INDEX.

Defendant's Witnesses:

EXHIBITS.

Plaintiffs:

Notice of Appeal.

NEW JERSEY SUPREME COURT.

LEON BYRAM, Plaintiff, vs. WARNER-QUINLAN COMPANY, Defendant.	Action at Law.

To:

LEON BYRAM or
ALEX. SIMPSON, Esq., his Attorney.

PLEASE TAKE NOTICE that the defendant, Warner-Quinlan Company, a corporation, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

Dated, November 14, 1927.

Yours respectfully,

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant.

Service of the within Notice of Appeal is hereby acknowledged this 15th day of November, 1927.

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed, New Jersey Supreme Court Clerk's office, November 16, 1927, Trenton, N. J.

EDWARD J. KELLEHER,
Clerk.

Grounds of Appeal.

NEW JERSEY SUPREME COURT.

LEON BYRAM, Plaintiff-Appellee, vs. WARNER-QUINLAN COMPANY, Defendant-Appellant.	Action at Law.

To:

LEON BYRAM and/or
ALEX. SIMPSON, Esq., his Attorney.

SIRS:

PLEASE TAKE NOTICE that the following are the grounds of appeal which the defendant-appellant, Warner-Quinlan Company, will urge why the judgment heretofore rendered against it in the above entitled cause should be reversed, set aside and for nothing holden:

1. Because the Court, although requested so to do by the defendant-appellant on the ground that there was no competent evidence before the Court and jury upon which the jury might reasonably predicate negligence on the part of a specific agent or through such agent of the defendant, in the bringing about of the accident alleged as the foundation of the cause of action, refused to non-suit the plaintiff-appellee.

2. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan

Company, on the ground that it appeared from the uncontradicted testimony introduced by the plaintiff-appellee, that the plaintiff himself assumed the risk of the particular scaffold referred to in the testimony, in that he saw the scaffold before he went upon it, and that it appeared to him to be adequate and proper, refused to non-suit the plaintiff-appellee.

3. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan Company, on the ground that there was no evidence in the case that there had been brought home to the defendant therein through its agents, servants and employees the amount of weight that the scaffolding equipment was supposed to sustain in the carrying out of its duties by said plaintiff-appellee, refused to non-suit the plaintiff-appellee.

4. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan Company, on the ground that there had been no competent proof before the jury to show exactly what defect there was, if any, in the scaffold which was the natural and proximate cause of its having fallen, refused to non-suit the plaintiff-appellee.

5. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan Company, on the grounds alleged in support of the motion to non-suit, refused to direct a verdict in favor of the defendant-appellant, Warner-Quinlan Company.

6. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan

Company, on the ground that it appeared from all the testimony in the case, to be so convincing in extent as not to warrant any inference to the contrary that in going upon the scaffold in question, the plaintiff-appellee assumed the risk thereof, in view of the circumstances under which it was erected and the nature and use to which it was put, particularly with regard to the fact that it had been testified and not contradicted that at the time this plaintiff and his helper got upon the scaffold and brought their machine there, the scaffold was not ready for them and at the time there were two other men in addition to themselves on the scaffold, refused to direct a verdict in favor of defendant-appellant, Warner-Quinlan Company.

7. Because the Court, although requested so to do by the defendant-appellant, Warner-Quinlan Company, on the ground that the plaintiff's whole case failed to disclose any duty on the part of the defendant owing to said plaintiff with respect to the erection, construction and maintenance of the scaffold or any violation of duty, and in view of the fact that this defendant was not a guarantor of the scaffold or its use for any particular purpose, that no implied warranty can be predicated upon the acts done and the circumstances involved, refused to direct a verdict in favor of the defendant-appellant, Warner-Quinlan Company.

8. Because the verdict rendered by the jury was against the weight of the evidence.

9. Because the verdict rendered by the jury was contrary to law.

10. Because the verdict rendered by the jury was contrary to the charge of the Court.

Dated, December 1, 1927.

Respectfully,

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant-Appellant,
Warner-Quinlan Company.

Service of the within grounds of appeal is hereby acknowledged as within time.

ALEX. SIMPSON,
Attorney for Plaintiff-Appellee.

Filed, New Jersey Supreme Court Clerk's office, December 2, 1927, Trenton, N. J.

EDWARD J. KELLEHER,
Clerk.

Summons.

The defendant, Warner-Quinlan Company, was duly summoned.

Complaint.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

LEON BYRAM, Plaintiff, vs. WARNER-QUINLAN COMPANY, Defendant.		Action at Law.

Plaintiff, residing at No. 308 Montgomery Street, in the City of Jersey City, in the County of Hudson, State of New Jersey, says that:

1. Plaintiff, on the 9th day of December, 1925, was employed by the M. W. Kellogg Company, as a boilermaker.

2. Plaintiff, on said 9th day of December, 1925, in the course of his employment was on the premises of the defendant, at Warner, N. J. as an invitee of the defendant.

3. Plaintiff, at the time and place aforesaid, was injured through the negligence of the defendant.

4. The negligence of the defendant consisted in this:

Defendant failed to use reasonable care to provide the plaintiff with a safe place in which to work and failed to supply the plaintiff with proper instrumentalities and facilities to do the work he was assigned to do, but on the contrary, while the plaintiff was upon a certain scaffold erected by the de-

fendant for the use of the plaintiff in a certain still used by the defendant in refining oil, for the purpose of drilling certain holes in said still, by reason of the faulty construction and unsafe condition of said scaffold erected by the defendant, the said scaffold collapsed and fell, causing the plaintiff to be thrown to the ground and injured.

5. By reason of said negligence, the plaintiff was injured in and about his head, body and limbs, bone in left heel broken and suffered severe nervous shock.

6. Plaintiff was at all times in the exercise of due care for his safety.

7. By reason of said injuries, plaintiff has been compelled to expend money for medical attendance and has lost earnings he otherwise would have made.

Plaintiff demands $10,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

Filed, New Jersey Supreme Court Clerk's office, April 29, 1927, Trenton, N. J.

EDWARD J. KELLEHER,
Clerk.

Answer.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

LEON BYRAM, Plaintiff, vs. WARNER-QUINLAN COMPANY, a corporation, Defendant.	Action at Law.

Defendant, a body corporate, organized and existing under the laws of the State of Maine, duly authorized to do business in the State of New Jersey, answering the complaint herein, says that:

1. It admits the allegation set forth in paragraph 1 of said complaint.

2. It admits that plaintiff, on the 9th day of December, 1925, was on the premises of said defendant at Warner, N. J. as set forth in paragraph 2 of said complaint, but denies that plaintiff was at said time and place an invitee of said defendant, as alleged in said paragraph.

3. It denies the allegations set forth in paragraphs 3, 4, 5, 6 and 7 of said complaint.

SEPARATE DEFENSES.

1. At the time and place mentioned and described in said complaint, plaintiff, being then and there employed by the M. W. Kellogg Company, a corporation, was at the instance of and under the orders of said M. W. Kellogg Company, a corporation, in and about said work and labor on, upon and in connection with a certain still upon lands and premises of said defendant without the knowledge of said defendant in the exclusive capacity of servant of said M. W. Kellogg Company, a corporation, under the control, direction and management of said corporation and in no wise connected with or in any way under the direction or supervision of said defendant, its agents or servants.

2. At said time and place, or prior to said time, plaintiff, as the servant of said M. W. Kellogg Company, a corporation, and the fellow servants of said M. W. Kellogg Company, a corporation, did assume exclusive and complete control on behalf of himself and said M. W. Kellogg Company, a corporation, of the prosecution of said work and labor and of such instrumentalities and equipment as were then and there requisite for the carrying on of said work and labor.

3. At said time and place, plaintiff or his fellow servants, all as agents and servants of said M. W. Kellogg Company, a corporation, were negligent, which said negligence consisted in the failure of said plaintiff and his fellow servants of said M. W. Kellogg Company, a corporation, and the agents thereof, to properly construct, maintain and guard certain scaffolding and other equipment by them for the prosecution of said work and labor without the knowledge of the said defendant constructed and erected, in that said plaintiff, knowing that said scaffolding and other equipment so as aforesaid by him and his fellow servants, all as agents of said

Answer.

M. W. Kellogg Company, a corporation, constructed and erected, did then and there with full knowledge of said defects and said unsafe condition, wantonly and recklessly use, employ and go upon said scaffolding and other equipment, assuming any and all risks of injury to said plaintiff by reason of the defects therein, and said plaintiff and his fellow servants of said M. W. Kellogg Company, a corporation, together with said corporation, were further negligent in failing to take any precautions by inspection or repair of said scaffolding and other equipment to avoid injury to said plaintiff and his fellow servants of said M. W. Kellogg Company, a corporation.

4. By reason of which said negligence on the part of said plaintiff and his fellow servants all as aforesaid by M. W. Kellogg Company, a corporation, employed, any injuries which plaintiff may have sustained in the premises resulted solely from and were proximately caused and contributed to by the said negligence of plaintiff and the said fellow servants of M. W. Kellogg Company, a corporation.

5. Plaintiff was at the time and place described in the complaint guilty of contributory negligence.

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant.

Filed, New Jersey Supreme Court
Clerk's office, May 18, 1927,
Trenton, N. J.,

EDWARD J. KELLEHER,
Clerk.

Postea.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

LEON BYRAM, Plaintiff, vs. WARNER-QUINLAN COMPANY, a corporation, Defendant.	Action at Law.

This case was tried before Honorable Henry E. Ackerson, Jr., Judge, and a jury at the Hudson Circuit on October 17, 18 and 19, 1927.

The jury rendered a general verdict in favor of the plaintiff and against the defendant, and assessed the damages in the sum of $2500.00.

HENRY E. ACKERSON, JR.,
Judge.

Entered October 21, 1927.
Costs were taxed at $61.85.

Case.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

LEON BYRAM,
Plaintiff,

vs.

WARNER-QUINLAN COMPANY,
Defendant.

Before—Hon. HENRY E. ACKERSON, Jr., *Judge,*
and a jury.

Jersey City, N. J., October 17, 18, 19, 1927.

APPEARANCES:

ALEXANDER SIMPSON, Esq., (By Mr. Archie Elkins), For the plaintiff;

AUTENRIETH, GANNON & WORTENDYKE, Esqs., (By Mr. Wortendyke), For the defendant.

A jury was duly impanelled; being found satisfactory, they were sworn.

Counsel opened to the jury.

Edward A. Pitcher. Called by Plaintiff. Direct.

EDWARD A. PITCHER, sworn:

DIRECT EXAMINATION BY MR. ELKINS:

Q. By whom are you employed? A. M. W. Kellogg Company, Jersey City.

Q. For how long have you been employed by them? A. Four and one half years.

Q. Were you in their employ on December 9th, 1925? A. I was.

Q. Did you have in your employ Mr. Leon Byram? A. We did.

Q. Now, do you know whether or not, of your own knowledge, your company was doing any work for the Warner-Quinlan Company on December 9th, 1925? A. We were.

Q. Will you tell us what that work was? A. We were to go to the Warner-Quinlan Company and drill some test holes in a still which had been in service for some time and had shown a defect.

Q. And in drilling these holes in that tank, what was your company to do, just what work were they to do? A. We were to drill some holes, fifteen sixteenths of an inch in diameter around the top seam of the still.

Q. Were you to do anything else? A. That is all.

Q. Now, what was the Warner-Quinlan Company to do in the matter of providing a place where the men were to work on, A. I do not know.

Q. Was there a written contract, if you recall? A. I think there was a written contract.

Q. Was it verbal first, then confirmed by writing later, do you know? A. Yes.

Q. Now, was there anything, if you know, in the contract about the erection of any scaffold?

Mr. Wortendyke: I object, immaterial. It has been testified that the contract, if any, was in writing, and necessarily the written contract must be construed by including all the provisions in the contract.

The Court: Sustain the objection.

Mr. Elkins: Withdraw the question.

Q. Who was sent down to the Warner-Quinlan Company? A. A man named Byram and a man named Stokes, as his helper.

Q. Is Stokes still in your employ? A. He is not.

Q. Have you any idea where he is? A. I have not.

Q. Do you know what tools were taken down by Byram? A. A drill, that is an air motor and a drill and a tap.

Q. And do you know whether they were the necessary tools for the work which he was to perform? A. They were the necessary tools.

Q. Did you give any instructions to Mr. Byram about any scaffold? A. I did not.

Q. Do you know whether your company was to build a scaffold?

Mr. Wortendyke: That has already been answered I think directly by this witness, to the effect that he does not know.

The Court: Do you or don't you?

The Witness: I do not.

Q. What did you say to Byram when you sent him down there? A. I instructed him to go to the plant of the Warner-Quinlan Company to drill some test holes.

Q. And was he to ask for any particular man there? A. I told him to ask for Mr. Metz.

Q. Do you know who Mr. Metz was? A. He was the superintendent of oil stills.

Q. And he was the man to whom Byram was to apply for instructions, is that so? A. Yes.

Q. Will you tell us from your own knowledge whether in the work that you were doing for the Warner-Quinlan Company, your company was to erect the scaffold?

Mr. Wortendyke: That has already been categorically answered twice.

Mr. Elkins: I want to show that this company had nothing to do with the erection of any scaffold on this job. I will withdraw the question.

May I call upon you for the documents I have asked you to produce, the contracts?

Mr. Wortendyke: Here it is.

Q. The original copy of the confirmation order is sent to the customer, is that correct? A. Yes.

Q. And your company keeps the copy, is that correct? A. I think so.

Q. And in your files there would only be a copy of the so called confirmation order, is that correct?

The Court: You have no objection to this?

Mr. Wortendyke: No.

Mr. Elkins: If there is no objection, I will offer these two in evidence.

(Marked Plaintiff's Exhibits 1 and 2.)

Q. You were familiar with this job, were you not? A. I was.

Q. And what position did you hold down there at that time? A. Assistant superintendent of the Forge Welding division.

Q. And was that the division under which this job came? A. Yes.

Q. Now, in this bill or confirmation order it is stated that the M. W. Kellogg Company was to furnish all material, tools and labor for this work; that is correct, is it? A. Yes.

Q. Now, in furnishing all materials, tools and labor for this work, will you tell us whether or not that included the construction and erection of a scaffold in the still?

Mr. Wortendyke: I object. The contract is in evidence and I think the jury and the court are sufficiently intelligent to determine the meaning of that detail.

The Court: Sustain the objection.

Mr. Elkins: Withdraw the question.

Q. Was Byram given any nails or boards or anything with which to build a scaffold? A. He was not.

Q. What material was necessary to carry out this order? A. An air motor, a drill, a tap and miscellaneous air hose.

Q. No board, lumber of any kind or nails, so far as your part of the work was concerned? A. I did not instruct him to take any boards.

Q. Was it necessary as part of your work, in fulfilling your part of this order, to furnish any lumber, nails or any such material for the erection of any scaffold? A. I was not instructed to do that.

Q. And do you know whether that was to be furnished by you, you being in charge of this work? A. I was not instructed to provide any scaffold.

Q. And therefore you could not supply any? A. I made no provisions for a scaffold.

Q. When Mr. Byram and Stokes left will you tell us what time of the day that was? A. I do not recall.

Q. Was it in the morning? A. Yes.

Q. They left your plant with these tools? A. Yes.

Q. They left your plant in Jersey City and they were to go to Warren, New Jersey? A. Yes.

Q. Will you tell us what next was brought to your personal knowledge regarding this work in Warren, New Jersey? A. The next call I had from the job was that Mr. Byram had been injured.

Q. And who communicated that information to you? A. Mr. Joel.

Q. Who was he? A. That is the safety engineer of the Kellogg Company.

Q. As a result of some information which you got, what next did you do, if anything? A. I prepared to send other men to complete the work.

Q. And who did you send? A. I sent a man named Gallagher.

Q. Did he go alone? A. He did not.

Q. Who went with him? A. A man named Stampan—I do not know the other man's name.

Q. Is he still in your employ? A. No.

Q. Do you know where he is? A. No.

Q. And Mr. Gallagher, did he take any tools with him? A. I do not know.

Q. Did he take any lumber with him, do you know? A. He did not.

Q. Did you give any instructions to the Warner-Quinlan Company as to the course they should pursue in building this scaffold? A. I did not.

Mr. Wortendyke: I object, I think it is entirely immaterial. Any instructions given by this witness would not be binding.

Mr. Elkins: I will not press the question.

Edward A. Pitcher. Called by Plaintiff. Cross.

Q. Now, did Mr. Gallagher come back from the Warner-Quinlan Company? A. He did.

Q. And do you know of your own knowledge whether the work, the drilling was done? A. It was.

Q. And do you know whether your company was paid for the drilling? A. I do not.

Q. Would Mr. Moore know that? A. I do not know.

Q. Did you, as part of your work there have to make up the items of material and time used on this job ? A. I did not.

Q. Do you know of your own knowledge how much time was used and what material, if any, was used? A. The only information—

Mr. Wortendyke: May I ask that the witness answer yes or no.

The Court: Do you know, of your own knowledge?

The Witness: No.

Q. Now, did Mr. Byram come back to work after that date, do you know? A. He did not.

Q. That was December 9th, 1925? A. It was.

Q. Has he been back in your service since? A. He has not.

Mr. Elkins: That is all.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. I didn't understand your capacity with the M. W. Kellogg Company. What is your official capacity there? A. Now?

Q. At the time of the accident. A. I was superintendent of the forge welding division.

Harold J. Hoops. Called by Plaintiff. Direct.

Q. Did you personally know who this Mr. Metz was? A. I had met him on the previous occasion.

Q. Where? A. Up at the plant of the Warner-Quinlan Company.

Q. Did you know when you sent Mr. Byram down to this job how high up the holes were that were to be drilled? A. I did not.

Mr. Wortendyke: That is all.

(Recess until Ten A. M.)

October 19, 1927, 10 A. M.

HAROLD J. HOOPS, sworn.

DIRECT EXAMINATION BY MR. ELKINS:

Q. Doctor, are you a practicing physician of this State? A. Yes, sir.

Q. How long have you been practicing your profession? A. Seven years.

Q. Do you maintain an office in Jersey City? A. Yes, 167 Ege Avenue.

Q. On or about December 9, 1925, did you have occasion to professionally treat Leon Byram, the plaintiff in this case? A. I did.

Q. Where did you see him if at all? A. At his home.

Q. Do you recall where that was? A. Montgomery Street, Jersey City. I do not know the number.

Q. At that time did you make a thorough examination of Mr. Byram? A. I did.

Q. Will you kindly tell us in the ordinary language what was your diagnosis? A. Fracture of

the left oscalcis, that is, the left heel. There were multiple fractures.

Q. You mean by multiple fractures, broken in several places? A. Yes.

Q. Can you tell us about how many fractures there were? A. Well about three or four I believe.

Q. In the left heel? A. Yes.

Q. Were there any other objective symptoms? A. No.

Q. Just the heel? A. Yes.

Q. Was he injured about his body? A. No, sir.

Q. Doctor, did you treat him for the injuries which you found? A. Yes.

Q. For how long a time did you treat him? A. Until the following July.

Q. That is, from December, 1925, until July, 1926? A. From December 1925 till July, 1926.

Q. And always at his home? A. At his home and also at his office.

Q. During the time that you treated him was he able to walk? A. Later on he was—not the first time.

Q. Did he require any artificial means to locomote, to get about? A. He required a crutch.

Q. He had crutches? A. Yes.

Q. How long did he continue to use crutches, if you know? A. About three and a half or four months.

Q. And after the use of crutches did he use a cane? A. He did.

Q. About how long did he use a cane? A. Until I saw him last.

Q. Which was in July? A. July.

Q. That is for a period of three and a half months subsequent to December, 1925, he used crutches and thereafter he used a cane? A. Yes.

Q. In your opinion, Doctor, the injury which he had, was that due to trauma, that is, a blow of some sort? A. Due to trauma.

Q. That is, due to a blow? A. Yes.

Q. Will you tell us what your opinion is as to what his condition was at the time you last saw him in July, 1926? A. Well, he had a painful heel.

Q. That injury which you are able to diagnosis, was that a painful one? A. Yes.

Q. And the injury which he had, would that in any wise interfere or will it interfere with his walking in the future? A. It will.

Q. In what way, Doctor? A. Well, it is painful when he steps on anything rough.

Q. Is the condition which he has a permanent condition? A. It is.

Q. That is, he will suffer that pain and inconvenience and disability for the rest of his life? A. Partly.

Q. Well, permanent means for the rest of his life? A. Yes, but as far as the pain is concerned, it is not as bad as it was.

Q. Now, Doctor, what was your bill for the services rendered Mr. Byram? A. I do not recall the exact bill.

Q. Can you give me some idea? What is your best recollection as to what a reasonable amount would be for the services rendered by you? A. Well, it was a fracture case and I believe the case came to about $45.

The Court: Is that a reasonable amount?

The Witness: That is a reasonable amount, yes.

Q. Doctor, these crutches which he used, do you know what they cost him?

Mr. Wortendyke: I ask that that be answered yes or no.

The Court: From your experience, Doctor, are you able to say the reasonable cost of such crutches, yes or no?

The Witness: Yes.

Q. What would they be? A. About six or seven dollars.

Q. Now, Doctor, subsequent to July, 1926, how long a time would it be, if you know, that Mr. Byram could go to work to do laborious work? A. Well, at that time he was able to go back to some work.

The Court: You are referring to what time, Doctor.

The Witness: After July, 1926.

Q. That is, he could do some work? A. Yes.

Q. But how about standing on the left foot, particularly the heel, would that in any wise inconvenience or bother him, that is, standing on that leg for four or five hours? A. It would.

Q. How about his ability to walk now as regarding the pressure on the left heel? How does that bother him?

Mr. Wortendyke: I don't think this witness is competent to testify unless it is shown that he has seen this patient since July, 1926.

The Court: I think that is so. From the examination you made of him the last time could you form any opinion as to whether or not the condition of the heel would be such as to prevent him at this time, speaking now of this time, from proper locomotion?

A. I could, somewhat, because he has a permanent disability there.

Q. Doctor, the condition you found Mr. Byram in in July, would further treatment alleviate or cure that condition? A. No, sir.

Q. That is, the condition is permanent, whether he is given further treatment or not? A. Yes.

Q. And the disability suffered then he would suffer now? A. Yes.

Mr. Elkins: That is all.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. You have been a practicing physician how long, Doctor? A. Seven years.

Q. And have you specialized in any branch of medicine or surgery? A. Yes, eye, nose and throat at the present time.

Q. Connected with any hospitals? A. Yes.

Q. What hospital? A. Fairmount and Greenville.

Q. And is your connection with those hospitals in the speciality which you have mentioned, eye, ear, nose and throat? A. That, together with general work.

Q. You have been a specialist in eye, ear, nose and throat how long?

Mr. Elkins: I object on the ground the question is improper, and especially is it improper cross examination. The Doctor has been asked several questions regarding certain treatments. Under the law, as an admitted man, his qualifications are prima facie. Now, to go into the ability as specialist I think is improper cross ex-

amination. I don't think it is an attempt to discredit the witness, nor an attempt to examine him.

The Court: He has a right to cross examine him to test the depths of this gentleman's learning.

A. About four years.

Q. Will you describe, Doctor, the treatment which you gave this plaintiff on the 9th day of December, 1925, for this fracture of the heel? A. I immobilized it in a plaster cast.

Q. And how long did you keep the plaster cast on him? A. About six weeks.

Q. Did you have this bone x-rayed? A. Yes, sir.

Q. Have you the x-rays with you? A. I have not.

Q. Did you have the x-rays made or did you make them yourself? A. I had them made by Dr. Perlberg.

Q. At the expiration of six weeks did you remove the plaster cast? A. I did.

Q. What then did you do in the way of treatment? A. Massage and baking.

Q. When was it you had the x-rays made, Doctor? A. The same day of the accident.

Q. And after you had removed the plaster cast, did you have another one made to ascertain the condition of the bone? A. Not that I recall.

Q. Were you able to tell after you removed the plaster cast, the condition of the union of the fragments? A. Well, from past experience, yes.

Q. Were you able to tell from an examination of the injured member the degree of union that had ensued in the fragments at that time? A. Not the degree, no, except from past experience.

Q. When you say past experience, what do you mean? A. Other cases.

Q. Do you mean to say that the fracture you found in this case was similar in all respects to other cases of similar nature? A. Well, no; all fractures unite in the same time, that is, under certain conditions.

Q. Then do I understand you to mean that when you removed the plaster cast you ascertained from your past experience that a union had been affected? A. Yes, I do.

Q. Then acting upon that assumption you gave him the massage and baking treatment which you mentioned? A. Yes.

Q. From that time on until you ceased to treat this patient did you give any other kind of treatment? A. No, sir.

Q. Did you have any more x-rays made? A. Not that I recall.

Q. Did you do anything further to ascertain the degree of union of the fragments other than rely on your experience in cases of similar nature? A. No, sir.

Q. Can you describe for us, Doctor, if you will, from what you found when you first treated this man, that is on December 9th, 1925, to what portion of the foot, that is the left foot, the trauma was received? A. The left heel.

Q. The trauma was right at the heel? A. Yes.

Q. Did you examine the instep of that foot? A. Yes.

Q. Were you able to discover any evidences of any trauma to the instep of the foot? A. No, sir.

Q. What was the condition of the arch of the foot? A. As far as I recall, it was all right.

Q. Then Doctor, if I understand you correctly, you finally discharged this man in July on the assumption from your past experience that union had been effected? A. I discharged him and referred him to the New Jersey State Department of Labor.

Q. You referred him to the Labor Bureau at the time you discharged him? A. Yes.

Q. How did you come to refer him to the Labor Bureau? A. To let them decide the degree of permanent disability.

Q. You testified, did you not, Doctor, in certain proceedings before the Labor Bureau?

Mr. Elkins: I object, immaterial.

The Court: I do not know what this question may lead up to. It may be for the purpose of attacking the credibility of the witness. I will overrule the objection.

Mr. Elkins: Exception.

Q. On behalf of this plaintiff? A. No.

Q. Over this period of months from December to July, how frequently did you treat this patient? A. Well, once a week or twice a week.

Q. On the average of once or twice a week? A. Yes.

Q. At your office? A. Home and office.

Q. Doctor, from your past experience and without having made any direct examination to confirm that experience, you assumed that the union of these fragments was completed—how do you account for this pain to which you have testified? A. That would occur in any fracture where there is callus formation.

Q. There was no callus shown on the x-ray which you said was taken on the day you first treated him, was there? A. No, of course not.

Q. And you never made any further x-ray to determine the presence or amount of callus, did you? A. Not that I recall.

Q. Well, is it a fact, Doctor, that you assume that there was callus there also from your experience in other cases? A. There is always callus formation in fractured bones.

Q. And when you say there is always callus formed in the fractured bones, you are speaking from experience in other fractures? A. Yes.

Q. And not from this particular one, as far as you are able to ascertain directly? A. No, sir.

Q. And evidences of pain that you received when you tested this patient were his statements? A. Yes.

Q. And you never saw him after July, 1926? A. Not until yesterday.

Q. Did you make an examination yesterday? A. No, sir. I saw him here.

Q. Would you say, Doctor, that in all fractures where there has been union, and assuming that callus has formed, the fractured member will be permanently disabled? A. Not in all fractures, no.

Q. Why in this fracture? A. Because it happened to be in the heel.

Q. Well, in all fractures in the heel, is that the case? A. Not in all; usually it is the case.

Q. And when you say that you are referring to your experience in other cases of fracture of the heel? A. Yes.

Q. You base your statement only on that experience and not on any symptons you found in this man other than what he told you? A. Exactly.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. Doctor, it is a fact that pain is a subjective symptom, that is, you cannot feel it or notice it, that is so? A. Yes.

Q. And you always take the patient's word for it? A. Yes.

Q. In fact, you have to? A. Yes.

Q. Now regarding the x-ray, Doctor, what did that x-ray plate show?

Mr. Wortendyke: If the court please, I think the x-ray plate itself is the best evidence of what it shows and I don't think, particularly in view of the fact that this Doctor did not take the picture himself, that he should tell us what it showed.

The Court: Sustain the objection.

Q. Did this x-ray confirm your opinion as to the multiple fracture? A. Yes.

Q. Something was asked about taking another x-ray after your treatment; that was to determine the man's present condition? A. Yes.

Q. Would another x-ray plate show anything regarding the original fracture? A. It would show the result of it, yes, sir.

Q. These bones have now united? A. Yes.

Q. And that is all the x-ray plate would show, wouldn't it? A. Yes.

Q. Now, the callus formation which you speak about is the usual result from a fracture? A. Yes, sir.

Q. And the callus formation is the condition which brings on the discomfort and the pain, isn't that so?

Mr. Wortendyke: I object to counsel leading.

The Court: Yes.

Q. Now then, the question was asked you about whether or not you made a further examination. A further examination would not alter or change the situation in this man's condition? A. No, sir.

Mr. Elkins: That is all.

RECROSS EXAMINATION BY MR. WORTENDYKE:

Q. In answer to one of counsel's questions as to the means of ascertaining pain, you stated I think that it was usually necessary for you to rely upon what the patient told you? A. Yes.

Q. And you say that the presence of callus and the degree and amount of callus in the united joints is the principal cause of pain in that member? A. Afterwards, yes.

Q. Would a subsequent examination made after this callus had formed enable you to determine whether there is pain there without the patient having told you anything? A. No, sir.

Mr. Wortendyke: That is all.

Phillip H. Moore. Called by Plaintiff. Direct.

PHILLIP H. MOORE, sworn.

DIRECT EXAMINATION BY MR. ELKINS:

Q. By whom are you employed, Mr. Moore? A. The Kellogg Company.

Q. And how long have you been employed by them? A. Eight or nine years.

Q. And what is your position with them? A. Chief Accountant in charge of the Accounting Department.

Q. Now, having this capacity with that firm are you familiar and were you familiar with the accounts, bills and so forth between the Kellogg Company and the Warner-Quinlan Company? A. I was.

Q. As of December, 1925? A. I was.

Q. And do you know of your own knowledge a particular job pertaining to the drilling of some holes in a still at their plant on December 9th, 1925? A. Yes, I am familiar with the records.

Q. Do you know of your own knowledge, and directly applying your knowledge to this particular job, whether or not your company was paid for erecting any scaffolds for that particular job? A. I should say that I do not know that they were, that that was a detail.

Q. If your company were to erect a scaffold, would they make a charge for it?

Mr. Wortendyke: I object, calling for a conclusion.

Mr. Elkins: I withdraw the question.

The Court: Do you know?

The Witness: I do not know.

Mr. Elkins: That is all.

Leon Byram. Called by Plaintiff. Direct.

Mr. Wortendyke: No questions.

Mr. Elkins: I want at this time to offer in evidence interrogatories served upon the defendant by the plaintiff and the answers thereto.

Mr. Wortendyke: No objection.

(Interrogatories marked "Plaintiff's Exhibit P-3.")

(Answers marked "Plaintiff's Exhibit P-4" of this date.)

LEON BYRAM, sworn.

DIRECT EXAMINATION BY MR. ELKINS:

Q. Where do you live? A. 308 Montgomery Street, Jersey City.

Q. How long have you lived in Jersey City? A. About 18 or 19 years.

Q. Are you married? A. I am a widower.

Q. How old are you now? A. 63.

Q. On December 9, 1925, for whom were you working? A. For the M. W. Kellogg Company.

Q. And how long had you been working for the Kellogg Company prior to that time? A. I think from the previous June.

Q. From June of 1925? A. From the third of July.

Q. And what was your work on December 9, 1925 while in their employ? A. I hired as a layer-out, in the Shell Department.

Q. By layer-out, what do you mean? A. Laying out the work.

Q. That is, you more or less supervised the work? A. Locating the work, locating the holes that were

to be cut in and the attachments that went on the drums they were building at that time.

Q. And as part of your work did you have to do drilling? A. Well, a short time before the accident, as the work was slack with the men, I was put on anything at all.

Q. So that you did do drilling? A. Yes.

Q. Now, when you got some word to go to the Warner-Quinlan Plant, did you take anybody with you? A. I took a helper.

Q. And what was his name? A. Stokes.

Q. Do you know where he is now? A. The last I got in communication with him, he was at home in Savannah, Georgia.

Q. Did you finally get down to the Warner-Quinlan Plant after receiving some notification? A. After being told, we went down there.

Q. And when you got to the plant, about what time of day was it? A. It was between nine and ten, in the neighborhood of ten o'clock.

Q. And when you got to the plant did you ask for anybody or did you see anybody? A. I was told to report to a Mr. Metz.

Q. And did you do that? A. I did.

Q. Did you meet Mr. Metz? A. Yes.

Q. Now tell us what conversation you had with Mr. Metz? A. I told Mr. Metz, in charge there that I had been sent down by the Kellogg Company to drill some test holes and he said, "We are not ready for you yet—"

Mr. Wortendyke: I must respectfully object at this point to the witness repeating what Mr. Metz may have said. Anything Mr. Metz may have said to him will not be binding on this defendant unless the authority and

agency and scope of authority of Mr. Metz is first shown.

Q. Well, confine what he said to the reference to the work you were to do in locating the drilling? A. He said he wanted to get the still cleaned out, scaled, so that he could tell the condition, and build a scaffold.

Q. And what did you say? A. I asked him if he thought I had better go back and come down the next day and he said, "No, wait around." I asked how long it would take to do it and he said it would be after noon.

The Court: To do what?

The Witness: I didn't know how long it would take to clean the still and put up the scaffold.

Q. Tell us further what was said regarding the drilling that you were to do? A. He said it would take until after lunch hour and I asked him if we should wait or go back and come down another day and he said, "You had better wait" so I asked him then where there would be a good place that we could wait and he directed us and said we could go in the pump house adjacent to this still.

Q. And did you do that? A. We went in there and found it was a very comfortable place and we waited there until Mr. Metz sent word down that it was all right, to come up and he would show me where the holes were to be drilled.

Q. When you went down there, Mr. Byram, were you told anything about having a scaffold erected—

Mr. Wortendyke: I object, entirely immaterial and not binding upon the defendant.

Mr. Elkins: I withdraw the question.

Q. When you got to the plant did you say anything to Mr. Metz or anybody at the plant about the erection of a scaffold? A. Nothing.

Q. Did you know anything about the scaffold? A. I didn't know anything about where the holes were to be drilled, or anything about it.

Q. Did you tell Mr. Metz or anybody in charge that you wanted a scaffold built? A. No.

Q. Did you in any wise undertake to supervise or help in the erection of a scaffold? A. No, sir.

Q. When you were notified that they were ready, did they take you to where the drilling was to be done? A. Yes.

Q. They took you to the still, is that correct, somebody showed you where the still was? A. Yes.

Q. And where did they take you? A. When I was notified the still was ready?

Q. Yes. A. As soon as I was notified that it was ready, I went to the still.

Q. Did anybody direct you where to go or where the still was before that time? A. No, Mr. Metz said it was not ready.

Q. And when you went to the still was anybody with you from the Warner-Quinlan Company to show you where the holes were to be drilled? A. When I went back?

Q. Yes. A. When he told me it was ready I went up to the still. There was a ladder leading up and Mr. Metz was there himself.

Q. Now, will you tell us whether or not there was a scaffold erected in the still at that time? A. Yes.

Q. Now, will you describe as best you can what this still was? A. It was a steel still.

Q. What was its diameter? A. I should judge perhaps seven feet.

Q. About how high was this scaffold that was erected on the inside of the still? A. In the neighborhood of six feet.

Q. About six feet high? A. Yes.

The Court: How high was the still?

The Witness: I should judge about 12 feet.

Q. You say the still was about 12 feet high and seven feet in diameter, is that correct? A. That is just an estimate.

Q. This scaffold which was in the still when you arrived there, how high was the scaffold? A. Well, it covered the body of the still, that is, the pieces were set out about the circular part of the still.

Q. Was that a square scaffold? A. Built up square.

Q. And how many posts were there? A. Four.

Q. And how high were the posts? A. Well, I should judge in the neighborhood of six feet.

Q. And what kind of material were they made of? A. Joists, two by four, three by four, four by four.

Q. When you refer to a joist, is this a section of a joist? A. I should judge they were four by four.

Mr. Wortendyke: May I ask if counsel is intending to offer these pieces of wood in evidence?

Mr. Elkins: Not yet.

Mr. Wortendyke: Then I submit it is highly prejudicial to use them in the way they are being used.

The Court: Yes.

Q. What size were the joists?

The Court: The joist that held this platform.

Q. The four posts you have referred to? A. I would not say positively, but I think they were four by four.

Q. Is that your judgment, four by four? A. Yes.

Q. Now, these four joists, how were they connected, that is, how were they connected so that they remained upright? A. There were pieces nailed across them at the top, and lateral pieces.

Q. Now, when you got to this scaffold you say Mr. Metz was with you? A. He was on the scaffold.

Q. And after you went to work, what was to be done? A. I marked the places where he wanted the still drilled.

Q. Then what did he do, go away or remain there? Did he remain on the scaffold? A. I think he went down out of the still, after showing me.

Q. How did you get up to the top of the scaffold, by what means? A. I climbed up the ladders.

Q. Now, when you went up did the scaffold appear all right to you? A. From a casual glance, I took it for granted that the scaffold was safe.

Q. And when you got on the scaffold and after the holes were located for you, did you start to drill? A. No, I first took a hammer and a center punch and I centered where they were marked so that the drill would not run.

Q. Now, what kind of a drill were you to use? A. A three-quarters drill.

Q. Is that an air drill? A. The drill we were using, the motor was an air drill.

Q. Now, after you center-holed the places where you were to drill, what did you do, what next did you do? A. I took the drill over near one of the spots which was center-punched and I said to the

helper to give me a hand and to hold this up until I could get back of it and begin to drill the hole.

Q. What did you mean when you said so that you could get back of it? A. So that we could put pressure on it to feed the drill.

Q. Go ahead, what next did you do? A. And the next, we went down.

Q. That is, while you were working, trying to drill this hole? A. We just lifted the drill up and the scaffold broke.

Q. When you say the scaffold broke, what do you mean, it fell down? A. Yes.

Q. The whole thing? A. No, that corner where we were standing on, and the two of us went down.

Q. What happened? A. The posts collapsed.

Q. By that, what do you mean? A. The nails pulled out of the posts.

Q. Then you went down? A. Yes.

Q. You fell to the bottom of the still? A. Yes.

Q. About how many feet was that? A. Approximately six feet.

Q. And when you got down there, what did you notice if anything regarding the nails in the post? A. I noticed that they were small nails.

Q. Can you tell us about what size nails they were, from your observation? A. I should think they were about a six penny nail.

Q. I show you a nail and ask you whether that is a six penny nail?

Mr. Wortendyke: I object on the ground that this man is not qualified as a carpenter.

Mr. Elkins: I withdraw the question.

Q. Will you tell us whether or not in your experience you have had occasion to supervise and

erect scaffolds? A. I have worked on scaffolds all my life.

Q. And how many years is that? A. Over 40 years.

Q. And do you know how to build scaffolds? A. I do.

Q. And do you know what type nails are used? A. I do.

Q. Do you know what type joists are used? A. I do.

Mr. Elkins: Are his qualifications admitted?

Mr. Wortendyke: The witness's statement that he has worked on scaffolds all his life is rather ambiguous. I submit if a man does drilling and does work necessitating his elevation to a certain point on a scaffold he may be able to do his work on the scaffold and yet not be sufficiently qualified.

The Court: I think you are entirely right on that. This man says he has worked on scaffolds, but that does not mean that he has worked on the building of scaffolds.

Q. In your experience of 40 years, have you built scaffolds? A. I have built scaffolds on tank work, and I worked as a carpenter with my father when I was a young man.

Q. How many years? A. I must have worked with my father four or five years.

Q. Well, have you had any experience building scaffolds? A. I have had. I built scaffolds on tanks that were 30 feet high and 90 feet in diameter.

Q. And have you built many scaffolds in your time? A. Well, in a great many places where we

worked, we would have to build our own scaffolds, but generally we have horses.

The Court: How many scaffolds have you built yourself during this time?

The Witness: Probably two dozen, 24.

Q. Are you familiar with the nails that are used and the size of the nails? A. Yes, sir.

Q. Do you know the different size nails? A. Yes, sir.

The Court: And have you worked on scaffolds that were built by other carpenters?

The Witness: Oh yes, sir.

The Court: See them erected by these other carpenters?

The Witness: Yes, sir.

The Court: See the nails used in them, as well as the nails you used yourself?

The Witness: Yes, sir.

The Court: All right.

Mr. Wortendyke: Now if the court please, I would like to ask one or two questions on this point.

The Court: You may do so.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. Is it a fact, Mr. Byram, that the materials used in building scaffolds vary upon different kind of work to be done, the size of the tank and so forth? A. Yes, sir.

Q. And when you say you have built 24 scaffolds, you do not mean that those scaffolds were all built of the same size lumber and with the same size

nails? A. Well, a scaffold builder never uses smaller than a ten penny nail.

The Court: No matter what size the scaffold?

The Witness: Regardless of the size, a larger scaffold will require a larger nail.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. What size nail is this one? A. That I judge is about a six penny nail.

Mr. Elkins: I would like to offer this in evidence.

Mr. Wortendyke: I don't think that is material or relevant.

The Court: No.

Q. Now, when you got down to the bottom of this scaffold you say you noticed the nails out of the posts, is that correct? A. Yes.

Q. Now, will you tell us what in your opinion the size of those nails were? A. Well, in my opinion they were six penny nails.

Q. Will you tell us whether or not the nails you saw were similar to this one in size? A. Just about the same.

Q. And the nails you saw in these posts were six penny nails? A. Yes, sir.

Q. Will you tell us from your experience whether those nails were the proper kind of nails to be used in the erection of that sort of a scaffold to hold two men? A. In my opinion they were not the proper nails to use in any scaffold.

Q. Would those nails hold the weight of two men and a drill when they got up? A. This apparently didn't.

Q. Now, what size nails should have been used? A. Ten penny nails.

Q. What size is this one? A. That is a ten penny, I should judge.

Mr. Elkins: May I offer these nails in evidence?

Mr. Wortendyke: I object. He may use them for illustration, but I do not think they are evidential in this case.

The Court: They may be admitted for illustration, not that they are the same nails, but to illustrate the sizes of ten penny nails and six penny nails.

The Witness: These are wire nails which have a greater tendency to pull out than the old cut nails.

Mr. Wortendyke: My objection to their admission is that a proper foundation has not been laid.

The Court: I will exclude them as evidence.

Q. Now Mr. Byram, after you had fallen to the bottom of this still, what was the next thing that occurred? A. Well, it took me a few minutes to collect my senses. I found there was blood running down on my forehead and I felt to see if I could locate the cut, to see what it was, and then I tried to get on my feet and found out I could not stand on my left foot, that I could not place no weight on it at all.

Q. Did you remain at the bottom of this still for any length of time? A. I remained there for a few minutes.

Q. Then how did you get out of the still? A. I got out through a hole in the bottom.

Q. What caused the scaffold to fall, in your opinion? A. The nails had pulled out and bent up as the weight pulled them.

The Court: Will you explain where these nails were, in other words what pieces they held together?

The Witness: This represents two pieces of board, square at the top with these strips nailed across, so the scaffold boards can go across, then there were laterals nailed along here. At each of the corners were one of these posts. When we were on the top of the scaffold me and my helper stooped down and picked up the drill like this and the scaffold gave way and I went down to the bottom. The bottom of the still was concave like that and my head was cut and my foot was hurt and I was lying on the bottom. I looked over and I could see the end of that board that had swung down with the nails pulled out, with the small nails in it.

The Court: Do you mean by that it was the crosspiece from the upright or the upright upon which the platform rested?

The Witness: The crosspiece nailed to the upright.

The Court: And upon which the floor of the scaffold rested, is that right?

The Witness: Yes, sir.

Mr. Wortendyke: May I ask that this diagram be marked for identification?

The Court: Yes, it may be marked.

(Marked Exhibit P-5 for identification.)

Q. These crosspieces, were they the things that held the posts together? A. They tied the posts together to keep them from swinging.

Q. And these crosspieces were the things that kept the posts in place, is that correct? A. Yes.

Q. And they were the only things that held the posts, so that they would not fall down, is that correct? A. That was it.

Q. And it was these crosspieces that came out, is that correct? A. It was the piece that supported the scaffold on top that was nailed across this way, not the laterals.

The Court: The horizontals gave way you mean?

The Witness: Yes, sir.

Q. What about the cross pieces? A. They were pulled out when we went down on that side, of course.

Q. They came down, too? A. Yes.

Q. In your opinion what caused the cross pieces to pull out? A. Why our weight falling with the scaffold broke the cross pieces on that side down.

The Court: How much did the drill you were lifting, weigh?

The Witness: Well, I would judge about 30 pounds.

Q. What I want to know Mr. Byram is this: What caused the collapse at the outset, your weight on this scaffold, if the scaffold were properly nailed, would the scaffold fall? A. No.

Q. Your weight having been put on it and the scaffold having fallen, what in your opinion caused

the scaffold to fall after your weight got on it? A. Why the nails were too small that were used in erecting it.

Q. And is that improper construction? A. Yes, I should call it so.

Q. Now, after you got out of the still, where were you taken to, where did you eventually go to? A. They assisted me down to what they called the laboratory.

Q. Were you able to stand on your feet? A. I could stand on my right leg, but the left foot was absolutely helpless, I could not rest any weight at all on it.

Q. Did you eventually get home, were you taken home? A. Yes.

Q. When you got home did the Doctor attend you? A. Dr. Hoops came down shortly after I was hurt.

Q. And when Dr. Hoops came down did he examine you? A. He looked at the foot and he said, "We will have to have an x-ray taken to determine the nature of the injuries."

Q. And was an x-ray taken? A. Dr. Pearlberg took the x-ray.

Q. Did you go back home then? A. Yes, I went back home.

Q. And were you put to bed? A. Well, I was not put to bed, but I had to rest the foot; I could sit in an easy chair raising the foot on something else.

Q. Did you have it in a cast? A. Not immediately; Dr. Hoops bound it up.

Q. Did he put a cast on later? A. Later, yes.

Q. How were you able to get around after the accident, how were you able to walk after the accident? A. I didn't walk only with two crutches.

Q. Doctor Hoops says the crutches were used about three and one-half months; is that correct? A. Something like that.

Q. What did you use after the crutches? A. Then I used a cane.

Q. He said he saw you last in July 1926—

The Court: How long did you use a cane after that?

A. I used a cane after discarding the crutches up to September or October of that year.

Q. September or October, 1926? A. Yes, sir.

Q. Now, during that time, from December, 1925, until September or October, 1926, did you work? A. No, I went to work late in 1926.

Q. About what month? A. I think it was the latter part of September, I am not positive about that.

Q. Will you tell us whether you worked from December, 1925, until some time in October, 1926?

Mr. Wortendyke: He has already testified that he went to work in September and October.

Q. From the time you were injured until the time you went to work, did you earn any money? A. No.

Q. Did you lose the salary you were getting? A. Certainly.

Q. How much were you getting at the time of the accident? A. Between forty and forty-five dollars.

Q. Were you paid by the hour? A. Yes, 90 cents an hour.

Q. And how many hours did you work? A. 48 hours a week for the Kellogg Company.

Q. So that at 90 cents an hour you made $43.20 a week, is that correct? A. Yes.

Q. And you made that every week? A. Yes.

Q. No lost time? A. I lost holidays.

Q. Well, your weekly salary was $43.20 and you lost that from December, 1925, until September, 1926?

Mr. Wortendyke: I object, he said he received an hourly rate and holidays and so forth were deducted.

Q. Well, did you make $43.20 every week? A. I did, with the exception of holidays.

Q. There were not many holidays in that period? A. Not many holidays, no.

Q. All right. Did you earn any money from the time of the accident until you went to work in September? A. No.

The Court: Were you paid anything on account of wages from this concern? Did you get any wages?

The Witness: No, sir, no wages at all.

Q. Did you have any bills for medicines? A. Doctor's bills?

Q. Yes. A. No, Dr. Hoops was paid by the insurance company.

Q. Did you have any medicine bills? A. Some small bills like for stuff to rub on it.

The Court: To make a long story short, you make no claim for doctors' bills or medicines?

The Witness: No.

Q. During the time of your injury, from December, 1925, until the time you went back to work, did you suffer any pain, disability or discomfort? A. Only from that foot.

Q. Which foot is that? A. It was very sore after the doctor told me I could walk on it.

Q. That was the left foot? A. Yes, sir.

Q. What part of the foot was injured? A. The heel.

Q. Did that pain? A. It did.

Q. After the time you went back to work did you walk on it as well as you could before the accident? A. No.

Q. What was wrong with it? A. I could not rest my weight on it. I had to rest my weight on the ball of my foot.

Q. What discomfort did you experience? A. Why, it hurt, particularly the cords leading up to the ankle from the heel.

Q. Before the accident did you have any such condition? A. No, sir.

Q. And do you have any of this discomfort now? A. Yes, if I put any weight on my heel. I carry my weight on the ball of my foot.

Q. While you were on the top of the scaffold, did you do anything which caused the scaffold to fall? A. Nothing at all.

Q. All you and your helper were doing was trying to drill these holes? A. Yes.

Q. Will you tell us whether or not you or Mr. Stokes had anything to do with the scaffold at all before it was built, or while it was being built, or after it was built? Did you have anything to do with the building of the scaffold? A. Nothing whatever.

Mr. Elkins: That is all.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. Now, Mr. Byram, your regular employment with the M. W. Kellogg Company was that of a layer-out in the shell department, is that a fact? A. A. Yes.

Q. And when you say shell department you refer to the department having to do with the manufacture of tanks of one kind or another, is that a fact? A. Tanks and cylinders.

Q. Do you know whether this particular tank was manufactured by the Kellogg Company in the first instance? A. I do not know whether they built it or not.

Q. On December 9th, 1925, work was slack down there, was it? A. Yes.

Q. And is that the reason you changed from your regular form of employment and took on the drilling work? A. No. I was working on my regular form of employment marking off the plates before they were formed up. It was not work that required a thorough mechanic, and they put me to doing anything so long as I was kept at work.

Q. In other words you were a skilled and thorough mechanic in the shop, were you not? A. Yes, sir.

Q. Skilled in structural and mechanical work? A. I won't say in structural work.

Q. And in the particular department you say you were in, namely the Shell Department, did that involve any drilling on your part? A. Not particularly.

Q. Is it or is not not a fact that when you took on this drilling job it was a different form of work than you had been regularly doing with the concern? A. It was.

Q. How did you and Stokes get down to the plant at Warren, New Jersey? A. In an automobile.

Q. Your car? A. My car.

Q. Who drove? A. I drove.

Q. Did you bring your equipment with you? A. We did.

Q. In the car? A. Yes.

Q. Now, in addition to this pneumatic three-quarter-inch drill—that uses compressed air, does it? A. Yes.

Q. What other equipment was necessary for the operation of this drill? A. A hose, an air line and the proper drills.

Q. And these you got where? A. From the company.

Q. So that you took the drill and the necessary equipment, the air supply? A. We had several drills of various sizes. They couldn't tell me what size holes were wanted so we took various size drills and sockets and two or three lengths of hose, I cannot say exactly how much, but what we thought would be sufficient.

Q. And you had this, I suppose, in the back of your car? A. Yes.

Q. Now, you got down to the Warner-Quinlan Company between nine and ten o'clock in the morning? A. Yes.

Q. And where did you put your car? A. Just ran it alongside the building where I saw other cars parked.

Q. And at that time your equipment was in the car, was it? A. Yes.

Q. And then where did you go, Mr. Byram? A. I went down to the watchman's shanty and inquired for Mr. Metz.

Q. And how far away from the car was that? A. Maybe 100 feet or 150 feet.

Q. How far from this still which you were to drill was it that you parked your car? A. About the same distance I think.

Q. In the opposite direction? A. No.

Q. Then when you saw Mr. Metz did you and he go to the still together? A. We walked over, yes. I received word, he told me that they were not ready and I think we walked together up to the still and he showed it to me where it was. The still was an upright steel still and he told me he wanted to get it cleaned out, the scale taken off and a scaffold built, and I asked him if we should return to Jersey City or wait there and he said wait, and I asked him how long it would take him to do it and he said it will probably be ready that noon time. Then we went to the pump house and waited.

Q. Now, referring to the first time you saw the still in the company with Mr. Metz, did you go in the still at that time? A. No, sir.

Q. Did Mr. Metz indicate to you in a general way from where you stood where these holes were to be drilled? A. No.

Q. From where you stood as you walked up to the still were you able to tell or form any opinion as to the height of the still? A. We could judge by looking at it from the outside. It looked to me to be approximately 12 feet.

Q. Then you waited around and had your lunch? A. Yes.

Q. And then you went over to the still? A. Just as soon as he sent word down.

Q. Now, from the time you arrived and parked your car and went to see Mr. Metz until you got word after lunch that you might proceed with the

job, your car was parked where you left it, with your equipment in the car? A. No. It was getting along toward noon time and I said to the helper, supposing we take the hose up and find out where we are going to need it, so we took the hose and the drill up and found out where we were going to need it and laid it at the foot of the still.

Q. Did you at any time from the time you reached there until the time when you climbed up on the scaffold or actually entered the still for the purpose of doing this work, either see the scaffold or examine it? A. No, sir.

Q. So that the first you saw of the scaffold was when you actually climbed up on it? A. Yes.

Q. Did anybody tell you it was O. K. before you went up? A. No.

Q. You just made a casual inspection? A. It looked to me like a scaffold.

Q. And you had about 40 years' experience with scaffolds? A. Not giving them any particular inspection.

Q. Between what intervals was the conversation had about building the scaffold for two men?

Mr. Elkins: I object, based upon an unwarranted assumption of facts.

A. I don't remember anything about that.

The Court: Leave out the two men. I do not recall the two men part of it. But he has said that they told him they were going to build the scaffold.

Mr. Wortendyke: I withdraw the question.

Q. Now, Mr. Byram, when you went in there after lunch you saw Mr. Metz up on the scaffold, didn't you? A. Yes.

Q. What was he doing up there? A. He was waiting for me to come up, so that he could show me where he wanted the holes drilled.

Q. Was there anybody else on the scaffold with him? A. I could not say, but I think there was one man.

Q. You are positive, however, that Mr. Metz was up there? A. Yes.

Q. And do you know who that other man was? A. No, sir, I do not.

Q. Is he in court here today? A. No.

Q. Do you recognize him in court here today? A. No.

Q. Now, when Mr. Metz was up there, did you have any conversation with him as to the form or method of construction of the scaffold? A. No.

Q. You looked at it and started to climb up? A. I just seen the scaffold was up there, that was all the looking at it I did. I could not help but see it. I didn't make any inspection, I thought they would know enough to build a scaffold.

Q. You usually inspect scaffolds before you go up on them? A. No.

Q. What was the weight of the equipment which you were about to bring up on this scaffold? A. I should judge 30 pounds; between 30 and 40 pounds.

Q. You have never weighed it? A. No, sir, but it is between 30 and 40 pounds.

Q. When you reported at the still you had your helper with you, did you not? A. I called to him to come up.

Q. Who went up first? A. I did.

Q. Who brought the equipment up? A. He handed it up to me.

Q. And after he handed it up to you, did he come up then, too? A. Yes.

Q. And when he and you and the equipment and Mr. Metz were on the scaffold, was there anybody else there? A. I don't think there was.

Q. Are you positive of that? A. I am quite positive. The other man had gone down.

Q. Now, do you recall the size of these uprights? A. Just from looking at it, climbing up. It might have been four by four or four by two.

Q. Then you are not positive whether it was two by four or four by four? A. No.

Q. Now, you said that this scaffold conformed roughly to the circular shape of the tank? A. The tank was circular and there were four posts.

Q. Now, was this scaffold circular or rectangular? A. It was four-sided.

Q. Then you climbed up the ladder? A. Yes.

Q. And had your assistant hand the equipment up to you? A. Yes.

Q. And in the meantime where was Mr. Metz? A. Mr. Metz was on the scaffold when we came up, to show us where the holes were to be drilled.

Q. Now, you say your doctor's bill was paid by an insurance company? A. Yes.

Q. What insurance company paid you? A. I do not know anything about that.

Mr. Elkins: I object.

The Witness: All I know is I got a statement here from the insurance company from M. W. Kellogg Company saying Dr. Hoops' bill was paid and the bill from the Rehabilitation Clinic was paid and Dr. Perlberg was paid for the X-rays.

Q. So that as far as you know, all the medical expenses and rehabilitation expenses were paid by your employer?

Mr. Elkins: We have no claim here for medical bills and I ask that the jury be instructed to disregard the remarks made by counsel.

The Court: Then you waive them?

Mr. Elkins: Yes.

Q. Now, after you fell this six feet, who picked you up? A. Nobody.

Q. You picked yourself up? A. Yes.

Q. And where did you go? A. As soon as I got my senses together and could see where I was going I got out of the still.

Q. How did you get out of the still, did you have to employ a ladder? A. I went down the ladder.

Q. So that after you fell down from the scaffold and picked yourself up, you lowered yourself down to the ground, is that a fact? A. Yes.

Q. Where did you go from there? A. Then I was taken down to the laboratory.

Q. Who did you talk to there? A. There were a couple of men in there and I told them I desired to go home, I would like to have somebody dress my heel.

Q. And how did you get home? A. Somebody drove me home.

Q. How did you get over to the car? A. I walked with the assistance of a man on each side of me.

Q. Now, from where you stood on the bottom of this still, just before you went up the ladder to get on the scaffold, were you able to reach the place where these holes were to be drilled? A. Before I went on the scaffold?

Q. Yes. A. No, they were located above the scaffold.

Q. They were above your reach from the floor of the tank? A. Oh, yes.

Q. You are employed now, are you not? A. Yes.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. Now at the time you fell, Mr. Byram, was that at or near the place where the holes were to be drilled? A. At one of the holes.

Q. And you were working on this one hole when the collapse came, is that correct? A. Just starting to work on it.

Q. How many pounds did you weigh at the time of the collapse of the scaffold? A. Between 175 and 180.

Q. Do you know how much your helper weighed? A. I should judge about 150 pounds.

Q. And you do not know whether there was anybody else on the scaffold at the time it collapsed or not? A. No.

Mr. Elkins: That is all.

RECROSS EXAMINATION BY MR. WORTENDYKE:

Q. When you say you were working on the holes you mean you were about to work on the holes? A. We were going to start work.

Q. Did you ever bring to the attention of Mr. Metz the equipment you were planning to bring up on this scaffold before the scaffold was erected? A. No, sir.

Q. Did you have your equipment there at any time when you talked with him? A. The equipment was in the car when I first talked to Mr Metz.

Q. Where did you talk to him, at your car or away from the car? A. Why, I waited—they sent word down I believe from this watchman's place and Mr. Metz came over and we walked up, then while we were waiting for them to get the still ready my helper and I brought the equipment over and laid it down just outside the still.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. Do I understand Mr. Metz saw the equipment before you brought it into the tank? A. I don't know if he looked at the equipment or not.

Q. Was he there when the equipment was being put in it? A. He was around the still.

Q. That was where the equipment was being brought to? A. Yes.

Q. You saw the equipment being brought into the still? A. Yes.

Q. And where was Mr. Metz while the equipment was being brought into the still? A. I think he was on the scaffold at first.

Q. In other words he did see the equipment some time before the fall of the scaffold? A. Yes.

Mr. Elkins: That is all.

RECROSS EXAMINATION BY MR. WORTENDYKE:

Q. Now, this tank I think you said was elevated above the ground? A. Yes.

Q. So that it was necessary to go up a ladder? A. Yes.

Q. And when you brought the equipment over, in order to save time, it was outside of the still, wasn't it? A. Oh yes, we didn't have it up in the still.

Q. And Mr. Metz was inside the still watching the cleaning, was he? A. I think he was.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. But he was outside also? A. In and out of the still.

Q. While the equipment was being brought into the still? A. I positively believe Mr. Metz saw the drill we had there.

Juror Number Eight: Did you have the drill in your hand at the time the scaffold fell?

The Witness: Yes, just picked it up.

Juror Number Eight: And is it possible that the hose could have been entangled around the cross-piece that came loose?

The Witness: No, I am positive it was not, because we took it up on this side of the scaffold and we were working over on the other side, there was not a possibility of the hose becoming entangled in the scaffold in any way.

Juror Number Two: Were you drilling at the time you fell? Was the drill going through the metal at the time you fell?

The Witness: No, sir, we had merely lifted the drill up until I could take a rule and measure the distance from one side of the still to the other to get the necessary blocking.

Juror Number Two: Then there was no vibration at the time from the drill?

The Witness: No, sir.

Juror Number Two: Just merely the weight of you men and the drill?

The Witness: Yes, sir.

(Witness excused.)

EDWARD J. LYONS, sworn.

DIRECT EXAMINATION BY MR. ELKINS:

Q. Where do you live? A. Cranford, New Jersey.

Q. How long have you lived there? A. Five years the 30th of January.

Q. By whom are you now employed? A. M. W. Kellogg Company, Jersey City.

Q. As what? A. Layer-out foreman, carpenter department.

Q. And is carpentry your trade? A. Yes, sir.

Q. How long have you been a carpenter? A. About 25 years.

Q. During your experience as a carpenter have you built scaffolds? A. Yes, sir.

Q. How many? A. Thousands of them.

Q. Of various types? A. All types and kinds.

Q. And have you built scaffolds in the interior of steel tanks? A. Yes, sir.

Q. Are you familiar with the type of construction, material and nails used? A. Yes, sir.

Q. Now, in a scaffold built in the interior of a tank about seven feet in diameter, about 12 feet high, the scaffold being built at a height of about 7 feet from the top, on which scaffold there are boards upon which men rest, on four uprights that

are called joists, is that correct? A. You can call them joists if you like.

Q. With cross bars across to hold it upright and in place, what is the usual size of nails, and what are the proper nails to be used on a scaffold of that type? A. When using one inch boards, one by ten boards, of which I have a piece on the desk, to connect the two uprights on which the floor planks are laid, they are fastened with ten penny nails, six ten penny nails on each side.

Q. Did you ever use a six penny nail? A. Never.

Q. Will you tell us in your opinion a scaffold which is constructed of the type which I just mentioned, and six penny nails are used, will you tell us whether in your opinion that is a faulty construction? A. Absolutely, yes.

Q. With a scaffold built with six penny nails, would you consider that scaffold safe for two men, one weighing about 175 or 180 pounds and the other 150 pounds and a drill weighing about 30 pounds—would the weight of those men on a scaffold for any length of time cause the scaffold to collapse, or would it hold? A. Well, that question is hard to answer in that way.

Q. Then I will withdraw it and ask you this question: Assuming that a scaffold is built of the type mentioned, and two men, one weighing 175 or 180 pounds and the other 150 pounds, and a drill about 30 pounds in weight, the two men not doing anything unusual on the scaffold to cause it to collapse or interfere with its construction, and that scaffold collapses, what in your opinion would cause it to fall? A. Faulty construction, not using bigger nails, because the nails were too small.

Mr. Elkins: That is all.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. You always build scaffolds of various degrees of strength, depending upon the work for which they are to be used? A. Positively.

Q. If you are going to build a scaffold to support two work men, you do not put the strength in it that you would in building a skyscraper? A. No, sir.

Q. And the thickness of the lumber used and the size of the nails varies with the nature of the job it is intended for, isn't that so? A. Well, to this extent: All scaffolding, as a rule, where it is for construction work, outside of carpentry work, are of four by four uprights, one by ten ledger boards and one by six braces, using ten penny nails, two nails in each end of the buck brace and six nails in each end of the ledger board, regardless of the height you go up.

Q. And regardless of the weight it is to carry? A. The weight for machinery and any kind of structural work is about the same.

Q. So that, according to your opinion, if this scaffold had been built with ten penny nails it would be sufficient to sustain the weight of any number of men? A. Positively, providing you had no cross grained or knotty material to drive your nails in, because each ten penny nail should support a weight of 300 pounds.

Q. So that if at one point you have six ten penny nails that would support a weight of 1800 pounds? A. Yes, sir, at that point.

Q. In other words the weight to be supported by the scaffold built with ten penny nails is in proportion to the number of nails used? A. Well, up to a certain extent, yes. If you go to put those nails

in a ten inch ledger board, one by ten, the board might not hold that weight because the board itself would not be strong enough.

Q. Well, assuming that the lumber is all right, I am asking you now only with regard to the nails? A. All right, every nail will hold approximately 300 pounds, that is, one ten penny nail.

Q. You are employed by the M. W. Kellogg Company? A. Yes.

Q. Were you employed by the M. W. Kellogg Company at the time of this accident, December 9, 1925? A. No, sir.

Q. What is your official capacity with the M. W. Kellogg Company? A. At the present time I am layer-out foreman in the carpentry department.

Q. Do you know the plaintiff? A. No, sir, I do not.

Q. Did you ever see him before? A. No, sir.

Q. You are here under subpoena?

Mr. Elkins: I object if the court please.

The Court: Sustain the objection.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. You have no interest in this case at all? A. Absolutely none.

Mr. Elkins: That is all.

(Witness excused.)

Mr. Elkins: That is the plaintiff's case with the exception that I would like to put on Dr. Perlberg when he arrives, which will be before one o'clock.

The Court: If there is no objection, you may have that privilege.

Motion for Non-Suit.

Mr. Wortendyke: I respectfully move for a non-suit in this case on the authority of the case of Holmes against Pellagrino, decided in the Court of Errors and Appeals in May 1926.

My specific grounds with respect to the present case are these:

First, there has been no competent evidence before the court and jury upon which the jury may reasonably predicate negligence on the part of a specific agent or through such agent of the defendant in the bringing about of this accident; secondly that it appears from the uncontradicted testimony introduced by the plaintiff,, that the plaintiff himself assumed the risk of this particular scaffold, and I refer, in that connection, to his testimony to the effect that he saw the scaffold before he went up it and that it appeared to him to be all right; third there is no evidence in the case that there was brought home to this defendant, through its agents, servants and employees, the amount of weight that this equipment was supposed to sustain in carrying on the duties of this plaintiff. Fourth on the ground that there has been no competent proof before the jury to show exactly what defect there was, if any, in this scaffold which was the natural and proximate cause of it having fallen.

The Court: While there may be merit in what you now urge in respect to contributory negligence or assumption of risk, nevertheless I feel that it is a question for the jury and I will deny your motion and allow you an exception.

Herbert Haslan. Called by Defendant. Direct.

DEFENSE.

HERBERT HASLAN, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. Where do you live? A. 621 Arlington Avenue, Westfield, New Jersey.

Q. By whom are you employed at the present time? A. I am employed at 90 West Street, New York City.

Q. On December 9th, 1925, by whom were you employed? A. By the Warner-Quinlan Company, plant manager in Warren, New Jersey.

Q. And what was your official capacity and connection with that company at that time? A. I was plant manager.

Q. And as plant manager what were your duties with respect to the maintenance, repair and upkeep of the equipment of the plant? A. Well, you are talking about the plant in general or this specific case? My duties there were to—well, I will give you an idea of how the plant was run: We had in that plant 13 asphalt stills, two dubbs cracking units, agitators, and other stills where we made gasoline and refined oil, and each one of these units had a superintendent. For instance, the asphalt stills had their superintendents, the dubbs stills, they had superintendents, and all through the line the work was detailed out so that each unit had its superintendent who had charge of that particular part of the installation. In the case of the dubbs units we had a man by the name of Metz.

Q. On the day of this accident, in December 1925, between nine and ten o'clock in the morning, did you see the plaintiff in this case, Leon Byram at the plant at Warren, New Jersey? A. I did not.

Q. Did you see him during that day? A. No, I did not.

Q. Did you, through the office of the plant manager, make any arrangement sfor the repair of a dubbs unit? A. I did.

Q. And those arrangements were made with the M. W. Kellogg Company? A. Yes, sir.

Q. And was that made by contract? A. It was.

Q. Now, referring to Exhibit P-1 and P-2, do those together constitute the contract under which this work was done? A. It did, but that is not a contract, that is an order.

Q. What is the function or purpose of the stub marked Exhibit P-2 with regard to the order itself?

Mr. Elkins: Objected to on the ground that it is immaterial. It speaks for itself.

The Court: I suppose it does.

Q. And was the work commenced pursuant to that order by the M. W. Kellogg Company? A. Yes, sir.

Q. And they were paid for it, were they? A. They were, so far as I know.

Q. As plant manager were you or were you not the superior of the subordinate superintendents in charge of the various units? A. I was.

Q. And on the 9th day of December, 1925 or previous thereto, did you give any instructions to Mr. Metz with respect to the repair work on this dubbs unit? A. I did.

Q. And what were those instructions?

Mr. Elkins: I object to them.

The Court: What is the purpose?

Mr. Wortendyke: To deny the evidence of the plaintiff to show that this Mr. Metz had authority to undertake the erection of a scaffold in the way and manner in which the plaintiff has alleged.

The Court: Of course that would not be binding at all if he disregarded his instructions. The objection is overruled.

Mr. Elkins: Exception.

Q. What was the nature of your instructions? A. To prepare the chambers, have them opened up and cleaned out and ready for Kellogg to go along and drill test holes into that particular chamber.

Q. After you had given those instructions, did you make any inspection to see whether they had been carried out? A. I did not.

Q. And were you ever given notice that anything had happened on that particular day in this dubbs unit that you refer to? A. Yes. It was brought to my attention that Kellogg wanted a scaffold built in the expansion chamber.

Q. When was that, do you remember? A. I don't remember the date, but just prior to their commencing the work, I suppose it must have been some time in the morning, the men came to carry out that work. I instructed Metz to have our carpenter build them a scaffold, to build them what they required to do their work. It was a small scaffold, the chamber is ten feet in diameter and ten feet high, and where these particular holes were going to be drilled was two feet from the top, so that the scaffold would naturally have to be about six feet high.

Q. Will you give us the exact words constituting the instructions to Mr. Metz to build this scaffold? A. Well, I told him to get our carpenter and build a scaffold for them to suit their requirements.

Q. And was that all you had to do with it? A. That was all, outside of when the holes were drilled they were to be gauged, measured.

Q. Do you know who the carpenter was or who the carpenters were that were going to build the scaffold? A. Yes, a man by the name of Rose.

Q. One man, was it? A. Well, he had a helper.

Q. The helper is not in court, is he? A. I really don't know; I don't see him.

Mr. Wortendyke: Cross examine.

Cross Examination by Mr. Elkins:

Q. Now, Mr. Metz was in charge of this particular work in this still, is that correct? A. He was—he was not in charge of the work, he was in charge of the units.

Q. And he had full control and supervision over the units, that is correct, is it? A. When they were operating Mr. Metz was their superintendent.

Q. Well, was he in charge when it was necessary to make repairs? A. Not in charge, no.

Q. I mean, if repairs were necessary, he would be the man to take care of them? A. He would see that the unit was cleaned out and opened up, ready for the mechanic to go in and do whatever work was necessary.

Q. And he was the man wtih whom the Kellogg men who were sent there had their conversation? A. Yes.

Q. And he was in authority to direct the men where the work was to be done, that is correct, is it? A. Yes.

Q. And whatever instructions Mr. Metz got was through you, is that correct? A. Yes.

Q. And you were the plant superintendent? A. Yes.

Q. And you had sole charge and supervision over the entire plant? A. Yes.

Q. Representing the company? A. Yes.

Q. Now, your company did build the scaffold, there is no doubt about that, is there? A. That is right.

Q. And the scaffold was built by your men only and without any aid given by the Kellogg men? A. The scaffold was built by Rose and his helper.

Q. Now you said to Metz to prepare the chamber so that the Kellogg men could work in it; did that include the erection of the scaffold if necessary? A. No.

Q. Well, was your company to build a scaffold? A. No, sir.

Q. Well why did it build a scaffold? A. As an accommodation, which is often done.

Q. How much time was consumed in the erection of this scaffold? A. A scaffold of that nature I suppose would take two and one half or three hours to put up.

Q. How much money did it cost your company to accommodate them? A. I suppose about maybe twelve dollars.

Q. Now, did your company deduct the $12 from the Kellogg Company? A. I don't know whether they did or not.

Q. In spite of the fact that your company was not to build a scaffold, the scaffold was built? A. That is right.

The Court: That was built by your orders?

The Witness: Yes, sir.

The Court: And under the direction of your superintendent?

The Witness: Yes.

Q. Now, you say that the Kellogg men through Mr. Metz instructed you that they wanted a scaffold built? A. Yes.

Q. Did you know anything about the construction of a scaffold before that time, before Mr. Metz told you about the men wanting a scaffold? A. I knew there would have to be a scaffold of some kind built.

Q. You knew that? A. Yes.

Q. Did you notify the Kellogg Company when you gave them the order that they would have to bring the necessary boards to erect this scaffold? A. I did not for this reason—

Q. Yes or no. A. No.

Q. Can you tell us what time of the day it was that your Mr. Metz told you about the men wanting a scaffold built? A. Sometime in the morning, I don't know exactly.

Q. I mean before that time, did you know it was necessary to build a scaffold? A. I knew when we were giving out the work that it would be necessary to have a scaffold there to do the work.

Q. How soon before the men came there did you know that the holes had to be drilled? Was it one day, two days, three days before the men actually got there that you knew the work had actually to be done? A. I don't follow your question.

Q. I mean this: How long before your men came there that morning, the day of the accident, was it that you knew these holes had to be drilled? I mean how long prior to the day of the accident? A. It was probably two or three months before that when

we determined to drill these holes to find the thickness of the still, to find the working pressure of that particular unit.

Q. So that you knew it two or three months before? A. Yes.

Q. And at that time you knew it would be necessary to build a scaffold? A. We had scaffolds built at the time, of the same kind; my men built them, similar to the one this man fell from.

The Court: And you were familiar with the erection of scaffolds?

The Witness: Yes, sir.

The Court: Did this same man Rose build other scaffolds for you for that purpose?

The Witness: Yes, sir, he built several scaffolds in that chamber.

The Court: So far as the actual construction of this scaffold is concerned, while you contend that you were not obligated under your contract to build it, nevertheless you do now say you did assume to build it and built it with your workmen under the supervision of your superintendent?

The Witness: Well, we did build it, yes sir, in order to facilitate the work, to get the job done. Instead of waiting for Kellogg to send their carpenters up from Jersey City, we had at the time probably a half million dollars of work going on, so instead of waiting we had our own carpenter jump in and build the scaffold to get them started.

Mr. Elkins: That is all.

Juror Number Two: When you built these scaffolds previous to this, how many men did you build it for?

A. Usually two men were on those scaffolds working.

REDIRECT EXAMINATION BY MR. WORTENDYKE:

Q. On these previous occasions when you had built scaffolds for your men to clean out, was it necessary for them to use any tools weighing 30 pounds or more in the work? A. We did, on different occasions. We had a certain amount of welding to do in there. I myself have been in different chambers with two men on scaffolds when making an examination, but not at this particular time when Kellogg's men were there. It was planned to have these men drill Kellogg's test holes. I had personally examined this chamber on a scaffold somewhat similar to the one this man fell from and in this chamber—I don't know whether it was on account of the sulphur in the oil, a tremendous amount of corrosion had taken place and where the plates were originally one and one-half inches thicks, they had corroded to one inch or three-quarters of an inch so we had to be very careful, building scaffolds, supervising and keep in close touch with the condition of the chamber on account of this corrosion and I would safely say that every month we were examining those chambers very careful on scaffolds something similar to the one I suppose was built at this particular time.

Q. And do you know of your own knowledge what caused this scaffold to fall on the 9th of December, 1925? A. I was not there when it fell.

Q. You do not know? A. No. I was told that it was overloaded, that there were too many men on it.

Q. Did you see it after this man is alleged to have fallen from it? A. I believe I went up on the scaffold, yes.

Q. And what was the condition of it when you saw it immediately after he fell?

Mr. Elkins: I object.

The Court: Objection overruled.

A. I really cannot remember. It had collapsed, but which way I do not remember, that is, which side had collapsed.

Q. Did you take occasion to examine the nails in it? A. No, sir.

Q. Do you know what portion of it had collapsed? A. My recollection of it was, although I am a bit hazy on this, it is over 12 months ago, the top board running across where the men stood on, I think it was that part that broke, although I am not positive about how that scaffold was.

Q. Do you say it was one of the planks that broke? A. Yes.

Mr. Elkins: I object. He says he does not remember.

The Witness: I said it was a plank where the men stood, and let go.

Q. You are not employed by the Warner-Quinlan Company at the present time? A. No, sir.

Q. And have not been for how long? A. Over 12 months.

Mr. Wortendyke: That is all.

RECROSS EXAMINATION BY MR. ELKINS:

Q. This scaffold that you saw after the accident, was that similar to the scaffolds which had been customarily built there? A. I believe it was.

Q. Had any other scaffolds collapsed previous to this particular one? A. No.

Mr. Wortendyke: I do not think that is material.

The Court: The question has been answered.

Q. Didn't it appear rather strange to you that this scaffold should collapse? Was there something unusual about that? A. Something unusual?

Q. Are you familiar with scaffold constructions? A. Yes, I have seen a lot of it.

Q. Well, with a scaffold of this type, with two or three men standing on it, having a drill weighing 30 pounds, one man weighing 175 or 180 pounds and one man weighing 150 pounds, the drill weighing 30 pounds, the men standing there and not working—should that make the scaffold collapse? A. I would not say, but a whole lot can make a scaffold collapse.

Q. Assuming that one man was placing the drill in position and the other man was in back of him ready to give pressure, with the men standing in that position, with nothing else interfering with the scaffold, should that cause the scaffold to fall, yes, or no. A. I would say no.

Q. And if it did fall, doesn't that indicate to you that there was something wrong with the construction of the scaffold, or doesn't it indicate that there was something wrong, when the collapse came. A. Something had happened, not necessarily to do with the scaffold.

Mr. Elkins: I ask that the last part of the answer be stricken out.

The Court: Yes.

Mr. Elkins: That is all.

REDIRECT EXAMINATION BY MR. WORTENDYKE:

Q. Do you know where Mr. Metz is now? A. I do not.

Q. How long is it since you have seen him? A. 12 months, about that time.

Q. When you examined this scaffold after the accident had occurred, do you know whether the four uprights and the cross braces were still in position? A. I do not remember.

Mr. Wortendyke: That is all.

The Court: To what portions of the scaffold were down, you do not presume to testify?

The Witness: No, sir, it is hazy in my mind.

The Court: So that what gave way and what portion came down, you do not now recollect?

The Witness: I do not recollect, no, sir.

Juror Number Eight: You said that the scaffold gave way. Just what do you mean by giving way? Pulling loose at the nails, or what?

The Witness: It fell. The scaffold fell. Now, whether the nails pulled up or the planks broke, I do not remember.

RECROSS EXAMINATION BY MR. ELKINS:

Q. The last time you saw Mr. Metz he was working for the Warner-Quinlan Company, is that correct? A. Yes.

Q. And that was the last place you knew he was at or could be found? A. Yes.

Q. And you have not seen him since? A. No, sir.

Mr. Elkins: That is all.

CHARLES ROSE, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. Where do you live? A. Clark Township.

Q. Where are you employed now? A. Bachman and Sellers, Rahway, on housework.

Q. What is your trade? A. Carpenter.

Q. On December 9th, 1925, by whom were you employed? A. By the Warner-Quinlan Company.

Q. Where? A. Over in Warren.

Q. Were you there employed as a carpenter? A. Yes.

Q. When did you leave the employ of Warner-Quinlan Company? A. The first part of April, 1926.

Q. Are you acquainted with the dubbs units, the tank which was to be repaired on the 9th day of December, 1925? A. Well, I seen them.

Q. Did you have anything to do about it or any connection with it on that day? A. Well, I built the scaffold.

Q. Who told you to build the scaffold there? A. Why Mr. Metz gave me the orders.

Q. And at that time when you built this scaffold, had you had any experience in the building of scaffolds before that? A. I built many of them.

Q. How many? A. That I cannot say.

Q. How many years have you been a carpenter? A. About 15 years.

Q. And have you built many scaffolds in that period? A. Well, I have been building scaffolds on and off on this job.

Q. Can you give me any opinion as to the number of scaffolds you have built? A. I cannot.

Q. Have you built scaffolds of varying degrees in size and height? A. I have.

Q. Now, Mr. Rose, you say Mr. Metz told you to build this scaffold in this dubbs unit on December 9, 1925? A. Yes.

Q. Did he say anything to you when you went there to build this scaffold as to what it was to be used for or by whom it was going to be used? A. Yes.

Q. What did he say? A. He told me to build a scaffold to suit them people that were going to work on it.

Q. And who are those people that were going to work in there? A. The Kellogg people I understand.

Mr. Elkins: I object unless he knows of his own knowledge. He says he was told by Mr. Metz.

The Court: It is too late. The question has already been answered.

Q. What did you do then when he told you to do that? A. Well, I built a scaffold.

Q. When you built the scaffold, describe what size lumber you used and just how it was constructed? A. Well, I used four by fours for uprights.

Q. Yes. A. One by tens for brackets, that is, across the two uprights.

Q. Did you put any planking on top? A. I did, yes.

Q. And how many widths of planking did you put across the top? A. Well, as many as would go in the chamber without cutting them.

The Court: You had these planks lying side by side?

The Witness: Yes, sir.

The Court: What were the sizes of the planks?

The Witness: Three by ten.

Q. Now, how were these uprights and cross members fastened together? A. Nailed.

Q. And what size nails? A. Well, that I am not quite certain about, whether I used ten penny or twenty penny nails on this particular scaffold.

Q. You say you are not certain whether you used ten penny nails? A. But any nail was strong enough to hold that, any of them two kinds.

Q. Are you or are you not certain as to whether you used six penny pails? A. Six penny nails? No, sir.

Q. When you say no sir do you mean you are not certain or that you did not use them? A. They cannot be used for scaffolds.

The Court: Did you use them?

The Witness: No, sir.

Q. Did you use nails any smaller than ten penny nails? A. No, sir, not that I can recall.

Q. And are you certain of that? A. I am.

Q. And while you were building this scaffold, was anybody in there in the tank with you? A. I believe I had a laborer helping me to get the lumber up there.

Q. Who was he? A. That I cannot recall.

Q. Is he in court today? A. No, sir.

Q. Do you know where he is? A. No, sir.

Q. Now, were any of the Kellogg men in there while you were building the scaffold? A. No, sir.

Q. After you had completed the scaffold did you inspect it, look at it? A. I did, I looked things over and as far as I could see the work was all right.

Q. When you finished the erection of this scaffold in your opinion, from your experience in building scaffolds, how much weight would that scaffold sustain? A. Well, it should have held the weight of two or three men; that is what I understand was supposed to be on the scaffold.

Q. How do you know how many men were supposed to be on the scaffold?

Mr. Elkins: I object.

The Court: By whom were you told?

The Witness: I was told by Mr. Metz that gave the order to build a scaffold for a couple of men to work inside the chamber. That is the word I got.

Q. And after you built the scaffold and before you turned it over, did you see the plaintiff, Mr. Byram? A. I don't remember really. I didn't have any connection with those people.

The Court: You say you had nothing to do with them at all?

The Witness: No sir.

The Court: They didn't give you orders or tell you how to build anything?

The Witness: No. I knew there were two men when I was through with the scaffold. I went and asked them if the scaffold was all right.

Q. You say you went to the men and asked them if it was all right? A. Well, there was some one of them people there in the place at the time, I won't say whether it was one or two, but there was some people connected with Kellogg that I asked if the scaffold was all right.

The Court: How did you know they were connected with Kellogg Company?

The Witness: I was told they were Kellogg people.

The Court: Who told you that?

The Witness: Metz told me, and that is all I know.

Q. Would you recognize one of them if you saw him? A. I won't say; I never seen him before that morning and I didn't pay no attention to him.

The Court: Mr. Byram stand up. Did you see that man there?

The Witness: I don't remember having seen him before that.

Q. Was Mr. Byram one of the men that you asked whether the scaffold was all right?

Mr. Elkins: I object. It is manifestly improper. He does not remember seeing this man before to-day and Metz told him that the men were from the Kellogg Company.

Q. Now, after you completed this job and asked these two men, whoever they were, whether it was all right, what did you do and where did you go? A. I went back to another job in the plant.

Q. Did you take your helper with you? A. That I don't remember. I had no regular helper.

The Court: There was nobody except Mr. Metz who gave you any orders or instructions regarding how to build or what material to use in the erection of that scaffold, is that correct?

The Witness: No sir; I didn't take no instructions, just to build the scaffold to suit them people who were to work there.

The Court: And you never asked them prior to building it, what woods to use?

The Witness: No sir, but I asked them when I was through if the scaffold was all right.

Q. Did you see the scaffold after this alleged accident, after it had fallen? A. Yes sir.

Q. Do you know what broke on it? A. I cannot exactly recall really what broke. I could not say for sure whether the wood split or the nails pulled out.

Q. What time of day was it you inspected this scaffold after it fell? A. That I cannot say exactly, but I was called to come and repair it after I heard that it fell down.

Q. And do you recall what you found broken about it? A. Well, that is what I say, I don't just exactly know because the lumber was all piled up in a heap and I could not just exactly say what it was.

Mr. Wortendyke: Cross examine.

CROSS EXAMINATION BY MR. ELKINS:

Q. Your name is what? A. Charles Rose.

Juror Number Two: May I ask a question: You said you were instructed to build a scaffold by Mr. Metz to suit these people. Just what do you mean by suiting them? In strength or in condition.

The Witness: Strength and height, so that they could feel satisfied with the scaffold when it was finished.

Jurior Number Two: For the holding of their equipment and hose?

The Witness: Yes.

Juror Number Eight: Did you use new joists or old joists and crosspieces?

The Witness: Well, they were not perfectly new. The lumber had been used before, but I could not see any defect in it.

Jurior Number Eight: The material was put together with what kind of nails, finishing nails or flat head nails?

The Witness: Common headed nails.

Mr. Elkins: May I put on Dr. Perlberg at this time?

The Court: You may.

HARRY J. PERLBERG, called as a witness for the Plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ELKINS:

Q. Doctor, are you a practicing physician of this State? A. I am.

Mr. Wortendyke: The qualifications are admitted. I know Dr. Perlberg.

Mr. Elkins: The jury may not know him.

Q. Have you specialized in any branch of your profession? A. Specialized in x-rays.

Q. And how long have you been doing that? A. Eight years.

Q. And how long have you been admitted to practice medicine? A. Since 1912—15 years.

Q. Connected with any institutions? A. The City Hospital, the County Hospital, the County Tuberculosis Hospital, the County Tuberculosis Clinic.

Q. Did you take an x-ray picture of Leon Byram, the plaintiff in this case in December, 1925? A. Yes, December 9th.

Q. At whose request did you take the x-ray? A. Dr. Harold Hoops.

Q. And have you got a copy of the x-ray or a report of what it discloses? A. I have a carbon copy of the report, a duplicate.

Q. Is that your report? A. Yes sir.

Q. Just tell the court and jury what the x-ray discloses regarding his foot and when I say foot, which foot do you speak of? A. The x-ray was taken of the left foot and it showed a multiple fracture of the oscalsis, which is the heel bone, with a slight turning inward of a large fragment of bone.

Q. That is shown on the x-ray? A. Yes sir.

Q. Have you got the x-ray plate, Doctor? A. I have not.

Q. Who did you give it to? A. Dr. Hoops.

Q. And you do not know what he did with it? A. No sir.

Q. Doctor, that condition of multiple fracture, that indicates a breaking of the bone into a number of fragments? A. Yes sir.

Q. Small fragments, were they? A. Well, I don't remember now whether they were small or large.

Q. Doctor, after the fracture and after the bones mended, is there any callus formation? A. There is.

Q. Will you tell us whether or not in your opinion the callus formations brings on disability and pain?

Mr. Wortendyke: I think we have that testimony in. The Doctor is qualified as an expert to testify to his findings on the x-ray, and I suggest that we eliminate any unnecessary consumption of time in bringing that out again.

Mr. Elkins: Then may I qualify the Doctor—

The Court: Is the question whether or not this condition will cause pain?

(Question repeated by stenographer.)

Mr. Wortendyke: I submit there is no proof that this doctor saw any callus when his x-ray was made.

The Court: Did you find any callus formation?

The Witness: At the time of the examination on December 9th, there was no callus formation.

The Court: That seems to answer the question.

Q. Did you take an X-ray of his foot recently? A. Yes, sir.

Q. How long ago? A. Three-quarters of an hour ago.

Q. And have you the plates here? A. Yes.

Q. Does it show any deformity? A. Well, there is some shortening of the heel bone, the oscalsis.

Q. Is that in your opinion due to the fracture, the multiple fracture? A. Yes.

Q. And is that a permanent disability? A. Yes, sir.

Q. In your opinion, how will that affect his ability to walk or stand on that foot? A. It will interfere with his balance, and, of course, putting his weight on it will probably give him some pain because the bones are not in normal alignment. The arrangement of the bones has been disturbed.

Q. Now, Doctor, will you kindly describe the plates which you took three-quarters of an hour ago, and particularly point out the part wherein there is an abnormality. A. This is a view of the left foot, and this is a side view. This is a view from behind, and this irregular line running through it between this point and this point is the line of the main fracture. This is the injured foot and this is the uninjured foot. This injured foot, this bone in the injured foot is thicker and turned slightly inward. This is the outer side of the foot and this is the inner side. This showed a turning slightly inward. This is the right foot, the normal one, showing that this bone is longer and it points directly backward, whereas in the other one it turns slightly this side, which is inward. This deformity is due to the fracture. In this view it does not show so much except that the fracture is evident in there, and this part that looks white is

callous, or new bone, and this bone is cocked up a little. This is what makes this shorter. This is the injured foot and this is the normal foot. This showed this bone to be thicker and shorter than this one on the uninjured right side.

Q. The fracture which you X-rayed in December, 1925, in your opinion was that due to a trauma or accident of some sort? A. Yes.

Q. And this condition now showed by the X-ray plates is a condition resulting from that original fracture? A. Yes.

Mr. Elkins: Cross examine.

CROSS EXAMINATION BY MR. WORTENDYKE:

Q. Doctor, can you tell us in what respect the left foot of Leon Byram differed in shape and size before the accident from its appearance now as shown by your X-rays? A. No, I cannot.

Q. Are you prepared to say, Doctor, that the present shape or size or the shortening, as you call it, of the left heel bone of this plaintiff could not have existed before this fracture? A. It would be most unusual.

Q. In your experience, Doctor, are the heel bones or the bones of the feet identical in shape and size in the case of a person that has sustained no fracture at all? A. Yes, that is to say, there may be a slight projection like a spur on it that will not be on the other, but otherwise they are the same.

Q. In other words, in a normal person who has sustained no fracture the heel bone of either foot may have a slight spur or irregularity on one which is not on the other where there has been no fracture? A. Just to answer your question technically,

a spur is simply a slight projection. There is a spur on this particular foot and the spur occurs in people who are on in years.

Q. So that you say there is a possibility that the left heel bone of this patient, you never having seen him before this plate was taken, did have some irregularity or spur on it which alters its contour from the other foot? A. No.

Q. Then what do I understand you to mean, Doctor? A. May I illustrate on this one?

Q. Yes, do so. A. This is a spur, this little dark projection there. That has nothing to do with the arrangement of the bone; it is like a wart on the nose, and that has nothing to do with the nose. Here is another one. This is a spur and this is a spur, but that has nothing to do with that bone at all.

Q. Is this structure of that spur osseus? A. Yes.

Q. Of the same composition as the bone itself? A. Yes.

Q. And located on the periphery of the bone, is it? A. Yes.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. But in your opinion, Doctor, the condition which this man has is one due to a natural cause, or one brought about by an accident? A. What condition?

Q. The condition of his leg. A. The deformity?

Q. Yes. A. Oh, positively.

Mr. Elkins: I will offer these plates in evidence.

Mr. Wortendyke: No objection.
(Marked Exhibit P-6, P-7, P-8 and P-9.)
Mr. Elkins: That is all.

RECROSS EXAMINATION BY MR. WORTENDYKE:

Q. Is it your experience as a medical and surgical practioner that the skin surrounding the heel bone is extra heavy, is it not? A. Yes.

Q. Now, referring to the heel on the injured foot of the plaintiff, Leon Byram, in your opinion, Doctor, will the abnormality or shortening of the heel bone to which you have testified, be compensated by the growth of extra or thicker tissues to make up for that difference? In other words, will not nature provide such a cushion through the tissues surrounding that member so as to compensate for any alteration in its size or contour? A. Why, that is a hard question to answer. Nature does ordinarily compensate to make up deficiencies, but there is no deficiency in this case, there is simply a loss of balance in the foot, and it does not mean that there is excessive wear on one point over the other.

Q. In your opinion there will be no compensation for the shortening of this heel bone? A. Not so far as skin and tissue are concerned.

Q. Will there be any compensation from any other source? A. His leg may be twisted slightly to compensate. He may walk differently. He may walk on the ball of his foot or the heel of his foot. I do not feel qualified to express an opinion as to how this is going to be compensated.

Q. But you will not go so far as to say that it is not possible that there will be—

Mr. Elkins: I object to any possibilities. What we are concerned with is probabilities.

Q. So that you will not go so far as to say, Doctor, that it is not improbable that it will be compensated for either by adjustment of the leg or its position, or some other growth of the bone to take care of it? A. I would not like to give an opinion on that. That is an orthopedic problem and I am not qualified in orthopedic surgery.

Juror Number Eight: From the X-rays you took at the time of the accident did you make a diagnosis?

The Witness: Yes, sir.

Juror Number Eight: And that report gives a complete diagnosis?

The Witness: This is the carbon copy of the report I sent the doctor.

Juror Number Eight: Weren't there any X-rays showing any indications of ligaments or tendons having been torn loose or anything of that kind?

The Witness: The X-rays will not show ligaments or tendons.

Mr. Wortendyke: That is all.

REDIRECT EXAMINATION BY MR. ELKINS:

Q. The X-ray just shows the broken fragments of the bone? A. Yes, sir.

Q. And that was indicated by the X-ray which you took? A. Yes.

Mr. Elkins: That is all.
(Witness excused.)

The Court: Do you take the position, Mr. Wortendyke, that the defendant company did not assume to do the work of erecting this scaffolding by their agent's servants and under the direction and subject to the orders of the defendant company?

Mr. Wortendyke: My position is simply this: That in order to expedite the work being performed by the M. W. Kellogg Company, through its agents and servants, employees of the Warner-Quinlan Company, the defendant company furnished a carpenter and foreman, material for the erection of the scaffold, and that scaffold was erected, as has been testified, for the purpose of accommodating these employees of the M. W. Kellogg Company and to suit their approval.

The Court: I understand that. The question I am concerned about is whether you take the position that your company, the defendant company, assumed responsibility for the proper construction of that scaffold.

Mr. Wortendyke: I take the position that it did not assume responsibility.

(Recess Until Two P. M.)

Charles Rose. Recalled. Direct.

AFTER RECESS.

CHARLES ROSE, recalled:

DIRECT EXAMINATION BY MR. WORTENDYKE RESUMED:

Q. Mr. Rose, how thick were the cross members joining the uprights on which the planks rested in this scaffold? A. One inch.

Q. And how long are six penny nails? A. Not quite two inches.

Q. And in your opinion, based upon your experience as a carpenter for I think you said 15 years, and specifically your experience in erecting scaffolds for various kinds of work, would six penny nails, driven through the one inch cross member, have been sufficient to support the weight of the planking alone? A. Well, I guess they would hold the planking, just the weight of the scaffold itself.

Q. Would they have been sufficient to support any other weight? A. I don't think it would. It will not hold any vibrations of the scaffold, with anybody on it.

Q. Would it be sufficient to support the weight of one man on the scaffold? A. Well, it might, if he was very careful.

Q. Would it be sufficient to support the weight of two men on the scaffold? A. I don't think so.

Q. Well, when you say you used either ten or twenty penny nails to hold these cross members on, how do you recall that fact? A. Because that is the nail I mostly used for scaffold work.

Mr. Wortendyke: Cross examine.

CROSS EXAMINATION BY MR. ELKINS:

Q. How long had you been working for the Warner-Quinlan Company before this accident? A. I started the first part of July the same year.

Q. And were you hired as a carpenter or as a scaffold builder? A. As a carpenter.

Q. And as a carpenter you did all the carpentry work around there, is that correct? A. I did for the plant, yes.

Q. And is that a very large plant? A. Well, I won't say it is so very large.

Q. Was there any other carpenter there besides yourself? Were you the only carpenter in the plant? A. Working for the company, yes.

Q. And how much space, how much ground did that plant cover? A. Well, that is a hard thing, I cannot really say.

Q. Well, it is not a small plant, there are a lot of stills there, is that correct? A. Well, I cannot say for sure, I would say it would occupy a square mile, maybe.

Q. How many stills did they have in that plant, the kind in which you built this scaffold? A. Why, I don't remember now. They had two, first, and they installed two more of the same kind while I was working there, but I do not remember if they were already installed at the time this happened.

Q. You were kept pretty busy around there? You had a lot of work, didn't you? A. Whatever repair work there was to be done around the plant I done.

Q. Now, when you were asked to build this scaffold, with reference to the day of the accident, was it the same day or the day before? A. I believe it was the same morning.

Q. The same morning? A. Yes.

Q. And what were you doing at the time you were notified to do this work? A. I believe I was doing some work in the shop; I cannot quite remember that.

Q. Well, when you you were called away to do this work, Metz was the man that called you? A. Yes.

Q. And he took you away from the work you had been doing to finish this scaffold job, is that so? A. Yes.

Q. Did Metz take you to the tank, to the still? Who took you to the still? A. Why, he told me the still the scaffold was to be built in, to build the scaffold to suit the people that were going to work in there. It was specified the scaffold would be built so that the men could work in it.

Q. Did you know the specific kind of a scaffold you were to build? A. I didn't know specifically the certain scaffold, I just built a scaffold to work on in the chamber.

Q. Just tell us exactly, if you remember, what Metz told you about the type of scaffold, what kind it was to be and how high it was and so forth. A. Why, I don't know if he told me the height.

Q. He must have told you? A. He told me just to build a scaffold high enough so that they could reach the top of the chamber.

Q. That is all he told you? A. Yes.

Q. Before that, nobody had said anything to you about the kind of scaffold or how it was to be made, how high it was, how many boards were to be put on it at all? A. No.

Q. And Metz was the man that gave you those directions? A. Yes.

Charles Rose. Recalled. Cross.

Q. After receiving those directions did you then go for your material and helper or was that brought to you by somebody else? A. As I said I had a laborer—I used to get a laborer to help me once in a while when I could not handle the lumber myself. I sent him to get some lumber and I was getting ready inside the chamber for the scaffold.

Q. This helper you had, he was not a carpenter, he was just an ordinary laborer around the yard? A. Yes.

Q. He did not know anything about carpentry, did he, the kind of nails nor the boards, nor anything like that? A. Not that I know.

Q. He brought this material to you and it was put into the tank, is that right? A. Well, I pulled it up in the tank from down below. I was in the chamber and he handed them up to me from the ground.

Q. Well, you finally got all the lumber into the inside of the tank, that is correct, is it? A. Yes.

Q. Now, these posts, how did you arrange to get those up against the side of the tank; were they placed against the side of the tank? A. Not exactly.

Q. These cross bars, isn't it a fact you nailed one side of them and the laborer nailed the other side? A. No, sir.

Q. Well, how did you manage to nail all these four sides together without the help of anybody? A. Why, I nailed one side at a time.

Q. And what about the other side, did the other man nail the other side until you could get around there? A. I stood those pieces up against the other side of the chamber until I got the nail started, then finished up myself.

Charles Rose. Recalled. Cross.

Q. Isn't it a fact that the other man helped put the boards together? He did help you to do that? A. I don't remember whether he did or not.

Q. Well, it is a fact that the helper nailed one end while you nailed the other, until you got around— A. He didn't use no tools.

Q. You are sure of that? A. I am sure of it.

Q. And you want us to believe that you did all the hammering? A. I did all the hammering there was to be done.

Q. And you put all the nails in? A. Yes, sir.

Q. Every one of them? A. Yes, sir.

Q. Now, how many nails—these nails were put in the end of the brackets, is that right, the cross brackets, that is one end of the brackets would be at the upper part of the upright, is that right? A. Right up at the end of the upright, yes.

Q. And you would nail it up there, is that correct? A. Yes.

Q. And then on the upper part of the upright there would be a plank across to the other upright upon which the planks of the platform would be, is that correct? A. Yes.

Q. And in the plank connecting the two uprights you put nails on both ends, is that corect? A. Yes.

Q. What kind of nails did you put in? A. Well, I am not quite sure if I used ten or twenty penny nails.

Q. As a matter of fact, you are not sure what kind of nails you used at all, that day, that is so, isn't it? A. No.

Q. You are not sure whether you used— A. Any one of them nails would be strong enough to hold any scaffold, either ten or twenty penny nails.

Q. Assuming you put a six penny nail in there, that would be the improper nail for that work, wouldn't it, assuming that you did.

Mr. Wortendyke: There is no evidence that he did, if the court please, as far as his testimony is concerned.

Mr. Elkins: I withdraw the question.

Q. You said that if a six penny nail was used on the cross brackets it would not hold two men, that is so, isn't it? A. Yes.

Q. So that if six penny nails were in those boards and these two men got on the platform and started work on the platform and the scaffold fell, isn't it a fact that the fall would be due to the improper construction and use of these nails, that is so, isn't it? If the scaffold fell on which these two men were and in the cross boards there were six penny nails, the falling would be caused by the improper construction and the improper use of those nails, that is so, isn't it? A. I guess it would, in that case.

Q. Now, Mr. Witness, you said, if I recall your testimony correctly, that you were told to build a scaffold to suit the men, that is so, isn't it? A. Yes.

Q. Well as a matter of fact, Mr. Rose, you had not seen the Kellogg men until after the scaffold was finished, that is so, isn't it? A. I had no communication with them.

Q. So that you did not know what kind of a scaffold these men wanted, so far as your knowledge was concerned, getting it from Kellogg's men, you did not know what kind of a scaffold would suit them, did you, until after you finished the scaffold? I mean, did you know from information which you received from the Kellogg men, whose opinion was

to guide you, that you were going to suit them? A. I cannot say that.

Q. So that you did not know from your own knowledge and the knowledge of these men, whether there were going to be one man, two men or three men, you did not know that, did you? A. Well—

Q. Yes or no, did you know that? A. No, but here—

Q. You have answered the question. Now Mr. Witness, in the construction of this platform or scaffold, did Mr. Metz say anything to you about getting it up in a hurry, that the men were waiting around, and to get back to your job right away? Did he say anything like that? A. I don't recall it.

Q. Did he say anything about the fact that the men were waiting there? A. He said they were waiting.

Q. And did he say, "I don't want to keep them waiting long?" A. Not that I remember.

Q. As a matter of fact, he did take you away from your job? A. Yes.

Q. It was a rush job? A. Yes.

Q. And as soon as you finished your work you went back to the unfinished work which you had left? A. I did.

Q. And how long did it take you, Mr. Rose, to build this saffold? A. I cannot just remember exactly.

Q. Well, was it 20 minutes or a half hour? A. Well, it took me pretty nearly the whole forenoon.

Q. The whole forenoon? A. That is, for getting the lumber and building the scaffold, and getting it finished.

Q. Now, Mr. Rose, can you tell us how many nails were put in on each bracket at the upper end of the

uprights? A. Well, I put in three nails on each one, on each stud.

Q. How about the bottom? A. The bottom was resting on two planks across the chamber.

Q. And there was nothing to hold the bottom, was there? A. I nailed the bottom fast to the planks.

Q. To the brackets? A. To the planks.

Q. What planks? A. That I had across.

Q. How many nails did you put in the ends of those? A. That I cannot say exactly.

Q. You do not know whether it was one, two, three or five? A. It was just to keep the uprights in position, just to keep them from slipping either way, forward or back.

Q. Now Mr. Witness, assuming that you put up this scaffold in the manner in which you have described and you used twenty penny or ten penny nails— A. Yes sir.

Q. What makes you so positive you used ten penny nails? A. I always use those for scaffold work.

Q. Did you use six penny nails? A. Never did for scaffolds.

Q. In all the time you worked there? A. In all the time I worked there.

Q. If you used six penny nails, they would not be strong enough? A. If I used them—they could not be used.

Q. If you used them it would have been bad construction, that is, if you used them, I am not saying you did. A. If I did, yes, but I didn't.

Q. Now you say you used twenty penny or ten penny nails. A. Ten penny nails.

Q. Assuming you used those, and that men got on there, one weighing 175 or 180 pounds and the other 150 pounds, with a 30 pound drill, is there

any reason why that weight could not have been held on that scaffold? A. With six penny nails?

Q. With ten penny nails. A. There could be, in a case like if the lumber was defective in some way, that it either split or sometimes there might be a spot where you put a nail where it is not quite solid enough.

Q. In other words, if the scaffold fell, it was not built right, that is so? If it fell while the men were on it it was not built right, that is so, isn't it, Mr Rose? That is, if these men were on there and the scaffold fell, it indicates that the scaffold was not built right, something was wrong with it, either the wood or the nails, that is so, isn't it? A. Well, sometimes when anybody builds a scaffold to do certain work, they generally do it to suit the work to be done. Now, I was told when I started the scaffold that a couple of men would be working there, and I understand there were four men on the scaffold when it broke down.

The Court: Did you see them?

The Witness: No sir.

The Court: That is just what somebody told you?

The Witness: Yes sir.

The Court: Strike that out, what he understands.

Q. Now, I would like to have an answer to my previous question.

(Repeated by stenographer as follows):

"Q. In other words, if the scaffold fell, it was not built right, that is so? If it fell while the men were

on it it was not built right, that is so, isn't it, Mr. Rose? That is, if these men were on there and the scaffold fell, it indicates that the scaffold was not built right, something was wrong with it, either the wood or the nails, that is so, isn't it?"
A. Well, it seems that way.

The Court: What is the difference in length between a six penny nail and a ten penny nail?

The Witness: Well, a ten penny nail is—I cannot exactly remember, three inches I think, and a six penny nail is something less than two inches.

Mr. Elkins: If your Honor please, I have samples of them, if counsel has no objection I will offer them in evidence.

Mr. Wortendyke: Ask the witness if those are the nails.

Q. Will you tell me whether or not the upper nail is a six penny nail? A. A. six penny nail, yes.

Q. And the lower one is what? A. That is a ten penny nail.

Mr. Elkins: I offer them in evidence.

Mr. Wortendyke: No objection.

(Card containing two nails offered in evidence marked Exhibit P-10.)

Q. What kind of heads did these nails have? A. Flat heads.

Q. Like these? A. Yes.

Q. How about the wood, did you inspect the wood before you put it up? A. Well I looked at it.

Q. Did you examine it? A. That is a thing I cannot say, that I examined every part of it.

Q. While you were building this scaffold, Mr. Rose, was anybody from the Kellogg Company whom you knew, in the tank while you were building the scaffold? A. No.

Q. You and your helper were in there alone? A. Yes sir.

Q. And as a matter of fact, you did not see anybody from the Kellogg Company at all from the time you first spoke to Mr. Metz until the time you left the tank and went back to your work, that is so, isn't it? A. Not that I remember.

Q. Had you put any scaffolds up in the plant before this one? A. Yes, I put up plenty of them.

Q. A lot of them? A. Yes.

Q. About the same kind of scaffolds? A. About the same kind of scaffolds we used in the chambers before that.

Q. And none of them ever fell, did they? A. No sir.

Q. You saw this scaffold after it fell, I mean the one in which these men were? A. I seen it, yes.

Q. And it collapsed entirely, the whole thing fell down? A. One corner of it.

Mr. Elkins: That is all.

REDIRECT EXAMINATION BY MR. WORTENDYKE:

Q. You are not now in the employ of the Warner-Quinlan Company? A. No sir.

Q. How long have you been out of their employ? A. Since the first part of April, 1926.

Mr. Wortendyke: That is all.

Charles Rose. Recalled. Recross.
Fred'k J. Conway. Called by Defendant. Direct.

RECROSS EXAMINATION BY MR. ELKINS:

Q. Did you leave yourself, did you get a new job? A. I left myself, yes.

Mr. Elkins: That is all.

FREDERICK J. CONWAY, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. On December 9, 1925, were you employed by the Warner-Quinlan Company? A. Yes.

Q. At Warren, New Jersey. A. Yes.

Q. What was your official capacity as an employee of that concern? A. Fireman on the high pressure stills, the dubb stills.

Q. Were you on that day familiar with number one dubbs unit as a part of your plant? A. Yes.

Q. On December 9, 1925, were you in that tank? A. Yes.

Q. On that day did you see the plaintiff in this case, Leon Byram, at Warren, New Jersey? A. Yes sir.

Q. When and where on that day did you first see him? A. It was about eleven o'clock when I first saw him.

Q. Where was he when you first saw him? A. Out in the road alongside the stills.

Q. And when you saw him outside the still at eleven o'clock that forenoon, what were you doing and where were you? A. That I do not know. I know what I was supposed to be doing.

Fred'k J. Conway. Called by Defendant. Direct.

Q. You say you do not know where you were or what you were doing when you saw him at eleven o'clock? A. I was passing by there.

Q. Did you after seeing him at eleven o'clock that forenoon, have occasion on that day to go into the tank? A. Not at that time.

Q. Did you after that time on that day? A. Yes.

Q. And what time on that day did you first go into the tank? A. About twenty minutes of twelve the carpenter finished up the scaffold.

Q. Was that the carpenter who was last on the stand? A. Yes.

Q. Now, when you went into the tank after the carpenter had finished up the scaffold, what did you do in there? A. Started scraping the corrosion at the top of the tank.

Q. And were you on the scaffold when you started to scrape it? A. We were on the scaffold.

Q. Was there anybody with you? A. Yes.

Q. Who? A. Cole.

Q. Who is he? A. Operator of the stills at the time.

Q. He was employed by the Warner-Quinlan Company? A. Yes.

Q. Where is he to-day? A. I do not know.

Q. How long since you saw him last? A. About a year ago.

Q. Do you know whether he is in the employ of the Warner-Quinlan Company or not?

Mr. Elkins: I object.

A. No, he is not employed by the Warner-Quinlan Company.

Q. What was he doing at the time you were scraping the corrosion on this scaffold, from the side of the tank?

Mr. Elkins: I object to what someone else was doing. In fact I object to this whole line of testimony. I thought it was going to lead up to something material, but I cannot see the materiality of something anybody else employed by the Warner-Quinlan Company did before.

The Court: Unless it has some bearing upon the strength of the scaffold.

Mr. Wortendyke: That is the purpose for which it is asked.

The Court: Overrule the objection.

Mr. Elkins: Exception.

Q. What was he doing on the scaffold? A. I was helping him scrape the corrosion.

Q. So that you were helping him scrape the corrosion? A. Yes.

Q. What kind of tools were you using? A. Files flattened off on the end and sharpened up.

Q. And at that time was there anybody else on the scaffold besides yourself and Mr. Cole? A. No sir.

Q. And at that time had the scaffold been completed? A. The scaffold had been completed.

Q. And what time after that particular hour when you and Cole were on the scaffold did anybody else come on, and who was it? A. Nobody came on there until Kellogg's men came on after awhile and I went down.

Q. At the same time they came on? A. I do not know the exact time.

Q. Did you see the Kellogg men when they first entered the tank? A. Yes.

Q. Where were they when they first entered the tank? A. They came through the bottom.

Q. And how many were there of the Kellogg men that you saw coming through the bottom? A. Two.

Q. And were you still continuing with your scraping? A. Yes.

Q. Now, will you state exactly what next happened? A. Well, we were scraping about two inches from the top and the Kellogg men came in and we were not finished with our work. They came up with their drill and we shifted over to the other side of the tank so as not to hold them up, to get out of their way, and they put the drill in place and down went the scaffold.

Q. And do you know what happened to the scaffold or were you able to see what caused it to fall down? A. No, sir.

Mr. Elkins: I object unless he is qualified.

Q. What became of you and Cole when the scaffold went down? A. We went down with it.

Q. And how much of a drop was there from the platform on which you were working to the bottom of the tank? A. Around six feet.

Q. Did you notice how long it was from the time when the Kellogg men first came into the bottom of the tank until they got upon it? A. No.

Q. Did you see this drill that they brought up? A. Yes.

Q. What kind of a drill was it? A. It was an air motor, an air drill.

Q. Can you give us any idea how big it was, how broad, how long and how high? A. It was about a foot, I think.

Q. And how thick through was it? A. It was a round drill.

Q. Did it have any connections to it? A. An air hose.

Q. How was it brought up on the scaffold for the Kellogg men? A. They carried it up. The helper lifted it up to the driller.

Q. And did the scaffold fall before or after the Kellogg men had gotten the drill and themselves up on the scaffold? A. The scaffold fell after.

Q. Where did this hose connected with the drill lead to as these men were bringing the drill up the ladder to the scaffold? A. It came in through the bottom hole of the tank and up over the side of the scaffold.

Q. Was there any rope connected with it at all? A. I didn't notice.

Q. After this scaffold fell did you see the plaintiff, Leon Byram? A. No, sir.

Q. What did you do when it fell? A. I barked my shin for one thing and I tried to get out.

Q. Did you then go out of the tank? A. Yes.

Q. Do you know whether you preceded Byram out of the tank or whether he preceded you? A. I was on top of the planks when they went down.

Q. And you did not see where Byram was? A. No, sir.

Q. When you went through the hole at the bottom of the tank was Byram inside or out? A. I was the last one out.

Q. And how long from the time that the scaffold fell was it that you finally emerged from the bottom of the tank? A. It was not very long.

Q. You did not lose any time getting out? A. No, sir.

Mr. Wortendyke: That is all.

CROSS EXAMINATION BY MR. ELKINS:

Q. Now, when you saw Mr. Byram in the morning, he was not doing any work? A. No, sir.

Q. He was just waiting around there? A. Yes, sir.

Q. And when you got into the still in the afternoon, the scaffold had already been erected? A. Yes, sir.

Q. You did not see Mr. Byram in the still while the scaffold was being erected? A. No, sir, I was not around there.

Q. As a matter of fact, Mr. Byram had to wait until you got finished, is that right? A. Yes.

Q. And did you hear Mr. Metz tell him to wait until you had finished? A. I told you I didn't see Metz.

Q. But you know Mr. Byram waited until you got finished, is that correct? A. He didn't wait until we got finished.

Q. He was waiting around for something, wasn't he? A. I guess he was.

Q. Now you say, Mr. Conway, that the air hose led from the bottom of the still, that is the opening through which you came, over the top of the scaffold, is that correct? A. The scaffold was built square with planks on top. He brought the air hose in through the opening at the bottom of the tank and right up over the top of the scaffold.

Q. Did the hose interfere with the scaffold in any way? A. Not that I know of.

Q. Did the hose rip the boards apart? A. Not that I know of.

Q. Isn't it a fact that suddenly and without any warning the boards gave in? A. I don't know about the boards giving in. She gave in somehow.

Q. Well, the scaffold gave way? A. Yes, sir.

Q. And down it came? A. Yes.

Q. And just before it came down Byram and his helper were actually working on the top of it, that is correct, is it? A. Yes.

Q. Now, is there anything which you noticed done by Byram or yourself or any of these men which caused this scaffold to fall? A. I didn't notice anything.

Q. In other words, all you know you were working there and suddenly this thing broke? A. Yes.

Q. Now, Mr. Conway, you had worked in stills before this, of course? A. Yes.

Q. And you had seen men on scaffolds using the same kind of a drill, and the scaffold did not break, isn't that a fact? A. Yes.

Q. And how do you account for the breaking of this scaffold, can you say? A. I cannot say.

Q. Did you see whether or not Mr. Byram was injured? A. I didn't see Mr. Byram.

Q. You saw him before he was hurt, though? A. Yes.

Q. You were hurt yourself? A. Yes.

Q. Was Mr. Cole on top of the platform, I mean on the top planks, when the crash came? A. Yes.

Q. And you were on top also? A. Right alongside of him.

Q. In other words, there were four men there? A. Yes.

Q. Did you have anything to do with the building of this scaffold? A. No, sir.

Q. Who gave you your orders? A. Cole, he was foreman over us.

Q. Did he say anything to you about the scaffold? A. No.

Q. Did you or Cole or anyone else present say anything in your presence to Byram about the scaffold, how many men it was going to hold? A. No, not that I now of.

Q. But Cole knew that the Kellogg men were going to work in the tank? A. I guess he did.

Q. In fact he was in there when it happened? A. Yes.

Q. Did you see Metz at all? A. No.

Q. Now, did you see Mr. Rose, the carpenter, at all, at any time before the accident? A. No.

Q. When you got there he had left? A. The carpenter had left.

Juror Number Eight: Could you have done any scraping in this tank without having the scaffold there?

The Witness: No, we could not.

Juror Number Two: There were four corners to this scaffold?

The Witness: Yes, sir.

Juror Number Two: There were four men, according to what you said on the scaffold at one time?

The Witness: Yes.

Juror Number Two: Were all four of you on the one corner when it went down?

The Witness: No, sir.

The Court: Where were you?

The Witness: I was on the opposite side of the tank.

The Court: You and your helper were over there?

The Witness: Cole and I. He was my boss.

The Court: You were on the opposite side and Mr. Byram and his helper were on the other side?

The Witness: Yes, sir.

Mr. Elkins: And it was necessary for you to have this scaffold in order to do your work, whether the Kellogg men were there or not at the time; you needed this scaffold?

The Witness: Sure.

Juror Number Eight: The testimony is a little confusing. One witness has testified that one part of the scaffold fell. You were on the opposite side directly across the tank?

The Witness: Yes.

Juror Number Eight: And your part fell as well?

The Witness: That I don't know.

Juror Number Eight: What caused you to fall?

The Witness: We were on the same scaffold.

Juror Number Eight: Did the whole scaffold collapse or just part of it? Were you on the same side or directly opposite?

The Witness: Directly opposite.

Juror Number Eight: And your part of the scaffold fell, too, that you were on?

The Witness: I don't know whether our side of the scaffold fell, but after one side fell, the other side had to go.

Juror Number Eight: The part you were on fell, did it?

The Witness: The uprights could stand there, but the platform on top would have to go.

Juror Number Eight: What made you go to the bottom of the tank unless your part of the scaffold fell?

The Witness: We had to go to the bottom of the tank anyway.

Juror Number Four: Do you know if the uprights caved in?

The Witness: I don't know what caved in.

Juror Number Four: There were four uprights, two on one end and two on the other?

The Witness: Yes, sir.

Juror Number Four: One end caved in, is that right?

The Witness: That I don't know.

Juror Number Four: And one end of the scaffold fell, or the scaffold would not have collapsed?

The Witness: You have four uprights and on top of those you have planks laid on the top so that we can walk. If this end went down, then the boards would slide down, anyway.

The Court: You had these boards across the top like the floor on a stage?

The Witness: Pretty nearly.

The Court: And if one end went down the boards would then be on an angle, is that what you mean?

The Witness: Yes, sir.

Juror Number Two: Then there were only two men on the part that went down?

The Witness: I don't know how the scaffold broke.

Juror Number Two: Why should that corner go down with two men on that corner?

The Witness: I don't know.

Juror Number Two: The cross planks were not nailed?

The Witness: No, I don't believe the top planks were nailed.

Mr. Elkins: As a matter of fact, you do not know what happened except that it fell?

The Witness: That is all.

LAWRENCE CAHILL, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. Doctor, are you a licensed practicing physician and surgeon of the State of New Jersey? A. Yes, sir.

Q. And you have been for how long? A. 16 years.

Q. Are you a graduate of any schools of medicine or surgery? A. Yes.

Mr. Elkins: I will admit the Doctor's qualifications if you want me to.

Q. Did you examine the plaintiff in this case, Leon Byram? A. Yes, sir.

Q. When and where? A. I examined him on October 25, 1926.

Q. And what was the nature of the examination that you made? Was it local or general? A. A general examination from his head down.

Q. And what did you find with respect to this patient as a result of your examination? A. I found him to be a man of about 61 years of age, a boiler maker, deaf from working at it a number of years. He was wearing glasses the day I examined him. I examined his head and an examination of the scalp showed negative for any signs of injury, no signs of any cuts on his head. His pupils reacted normally to light. I tested his muscles by having him stand with eyes closed with his hands by his sides and having him touch the tip of his nose. He could do that, showing that he could control the muscles, had good muscular co-ordination from the brain center. Another test was the Rhomberg test, having him stand with his eyes closed and noting whether he swayed. This man did not sway around. That indicated there was no disturbance in his brain.

The next examination was of his body. There was nothing on his body that was unusual. His heart and circulation was normal. The upper extremities were normal. His lower extremities from the knees down were covered with scars the result of an old eczema condition that the man had years before. The examination showed that he has two flat feet. He told me he suffered from a fracture of his left heel bone. I did not have any X-rays at the time to know whether he had or not, but I took his word for it. Outside of the fractured heel bone, that was all the matter with the man and I considered the man able to work at that time.

Q. Doctor, confining yourself to the left heel bone, did you make any tests to determine whether or not there was any limitation of function, assuming that he had had a fracture of that bone? A. There is no limitation in his ankle joint. He could bend the left foot as well as he could bend his right foot.

Q. Did you have him walk around? A. Yes.

Q. And in walking around did he give you any evidence of impairment of function or limitation of movement? A. No, sir.

Q. Did he complain to you at that time of any pain? A. He did not.

Q. Doctor, with respect to the flat footed condition, were you able to tell from your examination how long that condition had persisted at the time you found it? A. It looked like a permanent condition. Both feet appeared to be about the same.

Q. Could you give us in your opinion how long it had persisted? A. Not exactly. He may have had it 20 years or more.

Q. Now, Doctor, in your experience and practice, have you had occasion to see various cases of flat footedness and to treat cases of flat footedness and to diagnose such conditions? A. Yes.

Q. Can you tell us, Doctor, what results or effect are normally to be found from a flat footed condition, as far as the function of the feet and legs is concerned? A. Well, flat footedness generally causes considerable pain in the legs and of course this pain is relieved immediately with an arch support.

Q. Did you examine this man's shoes at the time you examined him? A. Yes.

Q. Did you find any arch support in it? A. He had an arch supporter in each shoe.

Q. Just what immediate results, as far as the surrounding anatomy is concerned results from a flat footed condition, particularly in an individual of the weight and size of this plaintiff? A. The normal arch of the foot is lost. The ligaments have been stretched from years of hard work. This is quite common in working men. They give way and the foot loses its normal contour unless it is artificially propped up. It is under constant strain and causes pain.

Q. Can you give us in your opinion, the degree of alteration in the contour of the foot resulting from the flat footed condition? A. In this gentleman?

Q. Yes. A. I would say he has a moderate degree of flat footedness in both feet.

Q. Now, Doctor, have you had any experience in the reading of radiographs and their use in the diagnosis and treatment of cases involving fractures? A. Yes. I have a machine of my own in my place that I have been using for the past ten years, to aid in making diagnosis.

Q. Are you connected with any hospital? A. Yes, I am medical director of the East End Hospital.

Q. Doctor, I show you Exhibit P-6, which purports to represent the heel of this plaintiff, the right foot, and Exhibit P-7, purporting to represent the heel of this plaintiff's left foot, and ask you from examining those two exhibits to tell us whether Exhibit P-7 indicates any distortion, abnormality or improper alignment as compared with the right foot, Exhibit P-6, and by that I mean any such distortion or change in alignment as would not exist in the absence of a fracture in the left heel. A. Exhibit P-6 is not so good, but judging from the lower end of the external malleus, the extreme end of this heel and the corresponding distance on the other picture, it seems to be about the same, according to the eye.

Q. Now, Doctor, referring you to those two exhibits, are you able to tell whether Exhibit P-7 would indicate that the patient is suffering from any impairment of function with respect to the left heel bone. A. You could not tell anything from these pictures. There is no detail here, only on one section of the picture from here down. The rest is simply a blur. There is nothing on this.

Q. Referring to the other two exhibits which you now hold in your hands, are you prepared to tell us

whether either one of them indicates any condition which would not be present in an unfractured left heel. A. I could not show anything by these pictures. They do not show anything.

Q. Now, Doctor, assuming that this plaintiff received a multiple fracture involving three or four fragments of the bone of the left heel, with proper treatment how long would it be, in your opinion, before this man would have complete resumption of function and be completely free from pain? A. He would have bony union in six weeks. He will have disability in and about the ankle joint for three months, and probably another month or two he will have some more trouble which gradually clears up in the period of four or five months.

Q. Are you able to tell—referring now to Exhibit P-7—whether the union of the fragments as there indicated is perfect or not? A. This picture does not indicate anything to me. There is no fracture shown here, no detail, only the lower end of the heel bone is shown. The upper end is just a blur.

Q. So that from that picture you are unable to form any opinion as to the impairment of the left heel as compared with the right? A. No.

Q. Now, Doctor, when there is a fracture, I understand that there is an excrescence of callus, osseu callus, which forms the union between the fragments, is that a fact? A. Yes.

Q. And from such a union, and assuming that the fracture has properly united, under proper treatment would there be any shortening of the bone as the result of the fracture and the union? A. This heel bone is about two and a half or three inches long and an inch or an inch and a half thick, and fractures of this bone are usually the result of

an injury such as this man received, like a fall, landing on the heel or legs. It is like hitting a window with a stone, it will crack it without breaking it completely apart. It would not cause any shortening, it simply heals up.

Q. Now, assuming that after this fracture there is complete union, attended with the usual formation of callus, would you say, Doctor, from your experience and also as a result of your examination of the plaintiff, that he would experience pain in this foot as a result of the fracture? A. No, sir.

Q. When you examined this plaintiff were you able to form any opinion from what you found as to his ability to perform his usual work, which is that of a boiler worker? A. Yes, I examined him in August following this accident and I concluded at that time that the man was able to work. He might have been able to work a month or so before, but he was able to work at that time.

Q. At the same trade he was formerly employed at? A. Yes.

Q. This eczemius condition which you refer to as having found on this man's legs, is that in any way connected with the fracture of the heel bone? A. No, that is a chronic skin disease he suffered from. It may have broken out on him again. I don't know.

Q. Affecting nothing but the skin? A. Yes.

Mr. Wortendyke: That is all.

CROSS EXAMINATION BY MR. ELKINS:

Q. How long did you take to make this examination, Doctor? A. It took about a half hour.

Q. And during the half hour you examined the man from head to foot? A. Yes.

Q. And did you then ascertain when the accident took place? A. Yes.

Q. That was in December, 1925? A. Right.

Q. Did you ascertain whether or not the man had returned to his employment when you examined him? A. I did not.

Q. From December, 1925, until the time you examined the man, the man should have been cured of any fracture in the left heel? A. Oh, yes.

Q. He did not complain that he was not cured, did he? A. No.

Q. He didn't make any claim to you about any injury to the head, the body or anything of that sort? A. No, he said his head was all right.

Q. For whom did you make the examination? A. Mr. Wortendyke.

Q. Of course you do a lot of court work I understand, and you examine a lot of patients? A. I did in one case for you.

Q. I am not trying to discredit you, Doctor. I am just trying to get something in. Of course you won't swear that this man did not have a fracture? A. No.

Q. And isn't it a fact that the best way to determine a fracture is by an X-ray? A. Yes.

Q. And X-rays usually depict the correct situation, do they not? A. If they are taken from the right angle.

Q. Dr. Perlberg is a good X-ray man, isn't he? A. I do not know anything about him.

Q. Now, Doctor, as a matter of fact, when one has flat feet there is a distortion of the contour of both feet, that is, the condition which exists in the left foot would exist in the right foot as to flat footedness, that is so, isn't it? A. If there is flat footedness in both feet, yes.

Q. And this man had flat footedness in both feet? A. Yes.

Q. So that the condition in the left foot should be the same as the condition in the right foot? A. Not necessarily. One can be greater than the other.

Q. Is there any marked difference in the distortion? A. I would not say that.

Q. In other words, would you say if there was flat footedness existing in both feet it would be more marked in the left foot than in the right? A. I would not say that. It could be either way. A man, for instance, could have one flat foot starting a year or so before the other.

Q. Now, Doctor, looking at Exhibit P-9, the right foot, how is that bone condition there? Is that a good picture? A. That is all right.

Q. Very good. What about the condition of the bone there as to whether that is normal? A. Which bone?

Q. I mean the heel bone, as to whether it is normal or abnormal. A. Here you see some spurs.

Q. That spur is due to some natural condition, isn't it, Doctor? A. I don't know what it is due to.

Q. Would you say it was due to an accident? A. No.

Q. What about this condition, is this a traumatic condition or a natural condition? A. I don't know.

Q. And you are not an expert on feet, is that right? A. In what way?

Q. You testified that this man's condition is due to flat footedness. I ask you now, reading this X-ray, which you now admit is a good picture, whether the condition you see depicted there is a natural condition or a traumatic condition. A. Well, it is not natural in everybody's feet, but it

occurs frequently enough in people without a history of accident.

Q. Just answer yes or no. If you don't know, all right. A. I can explain that.

Q. Is that condition shown there on the right heel bone a natural or a traumatic condition? You say there are spurs there? A. I will explain that—

Q. Yes or no, is it traumatic? A. I cannot answer you yes or no.

Q. Well, you do not know as a matter of fact, do you, Doctor? A. I do know.

Q. Well, what is it, traumatic or natural? A. I told you it occurred both ways.

Q. All right, we will let it go at that. How about this one, can you read this picture Exhibit P-10? A. Yes, I can read it. There is no mark here to indicate whether it is the right or the left foot.

Q. Well, this is the left foot. A. What is the other one?

Q. The right foot. A. This one is marked right. There is no notation on this one.

Q. In other words, the right foot is bad and the left foot is good? A. I don't know whether this is the right or the left.

Q. That is the left foot. How about that, is it all right? A. No, it is not all right.

Q. That shows a marked degree of distortion in the left heel, is that so, Doctor? A. No.

Q. Well, there is some distortion there? A. Yes. It shows a spur down on the lower surface.

Q. And it is greater than the one in the right foot, isn't it? A. It is greater than the one on the right.

Mr. Elkins That is all.

LAWRENCE REGAN, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. Where do you live? A. Raritan, New Jersey.

Q. In December, 1925, by whom were you employed? A. The Warner-Quinlan Company, Warren, New Jersey.

Q. What was your capacity? A. Office manager and secretary to Herbert Haslin.

Q. Did you see the plaintiff Leon Byram at the plant of this company on December 9, 1925? A. Prior to the accident?

Q. On the day of the accident? A. I did.

Q. What time of the day did you first see him? A. I would say between one and two, after the injury.

Q. And where was he when you saw him? A. Coming into our first aid room for treatment.

Q. Who brought him in? A. A man whom I did not know, and a Mr. Stauch, who was in our employ.

Q. Would you recognize that man now if you saw him? A. The man that brought him in?

Q. Yes. A. I believe I would.

Mr. Wortendyke: Mr. Gallagher, will you stand up?

Q. Is that the man that brought him in? A. No.

Q. And you were at the office when he was brought in? A. I was in the laboratory at the time which adjoins the first aid room.

Q. Did you do anything for him or to him? A. I helped our chemist—our chemist does the first aid work, and I aided him in taking off the man's shoe and stocking, if I remember rightly.

Q. How did he came in? A. On foot, but he was assisted by this gentleman whom I do not know. He had him under the arm.

Q. Did you have any talk with Mr. Byram at the time, any conversation? A. No, I did not. I was talking to our chemist and there was a conversation between probably the four of us in the laboratory at the time.

Q. Did Mr. Byram say anything in your hearing on that occasion? A. Yes sir, he said several things which I do not recall.

Q. Do you recall anything he said about the way this accident occurred? A. No, to me he didn't say anything.

Q. Had you seen him before that time? A. I had not.

Q. Now, who was your immediate superior at the time you were thus employed? A. Mr. Haslin.

Q. Did you personally have anything to do with the arrangements, if any, made for the doing of this work by the M. W. Kellogg Company? A. Well as his secretary, of course, I typed up all contracts rather, purchase orders which in the real sense of the word were contracts and checked the stuff on the purchase order; anything that was not quite satisfactory I went out and took care of it for Mr. Haslin.

Q. Now, on the morning of that day were you present on the making of any arrangements for the erection of a scaffold? A. No.

Q. At any other time? A. No.

Q. Did you during that day have occasion to inspect the scaffolding in the tank before the accident or after? A. I did.

Q. And when was that? A. After the accident.

Q. How long after the accident?

Mr. Elkins: I object to any testimony relating to a time after the accident on the ground it is incompetent, irrelevant and immaterial.

The Court: Do you claim there had been any change in condition?

Mr. Elkins: My objection lies mainly in the fact that any testimony given now relating to the time subsequent to the fall is immaterial unless they can show that the condition was the same. I say further, how can it affect the collapse and fall of the scaffold?

The Court: We are entitled to know whether it collapsed in the middle or at the ends?

Mr. Elkins: All right, I will not object.

Q. How long after the accident did you see the scaffold? A. From 20 minutes to a half an hour.

Q. How did you come to go there? A. On all accidents in the plant I have to make an investigation. On hearing of this accident I reported the same to Mr. Haslin. He told me to go over and find what was the matter, to get the data on it and report the same to him.

Q. And when you got over there who was there? A. When I got there there was nobody there.

Q. And what did you find when you got there, as far as the structure of the scaffolding was concerned? A. I found that one end of the scaffold had given way.

Q. And can you particularize for us just what particular section or part of the scaffold had given way and what you were able to find as to the cause of it?

Mr. Elkins: I object to any testimony as to cause unless he is qualified as an expert to be able to determine what the cause of it was.

The Court: Tell us what you saw.

The Witness: When I got there the four uprights were still standing and the boards which I assume the men were standing on, and the boards across the uprights to support the platform boards had given way. The boards remained intact but went down.

The Court: What boards or timbers were broken?

The Witness: None were broken.

Q. Then you reported back? A. I did. I got the men who were there and all concerned, and got their statements.

Mr. Wortendyke: Cross examine.

CROSS EXAMINATION BY MR. ELKINS:

Q. Now, when you saw Mr. Byram, will you tell us what leg was injured? A. Well, offhand I could not remember, but from hearing the testimony here I know it was the left leg.

Q. I don't want that, but was his leg injured, whether the left or the right, as far as you can remember? A. Nobody there could determine because there was no physician there, but he complained of injuries on his instep.

Q. And was he bleeding? A. No.

Q. No blood coming from his leg? A. No.

Q. Any from his face? A. I did not see any.

Q. Now, you say that the planks were all right, that is the planks on which you assume the men stood, is that right? A. Right.

Q. But the support, that is the board leading from one upright to the other upright, the end, gave way, is that correct? A. No. It fell in the center, the boards broke.

The Court: That is just what we asked you and you said there was nothing broken.

The Witness: I mean on the walk-way, there was nothing broken, where the men were standing there was nothing broken, but the one that came from the four by four to the other four by four broke.

Q. One of the supports holding this platform broke in half? A. That is right.

Q. Where did it break? A. Well, I didn't find out, whether in the middle or at a corner. I know it broke, but where I could not say.

Q. Did you see the nails sticking out of the ends? A. I had no occasion to look at the nails.

Q. Did you see them? A. I didn't see any nails.

Q. Did you look for any? A. No, I wanted to see what was the matter, I didn't expect anything to come out of it and I just wanted to find out what had happened.

Q. Had a board ever broken like this before in a platform? A. I never examined any. I have no knowledge of them.

Q. You are not familiar with scaffolds are you? You do not know anything about the construction of those scaffolds? A. No.

Q. Did you see any other boards off the scaffold broken? A. (No answer.)

Q. How about the cross pieces, they were down too, weren't they? A. The cross pieces, from the four by four to the four by four?

Q. Yes, I mean the cross bar brackets? A. I don't remember.

Mr. Elkins: That is all.

REDIRECT EXAMINATION BY MR. WORTENDYKE:

Q. You say this horizontal piece which counsel has designated as the cross bar, broke between the two uprights? A. That is right.

Q. When you say that did you notice whether or not the two fragments of its were fastened to the two uprights or not? A. They were on the four by fours, that is how I knew it broke. That was the report I made.

Mr. Wortendyke: That is all.

RECROSS EXAMINATION BY MR. ELKINS:

Q. Now, you say that they were still on. At that time did you go right up to the tank? A. I was inside the tank.

Q. Did you go up to the top of this scaffold after it collapsed? A. I didn't climb on the scaffold, I could see from the inside of the tank.

Q. How many feet high was the scaffold? A. I should say five or six feet.

Q. Was it light or dark in the tank? A. Well, it was light enough so that you could pick up a coin on the bottom of the tank.

Q. And you made a hurried examination of it and made your report? A. Yes.

Q. And in this hurried look you learned that the support running from one upright to the other broke in half? A. Yes.

Q. And that the two ends of the support were still attached to the uprights? A. That is right.

Q. But you do not remember whether the cross brackets were broken and had fallen, do you? A.

I cannot remember that. I remember about the cross piece breaking, that was in my report. That cross piece had cracked in half.

Q. As a matter of fact, the whole scaffold broke, the whole thing collapsed? A. No, the two by fours remained intact; they were still up when I made my examination.

Q. Of course the uprights leaned against the side of the still? A. That is right.

Q. And when you saw them they were against the side of the still? A. I would not say they yere against the side of the still. They were still standing up when I went in there.

Q. Of course they were because they were leaning against the wall of the still. A. They were standing straight, they were not leaning against anything.

Q. Why is it you cannot remember whether or not the bottom supports were broken, if they were? A. I paid no heed to them, I just wanted to know why the walkway came down, and I found out why and I made my report on the same.

Q. You do not know whether the cross brackets were broken or not? A. I do not remember that.

Mr. Elkins: That is all.

REDIRECT EXAMINATION BY MR. WORTENDYKE:

Q. When you were asked about the cross brackets do you refer to the horizontal piece that supported the platform or to some other brackets? A. Why the cross piece, what I call the crosspiece is what holds the walkway. That was broken in half.

Q. And were the ends still attached to the uprights? A. I could not see anything else broken; I didn't notice it.

Mr. Wortendyke: That is all.

FRANK STAUCH, sworn.

DIRECT EXAMINATION BY MR. WORTENDYKE:

Q. On December 9, 1925, were you employed by the Warner-Quinlan Company? A. Yes.

Q. At Warren, New Jersey? A. Yes.

Q. On that day did you see the plaintiff in this case, Leon Byram there? A. Yes.

Q. When and under what circumstances did you first see him on that day? A. Well, I saw him when he came in with his car.

Q. In the morning? A. In the morning.

Q. Do you know where he put his car? A. First he left it at the dubbs plant.

Q. And when he came up there to the dubbs plant after leaving his car, did he have his equipment with him? A. He had it in the car.

Q. Did he have the equipment over by the dubbs plant when you first saw him? A. No, he didn't have it out of the car yet.

Q. Now, when did you first see him? A. Well, I saw him when he was hurt.

Q. And that was where? A. In the laboratory.

Q. How did he come into that place? Did you see him come in? A. I saw him walk over there with the help of another man, with his elbow resting on his arm.

Q. Did he receive treatment at the laboratory? A. Yes.

Q. And thereafter what did you and he do, if anything? A. Thereafter they called me up again to ask me would I take him home, so I said sure I would take him home, which I did, and on the way over he was telling me about the machine. He said after he fell down this machine hit him on his leg.

Q. What machine did he mean? A. The air machine.

Q. When was it he told you that the air machine had fallen down and hit him on his leg? A. Him and his helper was telling me that.

Q. And who was his helper, do you know? A. I could not remember what his name was.

Q. Was it when you were on the way home with him that he told you that? A. Yes, as we were on our way home.

Q. That was the same day of the accident? A. Yes.

Q. What did he say to you? A. That he had fallen down and his machine dropped on his leg, his own air machine.

Q. And you took him home? A. I took him home to Jersey City, yes.

Q. Was he able to walk or not? A. Well, I had to assist him up the stairs.

Mr. Wortendyke: Cross examine.

CROSS EXAMINATION BY MR. ELKINS:

Q. Now, Mr. Stout, what was the occasion for your asking him about the air machine striking him? Were you investigating the accident for the company? A. I didn't ask him. His helper was the one that told me.

Q. Did you ask him how he was hurt? A. I asked him how he got hurt and then he told me.

Q. And did he tell you that this machine fell on his leg? A. After he landed, the drill came down—I don't know whether he said the drill, but the machine he was operating with.

Q. Did you see the scaffold after it collapsed? A. No, sir.

Q. You do not know if the scaffold fell or not? A. I don't know anything about the scaffold.

Q. Let me understand you correctly. Did he say that after the scaffold had fallen and he had been thrown to the bottom of the still that the drill, the machine which he was holding and using, fell and struck him on the leg, is that it? A. Yes.

Mr. Elkins: That is all.

Mr. Wortendyke: The defendant rests.

Mr. Elkins: No rebuttal.

Mr. Wortendyke: I respectfully move for the direction of a verdict in favor of this defendant on the grounds heretofore urged in support of my motion for nonsuit and in addition thereto on the following two grounds:

First, in that it appears from all the testimony in the case to be so convincing in extent as to warrant no inference to the contrary, that in going up on this scaffold this plaintiff assumed the risk thereof in view of the circumstances under which it was erected and the nature and use to which it was put, particularly with regard to the fact that it has been testified and not contradicted that at the time this plaintiff and his helper got on the scaffold and brought their machine there, that the scaffold was not ready for them and that at the time there were two other men in addition to themselves on the scaffold.

Secondly, upon the additional ground that the plaintiff's whole case has failed to disclose any duty on the part of this defendant owing

to this plaintiff with respect to the erection, construction and maintenance of a scaffold, or any violation of a duty, and in view of the fact that this defendant was not a guarantor of the scaffold or its use for any particular purpose, that no implied warranty can be predicated upon the acts done and the circumstances involved, and that therefore a verdict should be directed in favor of the defendant.

The Court: I understand your position to be that you do not dispute responsibility for exercising reasonable care in doing what you did do in the erection of a platform, but you insist that there is no testimony here to show that you did not exercise that degree of care?

Mr. Wortendyke: Exactly.

The Court: Not that there was no duty, but there was no proof that you violated such duty, is that your position?

Mr. Wortendyke: Yes.

The Court: Under those circumstances I must let the case go to the jury because there is some testimony here which is in dispute as to where the platform gave way and how it gave way. I shall be obliged to deny your motion and allow you an exception for the reason that I think it is not a court question but a question which the jury has to decide.

The Court's Charge.

The Court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY:

On December 9, 1925, Leon Bryam was employed by the M. W. Kellogg Company, which company had a contract with the Warner-Quinlan Company, the defendant in this suit, to do certain work in and about a steel or iron tank which has been referred to in this case as a still, which work consisted primarily in boring holes in the side of this tank which necessitated the erection of a scaffolding for the purpose of reaching the places where the holes were to be bored near the top of the still. Mr. Byram, having been sent by the Kellogg Company to this plant of the defendant company, at Warren, New Jersey, proceeded to take a position on a scaffold which had that day been erected inside of this still, in order that he and a fellow workman might reach the place where the holes were to be bored, and while he was in the act of placing the drill for the purpose of starting the boring of the holes, the scaffolding upon which he was then standing gave way and he was precipitated to the bottom of the still, and injured, and he brings this suit against the Warner-Quinlan Company, upon whose property the still was, to recover damages for the injuries which he claims he sustained in this fall.

At the outset, gentlemen, it must be apparent to you that the mere fact that Mr. Byram was precipitated to the bottom of this still because of the scaffolding giving way, standing alone by itself is not sufficient to justify you in bringing in a verdict in his favor and against this defendant company. In the first place the plaintiff must show that there

was a violation of or failure to perform some duty which this defendant company, the Warner-Quinlan Company, owed to this plaintiff because the suit is rested upon a charge of negligence and negligence presupposes the violation of or failure to perform some duty which one person owes to another. The duty rests upon the plaintiff of not only showing that there was a duty, but that the defendant violated or failed to perform that duty, and was therefore negligent, and that such negligence was the proximate cause of this accident. He must prove those things to your satisfaction by a fair preponderance of the evidence in this case.

You will observe that when Mr. Byram went to the property of this defendant company, he was in no sense their employee. He was an employee of the Kellogg Company. There is in evidence a contract between the Kellogg Company and this Warner-Quinlan Company with respect to the work which was to be done upon this particular still, and you may find therein language which reads something as follows: "That the Kellogg Company was to furnish all of the materials, tools and labor necessary for the work involved." But you see, gentlemen, so far as this case is concerned, the question of whether or not the Kellogg Company was to build this scaffold becomes of secondary importance, because if it should appear that this scaffolding, although the Warner-Quinlan Company was under no obligation to erect it, was in fact voluntarily erected by them, by servants of theirs acting under their supervision and control, then there would be a duty owing by this defendant company, the Warner-Quinlan Company, to this plaintiff, who was an employee at that time of the Kellogg Company. Now, if you find the facts to be that

such was the duty that arose here, that is to say, that the Warner-Quinlan Company, although not obligated probably in a technical sense to build a scaffold, nevertheless assumed to do it and assumed control, management and supervision of its construction, then there was a duty upon their part to exercise reasonable care in the construction of this scaffolding to see that it was made reasonably safe for the purposes for which the scaffolding was intended. The burden rests upon the plaintiff of proving that the defendant company, if that was the situation here, did not exercise such care.

Now remember, gentlemen, that the Warner-Quinlan Company was in no sense an insurer of the safety of Mr. Byram when he went on that platform, nor, on the other hand, was this defendant required to furnish him a perfectly safe scaffolding. It was in no sense a guarantor of the safety of that scaffolding, but under such circumstances this defendant company would be required to exercise reasonable care to see that the scaffolding which was furnished was reasonably fit and safe for the purposes for which it was intended. That is the measure of duty under such circumstances, and the burden rests upon the plaintiff, as I said before, of establishing that reasonable care in that respect was not exercised.

There is some dispute in the testimony as to what was the cause of the fall of this scaffolding. Mr. Byram claims that it was due to insufficient nailing of the cross member between the uprights, which cross member supported the platform of the scaffolding. He claims that six penny nails were used, whereas in his judgment as a carpenter and an erector of scaffolding ten penny nails should have been used, or larger. On the other hand one

of the witnesses for the defendant says that that was not the cause of the scaffolding falling, but that it was due to the breaking of the wood in one of the cross members that bore up the platform.

If it should be the fact—and that is for you to say—that the wood in the cross member was defective, you must remember that that alone would not be sufficient to charge liability to this defendant, because, as I said before, the defendant was not a guarantor or warrantor that this platform was absolutely safe under all conditions, and was not under an obligation to furnish boards that would absolutely stand the tests regardless of any question of inspection, but in furnishing the timber which went into this scaffolding the defendant would be required to exercise reasonable care, and if reasonable inspection of that timber would not have disclosed this defect the defendant company could not be held responsible for anything that ensued from such latent defect which was not discoverable by the exercise of reasonable care.

So if you reach the conclusion that the plaintiff here has not borne the burden of proof of satisfying you by a fair preponderance of the evidence, assuming that this platform was erected voluntarily by this defendant, by its agents, under its supervision and control, that this defendant, through its agents and servants was negligent with respect to the erection of that scaffolding, there could be no recovery here by this plaintiff, and your verdict would have to be for the defendant and against the plaintiff, a verdict of no cause of action.

But, gentlemen, if you find that this defendant was chargeable with negligence, then you must proceed to consider the next question involved here, and that is whether or not any negligence on the

part of the defendant, if any is found, was the proximate cause of the falling of the scaffolding.

By proximate cause we mean that cause which naturally and probably led up to and which naturally might have been expected to produce the very thing that happened, namely, the falling of this scaffolding. It is the moving, efficient cause of an accident, without which the accident would not have happened.

Even though the defendant should have been found to be negligent on this occasion, if such negligence was not a proximate cause of this accident, then again there could be no recovery by the plaintiff against the defendant. Your verdict would be in favor of the latter and against the plaintiff, a verdict of no cause of action. But if you reach the conclusion that this defendant was negligent, and that its negligence was a proximate cause of this accident, then you have to consider two interwoven questions—if I may use that expression—which have been raised here in the defendant's answer, namely whether or not this plaintiff was guilty of contributory negligence or assumed the risks incident to his work on this particular scaffolding.

Now, gentlemen, the burden rests upon the defendant of proving such defense to your satisfaction by a fair preponderance of the evidence in this case. In a case such as this when we say "Assumption of risk" it virtually means contributory negligence because it is not in any manner or means meant to convey the inference that Mr. Byram was the agent or servant of this defendant company. So the question you will want to take up first is whether or not Mr. Byram was guilty of contributory negligence.

He was required, gentlemen, to exercise reasonable care for his own safety when he went into this still and upon that scaffolding. He was required to so conduct himself, to make such inspections and to make such observations with respect to the place he was to work in and with respect to the scaffolding upon which he assumed to place himself, as a reasonably prudent person would have done when confronted by the same situation and circumstances, and if he failed in that particular and thereby in any degree contributed to the happening of this accident, no matter what that degree might have been, then he is precluded from a verdict at your hands and your verdict would have to be in favor of the defendant and against the plaintiff, a verdict of no cause of action.

I do not want you to get the impression, from what I said a moment ago regarding the contributory negligence and assumption of risk, that the decision of one disposes of the other in any manner or means, because you have to consider whether or not in view of the circumstances of this particular case, Mr. Byram assumed when he went up on this platform, the risk of an injury such as eventually came to him. The burden rests upon the defendant of proving that to you by a fair preponderance of the evidence in this case. But, gentlemen, if Mr. Byram, with several years experience as a builder, or at least experienced in erecting scaffolds, went into this still knowing the character of the work which was done and the size of nails that went into this scaffold, and was acquainted with everything concerning the erection and construction of this scaffold, and he then assumed to go on the scaffolding without exercising reasonable care for his own safety, in other words,

if he shut his eyes to the conditions that confronted him there and which reasonable prudence on his part would have apprised him of, why then of course he did assume the risk of any accident which might have come to him in connection with a faulty construction of this scaffold, because as I said at the outset, he was required to exercise reasonable care for his own safety. He was not required to go in there and assume everything, all risks that might come to him, whether he exercised reasonable care or not, but he was required to exercise such care as a reasonably prudent person would have done, confronted with the situation which confronted him when he went into that still and upon the scaffold.

Now then, if you find that this plaintiff was guilty of contributory negligence, or assumed the risk of an accident such as that which happened under the circumstances of this particular case, that would prevent a recovery by him.

But, if on the other hand, gentlemen, you find that this defendant was negligent, that its negligence was a proximate cause of the accident, and it further appears from all the evidence in this case that this plaintiff was free from contributory negligence under the rules I have given you, then the plaintiff is entitled to a verdict against the defendant, and if he is so entitled he is entitled to be compensated for the injuries which he personally sustained as the natural and proximate result of the accident. That would include pain and suffering for so long a time as you find he has experienced it and if it was the natural and proximate result of the accident. You will remember the testimony produced by the plaintiff, to the effect that a bone in the left heel was fractured. There is

some claim here that it has resulted to some degree in a permanent disability. If that is true, this gentleman is entitled to be compensated for it. If he lost any earnings or wages as the natural and proximate result of this accident, he is entitled to be compensated for those, too, or for any loss in his earning capacity.

I am not going to dwell on what the testimony was in that respect, but I think that he testified that he had been making on an average forty or forty-five dollars a week, that is, at the rate of ninety cents an hour. I think that was his testimony, but you will be governed on all these questions by your own recollection of the testimony; you are not bound by what the court may say in that respect when it differs from what you remember. Then, too, he would be entitled to be compensated for the reasonable cost of an endeavor to cure himself of the injuries sustained as the result of this accident.

There is some testimony here that there was a doctor's bill of about forty-five dollars, and crutches were purchased at a cost of six or seven dollars. If those sums are reasonable and were necessary as the result of this accident, then there might be a recovery for that also.

I think there are no further rules of law, gentlemen, that it is necessary for me to give for your guidance in disposing of this case, but in conclusion I think I should caution you that you are not to be swayed by passion, sympathy or prejudice. If you merely follow the oath you have taken here, determine what the facts in the case really are, and apply the rules of law the court has now given you to those facts as you find them, then your verdict will be a right verdict, no matter for which party

it may be rendered. I am reminded that the plaintiff himself testified that he was under no expenses for doctor's bills or crutches, that those items were paid for by other sources, so you will eliminate those sums and those expenditures from your consideration if you find the plaintiff is entitled to a verdict.

There was some testimony on the part of one of the doctors for the plaintiff, that this injury would in some degree be of a permanent nature. Now, if that causes him any inconvenience in the future, or disability in the future, he is entitled to be compensated for that, but only in case that such disability is the natural and proximate result of this accident.

You may now retire.

Exhibit P-1.

WARNER-QUINLAN COMPANY
PURCHASING DEPARTMENT

Telephone 1110 Bowling Green November 18, 1925
New York

Purchase Order No. 12941

The M. W. Kellogg Co.
Foot of Danforth Ave.
Jersey City, N. J.

Please furnish the following material, consigned to destination given below, IN ACCORDANCE WITH CONDITIONS GIVEN ON BACK OF THIS ORDER, sending bill in duplicate for each shipment, send shipping receipt for each shipment.

NOTE ORDER NUMBER ON EACH BILL

QUANTITY	ARTICLE	PRICE
	Drill plug and electric weld expansion chamber on #2 unit where cracked.	
	Expansion chamber on the inside in way of crack, to be reinforced with 1″ boiler, plate the size of re-inforced patch approximately 18″ x 24″. This patch to be attached by electric welding.	
	The M. W. Kellogg Co. to furnish all material, tools and labor for this work.	

Job. No. 3530

Terms of delivery
Wanted: at once (If you cannot fill
F. O. B. Warners, N. J. (this order by this
Ship via ..... (date advise at once

Requisition NO. Dubbs system

WARNER-QUINLAN CO.
H. HASLAM,
General Manager.

CONDITIONS.

QUALITY:

All materials furnished must be the best of their respective kinds, and will be subject to our inspection and approval at any time within thirty days after delivery. If not up to specifications they will be held for disposition at your risk and expense.

QUANTITY:

The quantity of material must not be exceeded without our permission in writing being first obtained.

DELIVERY:

Delivery must be effected within the time stated on the purchase order, unless prevented by unforeseen circumstances and delays beyond your control.

ROUTING:

All material must be forwarded by the particular route named, otherwise the difference in freight and extra cost of cartage will be charged to your account.

BILLS:

Itemized bill giving the correct purchase order number must be sent at time of each shipment accompanied by a copy of the manifest and bill of lading otherwise we cannot prevent delays in payment of your account.

DRAFTS:

No draft for purchase made by this company will be honored.

CARTAGE:

No charge will be allowed for cartage or packing unless by special agreement.

STATEMENT:

Send statement of account the first of each month.

NOTICES:

A notice must be sent to us as soon as material has been forwarded on account of this purchase order, giving number of order, kind of material, shipper's name, car number and initials, and route by which forwarded.

DISCOUNT:

Show cash discount on invoice:

Exhibit P-2.

Purchase Order No. 12941

Return this to
WARNER-QUINLAN COMPANY
79 Wall Street, New York

Receipt is hereby acknowledged of this order and delivery will be made at the time specified and in accordance with the price, terms of delivery and conditions mentioned on this order.

Date Nov. 19, 1925

(Signed) The M. W. Kellogg Co.
F. J. DIETZ.

NOTE: Acknowledgments must be signed. No rubber stamp signature will be considered sufficient.

Exhibit P-3.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

LEON BYRAM, Plaintiff, vs. WARNER-QUINLAN COMPANY, Defendant.	Action at Law. Plaintiff's Interrogatories.

To:

MESSRS. AUTENRIETH, GANNON & WORTENDYKE,
Attorneys of Defendant:

PLEASE TAKE NOTICE, that the plaintiff demands of the defendant, answers under oath to the following interrogatories, within ten days after the service thereof upon you:

1. State whether the defendant entered into an agreement with the M. W. Kellogg Company to perform certain work upon their premises at Warner, N. J.

2. State what work was to be done under the contract aforesaid.

3. State whether the defendant knew of the presence of the plaintiff upon its premises at Warner, N. J., in pursuance of his duties as a boilermaker for his employer M. W. Kellogg Company.

4. State whether the defendant supplied a certain scaffold for the use of the plaintiff in a certain still used by the defendant in refining oil.

5. State whether said scaffold was erected by the defendant.

6. State whether the defendant in anywise notified the plaintiff before alleged accident of the condition of said scaffold supplied by it.

7. State whether the defendant through its agent and servant in anywise advised or directed the work to be performed by the M. W. Kellogg Company at its plant Warner, N. J.

8. State whether said scaffold was lent to the M. W. Kellogg Company for the purpose of performing the work under the contract aforesaid, at its plant at Warner, N. J.

ALEX. SIMPSON,
Attorney for Plaintiff.

Service of the within is hereby acknowledged this 25th day of May, 1926.

AUTENRIETH, GANNON & WORTENDYKE.

Exhibit P-4.

NEW JERSEY SUPREME COURT

HUDSON COUNTY

LEON BYRAM, Plaintiff vs. WARNER-QUINLAN COMPANY, Defendant	Action at Law Defendant's Answers to Plaintiff's Interrogatories

To: ALEXANDER SIMPSON, Esquire,
Attorney of Plaintiff.

PLEASE TAKE NOTICE that the defendant herein submits the following answers under oath to interrogatories heretofore demanded by plaintiff herein:

Answer to First Interrogatory—Yes.

Answer to Second Interrogatory—Drilling holes in south expansion chamber of No. 1 Dubbs unit.

Answer to Third Interrogatory—Yes.

Answer to Fourth Interrogatory—Yes.

Answer to Fifth Interrogatory—Yes.

Answer to Sixth Interrogatory—No, but furnished carpenter to build a scaffold under plaintiff's supervision.

Answer to Seventh Interrogatory—C. L. Meetze, superintendent of oil refinery located the place to be drilled in the expansion chamber but did not direct or advise how the drilling should be done.

Answer to Eighth Interrogatory—The scaffold was built at the request and under the supervision of the M. W. Kellogg Company's employees to perform their work.

WARNER-QUINLAN COMPANY,
By: H. HASLAM.

STATE OF NEW JERSEY
COUNTY OF UNION } ss.:

H. HASLAM of full age being duly sworn according to law on his oath deposes and says: I am the Plant Manager of Warner-Quinlan Company, a corporation, the defendant in the above entitled cause named and am personally acquainted with the details and circumstances of the situation set forth and described in the complaint therein. I have read the interrogatories served by plaintiff herein upon defendant herein and the foregoing answers thereto and the matters and things contained in said answers are true.

H. HASLAM.

Subscribed and sworn to before me this 9th day of June, 1926.

LAWRENCE REAGAN,
Notary Public,
Commission Expires February 27, 1931.
(N. P. Seal)

Service of the within Answers to Interrogatories is hereby acknowledged this 11th day of June, 1926.

ALEX SIMPSON,
Attorney for Plaintiff.

Exhibits P-6, 7, 8 and 9

X-ray plates of various aspects of left foot and heel of plaintiff.

Exhibit P-10.

Card containg two nails.

New Jersey Court of Errors and Appeals

LEON BYRAM,
Plaintiff-Appellee,

vs.

WARNER-QUINLAN COMPANY,
Defendant-Appellant.

ON APPEAL.

BRIEF FOR APPELLANT.

Facts.

The parties hereto will be designated for the purpose of reference herein, by the respective appellations of plaintiff and defendant.

On the 9th day of December, 1925, defendant having ordered the M. W. Kellogg Company, a concern engaged in the business of constructing and repairing steel tanks and equipment of a similar nature, to make repairs in and upon a certain steel oil still owned by and upon the property of the defendant, said M. W. Kellogg Company, in pursuance of said order, sent plaintiff, one of its men, with a helper to the plant of the defendant, directing the plaintiff to report for instructions to the general superintendent of defendant's plant (Case, pp. 13, 14 and 32). Before arriving at defendant's plant, neither plaintiff nor the M. W. Kellogg Company had any notice as to the particular nature of the tank to be repaired or particularly as to its size, height above ground, etc. (Case, pp. 19 and 34). The plaintiff

reported to defendant's superintendent in the morning of the day in question, and was informed by said superintendent that the still would have to be cleaned before plaintiff could commence work therein, and suggested that plaintiff wait around until said cleaning process had been completed (Case, pp. 32-33). Plaintiff accordingly waited until noon time, or shortly thereafter, and then prepared to proceed with his work (Case, pp. 50-51).

It appeared that the location at which the repair work was to be performed in the still was several feet above the level of the base thereof, and was accessible only by way of ladders or scaffolding (Case, p. 50). It does not appear from the evidence in the case whether or not defendant's other employees had been doing any cleaning in the still before the scaffold in question and hereinafter referred to, was erected. Neither M. W. Kellogg Company nor the plaintiff had made any provision for equipment by which plaintiff might reach the point in the still at which the repairs were to be made (Case, pp. 16, 30 and 34). While plaintiff was waiting for the cleaning process to be completed in the still, defendant's superintendent requested one of its carpenters, a man who had been employed in similar work for a good many years, and who had built scaffolds in many of the stills located at the plant, to erect a scaffold in the particular still in question "to suit" plaintiff and his helper (Case, p. 75). The carpenter thereupon erected a scaffold similar to those which he had erected for similar purposes in other stills of a similar nature and thereupon plaintiff, in preparing to commence work, entered the still from the bottom by means of a ladder leading from the ground to an aperture in the bottom of the still, looked it over, and in response to

the carpenter's question as to whether or not it suited him, plaintiff, answered in the affirmative (Case, pp. 78 and 79).

Before the accident hereinafter referred to and in the course of preparation for commencement of the work, plaintiff had mounted the scaffold upon which defendant's superintendent was already standing, as well as were other employees of defendant, and the superintendent thereupon designated the particular area and place on the inside of said still at which plaintiff was to perform his work (Case, p. 36). Plaintiff had brought with him for the purpose of performing his work, a pneumatic drill, weighing thirty pounds, together with miscellaneous hose and other attachments and connections therefor (Case, pp. 49 and 52). After the plaintiff had been shown by defendant's superintendent where the work was to be done, and plaintiff being then upon the scaffold, plaintiff's helper handed up to him the pneumatic drill and his equipment, and thereupon himself mounted the scaffold, whereupon the same gave way, carrying the plaintiff and the others then upon the same to the bottom of the still, whereby plaintiff sustained personal injuries (Case, pp. 52 and 53).

At no time before the accident had plaintiff shown either defendant's carpenter or defendant's superintendent the equipment which he, plaintiff, was going to use on the scaffold, nor had he told them or either of them what the nature of the same was or how much the same weighed (Case, p. 55). In directing defendant's carpenter to build the scaffold, the defendant's superintendent had informed him that it was to be built for two men (Case, p. 94).

ARUGMENT

POINT I.

There was insufficient evidence to take the case to the jury on the question of the existence of negligence on the part of the defendant.

Even if we assume that plaintiff as a representative of M. W. Kellogg Company, was an independent contractor as far as the defendant was concerned, the furnishing of the scaffolding equipment to the plaintiff by or with the consent of the defendant for use by the plaintiff in expediting his work or in assisting him in the performance of the same, coupled with the fact that upon his making use thereof, the same failed and he was injured, would not be sufficient of such proof to take the case to the jury. In the case of *Abram Holmes* vs. *Stephen Pelligrino,* IV N. J. Advance Reports, page 849, the defendant, the owner of a building, for the purpose of expediting the completion of certain work therein by an independent contractor, furnished the latter with planks, horses, etc. for use as a scaffold in order to enable the contractor by standing thereon to reach the portions of the walls of the building upon which he was to perform work. Said defendant in the cited case was under no contractual obligation to furnish this scaffolding equipment, but volunteered to do so partly for his own benefit in anticipation of the resultant expedition of the work. In said cited case, plaintiff, the employee of said independent contractor, in making use of the scaffold for the purpose of carrying on his work, was caused to fall therefrom through the breaking of one of the

planks. This was the *quantum* of proof adduced in the case, and upon which the court held that the *res ipsa loquitur* doctrine upon which, if upon any ground, plaintiff might be entitled to a recovery, did not apply, in view of the fact that there was no proof that the breaking of the planks resulted from some defect discoverable by inspection on the part of the defendant in the exercise of ordinary care, particularly in view of the fact that the object causing the injury was not of itself highly dangerous. In the instant case, the facts and *quantum* of proof appear to render the same parallel with the case just cited, in that, in the instant case for the purpose of enabling the employee of the alleged independent contractor, to get started on his work without unnecessary delay, the defendant furnished scaffolding equipment for his use. There is this additional element in the instant case, however, which seems to confirm the applicability thereto of the rule in the Holmes case, that is, that in the instant case defendant undertook to furnish and build this scaffold "to suit" plaintiff and his helper, and thereby, we respectfully submit, constituted the carpenter whom defendant furnished, the agent of plaintiff in the erection and construction of the scaffold.

Scherer vs. *Post Office B. & L. Ass'n,* 91 N. J. L., 666.

The only evidence tending to point out the particular and immediate cause of the falling of the scaffold, was the testimony of the plaintiff himself, that when he fell, he noticed that one of the cross members supporting the planking of the scaffold was down, and that in the few moments required to recover from his fall, the ends of the

nails protruding from said cross member seemed to him to be six penny nails (Case, p. 37). This evidence we submit, bearing upon the particular cause of the failure of the scaffold, could at best create only a temporary prima facie basis for inference of fact, and even if standing unexplained, its presence in the plaintiff's case would not justify the denial of a non-suit. Nevertheless, the uncontroverted proof put in on the defendant's case in the testimony of the carpenter who erected the scaffold, that he used nothing smaller than ten penny nails (Case, p. 76), should destroy whatever prima facie foundation might be deemed to have been laid by plaintiff's testimony, and the effect thereof being thereby nullified and eliminated, a verdict should have been directed in favor of the defendant at the close of the whole case on this particular aspect of the matter.

Possibly, our position with respect to the effect of the prima facie case created by the particular testimony of the plaintiff just referred to, is best illustrated by the analogy of the rule governing the drawing of inferences as to agency where an automobile owned by A and driven by B is upon proof of such facts, presumed to have been driven by B as the agent of A, for the purpose. This presumption, however, is, of course, overcome by proof as part of the defendant's case that although B was driving A's automobile at the time in question, and even though such use by B was with A's knowledge and consent, yet that B in so using said automobile was not acting as the agent of A and upon the introduction of this proof in rebutting the direction of a verdict in favor of A at the suit of a third party injured through the operation of said automobile, is justified.

Tischler v. *Steinholtz,* 122, Atl. 880.

The particular aspect in this case which discloses the fact that in furnishing the scaffold for plaintiff, defendant's superintendent undertook to do so without being obligated so to do, should not be lost sight of. There is no proof in the case that defendant's superintendent was under the duty, as far as the scope of his employment by defendant was concerned, of furnishing plaintiff, the employee of M. W. Kellogg Company, with any equipment or assistance for the purpose of his work. The nature of the contract arising out of the employment by defendant of M. W. Kellogg Company to do the repair work on the still, is disclosed by the document consisting of two parts, namely, an order and acceptance, which was offered in evidence by the plaintiff in this case, and marked Exhibits 1 and 2 on his behalf (case, pp. 139-142). In and by the terms of said contract, M. W. Kellogg Company undertook to perform the work without more, except for a certain provision with regard to payment of workmen's compensation insurance coverage premiums by the defendant. Said contract made no provision whatsoever obligating the defendant to furnish any equipment or assistance to M. W. Kellogg Company's men in the doing of the work. The superintendent of the defendant, however, when the plaintiff came to defendant's plant ready to go on with the work, for reasons best known to himself as far as any evidence in the case is concerned, desired to expedite the doing of the work, particularly in view of the fact that it appears in the testimony that the still was not ready for the plaintiff, because the inside thereof required cleaning (Case, pp. 32 and 33). In the absence of proof, therefore, of defendant's superintendent's duty to furnish such equipment and assistance to the plaintiff, this superintendent must be taken, not only to have exceeded

the scope of his employment as agent of the defendant, but to have been a mere volunteer as far as acting in furnishing or attempting to furnish a scaffold for the plaintiff was concerned.

The situation is, in our opinion, parallel with the facts in the case of *Bielecki* v. *Max Hertz Leather Co.,* reported in 3 N. J. Miscellaneous Reports, page 375. In the cited case, M had a contract to wash the windows of defendant's factory periodically. In pursuance of said cotract, M sent the plaintiff, one of his employees, to defendant's factory to wash the windows. Plaintiff, through unfamiliarity with the method of operating the windows, fell from one of them and was injured. It appeared that the defendant's superintendent had accompanied the plaintiff around to the different windows to be cleaned, but failed to show him how they worked. Upon such a posture of fact, the court held that in the absence of proof of the existence of a duty on the part of its superintendent to show plaintiff how the windows worked, the defendant could not be held answerable for the injuries which plaintiff sustained, the court stating that in going so far as to accompany the plaintiff around to the different windows in order to show the plaintiff what ones were to be washed, the superintendent was a mere volunteer on his own initiative, and in failing to go further by way of assisting the plaintiff could not render the defendant liable.

POINT II.

In erecting the scaffold in question, defendant's carpenter became pro hac vice the agent of the plaintiff.

Defendant's carpenter, Mr. Rose, was a general utility man on the payroll of the defendant, who customarily performed carpentry work when and where needed throughout the plant (Case, p. 90), and as directed by the defendant's superintendent. When it appeared that the plaintiff had come down to Warners, New Jersey, the place at which defendant's plant was located, without any equipment or means for enabling him to reach the point on the still at which he was to work, defendant's superintendent as aforesaid, volunteered to furnish him the instrumentalities necessary for the purpose. The superintendent thereupon instructed Mr. Rose, the carpenter, to go ahead and build a scaffold in the tank "to suit" plaintiff and his helper (Case, p. 65). This, we respectfully contend, and there being no contradiction as far as what Rose was instructed to do is concerned, constituted Rose *pro hac vice* as the agent and/or servant of the plaintiff, charged with the duty of constructing a scaffold in such a manner and of such materials as the plaintiff and his helper might require in the conduct of his work, and "to suit" the pleasure and requirements of the plaintiff. Nay, more, after the carpenter had finished building the scaffold, he asked the plaintiff if it was all right and received an answer in the affirmative and the plaintiff himself admits that he looked at it and it seemed O.K. (Case, pp. 78-79 and 36).

Assuming now for the moment that the testimony as to the specific cause of the failure of the scaffold was sufficient to constitute a foundation upon which the jury might find negligent construction, it must be noted that the burden of plaintiff's testimony in this regard, seeks to charge the failure of the scaffold upon the use of nails of inadequate weight or size in its erection, the plaintiff in no respects contending that there were any knots or other inherent weaknesses in the wood or lumber used, but simply that the pieces used in the construction were insufficiently fastened together. Plaintiff testified at some length after qualifying as an expert in that regard, that he had constructed scaffolds of all kinds and used all kinds of nails therein for a period of many years, and that he would be able to tell from an inspection of the scaffold what kind of nails was used therein. Therefore, if improper nails were used in the scaffold in question, plaintiff is barred of recovery, either because the act of the carpenter in using such nails, if negligent, was imputable to the plaintiff on the theory here advanced that said carpenter was *pro hac vice* the agent of said plaintiff, or plaintiff assumed the risk of injury in mounting said scaffold because he undertook to examine the same, was satisfied in his own mind that it was in proper shape and condition, and thereupon got upon it.

Proof of a contractual relationship or of the obligation of the one sought to be charged as principal to pay compensation to the one sought to be charged as agent, are not essential in establishing the existence of the relationship of principal and agent. Neither is the mere fact that for other purposes plaintiff had been employed by one corporation and defendant's carpenter by the other, conclusive of the impossibility of principal-

agent relationship being created for a particular purpose, between plaintiff and defendant's carpenter. By way of illustration, if, while plaintiff was waiting at defendant's plant for the cleaning of the still to be completed, he had seen fit to have some business of his own transacted at a nearby town, and finding it inconvenient to go himself, had borrowed an automobile driver from among defendant's employees, sent him on his mission, and the employee of the defendant while so acting for the plaintiff had committed a tort, it would seem that there would be no question but that for that purpose the selected employee of the defendant was the agent of the plaintiff in going on plaintiff's mission under the circumstances. By the same token, therefore, we respectfully contend that in undertaking to build the scaffold to suit the needs, requirements and pleasure of the plaintiff, defendant's carpenter ceased for that purpose to be an agent of the defendant and became for that purpose the agent of the plaintiff, and if there were any negligence found on the part of said carpenter in the erecting of said scaffold, defendant would be properly chargeable therewith, but the negligence would be imputable to the plaintiff through said carpenter so acting as agent.

POINT III.

The injuries sustained by plaintiff were not the proximate result of negligence on the part either of defendant's carpenter or through said carpenter, on the theory of master and servant, of defendant.

When the plaintiff reported to defendant's superintendent on the morning of the day of the accident, he had with him one helper (Case, p. 32). He had left his heavy pneumatic drill and appurtenant equipment in the automobile in which he had driven from Jersey City to Warners, New Jersey (Case, p. 49). In the discussion between defendant's superintendent and the plaintiff regarding the doing of the work, the superintendent had no notice or knowledge of the kind or weight of the equipment which plaintiff intended using upon any scaffold which might be erected in the still (Case, p. 55), and the superintendent further informed the plaintiff that it would be impossible for him to commence work until the inside of the still had been cleaned by defendant's own servants, and until this cleaning process had been completed (Case, p. 50). It appears that the last time prior to the accident, at which defendant's superintendent took any personal active part in relation to the plaintiff as far as this work was concerned, was when he indicated to the plaintiff the particular places around the side of the still at which the work was to be performed (Case, p. 36). Plaintiff testified that at this time his helper was not with him on the scaffold, neither was the equipment thereon, and that he and the superintendent of the defendant were on the same alone for the purpose just mentioned.

There is no evidence in the case that at any time after the superintendent had shown the plaintiff where the work was to be done, did he, the said superintendent, either request, invite or direct the plaintiff to proceed with the active work. After plaintiff had been shown where the work was to be done, the superintendent returned to his office, and thereupon the plaintiff reascended the scaffold in the still and while one or more of defendant's other employees were still engaged in scraping the same, had his helper bring the heavy drill and other equipment, put it on the scaffold and then mount the same himself, whereupon the whole structure collapsed (Case, pp. 36-37).

We have heretofore adverted to the fact that sight should not be lost of the testimony uncontradicted, that in directing the carpenter to go and erect a scaffold, the superintendent had informed him that it was to be for two men (Case, p. 94). There is not only no proof in the case that the scaffold as erected was not sufficient for two men, but there is also affirmative proof that it was (Case, p. 77). This posture of fact taken in connection with the further fact that the superintendent had informed the plaintiff that it would be necessary for defendant's employees to clean the still before he could commence work, conclusively indicates, we respectfully contend, that the scaffold was caused to fall by the excessive weight placed thereon by the act of the plaintiff in going upon the same himself and bringing his helper and equipment thereon, while other employees of the defendant were still engaged in the work of cleaning the inside of the still.

It is fundamental that a party can recover damages in tort only where the negligence of the

party sought to be charged is the natural and proximate cause of the injuries sustained. The doctrine of proximate cause is often explained by the corollary thereof, to wit, that recovery may be had only for such injuries as might be reasonably anticipated by or in the contemplation of the parties at the inception of the relationship out of which they arose. As far as any notice or information on the part of defendant's superintendent to the contrary was concerned, he undertook only to furnish a scaffold for the two men, that is, for plaintiff and his helper. Neither said superintendent nor defendant's carpenter, nor through them or either of them, defendant, was a guarantor of the safety of the plaintiff in the premises, nor were they chargeable with any duty of anticipating a situation which, at the time they undertook to erect the scaffold, was not within their contemplation. If they undertook to erect a scaffold for two men, which seems to have been conclusively shown, and several other men and heavy equipment in addition to the weight of the original two men, were imposed upon the scaffold, certainly neither the superintendent nor the carpenter nor through them, the defendant, could be charged as having through their negligence brought about the result that transpired. No liability for negligence attaches to a party when, in the prosecution of a lawful act injury to another is caused by a pure accident; nor can anyone be said to be negligent merely because he fails to make provision against accident which he could not be reasonably expected to foresee.

39 C. J. 288, §414, citing *Coyle* vs. *A. A. Griffing Iron Co.*, 62, N. J. L. 540.

POINT IV.

On the case presented by the plaintiff, it conclusively appeared that in making use of the scaffold under the circumstances, he assumed the risk of injury to himself.

The doctrine is well established in this jurisdiction, which holds that where on the case made by the plaintiff, his assumption of the risk that led to his injury appeared, a motion for a non-suit should be granted.

Mannebach vs. *Stevens,* 71 N. J. L., 368.

We have heretofore adverted to the uncontradicted proof in the case that the carpenter who erected the scaffold was directed by defendant's superintendent to erect the same to suit the plaintiff and his helper, and also that when the erection thereof had been completed, the carpenter asked plaintiff if it was all right, and was answered in the affirmative, and furthermore, that before going upon the same, plaintiff looked it over and it appeared O. K. Under this posture of fact, we are forced quite closely to the border line between contributory negligence and assumption of risk, and we submit that under the facts referred to, plaintiff appears not only to have been guilty of contributory negligence, but also to have assumed the risk of injury in going upon the scaffold without making a more careful inspection than the cursory examination which he made. There was no contractual obligation existing between defendant and plaintiff's employer or between defendant and plaintiff himself, which required the furnishing of this scaffold. The act

of the superintendent, therefore, even assuming that such act was imputable to the defendant, which we deny, was at best that of a volunteer done for the purpose of assisting the plaintiff, and, if you will, of expediting the completion of the work. We are free to admit that the plaintiff could not be deemed to have assumed any risk that would not have been apparent or which might have been latent under the circumstances, but we contend that the circumstances under which this scaffold was erected, paticularly the fact that it was to be erected to suit the plaintiff, render the conclusion inevitable, that in making use of this voluntarily given assistance, particularly in the light of the opportunity afforded for making the inspection thereof, plaintiff in failing to make an effective or proper or sufficient inspection, and still going upon the scaffold, assumed the risk of injury therefrom, and having assumed such risk and the assumption thereof appearing either on the plaintiff's case alone or upon the whole case from the standpoint either of a motion for a nonsuit or direction of a verdict, the court should have precluded the jury from finding in favor of the plaintiff.

POINT V.

The proof so conclusively showed that the plaintiff in going upon the scaffold was a licensee as to have rendered it obligatory upon the Court to so find, and in so finding, to have either nonsuited the plaintiff or directed a verdict in favor of the defendant.

The doctrine differentiating between the duties owed by a party respectively to a licensee and to an invitee, is so well established as to render citation of authorities unnecessary, that is to say, a party owes to a licensee merely the duty of refraining from willful, wanton or malicious acts resulting in injury, whereas, to an invitee, such party owes the duty of exercising reasonable care to prevent injury to him.

Fleckenstein vs. *Gt. Atl. & Pac. Tea Co.*,
91 N. J. L., 145.

The defendant had entered into a contract with M. W. Kellogg Company to perform certain work at defendant's plant, for which defendant undertook to pay M. W. Kellogg Company the consideration agreed upon. In order to perform this contract, and therefore to become entitled to the consideration agreed upon, it behooved M. W. Kellogg Company to send its man or men to defendant's plant and to effect the particular repair work contemplated by the contract. Again, sight should not be lost of the failure of the contract to make any provision as far as furnishing of instrumentalities for the work might be concerned. In pursuance, therefore, of the contract in question, M. W. Kellogg Company's men came to defendant's plant prepared to do work. Upon

their arrival, the particular still to be repaired was not ready for them, the same being then in use by employees of the defendant, engaged in the work of cleaning the interior thereof. It appears in the case, and there further appears no contradiction thereof, that the Warner-Quinlan Company employees who were engaged in the work of cleaning the still, were not only using but were compelled to use the scaffold in order to enable them to reach the sections of the interior to be cleaned, in which area, by the way, the repair work to be performed by M. W. Kellogg Company, was to be done. The plaintiff having no equipment of his own, and there having been erected scaffolding equipment which was then in use by Warner-Quinlan Company's employees, made use of the same, or was in the act of making use of the same, and was directed so to do by the defendant. We respectfully submit, that under these circumstances, the plaintiff, although possibly an invitee as far as the plant of the defendant generally was concerned, yet was not an invitee, but merely a licensee as far as this particular scaffold which was then being used by Warner-Quinlan Company's employees was concerned.

We cannot see, of course, how it can be intended with any reason that this scaffold constituted a trap or any other sort of a wanton or malicious contraption inherently dangerous in itself, intentionally or recklessly created by the defendant, either for the purpose of doing injury to the plaintiff, or with such reckless disregard of plaintiff's safety as might justify the implication of such intent.

We appreciate that it may be contended in opposition to our contention herein, that the testimony indicating that the superintendent of defendant accompanied the plaintiff on the scaffold

for the purpose of showing him where the holes were to be drilled, constituted invitation. Granting this, however, which we deny, our contention is that the invitation, if any between the superintendent of the defendant and the plaintiff, extended only as far as the purpose of showing him the location at which the holes were to be drilled was concerned, and that after this purpose had been accomplished, and this object attained, the plaintiff remained or became merely a licensee, directed to make use of the scaffold which was used originally by defendant's employees, but in which use the defendant did not become chargeable with liability for injuries which might result from the failure of the scaffold.

POINT VI.

Defendant's carpenter, in erecting the scaffold, was the fellow servant of plaintiff, and the negligence of said fellow servant cannot impose liability upon defendant.

We have hereinbefore adverted specifically to the uncontroverted portions of the evidence whereby it appears that defendant assigned its carpenter to erect a scaffold "to suit" plaintiff and his helper and, beyond such instructions, exercised no further control, supervision or direction over said carpenter. Under this posture of uncontradicted fact said carpenter, we contend, became the fellow servant of plaintiff in erecting the scaffold in question. If, therefore, said carpenter thus became a fellow servant of the plaintiff, and said carpenter was negligent in the manner of constructing said scaffold, said negligence cannot be imputed to defendant, in the absence

of any evidence that defendant was negligent in hiring an efficient servant in the person of such carpenter. In support of this our contention, we rely upon the well-recognized rule that the servant of a general master is *prima facie* the fellow servant of the servants of an independent contractor when his master directs him to assist the servants of such independent contractor.

> 39 C. J. 560, §670, citing *Illinois Cent. R. Co.* vs. *Cox,* 21 Ill. 20; *Hoveland* vs. *National Blower Works,* 134 Wis. 342.

This doctrine is referred to with approval in the New Jersey case of *Ewan* vs. *Lippincott,* 47 N. J. L. 192.

Under the rule stated we contend that the court should have directed a verdict in favor of the defendant.

We respectfully contend, therefore, in conclusion, that the Trial Court erred in denying defendant's motion for a non-suit, and further erred in denying the defendant's motion for the direction of a verdict, for the reasons and on the grounds as set forth and expressed by the points herein argued.

Respectfully submitted,

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REYNIER J. WORTENDYKE, JR.,
Of Counsel.

(3433)

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals 10

LEON BYRAM,
Plaintiff-Appellee,

vs.

WARNER-QUINLAN COMPANY,
Defendant-Appellant.

} On Appeal.

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BRIEF FOR PLAINTIFF-APPELLEE.

Statement of Facts.

The parties hereto will be designated for the purpose of reference herein, by the respective appellations of plaintiff and defendant. 30

On the 9th day of December, 1925, the plaintiff's employer, M. W. Kellogg Company, was engaged to do some work for the defendant (Case, p. 13, lines 10-20). The work consisted in drilling some test holes in a still which had been in service for some time and which showed a defect (Case, p. 13, lines 20-30). The plaintiff and a helper, named Stokes, were ordered to go to the plant of the defendant at Warner, N. J. (Case, p. 17, lines 1-10). 40

The plaintiff's employer was not required to build a scaffold in order that the plaintiff might drill the holes (Case, p. 16, lines 30-40). The plaintiff was informed to ask for Mr. Metz, superintendent of oil stills, who would show him where the holes were to be drilled (Case, p. 15, lines 1-10). The plaintiff arrived at the plant of the defendant and met Mr. Metz, who told him to wait until they had built the scaffold (Case, p. 33, lines 10-20). The plaintiff did not tell Mr. Metz or anyone in charge, that he wanted a scaffold built (Case, p. 34, lines 1-10). He did not in anywise undertake to supervise or help in the erection of a scaffold (Case, p. 34, lines 10-20). The defendant's servant, Mr. Metz, notified him to proceed to drill the holes and showed him where to go, which was in the steel still (Case, p. 34, lines 10-20). When the plaintiff arrived at the still, he saw a scaffold which had been erected by the defendant, through its agents and servants, and he got up on top of the scaffold and started to drill. Mr. Metz was on the scaffold with him showing him where to drill the holes (Case, p. 36, lines 10-20). While plaintiff was on the scaffold and about to drill the holes, the scaffold broke (Case, p. 37, lines 10-20). As a result of the collapse of the scaffold, the plaintiff fell to the bottom of the still and received personal injuries (Case, p. 37). The scaffold broke because of the improper construction thereof (Case, p. 40, lines 30-40). The plaintiff was under no obligation to inform the defendant's carpenter or superintendent as to equipment, etc. The plaintiff was to do certain work and it was the duty of the defendant to provide him with the scaffold so as to perform the work which they had contracted for.

The defendant's carpenter constructed the scaffold under the orders of Mr. Metz (Case, p. 75, lines 10-20). The carpenter did not ask the plaintiff nor his helper anything about the construction of the scaffold before he erected same (Case, p. 79, lines 10-30). The carpenter testified that he was told to build the scaffold high enough so that they could reach the top of the chamber (Case, p. 91, lines 20-40), and that no one had said anything to him about the kind of scaffold, how it was to be made, how high to make it and how many boards were to be put in it, etc., and that his instructions were received from Mr. Metz (Case, p. 91, lines 30-40). The carpenter further testified that he was not sure what kind of nails he used at all (Case, p. 93, lines 30-40). Mr. Rose further testified that if 6 penny nails were used in the boards used in the scaffold which he erected, that the falling thereof would be caused by the improper construction and improper use of the nails (Case, p. 94, lines 10-30). He testified further that he had no communication with the Kellogg men prior to the erection of the scaffold (Case, p. 94, lines 20-40).

The plaintiff recovered a judgment, from which judgment the defendant appeals.

POINT 1.

There was evidence showing the negligence of the defendant in the manner in which it constructed the scaffold.

The defendant cites the case of Holmes vs. Pelligrino, 133 Atl., 194, in support of the contention that there was no evidence of negligence.

This case, it seems to me, is not applicable for the reason that in the Holmes case the plaintiff relied upon the doctrine of Res Ipsa Loquitur regarding the question of negligence. In the instant case, there is direct proof of negligence on the part of the defendant. In the Pelligrino case, the scaffold was not erected by the defendant, the defendant merely supplied the boards. In the instant case, the testimony is undisputed that the scaffold was erected by the defendant through its agents and servants.

The case of Scherer vs. Post Office B. & L. Ass'n, 91 N. J. L., 666, it seems to me is not applicable in view of the testimony adduced on the part of the plaintiff.

It appears to me that the defendant now attempts to argue the weight of evidence, which it cannot do on an appeal. See Smith vs. Brunswick Laundry Co., 93 N. J. L., 436.

The plaintiff testified as an expert on the construction of scaffolds as follows:

"Q. Will you tell us from your experience, whether these nails were the proper kind of nails to be used in the erection of that sort of a scaffold to hold two men?

A. In my opinion they were not the proper nails to use in any scaffold" (Case, p. 40, lines 30-40).

"Q. Now, what size nails should have been used?

A. Ten penny nails" (Case, p. 41, lines 1-10).

"Q. What caused the scaffold to fall, in your opinion?

A. The nails had pulled out and bent up as the weight pulled them" (Case, p. 42, lines 1-10).

"Q. And it was these cross pieces that came out, is that correct?

A. It was the piece that supported the scaffold on top that was nailed across this way, not the laterals" (Case, p. 43, lines 10-20).

"Q. What I want to know Mr. Byram is this: What caused the collapse at the outset, your weight on this scaffold, if the scaffold were properly nailed, would the scaffold fall?

A. No" (Case, p. 43, lines 30-40).

Q. Your weight having been put on it and the scaffold having fallen, what in your opinion caused the scaffold to fall after your weight got on it?

A. Why the nails were too small that were used in erecting it.

Q. And is that improper construction?

A. Yes, I should call it so" (Case, p. 44, lines 1-10).

"Q. And you were working on this one hole when the collapse came, is that correct?

A. Just starting to work on it" (Case, p. 55, lines 10-20).

There was testimony by an expert named Lyons, who testified, that the construction of the scaffold was faulty by reason of the fact that the wrong size nails were used in fastening the boards together (Case, pp. 58-62).

It seems to me the following cases are applicable:

Jansen vs. Jersey City, 61 N. J. L., 247;

Mursh Bros. Construction Co. vs. Johnson, 203 Fed., 4;

Lechman vs. Hooper, 52 N. J. L., 255;
Riley vs. Jersey Leather Company, 126 Atl., 457.

POINT 2.

Defendant's carpenter was not the agent of the plaintiff.

The defendant did not set up as a defense in its answer, that in erecting the scaffold in question, the defendant's carpenter became pro hac vice, the agent of the plaintiff (Case, pp. 8-9-10).

Defendant cannot raise this issue at this time inasmuch as it was not raised at the trial.

Eannetta vs. D. L. & W. R. R. Co., 3 Miscel. Rep., 834;
Levenson vs. McQuade, 93 N. J. L., 184;
Van Houten vs. Van Houten, 89 N. J. L., 301.

It is a well-settled principle that the relationship of agent can exist only by the will of the principle and with the consent of the agent. 2 C. J., Par. 26, page 432.

There was no testimony in the case showing that the plaintiff requested the defendant or the carpenter to erect the scaffold.

The defendant admitted that it did not dispute responsibility for exercising reasonable care in doing what it did in the erection of a platform, but it insists that there was no testimony that it did not exercise that degree of care (Case, p. 129, lines 10-30).

POINT 3.

The injuries sustained by the plaintiff were the proximate cause of the negligence on the part of the defendant through its agents and servants.

The scaffold was constructed by the servant of the defendant upon instructions received from Mr. Metz (Case, p. 91, lines 30-40). While plaintiff was on said scaffold, it collapsed and he fell to the bottom of the still, causing the injuries about which he complains (Case, p. 44, lines 1-20; Case, pp. 19-30-40; Case, p. 20, lines 1-10).

POINT 4.

There was no assumption of risk by the plaintiff of injury to himself.

The plaintiff could not and did not assume the risk of the accident in question. The scaffold was erected by the defendant whose duty it was to erect the scaffold in a safe manner and to use reasonable care to see that same was secure. The plaintiff before going on the scaffold looked at same and it appeared to be in good condition. Defendant's own employees were working on the scaffold prior to and at the time it fell. It certainly cannot be argued that the plaintiff assumed that the scaffold would fall while he was working thereon.

It seems to me that the defendant cannot raise this issue at this time in view of its admission that it did not dispute its responsibility to the plaintiff (Case, p. 129, lines 10-30).

POINT 5.

The evidence showed conclusively that the plaintiff in going upon the scaffold was an invitee.

The defendant did not raise this issue (that plaintiff was the licensee) at the trial and it seems to me it cannot raise it at this point.

An employee of one who holds a contract to perform work in the premises for the owner or occupier thereof, who enters the premises to perform work, is thereby implied invitation.

Sommer vs. P. S. Corporation, 79 N. J. L., 349;
Albanese Adm. vs. Central R. R. Co., 41 Vroom, 241;
Catterall vs. Otis Elevator Co., 135 Atl., 865;
Riley vs. Jersey Leather Co., 126 Atl., 457.

POINT 6.

Defendant's carpenter in erecting the scaffold was NOT the fellow servant of the plaintiff.

The defendant did not set up the defense of fellow servant in its answer nor was this issue raised during the trial (Case, pp. 8-9-10).

This issue cannot be raised at this time. See Eannetta vs. D. L. & W. R. R. Co., 3 Miscel. Rep., 834.

The defendant by its admission that it did not dispute its responsibility; and thus waived any so-called defense, it seems to me to be dispository of this point (Case, p. 129, lines 10-30).

The case of Ewan vs. Lippincott, 47 N. J. L., 192, cited by the defendant, is not applicable for the reason that the plaintiff was not engaged in a common employment with the defendant. He was there to do specific work pursuant to a contractual relationship entered into by and between the plaintiff's employer and the defendant. His work had nothing to do with the other men's work nor with the work of the defendant in and about his plant.

Our courts have held that the defendant, under the circumstances of this case, is responsible. See Kappertz vs. The Jerseman, 98 N. J. L., 836.

CONCLUSION.

We respectfully contend, therefore, in conclusion, that the trial court did not err in denying defendant's motion for non-suit, and further, did not err in denying defendant's motion for direction of verdict.

We respectfully submit that the judgment below be affirmed.

Respectfully submitted,

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2483