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*Summons.*

**SUMMONS AND COMPLAINT.**

Filed November 1, 1921.

THE STATE OF NEW JERSEY to THE JERSEYMAN:

(SEAL) You are summoned to answer the  
annexed complaint of LEO KAP-  
PERTZ, in an action at law in the 10

New Jersey Supreme Court. And take notice  
that unless you file your answer to said com-  
plaint with the Clerk of the said Supreme Court,  
at Trenton, within twenty days, after service  
upon you of this writ and the annexed complaint,  
that plaintiff may proceed in the suit and judg-  
ment may be entered against you.

WITNESS, William S. Gummere, Chief Justice  
of the said Supreme Court, at Trenton, this  
twenty-eighth day of October, A. D. 1921. 20

ENOCH L. JOHNSON,  
*Clerk.*

ELMER W. ROMINE,  
*Attorney.*

30

40

*Complaint.*

## New Jersey Supreme Court

### MORRIS COUNTY.

10	LEO KAPPERTZ,  <div style="text-align: center;"><i>vs.</i></div> THE JERSEYMAN, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Plaintiff,</i>   <i>Defendant.</i>  <i>Action at Law.  Complaint.</i>
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The plaintiff, residing at No. 93 Washington street, in the Town of Morristown, in the County of Morris and State of New Jersey, says that:

20     1. On or about June 16, 1921, and for some time prior thereto, the plaintiff was engaged in the business of welding and repairing machinery, having his place of business at No. 95 Washington street, in the Town of Morristown, in the County of Morris and State of New Jersey.

30     2. The defendant corporation were engaged in the business of printing and the publication of a daily newspaper known as "The Jerseyman," having their plant and offices at No. 20 Washington street, in the Town of Morristown, in the County of Morris and State of New Jersey.

40     3. On or about June, 1921, and particularly on the sixteenth day of June in said year, there existed in the Town of Morristown what was known as a printers' strike which affected the plant, establishment, business and operation of the defendant corporation so that they were compelled to accept such help as was available, thus

*Complaint.*

incurring frequent breakdowns and repairs to their machinery.

4. The plaintiff in this case was at various times called to the plant of The Jerseyman at Morristown for the purpose of making repairs and adjustments to its machinery.

5. The plaintiff rendered separate bills to defendant company in the usual course of his business for the special work that he did, no agreement being made by plaintiff as to amount to be received for his work, and no time being specified when he should work for defendant. 10

6. On June 16, 1921, the plaintiff was called to the plant of The Jerseyman for the purpose of inspecting the machinery and making such adjustments to the machinery as were necessary to run out the daily newspaper of the defendant corporation. 20

7. On said date, a roll of paper was hoisted through the hatchway or opening in the floor of defendant's plant or printing establishment by the servants, agents or employees of the defendant corporation, and thereafter the covering on said hatchway was replaced under the supervision of the plaintiff so as to permit persons to walk over said covering as part of the floor space, and thereupon the said roll of paper was placed into the newspaper printing machine under the direction of the plaintiff, whereupon the plaintiff, pursuant to the requirements of his special work, examined and inspected the machinery and saw that the roll of paper was properly installed and adjusted to the press, and while the plaintiff was so engaged in this work with his back to the space in the floor where the opening or hatchway was located, one of the 30 40

*Complaint.*

servants or employees of the defendant corporation removed the covering of said hatchway which was within a foot or so of where the plaintiff then stood, without the knowledge of the plaintiff, and allowed the same to remain open so that when the plaintiff arose from his position and moved a step backward, he fell into the said opening, a distance of about twelve feet, to the concrete floor below, thereby sustaining, through the fault and negligence of the defendant corporation, its servants or agents, and without any fault or negligence of the plaintiff, a fractured skull and other sprains, bruises and injuries in and about the face and body as a result of which the plaintiff is permanently injured and disabled, has suffered a loss in his business and will continue to suffer a loss, has undergone great pain and suffering and will continue so to do in the future and has expended a considerable sum of money for medicine, doctors' bills and nurses and will in the future undergo considerable expense for medical treatment.

Plaintiff demands as damages the sum of fifty thousand dollars (\$50,000).

ELMER W. ROMINE,  
*Attorney for Plaintiff.*

*Answer.*

### **ANSWER.**

Filed December 6, 1921.

The defendant, a corporation, having its principal office on Washington street, Morristown, New Jersey, answering the complaint of the plaintiff, says: 10

#### **FIRST DEFENSE.**

1. It denies the truth of the matters contained in the complaint, except that it admits the allegation of paragraph two; and also admits the allegation in paragraph seven that the plaintiff fell into the hatchway opening, a distance of about twelve feet to the concrete floor below and sustained certain physical bruises and injuries, the extent of which is not known by the defendant and therefore is neither admitted nor denied. 20

#### **SECOND DEFENSE.**

The accident alleged in the complaint was due directly to contributory negligence on the part of the plaintiff.

#### **THIRD DEFENSE.**

The defendant is not guilty of the negligence alleged in the complaint. 30

#### **FOURTH DEFENSE.**

The defendant violated no duty which it owed the to plaintiff.

*Answer.*

FIFTH DEFENSE.

The injuries sustained by the plaintiff, if any, were due to the negligence of the fellow servants of the plaintiff.

SIXTH DEFENSE.

10

The plaintiff in entering upon the employment with the defendant assumed the risks thereof, and the alleged accident was due to such risks.

SEVENTH DEFENSE.

20

1. On June 16, 1921, and for a long time prior thereto, the plaintiff had been in the employ of the defendant, aiding in the operation of the newspaper plant of the defendant, and the alleged accident arose out of and in the course of the plaintiff's said employment.

30

2. Said employment was subject to the provisions of Section 11 of the act of the Legislature of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the supplements thereto and amendments thereof, and by reason thereof the plaintiff is not entitled to maintain his aforesaid action against this defendant and is required to proceed according to the provisions of said act.

EIGHTH DEFENSE.

40

The defendant objects, as a matter of law, to paragraph three of the complaint as setting up

*Reply.*

matter having no proper relation to the subject matter of the complaint, and as setting forth conclusions, objectionable not only because they do not set forth facts, but also because they have no proper relation to the premises.

CHARLES A. RATHBUN,  
*Attorney of Defendant.* 10

**REPLY.**

Filed December 13, 1921.

The plaintiff joins issue on the answer of the defendant and as to the separate defenses, says:

Plaintiff denies the special allegations in the second, third, fourth, fifth, sixth and seventh defenses. 20

ELMER W. ROMINE,  
*Attorney for Plaintiff.*

30

40

*Order.*

**ORDER.**

10 Application being made to the Court by Charles A. Rathbun, attorney for the defendant, in the presence of Elmer W. Romine, attorney for the plaintiff, for an order striking out paragraph three of the complaint filed in this cause, and the Court being of the opinion that paragraph three as stated should be stricken from the complaint, and the plaintiff making application to amend the same,

It is on this seventh day of February, A. D. 1922, ORDERED, that paragraph three of the complaint filed in this cause be stricken out and that the plaintiff be allowed to substitute in the place thereof:

20 #3. During the months of May and June, 1921, frequent breakdowns occurred in the machinery of defendant company, in its printing plant, and by reason thereof plaintiff was called from his place of business to defendant's plant to make repairs and adjustments to said machinery.

WILLARD W. CUTLER,  
*Judge.*

30

40

*Leo Kappertz, direct.*

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

LEO KAPPERTZ,  <i>vs.</i>  THE JERSEYMAN, a corporation,	} <i>Plaintiff,</i>  <i>Defendant.</i>	} <i>Action</i> <i>at Law.</i>	10
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Morristown, N. J., November 13, 1922.

Before Hon. Richard Doherty, Judge, and a jury.

Appearances:

For the plaintiff, Elmer W. Romine, Esq. 20

For the defendant, Charles A. Rathbun, Esq.

A jury was empanelled, accepted and sworn.

Mr. Romine opened the case to the jury on behalf of the plaintiff.

Mr. Rathbun opened the case to the jury on behalf of the defendant.

LEO KAPPERTZ, the plaintiff, sworn as a witness on his own behalf, testified as follows: 30

*Direct examination* by Mr. Romine.

Q Mr. Kappertz, you are the plaintiff in this case? A Yes, sir.

Q And where do you reside? A 93 Washington street.

Q Morristown? A Morristown.

Q What was your business in June, 1921? A Welding and machinery repair. 40

*Leo Kappertz, direct.*

Q And where was your business located? A 95 Washington street.

Q During that month, were you called to The Jerseyman office in Morristown? A Yes, sir.

Q And for what purpose? A Doing repair, broken machinery.

10 Q And can you tell us the first time you went to The Jerseyman office to make repairs? A Well, the first time was in the beginning of May.

Q Yes. 1921? A 1921? Well, the first time was years ago.

Q Well, but in 1921, the first occasion was in May, was it? A On this particular work, in May, the beginning of May.

Q At whose request did you go to The Jerseyman office? A Upon the request of the then  
20 manager, Mr. Morton.

Q And you made repairs from time to time? A Yes, sir.

Q Until when? A Up to and including June the sixteenth.

Q What was the general nature of the work that you had to do? A As a rule, it was part or a piece of machinery was broken and they had to have it repaired or welded, or it was  
30 attending to certain machinery, making adjustments, general repairs, what they were in need of.

Q Now, did you repair the machinery in each instance at The Jerseyman plant, or was it taken away by you? A It all depends. Sometimes in the plant; when it necessitated a part to be taken to the shop for welding, and so on; or some repairs, I took it to the shop, or it was brought to the shop by them and taken away  
40 and back, inserted into the machinery.

*Leo Kappertz, direct.*

Q Were you employed steadily at The Jerseyman? A No, sir.

Q During the months of May and June, and up to June sixteenth, did you work every day during the month? A No.

Q And how many hours would you work on some days? A Well, I cannot tell. It all depends on the piece of repair they had to do. 10

Q Some days you worked longer than others? A Oh, yes.

Q Depending upon the work? A Some days is was for an hour or so, and another day it was probably the whole night, doing night work to finish up for the next day.

Q Did anyone direct you in doing this work? A No. Except simply say what is needed on repairs. 20

Q I see. You were your own boss as to the accomplishment of the work, is that right? A Oh, yes.

Q Did you render separate bills to The Jerseyman on your billheads? A Yes, sir.

Q For the work that you did during those months? A Every first of the month, they got their bill.

Q And did they make payment of those bills? A They paid by checks. 30

*Mr. Romine.* Do you have those, Mr. Rathbun?

*Mr. Rathbun.* I have not.

*Mr. Romine.* Your Honor, I have given notice to produce the original bills, and they were not produced. Mr. Rathbun evidently does not have them.

Q I show you two billheads and ask you if they are billheads of yours used at that time?

A (Referring.) Yes, sir. 40

*Leo Kappertz, cross.*

Q That is, in May and June, 1921? A That is the bills, the way we make them out and send them out at the end of the month.

Q Are they copies of the bills that were forwarded to The Jerseyman? A They are copies.

10 *Mr. Romine.* I offer these in evidence.

*The Witness.* That is true copies.

*By Mr. Rathbun.*

Q Do you say that these were made by you at the same time that you made the bills out for The Jerseyman? A That is the exact true copies of the bills, senator.

Q Now, will you kindly answer my question, Mr. Kappertz?

20 *The Court.* Listen to the question. Read the question.

(Question read by the stenographer.)

A Not by me; no, sir.

*Mr. Romine.* We do not contend that they were made at the same time.

*The Witness.* They were made at the same time.

30 *The Court.* They were?

*The Witness.* Yes, sir; but not by me; by the bookkeeper. They were made out at the same time; a copy kept of the bills.

Q These are in the handwriting, then, of your bookkeeper? A That is what I couldn't tell. The original may have been written by machine.

40 Q Now, will you listen to the question and answer my question? We will get along a good

*Leo Kappertz, cross.*

deal better. I say, are these in the handwriting of your bookkeeper? A Yes, sir.

Q Were the bills which you sent to The Jerseyman typewritten or in the handwriting of your bookkeeper? A I do not recall.

Q Did you send them yourself, or did the bookkeeper? A I do not recall, I do not think so. 10

Q You do not know, then, whether they were sent or not, do you? A I think the bookkeeper did.

Q You only think he did. Who is the bookkeeper? A Mrs. Kappertz.

Q Well, she is here, then? A Yes, sir.

*Mr. Rathbun.* I object to these.

*The Court.* There appears to be some 20 superfluous matter on the bills.

*Mr. Romine.* Well, we will tear that off at the bottom if you object to that.

*Mr. Rathbun.* I certainly do.

*Mr. Romine.* He has already testified to that and it has been paid.

*Mr. Rathbun.* I object to your making remarks of that kind.

*The Court.* We will dispense with the 30 colloquy of counsel now and try this case on the evidence.

Q How did you happen to make out these at the same time, if they were made out that way, at the time the original bills were sent to The Jerseyman? A We keep a copy of the bills.

Q Well, I suppose they are for the account books, aren't they? A No. We have no books, but repair cards, and the bills are made up from 40

*Leo Kappertz, cross.*

the repair cards daily; that means daily cards, we have a daily record system.

Q I show you one dated June 25, 1921. You have no knowledge of that at all, have you? A No, sir.

10 Q No. Then, your testimony is only directed to the one dated June 1, 1921, the testimony you have already given, isn't that right? A That is right. It is a bill of June the first, it is rendered June the first.

*Mr. Rathbun.* I object to the one of June 25th. I do not think either one is permissible.

A (Continuing.) And the other is rendered on the—on June the 25th, because there was need of money.

20 *Mr. Rathbun.* (To Witness.) Now, I haven't asked you a question. (To Court.) I object to both for the reason that he knows nothing, as he admits, whether they were sent or not. Everything was done by his bookkeeper.

30 *The Court.* The testimony of which the plaintiff seeks advantage is the fact that these bills were sent. This witness does not have knowledge of the transaction. I sustain the objection.

*Mr. Romine.* I ask leave to withdraw the witness for the present and put on another witness. I would like to get these in at this time, your Honor.

*The Court.* All right; you may do that.

*Mr. Romine.* Mr. Kappertz, will you just withdraw for a moment?

(Witness excused.)

*Clara Kappertz, direct.*

CLARA KAPPERTZ, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Mrs. Kappertz, you are the wife of the plaintiff in this case? A Yes, sir.

Q And did you make out the bills for Mr. Kappertz in connection with his business that were sent to The Jerseyman? A Always. 10

Q I show you two bills and ask you if you made those out? A (Referring.) Yes, sir.

Q Did you make those out at the time you sent the original bills? A Yes, sir.

Q To The Jerseyman? A Yes, sir.

Q Those are copies that you kept? A Yes, sir.

Q And did you send the original bills to The Jerseyman? A Yes, sir. 20

Q At that time? A Yes, sir.

*Mr. Romine.* I offer these in evidence.

Q Why did you make copies at the time? A I always do.

Q No special instructions from Mr. Kappertz, then? A No, sir.

Q And you have retained these in your possession all this time? A Yes, sir.

Q I presume you mean they are in the possession of your husband since then? A Well, I always did the bookkeeping. 30

Q I know. But he is not in business now? A Well, we have all the records.

Q And in whose possession have they been all this time? A In our possession.

Q Well, in his possession, you mean, I suppose? A No. I do not know as there is any difference, is there, his or mine? 40

*Leo Kappertz, direct.*

Q You mailed the bills yourself? A Yes, sir.

*Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

10 Q And do you know of your own knowledge that the bills which you mailed were subsequently paid by The Jerseyman? A Yes, sir.

*Mr. Rathbun.* That is all.

*Mr. Romine.* I ask to have these marked.  
(Two bills marked Exhibits P. 1 and P. 2.)

LEO KAPPERTZ, the plaintiff, recalled, testified further on direct examination as follows:

*By Mr. Romine.*

20 Q You were in the plant on June 16, 1921? A Yes, sir.

Q What were you doing that day? A That day the press was way out of condition.

*The Court.* You are just talking a little too low now; raise your voice so that all the jury can hear what you are saying.

30 A (Continuing.) And it is needed a whole lot of adjustments, which practically could not be done or accomplished in a day or during the day, with the exception of when the press is running and types and forms is in place to have the paper in it, to actually print the paper. And this was being done.

Q What time of the day? A All the afternoon.

40 Q What time of the day did you get there? A I think it was about two o'clock in the afternoon.

*Leo Kappertz, direct.*

Q At whose request did you come that day?

A At Mr. Morton's.

Q And what work did you do in adjusting the press that day? What condition did you find the press in? A Well, the paper kept breaking till I found that the paper was inferior; there was some trouble with the paper.

10

*The Court.* Can the jury hear? Won't you please talk a little louder so there will be no question as to whether you are being understood or not.

A (Continuing.) And I ordered a new roll of paper to be brought up and take the old one out, not to work with that any further because the paper seemed to be the whole of our troubles.

Q Now, right there, will you describe to the jury—

20

*Mr. Rathbun.* I want to call the Court's attention to the fact that counsel seems to have handed to the jurors the bills. It is only going to distract their attention, sir. This testimony is being offered, and I would like to have the testimony go before the jurors.

*The Court.* I think the jury is entitled to have the exhibits at the conclusion of the case or such time when the exhibits are the subject of discussion by a witness.

30

*Mr. Romine.* Well, that is all right. The jury will have those, anyway.

Q Now, will you just describe to us the press itself, how it works, how it operates? A The press is a piece of machinery where, on the one end, a roll of paper about a thousand pounds is attached to it. This paper is running through the

40

*Leo Kappertz, direct.*

10 various courses, through the vibrators and rollers and inkers and all till it comes to the main vat in the center of the press where the fill blankets cover it, run over it, and press it down to the type. Then, on the other end, it comes back and prints on the other side of the paper. There is a double system of printing press, and both sides of the press, it runs all the way through this machine, which is a machine about twenty feet in length and about ten feet in width. It comes back and is folded up; it folds up in half, and then in quarters, and is cut off and comes finished out of the press. The roll of paper is on the rear part of the machine, low to the floor.

20 Q Now, you had nothing to do with setting the type for that machinery, did you? A No, sir.

Q Nothing to do with the operation of the press, did you? A No, sir.

Q But there was some trouble with the breaks in the paper that day? A Breaks in the paper, and the machine out of adjustment.

Q Yes. And you had been called there for the purpose of correcting that, is that right? A Yes.

30 Q All right. Now, you found that the paper was continuously breaking, and you ordered a new roll of paper, is that right? A Yes, sir.

40 Q All right. Now, describe to us where the other roll of paper came from. A The paper, the stock of paper, is carried in the basement, is kept in the basement. In the back of the machine, there is a hatchway, a trap door, which is opened. There is a chain hoist hanging overhead, and a roll of paper is attached to the chain hoist and pulled up to the first floor. Then it

*Leo Kappertz, direct.*

is pulled up to the height of about like that (indicating), the trap door is closed, and that is a space where the roll of paper is let down onto that floor, which is the trap door; and then—

Q Now, was that done in this instance on this day? A Yes, sir.

Q All right. The trap door, then, had been closed down? A The trap door had to be closed in order to leave the paper down onto it. 10

Q Now, then, what was done with the roll of paper after the trap door had been closed? A Then the paper is roughly trimmed off. That is, I mean the wrapping is trimmed.

*The Court.* Pardon me. Is the paper hoisted through this hatchway that is covered by the door?

*The Witness.* Yes. 20

*The Court.* The door is opened?

*The Witness.* The door is opened.

*The Court.* The paper is lifted up on the chain hoist?

*The Witness.* Hanging on the ceiling.

*The Court.* And then where is it laid?

*The Witness.* It is hanging up; bring the roll of paper about that high from the floor, to the floor, then close that trap door which is standing against the wall, close that, and then leave the paper go down again onto the floor, and put the chain hoist out of the way. Then the paper had to be stripped from its wrapper. When that is done, then—it is a heavy roll of paper—a shaft, an axle, put through it, and two men go and roll that roll of paper into its bearings, which is a distance of about two feet from 30 40

*Leo Kappertz, direct.*

the center of this hatchway, I should judge, roll that into its bearings, then—

Q Now, on this particular day when the roll of paper was placed in the machinery, what did you do then? A When this roll of paper is put in its place—

10

Q What did you do that day? That is what we want to know. The roll of paper was put in; then, what position did you take? We want to know just what you did that day. A I stood in a stooped-down position like this (illustrating). Taking my pen knife, I slit that paper for some other layers. There is always some chips on the rolls on the end of the paper which has to be taken off. I slit this and pulled off the loose layers which is slit open.

20

Q Now, just a minute. When you got down to slit the paper— A Yes.

Q —was the trap door closed? A Absolutely.

Q All right. Now, what was the distance between you where you got down and the edge of the trap door, that is, the part of the door which would be open? A There is a distance of no more than two feet, a foot and a half.

30

Q A very close distance, then? A Yes, sir.

Q Now, you got down and you slit the roll of paper. Then, what did you do? A Then I took a ruler, I had a steel ruler, I measured off the distance on this side of the roller between the press bearing and the the paper, and then on the other side, taking my measurements, and adjust this roll to the exact center of the press. When that is adjusted, then pull up the clean paper that is not torn or cut, some way or

40

*Leo Kappertz, direct.*

another, and begin threading the machine. This far I didn't go; I only got that far.

Q How far did you get? A I got that far, that I had it slit and was pulling off these layers that was damaged. I pulled them off. So, a big sheet, six feet, you pulled it this way or that way, whatever, and I kept pulling my paper backward over the head, them sheets on that trap door, and while doing so, getting up and bringing another layer down, I go backward in that trap door in the basement. 10

Q So that you fell into an opening there?  
A Yes, sir.

Q Now, that opening had been closed when you got down? A It was closed. I couldn't work without having it closed. I couldn't get to it. 20

Q But after you got the roll slit and began to pull the paper out, you stepped backward and fell into the opening? A Yes, sir.

Q So that the door had been opened between the time that you got down and when you stepped back, is that right? A Exactly.

Q All right. Now, didn't you know that that door had been opened? A I couldn't have worked. No, sir. 30

Q You did not know it? A No, sir.

Q Did anybody tell you it had been opened?  
A No, sir.

Q You had no knowledge whatsoever that the door was open? A No, sir.

Q Now, you fell down in this hatchway? A Yes, sir.

Q Then what happened to you? A Well, I only recall when I was home in bed. 40

*Leo Kappertz, direct.*

Q The next thing you remember, you were home in bed. And when you began to realize what was the trouble with you, how did you feel? Did you have any pain, and if so, where? A Well, I wasn't—I wasn't capable of nothing. I couldn't do nothing. I couldn't move. I had pain all over the body.

10 Q Yes. A Because I was all over sprained and—

Q Did you have a doctor? A Yes. The doctor had brought me home; he brought me home in his car.

Q What was his name? A Doctor Rice.

Q Yes. And what did he do for you? A Well, Doctor Rice has been taking care of me and treating me ever since to today.

20 Q Now, tell us where you suffered the most pain. A The most severe pain and trouble I notice is in the head.

Q And what part of the head? A This (indicating).

Q That is on the right-hand side? A Yes.

Q And did you go to the hospital for any purpose? A Yes. I was sent—I was taken to the hospital for an examination for the X-ray.

30 Q And after the X-ray was taken, what was done for you? A I was kept quiet in bed, and been fed with some liquid diet, whatever it was, I don't know; given medicines, kept ice bags onto me, onto the head.

Q Now, just tell us, during that period of time, what your condition was, how you suffered so far as your head was concerned. A Why, it took several weeks that I couldn't stand up. I couldn't talk. I was dizzy, flabby, falling over, losing control.

*Leo Kappertz, direct.*

Q Did you have any other doctors treating you at that time? A Why, not at that time; but—oh, yes, Doctor Sutphen, he made an examination of the hearing, because there was an awful noise and buzzing in the head, and Doctor Rood was called.

Q Who is Doctor Rood? A He is a dentist. 10

Q What was he called for? A The teeth all came loose.

Q Were any teeth extracted? A I could not chew.

Q Were any teeth extracted? A Yes. He pulled the right—the right top teeth he pulled.

Q How many? A On the other side. Three. And the others he tightened through long treatments, difficult, severe treatment. 20

Q How long were you confined to the bed or the house? A Well, I have been in bed most nearly about six weeks.

Q After getting up out of bed, were you able to get outdoors? A I have been outdoors, while I wasn't—I wasn't fit to walk on the street or alone or in the dark.

Q What was the reason? What was the trouble? A Losing control, dizzy. 30

Q In what way? A Dizziness.

Q Do you still have the dizziness? A Yes.

Q Just describe it, will you? A Well, I—sometimes I went to put on my shoe, my shoes, and I had one shoe on and I stoop down for the other, I take it up, and all of a sudden I feel something is turning around, just like the house gradually toppling over, and I cannot tell what it is, I cannot describe the feeling, but things is moving. 40

*Leo Kappertz, direct.*

Q Have you noticed that at any other time during the day? A Well, if I haven't—if I haven't any severe headaches, say, for instance, some day or some half a day, I can wake up two o'clock or midnight, from severe headaches.

Q Are you able to sleep well at night? A  
10 Not much.

Q Describe this buzzing in the head, can you? A Well, the head constantly feels and sounds like as you walk through the woods and hear the tree, the leaves, or water rolling down or a buzz-saw running, that constant noises there, and doesn't relieve.

Q And that has continued down to the present day, has it? A Yes, sir.

Q Have you been to various doctors to try and get relief? A Yes. I have been at least  
20 by twenty to twenty-five doctors.

Q Have you been able to attend to your work since the accident? A No, sir; I have not.

Q What did you work consist of before the accident? Just briefly, what did it consist of? A Specialty, as welding. I specialize, working out patents, doing repair on machinery, and not as common, but when it comes to be something special, that is a job I tackle, where it requires  
30 special experience or skill; that is the jobs I am called for, but I haven't been able to—

Q Did you try to do your usual work after getting up and around? A Yes, sir.

Q And what happened? A I couldn't carry it on. I—the minute—not the minute, but when I handled the torch, the heat seemed to attract—seemed to affect the head. When I went to work on a piece of machinery and want to lie down or stoop down, it seemed to act on the  
40

*Leo Kappertz, direct.*

head; I get dizzy. If I want to locate a certain noise, it is very important and necessary to get down to the repair, what is needed, I lose sight of it, I hear it from the wrong side, I I am looking on the wrong end.

Q Do you suffer any loss of hearing? A Well, the hearing is lost on the right side. 10

Q I see. A It is confusing, what I want to hear now, what I want to listen to.

Q Did you go away for your health after getting up and around? A Yes, sir.

Q And where did you go first? A Well, the doctors told me I should go and take ocean—

*Mr. Rathbun.* No. The question is, where did you go? Not what somebody told you.

A Well, I have been here on the seashore to Asbury Park. I went even, last winter, to that expense that I went on an ocean trip for 7 weeks, all the way across to Europe and back. 20

Q Now, the trip that you took to the seashore, when was that after the accident? A That was sometime in August.

Q 1921? A 1921.

Q Was that by the advice of a physician? A Yes, sir. That was twice. 30

Q And when did you make the trip abroad on the ocean? A In December, 1921.

Q And was that by the advice of a physician? A Yes, sir.

Q Have you been doing any work since the accident? A I have tried to do outdoor work, that is what I was advised afterwards, to get outdoor exercise.

Q Now, in connection with your business, before the accident occurred, what was your in- 40

*Leo Kappertz, direct.*

come from your business? A Between four and five hundred dollars a month.

Q And for how many months prior to the time of the accident did that prevail? A About 5 months.

Q And prior to that time, what was your income? A Something around \$300, between 10 two and three hundred dollars a month; that was during the war time. There was not much—

Q During the war times, it was less? A Yes.

Q Than what it was the five or six months prior to the accident? A Previous to the war, it was the same as after the war. During the war, there was a reduction.

Q Have you received any income from that 20 business since the accident? A No, sir.

Q What money have you expended for physicians and medicines and nurses, as a result of this accident? Can you tell us? A I spent on doctors and medicines, on nurses, on those trips on the ocean—

*Mr. Rathbun.* Now, I object to the generalizing. Counsel has asked for a detailed statement.

30 A (Continuing.) I have spent over \$3,000.

Q How many? A Over \$3,000.

Q All right.

*Mr. Romine.* Now, I am going to itemize, Mr. Rathbun.

Q Now, will you endeavor to tell us, as nearly as you can, the different items that go to make up this three thousand dollar aggregate sum? Just tell us the different physicians and nurses

*Leo Kappertz, direct.*

and others that you have paid money. Do you know what Doctor Rice's bill was? A I did not pay Doctor Rice. I haven't his bill yet.

Q Well, we will leave him to testify as to what that is. Do you know what Doctor Rood's bill was? A Something about \$140.00.

Q Did you have a nurse in attendance? A 100  
Yes, sir.

Q And who was that? A Mrs. Wiel;  
W-i-e-l.

Q Is she a trained nurse? A She is a practical nurse.

*Mr. Rathbun.* Are you reading from something? Have you a memorandum?

*The Witness.* No.

*Mr. Rathbun.* He had his head down; I 20  
thought he was reading from something.

Q And how much did you pay her? A She was there ten weeks; she got \$25.00 a week, \$250.00; and we paid the railroad fare.

Q Where did she come from? A From Aiken.

Q Ohio? A North Carolina.

Q Oh! And what was the railroad fare? A 30  
\$90.

Q Now, just tell us what this nurse did for you during the time that she was there? A Well, she kept pretty busy running up and down stairs.

Q Waited on you while you were in bed? A Attending to me, getting whatever was needed, whether it was water or putting ice on me, or getting medicines, whatever, or helping along with the Mrs. 40

*Leo Kappertz, direct.*

Q Did you have any X-rays taken? A Yes, sir.

Q And what did you expend for those? A One time I paid \$10 here in the Memorial Hospital for the X-ray, and \$20 in New York for an X-ray. Then, \$15.00 to Doctor Mills for an X-ray, and again, \$10.00 for Doctor Mills for an X-ray.

Q What did you expend to other physicians for? A I paid \$55 to the doctors one time in New York, going to see Doctor Kellogg, fifty-five. Ten dollar to—to Doctor Quimby. I spent sixty dollar to the Cornell University.

Q Did you pay Doctor Sutphen anything? A Doctor Sutphen, \$10.00.

Q What was the expense of your trip to the seashore in August? A And the seashore, was one day, I pay \$40.00. And—

Q Well, then, tell us the total amount, if you can, of that trip to the seashore? A Forty and sixty; it was \$100.00. And two hundred dollars I pay again for the seashore; that was the other trip.

Q You made two trips to the seashore? A That is \$300.00. Yes, sir.

Q What was the expense of the ocean trip? A I paid \$150 one way.

Q Just tell us what the total was. A And sixty the other way. The ocean trip was—well, I spent in total about six hundred dollars on the ocean trip.

Q Yes. What have you expended for medicines? A About \$50.

Q Have you had any other expenses? A I had to buy an electric fan and a bed rest, ice bags and so on, another about \$60.000, and then

*Leo Kappertz, direct.*

Mrs. Kappertz, she used so much more ever since in the house for keeping house, for food, for extras.

Q Special foods, you mean? A Yes, sir. We have used more eggs this last year as we have been using in ten years previously.

Q Well, I do not mean that. I mean during the time you were sick? A During the time I was sick, up to today. 10

Q Well, you mean that you have had to eat special foods ever since as a result of this accident? A I am living mainly on liquid diet today. There is an extra expense of about \$500.00, what we spent.

Q Now, can you tell us any other expenses that you had? A I have spent quite a little for legal advice and witnesses and so on. 20

Q Of course, you have. A It costs money.

Q I mean, any other expenses by way of medicines or doctors in attempting to cure yourself of this trouble that you have? A I have gone to New York at various times; I spent on railroad fares; I spent on automobile hire, on driver.

Q Well, what would that total? A I had—two months, I had a commutation ticket to New York. 30

Q Well, just tell us in round figures what the railroad fares and the auto hire would be. A Well, it would be \$50 on the railroad. I paid over \$500 for automobile use and rates.

*Mr. Rathbun.* I did not catch that last. (Answer read by the Stenographer).

Q Are you employed now in any way at all? A No, sir.

*Mr. Romine.* That is all. 40

*Leo Kappertz, cross.*

*Cross examination by Mr. Rathbun.*

Q How old are you? A 42.

Q You commenced, or you did work, in the month of May, 1921, for The Jerseyman, didn't you? A Yes, sir.

10 Q And you think the work began sometimes about the first of May, 1921? A Well, when The Jerseyman started out in business, I began with them.

Q Now, just forget all about that and answer the question I put. We are referring to the more recent employment. You have testified you went there on about the first of May? A Yes.

20 Q 1921. And how often were you there during the month of May, 1921? A I do not remember. About twelve times, fifteen times.

Q And what was your work there? A Well, today they call for repairing a linotype; tomorrow they call for repairing the press; then they call for repairing another machine, for whatever repair happened to be.

30 Q Well, how did your time average in the month of May at The Jerseyman plant? A I do not remember. I didn't have to think of the time. It is all put down every day.

Q Well, now, what is your best recollection of it? A Well, the recollection is, every piece is marked down as it is done.

Q Now, what is your best recollection of the amount of time you spent there in the month of May, 1921, day by day? A I could not recall. It is—

*Leo Kappertz, cross.*

Q Well, sometimes you spent two hours and sometimes three hours and sometimes more, would you? A Yes. The book would show the hour, the time; I could not recall the times; that means, in hours.

Q And then, during the month of June, you were there continuously every day, were you not, up to the time of the accident? A No, sir. 10

Q Barring Sundays? A I was—I have been there Sundays.

Q Weren't you there nearly every day in June up to the time of the accident? A No, sir.

Q How many days were you there during the month of June? A I think I have been there on—during the month of June, I have been there on ten or eleven days, if I recall right. 20

Q And what was your particular work at that time? A Repairing of machinery.

Q At that time, they did not have a man to run that big press, did they? A Yes, sir.

Q Who was it? A I could not recall. They had different men; they kept changing. I do not know.

Q Well, the days you were there? A I knew some. 30

Q Did you see any man running that press other than yourself? A Well, yes; they had a second man there.

Q Yes. Well, the first man—you were the first man, weren't you? A No, sir.

Q Well, who was this second man? A Mr. Walsh.

Q John Walsh? A Yes; he was the second man. 40

*Leo Kappertz, cross.*

Q Well— A Who the first man was, I do not know.

Q What is that? A I do not know about the first man.

Q Well, then, how did you distinguish between the men so as to classify him as the second man? A That is what I am told. That is what they told me; that is all.

Q Well, who would act as the superior— A I am told.

Q —when Walsh was working there? A Mr. Morton or Mr. McArthur, the foreman.

Q Well, who was the foreman? A Mr. McArthur.

Q Yes. And Mr. Morton did not have anything to do with the press room, did he? A No; but he gave his instructions.

Q In his front office? A No, no; in the back; his office in the rear, by the press.

Q Now, we will take you work, particularly. A Yes.

Q In the month of June, what was your work? A Nothing but repairs, see that machinery is in shape.

Q You were making repairs every day? A Yes, sir.

Q And did nothing but make repairs? A Yes, sir.

Q Well, do you classify this act of putting the big roll of paper into the press as repairing that machine? A I didn't do that; I didn't do that.

Q Well, it was put in the machine, wasn't it? A Yes. The men in that plant put 'em in the machine, and I directed and told them.

*Leo Kappertz, cross.*

Q You directed them and told them how to put it in? A Yes, sir.

Q Yes. And you were acting as the superintendent then, on that day, weren't you? A No. I had to test the press, and I told them just what to do and how to go about it.

Q Well, you told them how to bring this roll of paper up out of the hatchway and put it onto the press, did you? A I just tell them when to do it, get it up, get a new roll of paper; the paper is the trouble; get another roll. 10

*The Court.* What became of the old roll?

*The Witness.* We left it lay. It was afterwards taken down to the basement again.

*The Court.* You left it lay where?

*The Witness.* We left it lay on the floor, and I didn't— 20

*The Court.* How do you know it was taken down to the basement?

*The Witness.* I do not know if it was. I say, this paper was taken down to the basement and put in a pile. I never looked at it. I don't know what became of it. We left it lay on the floor.

Q You had been working on the other roll, hadn't you? A Yes, sir. 30

Q And it proved to be poor paper, and you complained about its being poor paper? A Yes.

Q And it had been breaking off and you had been throwing it on the floor, quite an accumulation, and you complained about it and told them to get another roll, didn't you? A Not at the time. Well, yes. 40

*Leo Kappertz, cross.*

Q Yes. A Get a new roll, yes.

Q So the old roll was taken out and, under your direction, a new roll was put in? A Yes, sir.

10 Q And as a matter of fact, at the very time of the accident, you were still adjusting that roll of paper, weren't you? A Yes, sir.

Q And that had nothing whatsoever to do with the repair of the machinery, had it? A Absolutely, absolutely.

Q Oh, well, then let us understand. Maybe you have a different meaning as to repairing machinery. Do you consider the getting of the roll and the putting of that into the machine—  
A Yes.

20 Q —as repairing machinery? Do you? A Absolutely.

Q Oh, yes. Well, then, that had been your duties on other days, then, hadn't it? A Sometimes.

Q Yes. It had nothing to do with welding, your own business occupation, had it? A With the repairing and testing; yes, sir.

30 Q Now you have added another word. What do you mean by testing? A That belongs to repairing. I cannot repair unless I test the machine. I cannot test the machine unless I adjust it and attach a roll of paper to the machine according to the way I want it, not to the way the men have it and make a mistake, and the machine is working right. So I put in a roll of paper as is proper, and don't take anybody's dictation. I do it as I see fit, as is proper, I have to do that.

40 Q Now, you say repairing. What kind of repairing did you do on that machine? A Oh,

*Leo Kappertz, cross.*

there was several pieces broken, bent out of adjustment.

Q Well, how recently before the accident had you made any repairs whatsoever? A The very same day.

Q The same day? A Yes, sir.

Q What kind of repairs? A The vibrators was bent. 10

Q And you straightened out that bend? A I had to take them down to the shop to straighten them out. It was a big job.

Q How long were you there on June 16th? A If I recall, I was there at two o'clock.

Q And you stayed there until the accident? A Yes, sir.

Q Which was about six o'clock? A Yes, sir. 20

Q Well, what other repairs did you make? A Adjustments to the press; adjustments.

Q Well, what was the nature of these adjustments? A Adjustments. The press is a— a man wants to go all through a press and make adjustments; sometimes he can stick to it for a week or two weeks before he gets through making adjustments to a printing press of the type of this— 30

Q Well, by adjustments, you mean tightening up a bolt or a nut here— A No, no, no.

Q —and one there? A I cannot explain you the whole machine. The time to adjust a press is a very big job. Now, it depends on which parts are those what has to be adjusted. You got to tell me and ask me which is out of order or out of shape. Is it the vibrators? Is it the blankets? Is it the ink rollers? Is it the dog rolls? Is it the gears? Is it the folder? Is 40

*Leo Kappertz, cross.*

it the cutter? Is it the forwarding device for the paper, or which part? There is a lot of things in a part of a press, in a machine as a printing press, a duplex press. It is the same as a man that is repairing on this building. On what part of the building?

10 Q And it is similar to the tuning up of a violin or the tuning up of a piano, isn't it? A Yes, sir.

Q The adjusting? A Yes, sir.

Q That is what you mean by adjusting, isn't it? A Only we got many parts. In a violin you only have four or five strings, and we have a million.

Q Merely in tuning up this machine, that is all you mean by adjustments? A That is all,

20 Q Now, when you talk about repairs, that is where a part is broken, isn't it? A Either broken or out of adjustment or out of time.

Q Well, get back to the word adjustment, then. A That is what it is, adjustments.

Q Well, repairing is not adjusting, and adjusting is not repairing, is it? A Oh, yes, in my estimation. In that line of business, it is exactly the same thing as repairs. There is a round shaft; one of the main shafts is a five-inch or four-inch diameter shaft. Onto this is a—well, it has a piece like a wheel on it, only it has no teeth, and it has a snake wound—driven through it, through which a roller goes, on which an arm goes; that has got to move exact in turn. Now, the arm of that shaft is apt to slip for a one-thousandth of an inch; it puts the whole machine out of time; you got to locate it and find it. There is set-screws, there is dozens of them on this press, and some of them slip for a fraction

30

40

*Leo Kappertz, cross.*

of an inch, it throws it out of turn that the paper will not cut or print or roll through without breaking. You got to locate these troubles, this break, a slip or a shift or something, as out of time. That is repair. To locate that takes a man's time and patience, and he should be able to work on it any time as long as he needs till he completes the machine. This could not be done on that machine in one day, neither in three or four days. At the same time, there was no chance of doing it, with the exception of during the daytimes when the press had to run to run the paper out. They could not keep a man on it no more because the machine was out of order; it didn't print properly; it didn't keep the paper without breaking. 10

Q Every machine— A After this trouble, it was to locate this trouble and remedy those brakes that I was called. 20

Q Every machine of that size needs going over, needs attention, every day, doesn't it, if it is being used? A Absolutely.

Q Yes. A Absolutely.

Q And so you were the one to do that particular work, weren't you? A No. You mean the oiling? It needs going over, oiling, not re-adjusting; when it is once in adjustment it stays for ten years without touching. 30

Q And yet you were there from May right on through to June 15th to remedy the troubles which they were having? A They had nothing but trouble with the machinery, and I was to fix and remedy it, and it took me already two weeks and I wasn't through with that machine. I was still doing it and working sometimes on it nights. I asked Mr. Morton, the manager, I said, "Mr. 40

*Leo Kappertz, cross.*

Morton, we never can get through with this repair."

*The Court.* All right, now. I will control this examination.

10 Q Now, who was there working with you that day on that press? A On that day, Walsh was there.

Q Anyone else? A McArthur was there. Mrs. Solvia was there.

Q Was Pryor there? A Pryor was there.

Q And what were they doing? A Mr. Solvia was there, a young fellow.

Q What were they doing? A Well, they were working around. I do not know what they were doing.

20 Q Don't you know what Walsh was doing? A Walsh was handling the press, starting and stopping the press; he was on the lever, on the brake to start the press and stop the press.

Q What was Pryor doing? A Pryor, he was sending out the newspapers. He is seeing to the mailing list. I don't know what he does.

Q I mean, what was he doing that day? A He was mailing papers.

30 Q What was McArthur doing? A McArthur was the foreman. He was helping on the press.

Q And what particular work was he doing on the press? A Well, I don't know.

Q In other words, how did his work— A I don't know.

Q —differ from yours? A What?

Q How did his work differ from yours? A Well, they had nothing to do with my repairs or adjustments, what I was to do.

*Leo Kappertz, cross.*

Q And you did not have anything to do with his work as foreman? A No, sir; nothing to do with it.

Q And you were getting out a paper that day, weren't you? A I didn't get any paper out.

Q Well, we will say The Jerseyman was getting out the newspaper know as "The Jerseyman," is that not true? A Yes. 10

Q And you were aiding in getting that paper out, weren't you? A Yes, sir.

Q And Pryor was aiding in getting that paper out, wasn't he? A I suppose—I don't know about that.

Q And so was Walsh? A I don't know about them. I had nothing to do with them. 20

Q Well, unless Walsh had been at the lever and looking after the inking and all that, the paper could not have been printed, isn't that so? A Well, he was doing it.

Q Yes. A Yes, sir.

Q Didn't you complain about the quantity of scrap paper around the floor? A A good many times.

Q Yes. And you said you could not do work there with that paper around on the floor? A Not at the time. 30

Q And didn't you know that they opened that trap door for the purpose of sweeping the paper, this broken scrap or refuse paper, down the hatchway? A No, sir.

Q How long were you down on your haunches after the roll of paper had been put in the press? A How long, what?

Q How long were you down— A Stooped down? Oh, about five minutes. 40

*Leo Kappertz, cross.*

Q That is, between the time that new roll of paper had been put into the press and the time of the accident, you were there five minutes, you think? A Yes, about.

Q Well now, what had you done during that five minutes? A Trimming off the roll of paper and lining it up, measuring it, taking the  
10 measurements and attaching it to the press.

Q Well, didn't you have to stand up at times during that five minutes in order to fasten it up into the press? A Yes.

Q Yes. A I stood up, of course.

Q So you were not down in that stooping position the whole five minutes, were you? A No, sir.

Q You were down and then up and then down  
20 again? A No, sir.

Q Well, how? A That is not the way it goes.

Q How was it? A It is—in the five minutes, means to take the roll, trim it off while it is lying on the floor, rolling it onto the press in the bearings, then measuring, taking the measurements, and stoop down and trim off the rest which has touched the floor or was damaged  
30 somewhat.

Q Oh, then, you were— A And doing that takes about five minutes—

Q Yes. A —I should judge.

Q And had this roll of paper been connected up with the press at the time? A The roll of paper was laid in its bearings, not hooked up yet; I didn't get that far.

Q And this machine was one that, when the paper is finally gotten into the press and the  
40 press is started, it goes around and the whole

*Leo Kappertz, cross.*

paper is printed and comes out all folded, doesn't it? A Yes, sir.

Q To one side? A Yes, sir.

*The Court.* As I understand it, the roll had not been fed into the machinery as yet?

10

*The Witness.* No.

*The Court.* It was merely on the bearings?

*The Witness.* That is all.

*The Court.* And did it revolve easily? Could you pull the paper off it?

*The Witness.* Well, it revolves, see? It revolves hard, but if a man pulls straight, then the paper will stand the pull of the roll without breaking. If he pulls a little twisted, it will break. It rolls easy, but by me rolling this, the paper is cut to get about a dozen or twenty layers of paper, get that off, because the outer edges is liable to be chipped, and this would cause an immediate break. In order to be sure to have a perfect roll, we slit so much in thickness for an inch or so and pull that off, and then start with a clean sheet to attach it to the press, to feed it in and feed it through; that has to be done by hand all the way through.

20

30

*The Court.* Well, then, the length of those sheets of paper was the circumference of that roll?

*The Witness.* Yes, sir.

*The Court.* And what would that measure?

40

*Leo Kappertz, cross.*

*The Witness.* Well, the roll is six feet wide.

*The Court.* No. But I mean, what is the diameter of it?

10 *The Witness.* The diameter is about two and a half feet, something like that, thirty inches.

*The Court.* And the length of the paper, the sheets were about nine feet?

*The Witness.* About nine feet you have in the circumference.

*The Court.* Why was it necessary for you to walk backwards to take those sheets off? Why couldn't you have just taken them off in the position that you were in?

20 *The Witness.* Well, you see, their press—on all presses is alike—this press has got a roll of paper down on its bearings onto the floor; to get ahold and start, you kneel down or sit down like this and begin to work by taking the measure, then taking this sheet off, you go back further.

*The Court.* Well, why did you do that? Why is it necessary to do that?

30 *The Witness.* Well, you wouldn't be able to handle it any different.

*The Court.* Did you pull it out with your hands?

*The Witness.* Yes. But you have eight to nine feet length to pull, Judge, that you have to pull off that roll. It takes quite some distance to go back. There is six feet in the rear. That is about a weight of twenty pounds.

40

*Leo Kappertz, cross.*

*The Court.* What I want to find out, Mr. Kappertz, is why did you have to walk back to do that work? Why couldn't you have rolled it off the machine, staying near the machine?

*The Witness.* Well, I don't understand.

*The Court.* Yes, I know. But you are 10  
about to pull many sheets of paper nine feet long and six feet wide off a roll?

*The Witness.* Yes, sir.

*The Court.* Which revolves as you pull the paper?

*The Witness.* Yes.

*The Court.* Now, why was it necessary, in the performance of that work—

*The Witness.* To step back? 20

*The Court.* —that you stepped back away from the machine instead of standing at that machine and unrolling it there in that position?

*The Witness.* Why, you would get entangled in such a big sheet of paper; it is twenty-two to a hundred sheets, and that big piece of paper, you want to pull it off. You might be trying to pull it off. You 30  
cannot stand there and pull it. You wouldn't have a chance. You got to go and take the end and pull it off like that. You cannot go a shorter distance. There is only the distance between the press and the trap door which is only a space like that; but you got to go out with it.

*Mr. Romine.* You have to pull it out straight, do you?

*Leo Kappertz, cross.*

*The Witness.* Yes, sir. You couldn't handle it any different way.

*The Court.* All right; resume.

Q So that the entire time taken by you, you say, was five minutes, you think? A About.

10 Q And how long had you been down in that stooping posture before the accident happened?

A I would judge to a minute or less.

Q Now, after the accident, you next found yourself where? A Home in bed.

Q You were rendered unconscious at the time? A Yes.

Q And when did you regain consciousness? A When I was home in bed.

Q Well, when was that? A I don't know. Between seven and eight; about eight o'clock.

20 Q Oh, you mean the same night? A Yes.

Q And how long did you remain in bed? A More or less, about six weeks.

Q When was the first time you got out of bed? A About two days, three days, after the accident.

Q And what happened, or where did you go then? A I was taken to Doctor Sutphen's, and to the Memorial Hospital.

30 Q And how were you taken? A By automobile.

Q Who went with you? A The—Mr. Murphy.

Q Well, he was the driver of the car, of the taxi, wasn't he? A Yes. I was sitting alongside of him.

Q And you went alone so far as any— A Yes.

40 Q —relative is concerned, or anyone else? A Yes.

*Leo Kappertz, cross.*

Q And you walked out from your house to the taxi, did you not? A Yes, sir; but with the help of Mrs. Kappertz.

Q What is that? A With the help of Mrs. Kappertz.

Q Then you went down and saw Doctor Sutphen and had him examine you, and you came back and you got out of the automobile and walked into the house? A Yes, sir. 10

Q Then, do you say you went back to bed? A Yes.

Q Well, you were not in bed all of the time for the next six weeks, were you? A Not all of the time; no, sir.

Q No. You were up and down? A Yes.

Q You did not have to remain in bed, did you? A Not all of the six weeks. 20

Q You had dizziness, you say? A Yes, sir.

Q And you still have dizziness, you say? A Yes, sir.

Q You had dizziness before this accident, didn't you? A No, sir.

Q Didn't you ever complain about having dizziness before this accident? A No, sir; no, sir. 30

Q Well, when was this nurse called that you speak of? A Almost immediately upon—after the accident.

Q Well, when did she come there? A I forget if it was about a week or so, she got here.

Q And how long did she remain? A Ten weeks.

Q Well, she was not there for your benefit then, was she? A Absolutely only; yes, sir. 40

*Leo Kappertz, cross.*

Q What did she do for you? A She has been taking care of me, as Mrs. Kappertz did.

Q What did she do for you? A She gave me whatever I needed, as far as eat or drinks or medicines.

10 Q That does not help us a bit. What did she do for you? A She gave me ice bags; she gave me medicines; she gave me to eat; she gave me to drink.

Q Well, you were up and around the house? A She helped me to go to the toilet.

Q You were up and around the house, weren't you? A I have been; yes, sir.

Q Was she a trained nurse? A No, sir; she was a practical nurse.

20 Q You call her a practical nurse? A Yes, sir.

Q Was she a licensed nurse, licensed under the law of New Jersey to act as a nurse? A I do not know about that.

Q You know she came from North Carolina, don't you? A Yes.

Q Is that her home? A Yes, sir.

Q She was a friend of your wife, was she not? A From years ago; yes, sir.

30 Q And wasn't she here visiting? A No, sir.

Q Did she have any relatives north? A She had a relative. She had a daughter.

Q Who, or where was she? A In Summit, in the hospital.

Q And she visited that daughter, didn't she? A She has while she has been here; yes, sir.

Q Yes. And do you know whether she went to see her daughter after she left you? A No.

*Leo Kappertz, cross.*

Q Her work was mainly house work, wasn't it? A No; not at all.

Q Well, now, you were up and around, according to your testimony, in six weeks, at times. Now, what did she do the other four weeks. A I wasn't more competent then as I was two weeks after the accident. I have been for longer than six weeks that I have been in need of help. 10

Q Well, now, she did not do anything for you after the lapse of six weeks, did she? A Yes, sir.

Q What did she do for you? A The same thing, kept up.

Q Well, you did not need any ice bags at that time? A The Mrs. was run down completely; Mrs. Kappertz— 20

Q Now, wait a minute. The Mrs. has nothing whatsoever to do with it. A No.

Q Nor any other member of the family. It is what this nurse was doing for you. A My wife was completely run down.

Q If you want to say it, go ahead. A She couldn't do nothing more, no more, for me with her baby, and we had to have this nurse and kept her there. We needed her about a month. 30

*The Court.* Go ahead, now.

Q She looked after the house work, didn't she? A She did all, with Mrs. Kappertz.

Q Yes. And looking after Mrs. Kappertz? A They divided up the work, and Mrs. Kappertz did, and Mrs. Wiel did—

Q Yes. A —day and night. 40

*Leo Kappertz, cross.*

Q And she was looking after Mrs. Kappertz and looking after the house, wasn't she? A She looked after all; she did a lot of house work too; yes, sir.

Q And mainly house work, didn't she? A Well, we never needed any before.

10 *The Court.* What Senator Rathbun wants to know is, did this lady assist your wife just as much as she assisted you?

*The Witness.* She assisted the Mrs.

*The Court.* She was a general helper around the house?

*The Witness.* She was generally all around.

*The Court.* All right. Go ahead, Sena-  
20 tor.

Q Well, you helped yourself to medicines, didn't you? A To some extent.

Q Yes. A Yes, sir.

Q When was the first time you went into your shop after the accident? A I do not know. Sometime in August.

Q You are sure you did not go into your shop before that? A It may be that I have  
30 been in even in July. I cannot remember.

Q Now, isn't it a fact that you were there in July? A It may be.

Q Yes. Now, this trip to the seashore that you speak of: Anyone go with you? A Yes, sir.

Q Who? A Mr. Stratman.

Q Was he a friend of yours? A From years ago; yes, sir.

Q Yes. And how did you go, by train or by  
40 automobile? A By automobile.

*Leo Kappertz, cross.*

Q Whose automobile? A Mr. Stratman's car.

Q Well, that did not cost you anything going down in his automobile, did it? A Well, I had to pay him, yes, sir; the same as anybody else.

Q This friend of yours went and took you down to Asbury Park? A Yes. 10

Q And you paid him? A Yes, sir.

Q How much did you pay him? A Well, it is \$40 and \$60. I paid the first trip.

Q \$60? A \$100.

Q Well, you paid him \$100 for the first trip? A That is what it—no, I didn't pay him the \$100. There was—I forget—no, sixty dollars for the car, or sixty dollars for hotel expenses, and \$40, the other one; I forget which way it was; but it was \$100. It was \$40 and \$60. It was sixty dollar I paid him for the car; that was four days; and \$40 I paid for hotel, for the hotel expense. 20

Q Well, now, as I understood you on your direct examination, you spent one day at the seashore the first time? A Four days.

Q And you paid \$40 for the hotel? A Yes. I do not recall just what I paid. 30

Q Now, did you pay Mr. Stratford one penny for his automobile? A What did you say?

Q Did you pay Mr. Stratford, I think you called his name? A Stratman.

Q Stratman—one penny for his automobile? A Absolutely.

Q How did you pay him? A In cash.

Q You didn't pay him by check? A No, sir.

*Leo Kappertz, cross.*

Q You kept a bank account, didn't you? A Oh, yes.

Q Yes. You generally paid by check, didn't you? A No; no, sir.

Q Well, when did you go the second time to Asbury Park? A I think it was a week or so later.

10 Q Who went with you then? A The same man.

Q And how long were you there that time? A I do not recall. It was 5 days or so. I do not recall.

Q And how much did it cost you that time? A I think it was \$150.00.

Q How much did you pay him? A I forgot.

20 Q Why can't you remember? A I did not keep track of it.

Q Well, how can you remember the first time and you cannot remember the second time? A I forgot.

Q Did you pay him anything the second time? A Yes, sir.

Q The \$150.00 was the hotel bill, I take it, is that right? A I forget just how it was.

30 Q And you paid his expenses as well as yours, didn't you? A I paid both.

Q Yes. A Yes.

Q And he was a friend of yours? A Oh, yes.

*The Court.* Have you got any records that will clarify your memory what you paid?

*The Witness.* Yes, there was some, Judge.

*Leo Kappertz, cross.*

*The Court.* Have you got them with you?

*The Witness.* No, I haven't.

Q Now, let us see about this ocean trip. You went to Europe? A Yes, sir.

Q You went to what part of Europe? A Well, mainly to Germany. 10

Q Yes. And that was your homeland, wasn't it? A Yes, sir.

Q And you went to see your parents, didn't you? A Yes, sir.

Q And you visited your own relatives over there, didn't you? A Yes, sir.

Q And you had not been able to see your relatives for several years, had you? A No.

Q When was the last time you had been over there to see your relatives? A 1913. 20

Q Yes. And you took this occasion to make a trip to see your own family? A Yes, sir.

Q Your parents and other relatives? A Yes, sir.

*The Court.* How many times had you seen this hatchway in use? How many times was it open, to your knowledge?

*The Witness.* I could not tell you, Judge. That has been opened off and on; I seen that open when a new roll of paper came up; but a new roll of paper don't come up every day. 30

*The Court.* Did you ever see it in use for any other purpose except to bring up rolls of paper or to dispose of discarded rolls?

*The Witness.* No. It is not supposed to be used; I do not think so. 40

*Leo Kappertz, cross.*

*The Court.* Have you been down in the cellar?

*The Witness.* Yes.

*The Court.* Frequently?

*The Witness.* I was down that day.

10 *The Court.* What have they got down there besides paper?

*The Witness.* Not before, I never was down.

*The Court.* What have they got there besides paper in the cellar?

*The Witness.* That is all they keep there.

*The Court.* There is no stairway—

20 *The Witness.* What I know of.

*The Court.* —in this hatchway, is there?

*The Witness.* That is in another part of the building is a stair.

*The Court.* Go ahead.

Q How much did you pay for medicines?

A I could not tell exact. About \$50.00.

Q Did you buy them from any one drug-store? A Mostly—mostly here at Smith's.

30 Q Did you pay for it in cash? A Yes, sir.

Q You never had a bill for it? A No.

Q Now, was it \$50.00, or was it \$75.00? A I don't know; I can't recall it.

Q Well, are all these things guesses on your part as to what it has cost you? A Some; yes, sir. To the best of recollecting, because there isn't all bills kept, and whatever I did get, I paid cash.

40

*Leo Kappertz, cross.*

Q You have mentioned one item of \$500, special or extra; how do you make that up? A You mean, the household?

*Mr. Romine.* Your Honor, please, he mentioned two items of five hundred; one for extra foods, and one for auto hire.

Q Well, we will come to the auto hire next. How about the household; how do you make that up? A Well, that is as much as—what Mrs. Kappertz has used more in money during the house—during the time since the accident till today, as what we have used previously, ordinarily or regularly. 10

Q Well, do you mean this is what Mrs. Kappertz has told you, or that you know yourself? A No. I do not know nothing about it. I know what I pay out, that is all. I give the money to Mrs. Kappertz and she pays and buys what she has to buy, and my household expense has been for that much more as it ought to be over what it has been. 20

Q It has nothing to do with the high cost of living, has it? A No, no; not at all.

Q Well, now— A I have found out—

Q —you cannot specify in what particular this \$500.00 extra is attributable, can you? A Yes. 30

Q How? A We never bought eggs as we do buy them. We get the eggs, we have been getting the eggs now from a certain farmer; we never get less than five or ten or twenty dozen eggs. The eggs have been—I have consumed in one year—I never would have consumed them with the family in ten years before. The item of the eggs alone has been an increased cost of two 40

*Leo Kappertz, cross.*

and a half a week. Then, the item of milk. We never did need to buy that in large quantities, and we have been getting the milk off Decker's since this period by the case, and a case only lasts two weeks. I am consuming the milk.

10 Q Well, on the former trial, you never mentioned this item at all, did you? A I do not remember. I do not know.

Q No. You know you did not mention this item all. A I do not remember. I might have mentioned, not a great deal.

20 Q Now, this other \$500.00 item for auto hire, how did you make that up? A Well, it is the renting of a car going back and forth now and then like going to Doctor Sutphen's, to the Memorial Hospital, or so, when I could not drive myself. And later on, I have had an additional cost of—I used to have a Ford car myself; that means only a Ford car for my own use, but as I felt better in the car than any other way, other wheres, I found fit to pay the money for the car which I could get at a reasonable rate, a Dodge, and I could take that car and ride in that, which was easier on my head as a Ford was. The Ford was too noisy and too shaky, where the touring car did do me a whole  
30 lot of good.

Q In other words, you bought a new car?  
A Yes, sir.

Q And you want us to pay for it? A I am not asking for the amount. The car cost \$1,180.00.

Q Yes. A I ask for four hundred dollars, what I spent for the accident.

40 Q Then, why did you put it in as auto hire?  
A Well, that was trips. This car—

*Leo Kappertz, cross.*

Q I know; but in your testimony on direct examination you said \$500.00 for auto hire and rates? A A car.

Q You didn't put it that way? A I didn't say rate, name like that; I didn't speak about rate.

Q That is the way the stenographer has it. A Well, you didn't understand it; I never said rate. 10

Q You still have the car, haven't you? A Yes.

Q And your family use it? A Well, I use it.

Q And your family use it? A You got to take them; yes, sir.

Q Did I understand that there was a charge from a university, on your direct examination? 20

*Mr. Romine.* Cornell University.

A Cornell University; yes, sir.

Q And when was that bill contracted? A There was no bill. I paid that every time when I go there; I paid cash.

Q Cornell University, Ithaca, New York? A Yes, sir.

Q And how often have you been going there? A Oh, I don't know. I have been going for a couple of months. 30

Q How many times? A Every day or other day.

Q Every other day you have been driving up to Ithaca, New York?

*Mr. Romine.* New York City.

A Driving?

Q To Ithaca, New York? Cornell University is in Ithaca, New York, as I understand it. A 40

*Leo Kappertz, cross.*

I do not know what you are talking about. The Cornell University is in New York City.

Q Columbia, you mean, don't you?

*The Court.* The Medical Department is in New York City.

10 *The Witness.* Cornell.

Q Oh, you mean the Medical Department at Bellevue Hospital? A No. That is the Cornell University.

*The Court.* What are you quibbling over it for? It is only next door to the Bellevue Hospital, isn't it?

*Mr. Romine.* What street is it on?

*The Witness.* It is on Avenue "A" and 27th street.

20 Q Have you paid anything to them? A Why, yes.

Q And you think it aggregates \$50? A About \$60.

Q Well, you said on your direct examination \$50. Now, is it fifty or sixty? A I cannot remember. I paid a dollar to a time to each doctor. I see it cost one dollar, but I cannot recall exact.

30 Q Now, you went all over this story on Friday night, didn't you, at your home, with all the rest of the witnesses? A Well, I cannot keep it on my mind. If I could look up papers, I would know.

Q I say, as recently as last Friday night at your home, you went over this whole story with all your witnesses, didn't you? A No, sir; I don't know nothing about that. That is new to me.

40

*Leo Kappertz, cross.*

Q What is that? A That is new to me. I don't know nothing about it.

Q Didn't you go all over this Friday night? A No, sir; not to my knowledge.

Q With all your other witnesses? A I haven't had a witness in the house.

Q Well, maybe somewhere else, then. Wasn't it Friday night you went and rehashed this whole story? A I don't know nothing about it.

Q Now, you spoke about not having received any income from your business since the accident? A No.

Q As a matter of fact, you have sold your business out, haven't you? A I didn't sell the business! no, sir; I didn't get a cent for business; I didn't sell the business.

Q Well, do you own the business now, or any part of it; any interest in the business? A No, the business didn't sell. I sold my tools and equipment and rented the shop.

Q Well now, don't quibble. You have gotten rid of every interest you had in that business, haven't you? A I sold the equipment; no good will.

Q All right. When did you sell the equipment? A What is that? 30

Q When did you sell the equipment? A In April.

Q April, when? A 1922.

Q Yes. A Or, rather, in October, 1921.

Q Oh, in October, 1921. And, of course, you haven't had any income from it since then, have you? A And then I kept half interest to April, 1922.

Q Yes. A I took a partner.

*Leo Kappertz, cross.*

Q Who was your partner in October, 1921?

A Simon Muller.

Q And he continued as a partner until April, 1922? A Yes, sir.

Q When you sold out your interest to him, is that it? A Yes, sir.

10 Q Was there any business being done by the partnership? A Yes, sir.

Q And you received your share, did you not? A If there had been any.

Q Well, was there any? Not if. A No.

Q There was nothing at all during that whole period of October to April coming to you? A It was only for the other man. There was nothing for me. We had the agreement to pay to one, to draw, each one, what he earned.

20 Q Yes. Well, what was the condition of the business from June 16th until October? Any-one running it? A None at all.

Q It was closed? A Yes.

Q And isn't that due to the fact that the business had been poor with you, anyway? A That business?

Q Had been poor with you? A Well, since I closed.

30 Q Well, even before, the business had been poor, hadn't it? A Oh, no.

Q You have testified you were receiving an income of what, four or five hundred dollars a month? A Yes, sir.

Q From sometime in November, 1920, down to June 16, 1921. Did you file any income tax return? A No, sir.

Q You never filed any income tax return, did you? A No, sir.

40 *The Court.* When this hatchway was opened to bring up the roll of paper, was

*Leo Kappertz, cross.*

any warning given to the other employees of the place that the hatchway was open?

*The Witness.* No.

*The Court.* Did you have any warning given that the door was open?

*The Witness.* No, sir.

*The Court.* Never any warning given to you? 10

*The Witness.* No, sir.

*The Court.* There was no such warning given?

*The Witness.* No, sir.

Q Returning to this nurse question once more: You testified on the former trial, did you not, that she took almost completely care of the house, cooking, washing, ironing, up and down stairs a hundred times a day. Is that what you testified to before? A I do not remember. 20

*Mr. Romine.* Well, it is practically the same what he testified this time.

*Mr. Rathbun.* Well, you can argue that, if you want to.

Q Were you not asked a question: "She didn't have to administer medicines, did she?" And you answered: "No, I was competent to take them myself." A I don't remember. 30

Q Do you remember Judge Cutler asking you, "When did this lady come to your house?" and you replied, "I don't remember; it was in the middle of July"? A I told before I don't remember the time when she came. I don't remember that.

Q Now, you have testified this time that your expenses are over \$3,000.00. What expenses 40

*Leo Kappertz, cross.*

have been incurred by you since the last trial?  
 A Well, there has been continuous expense incurred in the expenditure for foods since that. That means a half year.

Q Well, now, this last trial took place on June first, 1922, A Yes.

10 Q What expenses have you had since that date? A I have to figure, but it should figure \$5.00 a week on the various foods from that trial to today.

Q Well, about how much would that amount to? Can you tell us? A Well, no. I got to have a pencil and paper and I can tell you.

Q Well, I will give you a pencil and paper, both (handing same to witness). A (Figuring on paper.) I don't know; if I am right, since 20 that time there is \$120 on the food. I don't know. I haven't got it right.

*The Court.* Go on to the next question.

*Mr. Rathbun.* I think that is going to be about all as soon as he gets that. Then I want to ask a question, and then I think I am through.

A (Continuing.) Oh, I cannot make it out.

30 *Mr. Romine.* Figure the X-rays or medical attendance, if any.

*Mr. Rathbun.* Oh, the X-rays were all before, and that has all been testified to.

*The Court.* You are not capable of figuring it, now?

*The Witness.* No. I cannot get it in mind. I get it mixed.

Q Now, you testified before, did you not, on the former trial, your expenses amounted to

*Leo Kappertz, cross.*

about two thousand dollars? A Over three thousand, I said.

Q I say, you testified on the former trial your expenses amounted to about two thousand dollars, did you not? A I don't remember. If I said \$2,000, then it must be.

Q I know. But—

10

*Mr. Romine.* Let him answer.

A I haven't had a chance in the former trial to get all the expenses there, because I wasn't allowed to look up anything, and I couldn't recall it, and I didn't give you all figures of all that I expended. I recall that, but what the figures was, I don't know; I don't recall. But I went home and added up some figures that I found I spent over three thousand dollar.

20

Q Did you pay this money out by check? A No, sir. I paid checks or cash, whatever I happened to.

Q Well, did you have \$3,000 in the bank? A I had more than that.

Q And your bank account has been reduced? A Oh, yes.

Q Well, I know. But I mean, not in building houses, or anything like that? A No.

30

Q I mean, in connection with this accident, this illness of yours? A Exactly. That has been reduced that I had to go and raise a mortgage.

Q Oh, that is on a house you are building? A No, before; it is before that I had to go and increase the mortgage. I had to mortgage my home in order to get money. I had to go and borrow all the money I could on my life insurance policy.

40

*Leo Kappertz, cross.*

*The Court.* Well, when you recently calculated your whole expenses being around \$3,000, did you keep any schedule of your disbursements?

*The Witness.* Yes. I went over all the slips.

10 *The Court.* Have you got it?

*The Witness.* And things, whatever has been kept. The Mrs. usually kept a memorandum.

*The Court.* I know. But have you here now any record of those expenditures?

*Mr. Romine.* Did you bring the book with you that you made then?

*The Witness.* No.

20 Q You said just a moment ago that on the former trial you were not allowed to testify to different items or expenditures. Name a single item that you were denied that privilege by the Court. A I wanted to look them up on paper and you didn't allow me, and I had a paper there with the whole list, but you didn't allow me; you refused, and then I had to say it from memory, and I couldn't—

30 Q Didn't you testify about the nurse on the former trial? A I might have testified.

Q Didn't you testify about the Asbury Park trips on the former trial? A That may be the case.

Q Didn't you testify about the ocean trip on the former trial? A Yes; but—

Q Didn't you testify about the automobile on the former trial? A Oh, not exact, because I had nothing to go by but memory.

*Leo Kappertz, re-direct.*

Q Now, one moment. Didn't you testify about the automobile on the former trial? A I do not remember. I do not know.

Q Didn't you testify about the X-rays on the former trial, the cost of the X-rays? Did you?

A Not all; I know that.

Q Didn't you testify about Dr. Rood's pulling your teeth on the former trial? A Yes; that is right. 10

*The Court.* For what purpose is this, Senator Rathbun?

*Mr. Rathbun.* Because he just said he was denied on the former trial, and that is the reason he wants to account for the excess in the expenditures at this time.

*The Witness.* You declined me, I said, to look at a paper or any papers. You didn't deny; you declined. 20

*The Court.* I think we are wandering a little afield.

*Mr. Rathbun.* I think that is all.

*Re-direct examination by Mr. Romine.*

Q How many children do you have? A Two.

Q And the eggs and milk, what were they used for? A For my personal use. 30

Q Well, mixed how? That is what we want to get. How were they made up? A In the morning, the Mrs., first she—

Q Well, what was it made up as an egg-nog? Let us get it so we know what it was. A Raw milk and egg; that is all.

Q That was by the doctor's advice? A Yes, sir.

*Mr. Romine.* That is all. Dr. Rice. 40

*Franklin W. Rice, direct.*

FRANKLIN W. RICE, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Dr. Rice, you are a practicing physician in the Town of Morristown? A I am.

10 Q A graduate of what college? A Columbia University.

Q And how long have you been practicing? A Five years.

Q In the Town of Morristown exclusively? A About four years.

Q Do you know Mr. Kappertz, the plaintiff in this case? A I do.

Q And on June 16th, 1921, were you called to treat him? A I was.

20 Q Where did you find him? A In the cellar of The Jerseyman building.

Q And what was his condition? A He was unconscious.

Q What was done with him? A He was given an injection of a certain medicine and he came out of his unconscious state, and then he was carried up into my automobile, and then from there to his home. I took him to his  
30 home.

Q And how many times did you visit him that day or that evening? A About 3 times.

Q What was he suffering from? A Well, he was suffering from a fractured skull.

Q And did you make any examination of him? A I made a complete examination of him.

Q What did the examination disclose as to his condition? A He had the symptoms of a  
40

*Franklin W. Rice, direct.*

fractured skull. There was blood coming from his ear.

Q Now, just which ear was it, and where were the symptoms of the fracture? A Blood was coming from his right ear and he was unconscious. Those are the only two symptoms of the fractured skull that were found immediately; but he had severe bruises all over his body; over his body, on his shoulder and arm and his leg. 10

Q Was anything done later to determine whether or not this was a fractured skull? A An X-ray was taken a few days later.

Q And did you examine the X-ray? A I did.

Q What did that disclose? A It showed a fracture of the base of the skull through the sphenoid bone. That is the bone right near the right ear. 20

Q And did Mr. Kappertz have any symptoms at that time? A Yes. He was having pressure symptoms then. That is, he had headaches and dizziness, and then there was a yellow fluid coming from his ear, which was a serum.

Q What was done for the fracture? A He was placed in bed and kept there. There was no other treatment necessary unless he had other pressure symptoms which might necessitate an operation; but his blood pressure was taken daily, and his blood pressure was within normal limits; it was a little higher than usual. And we just kept him in bed and watched him. 30

Q Do you know anything about ice bags being ordered? A Yes. He had an ice cap on his head, and he had other medicines internally. 40

*Franklin W. Rice, direct.*

Q Do you know whether he had a nurse or a woman there to help and assist? A Yes. There was a nurse there.

Q And how long did you continue to treat Mr. Kappertz? A Well, I had seen him from the day of the accident, I think, just the other day; from the beginning, and after the accident, I saw him practically two or three times a day. Then I would get down to once a day, then about twice a week, and once in about every three weeks lately.

Q Now, will you tell us, doctor, what happens when there is a fracture of the skull? Just describe what happens in the repair of that condition. A When the bone is broken, there is a separation of the fragments, that is, the parts of the bone are a small distance apart, depending upon the part of the body, the location of the fracture. And, of course, in the skull the fragments of bone are less separated; in the leg they would be more separated. The fragments of bone tear into the neighboring tissues and produce hemorrhage, and this hemorrhage may last from one day to a week. When a hemorrhage subsides, it leaves a straw colored serum, and this serum presses on the adjacent structures which may be a muscle or brain tissue or nerves or anything in that region, even other blood vessels. The serum gradually classifies, that is, it hardens, and as it hardens, it forms a mass that we call a callus. This callus enlarges itself, depending upon the amount of serum that is present at the site of the fracture.

*The Court.* Callus is a sort of cement that forms—

*The Witness.* Where the bones were broken.

*Franklin W. Rice, direct.*

*The Court.* —at the fracture of the bone?

*The Witness.* It is just a lapping over of the broken bones to bring the two edges together.

Q Now, in this particular case, considering the fracture and its location, would that callus condition cause pressure on any nerves? A It would. The nerve of hearing is just adjacent to this bone that was fractured, that is, the petrous portion of the temporal bone. The nerve is situated right in that spot. 10

Q What effect would that have on the hearing? A It would make the patient deaf.

Q And would that callus condition causing pressure on the nerves in that vicinity have a tendency to cause dizziness and headache? A Yes, it would. 20

Q And have you examined X-rays taken recently? A Yes, I have.

Q And does that callus condition still continue? A Yes, it is the same today at the same spot.

Q And in your opinion, will that still continue to cause pressure and produce dizziness and headaches? A He will have that dizziness and pressure symptoms in spells; it may clear up for awhile, and then it may come back again. 30

Q In your opinion, is that a permanent condition? A Permanent as far as spells are concerned. That is, these attacks of dizziness and headaches will come and go.

Q Yes. And will that interfere with his work? A It does.

Q What is your bill, doctor, for your services? A \$425.00. 40

*Franklin W. Rice, cross.*

Q Did you give any advice to Mr. Kappertz about going to the seashore? A Yes. I advised him to go down there to the seashore.

Q And did you give him any advice about going away on an ocean trip? A I approved of it.

10 *Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

Q Have you been paid \$425.00, doctor? A I beg your pardon?

Q Has Kappertz paid you \$425.00? A No, sir; no, sir.

Q Has he paid any part of it? A No, sir.

20 Q Now, this pressure may gradually disappear, may it not? A Yes, sir; it may gradually disappear.

Q And if it does, then the disability will also disappear, will it not? A Yes, sir.

Q And you have mentioned the fact that the pressure makes the patient deaf. You do not mean to say that in all cases it makes the patient deaf? A In that part of the body, yes.

30 Q Well, you did not notice anything—you have been sitting here in the court room while Mr. Kappertz was on the witness stand, have you not? A Yes.

Q Did you notice anything in his action indicating lack of hearing, did you? A I did. His attitude. The way he leaned over in the chair for certain questions.

Q Might that also be a failure to grasp a question as well as lack of hearing? A It might be lack of mentality, yes.

40 *Mr. Rathbun.* That is all.

*Franklin W. Rice, re-direct—re-cross.*

*Re-direct examination by Mr. Romine.*

Q Now, something was said about this callus condition disappearing in time. Taking into consideration the fact that the accident happened June 16, 1921, and the fact that an X-ray was taken recently which shows that callus condition, is it your opinion that that callus condition, still remaining now, that there is any likelihood of it dsappearing? A It would not completely. There will always be some evidence of it, small evidence, maybe, just a little.

10

*Mr. Romine.* That is all.

*The Court.* The callus dissolves, doesn't it?

*The Witness.* It generally dissolves within a period of a few years.

20

*The Court.* And sometimes it is not entirely dissolved?

*The Witness.* Sometimes it does not completely go away.

*Re-cross examination by Mr. Rathbun.*

Q And more apt to in a man 42 than 52, I suppose? A Age does not make any difference. It depends upon his power of making bone himself, his general physical condition, if he is able to throw out enough calcium to form a big callus; there are people that have a broken leg that you can feel the callus in their leg for a few years afterwards, and then there are some you won't feel the callus for a year afterwards. It is just an individual susceptibility.

30

*Mr. Rathbun.* That is all.

40

*A. Bliss Coultas, direct.*

A. BLISS COULTAS, sworn as a witness on behalf of the plaintiff, testifies as follows:

*Direct examination by Mr. Romine.*

Q Doctor Coultas, you are a physician and surgeon? A I am.

10 Q And practicing in the State of New Jersey? A I am.

Q A graduate of what college? A Columbia.

Q And how long have you been practicing? A Twenty years.

Q Did you make an examination of Mr. Kappertz, the plaintiff in this case? A I did.

Q And when did you make that examination?

A I made two. I made one about three weeks ago; another one last week.

20 Q And what was the result of your examination? A Well, he—his subjective symptoms were dizziness and deafness and headaches; and then he spoke of some other symptoms, difficulty in walking. And then he said that the headaches had subsided somewhat.

Q Did you make an examination of the inner ear? A I did.

Q And what did you find there? A Why, I found a chronic inflammation of the inner ear.

30 Q Indicating what? A Well, that would indicate that there had been a rupture of the drum membrane, and a chronic inflammation had been going on ever since.

Q And did that indicate to you any evidence of deafness? A Yes. That would produce deafness. That is the important objective symptom that he had.

Q Did you examine the X-ray plates that were taken at the Memorial Hospital? A No, I did not.

*A. Bliss Coultas, direct.*

Q Shortly after the accident? A I did not.

Q I think these are the X-rays. A No. Those are the X-rays taken—the dates are on there—since the—

Q Have you examined the X-ray plates of Mr. Kappertz? A Yes, sir; I did.

Q And those X-ray plates, did they show evidence of a fracture? A They did not. 10

Q If you should see evidence of a fracture, would you doubt that there was ever a fracture there? A At this date? There was some symptoms there or some evidence of a callus formation.

Q That is what I mean. You found a callus condition where there had evidently been a fracture? A There was some evidence of callus formation.

Q Now, that is in what region? A That is in the petrous portion of the temporal bone. 20

Q Near what important nerves? A Well, near the auditory nerve, of course.

Q And a callus condition resulting from a fracture, would that tend to have pressure on those nerves? A It would.

Q And would it affect the hearing? A It would, certainly.

Q And would it cause dizziness and headaches? A Yes, it would. 30

Q And if that callus condition continues, the patient would still continue to have that condition, would he? A Yes.

Q And, in your opinion, the recent X-rays still showing evidence of the callus and an injury that happened over a year ago, do you think there is any likelihood of that clearing up entirely? A There is. Some of his deafness might be due to the rupture of the drum mem- 40

*A. Bliss Coultas, cross—re-direct.*

brane and the chronic inflammation of the middle ear. In that case, there might possibly be some improvement in his hearing, but he has got a pretty—a loss of function there of almost total deafness of that right ear.

10 Q And so far as the dizziness and headaches are concerned, would that continue so long as the callus condition remains? A It would, yes.

*Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

Q The question of headaches, doctor, is one you have to depend upon the say-so of the patient? A The subjective symptoms.

Q Isn't that so? A It is, yes.

20 Q And what was the particular subjective symptom which indicates headache? A Well, the fact that he told me he had headaches; that is all.

Q Well, I say, you have to depend upon his say-so? A On what he said; yes.

Q That is true, also, as to the question of dizziness, is it not? A Yes.

30 Q You have to depend upon what he says? A Yes. There was one objective symptom, though.

*Mr. Rathbun.* That is all.

*Re-direct examination by Mr. Romine.*

Q And, of course, Doctor, as a medical man, finding this callus condition and knowing of the fracture, that would of itself cause pressure and result in headaches and dizziness, would it not?

40 *Mr. Rathbun.* Every question you have asked, Mr. Romine, has been leading, and he is an expert here.

*Vernon Rood, direct.*

A I didn't get the question.

*Mr. Rathbun.* I object to it as very leading.

*The Court.* It was not a leading question when the Doctor did not even understand it. Make up another question.

10

Q Well, Doctor, to you as a medical man, if there are evidences from an X-ray of a callus condition where a fracture has existed, being in the region where this fracture occurred, it would have pressure on the nerves, would it not? A I do not see how it could help but have pressure on the optic nerve.

Q Now, having pressure on those nerves, would it cause headaches and dizziness? A It would cause headaches and dizziness, yes.

20

*Mr. Romine.* That is all.

*Mr. Rathbun.* That is all.

VERNON ROOD, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Doctor Rood, what is your profession? A Dentist.

30

Q And how long have you been engaged in that profession? A 23 years.

Q A graduate of what college? A University of Pennsylvania.

Q And practicing at Morristown? A Yes.

Q Do you know Mr. Kappertz, the plaintiff in this case? A I do.

Q Were you called to treat him some time in June, last year? A I was.

40

*Vernon Rood, cross.*

Q And where did you find him? A At his home.

Q What was his condition so far as teeth were concerned? A I found five teeth on the upper right side loose.

10 Q And did you at that time or at a subsequent time do anything with the loosened teeth? A Three of the teeth had to be extracted. Two of them I have succeeded in preserving.

Q And did he come to your office subsequent thereto for treatments? A He did.

Q Continuing for how long a time? A About, approximately two months.

Q And what was your bill, doctor? A \$131.00.

20 Q There are some teeth that you have taken out of the mouth? A Three.

Q And what would be necessary to replace those? A A temporary fixture was put in, in the fall; that is, early in the fall, and eventually it will have to be a—should be a permanent fixture, which will necessarily have to be gold.

Q And what would that cost? A Approximately \$100.00.

30 *Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

Q He wasn't suffering from Rigg's disease, was he, at all? A His mouth was in a sort of a general septic condition as we find a great many mouths which, of course necessitated the treatment of all the teeth to prevent infection at this particular area where the teeth were extracted. We had to get the mouth in a general sanitary condition.

*Doctor Dean Abell, direct.*

Q Had the gums receded? A Why, not very much; slightly.

Q Indicating some presence of Rigg's disease? A Yes.

Q And the tendency of Rigg's disease is to loosen the teeth, anyway, is it not? A It will eventually loosen them unless the condition is cured up, yes. 10

Q And when one once gets the Rigg's disease, it is very difficult to cure it, is it not? A Well, repeated treatments will stop the trouble.

*Mr. Rathbun.* That is all.

*Re-direct examination by Mr. Romine.*

Q Did you find any evidence of a blow or bruise to the side of the face where the teeth were loosened? A Nothing, only extreme redness on that side of the face. 20

Q Could those teeth have been loosened from a blow? A They could have been.

Q And, in all probability, is it your opinion that that was what caused the loosening of those teeth? A Yes.

*Mr. Romine.* That is all. I want to read, with Mr. Rathbun's permission, the testimony of Doctor Dean Abell taken before in this case. Doctor Abell cannot be present. The testimony is as follows. Doctor Abell has charge of the X-ray for the Memorial Hospital. (Reading.) 30

*"Direct examination by Mr. Romine.*

"Q Doctor, you have charge of the X-rays at the Memorial Hospital, do you?

A Yes, I have.

*Doctor Dean Abell, direct.*

“Q And you are also a practicing physician in the Town of Morristown?

A Yes.

“Q And did you take an X-ray of Mr. Leo Kappertz? A Yes, I did.

10 “Q And when was that taken? A June 20th, 1921.

“Q And you have the X-ray plates with you here? A I have.

20 “And what do those X-rays show? A Why, they showed a very fine linear fracture in the—what we call the squamous portion of the temporal bone, which extended down into the petrous portion on the right side; and in the mastoid region, it showed all the mastoid cells were cloudy, apparently filled with blood clot, hemorrhage.

“Q Now, can you just describe from your own side of your head just where that is so that the jury may get a little better idea of it? A Well, he had a very fine crack in his skull, it ran up above the ear, and it ran down into the auditory portion of the ear.

30 “Q And that is near the auditory nerve, is it? A Yes. Judging from the fact that the mastoid cells were cloudy, the fracture evidently extended into the mastoid portion of the bone.

“*Mr. Romine.* That is all.

“*Mr. Rathbun.* No questions.”

*The Court.* I think at this juncture we will take a recess until ten minutes to two. Do not discuss this case while you are out,

*Wheeler G. Shawger, direct—cross.*

gentlemen, or allow anybody to approach you for the purpose of discussing it.

(Recess.)

AFTER RECESS, 1:50 o'clock P. M.

10

*Mr. Romine.* Is John Walsh here? (No response.) Wheeler Shawger?

WHEELER G. SHAWGER, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Mr. Shawger, were you employed in The Jerseyman office in June, 1921? A Yes, I was.

20

Q In what capacity? A Bookkeeper.

Q Did you have charge of the payroll? A I did.

Q Was Mr. Kappertz, the plaintiff in this case, on the payroll? A No.

Q Do you know whether he rendered separate bills for his work? A Yes, he did, once a month.

*Mr. Romine.* That is all.

30

*Cross examination by Mr. Rathbun.*

Q You are not in the employ there now, are you? A No.

*Mr. Rathbun.* That is all.

*Mr. Romine.* That is all. Mrs. Kappertz.

40

*Clara Kappertz, direct.*

CLARA KAPPERTZ, recalled as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Mrs. Kappertz, you recall the time when your husband was injured at The Jerseyman  
10 plant? A Yes, sir.

Q What time of day did he come home? A I believe it was ten minutes of seven, or ten minutes after seven; I do not know which.

Q And who brought Mr. Kappertz home? A Dr. Rice and another man from The Jerseyman.

Q What was Mr. Kappertz's condition? A Well, he did not know me; he was unconscious.

Q Did you observe anything about his face  
20 or body indicating bruises or wounds? A Well, his face was bloody and a streak of blood right here (indicating).

Q What was done for him? A Dr. Rice gave him an injection of some kind, I do not know what it was, and then he was made comfortable.

Q How many times did the doctor call that  
30 night? A I believe it was two or three times, three times.

Q And do you remember the time when your husband went to have the X-ray? A Yes, I do.

Q Had Dr. Sutphen come to the house to make an examination before that time? A No, he didn't.

Q Did you assist your husband in any way? A What do you mean?

Q That is, in going to the hospital for the  
40 X-ray? A I helped him in the car.

*Clara Kappertz, direct.*

Q And when he returned from that trip to the hospital, what was done with your husband?

A Well, he was very miserable; he was put back to bed and we were notified to keep him in bed for six weeks at Dr. Sutphen's orders.

Q Did he have any assistance in the home? A Yes, he did. 10

Q Who? A We had a nurse; a practical nurse.

Q Where did she come from? A Aiken, South Carolina.

Q And how long did she remain? A Ten weeks.

Q Just tell us what work the nurse did. A Well, she took charge of him, that is, give him his medicine, keeping the ice on his head, almost full charge of him. 20

Q Do you know how much was paid? A \$25.00 a week.

Q That is a total of \$250? A And her carfare there and back.

Q What has been Mr. Kappertz's condition since the accident? A He is very nervous, and he has these dizzy spells and headaches. Then, he has no ambition either to work, he isn't able to. 30

Q In weight and looks, how does he compare now with before the accident? A He has aged a great deal.

Q Is he as robust as he was? A No. He doesn't eat. He has no appetite.

Q What do you give him? A Mostly liquids; eggs and milk, soups, broth.

Q What was his condition of health before the accident? A He was never sick a day. He didn't know what it was to have a doctor. 40

*Clara Kappertz, cross.*

Q Do you notice any deafness? A He is entirely deaf on the right side.

Q And did that exist before the accident?

A No, sir.

Q Has he been able to do any work since the accident? A No, he hasn't. Very little.

10

*Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

Q He has been able to superintend and look after the building of a house, hasn't he? A Partly, at times.

Q Well, all that is necessary, I presume? A No; at times; partly.

Q And what other person looked after it?

A It lay idle.

20

Q It lay idle? A Yes.

Q That was because of lack of money, wasn't it? A No. Because he wasn't able to attend to it.

Q Well, was he working himself on the building? A No. He hired men.

Q And how near is that building that is being erected to your house? A Right adjoining; partly adjoining; about four feet.

30

Q And he has superintended it as much as it has been superintended by anybody, hasn't he? A As much as he could, yes.

Q And any other superintendent on the building? A No. That is, a—except there is a contractor on the place, and he has nothing to do with it. Some work was given out on contract. He has nothing to do with that. He hires the laborers.

Q Was there any architect on the building?

A Sometimes.

40

*Clara Kappertz, cross.*

Q Who was the architect? A I think it was Mr. Pierson. I believe it was Arthur Pierson. It was either him or the Interstate; I do not know just which.

Q What else had he been doing— A Nothing.

Q —since the accident? A Nothing. 10 01

Q Now, you speak of this nurse; when did she come there to your place? A I believe it was the first week in July.

Q You are not certain about it? A No. I am not certain about it. It wasn't any later than that, though.

Q How old is your baby? A How old? She is now a year and a half.

Q A year and a half old? A Yes. 20 02

Q Well, then, at the time of this accident, your baby was very young, wasn't it? A She was, yes.

Q You weren't very well yourself at the time? A Yes, I was well; but I wasn't able to take care of both.

Q And she helped look after you, didn't she? A No, not after me; I didn't need any help. 30 03

Q Or the baby, either one? A No. I took care of my baby myself.

Q Well, she was a great friend of yours, wasn't she? A My mother's.

Q Well, a friend of yours, too? A It may be; but my mother is dead since I am four years old, so I do not know.

Q How did it happen you sent way down to North Carolina to get a nurse? A I couldn't get anybody here. 40 04

*Joseph Schmaltz, direct.*

Q Couldn't the doctor find you one? A Yes, he could find a trained nurse, but I couldn't afford to pay for a trained nurse.

Q You couldn't find a practical nurse around Morristown? A No, I could not.

10 Q Do you know whether any effort was made to find a practical nurse? A Yes, I made it myself.

Q Well, did you get one? A No, I did not.

Q Didn't you have anyone there at all? A No, not at first; except the neighbors came in and helped.

Q The neighbors came in and helped you? A Yes.

Q Did you see her paid? A Yes, I did.

20 Q Did you pay it yourself? A We paid it together.

Q You paid it together? What do you mean by that? A Well, Mr. Kappertz paid her, and I was there.

Q And how did you figure up the railroad fare? A \$45.00 each way.

Q She just told you that, and you paid it to her? A \$90.00; yes.

30 Q You did not try to verify that, whether it was right or wrong? A No. I took her word for it.

*Mr. Rathbun.* That is all.

*Mr. Romine.* That is all. Is Mr. Walsh here? (No response.) Mr. Schmaltz?

JOSEPH SCHMALTZ, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination* by Mr. Romine.

40 Q Where do you reside, Mr. Schmaltz? A In Madison.

*Joseph Schmaltz, direct.*

Q What is your business? A I am a chauffeur.

Q And do you know Mr. Kappertz? A I know Mr. Kappertz; yes, sir.

Q How long have you known him? A Well, about 15 years.

Q Do you recall the time of this accident? A 10  
I did hear about the accident, yes, the following day.

Q And had you frequently been to Mr. Kappertz' place before the accident? A Oh, yes.

Q You knew the kind of work that he was engaged in? A I do.

Q And, after the accident, did you have occasion to go there? A I did.

Q And have you seen Mr. Kappertz frequently since the accident? A I did. About 20  
once a week, or twice a week.

Q What have you to say about his appearance now as compared with what it was before the accident? A Well, Mr. Kappertz was, before the accident, a very active man. He looked quite active, all around, in his manners. I did know him when he worked for me, and then I know him in chauffeur matters. I used to go over there and look over his work, working on patents; he has got several patents out, worked 30  
on patents. I am very interested in patents, and he was active, an active man.

Q What have you to say about his appearance and face now as compared with what it was before the accident? A Well, he looks different altogether now.

Q Just describe that to the jury. A He used to be—his face used to be full, and his eyes clear. Now, he looks—he looks tired, like he is not the same man. 40

*John Walsh, direct.*

Q Is he as stout now as he was before the accident? A No, no.

Q What have you to say about his manner of speech, as to whether it is as quick as it was before or not? A His speech is much slower, distinctly slower. He used to be quick, right  
10 there; now, he is—

Q Have you noticed anything else about him since this accident that was not apparent before the accident? A Well, there was one occasion I was there, and he was working. He did some welding work.

*The Court.* I do not think you are entitled to cite any instances. Just tell us what is the difference in his appearance or in his personality or vigor now as compared  
20 with what it was before the injury.

*The Witness.* Well, he is—what I said before, he is not the same man. He looks tired, and he is absolutely a different man altogether.

*Mr. Romine.* That is all.

*Mr. Rathbun.* No questions.

JOHN WALSH, sworn as a witness on behalf  
30 of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Mr. Walsh, were you employed in The Jerseyman office in June, 1921? A Yes, sir.

Q What were your duties? A Why, handy man around the place.

Q Do you recall the date, June 16th? A Yes, sir.

Q When Mr. Kappertz was there and an ac-  
40 cident occurred? A Yes, sir.

*John Walsh, direct.*

Q Were you there at the time the roll of paper was taken from the cellar through the hatchway? A Yes, sir.

Q And just describe to us what was done with that roll of paper? A Well, we took the roll of paper upstairs and put it on the press, and when we put the paper on, I opened up the door. 10

Q Now, wait a minute. The door was open when you brought the roll of paper through? A Yes, sir.

Q Then what was done with the trap door? It was closed down again.

Q Closed down? A Yes, sir.

Q And the roll of paper was put in the machine? A Yes, sir.

Q Then what did Mr. Kappertz do? A He was down like this here (illustrating). 20

Q In a bending position? A Yes, sir.

Q Yes. A Tearing off this old paper.

Q All right. Now, while he was in that position, did you do anything with the trap door? A Yes, sir.

Q What did you do? A Raised the trap door up.

Q Did you make known to Mr. Kappertz in any way that you had opened that trap door? A No, sir. 30

Q So far as you know, did he have any knowledge that the trap door was open? A Not as I know of.

Q Did you see what happened to Mr. Kappertz after you opened the trap door? A Yes, sir.

Q What happened? A He fell down, and he was down—he laid down there on the floor, unconscious. 40

*John Walsh, cross.*

Q Well, while he was in this bending-over position attending to the roll of paper, did you see him change his position before going down the open hatchway? A No, sir.

Q Did he get up or step back? A No, sir.

10 Q Well, how did he get down the hole? That is what I want to know. A Well, he was—he had ahold of the paper like this here, taking it off the roll.

Q Yes. A And he pulled it back like that, and he went over like that (indicating).

Q He went over that way? A Yes, sir.

Q And then that trap door was open, then, and he went down? A Yes, sir.

*Mr. Romine.* That is all.

20 *Cross examination* by Mr. Rathbun.

Q I show you a paper. Is that your signature? A (Referring.) Yes, sir.

Q You made that affidavit before Robert E. Burke, a Master in Chancery of this State, on August 9, 1921, did you not? A Yes, sir.

*Mr. Rathbun.* I ask to have that marked for identification.

30 (Paper marked Exhibit D. 1 for identification.)

Q Who were in the room at the time he fell? A Why, McArthur, Pryor and that Solvia girl; three or four others more.

Q And what work were you doing? A Handy man, cleaning up around the press.

Q What was Pryor doing? A Well, Pryor was helping to get out the paper there.

Q And what was McArthur doing? A He was the foreman; he was busy.

40

*John Walsh, cross.*

Q Doing what? A He was busy over there at the other machines, in the type machines.

Q And what was Kappertz doing? A He was putting on this roll of paper.

Q Well, what had he been doing just before? A Helping repairing the machine.

Q He had been there all afternoon? A Yes, sir. 10

Q A great deal of waste paper had been cut off or torn off of the rolls of paper, had there not? A Yes, sir.

Q Had Kappertz complained to you or any of them about the amount of paper around the floor? A Somebody did. Somebody told me that we better get this paper up out of the way. They couldn't work around this machine.

Q Didn't Kappertz say to you that the paper on the floor was in his way, and you then said, "Well, I will get rid of it. I will have to open the trap door to get the paper out"? A No, sir. 20

Q Didn't you swear to that— A Yes, sir.

Q—in August, 1921? A Somebody said, I don't remember or recall, see? Somebody told me that there was a whole lot of paper around this machine, and to get it away from there.

Q Now, didn't you also swear that when you had opened the door, you said to Kappertz, "Look out now, the door is up"? A No, sir. 30

Q Do you mean to say you did not swear to that? A I did not; no, sir.

Q Well, didn't you read this paper before you signed it? A I did; yes, sir.

Q Well, now, if that is in that paper, then you would conclude your testimony now is wrong, wouldn't you? A No, sir.

Q What is that? A No, sir. That—I didn't say nothing to him about the paper. 40

*John Walsh, cross.*

Q Well, then, a statement to that effect in this affidavit, you say, now, is wrong? A Yes, sir; according to that.

Q You testified on the former trial of this case, didn't you? A Yes, sir.

10 Q Do you remember this testimony? "Mr. Kappertz complained about the amount of paper lying around the floor, did he not? Yes, sir. About it being in his way? Yes, sir. And you then said to him, 'Well, I will get rid of it'? Yes, sir." A Yes, sir.

20 Q (Reading.) "'I will have to open the trap door to get the paper out,' did you not? Yes, sir. And then you opened the trap door, and you kicked and pushed the paper into the basement? Yes, sir. Whether he heard that or not, I do not know. And you had a broom there? Yes, sir. I stood about, well, I should judge, about a foot and a half or two feet away from him. Now, didn't you, after opening the door, say to him, 'Kappertz, look out now, the door is up'? Well, I did not go over there to him. I just said, 'Look out now,' I says, 'the door is up.''" You testified that way before, didn't you? A Yes, sir; yes, sir.

30 Q Well, now, isn't that testimony that you gave on the former trial correct? A Whether he heard that or not, I do not know.

Q I haven't asked you that. I asked you whether you did not say that to him? A No, sir; I did not.

40 Q Well, now, one moment. Did you say that to him, or did you not say that to him? A Well, I was away from him there, when I said it; whether he heard that or not, I do not know.

*John Walsh, re-direct.*

Q But you did say it to him, didn't you?  
"Kappertz, look out, the door is up"? A No, I  
did not say it to him.

Q Well, didn't you testify that you did that  
on the former trial? On the former trial, didn't  
you testify, "Kappertz, look out now, the door is  
up"? A Well, I was working at the same time 10  
when I said that.

Q Now, my question is, didn't you say that  
to Kappertz, and didn't you testify that way  
last time? A Well, yes, I did, according to that,  
yes.

Q Now, isn't it a fact that you did say to  
Kappertz, "Kappertz, look out now, the door is  
up"? A Yes, sir.

Q Yes. And this refuse paper was all  
around, wasn't it? A Yes, sir. 20

Q Around where he was working? A Yes,  
sir.

Q And you were shoving it away from where  
he was? A Working it down that trap door.

Q Yes. And you were working on the sides  
and in the rear and all around him, weren't you?  
A All around the machine; yes, sir.

Q And getting that paper down? A Yes, sir.

Q You are not with The Jerseyman any more, 30  
are you? A No, sir.

*Mr. Rathbun.* That is all.

*Re-direct examination by Mr. Romine.*

Q Now, just a minute. When you opened  
the trap door, were there other machines going  
in the place? A Yes, sir.

Q There were noises around there, were  
there?

*John Walsh, re-cross.*

*Mr. Rathbun.* Please do not lead. He is your witness.

Q And what you did was to pass a remark about opening the door, is that right? A Yes, sir. I says, "Look out, the door is open." Whether—

10 Q Yes. And whether Kappertz heard that or not, you do not know, do you? A No, sir.

*The Court.* Why did you open the door?

*The Witness.* Right in back of this machine.

*The Court.* Why?

*The Witness.* Why? To push this paper that was breaking on the machine down in the cellar; that is the door they had for that.

20

Q Now, your attention has been directed to an affidavit which you made. Who caused you to make that affidavit? A I do not know.

Q Did you make the affidavit voluntarily, or did someone come to you? A Why, Mr. Burke came to me.

Q Mr. Burke, an attorney at law? A Yes, sir.

30 Q Representing The Jerseyman, is that right? A Yes, sir.

Q He prepared the affidavit, did he? A Yes, sir.

Q And asked you to sign it? A Yes, sir.

*Mr. Romine.* That is all.

*Re-cross examination by Mr. Rathbun.*

Q Now, one other question: What other press was running in that room? A Why, these  
40 little linotype machines.

*Lena Solvia, direct.*

Q Who was running them? A That I couldn't tell you.

Q Now, you have tried to tell us what persons were in that room. A Well, I do not know the names. They were all new men.

Q Wasn't there someone else in that room besides the ones you have testified? A They were all working there. This McArthur and this Pryor and Mr. Kappertz there, and this Solvia girl, is the only ones I knew were working in the— 10

Q Well, it is customary to sweep the refuse paper down this trap door, wasn't it? A Yes, sir.

Q That had been done often? A Yes, sir.

Q While Mr. Kappertz was around, too? A Yes, sir. 20

*Mr. Rathbun.* That is all.

*Mr. Romine.* That is all. *Mrs. Solvia.*

LENA SOLVIA, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Romine.*

Q Mrs. Solvia, were you working in The Jerseyman office on June 16th, 1921? A Yes, sir. 30

Q The day that Mr. Kappertz was hurt? A Yes, sir.

Q What time of the day did the accident happen? A I do not remember exactly, but it was about six or half-past six.

Q Just speak up a little louder so the jury can hear. Were you there when the roll of paper was hoisted up from the cellar? A Yes, sir. 40

*Lena Solvia, direct.*

Q And what was done with that roll of paper? A It was tipped up from the trap door and then the trap door was shut down, and it was put in the machine.

Q And did you see what Mr. Kappertz was doing after the trap door was closed and the roll  
10 of paper was put in the machine? A Yes, sir.

Q What was he doing? A He was putting the roll of paper, and then he knelt down and the trap door was open to throw the paper down.

Q Now, who opened the trap door? A Mr. Walsh.

Q That is the last witness? A Yes, sir.

Q That has just testified? A Yes, sir.

Q And how was Mr. Kappertz with reference  
20 to the trap door? A He was kneeling down.

Q Well, was he facing it, or did he have his back to it? A He had his back to it.

Q So the trap door was opened while he was kneeling down with his back to the opening, is that right? A Yes, sir.

Q Then what happened? A He knelt down, and then, when he pulled the paper this way, he lost his balance and down he went.

Q Yes. Now, did you hear anybody tell Mr.  
30 Kappertz that the door was open?

*Mr. Rathbun.* One moment. I suppose he is not entering into rebuttal. He is not going to impeach his own witness.

*Mr. Romine.* I do not think I will impeach it that way.

*The Court.* I suppose you want to elicit a failure to warn, is that it?

*Mr. Romine.* That is it.

*Lena Solvia, cross.*

*Mr. Rathbun.* The fact is he has brought a witness here who testified he did warn. Now, the question is whether Mr. Kappertz heard it.

*The Court.* That witness, in one stage of his testimony, said he did not warn; in another state, he said he did. 10

*Mr. Rathbun.* He cannot impeach his own witness by somebody else.

*The Court.* You ought to corroborate him. The objection is overruled.

*Mr. Rathbun.* Note an exception.

*Mr. Romine.* Will you read the question?

Q (Question read by the stenographer.) A No.

Q Did you hear anybody announce that the door had been opened? A No, I did not hear anything. 20

Q Where were you? A The side where the paper comes out.

Q Right by the trap door? A Right next to the trap door.

*Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

Q Which side of the press were you on? A On the side where the paper comes out. 30

Q Yes. And that is on the right side of the press when you are facing the press? That is, here, I am facing the press; this is the same position that Kappertz was in, and you were here on the right side, weren't you? A On the other side.

Q Well, you were between the wall and the press? A (No response.) 40

*Lena Solvia, re-direct.*

Q Which side— A Where the paper comes out.

Q Well, does that come out— A When you first come in.

Q Let me turn another way. Now, I am standing in the position that Kappertz was in, and here is the machine, the press (illustrating).  
10 Which side were you on, that side or that side (indicating)? A The other side.

Q On the left-hand side? A (Witness nods head in the affirmative.)

Q You mean, on the left-hand side? A You know, when you come in the door, the other side of the press.

Q Then, you were over on this right-hand side? A Yes, it must be.

20 Q Yes. In other words, the press—I don't want to tangle you up. Well, you saw Walsh sweeping the paper down? A Yes.

Q And you saw him open the door? A Yes.

Q And this paper, that was a regular way of disposing of it, wasn't it, by being swept down this hatchway? A Swept down.

Q And had Mr. Kappertz been there at other times when the paper was swept down this open hatchway? A Yes, sir.  
30

Q Had you heard Mr. Kappertz complain about the amount of waste paper around the floor? A No.

Q You did not hear even that? A No.

Q You do not work for the Jerseyman either, now, do you? A No.

*Mr. Rathbun.* That is all.

*Re-direct examination by Mr. Romine.*

40 Q Were you present at times when paper was being swept up around the machine when the trap

*Lena Solvia, re-direct.*

door was not open? A What did you say then?

Q I say, were you present in the plant when paper was being swept up around the machine and the trap door was not open? A The trap door had been opened to sweep it down.

Q I know, to sweep it down. But were there times when they were sweeping up that paper around there when the trap door was not open? A The only time I was there, when the paper come out. 10

Q Well, what I want to know is, were there times when you were there when somebody was sweeping up around the place when they didn't have the trap door open, when they were sweeping up? A They always had the trap door open to sweep it down; that is all I know.

Q Well, when they got the paper up to the trap door, the trap door would always be open, is that right? A The trap door was always open ahead of time, sometimes. 20

*The Court.* What was that?

*The Witness.* What?

*The Court.* It was always open ahead of time?

*The Witness.* When they started to sweep, they opened it. 30

Q Now, were there times when the trap door was not open when they started to sweep? A Yes; sometimes.

Q Yes.

*Mr. Romine.* That is all.

*Mr. Rathbun.* That is all.

*Leslie McArthur, direct.*

LESLIE McARTHUR, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination* by Mr. Romine.

Q Were you employed in The Jerseyman office in June, 1921? A Yes, sir.

10 Q In what capacity? A Foreman.

Q And during the month of May and June of that year, were there frequent breakdowns in the machinery? A Yes, sir.

Q And was that due to the fact that there were no experienced help employed?

*Mr. Rathbun.* That is objectionable.

A Yes, sir.

*Mr. Rathbun.* And immaterial.

20 *The Court.* What is that? Read it.

(Question and answer read by the stenographer.)

*The Court.* It calls for a conclusion. I sustain the objection.

*Mr. Romine.* Well, but he was there employed.

*The Court.* I sustain the objection.

*Mr. Romine.* I take an exception.

30 Q Had there been any change in the conditions at The Jerseyman plant during those two months which caused these breakdowns?

*Mr. Rathbun.* That is immaterial. I object to it.

*The Court.* What is the purpose, Mr. Romine?

*Mr. Romine.* Why, Mr. Kappertz testifies that when the machinery is once repaired

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*Leslie McArthur, direct.*

and properly adjusted, it will run ten years without readjustment, when it is properly operated. Now, I want to show, as counsel will undoubtedly argue to the jury, why this man was there so frequently. He has intimated in his examinations that they had to have a man there frequently to make these adjustments. Now, I want to show that a condition prevailed there which caused, during those two months, these frequent breakdowns, that it was an unusual condition and did not apply before and has not applied since and, therefore, it was necessary to call in an outside man to make these repairs. 10

*The Court.* The question involved in the issue is only the fact of whether or not he was there, not why he was there, but was he there in fact? I will adhere to the former ruling and exclude this testimony. 20

Q Did you receive any instructions from Mr. Morton what to do in cases of breakdown? A Yes, sir.

Q And what were you to do?

*Mr. Rathbun.* I object as immaterial.

*The Court.* It may have some bearing on the independence of the employment. The objection is overruled. 30

A I was instructed to call Mr. Kappertz, the machinist.

Q On the 16th day of June, do you recall whether you notified him to come there, that is, the day of the accident? A I do not think I did that day, because Mr. Morton was away that day, and he told me he had made arrangements himself. 40

*Leslie McArthur, cross.*

Q Oh, I see. And there were occasions when you notified Mr. Kappertz to come down when there were breakdowns? A Yes, sir.

*Mr. Romine.* That is all.

*Cross examination by Mr. Rathbun.*

10 Q What was your position in The Jerseyman at that time? A Position?

Q Yes. A Foreman.

Q And what position was Mr. Kappertz filling? A He was machinist.

Q Well, whose place was he taking in the running of the press? A Why, the man by the name of Snyder was the pressman.

Q I mean the name of the position, not the name of the person. A Well, I do not know.

20 Q Well, had you a pressman at that time? A Well, we had one previous to that.

Q Well, I mean, at that time? A No; not at that time.

Q And had you had a pressman at any time during June other than Kappertz? A Yes. We had another man there. I believe his name was Snyder.

Q Well, when had he left? A I think it was the Saturday before, the week before.

30 Q And Mr. Kappertz had been acting as pressman after this Snyder left?

*Mr. Romine.* I object to that. I did not go into anything of that sort. It is not cross examination. If you want to make him your own witness—

*The Court.* You have brought out that Mr. Morton informed this witness the day that he had arranged with the plaintiff

*Leslie McArthur, re-direct.*

to be there on that occasion. I think it is proper cross examination. The objection is overruled.

*Mr. Rathbun.* Read the question.

(Question read by the stenographer.)

A Yes, he was getting the paper off, seeing that the paper got off. 10

Q Well, was he acting as pressman? A He was doing the pressman's work.

Q Yes. And he had been coming there continuously from about the first of June, had he not? A Well, I do not know whether he was called without being—come without—

Q No. I didn't ask you that. Did he come there? A Yes, he was there at different times.

Q Continuously, practically, from the first of June? A Yes, sir. 20

Q Before that, he had been there at more or less frequent intervals? A Yes, sir.

Q Who made up the forms for the press? A I think a man by the name of Jerry France.

Q Was he there at the time of the accident? A No, sir; he was not.

Q They were made up on the linotype in part, and by hand? A Yes.

Q And after they were made up, to whom would they be delivered? A Why, the pressman; generally, Mr. Walsh would put them in the press. 30

*Mr. Rathbun.* That is all.

*Re-direct examination by Mr. Romine.*

Q Now, Mr. Kappertz came there when there were breakdowns, isn't that right? A Yes, sir.

*Interrogatories.*

Q He made repairs to the machines, and adjustments, is that right? A Yes, sir.

Q And this press operated itself, did it not? A Yes, sir.

Q All you needed was a man to start it and stop it? A Yes, sir.

10 Q And that was usually done by whom? A Mr. Walsh.

Q Yes. And on this particular day, what was the trouble with the press? A Why, it kept continually having breaks.

Q Breaks where, in the paper? A In the paper.

Q Did Mr. Kappertz make adjustments to the press that day? A Yes, sir.

20 Q And was endeavoring to get the press in proper running order? A Yes, sir.

*Mr. Romine.* That is all.

*Mr. Rathbun.* That is all.

*Mr. Romine.* I want to read, if your Honor pleases, two or three interrogatories and the answers thereto. First: Was Thomas B. Morton in your employ on June 16th, 1921, and, if so, in what capacity? He was, as general manager.

30 The second interrogatory: State fully the duties of Thomas B. Morton and the extent of his authority and control over employees. He was in charge of the business and the mechanical departments of the defendant; he had authority over all employees in said departments, including the hiring and discharging of the same.

40 Four: State whether Thomas B. Morton had the authority to employ and discharge employees and, if so, were the persons so employed subject to his orders and directions in their work. Yes,

*Motion for a Non-suit.*

in the business and mechanical departments only except where his orders might conflict with the editor of *The Jerseyman* in regard to the handling of copy and assembling of type for making up of the newspapers.

That is our case.

*Mr. Rathbun.* May it please the Court, I move for a non-suit on several grounds:

First, that there is no testimony as to the contract made between Kappertz and *The Jerseyman* showing any different arrangement than would have been between *The Jerseyman* and any other employee, and the evidence indicates—the evidence of Kappertz himself, and that is corroborated by McArthur and the other witnesses for the plaintiff—that he had been working there off and on during the month of May, up during the month of June. He had been there practically most of the time from the first down to the time of the accident. According to McArthur, the last witness, he was taking the place of the pressman and, according to the evidence of others, he was doing his part with Pryor and McArthur and Mrs. Solvia to get that paper out. There is nothing in the evidence to distinguish him from any other of the employees in that office. One was foreman and the others were general operators or workers on that press. So that, as the case stands, there is nothing to distinguish him from a fellow-employee, Pryor, McArthur and the others. That being so, his relief is not in this court but is under the law known as the Workman's Compensation Act, and there he must go for whatever redress he may be entitled to.

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*Motion for a Non-suit.*

The next ground is, that if it could be reasoned out that he was an independent contractor, yet there is nothing to show negligence which can be charged against the owner of this plant, The Jerseyman. That the hatchway was there for the purpose of lifting the roll of paper up and to dispose of the papers that gathered on the floor, the refuse paper, and that the plaintiff knew of that; that he had complained just before this door was opened about the quantity of the paper that was lying around on the floor, and he must have known, even though he might not have heard Walsh's statements to him, that the way that paper was to be disposed of was through that hatchway, and it was practically a suggestion or almost an order on his part to open that doorway or hatchway and throw that paper down and get it out of his way. Of course, he did not expect that that roll of paper was going to give way so easily and he be precipitated, and he was taking a chance of that working out all right. But we were not responsible for that; in other words, the operation of that hatchway was along the lines he knew about. There was nothing negligent about it. One of their own witnesses admits that he did tell Kappertz that the door was open and to look out, and the mere fact that Mrs. Solvia did not hear it does not weaken that testimony in the least, because she did not even hear Kappertz complain about the paper on the floor, and yet Kappertz admits in his testimony that he had complained about the quantity of refuse paper around the floor. Walsh swept the paper from all sides of Kappertz, both in the rear and on the sides, and Kappertz, knowing the situation there, must have known that that paper was be-

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*Motion for a Non-suit.*

ing swept back into this open hatchway, and, therefore, we are not guilty of negligence, but if there was any negligence at all, it was negligence on the part of Kappertz to have assumed that position while that paper was being swept up.

*The Court.* I will hear you, Mr. Romine. 10

*Mr. Romine.* It seems to me, if the Court pleases, that the entire matter is a question for the jury. The first ground that Mr. Rathbun urges is that there is no special contract existing between The Jerseyman—

*The Court.* Never mind about that. All the testimony up to the present time indicates that this was an independent contractor. In any event, I will have to leave it to the jury. Let me hear you on the question of liability. 20

*Mr. Romine.* Now, as to the question of liability: It seems to me that that is also a question for the jury from the facts in the case. It is true that Mr. Kappertz knew that the trap door was there; but the proof is, so far as he is concerned and so far as the plaintiff's case is concerned, that when this roll of paper came up through the hatchway, the door was closed. So that Mr. Kappertz, in assuming the position he did in endeavoring to put the roll of paper in the machine, had a right to assume that that trap door remained closed as he had left it. 30

*The Court.* Why? If its customary use was to permit paper to be swept down and he was an independent contractor there and not a part of the establishment, what right did he have to assume anything?

*Motion for a Non-suit.*

*Mr. Romine.* It was the duty, if your Honor pleases, of the defendant company to use ordinary care in providing a safe place where this man might be.

10 *The Court.* How about a trap door that has two uses, one to open and one to shut, and it cannot be shut until it is first opened? What right did he have to assume that that door was going to be kept shut on his account after apprised of the fact that its normal use required it to be opened periodically?

20 One other point is, you see, he was an independent contractor having the right to select his own methods of operation. The method that he selected in this case was to take a sheet of paper nine feet long and with that sheet of paper step backwards; that is, taking the testimony in its aspect most favorable to him. Under what obligation was the defendant to assume that he was going to select that method of operation and that he was going to leave a place of safety beside this press and step backward to a place of danger?

(Argument.)

30 *The Court.* Here we are dealing with an opening in the floor that is opened and closed as the exigencies of a commercial enterprise require it to be opened and closed. Then, when it is opened, it does not hurt anybody that keeps away from it. If this plaintiff backed into it, he did not use his ordinary powers of vigilance and absolutely abandoned all thought of his own welfare.

40 *Mr. Romine.* Will your Honor permit me to open the case and show that they failed to put guards around the opening?

*Judgment of Non-suit.*

*The Court.* Don't you admit that?

*Mr. Rathbun.* Well, we had a chain there that was used.

*Mr. Romine.* Well, it wasn't used on this occasion.

*The Court.* Do you conceive that that would make any difference in the legal aspect of the case? 10

*Mr. Romine.* Yes; because, under the law, they were bound to have the guard there for their own employees.

*The Court.* Does that in any way ensnare this plaintiff?

*Mr. Romine.* That is an evidence of negligence if they did not comply with the law in properly guarding the opening. 20

*The Court.* It would be negligence as regards a person who did not know there was an opening there. The point in this case is the prescience that this plaintiff had of the door being there and the likelihood of the door being up. It is my duty to non-suit when the application is made. I think it is a case of a nature where sympathy should not control. In this case, you have not shown that they were under any duty to warn this man. There will be a judgment of non-suit. 30

*Mr. Romine.* I take an exception.

*The Court.* Gentlemen of the jury, you are dismissed from service on this case.

*Postea.*

**POSTEA.**

Filed November 21, 1922.

This case was tried before Richard Doherty, Circuit Court Judge, with a jury at the Morris Circuit on November 13th, 1922.

10 At the conclusion of the plaintiff's case the defendant moved for a non-suit, which was granted by the Court.

RICHARD DOHERTY,  
*Judge, &c.*

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*Exhibit P. 1.*

**EXHIBIT P. 1.**

(COPY)

Telephone 1480  
Shop or Residence.

Morristown, N. J., *June 1st, 1921.*

*The Jerseyman. City.*

10

To KAPPERTZ AUTO-REPAIR  
AND WELDING WORKS, Dr.  
Consulting Engineer and Manager  
Leo Kappertz

Oxygen Welding of any Description  
Radiator Work a Specialty  
Windshields Repaired  
93-95 Washington Street.

---



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Notice—All payments cash on presenting of bill.		20
6 per cent. interest will be added after 30 days.		
May 3 Welding new end & fitting screw		
in linetype .....	\$ 4.50	
11 Mechanic time on linetype.....	2.50	
12   “       “       “       “       .....	4.25	
two new gas blow torches @ 4.50	9.--	
“ rubber hoses .....	1.20	
19 to straighten and repair pieces		
of job press .....	2.50	30
27 repairing part of linetype .....	3.50	
28 mechanic's time on press.....	14.	
“       “       “       “       .....	6.	
repairing part of linetype.....	1.50	
31 mechanic's time on press .....	13.	
to construct new steel belt shifter		
incl. material .....	18.25	
welding done on press.....	15.	
	<hr/>	
	95.20	40

*Exhibit P. 2.***EXHIBIT P. 2.**

(COPY)

Telephone 1480

Shop or Residence.

Morristown, N. J., *June 25th, 1921.*10 *The Jerseyman. City.*

To KAPPERTZ AUTO-REPAIR

AND WELDING WORKS, Dr.

Consulting Engineer and Manager

Leo Kappertz

Oxygen Welding of any Description

Radiator Work a Specialty

Windshields Repaired

93-95 Washington Street.

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Notice—All payments cash on presenting of bill.  
6 per cent. interest will be added after 30 days.

June 3 straighten &amp; repairing vibrator.. 13.50

welding &amp; repairing vibrator

lock ..... 2.25

4 repairs to vibrator ..... 7.75

one vibrator snap lock ..... 2.50

one oil stone for linotype..... 1.50

30

“ hammer, 1.50 two files with  
handles 1.60 ..... 3.10

damage to large monkey wrench 3.50

8 one form puller ..... 3.—

13 resharpen metal knife of lino-  
type ..... 1.—14 eight case hardened steel set  
screws (special) ..... 6.—

one cam key ..... 3.

damage to tools as level..... 6.75

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*Exhibit P. 2.*

one shears 2.25	one wrench 1.50	
one srew driver 1.50.....		5.25
mechanics time on press, to do repairs and making adjustment, and attending to running of press, including work at night's, furnishing additonal help, etc...	245.00	10
incl. June 16th (in pencil).		
		<hr/>
		304.35

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*Notice and Grounds of Appeal.*

**NOTICE AND GROUNDS OF APPEAL.**

Filed November 21, 1922.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

LEO KAPPERTZ,

*Plaintiff,*

*vs.*

THE JERSEYMAN, a corporation,  
*Defendant.*

*Notice of  
Appeal to  
the Court  
of Errors  
and Appeals.*

To The Jerseyman, a corporation, or Charles  
A. Rathbun, its attorney:

20

TAKE NOTICE, that the plaintiff appeals from  
the judgment of non-suit entered in this cause  
on the following grounds:

1. The Trial Court committed error in grant-  
ing a non-suit.

2. There was no evidence of contributory neg-  
ligence on the part of the plaintiff but there was  
evidence of negligence on the part of the defend-  
ant, its servants and agents, causing the injury to  
plaintiff, therefore the Court was in error in  
directing a non-suit.

30

3. The evidence at the close of the plaintiff's  
case established that the injury of the plain-  
tiff was due to the fault and negligence of the  
defendants, its servants and agents, thus pre-  
senting a case for the jury.

4. The facts of the case and the weight of  
the evidence should have been submitted to the  
jury for their consideration.

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*Notice and Grounds of Appeal.*

5. The Trial Court in deciding the motion for non-suit determined questions of fact which was the province of the jury.

6. The plaintiff was lawfully on the premises of the defendant company and it was the duty of said company to not only provide a safe place for plaintiff while in and upon the premises, but also to abstain from any act which would make the use of said premises dangerous, and the said defendant through its servants and agents having failed to comply with this rule as a result thereof the plaintiff received injuries without any fault of negligence on his part, the Court committed error in non-suiting and should have allowed the case to have gone to the jury. 10

7. The evidence established that the plaintiff was an independent contractor and not a regular employee of the defendant company and that he was lawfully on the premises of the defendant company, and said defendant owed to the plaintiff the duty to use reasonable care in the use of said premises while the defendant was thereon and the Court erred in directing a non-suit. 20

8. There were questions of fact presented by the evidence from which the jury could have determined that the defendant, its servants and agents were responsible for the injuries received by the plaintiff; that the defendant, by its servants and agents, were negligent in creating a dangerous situation unknown to the plaintiff and therefore it was error for the Trial Court to hold that there was no liability and directing a verdict of non-suit. 30

*Notice and Grounds of Appeal.*

9. The ruling of the Trial Court in directing a verdict in favor of the defendant was contrary to the law and facts of the case and for that reason a new trial should be granted.

ELMER W. ROMINE,  
*Attorney for Leo Kappertz.*

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

LEO KAPPERTZ,

*Plaintiff-Appellant,*

*vs.*

THE JERSEYMAN, a corporation,

*Defendant-Respondent.*

*On Appeal from  
Morris Circuit  
of the Supreme  
Court.*

### BRIEF OF PLAINTIFF-APPELLANT.

#### Preliminary Statement.

The plaintiff instituted a suit against The Jerseyman for injuries received by him on June 16th, 1921, in the printing plant of The Jerseyman, while he was engaged in testing and repairing machinery (pp. 2-3-4).

The case was tried before Judge Cutler in the May Term of the Morris Circuit, 1922 (p. 88, l. 4), and at that time the jury disagreed, and the case was again retried before Judge Doherty and a jury at the October Term, 1922 (p. 9), with the result that Judge Doherty granted a motion for non-suit on the ground that the plaintiff was guilty of contributory negligence (p. 105), holding, however, that he was an independent contractor, and it is from this direction of non-suit that appeal has been taken (p. 110).

#### Statement of Facts.

The plaintiff, Leo Kappertz, was at the time of the injury, engaged in a separate and distinct business of welding and repairing machinery at No. 95 Washington street, Morristown, New Jersey (p. 10), having no connection in a business way with defendant company.

During the months of May and June, 1921, there were frequent breakdowns in the machinery in the printing plant of The Jerseyman (pp. 11-96, l. 8), and from time

to time the plaintiff would be called in to make repairs to the machinery by or upon the instructions of Mr. Morton, then manager for The Jerseyman (p. 9, l. 32; p. 10, l. 18).

The plaintiff was not a regular employee and did not work during any stated hours (p. 11, ll. 1-4). On some occasions he would take parts of the machinery out of the presses and return to his plant for the purpose of welding (p. 10, l. 34). On other occasions he would repair the machinery at the plant. He was not subject to the orders of anyone in doing this work (p. 11, ll. 18-20), and he rendered a separate bill from time to time for such work as he did (p. 12; p. 16, l. 14; Exhibits P. 1 and P. 2, pp. 107 and 108).

On the day of the accident Mr. Kappertz had been called to the plant by instructions of Mr. Morton some time during the afternoon (p. 17, l. 1). It appeared that there had been frequent breakdowns during the day and that the paper was not operating properly through the machinery (p. 18, ll. 26-28). On arriving at the plant, Mr. Kappertz made certain adjustments and found that the paper was of such quality that it would be best to have a new roll of paper inserted in the machinery (p. 17) and then he could better test out the various parts of the machinery and adjust them so as to enable the newspapers to be printed.

He described the working and operation of the press as follows (p. 17, l. 38):

“The press is a piece of machinery where, on the one end, a roll of paper about a thousand pounds is attached to it. This paper is running through the various courses, through the vibrators and rollers and inkers and all till it comes to the main vat in the center of the press, where the fill blankets cover it, run over it, and press it down to the type. Then, on the other end, it comes back and prints on the other side of the paper. There is a double system of printing press, and both sides of the press, it runs all the way through this machine, which is a machine about twenty feet in length and about ten feet in width. It comes back and is folded up; it

folds up in half, and then in quarters, and is cut off and comes finished out of the press. The roll of paper is on the rear part of the machine, low to the floor."

Immediately in back of the press was a trap door (pp. 18-34), which was used to permit rolls of paper to be hoisted from the cellar and occasionally was used for the purpose of expelling excess paper from the floor.

Plaintiff on the afternoon in question caused a heavy roll of paper to be hoisted through the hatchway in back of the machine (p. 17), and closed the trap door, permitting the roll of paper to rest on the top of the door (p. 19). This roll of paper was then forwarded to the machine, where it was set in position (p. 20). The plaintiff then stooped down to adjust the roll of paper and the first thing he did was to slip the paper with his knife (p. 20, l. 12). *He had his back to the trap door and was within a foot or two of the edge of the opening* (p. 20, l. 28), *which was then closed* (p. 21, l. 18). He was unwinding rolls of paper and in order that the paper might work evenly, he took hold of one portion and stepped back with the paper in his hand (p. 21, l. 10).

In the meantime, however, and without the knowledge of the plaintiff (p. 21), one of the employees of The Jerseyman had, pursuant to a suggestion from some one in charge of the plant, opened the trap door (pp. 85-92), and was proceeding to throw down the hatchway papers which had collected in and about the plant. As the plaintiff took a move backward, holding the paper from the roll to keep it even, preparatory to further testing, he unknowingly stepped into what had been created an open hatchway (pp. 21, 85, 92), which precipitated him to the basement below some ten or twelve feet, where he was found in an unconscious condition.

For the purposes of this appeal it is unnecessary to narrate the seriousness of the man's injuries or go into details as to his loss of time. Suffice to say, however, that he received a permanent injury to his head which has prevented him from following his usual occupation, sustain-

ing a monetary loss each year, and in the opinion of the physicians there is a probability of pressure on the cranial nerves as a result of a fracture which he received.

Upon this state of facts, the Court non-suited, holding that the plaintiff knew that the purposes of this trap door were to open and close (p. 104, l. 10), and he was supposed to know that the door might have been opened while he was in a stooping-over position, although the evidence discloses clearly that he had no knowledge whatsoever that the door was, in fact, opened.

The points under discussion on this are as follows:

(1) The plaintiff was an independent contractor and did not come under the Employers' Liability Law.

(2) The plaintiff was in no way guilty of contributory negligence.

(3) The Trial Court erred in directing a non-suit, as the questions involved were for the consideration of the jury and a new trial should be granted.

## ARGUMENT.

### I.

**The plaintiff was an independent contractor and did not come under the Employers' Liability Law.**

The law defining who are classed as independent contractors, as collected, is as follows:

From Bradbury's Workmen's Compensation, Vol. 1, at page 127, under the heading

#### *INDEPENDENT CONTRACTORS: Sub-contractors:*

"The judicial conception of an independent contractor is simply that of a person who, being *in the exercise of a distinct and recognized trade, craft, or business*, undertakes to do a certain work, without submitting himself to the control of the employer in respect to the details of that work."

(E. L.) *Linton v. Smith*, 8 Gray, (Mass.) 147.

“Where a person is employed to perform a certain kind of work which requires the exercise of skill and judgment as a mechanic, *the execution of which is, because of his superior skill, left to his discretion, without restriction upon the means to be employed in doing the work*, and employs his own labor, *which is subject alone to his own control and direction, the work being executed either according to his own ideas or in accordance with plans furnished him by the person for whom the work is done, such a person is not a servant under the control of a master but an independent contractor.*”

(E. L.) *Richmond v. Sitterding*, 101 Va. 354; 99 Am. St. Rep. 879; 43 S. E. Rep. 562; 65 L. R. A. 445.

In *Stickle v. Pierson*, 37 Law Journal, p. 15, J. Roseberry said:

In the case of *Catherine Hann v. Mary S. Petty*, I adopted the rule relating to independent contract from 26 Cyc. 970, as follows:

“One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is an independent contractor and not a servant.”

The Court of Errors and Appeals in *Reisman v. Public Service Corporation of New Jersey*, 81 Atl. 839, cites with approval the definition of an independent contractor from 26 Cyc. 1546, as follows:

“An independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods, without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of his work.”

(Affirmed 81 Atl. 840.)

From *Words and Phrases*, 2nd Edition, p. 1037:

“An independent contractor is one who renders a service in the course of an occupation representing the will of his employer only as to the result of

his work and not as to the means by which it is accomplished. A corporation, which constructed a hotel, hired and discharged its employees at will, pursued its own methods and was not subject to the control of the employers, except as to the result of the work, was clearly an independent contractor."

Citing *Scharff v. Southern Illinois Const. Co.*, 92 S. W., 126.

"One who, as an independent business, undertakes to do specific jobs of work without submitting himself to control as to the petty details, is an 'independent contractor.'"

In 26 Cyc., page 1546, it is stated:

"An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive are, *the independent nature of his business*, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, *the furnishing by him of the necessary materials and his right to control the work while it is in progress except as to results.*"

Page 1548:

"*If the employee is merely subject to the control or direction of the owner or his agent as to the result to be obtained, he is an independent contractor.*"

The following have been held to be independent contractors: Persons engaged in construction work in general; persons who undertook the construction of an entire building or specific portions thereof; *persons engaged to make repairs or improvements on a building*; architects who merely draw plans; persons operating mines; *plumbers; gas fitters.*

Page 1551:

“The mode of payment may be taken into consideration as to whether one is an independent contractor.”

Page 1552:

“*The fact that a person is a servant of his employer in respect to certain work does not preclude his being an independent contractor as regards other work.*”

From Words and Phrases, page 1036:

“Taking the expression ‘an independent contractor’ within the popular understanding which the words impart, it is wholly descriptive. But in the law of negligence the expression is used not merely in a descriptive sense, but as well to designate relationship. *It is for the Court, then as a matter of law, to define the relationship, and for the jury to make finding of the fact as to its existence.*” Citing *Overhouser v. American Const. Co.*, 105 N. W. 113.

In *Jerrigan v. Houston Ice & Brewing Co.*, 77 S. W. 260, jury question as to whether the person in charge of the work was an independent contractor.

In 26 Cyc., page 1576: *Where the facts are in dispute or more than one inference can be drawn, the question is for the jury.* As to the existence of the relation either as master and servant or contractor and contractee.

In *Oatmer v. Perry*, reported in 108 Atl., p. 369, it appeared that the injured party was employed for One Dollar an hour to repair well. A work which took him some hours and in which he was injured. Justice Minturn speaking of the Supreme Court, said:

“The work which the petitioner contracted to perform in this instance was of a distinct and specific character, in the execution of which he was unhampered and uncontrolled by the views and orders of an immediate superior; and when the work was executed the relationship of the parties arising out of the contract was at an end. In that fact inheres the distinction which differentiates the work or employment of the ordinary servant from

that of an independent contractor. The distinction in the relationship is thus defined:

‘The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.’ ”

26 Cyc. 966, and cases cited.

Substantially the same criterion was applied in *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917 A, 474, as follows:

“Where an agreement provides for a result to be accomplished, but leaves to the person employed the choice of means and methods by which it is to be accomplished, ‘the person so employed is a contractor,’ and the relation is ‘not that of master and servant,’ and the employer is not liable for the contractor’s negligence.”

Justice Depue in the case of *Cuff v. Newark, etc., Ry.*, 35 N. J. Law 23, said:

“The legal status existing between these parties under their contract was manifestly one in which the defendant contracted for a certain specific result, and left the *modus operandi* entirely to the petitioner. The defendant obviously was interested only in the specific result of reparation, and not in the means of its execution, and that feature of the contract was entirely left to the judgment and discretion of the petitioner.”

Section 3, Laws 1911, c. 95.

The Trial Court was impressed with the insistment and establishment of plaintiff’s claim as being an independent contractor, because at the conclusion of the case it said (p. 103, l. 16):

“All the testimony up to the present time indicates that this was an independent contractor. In any event, I will leave it to the jury.”

It is quite clear from the law of the case that Kappertz in the work which he did must be classed as an independent contractor.

Kappertz was engaged in an independent business (p. 9). He was called in occasionally to make repairs to machinery and press for The Jerseyman (p. 10), and during the months of May and June, 1921, there were more frequent breakdowns (p. 96), because of the character of help The Jerseyman were required to employ during this period.

Plaintiff was not on the payroll of The Jerseyman (p. 77). He rendered separate bills for his work (pp. 11, 107, 108). He charged his own price for the work he did; engaged his own employees, pursued his own methods in doing the work and was not subject to supervision by The Jerseyman or its servants as to the means by which the result was accomplished (p. 11).

On the day of the accident Kappertz was called to defendant's plant by orders, of the manager (p. 17) to repair the press. He says (p. 16):

“That day the press was way out of condition and it needed a whole lot of adjustments, which practically could not be done or accomplished in a day or during the day, *with the exception of when the press is running and types and forms is in place to have the papers in it, to actually print the paper* (p. 17); *the paper kept breaking, till I found that the paper was inferior. There was some trouble with the paper and I ordered u new roll of paper.*”

And on p. 34, l. 30, continuing, said:

“That belongs to repairing, I cannot repair unless I test the machine. I cannot test the machine unless I adjust it and attach a roll of paper to the machine according to the way I want it, not to the way the men have it and make a mistake and the machine is working right. So I put in a roll of paper, as is proper, *and don't take anybody's dictation. I do it as I see fit.*”

Again in answer to a question propounded by defendant's counsel to whether repairing was adjusting, Kappertz said:

“Oh, yes, in my estimation. In that line of business it is exactly the same thing as repairs. There

is a round shaft; one of the main shafts is a five inch or four inch diameter shaft. On to this is a —well it has a piece like a wheel on it, only it has no teeth and it has a snake wound drive through it, through which a roller goes, on which an arm goes; that has got to move exact in turn. Now, the arm of that shaft is apt to slip for a one-thousandth of an inch, it puts the whole machine out of time; you got to locate it and find it. There is set-screws, there is dozens of them on this press, and some of them slip for a fraction of an inch, it throws it out of turn that the paper will not cut or print or roll through without breaking. You got to locate these troubles, this break, a slip or a shift or something as out of time. That is repair. To locate that takes a man's time and patience, and he should be able to work on it any time as long as he needs till he completes the machine. This could not be done on that machine in one day, neither in three or four days at the same time. *There was no chance of doing it, with the exception of during the day times, when the press had to run to run the paper out. They could not keep a man on it no more because the machine was out of order; it didn't keep the paper without breaking.*"

Plaintiff was his own boss on this work (p. 11, l. 20). He was not a pressman, did not set the type and did not attend to the running of the press; they had pressmen for that (p. 100, l. 38). Kappertz was there solely to make adjustments and repairs to the machinery (p. 17, l. 34). He was much in the same position as a plumber or gas fitter called to repair a leak or break. In such a case we would not say that a plumber or gas fitter was an employee coming within the provisions of the Workmen's Compensation Law, but would class such a mechanic as an independent contractor.

So from the facts of this case, as established by plaintiff's evidence, considering the independent business in which Kappertz was engaged, his method and manner in handling the work as well the accompanying results coin-

cides with essential requirements of the law as held to constitute one an independent contractor. At least there was presented from the facts in the case a question for the jury as to whether what plaintiff did was equivalent to the legal acceptance of what is required to establish one as being an independent contractor.

## II.

**The plaintiff was in no way guilty of contributory negligence.**

*The plaintiff was in and upon the premises of the defendant company rightfully. He was not a trespasser, or a mere licensee, but there by express invitation of defendant company, its servants and agents and the defendant owed Kappertz the duty not only to use reasonable care to protect him from harm, but to abstain from any act which might make his use of said premises dangerous or hazardous.*

This principle of law was first approved by our Court of Appeals in the case of *Phillips v. The Library Co.*, reported in 55 Law, p. 307, wherein Justice Depue said in part:

“The owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, *or at least to abstain from any act that will make the entry upon or use of the premises dangerous.*”

The gist of the liability in such cases consists in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used.”

Also in the case of *Higgins v. Goerke-Kirch Co.*, 91 Law, p. 464, at page 468, the Supreme Court repeated the general rule in the following language:

“But the case at bar is distinctly accentuated by the fact that the plaintiff occupies the status of an invitee, to the premises of another, whereby the duty is cast upon the inviter to use reasonable care and foresight to protect one who occupies the status of a guest from harm, *or at least to refrain from careless or indifferent conduct in the management and control of its property*, upon exhibition, which may prove injurious to one casually examining it, whether the property be a work of art or a domestic utensil, and which examination presents the conspicuous reason for the presence of the guest upon the premises. A case not unlike it in principle is the recent case of *Reese v. Abeles*, 100 Kan. 518; L. R. A. (1917), E. 747; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Southcote v. Stanley*, 1 H. & N. 247, and *Indemaur v. Dames*, L. R., 1 C. P. 274, present instances of a concealed trap upon the premises, but the rationals of the rule of liability is not limited to specific instances of entrapment, *but pervades the general doctrine of tort-feasance, produced by the absence of care in its various manifestations.*”

One who enters premises to perform work in the absence of an express request to do said work, is upon the premises by an implied invitation and protected by the duty imposed on the owner of the land as pronounced in the above cases.

*Sommer v. Public Service Corp.*, 79 L., 349.

Referring to the case of *Cooper v. Reinhart*, reported in 91 Law, p. 402, which was a case where plaintiff had entered defendant's hotel and knew that the steps were covered with snow and ice and was injured when leaving some two or three hours later. The Supreme Court held not only that the hotel keeper was negligent in failing to remove the snow, but declared respecting the rights of the plaintiff:

“The fact that the plaintiff noticed, when he entered the hotel that there was snow upon the steps and platform *is not conclusive evidence that*

*he was not in the exercise of reasonable care in attempting to use them several hours afterwards.'*

Therefore it cannot be said, as a matter of law, that Kappertz is guilty of negligence in stepping backward on what he considered was a safe place, made so a moment or two before by him (p. 21, l. 40), but turned into a dangerous opening, unknown to him (p. 21, l. 39), by a servant of defendant (pp. 85, 92), and although he knew that the purposes of the door was to close and open, the fact that it was opened while he had his back turned, and without his knowledge, not only was a violation of defendant's duty as expressed in the Phillips-Library case, *supra*, wherein one of the legal requirements was *to abstain from any act that would make the use of the premises dangerous*, but in the light of the decision in the quoted Cooper case, Kappertz stepping backward as he did, *it was not conclusive evidence that he was not in the exercise of reasonable care*. It was certainly not a Court question, but one solely for the determination of the jury. In fact, the Court of Errors and Appeals has stated the law to be in *Baker v. Fogg & Hires Co.*, 112 A-406, that contributory negligence, under the practice act, is a defense and not a ground for taking the case away from the jury upon the plaintiff's proofs only.

In the case of *Selfer v. Vanderbeek & Sons*, reported in 88 L., p. 636, it appeared that deceased entered upon the defendant's property on business and therefore was there by express invitation, the Court of Appeals holding that defendant owed to him the duty as expressed in *Phillips v. Library Co.*, 55 L., 307, and *Nolan v. Bridgeton and Millville Tract. Co.*, 74 L., 559, that while deceased was working along a balcony, to where he had been directed, he leaned against a railing attached thereto which gave way, precipitating him to the floor below, and Justice Trenchard said, respecting liability:

"He followed the superintendent to the place where he was told to go. He was thereby exposed to an unusual danger *of which the defendant knew or ought to have known and was killed by reason*

of the railing of a balcony being so insecurely placed as to fall when he put his hand upon it."

Dealing with defendant's motion the Court held *that under such circumstances the application for non-suit and direction of a verdict was properly denied.*

Another important case which is quite analogous to the one at bar is that of *McCormick v. Amstaki*, 66 L., p. 211, there it appeared that plaintiff occupied rooms in an adjoining building to that occupied by defendant, and for a number of years used a hallway in the rear of defendant's premises as a means of access to his rooms. The floor of the hallway was constructed as a hatchway which could be opened and used for hoisting articles from the cellar, of which fact the plaintiff was well acquainted. He knew that it had two uses, one to constitute the floor of the hallway and the other to be raised and lowered. Nevertheless, plaintiff on going to his place of business on the day of the injury, opened the outside hall door which was closed, but not locked, and was precipitated down the hatchway, which was open, and being used by defendant's clerk.

*The Appellate Court said that the evidence justified an invitation to use the hallway and held as error the direction of verdict in favor of defendant on the ground of contributory negligence.*

See *Land v. Fitzgerald*, 68 L., p. 28;

*Sommer Adm. v. Public Service Corp.*, 79 L. 349.

Kappertz had a right to assume that having closed the trap door, he had created a safe place around him and that it would remain so.

The same principle of law is enunciated in the following cases:

*Suburban Electric Co. v. Nugent*, 58 L., 658;

*O'Connell v. U. S. Express Co.*, 86 L. 586;

*Guinn v. D. & A. Atlantic Telephone Co.*, 72 L. 216;

*Barnet v. Atlantic City Elec.*, 87 L., 29;

*Lightcap v. Lehigh Valley R. R. Co.*, 94 Atl. 35;  
*Piraccini v. D. L. & W. R. R. Co.*

At any rate, he was entitled to the assurance that the defendant, or its servants or agents, would not create a dangerous situation by opening the door without notice, and to so permit the door to be opened without warning plaintiff was the very thing which constituted a violation of defendant's duty and made it negligent and responsible for the resulting injury. The resulting injury should have been anticipated by defendant's servants.

The master is liable to third persons for the acts of his servant, although not actually present.

*Post v. Munn*, 4 L., p. 61;

*Letts v. Hoboken Railroad & Steamship Co.*, 70 L., 358;

*Price v. Simon*, 62 L., p. 153;

*Salisbury v. Erie R. R. Co.*, 66 L. 233.

Under no construction of the evidence could it be said that plaintiff was guilty of negligence. He had not left the hatchway open (p. 19, l. 10; p. 21, l. 18), and he did not step backward knowing that the trap door had been opened (p. 21, l. 30; p. 39, l. 32). Plaintiff, in conjunction with the work he has to perform, was required to step or move backward, as explained at the conclusion of Point I. He had to adjust the machine while the paper was running through. Paper on the roll in the press was breaking so he was installing a new roll in the machine, preliminary to passing that paper through the machine; first he had to get the roll straight, then unroll some nine feet, stepping backward so as to keep it even (p. 43), and it was while engaged in this branch of the work, after having adjusted the roll, that in stepping backward he plunged into the open space. *The dangerous condition was created by one of defendant's servants employed in the plant as a handy man* (pp. 84-85), and who at the moment was preparing to throw into the opening waste paper, but who admits he did not inform plaintiff of the danger which he had created (p. 85, l. 30; p. 90, l. 10).

As a matter of law, it was the duty of The Jerseyman to have guards around this hatchway when opened, for the protection of its employees so that such absence is a further evidence of negligence. It is self-evident if the guards had existed, plaintiff could not have sustained the fall.

See First Supplement Compiled Statute, p. 869, par. 100, Section 7.

In the posture of affairs when plaintiff closed his case, there was evidence establishing a violation of duty on the part of defendant as required by law; that the act of defendant's servants was imputable to it and by his act not only a dangerous situation created, but one that should have been anticipated by defendant's servants which would or might cause injury to plaintiff; and with the plaintiff's absolute denial that he had any notice or knowledge of this dangerous situation, created while he had his back turned, and this supported by his witness, Lena Salvia (p. 93), and Jack Welsh (p. 85, l. 30; p. 90, l. 10), it was a positive error to non-suit, as the question was one of fact for the jury.

### III.

**The Trial Court erred in directing a non-suit as the questions involved were for the consideration of the jury and a new trial should be granted.**

The Trial Court ruled that plaintiff knew the trap door had two uses, one to open and one to close, and knowing that this door might be opened at any time he should have made an observation to so ascertain before having stepped backward. This, under the circumstances of the case, was an erroneous assumption of law as has been fully established by reference to the decisions dealing with this question under Point II.

It might be an argument before the jury that plaintiff should have taken other precautions, but this is argumentative and not absolute, it is not conclusive as Jus-

tice Trenchard said in the case of *Cooper v. Reinhart, supra.*

In the case of *Nolan v. Bridgeton & Millville Traction Co.*, 74 L., p. 559, there the plaintiff had been using a road for a number of years and received an injury caused by a danger placed therein by the owner. The familiar rule was invoked as stated in Phillips-Library case, and although the plaintiff could or might have used another route in safety it was a question of fact both as to the invitation and use, and in this connection the Court of Appeals approved the statement made:

“Where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, *the question at issue should go to the jury.*”

Another case where the Court of Appeals of this State approved the action of the Trial Court in submitting the case to the jury was that of *MacDonnough v. F. W. Woolworth Co.*, 103 Atl., p. 74, where it appeared that plaintiff entered the defendant's store as a probable prospective customer, and having observed some books behind a counter in the rear of the store, which was dimly lighted, proceeded through the passage way to read the titles, and while there stepped inside and fell down an open way. From the reported case and circumstances, she was unfamiliar with this passageway, and it is also apparent she did not look where she was stepping at the instant before going into the open way, nevertheless, the Court said in affirming judgment for plaintiff:

“We think, with the learned trial judge that, although none of the facts going to make up these existing conditions was disputed, *nevertheless, the deduction to be drawn from them was a question of fact \* \* \** It was, therefore, for the jury to visualize the situation from the evidence and decide whether the plaintiff had reasonable ground from what she saw for believing that she was invited or expected to go where she did go for the purpose she had in mind.”

The case at bar is much stronger than that one just cited. Here there could be no question of whether plaintiff was upon the premises by invitation of defendant, but like the Seefer case, *supra*, Kappertz was there on business by express invitation of defendant by its manager.

On the point of negligence it seems abundantly clear and manifest what defendant's duty was toward plaintiff and if any question arises from any act of Kappertz as to whether defendant's duty was mitigated, absolved or relieved such must be a fact to be decided by the jury.

See

*Price v. Simon*, 62 L. 153;

*Dettmering v. English*, 64 L. 16;

*Owen v. Associated Realties Co.*, 81 L. 586.

In summing up the entire case, where can it be said Kappertz was himself negligent?

He was not working in a position of danger when he stooped over to install the paper preliminary to testing the machine, it was not a situation where there was in the construction of the premises an open stairway, but a hatchway, the door of which had just been closed by plaintiff. Kappertz had created a safe place. As was said in *Sommer v. Public Service; supra*:

"Working in close proximity to wires which are apparently safe and without knowledge of their dangerous character *cannot be said to be negligence as a matter of law.*"

So that Kappertz, when he stooped over, with his back to the hatchway, the door of which was then closed, felt safe. Using the above expression of law and applying the facts of this case, it would read as follows:

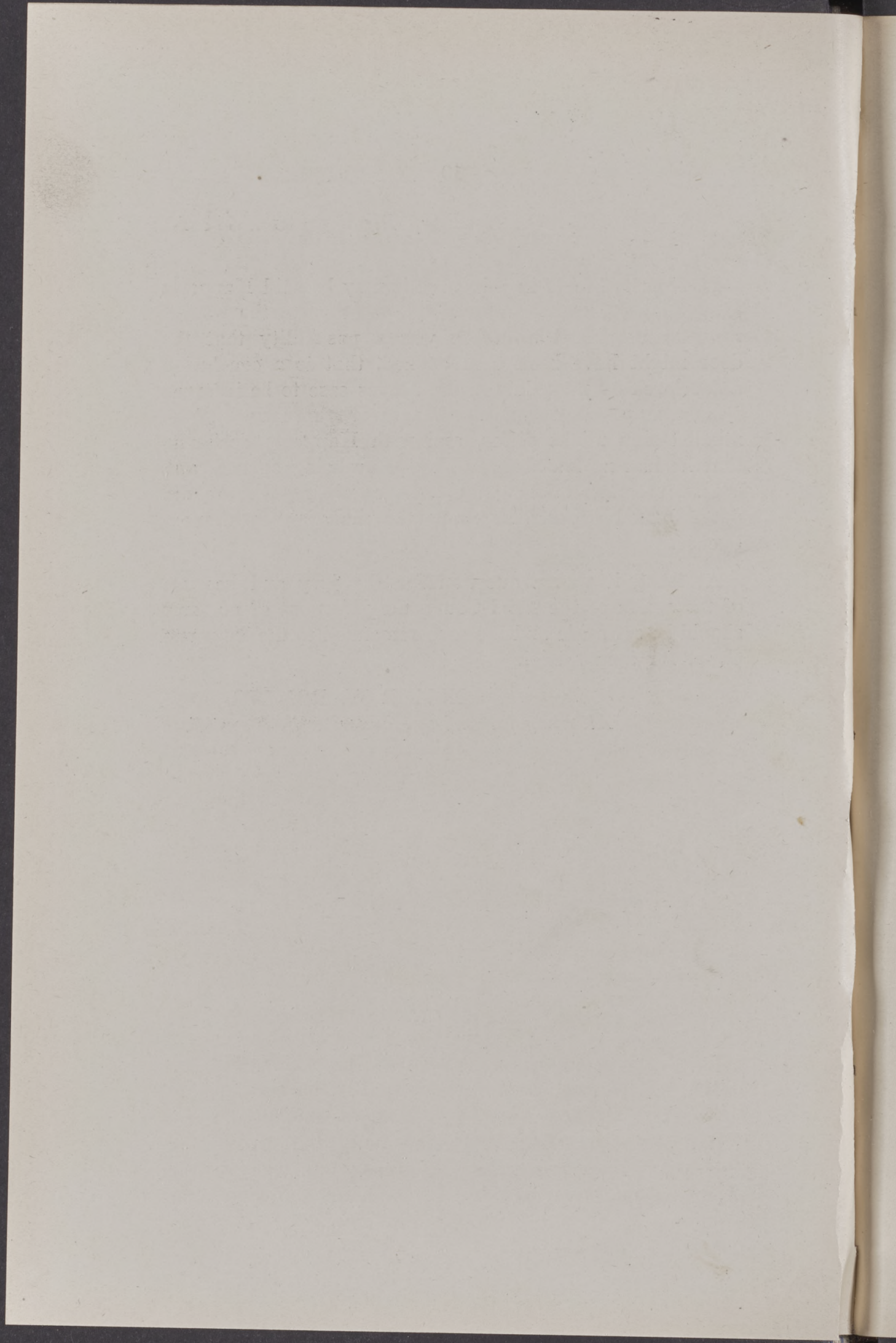
"Working in close proximity to a trap door, which had been closed and was apparently safe, but which trap door was thereafter opened thereby creating a dangerous situation, without plaintiff's knowledge, by his stepping backward and falling into the opening, *it cannot be said to be negligence, as a matter of law.*"

See *Mayes v. Splitdorf Electrical Co.*, 111 A.,  
p. 10.

If, from the facts in this case, it may be said Kappertz should have known or appreciated that when the papers were being picked up there was a possibility that the door might have been then opened, that is a conclusion as declared by the Court in the *Mayes* case to be inferred from the existing conditions and one on which fair-minded men might differ, and with Kappertz declaring that he had no knowledge of the door being opened, and Welsh, the man opening the door, admitting that he did not inform Kappertz, he cannot be chargeable with negligence.

At least, it was a question for the jury and because of the action of the Trial Court, the judgment of non-suit should be set aside and the case remanded to the Supreme Court for a new trial.

ELMER W. ROMINE,  
*Attorney for and of Counsel with Plaintiff.*



## New Jersey Court of Errors and Appeals

LEO KAPPERTZ

*Plaintiff - Appellant*

Vs.

THE JERSEYMAN, A Corporation

*Defendant - Respondent*

) On Appeal

) Brief of Defendant -

) Respondent

## Statement.

The plaintiff sought to recover for injuries received by him on June 16, 1921 in the printing establishment of the defendant. The defendant, by its answer, admitted the accident but denied the allegations as to the character of the employment. It further denied it was guilty of any negligence or had violated any duty that it owed to the plaintiff; and alleged that the accident was due to the contributory negligence of the plaintiff. As a further defense it set up that the plaintiff was an employee; that the accident arose out of and in the course of the employment and therefore the redress of the plaintiff was under the Workmen's Compensation act.

The plaintiff carried on the business of welding and repairing machinery but for several weeks he had been working in the Jerseyman plant aiding in getting out the daily issue of the paper known as The Jerseyman. It is not true, as stated in the preliminary statement of appellant's brief, that the accident happened while he was actually engaged in testing and repairing machinery. At that particular time he was trimming a new roll of paper and getting it ready to run through the large printing press, and at that time "he was doing the pressman's work" according to plaintiff's witness, McArthur, who was the foreman of the plant at the time, but no longer in the employ of the defendant (page 99, lines 10-14 and lines 30-35). He was taking the place of a man by the name of Snyder who had been the

pressman (page 98, lines 10-30). At the time there were aiding in getting out the paper McArthur, the foreman; Pryor and Walsh (page 38, lines 10-30; page 39, lines 1-30). There had been another roll of paper in the press which kept breaking, with the result that the floor got quite cluttered up and the plaintiff complained about it and ordered a new roll procured and put in the press (page 33, lines 30-40). The old roll was taken out and a new roll hoisted out of the cellar through the hatchway and put into the press. It is claimed that the trap door was lowered after hoisting the roll of paper up from the cellar. Walsh, the workman, aiding in getting out the paper, opened the trap door again for the purpose of getting rid of the waste paper lying all around the floor because Kappertz, the plaintiff had complained about it. He was a witness for the plaintiff and testified, at page 89, lines 10-30 as follows:—

“Q. Now, my question is, didn't you say that to Kappertz, and didn't you testify that way last time? A. Well, yes, I did, according to that, yes.

Q. Now, isn't it a fact that you did say to Kappertz, 'Kappertz, look out now, the door is up'? A. Yes, sir.

Q. Yes. And this refuse paper was all around, wasn't it? A. Yes, sir.

Q. Around where he was working? A. Yes, sir.

Q. And you were shoving it away from where he was? A. Working it down that trap door.

Q. Yes. And you were working on the sides and in the rear and all around him, weren't you? A. All around the machine; yes, sir.

Q. And getting that paper down? A. Yes, sir.

Q. You are not with The Jerseyman any more, are you? A. No, sir.”

and at page 88, lines 10-30 he testified as follows:—

“Q. Do you remember this testimony? 'Mr. Kappertz complained about the amount of paper lying around the floor, did he not? Yes, sir. About it being in his way? Yes, sir. And you then said to him, 'Well, I will get rid of it'? Yes, sir. A. Yes, Sir.

“Q. (Reading.) “I will have to open the trap door to

get the paper out," did you not? Yes, sir. And then you opened the trap door, and you kicked and pushed the paper into the basement? Yes, sir. Whether he heard that or not, I do not know. And you had a broom there? Yes, sir. I stood about, well, I should judge, about a foot and a half or two feet away from him. Now, didn't you, after opening the door, say to him, 'Kappertz, look out now, the door is up'? Well, I did not go over there to him. I just said, 'Look out now,' I says, 'the door is up.'" You testified that way before, didn't you? A. Yes, sir; Yes, sir.

And it appears by the testimony of Walsh that this was the customary way to dispose of waste paper. At page 91, lines 15-20 he testified:—

"Q. Well, it was customary to sweep the refuse paper down this trap door, wasn't it? Yes, sir.

Q. That had been done often? Yes, sir.

Q. While Mr. Kappertz was around, too? A. Yes, sir."

Lena Salvia, another witness for the plaintiff, at page 94, lines 23-30 testified as follows:—

"Q. And you saw him open the door? A. Yes.

Q. And this paper, that was a regular way of disposing of it, wasn't it, by being swept down this hatchway? A. Swept down.

Q. And had Mr. Kappertz been there at other times when the paper was swept down this open hatchway? A. Yes, sir." and at page 95, lines 18-27 she testified:—

"A. They always had the trap door open to sweep it down; that is all I know.

Q. Well, when they got the paper up to the trap door, the trap door would always be open, is that right? A. The trap door was always open ahead of time, sometimes."

The plaintiff made no claim that any of his work during the months of May and June at the Jerseyman was done with any employees of his own; and on the day in question he admits that "the men in that plant put 'em in the machine (referring to the rolls of paper) and I directed and told them," (page 32, lines 37 to 40) and Mr. Morton, the manager of The Jerseyman, "gave his instructions," (page 32, lines 18 to 20) and he

was working at the Jerseyman for ten or eleven days in June (page 31, lines 18 to 21) and he was there twelve or fifteen times during the month of May, 1921 (page 30, lines 19 to 20). The plaintiff failed to testify the terms under which he went to the plant of the defendant to work, although claiming that his work was making adjustments, but his various interpretations or definitions of adjustments comprehended nearly every line of activity in the manipulation of a large printing press and getting out a newspaper.

Upon the close of the plaintiff's case the Court granted a motion for non-suit. Two grounds for the non-suit had been argued by counsel for the defendant when the Court interrupted and, after discussion with counsel for the plaintiff, granted the non-suit. The stated grounds for the non-suit are found on pages 101 and 102.

The defendant insists that the judgement of non-suit should not to be disturbed and relies upon the following points in support of said judgement:—

1. The plaintiff was an employee and therefore any claim which he may have must be satisfied according to the provisions of the Workmen's Compensation Act.

2. The defendant violated no duty it owed to the plaintiff and was not guilty of negligence.

3. The plaintiff was guilty of contributory negligence.

4. Even though the questions of negligence on the part of the defendant or contributory negligence on the part of the plaintiff are questions for the jury, yet a judgement of non-suit should not be disturbed when from examination of the whole case no valid judgement could be properly rendered in favor of the plaintiff.

#### ARGUMENT.

*The plaintiff was an employee and therefore not entitled to maintain this action because his relief is in accordance with the provisions of the Workmen's Compensation Act.*

There are various citations in the brief of the appellant which define what constitutes an independent contractor but I respectfully submit they are not applicable. The underlying principles in all those cases holding one to be an independent

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contractor may be briefly stated as follows:—

- (a) Contract to do a special piece of work.
- (b) Furnishing one's own assistants who are subject alone to his control and directions.
- (c) That he has the right to execute the work according to his own ideas or in accordance with plans previously furnished him by the person for whom the work is done.
- (d) Freedom from orders in respect to the details of the work.

In addition to the authorities cited by appellant the following supports the view I have just expressed

“Where one contracts to do and deliver certain work the manner of doing which, including the employment, payment and control of the labor is left entirely to him, he is an independent contractor for whose acts the other contracting party is not liable. (E. L.) Robideaux, v. Herbert, 23 So. Rep. 887; 118 La. 1089; thus a person who agrees to whitewash a building for a certain specified sum is an independent contractor. (E. L.) Finkelstein v. Balkin, 103 Supp. 99.

One citation in the brief of appellant under this heading is very pertinent to my contention.

“The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished or, in other words, not only what shall be done, but how it shall be done. 26 Cyc, 966 and cases cited.”

What is the situation in this case? The plaintiff did not testify as to what the contract arrangement was he made with Mr. Morton, the manager of the respondent. It is true that he told of various things that he did, being all covered by the general term of “adjustments,” but much of it, according to cross-examination, was very far from adjustments. As noted above, he admitted that Mr. Morton came into the printing plant from time to time and gave instructions (page 32, lines 18-20). He also admitted that those whom he directed were Pryor, Walsh, and perhaps McArthur, and Salvia, none of whom were his employees nor paid by him, but all of whom were the employees of

The Jerseyman and paid by The Jerseyman. In fact, there is no evidence of any of his employees doing any work for or under him at the Jerseyman plant. It is probably true that from time to time, while he was working there, some pieces of machinery requiring special work done upon it, was taken to his plant for repairs and in that case it is probably true that if he had any employees, that they assisted in making such repairs; but all of his work done at the place of business of the defendant was done with the assistance of the other workmen of the defendant and, apparently, under the instructions of Mr. Morton, the manager. To say that he was an independent contractor while McArthur, the foreman, was an employee would be asserting a distinction which would be difficult under the evidence in this case to maintain under any definition that has been laid down by the Courts of this or any other State. His work was that of aiding in getting out the daily newspaper. McArthur had his work, Pryor had his, Walsh and Salvia each had theirs and so did the plaintiff. One supplemented the work of the other and, through combined efforts the newspaper was issued.

As I have noted above, according to the testimony of McArthur, a witness for the plaintiff, the latter was taking the place of the pressman. Undoubtedly he had skill as a machinist and was specially fitted to operate the press in case of any breaks, but every employee is supposed to have certain skill along certain lines, but the possession of such skill does not take the party out of the employee class into that of an independent contractor. He was aiding day after day in getting out the paper and it is certainly difficult to see how his position differs materially from that of any other of the employees so engaged. Before he came there, undoubtedly the press had mishaps which the pressman had to look after. The rolls of paper had to be replaced with new ones and such rolls of paper had to be trimmed and made fit to run through the press. Certainly he was not acting as a machinist at the time of the accident when he was replacing the roll of paper which was done by the other men under his directions, nor when he was down trimming the roll of paper just immediately before the accident.

I submit that he was not an independent contractor, but an employee, and therefore, notwithstanding the trial Judge thought it unnecessary to discuss this phase of the case and seemed to think that the evidence indicated an independent contractor, yet if my contention is correct, the judgment of non-suit should be sustained on this phase of the case even though as a general proposition the question of whether a man is an independent contractor or an employee should be left to the jury.

Certainly the policy underlying our Workmen's Compensation law has practically nullified any general rule about leaving to the jury the question as to whether a man is an independent contractor or an employee because no jury trials are had under the Workmen's Compensation law and the Bureau representative must pass upon this question without the aid of a jury. This being so, then the converse should be true, viz., that where one seeks in a law action to establish himself as an independent contractor rather than an employee, then the Court, where the evidence is persuasive, should determine the question as to whether the person is an employee or a contractor. In other words, the policy calling for a settlement of such a question by a jury which formerly existed no longer exists in New Jersey.

In *Callihan vs. Montgomery*, 115 Atl., 889, Callihan, a mechanic, was paid by the hour for repairing a pump engine and he found it necessary to take the cylinder to his own shop for re boring, but notwithstanding this, he was not classified as an independent contractor, but the Court held him to be an employee. So Kappertz was a mechanic and had his own shop and, from time to time, took parts of the machinery to his own shop, but this certainly did not make him an independent contractor.

In Mitchell's case decided by the Supreme Court of Maine in September, 1922 (118, Atl., 287) the Court held that one employed to move a boiler from place to place in a quarry and to haul water whenever required for a certain rate per hour for himself and his team, was not an independent contractor but an employee. In column 1, page 290 of the report the Court said:

“The determination of this question depends upon who had the right to direct and control the work of the claimant. Was he a law unto himself, responsible only for results, or was he subject to the dictation of the superintendent of the quarry.” L

In this case, as in the Kappertz case, he was to do a specified work but that did not make him an independent contractor. In Mitchell's case the Court further said as to Mitchell:—

“He was not working for himself, but for the quarry company, and he was paid, not by job, but by the hour, like any other employee. Under the well settled principles of law he could not be regarded as an independent contractor.”

“The test by which to determine whether a person is acting as a servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged for disobedience of orders or misconduct.”

1. Bradbury's Workmen's Compensation, page 109.

In *Reisman vs. Public Service Corporation*, 82 N. J. L., 464 the Court of Errors and Appeals defined an independent contractor as follows:—

“An independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work,” citing 26 Cyc, 1546.

*Kelly vs. D. L. & W. R. R. Co.*, 113 Atl., 419.

“One constructing a house, subject to the owner's control in respect to the details of the work, is a servant, and not an independent contractor.”

*Winslow vs. Wellington*, 111 At., 631.

In 13 Corpus Juris, 211-213 appears the following:—

“Although, in a general sense, every person who enters into a contract may be called a contractor, yet the word, for want of a better one, has come to be used with special

reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece, or job of work for other persons, using his own means and methods without submitting himself to control as to petty details. The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." Citing *Lehigh Coal Co. vs. N. J. Central Railroad Co.*, 29 N. J. Eq., 252-255.

## II.

*The defendant violated no duty it owed to the plaintiff and was not guilty of negligence.*

Certainly before the plaintiff has any right to recover he must show negligence on the part of the defendant because that is the basis of his action. But it is claimed that Walsh, one of the employees, opened the trap door covering the hatchway and that this constituted negligence on the part of the defendant. But in what respect? The Plaintiff had complained about the quantity of refuse paper on the floor and he wanted it gotten out of the way. He knew that the customary way of disposing of that paper was sweeping it into the cellar through the hatchway and that to do this the trap door had to be raised. Moreover, he knew that Walsh was actually sweeping the paper into the hatchway and that, as Walsh testified, the refuse paper was all around where the plaintiff was working and that he (Walsh) was working along, on the side, in the rear and all around the plaintiff getting the paper down the hatchway (page 89). Moreover Walsh, a witness for the plaintiff, testified that he had said,— "Kappertz, look out now, the door is open." This witness was inclined to be an adverse witness but he conceded this much. The testimony also shows that Kappertz had been there frequently when the door was raised for the purpose of getting rid of the refuse paper and that this was always the way by which refuse paper was disposed of. Kappertz knew that the hatchway was there, not only because he had known of the refuse paper being swept down there, but also because the large rolls of paper had to come up from there. With all this I insist that there is no

evidence of negligence on the part of the defendant and it was the duty of the trial Judge under the circumstances to direct a non-suit.

If Kappertz was an employee of the Jerseyman, then the liability, if not the duty also, of The Jerseyman, is measured by the Workmen's Compensation Act. The Jerseyman was not an insurer of the safety of Kappertz and it was only required to exercise ordinary care and diligence in providing a safe place in which to work, tools and machinery with which to work and reasonably careful fellow servants, and I do not understand that it is contended that any lack of care is found in any of these respects. As I understand it, the contention is—that at the particular moment one of the servants was guilty of negligence in raising the trap door for which it is claimed the Jerseyman is legally responsible.

But "the failure to put on safety appliances and to enclose an elevator to be used exclusively for freight does not constitute negligence." *Sierves vs. Peters Box Co.* 151 Ind., 642; 50 N. E. 877; 52 N. E. 399; *Kern vs. DeCastro Co.* 125 N. Y. 50; 25 N. E. 1071.

The hatchway was there for the purpose of lifting the roll of paper up and disposing of the papers that had gathered on the floor and the plaintiff knew of that and when he complained about the quantity of paper that was lying around the floor it was practically a direction that it be removed. Knowing this it also practically constituted a direction to open the trap door for the purpose of removing this waste paper, so that what was done in the matter of opening the door was essentially due to the direction of the plaintiff; and therefore he has no right to complain about the action of Walsh in opening the door and sweeping the refuse paper down the hatchway. Certainly this would not constitute negligence on the part of the defendant or its servants. Besides this, Walsh took the precaution to mention to the plaintiff that the hatchway was open and to look out. Apparently the plaintiff did not expect that the roll of paper was going to give way so easily else he probably would not have assumed that position, but there is no contention on the part of the plaintiff

that there was any negligence on the part of the defendant in respect to the selection of the roll of paper. In other words, the operation of the hatchway was along the lines he knew about and in accordance with the custom in the establishment and certainly there was no negligence on the part of the defendant. It was an unfortunate accident, the approximate cause being the sudden giving away of the paper. As before stated, even though Kappertz had not heard the warning of Walsh, yet he must have been cognizant of the door being open because Walsh was sweeping the paper from all around Kappertz.

“Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising prudence, and therefore does so at his own risk.”

Gespert vs. Evans, 112 Ind., 133 (138 N. E. 256)

“And if the danger is known, and can be easily avoided, a peril voluntarily and unnecessarily assumed may constitute such contributory negligence as would preclude a recovery.”

Harris vs. Clinton Twp., 64 Mich. 447 (31 N. W. 425)

Taylor vs. Home Tel. Co., 163 Mich., 458 (128 N. W. 728)

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“The rule of liability to invited persons has no application to a case where a person who, from his experience through many years in a sailing vessel, knows that it is customary to leave the hatchways of vessels open while in port.”

20 R. C. L. Sec. 53, last clause

### III.

*The plaintiff was guilty of contributory negligence.*

I think it is hardly necessary to elaborate this point because much which has been already said is applicable to it. In addition to what has been said, it is pertinent to note the comment of the trial Court in commenting upon the action of the plaintiff wherein it was stated that the plaintiff “did not use his ordinary powers of vigilance and absolutely abandoned all thought of his own welfare,” and also to the point that if he were an independent contractor he had the right to select his

own methods of operation, and that he selected one which produced the accident was not one which the defendant was called upon to guard against; and the method pursued by the plaintiff having brought about the accident, there was no liability therefor on the part of the defendant.

## IV.

*“Even though the questions of negligence on the part of the defendant or contributory negligence on the part of the plaintiff are questions for the jury, yet a judgment of non-suit should not be disturbed when from examination of the whole case no valid judgment could be properly rendered in favor of the plaintiff.”*

In support of this proposition I merely cite the Practice Act of 1912, the portion thereof reading as follows:—

“No judgment shall be reversed or new trial granted on the ground of misdirection, or improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

P. L. 1912, p. 382, Sec. 27

Sheen's N. J. Practice Act, pages 214 & 215 and cases there cited.

Respectfully submitted,

CHARLES A. RATHBUN

*Attorney of Defendant.*

