't know nothing about it; all I heard was the accident, that is all.

Q. Brown's Mills is right near to this place? A. Yes, and I went over and had a look.

Q. The saw looked just the same as it did before? A. I could not tell you; I saw a lot of blood there and plenty of wood, and plenty of other stuff round there; all the sawings were there all right.

Q. Didn't the saw look all right except for the blood? A. It looked all right.

30 Q. You didn't try it? A. I did not.

Q. The wobbling is caused when the screw is too loose? A. That's right.

Q. Which screw? A. There is a washer, the same as in ordinary wheels on a wagon, and if it is not looked after it is bound to wobble. You have to keep it tight, and if it is not tight the saw will begin to wobble right away.

Q. The moment it starts to run it will begin to wobble? A. Yes, that's right.

40 Q. And if the saw does wobble it will not cut the

stick properly? A. Certainly; you can't drive the stick unless by force.

Q. The saw will not cut through this stick? A. It will not.

Q. It might make notches? A. Notches, that's all right, and you have to hold it too tight and bind it too tight with force.

Q. Is that what you meant when you said it would make the wood so fine—it would cut it up into small pieces? A. Yes, into notches. 10

Q. When you saw it wobbling these other times you have spoken of was anybody using it? A. The boss was using it; his name is James Patton.

Q. You saw it wobble when Patton was using it? A. No, never did when Patton was using it.

Q. When anybody else was using it? A. I saw it wobble when it was being used.

Q. Who was using it? A. I couldn't tell.

Q. Name one? A. I couldn't do it; I couldn't name anybody, they all used to go to it; if you were standing there he would say "What are you doing there, can't you do it," that's the trouble—"Can't you do it?" I remember when I went there what I got all right. 20

Q. The boss put you at it? A. No, he didn't; I wouldn't go near it.

Q. You knew enough to keep away from it? A. I was told not to do it.

Q. The boss told you not to do it? A. The boss didn't. 30

Q. You knew it was against the orders? A. You are sent there, you have a job to do, you might be looking for the boss sawyer maybe half an hour, and in case the boss, Mr. Brown, is there, and many a time he has asked me, "What are you doing there?" "Well, can't you find the boss sawyer there?" "Can't you do it?"

Q. You never used the saw yourself? A. No, I 40

didn't, because I started the saw once and that was enough for me, as the saying is, "a burnt child dreads the fire."

Q. Can you give me any idea how many times before the accident you saw it wobble? A. I could not tell you; I saw it when it was put in place; I was looking at it.

10 Q. It wobbled because it was not screwed up tight? A. It didn't wobble that much; they had quite a little time to get it under control.

Q. They got it under control finally? A. Oh, I don't know; I could not answer you that.

Q. You didn't stay until they had finished working at it? A. I did.

Q. Did you stay until they had finished putting it in? A. I did.

20 Q. When you went away was it in working order? A. I didn't see that; I couldn't tell you; I don't know.

Q. When did you next see it wobble? A. A few days before the accident I seen it.

Q. Who was using it? A. I couldn't exactly say as to that.

Q. It wobbled, did it? A. Certainly it did.

Q. What was the man sawing when it wobbled? A. I couldn't tell you that; my gosh, why do you ask me.

30 Q. What time of day was it when you saw this man there working with the saw? A. It might be in the forenoon or afternoon.

Q. You don't know? A. Yes, I do.

Q. Which? A. The forenoon.

Q. Did you stop to look at it? A. Certainly, it drew my attention.

Q. What drew your attention? A. The saw.

Q. What was the man sawing? A. I think he was sawing a bit of an inch board.

40 Q. Who was the man? A. I don't know who

the man was; there is so many square heads there I don't know anything about that; I am probably the only Irishman among the whole lot of them.

Q. Did you notice on this occasion when you say the saw wobbled, who the man was that was using it? A. No.

Q. Did he succeed in getting the board cut or sawed through? A. I could not answer that.

Q. You don't know as to that? A. I could not answer that. 10

Q. Did you notice whether he screwed the saw or did anything to it? A. I couldn't tell you anything about that.

Q. How long was that before the accident? A. could not exactly tell you now.

Q. Could you come anywhere near it? A. I could not; I know it was in May anyway; the accident was in May.

Q. How long before the accident was it when you saw this man whom you don't remember, using the saw when it wobbled? A. I passed in there every day; I should have a regular dialogue for that same record, men at the saw; I don't say who is there; I couldn't tell you that. 20

Q. I wish you would try to fix the time when this man was using the saw, and you happened to pass along and looked at it? A. I couldn't tell you that, you are so busy round there you can't stand 30 to watch anybody.

Q. You didn't stop to look, you simply walked right on by? A. No, I stood there.

Q. How long? A. Not a minute or so.

Q. Did he cut the board through? A. I don't know.

Q. Did the saw work when you were looking at it? A. I couldn't tell you.

Q. Did it cut through the board? A. I don't know anything about that part of it. 40

Re-direct examination by Mr. Turner.

Q. You have seen a great many people running that same saw, have you? A. Yes, a good many.

Q. You said something about a rule; there was not any orders not to run the saw, was there? A. Yes, there was a rule, there was nobody to touch it; I know that the foreman, Mr. Patton, had a lock

10 and key on the motor.

Q. You know that nobody could run it unless it was unlocked? A. That's right

Q. That is what you mean by a rule? A. Yes.

Q. Whenever it was unlocked? A. Anybody could come along and go ahead.

Q. Did anybody ever tell you not to use the saw? A. No; I would not go near the saw at all; I know better than that.

20 Q. What way were you free to use the saw? A. It is not my business, there is a sawyer there, supposed to be, and that is locked up, and then the key was there I suppose; I don't know who opened it, but I know the boss used to have the key and for the motor, once in awhile it would be open and I tried to start the saw one day, and I wouldn't go near it any more.

30 Q. Why? A. It shocked the very life out of me. If Mr. Patton was there it was all right. Every Tom, Dick and Harry come along, Mr. Brown or the superintendent come along, and you were standing there waiting for the boss sawyer, and you have to go around for half an hour.

Q. Did Mr. Brown ever tell you to go ahead and saw? A. Certainly he did; he would say: "What are you doing there?"

Q. Why didn't you go ahead and saw? A. I wouldn't do it.

Q. Why not? A. I wouldn't do it, that's all.

Q. Were you afraid to do it? A. Certainly I was afraid to do it.

Q. Why were you afraid? A. You are not allowed to do it, that's all.

Q. Because of the condition of the saw? A. I didn't know the condition of the saw, but I wouldn't do it any way, and that's all.

Q. You work right next door to that place? A. 10
I do.

Q. Did you pass back and forth from one place to the other? A. Every day mostly.

Q. You notice that saw when you pass. A. I see it, of course.

Q. Ever see Mr. Sacks using the saw? A. No, I never did.

Q. Name any of the other men that you have seen use it? A. I have seen Mr. Betz and Mr. Patton, the foreman, use it.

Q. Anybody else? A. Lots of them, lots of 20
people; I can't tell you their names—Olsen and Johnsons, and Thompsons; I don't know the devil who they are.

Q. You remember the time of the accident, because you were in there then? A. Yes.

Q. That was the first part of May, was it? A. I do, faith.

Q. You have seen people cutting wood with this saw when it was in a wobbly condition; they run 30
the wood through it? A. Certainly.

Q. They have to push it through? A. If the saw is not in condition you have to force it.

Q. Did you ever hear Mr. Brown tell others to use the saw? A. He told them himself.

Q. Ever hear him tell other people standing there waiting? A. He would say: "Why don't you do it," "Why don't you do it."

Q. That was when he saw the saw-master was away? A. Yes.

Recross-examination by Mr. Hobart.

Q. How did it happen that after you had left the employ of this company, after this scrap you have spoken of, how did it happen that you went into the place afterwards? A. I was next door; when I heard that I said to myself: "I will go and look."

10 Q. You thought you would find out? A. I didn't think anything of the sort; he is a brother member of mine; I just wanted to see how the accident was.

Q. A brother member of what? A. Of our local, our Union; he is like a brother.

Q. What is the name of the order? A. The Federation of Labor, I think it is No. 31, of the carpenters' local.

PETER A. MARSHALL, sworn for plaintiff, testifies as follows:

20 *Direct examination by Mr. Turner.*

Q. Where do you live? A. 61 Lafayette street, Jersey City.

Q. On the 12th of May, 1906, were you employed by the Burt & Mitchell Company? A. Yes.

Q. Do you know Charles Marshall, the plaintiff in this case? A. Yes.

30 Q. Are you familiar with the saw upon which the plaintiff was injured? A. I know the saw; I saw it often—a circular saw.

Q. How long had you worked there at that time? A. About three weeks before.

Q. Do you know the condition of the floor where a person usually stands when using the buzz saw? A. Yes; the floor was usually slippery; the floor was usually covered with sawdust.

Q. What was the condition of the floor? A. It was slippery around there.

40 Q. Did that condition exist on the day of the accident? A. Yes:

Q. And before that? A. Yes.

Cross-examination by Mr. Hobart.

Q. How long had you worked for that company?

A. Four or five weeks altogether. I was working there at the time of the accident, I am not working there now. I left about a week or two weeks after. There was a strike, the carpenters had a strike. 10

Q. Are you a member of the Union and Local 33?

A. No.

Q. When did you ever have occasion to be around that saw? A. I was around there every day.

Q. You sawed there yourself? A. I never used the saw; I saw it when I was working around the shop.

Q. You saw sawdust on the floor? A. Yes.

Q. Did you ever brush the sawdust away to see how the boards were underneath? A. No, sir; there was sawdust there all the time, sawdust and pieces of wood. 20

Re-direct examination by Mr. Turner.

Q. You could see under the saw? A. There was one place in front, the wind would blow the dust away.

Q. You could see it was slippery there? A. Yes, that is in front, where they usually stand to use the saw. 30

Recross-examination by Mr. Hobart.

Q. They usually stand in front of the saw? A. Yes.

Q. The place you mean where the sawdust was, was directly in front of the saw? A. In the front it was smooth; the wind of the saw blowed the dust away.

Q. When you speak of seeing a lot of sawdust 40

there? A. There is sawdust all around; it was blown away in front where the saw made the wind.

PLAINTIFF RESTS.

Plaintiff moves for a non-suit on the ground, First, no negligence proved against the defendant. Second, negligence, if any, was not the proximate cause of the accident; Third, contributory negligence on the part of the plaintiff; Fourth, the danger was obvious and the risk assumed by the plaintiff; Fifth, the work of sawing was not within the scope of the plaintiff's duty.

PLAINTIFF'S COUNSEL—We seek to hold the defendant, because this man was made to work there after he had said he didn't understand the work; the work was unfamiliar to him and it was dangerous. And because the master failed to use reasonable care in not keeping the floor in proper condition. And because the saw was out of order; the master ought to have known that it kicked, and the defendant is liable on a combination of all the grounds. He didn't supply a reasonably safe place and he failed to instruct the plaintiff.

The Court refuses to grant a non-suit.

To which refusal defendant prays an exception may be allowed, and it is allowed, and signed and sealed accordingly.

C. W. PARKER, [L. S.]
J.

FRANK V. BETZ, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

I reside at 195 York street; am a ship carpenter; have been in that business about twenty years; I am working for the Burt & Mitchell Company; I have

worked for them between two and three years; I was working for them on May 12th, this year, when this accident happened.

Q. Did you have any particular duty at the company's place of business? A. Yes, I was supposed to do the sawing at that time; the boss sawyer or saw-master.

Q. Do you recollect the day when this accident happened? A. Yes. 10

Q. Where were you when the accident happened? A. I was down on the dry dock.

Q. How long had you been there on the dock? A. I don't know what time that accident happened, but I was down there between eight and nine; I heard of the accident after I came up to the shed; I got back to the shed about nine o'clock; Marshall had gone away at that time.

Q. Did you look at the saw? A. I looked at the saw. 20

Q. How was the saw arranged? A. The saw was raised between four and five inches above the top of the table; the gauge was alongside, about three-quarters of an inch from the saw.

Q. Did you make any examination of the saw? A. No; I looked at it and seen it was set just the same as I had set it that morning; before I went down to the dock that morning; I had set it because I had sawed a heavy stick that morning before I went down to the dry dock; I went down there between eight and nine; I just got through with the stick when I went down to the dock; the stick was eight inches through and about six inches long. 30

Q. Did you have any trouble with the saw? A. I did not.

Q. Did it wobble? A. No.

Q. Did it kick? A. No.

Q. What is meant by a saw kicking? A. When 40

you saw a piece and the saw is set too high for the piece; as the teeth comes up, it is bound to catch the piece and throw it up the same as this: Here is my saw coming and the teeth is up too high; it will catch that and throw that piece—raise it up from the table, that is, when the saw is too high.

10 Q. Look at this piece of wood which the plaintiff says is the one he was sawing at the time; what would you say is the thickness of that? A. Half an inch.

Q. How high should the saw be for that piece of wood? A. That saw should be no more than half an inch above the table.

Q. Why so? A. The only thing I can see is to protect yourself; keep the saw just as low as possible and to keep it from kicking.

20 Q. Is there any such thing as a saw, when it starts in to cut through the wood, stopping or arresting its speed and starting up again? A. It is according to the speed you have; if you have a heavy stick and shove heavy on the stick, you are bound to stop the saw; if you feed a saw too heavy by hand, you will stop her; that is because you feed it too fast—pushing faster than the saw can cut through it.

Q. If you stop pushing, the saw will start up again, won't it? A. Yes; the saw will start.

30 Q. Did you look at the floor round the saw table? A. I did.

Q. What kind of floor is it? A. Inch and a quarter spruce—undressed rough boards.

Q. Do you know how long they had been there? A. Yes; from January; that is when I saw them put in.

Q. Were those planks taken up by you? A. Yes; I took the plank up on the eighth day of August.

Q. Are they the same planks that had been there at the time of the accident? A. Yes.

Q. Did you mark them in any way? A. I did.

Q. Did you bring them to Court? A. Yes.

Q. Any saw dust on the floor. A. Usually always that way.

Q. Do you know Mr. Marshall? A. Yes; I know him from the time he started to work there. 10

Q. Ever saw any wood for him? A. Yes.

Q. Do you remember any occasion when Marshall himself used the saw. A. The only time I used to see Marshall use the saw was when I was using the band saw; that is another kind of saw; and while I was busy there, he went up and run it through on the other saw.

Q. What kind of wood was he using? A. White pine.

Q. Was it a board or strip of wood like this? A. 20
I can't remember that any more; it was a board.

Q. Did you notice whether he got along all right sawing that board? A. He got along all right.

Q. Please lay these boards on the floor with the upper side up?

Witness lays the boards on the floor.

Q. Please arrange them in order?

Witness arranges the boards. 30

Q. You have laid on the floor six boards numbered I., II., III., IV., V. and VI.; are those the boards that you took up from the machine? A. Yes; them is the boards.

Q. As the boards now lie on the floor, what is the location of the saw? A. Right here (showing).

Q. So that, as I stand at the end of the boards where the numbers are marked on them, I am

standing in front of the machine, am I? A. You are.

Q. The numbered side is the side which was up? A. Yes.

Q. How wide is the front of the machine? A. Three feet across.

Q. How long is the table? A. About four feet
10 six.

Q. These boards on this floor, as they lie, how wide? A. Four feet six inches the entire width.

Q. Did you take up any boards that were not directly in front of the machine? A. No, sir.

Q. This distance is wider than the machine? A. Yes; there are three more boards on this side; these are supposed to be nine inches boards; the machine is three feet wide.

Q. Then you did take up some boards that ex-
20 tended outside to the machine? A. Yes; four boards—II., III., IV., V., would cover the machine.

Q. Is there anything on the boards themselves which indicates the top of the saw table, extending out over the planking? A. Yes; No. IV. Here is the edge of the table; this is the marks on the edge of the table; these straight marks right across the end of the board at the edge of the table.

The Court.

Q. Is that where the feet would stand or where
30 a plumb line would fall from the edge of the table? A. From the edge of the table, yes.

Q. Had you used that saw the day before the accident? A. Yes; I used it to saw some white pine stuff—twelve inch boards—seven-eighths across; seventh-eighths by twelve.

Q. Did the saw wobble? A. No, sir; it did not?

Q. Had you ever known it to wobble? A. You can make the saw wobble; you can set the saw to

wobble; it has to be specially set. I never did it but I have seen it done.

Q. What happens to the board that you are trying to saw when the saw wobbles? A. It will cut straight through the same as if you set it for a half inch wobble, it will cut that slat half an inch wide. If it is set on a wobble it will make a wider cut. But you have got to set it to do it.

10

Q. Is it ever put that way to do any work? A. Yes.

Q. What sort of work? A. If you are going to rabbet or plow, or cut a groove out of a plank.

Q. Suppose this saw had been set to wobble, and you started to put through it a strip of wood about an inch wide, could you put a groove in it? A. I don't know; I never saw it tried on anything so thin as that.

Q. Suppose the saw had been set for wobbling, 20 to cut it through? A. It would cut straight through.

Q. How about cutting grooves? A. It would cut the groove all right.

Q. Grooves are not straight, are they? A. Yes, if I want to cut a groove in here to match another board, I have got to set that machine so far from that edge and I would set the saw to cut that, and I would make it wobble.

Q. Do you know how wide this saw is? A. The 30 saw cuts a quarter of an inch when she is set.

Q. Do you know how wide the place is in the table through which the saw is set? A. About three-quarters.

Q. What was the custom about the dynamo, whether or not it was kept locked? A. To keep the men away from it it was kept locked; I snapped the lock when I went out of the shed; I locked up the switchboard in the box.

Q. Did you use that saw the day of the accident 40

after the accident happened? A. Yes, about ten minutes after the accident—not longer than that; I used it.

Q. Did you make any change in it before you used it? A. I did; I lowered the saw to suit my idea and changed the gauge to suit my cutting.

Q. Did you make any change of any kind in the washer or bolt? A. No.

10 Q. That is left just the same? A. Yes.

Q. How long had it been just the same? A. It is supposed to be tightened up every time you go to saw, but I never did it, so I can readily raise the wood; I can lower it without going round to stop it.

Q. Tell me how the saw is kept in place; what does it revolve around? A. Revolves on an axle; is kept in place by two washers and a nut.

20 Q. When you started to use the saw shortly after the accident, did you make any change in the washers or nut? A. No.

Q. Did you have any trouble with the saw that day? A. No, sir.

Q. Did it wobble? A. No, sir.

Q. Did it kick? A. No, sir.

Q. Have you been using it since? A. Ever since.

Q. Have any trouble with it? A. Lately, about three weeks ago, I had.

30 Q. Up to that time have you had any trouble? A. No.

Q. Using it every day? A. Yes.

Q. Did Mr. Marshall ever say anything to you as to how this accident happened? A. No; only he said he was sorry that anything happened like that; that is all he ever told to me.

Q. Did he ever say or claim that the saw wobbled, or anything of that sort? A. No.

40 Q. When was it you were talking with him; how long after the accident? A. Sunday afternoon.

The accident happened on the twelfth; that was on Saturday; I saw him next day; Sunday afternoon.

Q. Did you say anything about why he used the saw? A. Yes

Q. Had you done his sawing for him before that? A. I had.

Q. He had asked you to saw for him before? A. Yes.

Q. Had you always done it when he asked you? 10
A. Yes.

Cross-examination by Mr. Turner.

Q. You had trouble with the saw about three weeks ago? A. Yes, I got the saw hot and she warped.

Q. You say this saw was supposed to be tightened every time you used it? A. Yes, every time we used it.

Q. And you never did tighten it? A. No, sir. 20

Q. When you said it was supposed to be tightened before using it what did you mean? A. I mean as if you are going to saw that rule in two, I would lower my saw down so the teeth would come through.

Q. What do you mean by tightening it? A. By setting it.

Q. Do you mean lowering, or raising the saw? A. Raising and lowering the saw; that is, setting the 30
saw.

Q. Did you mean tightened by the washer on the shaft so as to make it tight on the shaft? A. No, — this wheel and crank is what I mean by setting it.

Q. Is that what you mean when you said tighten the saw? A. Where the saw revolves on this shaft there is a set screw, and with this set screw you can tighten up the screw that will hold the saw; then you can lower it or raise it. 40

Q. That tightens it on the shaft? A. Yes.

Q. How do you make the saw wobble, you loosen the set screw don't you? A. No, you loosen the saw with this nut on this side.

Q. You loosen that nut on the shaft? A. Yes.

Q. That makes the saw wobble? A. Yes; but you have to wedge it and that will throw the saw.

10 Q. Did you ever tighten this nut on the shaft?
A. I have tightened every time I take off a saw and put one on.

Q. Do you recall ever tightening the nut on that particular saw? A. Yes, many a time.

Q. Why did you tighten it? A. Because I took the saw off to sharpen it and I had to tighten it to fasten it up again.

Q. Is that the only time you ever tighten it? A. That is the only time I tighten it.

20 Q. What day was it this accident happened? A. On the 12th of May, between eight and nine; I was down on the dry dock at the time; I didn't see it.

Q. Weren't you up on the hill fastening some windows for some relative of the president that day?
A. No, sir.

Q. What time did you go down on the dry dock?
A. Between eight and nine.

30 Q. Didn't you get to work at seven o'clock? A. Yes.

Q. What did you do? A. At seven o'clock I started some sawing; I sawed about twenty minutes, then I went out on board the boat where me and Mr. Marsh was working on the Burmese; I stayed there until I was sent up to the shop; then I came to the shop and stayed there till about eight o'clock; then went to the dry dock and stayed there until about nine o'clock; then I came up to the shop because I was through at the dock.

40 Q. Anything said about your going on the hill

that morning? A. No, I was not on the hill that morning.

Q. Were you on the hill the day before? A. I don't remember.

Q. Were you on the hill after the accident? A. No, I was not.

Q. Where were you the day after it? A. I went to the hospital to see him; I found he was not there; 10 then I went to another place to see him, on Hudson street; I saw him in bed.

Q. What did you say to him? A. I says "I am very sorry such a thing happened," he said "Yes, it happened, and that is all about it." And I told him he had no right to go to the saw.

Q. Why did you tell him that? A. Because I had charge of the saw; to do the sawing.

Q. You were not there? A. I was not there at the time the accident happened; I was down on 20 the dock.

Q. That is all there was said? A. That is all.

Q. You are working for the Burt Mitchell Company now? A. Yes, I am still there; I am sawing; the same work; the same saw.

Q. Did you look at the platform when you came back this morning? A. Yes, I couldn't help looking at it; when you pass over anything you have got to look, haven't you?

Q. You mean you looked at the sawdust? A. 30 Anybody could see the sawdust lying there.

Q. That is all you saw, the sawdust, wasn't it? A. Yes.

Q. You didn't see the platform? A. There wasn't sawdust enough to cover the platform and I could see that.

Q. Is the platform nailed on all sides? A. It is.

Q. How is it there are no nail holes in this covering? A. There are.

Q. There are not? A. Yes, there is.

Q. Where are they? A. Here and here; I sawed them off alongside the beam; I sawed off the end toward the saw.

Q. Because those ends were slippery, didn't you?
A. No, sir; them is the boards that were there.

Q. The slippery ends were up next the saw? A.
10 No, sir.

Q. Where was the slippery end? A. No place.

Q. You sawed the ends off up nearest to the saw?
A. Yes.

Q. You haven't got the ends that you sawed off?
A. They are down under the table.

Q. When did you saw off those ends? A. The
8th day of August.

Q. Where have these boards been kept since the
8th day of August? A. In a closet.

20 Q. Nothing has touched these ends that have
been sawed off since? A. No, sir.

Q. Where are the rest of the boards that you
didn't bring up here? A. Down in the shop under
the saw; they are still there; I put a new floor in
where I sawed these away.

Q. When did you put in the new flooring? A.
on the 9th of August.

Q. Did you put in boards just like those? A.
Yes; just the same.

30 Q. How could you put in new boards if the other
pieces are still there? A. Can't you put them two
fingers together (holding up two fingers).

Q. You pieced it? A. Yes.

Q. You left the ends toward the saw there? A.
Yes; they are there now.

Q. Who put these marks on these boards? A.
Me and Patton.

Q. Why? A. To show us the edge of the table.

Q. Couldn't you see the edge of the table without

any mark? A. I couldn't explain it; you wouldn't believe it.

Q. Didn't you mark all around the slippery place, so as not to cut it off? A. No, sir; that is just the end of the table.

Q. How is it you could get this particular board out IV., and you could not get out the other ends of the other boards? A. The other ends of the 10 boards they were fourteen feet long.

Q. There is about eight feet more of these particular boards? A. Yes.

Q. And that eight feet you did not bring? A. No, sir; it is down there under the table of the machine.

Q. And outside the table too? A. There is some outside the table, yes.

Q. You say this saw could be made to kick or to wobble? A. Yes. 20

Q. When the saw got heated, three weeks ago, it wobbled then? A. It didn't wobble while it was hot, but after it was hot and we started it up it twisted; I called the attention of the superintendent to it; he said, "Take it out;" I took it out and sent it to Philadelphia.

Q. You say you saw Mr. Marshall once use that particular saw? A. Yes.

Q. Was that the only time? A. No; it was not the only time; I could not say how often, but I 30 know he used it.

Q. How often have you seen him use it? A. I couldn't say; more than once.

Q. Where were you then? A. I was working on the other saw.

Q. Why did you say to him, when he lay in bed, that he should not have used that saw? A. Because I told him before not to touch the saw.

Q. Why did you let him use it frequently, if you

told him that? A. I saw him do it and he went out; I told him not to saw.

Q. When did you tell him that; when you were going out? A. Yes.

Q. How many times did you tell him? A. I couldn't say.

Q. Did you tell him every time? A. No.

10 Q. Why didn't you tell him every time? A. If I tell a man once or twice not to do it I will never tell him any more after that.

Q. Why didn't you report him to Mr. Brown? A. It was not my place.

Q. As a matter of fact, don't you know you never told him not to use the saw? A. I did.

Q. Don't you know you never saw him use it? A. I seen him use it; yes.

Q. You are sure about that? A. I am.

20 Q. When did you see him use it? A. I don't know the date.

Q. How long before the accident? A. A couple of days or so; I couldn't say when it was.

Q. You didn't tell him the day of the accident? A. I could not.

Q. That's the reason you didn't? A. Yes.

Q. This saw is run by electricity? A. Yes.

Q. That current increases and decreases some-times? A. No, sir.

30 Q. How do you know that? A. Because I know it when I am sawing that the saw never slows down any slower nor goes any faster.

Q. Don't the saw run slower when you force it? A. Yes.

Q. Did you ever force it? A. I did.

Q. Then why did you say it never stopped with you? A. I didn't say so.

Q. It has stopped when you were sawing? A. Yes.

40

Q. Then it starts up suddenly? A. Not unless I pull the stick out.

Q. When it wobbles it has a tendency to kick?
A. I never saw a saw kick. Explain to me what you mean by a saw kicking?

Q. All you have ever seen is the saw stop and suddenly start again? A. Yes, with a heavy stick and you force it.

Q. Doesn't that lift up the wood? A. No.

Q. What does it do to the wood? A. Nothing.

10

By the Court.

Q. What was the diameter of the saw which was being used? A. Twenty inches.

Q. You said you would have the saw set up about half an inch above the table in order to saw this particular piece? A. Yes.

Q. Don't you know if it was only half an inch above the table it would not saw this piece? A. It would.

Q. Sure? A. I am sure it would.

Q. Did you ever saw a piece of wood as thin as that without lowering the saw? A. No, sir; I always lower it.

Q. Always lower it as much as half an inch? A. I have lowered it down to a quarter of an inch.

Q. Not to saw a piece of wood like this? A. No; this is a half inch.

30

Q. When Mr. Marshall used the saw on previous occasions how high was the saw set? A. I couldn't tell you; I don't remember.

Q. You remember the time of day it was when he was using the saw. A. I remember the time of day of the accident, but I don't remember the time of day that he used it before; I know he was using it, but I don't remember the time.

Q. Was there anybody else there at the time you saw him before. A. I don't know.

40

Q. When did it first occur to you that you had seen Mr. Marshall using the saw on previous occasions? A. When I saw him using it.

Q. When did it come back to your mind? A. The day he got cut.

Q. Who brought it back to your mind? A. Conscience, I guess; I don't know anything else.

10 Q. Your conscience? A. Yes.

Q. You felt conscience stricken about it, d'yd you? A. I felt sorry for the man.

Q. You felt that you were a little bit to blame? A. No.

Q. Why did you feel conscience stricken? A. Because I was sorry for the man that the accident happened.

20 Q. How long after the accident did you use that saw? A. About ten or fifteen or twenty minutes afterwards I used it.

Q. How do you know that? A. Because there was some lumber there for me to saw.

Q. Any blood on the saw when you used it? A. Yes.

Q. Was it dry? A. It was.

Q. About what time of day was this? A. After nine o'clock.

30 Q. Don't you know that he was hurt about eight o'clock? A. I heard of it when I came up off the dock; I went down to the dock between eight and nine; I came up about nine o'clock and then I was told.

Q. What did you saw with it that same day? A. I sawed seven or eight boards.

Q. What were you using them for? A. For strips alongside the house on the tugboat Burmese.

Q. Window strips? A. No, for the cornice.

40 Q. Tell me why this wheel on the saw is supposed to be tightened every time you use it? A. Well, I sawed sixty-five thousand wedges, and when

I done that I set my saw, and I tightened her on that pulley to keep her, so nobody would move it up or down, and that's the reason she was set for that.

Q. Has that saw ever been tightened that way at any time so you could not move it up or down? A. Yes.

Q. Was it that way on the day of the accident? 10
A. No, it was loose.

Q. It wouldn't slide up and down? A. Yes.

Q. You didn't have to stop it in order to have it slide up and down? A. No.

Q. Did anybody else there use any of the saws there? A. Yes.

Q. Who? A. Billy Strang, Mr. Patton.

Q. Who else? A. They was the men that was supposed to use the saw.

Q. You were the saw-master, weren't you? A. 20
But they are foremen, and they have the privilege of sawing when they want to; I couldn't stop them.

Q. Ever see Frank Sacks use it? A. I did.

Q. He is not a foreman? A. No.

Q. Why didn't you tell me that when I asked you? A. I didn't know as you wanted to know that.

Q. I thought you knew everybody that used it?
A. I didn't keep a memorandum of all the men that used it.

Q. Tell me some more? A. That's all I know. 30

Q. Did Mr. Olsen ever use it? A. No, sir; not as I seen.

Q. Ever see Mr. Henderson use it? A. Hender-
son —; I don't know.

Q. How many other people have you seen use that particular saw? A. I never kept tally of them.

Q. But you know there could have been a number? A. Yes. 40

Q. Ever tell any of them not to use it? A. I did.

Q. Who instructed you to tell the men not to use it? A. Nobody; I did that myself.

Q. When you were cutting grooves and had fixed the saw so it would wobble, did you ever have any trouble with its stopping? A. I never set the saw to wobble; I have seen it done but I never done it.

10 Q. Isn't it done with the same saw? A. Yes, with that same saw; Mr. Patton set it when it wobbled.

Q. Did you watch him? A. I did.

Q. Did it wobble when he was using it? A. Yes.

Q. How much of that kind of work did he do with it? A. I couldn't tell you how many feet he done.

Q. How long before the accident was he doing the work? A. I should think that was in January or February.

20 Q. You previously testified that you never tightened up that nut on the shaft except when you took off the saw? A. That was the only time.

Q. Then you didn't tighten it up on the occasion when it was fixed so it would wobble? A. He done that himself.

Q. Did you see him do it? A. No, he must have done it; nobody else would have done it.

30 Q. You don't know whether he did it or not? A. No, I don't know.

Q. On the day when Marshall was hurt you changed the gauge of this saw, did you? A. No.

Q. You didn't change the gauge? A. No.

Q. Left it just as it was? A. Sure; you cannot change the gauge unless you slide it back and forth according to the width of the strip you want to saw. I could not saw an inch strip with a half inch cut.

Q. Has this saw ever been mended? A. Yes.

Q. How many times? A. I sent it three weeks ago to Philadelphia.

Q. How many times before that has it been mended? A. Not at all; that was the first time it got heated, and I sent it to Philadelphia to get it straightened.

Q. Did you break that saw before? A. No.

Q. You broke some saw? A. I did many a one; 10 bent the saw, but not a buzz saw.

Re-direct examination by Mr. Hobart.

Q. When you were sawing on the morning of the accident, before you went to the dry dock, what was the width of the board: how was the gauge set? A. I don't remember.

Q. Was it a quarter of an inch or more; this strip that he sawed; how wide was that? A. Three-quarters of an inch.

Q. Is that the width that you were sawing out that morning? A. I don't know. 20

Q. When you spoke of the saw sliding up and down, in order to make it do that, you would have to turn a crank? A. Yes, you would have to turn that little wheel on the end; take hold of the little wheel and screw it up and you can lower it back.

Q. When you saw the plaintiff on the day after the accident, Sunday afternoon, was he conscious? A. Yes.

Q. Did he seem to know what he was talking about? A. Yes. 30

Q. You told him he had no right to go there? A. Yes.

Q. Did he make any reply to that? A. No, he did not.

Q. How much does that saw table weigh with the saw on it? A. I couldn't tell you that.

Q. Several hundred pounds? A. Yes, several hundred pounds.

JAMES F. HAMILTON, called and sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

Q. You took a statement of Mr. Marshall? A. Yes.

Q. Did you call to see him two days after the
10 accident? A. I did; he was at his home in Jersey City.

Q. Who was present when you talked to him about the accident? A. His wife.

Q. Did you ask him how the accident happened? A. I did.

Q. Did you write down what he told you with respect to the accident? A. I did.

Q. Is this paper, Exhibit D 1, for identification, the paper that you wrote down at the time? A.
20 That is the paper, with my signature as a witness to his signature, 5-16-06, that is May 16th.

Q. Did you write down what he told you? A. I did.

Q. After writing it down was it read over? A. Yes, I read it over aloud; I was as close to him as I am to the stenographer; right alongside of him; after I read it to him I asked him was that statement correct as I read it, and he said yes.

Q. Did you ask him to sign it? A. I did, and he
30 did sign it after it was read over to him.

Defendant offers the statement in evidence.

Q. Did you have any further talk with him other than what appears in the statement? A. I stayed there and talked with him for quite a little while, both before and after taking the statement; I told him I was sorry, and that it was a case where there was not liability on the company's part; he said it
40 was not the company's fault; at first his wife didn't

want him to sign the statement; he said it was all right.

Q. What was Marshall's mental condition when you were taking this statement? A. Apparently all right, so far as I could see.

The statement is admitted in evidence and read to the jury by Mr. Hobart.

10

Cross-examination by Mr. Turner.

Q. What is your business? A. I am an adjuster for the Ætna Insurance Company.

Q. What did you have to do with this case? A. I investigated it.

Q. What has the Ætna Insurance Company got to do with it? A. I suppose they defend these people.

Q. They are supposed to pay any verdict which we may get against these people? A. Maybe they are. 20

Q. Up to the extent of five thousand dollars? A. I don't know.

Q. The business of adjusters is to dispose of claims? A. I suppose that is the meaning of the adjusters.

Q. You set out to dispose of this claim? A. Yes.

Q. Is this statement in your handwriting? A. Yes. 30

Q. You wrote every word in it. A. Except the signature.

Q. Everything else you wrote? A. Yes.

Q. And this getting of statements is part of your business as an adjuster? A. Yes.

Q. And the more beneficial the statement you get for the Ætna Insurance Company the better your work is appreciated? A. No, sir; I am supposed to get the truth, nothing but the truth; they don't 40

want me to get a garbled statement; they want me to get a true statement.

Q. What do you want to do? A. I want to do the same.

Q. You had some talk with Mrs. Marshall, didn't you? A. I talked with her in connection with Mr. Marshall.

10 Q. She asked you what you wanted him to sign this statement for? A. Yes; I told him that if there was anything wrong into it not to sign it.

Q. Is that the only inducement you offered to have this statement signed? A. I offered no inducement to have it signed.

Q. Didn't you say to Mrs. Marshall, "If you will leave your husband sign this statement it will be to your advantage?" A. I did not.

Q. "You will get the money?" A. I did not, and
20 you know better than that too.

Q. What is your recollection about that? A. I am positive I didn't say it; I don't have to say those kind of things.

Q. You mean everybody is willing to sign statements for you? A. No, sir; they are not; lots of people don't sign.

Q. But you say the plaintiff in this case did sign it because you wanted him to? A. Because he wanted to himself.

30 Q. Who said all these things to you? A. He, by my questioning.

Q. You asked him questions and he answered yes or no? A. Yes.

Q. He said all this about his having worked before on the saw? A. He said that; I asked him had he ever worked on the saw before and he said yes.

Q. You are the one who mentioned all the incidents as to the happening of this accident in your
40 questions? A. Yes, I asked the questions and he

answered; first I asked him how the accident happened, before I started to take down his statement; I said I would like to get this down in writing, then I took papers out of my pocket and wrote it down as he told me, asking him the question as I wrote.

Q. Do you mean you asked him the questions twice? A. Sure, I had gone over the case previous 10 to writing it.

Q. Did you notice any odor of ether or chloroform? A. Yes, I think it was iodoform; there was no ether or chloroform; I have been in hospitals a good many times on the same errand.

Q. You always try to get a statement from a man as soon as he has been hurt? A. As soon as I get notice.

Q. You knew this plaintiff was suffering considerable pain. A. No doubt of it; I could see the 20 man's hand was bandaged up.

Q. He appeared to be suffering considerable pain? A. It would be natural that he would be in pain; I am sure that he would be suffering pain from that hand.

Q. Do you mean to tell us that the man suffering that pain deliberately sat down and told you this long story that is in this paper? A. I do, most emphatically.

Q. You are here for the benefit of the insurance 30 company? A. For the benefit of the assured.

Q. It is to save your company this money that you are here? A. I am interested in the case.

Q. In order to save your company the money? A. That's what I am paid for.

Q. Because you got the statement? A. That is what I am paid for; getting statements.

Q. You didn't read this statement over to him right away? A. I did, to this man in his house.

Q. Positive about that? A. What's the use ask- 40

ing me a question like that when I am saying yes.

Q. How many statements have you taken since you took this? A. Hundreds.

Q. How many do you do a week? A. I don't know.

Q. You can state that you read this statement over to this man? A. Yes.

10 Q. How do you know you did? A. Because I read it.

Q. Can you tell the same instances in every case? A. No, but in any particular case I can; this is a particular case, and I can remember every particular case I have had for fifteen years, and can state all the particulars; I went there to get a statement; to get the facts.

20 Q. Besides this matter you have in this statement Mr. Marshall told you the company was not liable? A. He said it was not the company's fault; I think you will find it in there; I think it is down near the bottom.

Mr. Turner hands witness the paper.

MR. HOBART—It was not there. We didn't say that it was.

Q. The fact that he said that it was not the company's fault is a very important statement, isn't it?

30 A. Yes.

Q. Why haven't you that important statement? A. Well, it don't appear to be here, but that is what he said.

Q. Why haven't you got it in there? A. I don't remember.

Q. You as a successful adjuster, left out the most important part? A. I made that mistake there; I don't see it in there.

40 Q. You may have made other mistakes too? A. No.

By Mr. Hobart.

Q. What you wanted was the facts and not the law of the case? A. The law I leave to the lawyers.

WILLIAM L. STRANG, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

Q. You work for the Burt & Mitchell Company? 10

A. Yes.

Q. Did you bring with you to-day the boards that went in their factory near the circular saw table?

A. Yes.

Q. Where did you take the boards from? A. From the left hand side of the table as you face the table.

Q. Are these the boards, I., II., III., IV., V., VI., are they the ones? A. Them is the ones that 20 show where the table would be as compared with these other boards. The saw table would be about here, the saw here, right at the edge of the board; the left hand edge would be on the board marked III., the table and the saw.

Q. Put this table in the position of where you think the saw table was? A. (Puts the table in position). The edge of the table would come about there.

Q. You don't know anything about these shorter 30 boards that you bring here? A. No, I don't know anything about them.

Cross-examination by Mr. Turner.

Q. These boards that you have brought here were at the left hand side of the table? A. Yes, facing the saw.

Q. How long had these boards been down there? A. Been down there since the saw was put there; 40

I don't know when that was; I saw them put there when the saw was put there. These are the boards from the left hand side of the saw.

Q. You didn't bring the boards to the right hand side of the saw? A. No, sir.

Q. There had been some new boards put there? A. No, sir.

10 Q. These boards were put there at the same time that all the other boards were put there? A. Yes.

THE COURT—(To Plaintiff) Your claim is that your man was standing on the left hand side of the table.

MR. TURNER—My claim is that he was standing in front of the table.

20 THE COURT—You do not claim that he was standing on any other boards except those?

MR. TURNER—I do not admit that he was standing on boards in that position.

THE COURT—He was standing in front of the table?

MR. HOBART—On the left side.

30 THE COURT—Do you claim that he could stand on any other boards than these if these were the boards that stood there?

MR. TURNER—He must have stood on boards.

THE COURT—Are you going to claim that the defendants have failed to produce the boards this man was standing on?

40 MR. TURNER—Yes, I am. The defendants has brought the boards here which they say were the ones on which the plaintiff

iff was standing, and we claim that they are not the boards.

FRANK SACKS, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

I am a ship carpenter; have been a carpenter 10
for twelve years; in May of 1906 I worked for the
Burt & Mitchell Company; I am not working for
them now.

Q. Do you recall the fact of an accident happening to Marshall? A. I was in the mill at the time; I was at the band saw, sawing; that was about thirty feet from the circular saw.

Q. Were you looking toward Marshall? A. No, I had my back toward him.

Q. Was the band saw running? A. Yes, and I 20
was cutting my stick.

Q. Who had started it? A. Mr. Gerhardt had opened the switchboard box and turned on the power.

Q. When the power is turned on does that itself start the saws? A. No, sir; you have to turn the lever on yourself, and that starts the saw to running; you shift the belt from the loose pulley over to the tight pulley.

Q. Did Mr. Gerhardt say anything that you 30
heard after he turned on the power? A. He told me to go ahead and saw my plank.

Q. Do you remember the words he used? A. He said to me, "Go ahead Frank."

Q. Is Frank your first name? A. Yes.

Q. Is that all he said? A. That is all I can remember.

Q. Where was Marshall at that time? A. He was standing a little ways from me.

Q. Doing what? A. Standing there.

Q. Did he have strips of wood in his hand? A. Yes, he had a couple of strips.

Q. Did you start the band saw? A. I did.

Q. You had begun to use it? A. Yes.

Q. As you were using it you could not see Marshall? A. No, sir.

Q. How long was it before the accident
10 happened that you started to use the band saw?
A. About five or ten minutes before.

Q. Do you know what Marshall was doing during that time? A. No, sir.

Q. Did you hear anything, or was there anything that called your attention to the accident?
A. I heard a cry and turned around and saw what happened, and I saw Marshall stand there with his hand up in the air and said his fingers was gone; he was standing on the right side of the circular saw
20 as I was facing towards the saw and I went over to him; the saw was running when I got there.

Q. Anything peculiar about its running? A. I didn't take any notice of that.

Q. Did you see it wobble? A. No.

Q. Did you see anything of the stick that he had been sawing? A. No, sir; I told him to wait a minute until I shut down and I will take him to the office; as I shut down he ran out, and that's the last I saw of him.

30 Q. Did you notice anything about the floor and the sawdust? A. No, sir; I didn't notice.

Q. Did you observe anything about the gauge? A. No.

Q. Had you ever sawed wood for Marshall? A. The day before.

Q. How did you come to do that? A. Mr. Brown came there and told me to go in the mill and saw that piece of wood for that fellow; I went, and as I was going into the door, Charlie asked me to cut

that piece of wood; that is, Charlie Marshall, and I cut it for him.

Q. Was anything said why you should cut it and not he? A. No; I said to Marshall that the boss had sent me in there to saw that piece of wood; Marshall was the only man in there, and he had a piece of red pine three by eighteen; he turned it over to me and I sawed it for him.

Q. On the morning of the accident did Marshall ask you to saw anything for him? A. No, sir.

Q. Do you know anything about the floor near the accident? A. No; never paid any attention to that.

Q. You run that saw the day before and sawed a piece of wood for Marshall? A. Yes; in the afternoon, about three o'clock, I should judge.

Q. Did the saw go all right? A. Yes; it went all right.

Q. Did it wobble, or was anything loose about it? A. I didn't see anything loose or wobbly about it.

Q. Had you used the saw any other time? A. I had been there a month, and I used it four or five times altogether while I was there.

Q. Ever have any trouble with it? A. No.

Q. Did it ever kick? A. Never kicked on me.

Q. Or wobble? A. No, sir.

Q. After the accident, did you ever use the saw? A. No.

Q. One of the witnesses has spoken of the saw wobbling; what does that mean among carpenters?

A. They do grill work, and in order to make it wobble you have to set it on an angle, a little way from the perpendicular, and then it wobbles; that is the way we fix it.

Q. Suppose you take a piece of wood the same size as this strip that the plaintiff was working on, and you set the saw so that it will wobble and you start to put the stick through, what will happen to

the stick? A. It would tear that to pieces because it is so thin.

Q. Would it be possible to cut this stick the way it seems to be cut with a wobbly saw? A. No; it would make the cut bigger and tear it all to pieces.

Q. There would be nothing left of the stick but pieces, would there? A. Hardly.

10 *Cross-examination by Mr. Turner.*

Q. You have had some considerable experience in sawing? A. Yes; I have been working around off and on; worked for Lang & Company and others; sawed for them.

Q. How do you cut a groove in anything? A. Lower your saw half the thickness of the wood.

Q. Did you hear the saw-master testify this morning? A. Yes.

20 Q. Did you hear him say he loosened the saw and let it wobble, in order to cut a groove? A. He said he set the saw; there is different ways; I can cut a groove the other way too.

Q. How much experience have you had with a buzz saw? A. I served my time in a mill using buzz saw, band saw and planer.

30 Q. How far away from the box, where the power is turned on, is the band saw on which you were working on May 12th? A. Twelve feet away from the switchboard box.

Q. What was it the superintendent said? A. He told me to go ahead and cut my plank, and he opened the door for me.

Q. What did he say? A. He said, "Go ahead, Frank."

Q. Sure he said that? A. Pretty sure.

Q. Pretty sure? A. Yes.

40 Q. You are not positive about it? A. Why ain't I?

Q. Are you? A. Sure I am.

Q. You are positive he said "Go ahead, Frank."

A. Yes.

Q. What makes you so positive about that? A. I guess a man knows his name?

Q. Didn't he say, "Go ahead, Charlie?" A. No, I did not hear him say that at all. I didn't hear anything about him calling him Charlie.

Q. You saw Charlie there by the buzz saw? A. Yes.

Q. And he was waiting to cut a piece of wood? A. Yes.

Q. Had a piece of wood in his hand? A. Yes, a couple of strips.

Q. Did you see him start the saw? No, I was busy cutting on the band saw; my back turned toward him.

Q. How long had you been cutting when the accident happened? A. About five or ten minutes.

Q. Did you hear him cutting anything? A. No, I didn't take any notice until he gave the cry.

Q. You say the buzz saw does not start when the power is turned on? A. No, sir; you have got to put the belt from the loose pulley to the tight pulley.

Q. If the belt is on the tight pulley it starts? A. Yes.

Q. Then you don't have to do anything at all if the belt is on the tight pulley? A. There is the lever; you have got to start the machine with the lever.

Q. When the belt is on the tight pulley and the power is turned on, do you have to do anything to start the buzz saw? A. No, sir.

Q. You don't remember how the belt was that morning, do you? A. No, sir.

Q. Did you hear anything that the superinten-

dent said to Mr. Marshall? A. No, all I heard was "Go ahead with mine."

Q. You don't know what he said to Mr. Marshall?

A. No.

Q. You didn't notice whether the saw was in good or bad condition on that day? A. I didn't take any notice.

10 Q. If the saw was loose wouldn't it wobble? A. No, it wouldn't run if it was loose. That saw is fixed right on to the shaft.

Q. Suppose it was not fixed right, would it run?

A. It would run.

Q. If the shaft turned would the saw stand still?

A. It would shake; it wouldn't run round; it wouldn't turn.

By the Court.

20 Q. Is there a round hole in the saw? A. Yes, and it is a round shaft.

Q. Isn't there a key on it? A. Yes.

Q. Suppose that key was loose, then would not the saw blade turn? A. I believe so.

Q. You know that, don't you? A. I do not.

Q. Then the saw might run even if it was loose?

A. It wouldn't run so fast.

Q. It would run slower? A. Yes.

30 Q. If it were running slow, and the thing should happen to catch, it would run faster? A. The wood would not give the chance for the saw to cut.

Q. Suppose the saw were running slow because it was loose, then suppose it would tighten itself by turning round, then wouldn't it run faster? A. You have got to tighten the nuts on the side of the shaft to make it tight. It would never go tight itself.

40 Q. If the key should catch up there it would tighten up? A. Yes.

Q. Suppose the key did get tight, it would run faster, wouldn't it? A. It would.

Q. You say you used the buzz saw four or five times while you were there? A. Yes.

Q. How long were you there? A. About a month and a half.

Q. When did you leave? A. Right after June.

Q. You left in June? A. Yes.

Q. You were there part of the month of May, and all of the month of June? A. Yes, I was there before May; I went there the latter part of March 10

Q. Some of the times you used this saw were after the accident happened? A. I sawed four or five times with that saw, the latter part of March and part of May. I left in June on account of the strike.

Q. You went on a strike too? A. Yes.

Q. Have you used a buzz saw since then? A. 20
No.

Q. How long before the time of the accident had you used a buzz saw? A. The day before.

Q. Had you used a buzz saw at any other place? A. Yes.

Q. Where? A. At _____ Company's.

Q. Have you ever been a saw-master anywhere? A. No, sir; I am a ship carpenter.

Q. If a saw was loose it would wobble, wouldn't it? A. I don't know; I don't think so. 30

Q. You don't know anything about it, do you? A. I do know a little bit about it.

Q. What is your opinion? A. I should think the saw would never run if it was loose.

Q. If it does run wouldn't it be liable to wobble? A. Yes.

By the Court.

Q. Is there a slot in that table that the saw runs through? A. Yes. 40

By the Court.

Q. How wide is the slot? A. About half an inch.

By the Court.

Q. If the saw was very loose and started to wobble it would strike the side of the slot, wouldn't it?
A. Yes.

10 Q. You heard the saw-master testify that the slot was three-quarters of an inch wide? A. I didn't hear him say that.

Q. Do you say it is not three-quarters? A. I should say it was half an inch; I couldn't say positively.

Re-direct examination by Mr. Hobart.

Q. Did you ever fasten the saw on the shaft? A.
20 No, sir.

Q. Ever notice whether or not there was any key there? A. No.

Q. When you sawed this piece of wood for Marshall, the day before the accident, was he standing alongside of you or near you? A. He was standing at the back of the saw; I was standing in front of it.

Q. How long did it take you to saw the wood?
A. About fifteen or twenty minutes.

30 Q. Was he watching you at the time? A. Yes.

Q. Could he see how you did it? A. Yes.

Q. You stand in front when you saw? A. Part in front and part on the side on a short piece. If I had a long piece I would stand in front of it.

Q. Did you hear Mr. Gerhardt say anything but "Go ahead, Frank?" A. I didn't hear him say anything to anybody else, only he opened the lock for the motor and told me to go ahead with mine.

Q. How did Gerhardt happen to come there? A.
40 side of the machine put down at the same time that

I had just brought the plank in and he came through there.

Q. Did you ask him to open the box for you? A. No, I said I would like to know where Frank Betz is, and he said, "You can cut that."

Q. Did you hear Marshall ask him where Frank was? A. No, sir.

Q. Was Marshall standing there when he opened the box? A. Yes. 10

Q. Then why do you say he opened the box any more for you than for Marshall? A. He called me by name.

HALEY, called and sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

Q. You work for Burt & Mitchell Company? A. Yes. 20

Q. Did you help Mr. Strang bring some boards to the Court House? A. Yes.

Q. Are these the ones, the long ones, marked one, two, three, four, five and six? A. Yes.

Q. Where were those boards taken from? A. I don't know; I only helped bring them up here; I was not with him when he took them from the floor.

Cross-examination by Mr. Turner.

Q. You don't know what boards they are? A. I only helped bring them up here; they were taken out alongside the saw; I saw the place where they were taken from. 30

FRANK V. BETZ, recalled by defendant, testifies as follows:

Direct examination by Mr. Hobart.

Q. Were the boards that were on the left hand 40

those were at the front of the machine? A. Yes, all put down under my directions.

Q. These boards here were put down on the 8th of August, were they? A. No, sir; they were put down in January; the fore part of January.

Q. The boards that are in front of the machine now, were put down on the 8th of August, weren't they? A. Yes, those were put down in front of the machine.

Q. Were those boards that are here put down on the 8th of August? A. No, sir; they were put down in January.

Q. The short boards on which I am now standing were originally fourteen feet long? A. Yes.

Q. The same length as the pieces of the other boards which are brought here? A. Them boards and these boards are brothers and sisters; they were together.

Q. Fourteen feet long? A. Yes. I sawed them in two right there where the cut is.

Q. The boards marked one and two of the long, and five and six of the short, match? A. Yes, they match, they were sawed off to bring up here.

By the Court.

Q. No. 6 appears to be about one quarter of an inch narrower than this second board? A. Yes.

³⁰ *By the Court.*

Q. And this board No. 2, long, has never been sawed there at all? A. I didn't take them up; I didn't tear them; here is where the pulley is. Them cuts out of No. 6.

ALEXANDER MORTEN, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

⁴⁰ I am secretary of the defendant company; I was

such at the time of the accident; I didn't see the accident; I heard of it immediately after and I went down to the circular saw.

Q. When you got there did you see anything of a strip of wood that had apparently been sawed?

A. Yes; I looked round to see what he had been sawing.

Q. And is this strip the one that has been referred to as the one on which the accident occurred? 10

A. Yes, I picked it up and kept it in the office.

Q. Where was it when you saw it? A. Lying on the floor.

Q. What was the condition of the floor as to sawdust? A. I didn't pay particular notice; there was a little sawdust there.

Q. The saw was not in motion when you got there? A. No, sir.

Q. Had there ever been any trouble with that saw up to that time? A. None before that, and none since, except about three weeks ago, as Mr. Betz testified, and I sent the saw to Philadelphia. 20

Defendant offers the strip of wood in evidence.

It is marked Exhibit D 2.

Cross-examination by Mr. Turner.

Q. You are the secretary? A. Yes. 30

Q. You don't do any work with your hands outside? A. No, sir.

Q. Never have any business outside at all? A. I walk through there once or twice a day to see what is going on.

Q. What are your duties in the office? A. The duties of a secretary and treasurer, as they usually are.

Q. You have quite a good deal to do? A. Certainly. 40

Q. Kept pretty busy most of the time? A. Yes, I always make it a point to go around the shop at least once a day; I usually go around about nine o'clock.

Q. Did you go around this morning about nine o'clock? A. I would not say; I did not go out there until I heard about the accident.

10

WILLIAM W. GERHARDT, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

Q. At the time of this accident you were superintendent of the company? A. Yes.

Q. On the morning of the accident did you unlock the motor? A. Yes, I unlocked the switch-box.

20 Q. How did you happen to do that? A. Mr. Sacks asked me to unlock the box for him; he wanted to saw a piece of lumber.

Q. Did he say what saw he wanted to use? A. Yes; the band saw.

Q. You did unlock the box? A. I did.

Q. Who turned on the power? A. I don't remember whether he did or whether I did.

Q. Did you say anything to Mr. Sacks? A. I told him to go ahead.

30 Q. Did you see anything of Mr. Marshall at that time? A. I don't remember of having seen him.

Q. Do you know whether he was in the room? A. I didn't see him.

Q. Did you say anything to anybody there except to Mr. Sacks? A. No.

Q. Where were you standing when you spoke to Sacks and told him to go ahead? A. Near the switch-box.

40 Q. How far is that from the circular saw? A. Ten or fifteen feet.

Q. Is that box kept locked? A. The switch-box is always locked except when the saws are in use.

Q. Why was it locked? A. To keep the men away from the saw.

Q. Do you remember who it was that hired Marshall? A. I think Mr. Patton hired Marshall.

Q. You didn't yourself? A. I don't think so.

Q. After the switch was turned on is it necessary 10 to do anything else before the saws can be operated,

A. It is necessary to throw the belt on with the belt shifter.

Q. Did you notice the circular saw after you turned on the switch, whether or not it started?

A. The circular saw did not start.

Q. What did you do after you opened the box?

A. Went out of the shed and went down on the pier?

Q. Are you a mechanic? A. No.

Q. Had there been any trouble with this saw be- 20 fore this accident? A. No, sir.

Q. Ever have any trouble after the accident? A. No, except the saw run hot about three weeks ago, the time referred to by Mr. Betz.

Q. Is this drawing which appears in a page of some catalogue, does that correctly show the saw in question? A. Yes, that is a cut of the saw.

Defendant offers the cut in evidence; it is marked Exhibit D 3.

30

Plaintiff's counsel cross examines on that point, before the paper is received in evidence, as follows:

Q. What number is the saw that you have down there? A. No. 3.

Q. This in the picture is No. 2? A. That is a cut out of another book; the numbers run on the same.

Q. What make of saw have you down there? Atlantic Works, No. 3.

Q. What sort of a saw is this picture? A. At- 40

lantic Works, No. 3. It is the same saw exactly. The sales agents put their own numbers on, I believe they have their own cuts on; the salesmen put their own numbers on. That is their cut, not the Atlantic Works cut.

Q. How many pulleys are there on the machine that is down in your place? A. Four pulleys, live
10 pulley and dead pulley.

Q. There are only three on this? A. There are four on it.

Q. Where are they? A. There is 1, 2, 3, 4 (indicating); one back of the saw that you cannot see.

Direct examination resumed.

Q. While you were there that morning, did you notice how high the circular saw was above the level of the table? A. Yes, it was about four or five
20 inches. That was after the accident, four or five minutes; Marshall had gone.

Q. The saw was stopped, of course? A. Yes.

Q. Where was the gauge? A. The gauge was on the table.

Q. How was it set? A. Set about half an inch from the saw, I should judge.

Q. Notice any sawdust round on the floor? A. Yes.

Q. About how much? A. Some places there was
30 an inch, some places not that much, some places a little more evenly distributed on the floor.

Q. Did you see Marshall at any time after the accident? A. Yes, two or three days afterwards; I saw him on Morris Street.

Q. Have any conversation with him about it? A. Yes.

Q. State the conversation? A. He said he had run around the yard looking for Mr. Betz, and he couldn't find him, and he went in and started the saw
40

and sawed the strip himself, and he got his hand in the saw and got it cut off.

Q. Did he say anything about the saw wobbling or kicking? A. No, sir; he did not.

Q. Any discussion at that time as to whether or not it was any part of his work to do the sawing? A. No, he said he had gone around the yard to find Betz to saw the piece for him; he couldn't find him and he had to saw it himself. I didn't say very much to him. 10

Q. Did he give any explanation and state any of the details in which the accident happened? A. No, I don't think he did; I don't remember that he did.

Q. Who was the master sawyer? A. Frank Betz.

Q. How did it happen that you unlocked the motor for Mr. Sacks? A. Mr. Sacks was an extra sawyer, he had been employed at another factory as a sawyer, exclusively, and we used him as an extra sawyer. 20

Cross-examination by Mr. Turner.

Q. He had been employed by who? A. Tiejé & Lange, Hoboken.

Q. Didn't you hear him testify he had never been a master sawyer? A. I don't think he said so; we hired him as a carpenter; he was an extra sawyer; he had run Tiejé & Lange's saw for two or three years as a sawyer; told me he hadn't done anything else there but run the saw. 30

Q. You hired him as a carpenter? A. Yes.

Q. Frank Betz was the sawyer? A. Yes.

Q. Have you more than one sawyer? A. Yes, Mr. Sacks, and Mr. Betz and Mr. Patton, and Mr. Strang.

Q. As a matter of fact a good many people used

those saws? A. No, sir; only those four to the best of my knowledge.

Q. Ever hear of any one else using those saws?

A. Only the man that got cut.

Q. Have you been there when Mr. Brown has told the men to go ahead and do their own sawing?

A. No, sir; Mr. Brown never told anybody outside
10 that I ever heard.

Q. You say Mr. Marshall was employed by Mr. Patton? A. I think he was; I know I didn't employ him, that is, I don't think I employed him.

Q. You don't remember seeing Marshall at the saw that morning? A. No.

Q. You say he was not standing there with Mr. Sacks? A. I didn't see him.

Q. Why didn't you? A. I think he was not there.

20 Q. You heard Mr. Sacks testify that he was there?

A. Yes.

Q. You think Mr. Sacks is mistaken about that?

A. Yes.

Q. You have some doubt in your mind as to whether Marshall was cut at all, haven't you? A. No, I have not.

Q. You don't know who started this circular saw? A. No, I do not.

Q. Did you pay any particular attention to it?

30 A. When I unlocked the box for Mr. Sacks I went out of the building.

Q. Did you look at the circular saw when you went out? A. Yes, I had to walk right by it; I saw it was standing still.

Q. You didn't see Marshall standing there? A. No, I didn't see him.

Q. Then Marshall was not in that room at any time when you were there? A. I didn't see him. Mr. Marshall said he was upstairs in the loft.

By the Court.

Q. When did he say that? A. He said that on the stand here.

MR. TURNER—I beg to differ with the witness.

Q. There wasn't anyone in the room except 10
Frank Sacks? A. Not that I saw.

Q. When you turned on the power what did you say? A. I said, "Go ahead, Frank," or go ahead, I don't know which.

Q. You simply said, "Go ahead." A. I don't know whether I said "Go ahead, Frank;" I remember saying "Go ahead;" I don't know whether I said "Go ahead, Frank," or not.

Q. When you said that your face was toward the box? A. I think so. 20

Q. You were not looking round? A. I don't know.

Q. Did you see Frank Sacks doing the sawing? A. No, sir; I went right out.

Q. You didn't see Frank Sacks throw the belt on? A. I don't know whether he turned that on or whether I did; I don't remember about that.

Q. You are the superintendent there? A. Yes.

Q. And Mr. Brown was President? A. Yes.

Q. You worked under Mr. Brown's direction, did 30
you? A. Yes, he had entire charge of the plant.

Q. Did Marshall that morning ask you where Frank Betz was? A. No.

Q. Sure about that? A. Yes, quite sure.

Q. Didn't he ask you that when you were upstairs? A. I was not upstairs.

Q. Where did you go after you turned on the power? A. I went out of the shed down to the pier.

Q. Where had you been before that? A. I had been down to the pier.

Q. You came up from the pier and went right back again? A. Yes.

Q. All you did up there was to turn on the power? A. Yes.

Q. Who asked you to come up and do that? A. Mr. Sacks.

Q. Did he come down on the pier? A. He did.

Q. You came up and then went right back? A. Yes.

Q. Why didn't you give him the key? A. It was fastened on a chain and the chain was fastened to my suspenders.

Q. The sawyer has a key? A. Yes.

Q. The other men didn't have any key? A. There was three keys—Mr. Patton, Mr. Betz and myself.

Q. How far is it from the dock or pier up to where the power is? A. I suppose it is about three hundred or three hundred and fifty feet.

Q. Did you see Mr. Marshall when you were coming up? A. No.

Q. Did you see him on the way back? A. No, sir.

Q. You are sure you didn't see him when you were in there? A. No, sir; I did not.

30 *Re-direct examination of Mr. Hobart.*

Q. You know this man King that testified this morning? A. Yes.

Q. Do you remember when he was discharged? Yes; along the latter part of March or first of April, 1906.

Recross-examination by Mr. Turner.

Q. Why do you fix that date? A. I know that
40 was about the time; it was the latter part of March

or first of April, and I know he had a at that time, and we needed the tool that Mr. King had on this job.

Q. Then he went to work for one of your competitors? A. He went to work for another concern right next to us. I suppose you refer to the Brown Dry Dock Company.

Q. Their yard is right next to yours. A. Yes. 10

Q. Nothing between them? A. Nothing more than some sheds.

Re-direct examination by Mr. Hobart.

Q. How do you happen to remember so well the discharge of King? A. Mr. King had a chisel in his chest; he wouldn't give it up and we took it away from him.

By Mr. Turner.

20

Q. Do you know anything about that chisel? A. Mr. McLaughlin came and told me ;he said the chisel belonged to the Burt & Mitchell Company, and Mr. King said it was his own tool, and I took it away from him.

JAMES PATTON, sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

30

Q. You are employed by the defendant as a carpenter? A. No, foreman.

Q. Were you employed by that company in May last year? A. Yes.

Q. Did you have anything to do with that circular saw? A. I put in the saw; set it up; after it was put up I run it; sometimes all day long.

Q. Are you able to say whether or not you had done any work with the saw the day before this 40

accident to Marshall? A. No, not as late as that; it might have been a month before.

Q. After the accident have you ever used it? A. Yes; probably a week after, or something like that; it would be only some little, short job.

Q. During the time you did use it, either before or after, did it ever wobble or kick? A. Yes, I made it wobble—set it up to wobble.

10 Q. When you did set it up to wobble did it ever kick? A. No, sir.

Q. How do you do it? A. Putting a kind of washer on a spindle to make it make a wide cut.

Q. Do you know whether Mr. King ever saw you do that? A. I could not say.

Q. Did you hear of this accident? A. Yes.

Q. Did you go to the place? A. I went up in the mill where the saw was.

20 Q. Notice anything about the sawdust? A. I looked round to see what condition things was in, but there was nothing there to draw my attention; there was a great deal of sawdust round the saw.

Q. Any loose pieces of wood lying around there? A. Not that I noticed.

Q. What about the saw itself—what was its condition? A. It was in ordinary order—good order; it was working all the time; there was no trouble about it; I heard no complaints.

30 Q. Did you notice how far the saw was above the table? A. Yes.

Q. How high? A. About between four and five inches; I didn't measure it.

Q. What was the position of the gauge? A. The gauge was about three-quarters of an inch away from the saw.

Q. Suppose you were cutting a piece of wood about half an inch thick and about an inch wide, and the saw wobbled, what would happen to the
40 wood? A. It would make a wide cut.

Q. Wider than on exhibit D 2? A. Yes, considerably wider than that, if it wobbled any.

Q. Is this the width that that saw would cut if it were fastened up tightly with the gauge set at the distance where you noticed it shortly after the accident? A. Yes, that saw-cut is about the thickness of the saw.

Q. You put that saw up? A. Yes.

Q. How is it fastened to the shaft? A. It slips right on to the round spindle, and there is a washer on each side of the saw which clamps up with the left hand nut.

Q. Is there any kick to it? A. No, sir; no kick at all.

Q. If the washer were loose what would happen to the saw? A. It would not go round.

Cross-examination by Mr. Turner.

Q. Is there a set screw on the saw? A. No.

Q. Is there a set screw that holds the saw in position? A. No, a left handed nut that holds the saw on the end of the spindle.

Q. What does the nut set the saw up against? A. Two heavy washers; one of them is shrunk on the shaft and the other is loose.

Q. There is a washer on the shaft on one side? A. Yes.

Q. Then put the other washer on and screw the nut up on that washer? A. Yes.

Q. You can make the saw wobble as much as you like? A. Yes.

Q. When you cut a strip as big as this, Exhibit D 2, that saw would not wobble very much?

A. No, that is evidence that it was not wobbling.

Q. This opening is larger at one end than it is at the other, what causes that? A. I don't think it is.

Q. You say you hadn't used the saw for a month

before the accident? A. About that length of time.

Q. If this saw did wobble it would be pretty dangerous for one not familiar with the use of a saw, to use it? A. The saw was not set to wobble.

10 Q. I ask you if a saw did wobble wouldn't it be dangerous to one not familiar with the use of a saw? A. No more than any other time. You would have to keep your fingers out of it.

Q. Why does that stick show why the saw was not wobbling? A. The cut is so narrow. It would have taken out more wood.

Q. Did that saw come back from Philadelphia? A. Yes.

BERNARD McLAUGHLIN, sworn on the part of the defendant, testifies as follows:

20 *Direct examination by Mr. Hobart.*

Q. What is your business? A. Boiler maker.

Q. On May 12, 1906, did you work for the defendant? A. Yes.

Q. You were working for that company when this accident happened? A. Yes.

Q. You were a boiler maker. A. Yes.

Q. Were you in the shop at the time the accident happened? A. Yes.

30 Q. Did you see Mr. Marshall start the saw? A. Seen him at the saw, using it.

Q. Tell us what he was doing when you first saw him? A. I was passing through the shop and he was at the saw, sawing a piece of wood, something similar to that (Exhibit D 2); as I was passing I noticed him; being a strange man I stopped on my way; I wanted to have a good look at him; his back was to me.

Q. Where was he standing as to the table?
40 A. He was up alongside of it; partly alongside;

one foot was alongside and the other back a little farther toward the back of the saw.

Q. As he stood there did you notice where his hands were? A. Yes.

Q. Where were his hands? A. When he was getting pretty close up to the circular saw; when he got pretty near there; the end of the stick as I thought; he let the stick go with his right hand; he had hold of it with both hands; he let go with his right hand and he made a kind of a hitch for it with his left hand; and just as he got landed, I could not see him very clear, but when he reached with the right hand, I heard the saw ripping three times, like three rips through; he turned around his back to the saw and had hold of his hand like that (showing), and I noticed his fingers all off.

Q. Do you think you could show us the exact position where he was standing; just come down on these boards here; let this table represent the saw table; now will you show us how Mr. Marshall was standing when you saw him? A. Here is the position he was in (showing).

Q. Standing a little to the left? A. Yes; he dropped his right hand off the stick, and then he kind of lurched over that way (showing), soon as he made that lurch I heard the saw rip three times; then he turned round, and there was the hand with the fingers off, he says, "It is all up with me now; it is all up with my hand," twice

Q. How far away from him were you? A. I was about twenty feet away from him.

Q. Is this saw table near a window? A. Yes, pretty near; there is a window right there.

Q. A good light? A. Yes.

Q. Did you notice whether or not his foot slipped?

A. It did not slip.

Q. Could you see? A. Certainly.

Q. Did his foot move at all? A. No, his foot

never moved at all; kept in the same position all the time I was looking at him.

Cross-examination by Mr. Turner.

Q. What is your name? A. Bernard McLaughlin.

Q. Do you mean to tell us that Mr. Marshall
10 stood there, had hold of the stick with the right hand, and put his left hand on the saw and cut off his fingers? A. I saw his right hand leaving the stick and coming behind him; then he leaned forward like that (showing).

Q. What did you do after he cut off his fingers?
A. When he put up his hand like this (showing), there was no blood for an instant coming, and I was going toward him; as soon as I seen the blood coming out of his hand and I saw his fingers was gone,
20 my stomach commenced to get a little sick and I had to go away.

Q. You turned and left him because you were sick at your stomach? A. Certainly, I could not look at the blood.

Q. You say there was no blood for a minute? A. Not when he first put it up like that (showing); there was no blood showing; then it came down, and as soon as I seen that I had to turn away; I
30 I was coming through from the machine shop; I stopped; noticed there was a strange man; I was going to wait till he got through cutting; he was a stranger and I had never seen him there before.

Q. How long had you been there? A. About two years and two months.

Q. You are a machinist? A. No, I am a boiler maker.

Q. Where do you work? A. Sometimes in the shop, sometimes out in the boats.

Q. Every time you see a strange man you stop to
40 look? A. No, not to stand and look.

Q. Why did you stop this time? A. You generally look over a stranger to see what he looks like.

Q. You always do that, do you? A. As a general thing you do.

Q. How many men have they down there? A. A good many.

Q. Every time a strange man comes you stop 10 and look him over? A. No, I didn't make a habit of doing it.

Q. How long did you stand there? A. I was not a minute when the accident happened.

Q. Did he saw the two strips off correctly? A. I stopped and looked at him; his left hand came back with his head and shoulders, then next was the rip of the saw.

Q. How do you know he didn't slip? A. I seen everything else; I would have seen that; there was 20 nothing there for him to slip on.

Q. How do you know? A. I could see.

Q. Was there any sawdust there? A. Yes.

Q. Could you see what was under the sawdust? A. I could see part of the flooring.

Q. How do you know there was nothing for him to slip on? A. I couldn't see nothing.

Q. You say he did not slip because you did not see him slip? A. Could not slip without my seeing it; it only lasted a minute, not that. 30

Q. You saw him lay his hand on top of the saw? A. No; he reached forward like that (showing), with his head and shoulders; I couldn't see; I was standing right directly behind him twenty feet away.

Q. You didn't have any business in that room? A. I had to go past through that to go into the Morris shop.

Q. Did you think he put his hand on the saw on purpose? A. No.

Q. Then why do you think he put his hand on the saw? A. I don't know where he put it because I could not see his hand; I saw the right hand coming back off the wood; that was before his fingers was in; I could not see his left hand.

Q. You are pretty deaf; can't hear very well?

A. Not very well.

10 Q. You were twenty feet away? A. Yes.

Q. You heard the saw cutting the bones? A. Sure; I don't know whether it was cutting the bones or not; I heard two or three rips.

LEVI O. COGER, called and sworn on the part of the defendant, testifies as follows:

Direct examination by Mr. Hobart.

20 Q. Where are you employed? A. Vanderbeek & Sons' lumber yards.

Q. What is your business? A. Superintendent of the manufacture of lumber.

Q. Ever had anything to do with circular saws?

A. Yes; from the manufacture of the log down to the product of lumber of every description.

Q. Have you used them yourself? A. Yes.

Q. For how many years? A. Fifteen.

Q. Have you taught others to use them? A. I have; yes.

30 Q. Tell us what is meant by the expression "wobbling" in a circular saw? A. The wobbling saw is in various forms; they are made to be adjusted by mechanical devices; they are also made to cut various sized rabbets or grooves by a circular wedge giving the same result.

Q. A wobbling saw; does that mean that the saw is not running properly? A. No; a saw that wobbles is made that way to do a special kind of work.

40 Q. It is set specially to do that thing? A. Yes.

Q. Suppose you were sawing a piece of wood like this (Exhibit D 2), and the saw was set to wobble; shoving the stick through, what would happen?

A. It would be very likely that you could not get it in the saw; it would bounce it up and down on the table and break it in pieces; that has been cut with a perfect saw; there are marks that show it struck the back side of the saw at the rear of the table, taking little pieces out of it. 10

Q. What would that indicate with reference to the height of the saw table? A. That would depend entirely on the diameter of the saw.

Q. A twenty-inch saw which at that time was standing four or five inches above the level of the table? A. It would be exceeding dangerous to cut a piece of this character with a saw so set; the danger would be that after the piece had reached the rear end of the saw, the teeth would catch it in the back and throw it off the table; that is, the rising teeth on the back. 20

Q. What is the effect with the saw set four or five inches above the table? What, if any, bearing have these marks? A. These marks were made by the return cut of the saw (indicating on D 2); that indicates that it was cut by the return teeth of the saw coming up through the table.

Q. If the saw was set so as to be just high enough to cut through a piece of wood of that size, would those marks be there? A. No, sir; there would be merely the mark of the saw going down through the material unless the machine was not properly constructed or something out of order. 30

Q. Can you tell from an examination of that Exhibit D 2, especially that part which has been cut with a saw, whether or not the saw that did that cutting wobbled? A. No, sir; I don't think it did.

Q. What makes you think so? A. There is no 40

sign of anything wobbling on this; it is a perfectly true cut; almost as smooth as if it had been cut with a plane; from this mark X it is perfect; down from here on it has been shattered more or less; it is rough; that shows the distance that the saw was sticking up through the table.

Q. How many inches is that? A. (Measuring)
 10 Thirteen and one-half inches; that is evidently where the saw stopped and the accident occurred.

Q. If a man were shoving D 2 through a circular saw twenty inches in diameter, extending four or five inches above the table, what would be the tendency of the stick after you got it partly through the saw? A. That would depend entirely on the condition of the material you were sawing; if it were absolutely straight, it might go through all right, but if there was a crack in it, the teeth of
 20 the saw returning through the table would be apt to catch it and lift it up from the table; make it snap up and down.

Q. Do you happen to know what would be the arc of a twenty-inch saw—that part which was above the table; four or five inches above? A. No; it would be hard to give that off hand; have to figure that out.

Q. Can you give me any rough idea? A. It would possibly be a depth of two inches; three-
 30 quarters of an inch off; that is out of line; I can't tell exactly.

Q. Do you know what is meant by the expression a saw kicking? A. It is a common term used among sawyers where the piece kicks; it is not the saw that kicks; the saw will catch the material and kick it back, as they call it; it is not the saw that kicks; the saw does not kick; it is the material that kicks.

Q. What causes that? A. Sometimes shoving
 40 heavy material will heat the saw, and will cause

the saw not to follow the regular course it should follow, or they go to force the saw; the back teeth will catch the material and drive it in the opposite direction from which they are pushing it.

Q. It is in evidence that the plaintiff started to cut this strip D 2, and giving it a shove, and when he did so the saw seemed as if it made twice as many revolutions as it did before, and then it seemed to go all in jumps; then it started up again, what would that indicate? A. It is hard to explain an accident of that kind. The passing of the piece in the saw would naturally make some difference in the noise of the saw, giving the man that was operating it the idea that it was not running as fast as it was, or when it was running empty, and pushing the stick hard it checks the saw down; puts a brake on it. 10

Cross-examination by Mr. Turner.

20

Q. What is the other name for what you call a wobble saw? A. Dad saw. It is used for the same purpose.

Q. A special kind of a saw? A. Yes, a wobble saw is used in the same way as a dad saw; the wobble saw is a little quicker to adjust for various uses.

Q. That is not an ordinary buzz saw? A. Any kind of a buzz saw you can make one out of it. 30

Q. But you have to change it over? A. Yes.

Q. Have you ever seen a wagon wheel running along when it was loose on the axle? A. Yes.

Q. It wobbles? A. Yes, that is the idea exactly.

Q. You mean to say this saw does the same thing? A. Yes.

Q. Is the saw loose? A. No, it must be firm on the mandrel or arbor.

Q. If the saw was loose on the arbor would it 40

wobble then? A. There would be nothing to drive the saw; the saw is driven from the center of the saw, and if it is not securely fastened it would not be able to run.

Q. When you say that a saw kicks you mean that the saw throws the wood back? A. That's the idea.

10 *By the Court.*

Q. Is it practical to have a saw which is seemingly fast in places and stops when the work is pressing heavy, and the axle go round and leave the saw standing still? A. There have been cases of that kind, but if it is properly put on, screwed up tightly, nine chances out of ten it would tighten itself; the nut will tighten it. I have seen them tightened so the nut had to be cut off. They are
20 right and left handed, both. The nut is generally put on so that if it is loose it is likely to tighten itself up. Put on the opposite way from which the saw runs.

Q. Then a loose saw will tighten itself up? A. Very likely. If it is loose at all the chances are it would stop and do damage to the saw.

Q. What makes the saw get heated up? A. Friction from the material going by it; fast feeding; working it too heavily.

30 Q. If it was not properly set and was worked too heavy it might then go ahead? A. Yes, if it is not in proper condition to work they will soon know it.

Q. If a saw is not in proper condition it is likely to kick? A. Yes.

Q. Then it might go slower, and then start faster again if it is not in proper condition? A. It depends upon what they are sawing.

Q. And upon the condition of the saw? A. Yes.

40 Q. When you speak of a wobbling saw you don't

mean an ordinary buzz saw? A. I say that an ordinary buzz saw you can make into a wobbling saw.

Q. You don't call a buzz saw a wobbling saw?
A. No.

Q. It is a special kind of saw? A. No, sir; any saw can be made to wobble to cut a rabbet or a groove. It would not cut it uniformly. A saw that would get out of order and wobble would not cut a true groove or rabbet or dado. 10

Q. It would be dangerous for one inexperienced in the use of a saw, to use one which wobbles? A. No danger; it would break the work; it will tear your material to pieces.

Q. Would you say that a wobble saw would not kick? A. You can make any kind of a saw kick if you wish to adjust it so?

Q. If a saw was out of order and wobbled because it was out of order it would have a tendency to kick, wouldn't it? A. Yes. 20

Re-direct examination by Mr. Hobart.

Q. By kicking you mean it would have a tendency to tear up the wood or throw it back? A. Lift it from the table, as the case may be.

Q. It would not affect the motion of the saw itself? A. Not in the least, no, sir. 30

Defendant offers in evidence the six boards, the short boards, those taken from the front of the machine, and also the six boards that were taken up to-day, being the six on the left hand side of the machine.

Plaintiff objects to the admission of the boards in evidence, on the ground that it has not been shown that they are the boards that the plaintiff was standing on at the time of the injury. 40

The Court receives them in evidence.

DEFENDANT RESTS.

CHARLES V. MARSHALL, recalled in his own behalf, testifies as follows:

Direct examination by Mr. Turner.

10 Q. Do you remember this Bernard McLaughlin, the boiler maker, who testified? A. I remember seeing that man round there.

Q. Where did you see him? A. I seen him working in the yard outside, when they was putting up some foundry or factory there.

Q. Did you see him in the room? A. No; he told me he walked through the time it happened, and he said my three fingers hit on his shoulder. He told me that the sixth or seventh day after the
20 accident when I was down there; he says, "I know you, your three fingers hit on my shoulnder" I didn't see the man.

Q. Who employed you to work? A. Mr. Gerhardt employed me.

Q. He says he does not remember employing you? A. The superintendent, he employed me.

Q. When did he employ you? A. About five or six weeks before this thing happened. I don't know exactly how long I worked there.

30 Q. I read from the statement which Mr. Hamilton alleges you made—in that statement it appears that you were employed by the Burt & Mitchell Company for four weeks as a ship joiner, on May 12th; at 9.30, you left the tug Burmese on which you were working and went to the circular saw to have some window strips sawed, is that so? A. No, sir; I didn't go right to the circular saw. Mr. Sacks was carrying a big stick of wood; he aked me to carry in a big stick, and Mr. Gerhardt stood
40 there and he saw us coming in with the sticks.

Q. It further appears that you looked round for the saw-master and couldn't find him? A. That is so.

Q. Then you say another man came and wanted a piece of wood sawed, and the superintendent came in, and you say the motor runs the saw, and he opened the box and said "Go ahead." A. He said, "Go ahead;" I didn't hear him mention any name; he stood with his back to me; I was not ten feet away from him. 10

Q. Did you ask Mr. Gerhardt in there as to where the saw-master was? A. Yes; he shrugged his shoulders and said "I don't know."

Q. That you looked for the saw-master and couldn't find him, and you went and got a piece of wood and went and sawed it; after sawing that "I got another piece of wood"—is that so? A. No, sir; I only had one piece of wood; I only needed one. I don't know what I slipped on; I slipped on something, wood or iron; I don't know what it was; I was pressing up against the piece; one foot was on the floor; when I was pressing against the piece of wood my foot went out from under me; I fell over and my hand shot ahead. 20

Q. There was not any iron there? A. I don't know what was on the floor—pieces of wood, and sawdust, and stuff lying around there—I don't know what was there. 30

Q. It says that you said you were an experienced carpenter and had been a ship carpenter on ships at sea? A. That is not so.

Q. It says also that you had worked on this saw a number of times? A. I worked round them saws with Mr. Betz; Mr. Betz and me worked together all the time there was any sawing done; I never done it, except this time, when he was not there. Mr. Betz always done it every time. I was stand-

ing by him, helping him carrying the wood and handing him the wood.

Q. It further says that the saw and its appliances were in good condition on the day before the accident; that the superintendent got me to saw up some wood for him; for a new man. Did you see any wood the day before the accident for a
10 new man? A. No, sir.

Q. It further says, "I had used the saws in different places where I worked previous to this accident?" A. I never worked in a place where there was a buzz saw.

Q. Do you see here any of the wood or the boards upon which you slipped at the time you cut your hand? A. If they are, they must have been covered; they don't look like the boards what I went and examined and scraped the sawdust off. They looked as
20 if they had been worn and smooth. These boards look smooth. Unless there must have been something covered over them.

Q. Are any of these boards here the boards that you slipped on? A. They don't look to me the same.

Q. Do they feel like the boards you slipped on? A. No, sir; I walked over them.

Cross-examination by Mr. Hobart.

30 Q. They don't seem to be slippery now? A. No.

Q. What kind of boards did you slip on? A. The boards that I slipped on when I went to examine them they was boards something like that.

Q. The same width? A. I don't know; I didn't measure them.

Q. Were they about the same length as these? A. They might have been for all I know; I never measured them; they might have been eight inches or nine inches; I don't know; I didn't measure
40 them.

Q. Were the boards that you slipped on about the same width as these in the Court room? A. Yes, they might have been about the same.

Q. About the same thickness? A. I don't know; I only looked at the top of them.

Q. What kind of boards are these? A. Spruce, I believe.

Q. Do you know spruce when you see it? A. I could not swear to that either; I can tell yellow pine. 10

Q. Were the boards you slipped on yellow pine? A. I am not willing to swear they were yellow pine.

Q. Were the boards you slipped on spruce? A. I don't know what wood they were.

Q. Did they look like these? A. Yes, on the end, but they seemed to be worn down and smooth; that is the only difference I see in them.

Q. Show us the part that you saw was slippery? 20
A. From about here (indicating), two feet was a spot where a man would generally stand when he shoved, was worn down, then another spot was worn down smooth, not worn in deep, but smooth. If it was not worn down there was something over the top of it that made it slippery, as if I would take a piece of rosin; kind of a gloss on it.

Q. The smooth part of the boards was directly in front of the machine? A. Here was one foot, here. 30

Q. Your left foot there, at about a corner of the machine, opposite the front left hand leg? A. One foot was there.

Q. About opposite the front left hand leg, is that right? A. Yes, opposite that leg; one foot was about here.

Q. That was your left foot? A. No, sir; that is my right foot.

Q. Where was your left foot? A. About here, further up. 40

Q. How far from your right foot? A. About eighteen inches apart.

Q. This slippery place was about where you are standing now? A. Yes, where my right foot is.

Q. That was in front of the machine? A. Right by the leg of the machine; in front of the leg.

Q. The place where you slipped was about two
10 feet or so back of the left front leg on the machine?

A. My feet was about eighteen inches apart; one leg here and the other there. The spot where I slipped could not be only about six inches away from the leg.

Q. It was your right foot slipped? A. My right foot went out that way (showing), and this hand shot ahead.

Q. You said something about having worked around the saws with Mr. Betz? A. Yes, we
20 worked together on the boats, and when there was any sawing to be done he said—when I first come there he said, “I am the saw-master; I do the sawing,” and I saw him often doing it, and I been helping him carry the wood to the saw, carry it on my shoulders; he would send me for a board; he told me what to do.

Q. When he sawed the wood you stood by and looked at him? A. Yes, but I never took much interest in him because I thought it was dangerous.
30 He told me Mr. Patton lost his finger, and I was kind of afraid from that time.

Q. How many times did you see Mr. Betz use the saw? A. I could not tell you how many times.

Q. How many times did he saw wood for you before the accident? A. I couldn't tell you; anything had to be sawed he would go and saw it.

Q. Was it one or ten, or a hundred times? A. I don't know. Sometimes every day; sometimes every other day there would be a little sawing to
40 be done, he would do it himself without me.

Q. When you were in there with him you would stand and look at him? A. If he needed me there I would stay.

Q. Didn't you used to work on ships? A. I have been all my life on the water; I am a pilot in this harbor eighteen years, and have my license.

Q. You have been a carpenter on ships? A. No. I have seen them working; I have been sailing; 10 been a pilot.

Q. Ever do any carpenter work? A. The first carpenter work I done was for Brown Company, for about three months.

Q. Did they have a boss sawyer? A. No, not when I was there.

Q. Ever do any carpenter work before you went to Burt & Mitchell? A. With Brown, and Morris, that's all.

Q. Where was Gerhardt when you first saw him 20 that morning? A. Down on the dock.

Q. Where did you get those strips of wood that you were sawing? A. There is a platform where they keep white pine wood; I reached up to that place and got that piece of wood.

Q. While you were up there getting that piece of wood, isn't that the time you saw Gerhardt? A. Yes, I seen him before that, too; I come down with the piece of wood and Gerhardt's back was turned towards me, and he said "Go ahead; go ahead," 30 after he opened the machine.

Re-direct examination by Mr. Turner.

Q. He saw you there? A. I don't know; he had his back turned to me; I had a piece of wood in my hand and I says, "I wonder where Frank is; do you know where Frank is;" he shrugged his shoulders and said, "I don't know." He never used to speak much to me.

Q. He must have seen you there when you saw 40

him? A. No; after he went out of the door—went through the yard.

Q. Did he go right past that saw? A. He opened the box with his back to me; he walked past by the saw; I spoke to him; I says, "Where is Betz?" he shrugged his shoulder and says, "I don't know."

Q. Did he pass by your saw when he went out?

10 A. Yes, when he left the box.

Q. When he looked at the saw he must have seen you? A. I was not sawing then; he walked out as I went to the saw; I didn't start the saw.

Q. You didn't start the saw until after he went out? A. I didn't start the saw; I couldn't start the saw.

Q. Did you start the saw going? A. No.

Q. Who did? A. I don't know; it was going. All I done was to start to saw.

20 Q. Were you there when he turned on the electricity? A. I was there getting the piece of wood; looking down on him when he had his back to me and opened the box, then I came right down; it would only take an instant.

Q. Did you see anybody else turn the lever to start that saw? A. No, sir; the saw was going.

Q. The saw ran from his turning on the electricity? A. I think so; I don't know.

30 *Recross-examination by Mr. Hobart.*

Q. You were upstairs getting that piece of wood and Gerhardt opened that box? A. Yes.

Q. That was the time when Mr. Gerhardt opened the box? A. He went with his key to the box.

Q. That was the time when he said something about going ahead, isn't it? A. No, sir; he stood there, and he spoke about Frank, and by the time I just went down the stairs and was there, he says, 'Go ahead?' I don't know whether he says "Go
40 ahead, Frank," or not; he says, "Go ahead."

Q. You don't know whether he said "Go ahead," to you? A. He says "Go ahead;" I don't know whether he meant me or Frank; I don't know which.

Q. That platform is in the same room? A. Yes, it is a rack to put lumber on.

Q. Could he see you up there? A. Yes, it is all open.

10

KATIE MARSHALL, sworn for the plaintiff, testifies as follows:

Direct examination by Mr. Turner.

Q. You are the wife of the plaintiff? A. Yes.

Q. Do you recollect Mr. Hamilton, who came from the insurance company? A. Yes.

Q. What occurred at that time? A. He came in just a little after Mr. Marshall came home from the hospital; he talked a while with Mr. Marshall; he asked Mr. Marshall to lend him a table to sit by the window; he sat down there and he was speaking.

Q. Mr. Hamilton wrote out a paper, didn't he? A. Yes.

A. Was that paper read over to Mr. Marshall?

A. No, sir.

Q. Didn't Mr. Hamilton say anything about signing the paper? A. Yes.

Q. What did he say about signing the paper? 30

A. He said he came here, that he wanted to do some good by Mr. Marshall and if he could do it, it was in his power to do it now.

Q. Did you say anything? A. I told him to sign his name then.

Q. Did Mr. Hamilton say anything further about what he would do if Mr. Marshall didn't sign the paper? A. No, that is all; he said he would do us good.

Q. What was Mr. Marshall's condition at that 40

time? A. He had just come from the hospital and suffered great pain; that was the first time the hand was unwrapped.

Cross-examination by Mr. Hobart.

Q. How far is the hospital from where you live?

A. I believe it is about a mile.

10 Q. Mr. Marshall walked there? A. No, he went with the trolley car, and he came back with the trolley car; I was with him.

Q. Was that the first time that he had been to the hospital? A. The accident happened on Saturday and they wrapped his hand up, and they told him it would have to stay that way until Wednesday; that Wednesday we went out to the hospital; that was the first time that he had been out; Wednesday went to the hospital and back; he was

20 there about nine or ten o'clock, and came back about noon time; Mr. Hamilton arrived a short time after we got home; I asked him what he was signing; Mr. Hamilton says that the company wanted to do what was right to Mr. Marshall.

Q. Were you present when Mr. Hamilton was inquiring of your husband how the accident happened? A. Yes, I heard him asking questions and he answered them, and Mr. Hamilton wrote them down on the paper; then I told my husband to

30 sign it.

Q. Did you read it over? A. No.

Q. Did you hear what your husband said to Mr. Hamilton? A. No, I can't say what he answered; I was nervous myself.

EVIDENCE CLOSED.

Defendant asks for the direction of a verdict on behalf of the defendant, on the grounds stated on the motion to nonsuit.

The Court hears argument of counsel on both sides on the motion.

ADJOURNED FOR THE DAY.

FRIDAY, November 16, 1906.

THE COURT—After some deliberation over night, I have concluded that the jury is not fairly entitled 10 to take into consideration the slippery floor as a prime source of responsibility of the defendant, mainly on the ground that the slippery floor was just as obvious to the plaintiff as it was to anybody, and the defendant should not be held accountable because of that. And the Court has also concluded that it should not be fairly left to the jury to say whether or not the saw was out of order, if there was anything in the plaintiff's case to indicate that it was. There is the testimony of the plaintiff 20 himself that the saw kicked, and the testimony of Mr. King that at a previous time the saw had wobbled; there is no direct testimony that the saw did wobble at this time, only testimony that it kicked. That kicking has been satisfactorily accounted for by the testimony of the defendant, and especially by the stick itself, which it is conceded he was sawing at the time of the accident, which showed a clean cut, with no marks except which would naturally be made by reason of the fact that the saw 30 was too high to cut that stick. That, in the opinion of the Court, eliminates two of the three causes of the accident that were reserved on the motion to non-suit, and leaves one sole possible ground, namely, the putting of the plaintiff to work without instruction as to the inherent dangers of the work, and after he had notified the employer that he was ignorant of the work itself. That seems to the Court at this time, while a very slender ground for permitting the jury to take this case, 40

still it would be a legal ground, and the Court therefore is inclined to let the jury take it on that basis.

MR. HOBART—I call your Honor's attention to the fact that the man's ignorance to operate the saw was not the cause of the accident; the direct cause was his foot slipping.

10 THE COURT—I think the jury might be entitled, if they consider the evidence justified them, in finding that because of the plaintiff's ignorance the saw was too high, the saw snapped the stick up and down, and that that, together with the slippery floor, caused the plaintiff to fall. It would be two independent causes, for one of which the defendant would not be accountable, but for the other the defendant might be.

20 MR. HOBART—The declaration does not lay that as a cause of action; it does allege that the plaintiff was not instructed, but it does not say that because of his ignorance he used the saw while it was in such condition that it was dangerous.

MR. TURNER—It alleges that the plaintiff was ignorant of its use.

THE COURT—In failing to instruct the plaintiff, and so forth—in the declaration—that is sufficiently broad to cover this particular phase of the case.

30 MR. HOBART—May I add to the grounds on the motion for a direction of a verdict, in view of the ground which the Court has suggested, on which the case may be submitted to the jury, that there is a variance between the proof and the declaration.

THE COURT—The views of the Court must necessarily result in a denial of the request to direct.

40 Counsel are advised that the sole grounds on which the jury will take the case will be those indicated by the Court.

MR. HOBART—Then I suppose there is no use of discussing any other grounds.

THE COURT—I should think not. That will bring the argument within very narrow grounds.

Defendant prays an exception to the refusal to direct a verdict in its favor, and same is allowed and signed and sealed accordingly. 10

Counsel address the jury.

C. W. PARKER, [L. s.]

J.

GENTLEMEN OF THE JURY:

In the course of the trial of this case a number of the claims made by the plaintiff as a basis for claiming a verdict for damages against the defendant have been eliminated by the Court, in the discharge of its duty, and the plaintiff's case now stands on one ground only which the Court deems worthy to submit to you for your consideration. 20

Of course, you must understand, the Court, in submitting that to you for your consideration, expresses no opinion that the plaintiff ought to recover or ought not to recover, and the evidence on the case is to be considered and weighed exclusively by the jury. 30 The function of the Court is, in the first instance, to decide whether there are any facts material to the case which the jury reasonably will be called upon, or have a right, to consider, and upon which the liability of the defendant might be predicated. That has been done, and the Court has determined that there is one theory set up by the plaintiff which is worthy of your consideration; and then the function of the Court, in the second place, is to instruct the jury on the rules of law 40

with reference to the disputed facts which are laid before them.

Now, the only theory on which this claim comes to you is this: The plaintiff claims—not necessarily the fact, that is for you to find whether it is a fact or not—the plaintiff's claim, first, that he was told by Mr. Brown not to saw these strips of wood by hand, but to go into this portion of the works and use a power saw—a buzz saw—for the purpose, evidently by way of saving time and saving the employer's money by using power instead of hand work. You will recollect that the plaintiff testified about that. That Mr. Brown had, a day or two before that, told him not to saw these things by hand, but go and use the saw; and the plaintiff claims that he said to Mr. Brown at that time that he didn't know anything about the buzz saw, didn't like to do it, and that in effect Mr. Brown told him to go and do it anyhow; whatever the evidence was in that regard. If that is not satisfactorily shown to you by the plaintiff, there can be no recovery in this case, because the plaintiff must show you that he was told to use that saw by somebody who had authority to make him do it or to decide whether he should do it or be discharged. It all rests on this conversation with Mr. Brown. That is the first proposition that the plaintiff must establish before he can pass any further on the road to a recovery in this case.

The second proposition that he must establish is, that he was injured because of some danger inherent in the operation of this saw of which he did not know, and which he could not discover by the use of his reasonable powers of observation. And he claims, or must claim, in order to recover in this case, and must establish the claim that this was the particular danger that he did not know of and

could not discover, namely, that if the saw was too high above the table, and he undertook to use a thin strip of wood on it such as this one which he was using at the time, then when the strip should be pushed so far up against the saw as to extend the entire length of that portion of the saw which rose above the table, the rising teeth on the other side of the saw were liable, if the wood had a tendency to spring together, were liable to catch the wood, throw it upward and over back against the plaintiff as he was pushing it, and this is what happened and that as a result of that in combination with the slippery floor, or slipping on the floor as he claims he was injured. That is the second proposition the plaintiff must establish to your satisfaction before he is entitled to recover. The slippery floor alone has nothing to do with the case. The court has disposed of that upon the testimony and upon colloquy with counsel. It may have been that the plaintiff's injury was caused by a combination of these two causes, first, that there was a slippery floor and that he slipped, and secondly, that the board was thrown against him by this action on the part of the saw, of which he was not aware, and which he could not appreciate by using his powers of observation, and with regard to which he was not instructed. It must appear that the injury was materially caused by the board being thrown against him in this way. It must appear to your satisfaction that he did not know that that thing was liable to happen. It must appear to your satisfaction that he could not reasonably be expected to know it by observation, and it must appear to your satisfaction that he was not told about it.

The rule is that any person of full age, who accepts employment from another person to do any particular work, assumes all risks that are naturally

incident to that employment, and all other risks which could be discovered by the use of reasonable care on his part.

In other words, if one of you gentlemen wanted to be employed by these defendants on a buzz saw, the law presumes or assumes, that you make this agreement, that you know all dangers naturally
10 incident to the operation of a buzz saw. You may not know, as a matter of fact, anything about it, but you agree to know them, you hold yourself out as knowing about them. The employer is not bound to cross examine you to find out whether you know it or not. You say you want to do this work, and he is entitled to assume that you know how to do that which you agree to do.

The case here is modified a little by the fact, as
20 the plaintiff alleges, that he was told to do something that was outside of his employment as a ship carpenter, to go and work this saw. Even then, if he did it without any complaint; if he didn't say to the employer that he was ignorant of the buzz saw, there was no duty on the part of the employer to warn him of the danger. If he told the employer, Mr. Brown, that he was ignorant of the buzz saw and didn't like, it as he claims to have done, and if Mr. Brown insisted that he should go to
30 work on it whenever he had work of this kind to do, then it would be the duty of Mr. Brown to warn him of any dangers which were natural to the use of that buzz saw, and which were not naturally and reasonably obvious to a reasonable man in the position of the plaintiff.

The plaintiff says that this was a danger, and that this was not obvious, and that he was not warned of it. It may be a question in the case also, whether Mr. Brown's direction to use the
40 saw, even if given originally, applied to this par-

ticular occasion on which the plaintiff undertook to use it; because you will remember, it was not on this occasion that Mr. Brown said, "Go use the saw", it was several days before. This time, as I understand the plaintiff's story, he was working on a tug, and he wanted a window strip, and apparently he didn't have the wood on the tug. If he had had the necessary wood for the strips on the tug it would be unnecessary and a waste of time for him to go to the buzz saw to saw out two or three strips that he could do on the tug with the hand saw. He says he didn't have the wood, and so he went to the place where the wood was kept, it was adjoining the room where the saw was, and selected wood, and while he was picking out his sticks he saw Mr. Gerhardt unlock the switch box and turn on the power. 10

Well, now, has the plaintiff satisfied you of these things? If he has not satisfied you of everything I have told you it was necessary for him to satisfy you of, there should be a verdict for the defendant. With respect to the diagram on the board, the Court has made that somewhat on its own motion, partly to assist counsel by showing a circle which is intended to correspond with the size of a twenty-inch saw and of four inch rise through the table, which would be about sixteen inches on four inches and seventeen on five inches. The witness says it was thirteen inches and a half from the point marked with a cross to the end of the cut on the stick. Measured on the side of the stick it is fourteen inches. Something can be told by observing the angle on which the cut is made. You will see there could not be very much of it. Four inches would probably be ample to account for the distance of the saw above the table. That is merely incidental to the case. It bears, you see, on the 20 30 40

question whether the plaintiff was struck or pushed back and caused in part to slip by the riding up of the board, due to the rising teeth on the other side of the saw.

There is another phase of the case which the Court thinks you should also bear in mind. That is what is known as contributory negligence. This man was under the duty to use reasonable care for his own safety. If the floor, for example, was slippery and the defendant exercised reasonable care, and if he, the plaintiff, could have observed it was slippery, or if, as matter of fact, he did observe that it was slippery, and if, in the exercise of reasonable care, a man should take special precautions with regard to the danger of being struck or thrown off his balance by something connected with the operation of the saw, of course it would be the duty of the plaintiff to take these special precautions, and if he failed to do it and was injured because of that failure, it would be contributory negligence on his part and he would not be entitled to recover, even if all that I have already said should be found by you in favor of the plaintiff.

The burden is on the defendant to establish contributory negligence after the defendant's negligence has been shown by weight of evidence. The defendant should therefore establish it in this case. With regard to the testimony the Court does not care to go into details. It has been presented to you at a good deal of length. There is a good deal of testimony tending to show the floor was not slippery at all. The defendant has produced here various boards which it claims and offers in evidence to support the claim that they are the boards on which he, the plaintiff, actually stood at the time, or that some of them were, and you have observed these boards.

Plaintiff's counsel apparently concedes that if those were the boards, there could be no ground for the claim that the boards were slippery, but he says in his argument that these were not and could not be the right boards. You have to decide as to that. Even if they were, the Court has already told you that the mere fact that the boards were slippery of itself is no reason for holding the defendant. It is only admitted in the case as one of the circumstances from which you might infer how the accident occurred, and unless the case had in it the element of the saw throwing this strip of wood against the plaintiff or pushing him in such way as to cause him to slip on these boards, there should be no recovery, of course. 10

If the plaintiff is entitled to a verdict in this case, the damages will be such as will reasonably compensate him for the injury he has sustained. In all respects the accident seems to have been a most unfortunate one, resulting in the almost entire disability of the plaintiff's left hand. Apparently he can do little more with it than to hold something down or push. There is no prehensile power left in the fingers. There is nothing left of them. They are of very little practical use to him for holding a grip. At the same time it is his left hand. The damages, if the plaintiff recovers damages, should be such as will compensate him for pain and suffering which he underwent; such as will compensate him for loss of wages while he was being cured and such as will compensate him for the permanent injury and permanent disability which he has sustained by reason of the loss of those fingers. 20 30

He said he was earning some twenty-eight dollars a week, or so, and he says that he can earn very little now; that he has tried to work as a life insurance agent. Of course, he cannot work at his trade any more. In all probability his capacity will in. 40

crease to some extent in the future, if he keeps on as an insurance agent and makes a success of it; but, under any circumstances, if he is entitled to recover at all, he is entitled to a reasonable sum by way of compensation for the permanent loss of these five fingers as part of the damages in the case.

Defendant prays exceptions, as follows:

10 1. To that part of the charge where the Court said in substance, that the only thing on which the plaintiff could establish a right to recover was based on his claim that he was told by Mr. Brown not to use the hand saw, but to go and use the buzz saw; that he told Brown that he didn't know anything about the buzz saw. The point is that the evidence should not have been submitted to the jury at all.

20 THE COURT—You do not claim that the evidence was misquoted?

MR. HOBART—No, that is correct.

This part of the charge reads as follows:

30 “The plaintiff claims—not necessarily the fact, that is for you to find whether it is a fact or not—the plaintiff's claim first, that he was told by Mr. Brown not to saw these strips of wood by hand, but to go into this portion of the works and use a power saw, a buzz saw for the purpose, evidently by way of saving time and saving the employer's money by using power instead of hand work. You will recollect that the plaintiff testified about that. That Mr. Brown had, a day or two before that, told him not to saw these things by hand, but to go and use the saw, and the plaintiff claims that he said to Mr. Brown at that time that he didn't know anything about the buzz saw; didn't like to do it, and that in effect Mr. Brown told him to go and do it anyhow;

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whatever the evidence was in that regard. If that is not satisfactorily shown to you by the plaintiff, there can be no recovery in this case, because the plaintiff must show you that he was told to use that saw by somebody who had authority to make him do it or decide whether he should do it or be discharged. It all rests on this conversation with Mr. Brown. That is the first proposition that the plaintiff must establish before he can pass any further on the road to a recovery in this case." 10

Exception allowed. Let it be sealed, and it is sealed accordingly.

C. W. PARKER, [L. S.]
J.

2. And also to leaving to the jury to find whether or not the plaintiff was injured because of some danger inherent in the operation of the buzz saw which he didn't know and could not discover by reasonable observation. Which part of the charge reads as follows: 20

"The second proposition that he must establish is, that he was injured because of some danger inherent in the operation of this saw of which he did not know, and which he could not discover by the use of his reasonable powers of observation." 30

Exception allowed. Let it be sealed, and it is sealed accordingly.

C. W. PARKER, [L. S.]
J.

3. Also to that part of the charge which left it to the jury to find in favor of the plaintiff on the theory that the saw was too high; that when the stick was pushed to an extent beyond the width of 40

the saw that the rising teeth were liable to catch it. The point being that that was an obvious danger, and there was no evidence to sustain that theory of the case. Which part of the charge reads as follows:

“And he claims, or must claim, in order to recover in this case, and must establish the claim
 10 that this was the particular danger that he did not know of and could not discover, namely, that if the saw was too high above the table, and he undertook to use a thin strip of wood on it such as this one which he was using at the time, then when the strip should be pushed so far up against the saw as to extend the entire length of that portion of the saw which rose above the table, the rising teeth on the other side of the saw were liable, if the wood had a tendency to spring together, to catch the
 20 wood, throw it upwards and over back against the plaintiff as he was pushing it, and that this happened, and that as a result of that, in combination with the slippery floor, or slipping on the floor as he claims, he was injured. That is the second proposition the plaintiff must establish to your satisfaction before he is entitled to recover.”

Exception allowed. Let it be sealed, and it is sealed accordingly.

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C. W. PARKER, [L. S.]
 J.

4. Also to that part to the effect that if the accident were due to a combination of causes, to wit, the one last mentioned, and the fact that the floor was slippery, that in that event the plaintiff might recover. Which part of the charge reads as follows:

40 “It may have been that the plaintiff’s injury was

caused by a combination of these two causes, first, that there was a slippery floor, and that he slipped; and secondly, that the board was thrown against him by this action on the part of the saw, of which he was not aware, and which he could not appreciate by using his powers of observation, and with regard to which he was not instructed."

Exception allowed. Let it be sealed, and it is sealed accordingly. 10

C. W. PARKER, [L. S.]
J.

5. And also to that part of the charge which was to the effect, that where the Court after stating the rule of law as to obvious danger, and the assumption of risk by the employee, stated that the present action was modified in some respects by the fact 20 that the plaintiff was told to do something outside of his employment, and that if Mr. Brown after being told by the plaintiff that he was ignorant of a buzz saw, and that he then insisted that he must do so, then it was Brown's duty to warn the plaintiff of the danger naturally incident to the use of the saw, and which was not reasonably obvious to the plaintiff. The point being that the danger was obvious and that he had opportunity to observe. Which part of the charge reads as follows: 30

"The rule is that any person of full age, who accepts employment from another person to do any particular work, assumes all the risks that are naturally incident to that employment, and all other risks which could be discovered by the use of reasonable care on his part.

"In other words, if one of you gentlemen wanted to be employed by these defendants on a buzz saw, the law presumes, or assumes, that you make this 40

agreement, that you know all the dangers naturally incident to the operation of a buzz saw. You may not know, as matter of fact, anything about it, but you agree to know them; you hold yourself out as knowing about them. The employer is not bound to cross-examine you to find out whether you know it or not. You say you want to do this work, and
 10 he is entitled to assume that you know how to do that which you agree to do.

“The case here is modified a little by the fact, as the plaintiff alleges, that he was told to do something that was outside of his employment as a ship carpenter; to go and work this saw. Even then, if he did it without any complaint, if he didn't say to the employer that he was ignorant of the buzz saw, there was no duty on the part of the employer to warn him of the danger. If he told the employer,
 20 Mr. Brown, that he was ignorant of the buzz saw and didn't like it, as he claims to have done, and if Mr. Brown insisted that he should go to work on it whenever he had work of this kind to do, then it would be the duty of Mr. Brown to warn him of any dangers which were natural to the use of that buzz saw, and which were not naturally and reasonably obvious to a reasonable man in the position of the plaintiff.”

30 Exception allowed. Let it be sealed and it is sealed accordingly.

C. W. PARKER, [L. s.]
 J.

6. Also to leaving to the jury the question, whether or not the boards produced by the defendant were in fact the boards, or some of them, on which the plaintiff was standing at the time of the accident. Which part of the charge reads as fol-
 40 lows:

“The defendant has produced here various boards, which it claims, and offers in evidence to support the claim, that they are the boards on which the plaintiff actually stood at the time, or that some of them were, and you have observed these boards.

“Plaintiff’s counsel apparently concedes that if those were the boards there could be no ground for the claim that the boards were slippery, but he says in his argument that these were not and could not be the right boards. You have to decide as to that. Even if they were, the Court has already told you that the mere fact that the boards were slippery of itself, is no reason for holding the defendant. It is only admitted in the case as one of the circumstances from which you might infer how the accident occurred, and unless the case had in it the element of the saw throwing this strip of wood against the plaintiff, or pushing him in such way as to cause him to slip on these boards, there should be no recovery, of course.

Exception allowed. Let it be sealed, and it is sealed accordingly.

C. W. PARKER, [L. S.]

J.

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EXHIBIT D 1:

STATEMENT OF PLAINTIFF.

*Charles Marshall vs. Burt & Mitchell Company.*Statement of Chas. Marshall, 65 Sussex Street,
Jersey City, N. J.

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“I was employed by the above named com-
“pany for four weeks as a ship joiner.

“On May 12th, 1906, about 9.30 A. M.,

“I left the tug Burmese, “on which I

“was working. I went to the place

“where the circular saw is, to have

“some strips sawed out. I looked around

“for the saw-master, or man who runs

“the saw, but could not find him. An-

20

“other man came and wanted a piece of

“wood sawed. The superintendent,

“Gerhardt, came in; “he has a key to

“the motor which runs the saws; he

“opened the motor box and told the

“other man to go ahead and saw his

“piece of wood, but he did not tell me

“to do it. I again looked for the saw-

“master; could not find him; got a piece of

“wood and went and sawed it. After saw-

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“ing that, I went and got another piece of

“wood. Out of the last piece of wood

“I cut two strips three-quarters of an

“inch wide, and when stepping back to

“saw off the third strip, I stepped on to

“a small piece of wood that was lying

“among the sawdust and slipped and

“fell head first towards the saw. To

“save my head I put out my left hand

“with the in-tention of throwing my

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“hand over the saw to save myself and

"my hand came in contact with the saw
 "cutting off my five fingers. I am an
 "experienced ship carpenter and have
 "been ship carpenter on ships at sea. I
 "have worked on this saw a number of
 "times in the past four weeks. The
 "saw and its appliance was in good con-
 "dition. On the day before the accident, 10
 "the superintendent "got me to saw out
 "some wood for a new man. I have
 "used the saws in different places where I
 "have worked previous to this accident.
 "I am married; two children; 44 years
 "of age; German. I earn forty-one
 "cents per hour."

CHARLES MARSHALL.

JAMES F. HAMILTON.

5/16/06.

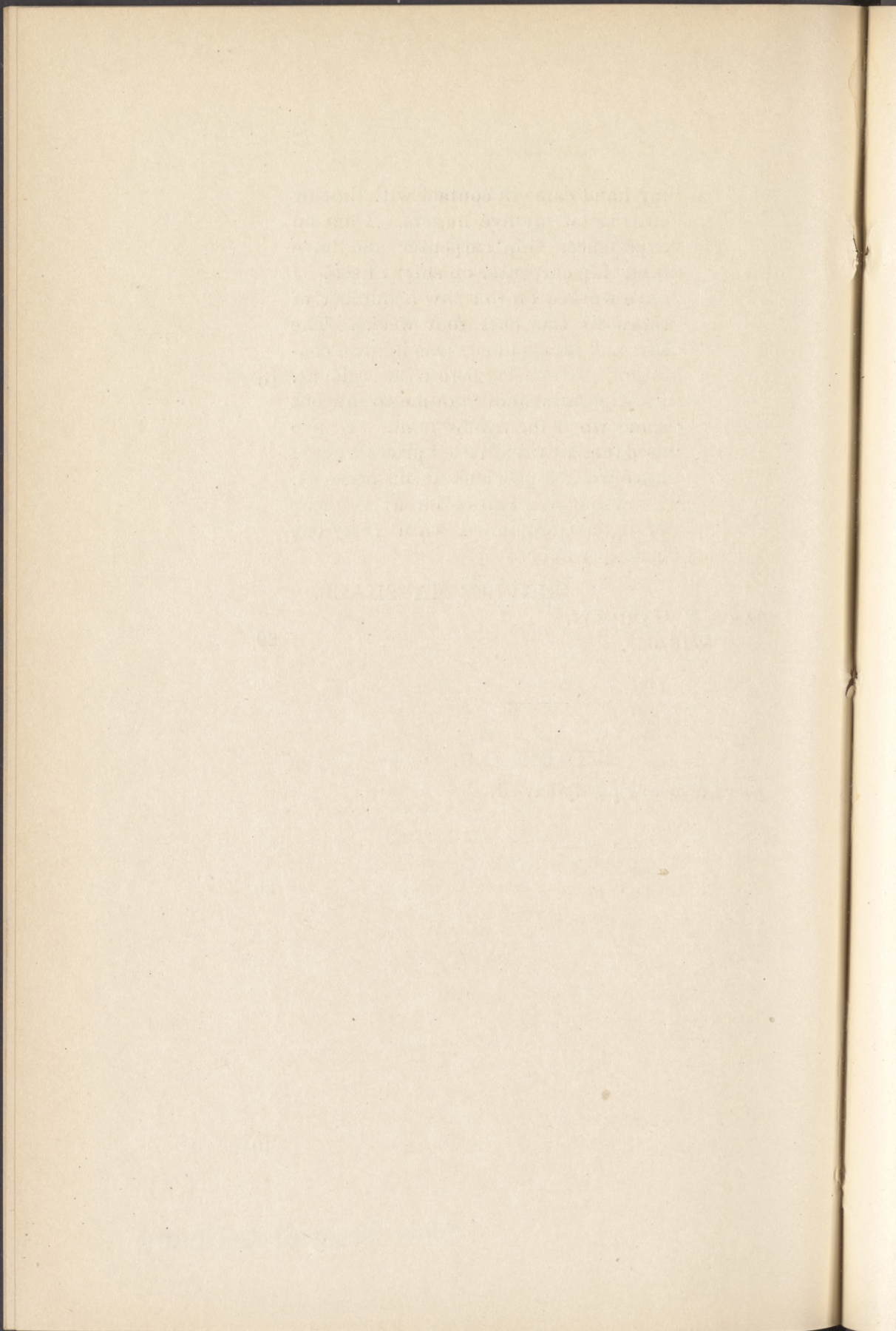
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EXHIBIT D 2.

Piece of board partly sawed.

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ASSIGNMENTS OF ERROR.

Afterwards—that is to say on the eleventh day of December, nineteen hundred and six, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey—comes the said The Burt and Mitchell Company by Collins and Corbin, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters 10 recited and contained in the said bill of exceptions, and also in the giving of verdict and judgment aforesaid, there is manifest error, to wit:

First—That at the trial of the cause in the Hudson County Circuit Court the Judge who tried the cause refused to non-suit the said Charles V. Marshall when thereunto moved on behalf of said The Burt and Mitchell Company, whereas by the law of the land the said Court should have ordered a non- 20 suit for one or more of the following reasons alleged on behalf of said motion, to wit:

(a). Because no negligence was proved against the defendant.

(b). Because the negligence of the defendant, if any, was not the proximate cause of the accident.

(c). Because there was contributory negligence on the part of the plaintiff. 30

(d). Because the danger was obvious and the risk thereof assumed by the plaintiff.

(e). Because the work of sawing was not within the scope of the plaintiff's duty.

Second—That at the trial of the said cause the Judge who tried the cause refused to direct a verdict for the defendant The Burt and Mitchell Company when thereunto moved on behalf of the said 40

defendant, whereas by the law of the land the said Court should have directed such verdict for one or more of the following reasons alleged in behalf of said motion, to wit:

- (a). Because no negligence was proved against the defendant.
- 10 (b). Because the negligence of the defendant, if any, was not the proximate cause of the accident.
- (c). Because there was contributory negligence on the part of the plaintiff.
- (d). Because the danger was obvious and the risk thereof assumed by the plaintiff.
- (e). Because the work of sawing was not within the scope of the plaintiff's duty.
- 20 (f). Because there was a variance between the proof and the declaration.

Third—That at the said trial the Judge who tried the cause submitted to the jury the question whether the plaintiff told one Brown that he did not know anything about the buzz saw, which part of the charge reads as follows:

- 30 “The plaintiff claims—not necessarily the
“fact, that is for you to find whether it
“is a fact or not—the plaintiff's claim
“first, that he was told by Mr. Brown
“not to saw these strips of wood by
“hand, but to go into this portion of the
“works and use a power saw, a buzz
“saw for the purpose, evidently by way
“of saving time and saving the em-
“ployer's money by using power instead
“of hand work. You will recollect that
40 “the plaintiff testified about that. That
“Mr. Brown had, a day or two before

"that, told him not to saw these things
 "by hand, but to go and use the saw,
 "and the plaintiff claims that he said to
 "Mr. Brown at that time that he didn't
 "know anything about the buzz saw,
 "didn't like to do it, and that in effect
 "Mr. Brown told him to go and do it
 "anyhow; whatever the evidence was 10
 "in that regard. If that is not satis-
 "factorily shown to you by the plaintiff,
 "there can be no recovery in this case,
 "because the plaintiff must show you
 "that he was told to use that saw by
 "somebody who had authority to make
 "him do it or to decide whether he
 "should do it or be discharged. It all
 "rests on this conversation with Mr.
 "Brown. That is the first proposition 20
 "that the plaintiff must establish before
 "he can pass any further on the road to
 "a recovery in this case."

which charge was illegal and to the injury of the defendant.

Fourth—That at the said trial the Judge who tried the cause in charging the jury permitted the jury to consider whether plaintiff was injured be- 30
 cause of some danger inherent in the operation of the buzz saw which he did not know and could not discover by a reasonable observation, which part of the charge reads as follows:

"The second proposition that he must estab-
 "lish is, that he was injured because of
 "some danger inherent in the operation
 "of this saw of which he did not know,
 "and which he could not discover by the 40

“ use of his reasonable powers of ob-
 “servation.”

which charge was illegal and to the injury of the defendant.

Fifth—That at the said trial the Judge who tried the cause in charging the jury permitted the jury
 10 to find a verdict in favor of the plaintiff on the theory that the saw on which plaintiff was injured was too high so that the rising teeth were liable to catch the stick, which part of the charge reads as follows:

“And he claims, or must claim, in order to
 “recover in this case, and must estab-
 “lish the claim that this was the par-
 “ticular danger that he did not know
 20 “of and could not discover, namely,
 “that if the saw was too high above the
 “table, and he undertook to use a thin
 “strip of wood on it such as this one
 “which he was using at the time, that
 “when the strip should be pushed so far
 “up against the entire length of that
 “portion of the saw which rose above
 “the table, the rising teeth on the other
 30 “side of the saw were liable, if the wood
 “had a tendency to spring together, to
 “catch the wood, throw it upwards and
 “over back against the plaintiff as he
 “was pushing it, and that this happened,
 “and that as a result of that, in combi-
 “nation with the slippery floor, or slip-
 “ping on the floor as he claims, he was
 “injured. That is the second proposi-
 “tion the plaintiff may establish to your
 “satisfaction before he is entitled to
 40 “recover.”

which charge was illegal and to the injury of the defendant.

Sixth—That at the said trial the Judge who tried the cause in charging the jury permitted the jury to find a verdict in favor of the plaintiff on the theory that if the accident was due to a combination of causes, to wit, the fact that the saw was too high and the fact that the floor was slippery, then in that event the plaintiff might recover a verdict, which part of the charge reads as follows: 10

“It may have been that the plaintiff’s injury
 “was caused by a combination of these
 “two causes, first, that there was a slip-
 “pery floor and that he slipped, and sec-
 “ondly, that the board was thrown
 “against him by this action on the part
 “of the saw, of which he was not aware, 20
 “and which he could not appreciate by
 “using his powers of observation, and
 “with regard to which he was not in-
 “structed.”

which charge was illegal and to the injury of the defendant.

Seventh—That at the said trial the Judge who tried the cause in charging the jury stated that the rule of law as to obvious dangers and the assumption of risks by employees was modified in the present case by reason of certain facts specified in said charge, which part of the charge reads as follows: 30

“The rule is that any person of full age, who
 “accepts employment from another per-
 “son to do any particular work, assumes
 “all the risks that are naturally incident
 “to that employment, and all other risks 40

“which could be discovered by the use
“of reasonable care on his part.

10 “In other words, if one of you gentleman
“wanted to be employed by these de-
“fendants on a buzz saw, the law pre-
“sumes, or assumes, that you make this
“agreement; that you know all the dan-
“gers naturally incident to the operation
“of a buzz saw. You may not know, as
“matter of fact, anything about it, but
“you agree to know them; you hold
“yourself out as knowing about them.
“The employer is not bound to cross-ex-
“amine you to find out whether you
“know it or not. You say you want
“to do this work, and he is entitled to
20 “assume that you know how to do that
“which you agree to do.

30 “The case here is modified a little by the
“fact, as the plaintiff alleges, that he
“was told to do something that was
“outside of his employment as a ship
“carpenter; to go and work this saw.
“Even then, if he did it without any
“complaint, if he didn’t say to the em-
“ployer that he was ignorant of the
“buzz saw, there was no duty on the
“part of the employer to warn him of
“the danger. If he told the employer,
“Mr. Brown, that he was ignorant of
“the buzz saw, and didn’t like it, as he
“claims to have done, and if Mr. Brown
“insisted that he should go to work on
“it whenever he had work of this kind
“to do, then it would be the duty of
40 “Mr. Brown to warn him of any dangers
“which were natural to the use of that

“buzz saw, and which were not natur-
 “ally and reasonably obvious to a reason-
 “able man in the position of the plaintiff.

which charge was illegal and to the injury of
 the defendant.

Eighth—That at the said trial the Judge who 10
 tried the cause in charging the jury left it to the
 jury to determine whether or not the boards,
 produced by the defendant were in fact the boards
 or some of them, on which the plaintiff was
 standing at the time of the accident, which part
 of the charge reads as follows:

“The defendant has produced here various
 “boards, which it claims, and offers in
 “evidence to support the claim, that 20
 “they are the boards on which the plaintiff
 “iff actually stood at the time, or that
 “some of them were, and you have ob-
 “served these boards.

“Plaintiffs counsel apparently concedes that
 “if those were the boards there could be
 “no ground for the claim that the
 “boards were slippery, but he says in his
 “argument that these were not and
 “could not be the right boards. You 30
 “have to decide as to that. Even if
 “they were, the Court has already told
 “you that the mere fact that the boards
 “were slippery of itself, is no reason for
 “holding the defendant. It is only
 “admitted in the case as one of the cir-
 “cumstances from which you might in-
 “fer how the accident occurred, and un-
 “less the case had in it the element of
 “the saw throwing this strip of wood 40

“against the plaintiff, or pushing him
 “in such way as to cause him to slip
 “on these boards, there should be no
 “recovery, of course.”

which charge was illegal and to the injury of the defendant.

10 *Ninth*—That the judgment in said cause was given in favor of said Charles V. Marshall and against the said The Burt and Mitchell Company, whereas by law it should have been given against the said Charles V. Marshall and in favor of the said The Burt and Mitchell Company.

Wherefore the plaintiff in error, The Burt and Mitchell Company, prays that the judgment aforesaid may be reversed, annuled and for nothing
 20 holden, and that it may be restored to all things which it has lost by reason of said judgment.

COLLINS & CORBIN,

Attorneys and Counsel of Plaintiff in Error.

Dated December 29, 1906.

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STATEMENT OF PAGES

The following pages are numbered in the order in which they appear in the original manuscript.

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