

INDEX.

	PAGE
Notice of Appeal to Court of Errors and Appeals	a
Opinion of Supreme Court	d
Rule of Affirmance	g
Complaint	1
Affidavit of Merits	5
Order Extending Time to Answer	5
Answer	6
Rule to Show Cause	8
Reasons for New Trial	9
Conclusions	11
Rule for Judgment	11
Notice of Appeal and Grounds of Appeal....	12
Answer of Court	16
Motion to Nonsuit	93
Motion to Direct a Verdict	185
Court's Charge to Jury	188

TESTIMONY.

Adolph Kinnert:

Direct	17
Cross	24
Re-direct	34, 84
Re-cross	84

Edward S. McConville:

Direct	35
Cross	41
Re-direct	57
Re-cross	63

	PAGE
John Smolenski:	
Direct	68
Cross	75
Re-direct	82
Re-cross	83
Andrew Boyak:	
Direct	85
Cross	90
Peter F. McConville:	
Direct	125
Cross	137
Re-direct	141
Re-cross	142
Recalled, re-direct	143
Recalled, re-cross	147
Recalled, direct	176
Basilio Giaimo:	
Direct	148
Cross	158
Re-direct	159
Re-cross	159
Rosari Madelli:	
Direct	160
Cross	163
Re-direct	170
Re-cross	170
G. Earl Brugler:	
Direct	171
Cross	173
James Mathison:	
Direct	177
Cross	182

**Notice of Appeal, and Grounds of
Appeal.**

NEW JERSEY SUPREME COURT.

Filed March 26, 1917.

ADOLPH KINNERT,
Plaintiff-Respondent,

vs.

MATHISON COOPERAGE Co.,
a Corporation,
Defendant-Appellant.

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Action at Law.

To Nathaniel Kantrowitz, Esq.,
Attorney for Plaintiff-Respondent.

20

Sir:

PLEASE TAKE NOTICE that the appellant, Mathison Cooperage Co., a corporation, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment rendered in this cause, on the following grounds, viz:

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1. The Supreme Court affirmed the judgment of the Hudson County Circuit Court, although there was error in doing so.

2. The Supreme Court erroneously affirmed the refusal of the Circuit Court to non-suit the plaintiff-respondent when requested to do so by the defendant-appellant, (a) although when the plaintiff rested his case there was no proof of any negli-

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Notice of Appeal, and Grounds of Appeal.

10 gence whatever on the part of the defendant; (b) although the plaintiff had not proven any of the acts of negligence alleged in the complaint as a cause of action; (c) although no cause of action had been shown to exist against the defendant either under the common law or any of the statutes of this State; (d) although the plaintiff had demonstrated that he was guilty of contributory negligence; (e) although it clearly appeared from the evidence that whatever injury came to the plaintiff was brought about through his own conduct and not by reason of any defect in the machine upon which he was injured, or by reason of any negligence on the part of the defendant; (f) although the accident and injury to the plaintiff

20 arose from risks and dangers which were incident to his employment and obvious and perceivable by him in the exercise of ordinary care; (g) although the plaintiff had not shown any cause of action arising out of the laws of 1909; (h) although none of the issues tendered by the plaintiff's complaint had been proven by a preponderance of proof; (i) although no circumstances had been proven from which the defendant-appellant's want of due care was a legitimate inference. All of which reasons

30 were urged as grounds for a non-suit.

3. The Supreme Court erroneously affirmed the refusal of the Circuit Court to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent at the close of the whole case when requested to do so by the defendant-appellant, (a) although at the close of the whole case there was no proof of any negligence whatever on the part of defendant; (b) although the plaintiff

40 had not proven any of the acts of negligence alleged

Notice of Appeal, and Grounds of Appeal.

in the complaint as a cause of action; (c) although no cause of action had been shown to exist against the defendant either under the common law or any of the statutes of this State; (d) although the plaintiff had demonstrated that he was guilty of contributory negligence; (e) although it clearly appeared from the evidence that whatever injury came to the plaintiff was brought about through his own conduct and not by reason of any defect in the machine upon which he was injured, or by reason of any negligence on the part of the defendant; (f) although the accident and injury to the plaintiff arose from risks and dangers which were incident to his employment and obvious and perceivable by him in the exercise of ordinary care; (g) although the plaintiff had not shown any cause of action arising out of the laws of 1909; (h) although none of the issues tendered by the plaintiff's complaint had been proven by a preponderance of proof; (i) although no circumstances had been proven from which the defendant-appellant's want of due care was a legitimate inference; (j) although no evidence had been submitted that warranted the Court in submitting the case to the jury; (k) although it had been demonstrated and established beyond any question that there was nothing in and about the operation of the machine in question which was in any way hazardous or which could have in anywise resulted in the plaintiff's injury by reason of suction of said machine; (l) although the overwhelming weight of the evidence established that there did not exist either before or after the accident, any defect in the machine in question that could have resulted in the plaintiff's injury; (m) although the defendant-appellant had proven beyond any question that the

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Opinion.

injury to the plaintiff-respondent did not occur and could not have occurred in the manner alleged in the complaint. All of which reasons were urged as grounds for the direction of a verdict against the plaintiff-respondent and in favor of the defendant-appellant.

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Yours respectfully,

WELLER & LICHTENSTEIN,
Attorneys for Defendant-Appellant.

Opinion.

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NEW JERSEY SUPREME COURT,

NOVEMBER TERM, 1916.

Filed March 6, 1917.

ADOLPH KINNERT,
Plaintiff and Respondent,

vs.

MATHISON COOPERAGE Co.,
a Corporation,
Defendant and Appellant.

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Submitted December 7, 1916; decided March ,
1917.

On Appeal from the Hudson County Circuit
Court.

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Opinion.

Before GUMMERE, Chief Justice, and Justices
TRENCHARD and BLACK.

For the Appellant, WELLER & LICHTENSTEIN and
ROBERT H. McCARTER.

For the Respondent, NATHANIEL KANTROWITZ and
ALEXANDER SIMPSON. 10

Per CURIAM:

This is an appeal from a judgment entered on the verdict of a jury for the plaintiff in a suit for negligence. After the verdict a rule to show cause why the verdict should not be set aside was obtained, and after hearing, the rule was discharged. Thereafter the defendant took this appeal.

The plaintiff was a Polish boy 17 years of age. 20
jections to the refusal of the trial court to non-suit the plaintiff and to direct a verdict in favor of the defendant. And it is now urged that these motions should have been granted because it is contended that there was no evidence of negligence upon the part of the defendant and that the plaintiff assumed the risk.

The plaintiff was a Polish boy 17 years of age. He did not speak nor understand English. He had been working at cooperage for the defendant company for 3 weeks at the time of the accident. He first worked in the yard carrying staves. After that he was put inside on a sawing machine. He was not hurt at the machine on which he was first put to work. Just prior to the accident he was directed by the foreman, by pantomime, to go to work at a planing machine. According to his testimony he was required to pick up little staves and carry them to the machine and cut them; that 40

as he stopped he felt something cold draw his hand in and his hand was cut off.

10 Plaintiff's contention was that this machine being dangerous, being a machine at which there was a suction sufficient to draw towards it articles of clothing, and the plaintiff being ignorant of such danger, and being youthful, it was the master's duty to warn and instruct the plaintiff, and that the master neglected to perform that duty.

It was clearly open to the jury to find from the evidence that there was no warning or instruction given to the plaintiff of the danger of which he was ignorant. It was also open to the jury to find from the evidence that there was suction by this machine, created by some sort of a device for the purpose of removing the shavings, and that the plaintiff was hurt by reason of such suction.

20

As we have pointed out, there was some evidence that there was sufficient suction about the machine to disturb the clothing of one near by.

Whether the accident happened as the plaintiff says it happened, seems to us to have been a question for the jury, and we think the question of the negligence of the defendant was properly for the jury.

30 The question whether the plaintiff assumed the risk was one which certainly could not have been withdrawn from the jury.

The judgment below will be affirmed, with costs.

Rule on Affirmance.

NEW JERSEY SUPREME COURT,

NOVEMBER TERM, 1916.

Entered March 9, 1917.

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<p style="text-align: center;">ADOLPH KINNERT, Plaintiff and Respondent, vs. MATHISON COOPERAGE Co., a Corporation, Defendant and Appellant.</p>	}	<p>On Appeal from the Hud- son County Circuit Court.</p>
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This cause having been duly submitted at the present Term of this Court by Robert H. McCarter, of counsel for defendant-appellant, and Alex. Simpson, of counsel for plaintiff-respondent, and the Court having considered the same, and finding no error in the record or proceeding in the Hudson County Circuit Court; 20

It Is Thereupon Ordered and Adjudged, that the judgment of the Hudson County Circuit Court appealed from in this cause be affirmed, with costs; that the record be remitted to the Circuit Court, to be proceeded with in accordance with the judgment and practice of the said Court. 30

Entered March 9, 1917,

On motion of

NATHANIEL KANTROWITZ,

Attorney for Plaintiff-Respondent.

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Rule of Affirmance.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

10

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at
(Seal) Trenton, this twenty-ninth day of March, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

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Complaint.

Hudson Circuit Court

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ADOLPH KINNERT,
Plaintiff,
vs.
MATHISON COOPERAGE Co., a corporation,
Defendant.

The defendant was summoned to answer unto the plaintiff's complaint.

20

The plaintiff residing at the City of Jersey City, in the County of Hudson and State of New Jersey, for his complaint herein, alleges :

1. That at all the times hereinafter mentioned, the defendant was and still is a domestic corporation, organized and existing under and by virtue of the laws of the State of New Jersey.

30

2. That on or about the 13th day of August, 1910, the plaintiff was employed by defendant, as a laborer or helper at the factory of said defendant, located at Jersey City, in the County of Hudson.

3. The said defendant, at its said factory, operated a certain machine known as a planing machine, which consisted in part of a number of knives, attached to wheels revolving at a great speed, thereby

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Complaint.

creating a great suction, which suction is sufficient to draw in the part of the person or clothing coming into proximity thereto.

10 4. That the said planing machine, at the time and place aforesaid, was unguarded and unattended, and constituted a grave danger and menace to the life and limb of persons coming into proximity thereto, which condition was not apparent to any person uninstructed in the operation of said machine, and which dangers were a latent danger; and also the said machinery was not within the requirements of the provisions of an Act of the Legislature of the State of New Jersey, entitled,
20 "An Act regulating the age, employment, safety, help and work hours of persons, employees, and operatives in factories, workshops, mills and all places where the manufacture of goods of any kind is carried on, and to establish a department for the enforcement thereof," which Act was approved March 24th, 1904.

30 5. That the plaintiff, at the time of the accident, was an infant and unaware of the operation of said machine and of the danger and risk attended to the proximity to said machine and that it was the duty of the defendant to instruct the plaintiff of the same and to warn him.

6. That it was also the duty of the defendant to provide plaintiff with a good, safe and secure place to perform the work in said factory.

40 7. That on or about the 13th day of August, 1910, plaintiff was put to work in close proximity to said planing machine by the said defendant, who, well knowing that the said planing machine was un-

Complaint.

guarded, unattended and dangerous, and who did not instruct the plaintiff in the operation of said machine and the danger attended to be in proximity thereto, and in express violation of its duties to the plaintiff herein, as expressly enumerated above, that the said plaintiff's hand came into contact with the knives of the said plan-
ing machine which were revolving at a great speed
and creating a great suction, causing it to be drawn
into said machine and cutting off the said hand
above the wrist, without any fault or negligence on
the part of the said plaintiff. 10

8. Plaintiff further alleges that by reason of the premises, an action has accrued to him for compensation against the said defendant under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entitled, "An Act
to Extend and Regulate the liability of employers
for injury or death to employees in certain cases,"
which act was approved April 13th, 1909. 20

9. Plaintiff further alleges that within 120 days after the date of the said injury and on the 10th day of October, 1910, the plaintiff caused to be served on the defendant a notice, in writing, of the time, place and cause of the injury aforesaid, signed by
the plaintiff, which notice was delivered at the
office of the defendant, at Jersey City. 30

10. Plaintiff further alleges that by reason of the premises and solely through the negligence of the defendant, its agents, servants and employees, without any fault or negligence on his part, he has lost his right hand and arm and has otherwise been seriously and permanently injured internally and
externally. 40

Complaint.

11. Plaintiff further alleges that, at the time of the accident, he was a minor, to wit, the age of seventeen years, and that he became of age on or about the 28th day of July, 1914.

10 WHEREFORE, plaintiff demands judgment for the sum of \$50,000, besides the costs and disbursements of this action.

NATHANIEL KANTROWITZ,
Attorney for Plaintiff,
Second National Bank Building,
Paterson, New Jersey.

Filed Clerk's Office, June 11, 1915,
Hudson County, N. J.

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JOHN J. McGOVERN,
Clerk.

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Affidavit of Merits.

State of New Jersey, }
 County of Hudson, } ss.:

James Mathison, of full age, being duly sworn according to law, upon his oath deposes and says that he is the president of the Mathison Cooperage Co., a corporation, and that he has knowledge concerning the matters in controversy in the complaint filed in this cause; that he believes that said Mathison Cooperage Co., a corporation, has a just and legal defense to the action on the merits of the case. 10

JAMES MATHISON.

Sworn and subscribed to before me
 this 16th day of June, A. D. 1915.

(Seal)

WILLIAM S. FINKENSIEPER,
 Notary Public,
 New Jersey.

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Filed Clerk's Office, June 16, 1915,
 Hudson County, N. J.

JOHN J. McGOVERN,
 Clerk.

Order Extending Time to Answer.

On application of Weller & Lichtenstein, attorneys for the defendant: ORDERED that the defendant have two days' further time within which to plead to the Complaint in said case. 30

Dated, June 28th, 1914.

LUTHER A. CAMPBELL,
 Judge.

Filed Clerk's Office, June 29, 1915,
 Hudson County, N. J.

JOHN J. McGOVERN,
 Clerk. 40

Answer.

The defendant corporation answers as follows:
Defendant, Mathison Cooperage Company, a corporation of the State of New Jersey, answering the complaint of the plaintiff herein, says that:

1. It admits the allegations of the first paragraph of said complaint.

2. Defendant denies each and every allegation of the second paragraph of the complaint filed herein except that it admits that the plaintiff was employed by it on August 13th, 1910.

3. Defendant denies each and every allegation of the third paragraph of the complaint filed herein except that it operates certain machines known as planing machines at its factory.

4. Defendant denies each and every allegation contained in paragraph four of the complaint filed herein.

5. Defendant has not sufficient information or knowledge to form a belief as to whether or not the plaintiff was an infant at the time of the alleged accident, and leaves the plaintiff to make such proof thereof as he shall deem necessary. Defendant denies that the plaintiff was unaware of the operation of said machine and denies that the plaintiff was unaware of the danger and risk attending to the proximity of said machine, and denies that it was the duty of the defendant to instruct the plaintiff of same and to warn him.

6. Defendant did provide plaintiff with a good safe and secure place to perform the work required of him in said factory.

Answer.

7. Defendant denies each and every allegation of paragraph seven of the complaint filed herein.

8. Defendant denies each and every allegation of paragraph eight of the complaint filed herein.

9. Defendant denies each and every allegation of paragraph nine of the complaint filed herein. 10

10. Defendant denies each and every allegation of paragraph ten of the complaint filed herein except that portion of paragraph ten wherein the plaintiff alleges that he has lost his right hand and arm and has otherwise been seriously and permanently injured, internally and externally, and as to those allegations, defendant has no knowledge or information sufficient to form a belief, but says that if the said plaintiff has lost his right hand and arm and has otherwise been seriously and permanently injured, internally and externally, that he did not lose his right hand and arm, nor was he otherwise injured through any negligence, fault, misconduct or omission of duty on the part of the defendant herein. 20

11. Defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph eleven of the complaint filed herein, and leaves plaintiff to make such proof thereof as he shall deem necessary. 30

FIRST SEPARATE DEFENSE:

At the times mentioned in the complaint plaintiff was not himself in the exercise of reasonable care. 40

*Rule to Show Cause.***SECOND SEPARATE DEFENSE:**

10 Defendant says that the injuries alleged to have been sustained or suffered by the plaintiff at the place referred to in the complaint were caused in whole or in part, or were contributed to by the want of reasonable care of the said plaintiff, and not by any negligence or default, or want of care on the part of this defendant.

THIRD SEPARATE DEFENSE:

20 Defendant will object that the complaint discloses no cause of action under the act referred to in the complaint.

WELLER & LICHTENSTEIN,
Attorneys of Defendant.

Filed Clerk's Office, June 29, 1915,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

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Rule to Show Cause.

Application having been made within six days after the rendering of the verdict in the above entitled cause, now, on motion of Weller & Lichtenstein, attorneys for the defendant, it is ORDERED that the plaintiff show cause before the Hudson County Circuit Court, at the Court House in the City of Jersey City, on Friday, the 18th day of February, 1916, at the hour of ten o'clock in
40 the forenoon of said day or as soon thereafter as

Reason for New Trial.

counsel can be heard, why the verdict in this cause should not be set aside and a new trial granted;

And it is further ORDERED the objections and exceptions of the defendant to the ruling of the Court on the motion for non-suit and direction of verdict be and the same are hereby expressly reserved; 10

And it is further ORDERED that all proceedings upon the verdict and judgment entered hereunder be and the same are hereby stayed until the further order of the Court.

Let the above rule be entered.

LUTHER A. CAMPBELL,
Judge. 20

Filed Clerk's Office, Jan. 19, 1916,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Reasons for New Trial.

The following are the causes upon which the defendant rests the motion for a new trial of the above-stated cause, viz.: 30

1. Because the verdict of the jury was against the evidence.
2. Because the verdict of the jury was against the weight of evidence.
3. Because the damages awarded by the jury 40 are excessive.

Reason for New Trial.

4. Because at the close of the plaintiff's case the Court refused to non-suit the plaintiff when requested to do so by the defendant.

10 5. Because at the close of the whole case the Court refused to direct a verdict in favor of defendant and against the plaintiff, when requested so to do by the defendant.

6. Because the Court admitted improper evidence over the objection of the defendant.

7. Because the Court refused to admit proper evidence when offered by the defendant.

20 8. Because the verdict of the jury was contrary to law, and the same is unjust and illegal.

9. Because there was no evidence offered on the part of the plaintiff that would justify the finding of the jury.

WELLER & LICHTENSTEIN,
Attorneys for Defendant.

30 Filed Clerk's Office, Jan. 27, 1916,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

ALEX. SIMPSON and N. KANTROWITZ, Esqs., for
Plaintiff.

WELLER & LICHTENSTEIN, Esqs., for Defendant.

Conclusions.

CAMPBELL, J. :

I am unable to conclude that the verdict in this cause should be set aside for the reasons advanced and urged.

The rule to show cause will be discharged with 10 costs.

Dated, June 1, 1916.

LUTHER A. CAMPBELL,
Judge.

Filed Clerk's Office, June 9, 1916,
Hudson County, N. J.

JOHN J. MCGOVERN, 20
Clerk.

Rules For Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, January 10th, 1916.

The cause having been heard and submitted to the jury they returned their verdict as follows: 30

They say they find for the plaintiff, and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of Twelve thousand Dollars (\$12,000.00),

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Twelve thousand Dollars damages and his costs which are taxed at Fifty-seven Dollars and forty-five cents (\$57.45), making in the whole the sum of Twelve 40

Notice of Appeal and Grounds of Appeal.

thousand fifty-seven Dollars and forty-five cents (\$12,057.45).

Judgment entered this 17th day of January, 1916.

10

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN J. MCGOVERN,
Clerk.

Notice of Appeal and Grounds of Appeal.

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HUDSON COUNTY CIRCUIT COURT.

ADOLPH KINNERT,
Plaintiff-Respondent,

vs.

MATHISON COOPERAGE CO.,
Defendant-Appellant.

}
Action
at Law.

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To Nathaniel Kantrowitz, Esq.,
Attorney for Plaintiff-Respondent.

Dear Sir:

TAKE NOTICE that the defendant-appellant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this case, on the following grounds, viz.:

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Notice of Appeal and Grounds of Appeal.

1. The Court refused to non-suit the plaintiff-respondent, at the close of his case, when requested to do so by the defendant-appellant:

(a) Although when the plaintiff rested his case there was no proof of any negligence whatever on the part of the defendant; (b) although the plaintiff had not proven any of the acts of negligence alleged in the complaint as a cause of action; (c) although no cause of action had been shown to exist against the defendant either under the common law or any of the statutes of this State; (d) although the plaintiff had demonstrated that he was guilty of contributory negligence; (e) although it clearly appeared from the evidence that whatever injury came to the plaintiff was brought about through his own conduct and not by reason of any defect in the machine or by reason of any negligence on the part of the defendant; (f) although the accident and injury to the plaintiff arose from risks and dangers which were incident to his employment and obvious and perceivable by him in the exercise of ordinary care; (g) although the plaintiff had not shown any cause of action arising out of the laws of 1909; (h) although none of the issues tendered by the plaintiff's complaint had been proven by a preponderance of proof; (i) although no circumstances had been proven from which the defendant-appellant's want of due care was a legitimate inference. All of which reasons were urged as grounds for a non-suit.

2. The Court refused to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent, at the close of the whole case, when requested to do so by the defendant-appellant:

Notice of Appeal and Grounds of Appeal.

(a) Although at the close of the whole case there was no proof of any negligence whatever on the part of the defendant; (b) although the plaintiff had not proven any of the acts of negligence alleged in the complaint as a cause of action; (c) although no cause of action had been shown to exist against the defendant either under the common law or any of the statutes of this State; (d) although the plaintiff had demonstrated that he was guilty of contributory negligence; (e) although it clearly appeared from the evidence that whatever injury came to the plaintiff was brought about through his own conduct and not by reason of any defect in the machine or by reason of any negligence on the part of the defendant; (f) although the accident and injury to the plaintiff arose from risks and dangers which were incident to his employment and obvious and perceivable by him in the exercise of ordinary care; (g) although the plaintiff had not shown any cause of action arising out of the laws of 1909; (h) although none of the issues tendered by the plaintiff's complaint had been proven by a preponderance of proof; (i) although no circumstances had been proven from which the defendant-appellant's want of due care was a legitimate inference; (j) although no evidence had been submitted that warranted the Court in submitting the case to the jury; (k) although it had been demonstrated and established beyond any question that there was nothing in and about the operation of the machine in question which was in any way hazardous or which would have in anywise resulted in the plaintiff's injury by reason of suction of said machine; (l) although the overwhelming weight of the evidence established that there did not exist either

Notice of Appeal and Grounds of Appeal.

before or after the accident, any defect in the machine in question that could have resulted in the plaintiff's injury; (m) although the defendant-appellant had proven beyond any question that the injury to the plaintiff-respondent did not occur and could not have occurred in the manner alleged in his complaint. All of which reasons were urged as grounds for the direction of a verdict in favor of the defendant-appellant. 10

Yours respectfully,

WELLER & LICHTENSTEIN,
Attorneys for Defendant-Appellant.

Filed Clerk's Office, Jun. 29, 1916, 20
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

(Endorsed)

ACKNOWLEDGMENT OF SERVICE OF NOTICE OF APPEAL AND GROUNDS OF APPEAL. 30

SERVICE of a copy of the within NOTICE and GROUNDS OF APPEAL, is hereby acknowledged this 29th day of June, 1916.

NATHANIEL KANTROWITZ,
ALEX. SIMPSON,
Atty. for Pltff.Respon't.

Answer of Court.

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the
 10 same, I send to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

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ADOLPH KINNERT,
Plaintiff,

vs.

MATHISON COOPERAGE Co.,
a Corporation,
Defendant.

} Action at Law.

30

.. APPEARANCES :

NATHANIEL KANTROWITZ and ALEXANDER SIMPSON for the plaintiff.

WELLER & LICHTENSTEIN (Julius Lichtenstein) for the defendant.

The above entitled cause was tried January 10th, 1916, before Hon. Luther A. Campbell, Judge, and a jury.

40

Adolph Kinnert—Direct Examination.

Mr. Simpson: Will you admit we served a notice on you, although you deny the notice was sufficient under the Act of 1909? You admitted it in the former trial, that we did serve a notice on you, but that the notice was not such as contemplated by the act. 10

Mr. Lichtenstein: Yes; I will admit that a notice was served upon us. (Producing original notice.) That is the original notice.

Mr. Simpson: Then you will admit we served this notice on you, and we will put it in evidence.

Paper marked Exhibit P-1.

The Court: The admission is as to the service only? 20

Mr. Lichtenstein: Yes, sir.

Mr. Simpson: Served within the one hundred and twenty days, that is all I care about, within the time the statute provides for.

ADOLPH KINNERT, sworn.

30

Direct Examination:

Mr. Simpson: Is the interpreter here? He cannot talk English.

Mr. Lichtenstein: I think this young man talks English.

Mr. Kantrowicz: He cannot.

The Court: You understand a little?

The Witness: Not much.

The Court: You understand some? 40

Adolph Kinnert—Direct Examination.

The Witness: Little bit.

Mr. Kantrowicz: I found, your Honor, that we could not talk to him in English.

The Court: We will try. If we cannot succeed we will go back to the interpreter.

10 By Mr. Kantrowicz:

Q. What is your name? A. Adolph Kinnert.

Q. Will you please talk louder, so the last man on the jury can hear you? What is your name?

A. Adolph Kinnert.

Q. How old are you now? A. Twenty years.

Q. How is that? A. Twenty-two years.

Q. When were you twenty-two? A. 28th of July.

20 Q. Of what year? A. 1915.

Q. This last year? A. Yes.

Q. Well, where were you working in the month of August, 1910? A. At the Mathison Cooperage Company.

Q. When did you first start to work at the plant of the Mathison Cooperage Company? A. I cannot say so much.

The Court: Oh, well.

30

A. I don't remember about that.

The Interpreter: Don't remember the date.

A. How long before the accident did you start to work at the Mathison Cooperage Company? A. It is three weeks, three days.

40 Q. Three weeks and three days before the accident you first started to work there? A. Yes.

Q. Is that the first job you had? A. First working in the yard.

Adolph Kinnert—Direct Examination.

Q. No; is that the first job you had? A. First I get job in the yard. Working three days.

Q. No; I am not asking you about the first work. Did you ever have any job before this job? A. Oh, no.

Q. This was your first job then? A. This is first job, yes. 10

Mr. Kantrowicz: I do not care to lead the witness unless I have to in order to get what I want.

The Court: All right. There is no objection so far.

Q. Did you, prior to that time, ever work in a job where machinery was? A. No. 20

Q. Did you ever work around machinery before? A. No.

Q. When you first went to work for the Mathison Cooperage Company, what did you do in the beginning? A. I was work in the yard first.

Q. Work in the yard; what were you doing in the yard? A. Carry boards and staves.

Q. How long did you do that? A. Three days.

Q. Three days. Then what did you do after that? A. After foreman took me inside and give me a job inside on the saw machine. 30

Q. What kind of a machine was that ? A. Saw machine.

Q. Sawing machine? A. Yes.

Q. What did you do on the sawing machine? A. Cutting staves.

Q. How long did you work on that machine? A. It is three weeks.

Q. Now tell us what happened on the day of the accident? A. Saturday afternoon he told me I could go to that machine. 40

Adolph Kinnert—Direct Examination.

Mr. Kantrowicz: Can you hear, gentlemen?

Mr. Simpson: "Saturday afternoon he told me to go to that machine." Ask him that, that is, if he told you to go to that machine.

10

Q. Was that the first time you ever went to that machine or told to go? A. Yes; that is the first time he told me to go to that machine.

Q. Who told you to go the machine? A. This foreman, Eddy—Mr. Eddy.

The Court: Mr. Interpreter, won't you get the witness to talk louder?

20

Q. What did he say to you, do you know? A. He talked something to me, I don't know, only show his finger go over to that machine.

Q. What machine was that? A. The plane machine.

Q. Now tell us what you did when you went over to that machine? A. After I go over to that machine, one time I go and pick little staves and carry to the machine and cut them, and after I go again, you see; once I took other man, but after

30 I go—

Mr. Simpson: I think it is not fair to examine him in English, particularly when he does not talk sufficiently loud for me to hear him.

The Court: The interpreter may put the question to him.

(Question repeated.)

40

A. I went to the machine. I went to pick up the staves. There were a small pile there. There

Adolph Kinnert—Direct Examination.

was a hole there near the machine. I went there intending to take some staves. I felt something cold draw my hand in. I wanted to take out and something drew me in. I don't know myself what happened at that moment.

Mr. Simpson: What happened to him? 10
What happened to his hand—his arm?

A. It tore off my hand.

Q. Show it.

Witness displays injured arm to the jury.

Mr. Kantrowicz: Is that about midway between the elbow—

Mr. Lichtenstein: Really, I don't know. 20
Let's get it.

Mr. Simpson: He can show it to the jury.

Mr. Lichtenstein: Haven't you any doctor here at all?

Mr. Kantrowicz: No. That is plainly evident.

Witness removes coat and rolls up sleeve.

Mr. Kantrowicz: That is about midway.

Mr. Lichtenstein: Let's see the other hand. It is not midway. There is more 30
than—

Mr. Kantrowicz: It is more than half.

Mr. Lichtenstein: We ought to measure it. We ought not to guess at it.

A juror produces a tape measure and Mr. Lichtenstein measures the left arm and then the right arm of witness.

Mr. Lichtenstein: About four inches.

Mr. Kantrowicz: About four inches above the wrist? 40

Adolph Kinnert—Direct Examination.

Mr. Lichtenstein: Yes; four inches above the wrist.

10 Q. Now, where was your hand after it was cut off? A. I don't know what happened to my hand. I know that it remained there around the machine somewheres.

Q. Did you ever see that hand again? A. At the time when I was about to be taken to the hospital the hand was brought to me and I saw it.

Q. Now were any instructions of any kind given to you at the time you went to pick up those staves?

20 Objected to as leading. Objection sustained, and question withdrawn.

Q. When you were instructed to go to the planing machine to get staves were any instructions given to you?

Objected to.

The Court: What was said?

30 Q. What was said to you at the time? A. He told me something, but I didn't understand him.

Mr. Simpson: What language did he talk?

A. He spoke English, but he pointed out with his finger towards the place what I was to do.

Q. Did you in August of 1910 understand English? A. No, I didn't understand it at all.

40 Q. Now, Adolph, did you at any time after the accident examine that planing machine? A. After the accident at night I looked at the machine.

Adolph Kinnert—Direct Examination.

Q. Can you tell us whether that back of that machine was protected by any cover or not?

Mr. Lichtenstein: I object to it as highly leading; and second, there is not anything to show that this witness knows anything about the construction of this machine so far as to be capable of testifying to the extent which is being asked of him. What is meant by being open? Here is a machine; we do not know what the character of the machine is. Does he mean whether there was a hole or an opening of an inch in circumference, or does he mean a yard wide? 10

Mr. Kantrowicz: The entire back of the machine, our contention is, was open. 20

Question permitted.

The Court: I will permit the question.

Mr. Lichtenstein: Your Honor will grant an exception?

The Court: I do not know that it is of any definite value. I will permit it.

A. I do not know.

Q. Was there a covering on the back of that machine at the time of the accident? 30

Mr. Lichtenstein: I object to that question, on the same ground, sir, that it is indefinite and vague. It does not give the jury any information. It is not shown that the man has any knowledge.

The Court: That is true. I have that in mind. I will permit the question, however.

Mr. Lichtenstein: Will your Honor grant an exception?

The Court: I will grant it. What is his answer? 40

Adolph Kinnert—Cross Examination.

A. I did not notice.

Q. The place where your hand went into the machine, was that covered or not?

10 Mr. Lichtenstein: I object to that upon the ground that there is no proof as yet where his hand went into the machine or what part of the machine it went into.

The Court: That is true. I have not heard myself yet anything which told me where it was that he actually met with this injury, and until that is established, of course it cannot be of much service.

Mr. Kantrowicz: Yes. Is Mr. McConville here?

20 Mr. Simpson: Ask him.

Q. Is Eddy here in court?

A Voice: Here I am, yes.

A. Yes.

The Court: I was going to suggest it would be far more satisfactory to everybody if he testified to that point.

30 Mr. Simpson: We will let Eddy describe the machine.

Cross Examination by Mr. Lichtenstein:

Q. (To Interpreter: He can speak in English to me.) When you were put to work on the sawing machine, they gave you barrel staves to saw the ends off, didn't they? A. Yes; the saw machine.

40 Q. The saw machine is a machine that stands about so high—about four feet high from the floor; is that right? A. Yes.

Adolph Kinnert—Cross Examination.

Q. And it has a saw, a round saw; that is right, isn't it? A. Yes.

Q. And you had pieces of boards like this (indicating) and you would run them up against the side of a guide and shove them through and cut the end off; that is right? A. Yes.

Q. And the staves when you got them to cut the ends off, were already planed on both sides, were they not? A. On the two sides. 10

Q. Planed? A. Yes.

Q. Smooth like this (indicating board)? A. Yes.

Q. And rounded? Is that right? A. Yes.

Q. Where were these staves planed before you got them to cut the ends off? A. Before I never work at that machine.

Q. But what machine planed them off and made them round on one side; what machine? 20

Objected to as not proper cross examination.

Question allowed.

A. The planing machine.

Q. Speak louder so the gentleman over in the corner can hear you? A. The planer.

Q. How far away from you was that planing machine? 30

Objected to unless a time is fixed.

Q. At the time that you were working on this sawing machine? A. About fifteen foot.

Q. Fifteen feet? Who ran the planing machine? A. There is a fellow sitting there.

Q. Fellow sitting there? Which one? A. That one. 40

Adolph Kinnert—Cross Examination.

Q. The man standing up? What is your name?

A voice: Rosario.

Q. And Rosario was the man that planed the staves, did he? A. Yes.

10 Q. And how would he plane the staves? What would he do? A. I never looking.

Q. But what did he do with the staves?

Mr. Simpson: I object; that is an answer. He says, "I never looked." He cannot repeat his question to make him say what he wants him to say.

Mr. Lichtenstein: I am cross examining.

The Court: What is the question?

20

(Question repeated.)

The Court: What did he do with the staves?

A. He planed them.

Q. He planed them. Where did he take the boards from—Rosario? A. Took them by the machine.

Q. Have them right next to him? A. Right by that hole.

30

Q. Where did Rosario take the boards from that he put into the planer? A. He brought them from the yard.

Q. When he brought them from the yard where did he put them, right near the planer? A. By the planer.

Q. Well, now then when he wanted to plane the boards did he take them from that pile? A. Sure.

Q. Yes; and then he put them in the machine?

40 A. I don't know where he put them. I know he came off of the machine.

Adolph Kinnert—Cross Examination.

Q. They came off of the machine? He put them in one side and they came out the other side? A. I never look.

Q. But how did he plane them? A. I know I not see him.

Q. What did he do with the boards when he put them in the machine? A. I no see him. 10

Q. Do you mean to say that after working there three weeks with that man and you saw him bring the boards from down stairs and put them in a pile and then you saw him take them from the pile and put them in the machine, and you don't know what he did?

Mr. Simpson: I object that it assumes a fact not in evidence. He does not say he worked at this machine with this man. 20

The Court: He says he worked at the machine about fifteen feet away from the machine.

Mr. Simpson: He says, "Do you mean to say you worked with this man."

Mr. Lichtenstein: I did not mean to say that.

Q. You say the boards fall out of this machine? A. Yes, fall off. 30

Q. They fell on the floor? A. Yes.

Q. All over the floor? A. Not—right by that where it came off.

Q. When the staves came out of the machine were they all planed? A. Yes; the same way as that.

Q. Planed the same as this board is? A. Yes.

Q. Who took the boards away from the machine 40

that were already planed that came out of the plane? A. I took them.

Q. Well, did this man also take them away, Rosario? A. No; not at that time.

Q. What time do you mean? A. Before dinner.

10 Q. Eh? A. Before dinner. Some day he took them away from that machine.

Q. Some days he would take the boards and throw them from the machine, and he would throw them off the machine? A. Six feet.

Q. Then you would walk over and pick them up, would you? A. Yes.

Q. You would pick up these boards that had already been planed and put them on your bench? A. Yes—only one time I bring over to my machine.

20 Q. Only one time? A. Yes.

Q. Was that on Friday or Saturday? A. Friday.

Q. On a Friday— A. Saturday, Saturday.

Q. On a Saturday? A. Yes.

Q. Ont of the whole three weeks that you were working there? A. Yes.

Q. Where did you get your staves from to cut the ends off? A. I am took it in the yard-- some in the shop down stairs and I work upstairs.

30 Q. You had a big pile right near you, of staves? A. I am working, not planing.

Q. I know you did not plane, you were cutting the end off, but didn't you have a pile of staves right next to you that you took your staves from and cut the ends off? A. I took only first time that day.

Q. I don't mean the day you were hurt, but I mean other days, for the whole three weeks that you worked there?

40

Adolph Kinnert—Cross Examination.

(Mr. Simpson objected to the cross examining continuing without the interpreter, and Mr. Lichtenstein agreed to the use of the interpreter.)

Q. During the three weeks that you were working there up until the day that you were hurt was there not a pile of staves already planed piled up right near his machine to which he always went to get them to cut the ends off? A. They were laying there, planed and unplaned. 10

Q. Yes. Now during the three weeks that you were cutting the ends off before you were hurt, where did you take the staves from as you were standing at your machine cutting the ends off? A. Downstairs from the shop and from the yard also. 20

Q. Who brought them there to pile them up? A. Do you mean to my machine?

Q. Yes. A. I brought it there on a wheelbarrow and placed them there.

Q. All of the staves that were being planed in this planer by Rosario, after they dropped on the floor, during this three weeks, where did those staves go to? A. All three weeks he threw over there. 30

Q. Threw them over where? A. Little way from his machine.

Q. What became of them after he threw them over a little way from the machine?

Objected to. Question permitted.

A. Then he told us we should cut it, so we took it away from there and had it cut. 40

Adolph Kinnert—Cross Examination.

Q. Yes. So that Rosario during the three weeks you were working there would sometimes take these staves that came out of the planing machine, throw them a few feet away, and you would go there and pick them up and cut the ends off? A. Yes; I took them to my machine to have them cut off.

10 Q. Well, on Friday before you were hurt, Eddy, the foreman, told you to go over and pick up the staves? A. Saturday.

Q. Did he talk to you on Friday? A. On Friday he did not ask me, but on Saturday only he asked me to carry the staves from the machine.

Q. Did he say anything to you on Friday? A. No, sir.

20 Q. Did you go over to the machine on Friday?

Mr. Simpson: Planing machine?

Q. Planing machine, yes. A. No, sir.

Q. When he pointed over to the planing machine did you know what he meant you to do? A. He told me to go to that machine and get some staves and carry to my machine.

The Court: I didn't understand him.

30 Q. You understood him to say that, did you? A. No; all I knew that he understood according his indication with his finger.

Q. And he pointed where? A. To that machine.

Q. The staves on the floor? A. Yes, alongside of the machine.

Q. How many staves were there laying there on the floor, about? A. Well, about—indicating with the hand from the floor up.

40 Q. He is on the platform there, Mr. Interpreter. A. About three feet.

Adolph Kinnert—Cross Examination.

Q. All scattered over the floor? A. No, sir; no, sir.

Q. Well, where was Rosario, the man that worked at the planer, at the time you went over to pick up the staves? A. I did not see him.

Q. Well, he wasn't at the machine, was he? A. I did not see him. 10

Q. Well, you walked over to the machine; did you see him standing there? A. I did not look.

Q. Well, you walked over to the machine; did see him.

Q. Well, how many times did you walk over to the machine to pick up staves? A. Once I went and picked up some that were laying a little way from the machine, and the next time I went and I was going to take some staves from the top of the pile— 20

Q. Yes; what did you do with the staves you took the first time? A. I brought them and cut them up and went for some more.

Q. And when you went for some more was Rosario there? A. I did not look. I went only to pick up some staves.

Q. Well, but you could see a man that was standing right in front of the machine, couldn't you, if he was there? A. I did not look for anybody. 30

Q. Well, the machine is only about as big as this little desk, about three by four, isn't it? A. Yes.

Q. Well, when you went to pick up the staves in back of the machine couldn't you see whether a man was standing right in front of the machine? A. I didn't look. I only looked to pick up staves.

Q. Well, the machine was running, was it? A. Yes, sir.

Q. How do you know it was running? A. Because I heard it in motion. 40

Adolph Kinnert—Cross Examination.

Q. You heard it in motion, but no staves were coming out of it at that time? A. It was quite a pile then laying there.

10 Q. I don't mean the pile laying there. Were there any staves coming out of the machine while you were picking them up? A. Didn't notice.

Q. Well, you say you don't know where your hand was caught, do you? A. I only know that it happened near that machine, but as to describe how it happened I cannot say.

Q. Do you know how far away your hand was before, as you say, you felt cold air that was sucked in—how far away was your hand from the machine? A. I stood close to the machine.

20 Q. Yes, but how far was your hand away from the back of the machine? A. As he indicates, from his hand to the desk.

Q. Well, how far away from the back of the machine? Here is the back of the machine; how far away was your hand? A. Like that.

Q. About a half a foot?

Mr. Kantrowicz: No, no; almost against it.

30 Q. Here is the back of the machine. How far away from this? Come over here. How far away from here or from there? A. I came there and I was going to take the staves and my hand was caught.

Mr. Simpson: How far is that? How near was he to the back of the machine with his hand? It is only about an inch.

40 Mr. Lichtenstein: He shows all the way to a foot.

Adolph Kinnert—Cross Examination.

Mr. Simpson: A foot to an inch. That is a fact—back from the machine?

Mr. Lichtenstein: Yes, a foot to an inch.

Q. Were you stooping down? A. Sure.

Q. What part of the back of the machine was it that you were picking up the staves from? A. 10
From the side where the staves fell out.

Q. Well, where do they fall out? A. Near where my hand was caught.

Q. How do you know that they fall out there?
A. Because I saw them fall out there.

Q. You saw them fall out—during the three weeks you were working there?

Mr. Kantrowicz: He said that.

20

A. Only that day I saw them fall out.

Q. Only that day; that is, before you went over there to pick up the staves? A. Only the same day—not directly at that time when the accident happened.

Q. Not at the time the accident happened, but in the morning before the accident happened? A. No; it was in the afternoon.

Q. In the afternoon? How long before the accident happened did you see the staves coming out of there, out of the machine? A. I didn't look at the clock; cannot indicate any particular time. 30

Q. Well, you were fifteen feet away at that time, weren't you, from the machine? A. Yes.

Q. How could you see where the staves were coming out? A. The foreman told me to go to the machine.

Q. I know, but how could you see where the staves were coming out? A. I know that the 40

Adolph Kinnert—Re-direct Examination.

staves were laying near the machine—near that hole.

Q. But there was no hole in the floor, was there?

A. In the machine.

10 Q. Well, but there are lots of holes in a machine, aren't there, or in this machine? A. I did not observe the machine. All I looked at is the place where the pile of staves were laying with the intention of picking up some staves.

Q. So that you did not see the hole at all, did you? A. No; I didn't look at the place where the hole was.

Re-direct Examination by Mr. Kantrowicz:

20 Q. At the time the foreman told you to get some more staves were you out of the sizes you were cutting? A. I cut eighteen inch staves.

Q. Did you have any more eighteen inch staves to cut at that time? A. No, sir; did not.

Q. Were they eighteen inch staves at the planing machine? A. Yes.

30 Q. Is that when the foreman pointed out to you to go to that planing machine? A. He pointed his finger to the place where the staves were and told me to go and get some.

Mr. Simpson: At that time?

A. Just before the accident.

Mr. Simpson: Just before what?

The Interpreter: The accident.

Q. Since the accident you have examined the machine, haven't you?

40

Edward S. McConville—Direct Examination.

Mr. Lichtenstein: He has already said he had.

A. After the accident I got some work and I went and examined the machine.

Q. What kind of a hole is the one you mean in back of the machine? 10

Mr. Lichtenstein: He has already said he didn't see any hole.

Mr. Kantrowicz: He said there was.

The Court: Let us see what he says about this.

A. I noticed afterwards that the hole was about the size of this board here (indicating). 20

Mr. Kantrowicz: That is about eight by seven.

Mr. Lichtenstein: It is more than that.

Mr. Kantrowicz: (Measuring) Eight by ten.

By Mr. Lichtenstein:

Q. Well, there were lots of holes in that machine that were bigger than eight by ten, weren't there, openings? A. I only looked at the place where I picked up the staves. 30

EDWARD S. McCONVILLE, sworn.

Direct Examination by Mr. Simpson:

Q. Did you work for the Mathison Cooperage Company on the 13th of August, 1910? A. I did, yes. 40

Edward S. McConville—Direct Examination.

Q. What was your position there? A. Foreman.

Q. Were you general shop foreman? A. General shop foreman.

10 Q. Did you know this planing machine on which this accident is said to have happened? A. Yes.

Q. What was the construction of that machine on the 13th of August? A. What do you mean by the construction?

Q. What was it? Did it have any knives in its interior? A. Yes, it had four knives.

Q. How did they operate? A. Well, two on the top and two below.

Q. They operated on a shaft? A. Yes; on a spindle, yes.

20 Q. How large were the knives? A. About seven and three-quarters inches.

Q. In width? A. In width.

Q. And how long? A. Oh, about four inches.

Q. Did it do this work? That is, taking the rough board and planing it? A. Yes.

Q. Which side of the board was up and which was down? A. That is the way (illustrating).

30 Mr. Lichtenstein: That is the convex side to the top.

The Court: Convex to the top?

A. Yes, sir.

Q. Was there any suction connected with the machine, that is any part of it which drew in the shavings or expelled the shavings? A. There is a little suction there.

40 Q. What was the purpose? A. Simply to draw shavings away and draw them down to the boiler room to burn them up.

Q. That is the suction carried the shavings which were cut from the board away into the fire-room?

A. Yes, sir.

Q. Where was that suction hole, on the back of the machine or front of the machine? A. There was two hoods covered each knife. The shavings dropped into a hood at the bottom, and the shavings was caught on the top from another hood.

10

Q. Where was the suction? A. There was two blowers.

Q. What I want to find out, in the construction of this machine were there any holes open on the back through which the air came in to make this suction carry the shavings away? A. No.

Q. Where did the air come from? The machine could not be enclosed; it must have got the air somewhere. You say the blower sucked the air in. It must have sucked it in from some place. A. The blowers sucked the shavings away.

20

Q. The machine must have been open to the outside somewhere to get the air from? A. It was not open, no, but it was all piped up.

Q. It was not a vacuum, the inside of that machine, was it? It was exposed somewhere where they got the air from. You say there were no holes at all in the back of the machine? A. No.

30

Q. How did these things come out? A. Oh, through a little space, certainly, for them to come out?

Q. Well, is there any suction, or any suction in the space through which they were forced out? Any air drawn in? Any suction in? A. No.

Q. Now, on the day of the accident there were no guards around that hole, were there? A. There certainly was guards.

40

Edward S. McConville—Direct Examination.

Q. Why, there have been guards put on since?
A. No, sir; there was guards on then; just the same then as what there is now.

Q. On the 13th of August, 1910? A. Yes.

10 Q. Will you describe those guards? What were they? A. They were two hoods, one fitted over the under knives, and the other hood fitted on top of the upper knives.

Q. They simply protected the upper and the under surface; there were not any guards on the back, were there, where this thing comes out? A. Where what come out?

Q. This. A. There was no necessity of any guards.

20 Q. There were not any guards there? A. For the staves to come out, no.

Q. Where the staves came out? How large was the hole where the staves came out? A. It didn't come out of no hole; it came out of the—a plate under the planer like this; it went right there.

Q. It was exposed where it came out? It got out, didn't it—the staves got out? A. Certainly got out.

Q. That hole it got out of, how large was it?
A. How large was the hole?

30 Q. Yes. A. Let me get that?

Q. What do you want? A. I want that piece of machinery over there. I can show you (piece of machinery produced).

Q. Explain to these gentlemen what you want to explain. A. Now, the stave (stave produced). That is the only hole that came out of.

Q. Came right out there? A. Yes.

40 Mr. Lichtenstein: I have illustrated by a lower piece, which you call what?

Edward S. McConville—Direct Examination.

A. That is part of the bed of the planer.

Q. The bed of the planer? A. Yes.

Q. The upper part? A. This is the part—the pressure bar.

Q. To hold the stave down? A. Yes.

Q. Then the stave rests on the bed plate and is held down by the pressure bar? A. Yes. 10

Mr. Lichtenstein: It is for the record.

Mr. Simpson: This is my witness, not yours.

The Court: He is the plaintiff's witness.

By the Court:

Q. As that apparatus is now, as set up there now, and as the stave is in there, which way does it run through—from this way, from the left to the right or the right to the left? A. From the left to the right. 20

Q. Put in at the left and comes out at the right? A. Yes.

By Mr. Simpson:

Q. Underneath here is open, in the open? A. There is a hood that goes under that. 30

Q. Where is the hood? Somebody said he had the hood? Isn't there a foot and a half distance between this hood and the knives that you have mentioned? A. Hood and the knives? No.

Q. How much distance is there? A. That hood covers the top—the top knives is like that; it covers that (illustrating).

Q. Yes? A. That other one covers the under knives (illustrating). 40

Edward S. McConville—Direct Examination.

Q. What is the hole for, that hole there? A. That hole there is cut in there.

Q. What is it for? A. It was cut in there to see—to prove whether the shavings could be sucked in there or not.

10 Q. This hole? A. Yes.

Q. Was cut in there? A. Yes.

Q. How long has it been cut in there? A. It was cut in there last Saturday.

Q. Now, that is the hood. Then the knives are protected by that, and the upper knives are protected by this? What does this open on—this? A. That carries the shavings away.

20 Q. In the bottom? The pipe at the bottom hood that you speak of, where does that open on? A. It runs into a pipe and carries to a blower and carries down to the boiler room.

Q. This pipe does? A. Yes.

Q. This bottom pipe, you say, fits on to another pipe? A. Yes.

Q. Where is the pipe it fits on? Did you bring it? A. Oh, no, I didn't think it was necessary to bring that.

Q. Doesn't that go right to the blower in here? A. This?

30 Q. Yes. A. Why, no; there is another pipe underneath.

A Voice: There is another piece here. That is the old one. That gives them an idea.

Mr. Simpson: What old one do you mean?

A Voice: The old one.

The Court: Never mind.

40 Q. What do you mean, the old one? What is the old one? Mr. McConville, what is the old ma-

Edward S. McConville—Cross Examination.

chine? A. The old pipe. We have had new pipe put on that machine since then.

Q. Since the accident? A. Yes.

Q. This is the old pipe? A. Yes.

Q. This is a pipe that you are using now, is it? A. Yes.

Q. How long have you been using that pipe? 10

A. Well, have been using that pipe maybe since the accident.

Q. Since the accident? A. Yes.

Q. Who made this pipe? A. That pipe?

Q. Yes? A. Well, I don't know. Some firm out west made it.

Q. Who fitted it on the machine? A. The man that put the pipe in.

Q. How long after the accident was that? A. 20
Oh, that is six or seven years ago.

Q. Well, the accident— A. No, no; about four years ago.

Q. Four years ago? A. Yes.

Cross Examination by Mr. Lichtenstein:

Q. Mr. McConville, we will get the record in some sort of shape. You have been working for this concern for how many years? A. Oh, over 30
forty years.

Q. And have had charge of the machinery in that place during all of that time? A. Well, part of that time.

Q. Eh? Speak up loud. A. I have been foreman for about thirty-five years.

Q. And this planing machine is what make machine? A. It is John F. Orell's machine, made in Cleveland, Ohio.

Q. Is that the standard planing machine that 40

Edward S. McConville—Cross Examination.

is used all over this country? A. Yes, all over this country.

Mr. Simpson: I object, unless he can show that he knows what—

10 Mr. Lichtenstein: I can bring that out. I will withdraw it.

Q. For how many years has this machine been used in the old plant? A. This machine?

Q. This same machine? A. About seven or eight years.

Q. And did you have one before you had this machine? A. Yes, we had one before?

Q. Same make? A. Same make.

20 Q. For how many years did you use that other machine? A. Well, about eleven years.

Q. Same construction. A. Same construction.

Q. Now I show you a catalogue and ask you whether that is the cut of the machine that was used in your factory on the day of the accident? A. That is the cut of the machine, yes.

Q. On page 8. How high is this machine from the floor to the bed plate? A. Thirty-one inches, about.

30 Mr. Simpson: Going to offer that in evidence? Mark it.

Mr. Lichtenstein: I will offer it when the time comes, yes.

Q. The machine that was in operation on the day that this young man was hurt, do you recall that day? A. Yes.

40 Q. Is it the same machine that you have there to-day? A. The same machine.

Edward S. McConville—Cross Examination.

Q. Was it the same machine that you had there before the accident? A. Same machine.

Q. Had you had it for several years before the accident? A. We had had.

Q. Did you have a blower system before the accident? A. Yes.

Q. For how many years did you have the blower system? A. Had a blower system there since the machine was put up.

10

Q. That is how many years? A. About nineteen years ago.

Q. From the time that the blower system was put in up until the present day, have you had the upper caps and lower caps covering the knives? A. Yes.

Q. All the time? A. All the time.

20

Q. Has there ever been a time when you did not have those caps? A. No.

Q. When Mr. Simpson asked you about when this cap—referring to the cap which you then held in your hand, covering the lower set of knives—was put on there, you said since the accident? A. Yes.

Q. And for years before? A. Yes, sir.

Q. When you said since the accident what did you mean? A. What did I mean?

30

Q. Yes. A. I mean that those hoods had been put on since the accident.

Q. That is there were newer hoods put on afterwards? A. Yes, newer ones.

Q. Did you change your blower system some six months or a year after the accident? A. Yes.

Q. For what purpose? A. To get a little more power.

Q. Is this system that you are using now exactly the same blower system as you used before the

40

Edward S. McConville—Cross Examination.

accident and on that day, excepting it has a little more power? A. The same system.

Q. And the arrangement of hoods? A. Just—

Q. Are they same as they were on the day of the accident and for years before? A. Yes, just about the same.

10 Q. Did they cover the knives in exactly the same manner as they do now? A. Yes, covered the knives in exactly the same manner.

Q. Taking this bed plate, what is the distance from the rear of the—in the first place, the point that I am touching now on this bed plate, is that the front or rear of the bed plate? A. That is the front of the bed plate.

20 Q. Is it the front or rear of the machine? A. It is the rear of the machine.

Q. The man that is putting in the staves stands in the front of the machine? A. Yes, stands this side.

Q. Stands what side? A. Right where I am now.

Q. Where you? A. Yes—that is the rear of the machine, where I stand—that is it now.

Q. The bedplate should be turned around that way? A. Yes.

30 Q. If you were the operator you would be standing where you are sitting now? A. Yes, sir.

Q. And you would shove in these boards? A. Yes.

Q. At that time they are straight, are they, level, flat? A. No, they are not flat; they are the same as they are now, but planed a certain thickness. The circle is on them.

Q. What is the width of the machine from where the man stands to the rear of the bedplate? A. What is the width of it?

40 Q. Yes. A. Well, I don't understand the question.

Edward S. McConville—Cross Examination.

Q. Well, taking from the point where the machine begins to where it ends, the end of the bedplate? A. Oh, the bedplate? Well, I should think about thirty inches.

Q. What is the width of the machine? A. Well, the bedplates is just about ten inches wide.

10

Q. Well, I know, but the whole machine, the bearings and everything else? A. I don't know. I suppose about three feet.

Q. Now from the rear of the machine at the point that you call the bedplate to the rear—or the front of the bedplate, is how much in distance? A. What is that?

Q. Just come right down here and take your rule, if you please. Just erase that question. What is the length of the bedplate? A. Where do you mean, here?

20

Q. Yes. A. Eight and a half inches.

Q. What is the width of the bedplate, the whole bedplate? A. You mean this part?

Q. Yes. A. About ten inches.

Q. Where do the upper knives revolve with reference to the bedplate? A. They revolve above the bedplate.

Q. About how high above the bedplate? A. Well, above the bedplate—well, just about the thickness of that stave there.

30

Q. The thickness of the stave? A. Yes.

Q. How far inside of the rear end of the machine do the upper knives revolve? A. How far from the machine?

Q. Yes, from the rear of the machine? A. Seventeen inches.

Q. And those knives, you say, are covered by the hood which you have shown here? A. Yes.

Q. And that is the hood which I hold in my hand now? A. Yes.

40

Edward S. McConville—Cross Examination.

Q. I notice that the hood is roughly cut—made of galvanized iron and is roughly cut at the bottom?

A. Yes.

Q. What are all these openings for? These little cuts in the galvanized iron? A. Well, some of them is to fit on to the top of the machine.

10

Q. To fit over the top of the machine? A. Yes.

Q. And in that way does it cover the knives? A. It covers the whole machine—covers the knives, yes.

Q. Now, the lower knives of this machine, they operate on the convex side of the stave, do they not? A. Yes.

Q. And how far back from the rear end of the machine do the knives revolve? A. About seven and a half inches.

20

Q. Seven and a half inches? A. Yes.

Q. So that the knives from the rear end of the machine would be revolving about where I hold my hand (illustrating). A. Just about that there, yes.

Q. Then that is right, is it? A. Yes.

Q. Get your pressure bar. (Witness produces article referred to.)

Q. Just turn that around, please. Place the pressure bar on top of the bedplate as you illustrated it to Mr. Simpson. A. Yes.

30

Q. Have you done that? A. Yes.

Q. Is that the manner in which the pressure bar bears down on the bedplate when it is in operation? A. Yes, that is the way.

Q. With reference to the pressure bar as you have placed it on the bedplate, where do the knives revolve? A. Right here, and back here.

Q. When you say "right here and back here" you are indicating and pointing underneath the pressure bar? A. Yes.

40

Edward S. McConville—Cross Examination.

Q. Underneath the pressure bar? A. Yes.

Q. Are the knives covered by the pressure bar?

A. The knives is partly covered by the pressure bar, yes.

Q. And way in the rear of this bed plate? A. Rear of this bedplate, yes.

Q. So that the knives revolve underneath the pressure bar out front of that where you indicate, and about seven and a half inches from the rear of the bedplate? A. Yes. 10

Q. And are covered by this pressure bar? A. Yes, are covered by this pressure bar.

Q. Take the hood that covers—when you say that the pressure bar covers the lower knives, you have indicated the upper part of the lower knives?

A. Upper part, yes. 20

Q. Taking the lower portion of the upper knives— 20

The Court: You mean that or the lower portion of the lower knives?

Mr. Lichtenstein: Of the lower knives, yes.

Q. Just let the jury see this; put it on top here (indicating table). And placing the hood underneath the pressure bar and the bed plate, is that the position in which the hood always rests? A. That is the position. 30

Q. Is that the position in which it rested at that time? A. The position it rested at that time.

Q. From the time that machine was built or put into your place? A. Yes.

Q. Where with reference to this hood do the knives revolve? A. Right in there.

Q. Right in there, indicating a point about the 40

center of the hood; is that right? A. About the center, yes.

Q. When you point at the center of the hood, is that also at the point in the center of the opening of the hood which leads down to it? A. That is the center of it.

10 Q. Taking the point at the rear of the machine, or which you have indicated as being the bedplate—take a rule, if you please, and tell us how many inches from the front of your bedplate or the rear of the machine your rule extends back before it strikes the lip which appears to be part of the casting underneath? A. Two and five-eighths.

Q. Two and five-eighths inches? A. Yes.

20 Q. And this, when you placed the hood underneath the pressure bar and in the position in which it stands, does it rest up against the rear part of that lip or the front part of the lip? A. Rests against the front part of the lip.

Q. Well, the front part towards the rear of the machine? A. Yes.

Q. And does the lip hold that galvanized iron hood? A. It holds it, yes.

30 Q. Now then, just take a seat again, please. The lower hood covering the lower knives also appears to be rather ragged. What are these cuts in here for? A. Well, they wore away a little bit from shavings.

Q. From shavings striking up against it? A. Yes, and from putting it on and taking it off.

Q. A hole which appears to have been cut out with a chisel in the front of the lower hood you say you cut out on Saturday last? A. Saturday, yes.

40 Q. Did you do that at the request of a young man from my office? A. Yes.

Edward S. McConville—Cross Examination.

Q. For the purpose of doing what? A. To see if the blower—if the blower would draw the shavings in.

Q. Did you cut that out yourself or have some one cut it out? A. No, sir; I had a man cut it out.

Q. You had this whole thing in court pretty near the whole week? A. Yes. 10

Q. Did you have that hole in or have it cut out afterwards? A. No; cut it out afterwards.

Q. For the purpose of making that test? A. Yes.

Q. Mr. McConville, you were asked whether the machine had any suction about it? A. Yes.

Q. And you answered Mr. Simpson that you had—that there was some suction, a little suction for the purpose of taking the shavings away? A. Yes. 20

Q. Now the hood which covers the upper set of knives and the hood which covers the lower set of knives, is a hood which is used in connection with your blower system, isn't it? A. Yes.

Q. And at the same time it covers the knives? A. At the same time it covers the knives.

Q. What is the purpose of both of these hoods? A. Simply to carry the shavings away. 30

Q. And as your machine revolves and these knives cut—as the knives plane the staves, the upper portion and the lower portion, the shavings from the upper portion go where? A. Up above.

Q. Up above? A. Yes.

Q. And the shavings from the lower portion, where do they go? A. Down below.

Q. Do both of these pipes connect in some way? A. Yes; they connect with one pipe.

Q. Connected with one pipe? A. Yes. 40

Q. You said the blower system which you have at the present time is a little stronger than the blower system you had at that time? A. Yes.

10 Q. Now at the time that this boy was hurt and for some years prior thereto was the blower system that you had there sufficient even to carry off the shavings? A. No.

Q. Would it carry off all kinds of shavings? A. No.

Q. What kind of shavings would it carry off? A. little pieces of light shavings.

Q. What became of the heavier shavings? A. They would lay in the bottom of the pipe.

20 Q. And did you have a place that was used for the purpose of taking out the shavings that dropped to the bottom of the pipe? A. Yes; we had a kind of opening in the pipe, a door like in the pipe, and we took the shavings out of it.

Q. Mention was made of a piece of the old pipe? A. Yes.

Q. Is that the piece of the old pipe (indicating)? A. Yes.

Q. Where did this old pipe rest with reference to the lower hood covering the knives, the lower knives. A. It rested on the floor.

30 Q. Rested on the floor? A. Yes.

Q. Is that the piece that rested on the floor? A. That is the piece that rested on the floor.

Q. And the piece that you are indicating now and talking about appears to be what would commonly be termed an elbow, I think? A. Yes.

Q. Is that the way it rested on the floor? A. That is just the way it rested, yes.

Q. There appear to be two openings? A. Yes.

Q. I mean two ends to this elbow? A. Yes.

40 Q. And also in the center of the elbow there appears to be a little opening? A. Yes.

Q. What is this little opening, or what was it?

A. That was left there so as to take the heavy shavings out that the blower would not draw up.

Q. Now what was there attached to the part of this elbow which was nearest the machine? A. There was a pipe attached to it.

10

Q. A pipe attached to it? A. Yes.

Q. Was that the hood itself? A. Yes; I guess the hood was there.

Q. And as the shavings dropped from the lower or under knives down to the hood and into this elbow would all of the shavings be carried up? A. No, not all of them; the heavy ones would lay there at the bottom.

Q. Then how would you get rid of the heavy ones? A. Take that little slide off there that fitted on there and pull them out with our hands.

20

Q. Was there a cap on it? A. Yes.

Q. A cap covering this opening between the two ends of the elbow? A. Yes, sir.

Q. Take that little cap off. A. Yes.

Q. What did you do? A. We put our hands in and pulled them out.

Q. Did you ever take shavings out of this cap? A. Yes.

Q. At the time when it was in operation? A. Yes.

30

Q. Out of this cap? A. Yes.

Q. Was there sufficient suction to draw your hand in? A. No.

Q. In either direction? A. No.

Q. While it was in operation? A. While it was in operation.

Q. How large would the shavings be that fell to the bottom of this elbow that would not be carried off by the suction system? A. Well, they would

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Edward S. McConville—Cross Examination.

be heavy shavings, you know, like from the ends of staves where they broke off, the little pieces broke off, and they lay at the bottom.

10 Q. Have you any pieces here that you could illustrate to the jury the kind that would be carried off and those which would not? A. No, I have not.

Mr. Lichtenstein (aside): Have you any of those here? Have you any larger pieces?

Q. I show you an envelope containing some shavings, and I ask you whether they are shavings as they come from the operation of this— A. Them is the shavings.

20 Q. Is that the general character of the shavings? A. Yes.

Q. Do you find any of the larger pieces here that would not be carried off? A. No.

Q. From this blower system? A. No.

Q. They would be larger pieces than these that would have to remain there? A. Yes.

Q. Now this blower system that you had in operation at that time, was it sufficient in capacity, I mean so far as suction was concerned, to carry off the ordinary shavings at that time? A. No.

30 Q. Was that the reason why you changed the system? A. That is the reason why we changed it. That is one of the reasons.

Q. Yes. Did you at the time that you had the old system, at the request of counsel, make tests for the purpose of seeing whether shavings which would be held in the hand in the rear of this machine were affected by the blower system when the machine was in operation?

40 Mr. Simpson: I object to it as improper cross examination. If he wants to make this

Edward S. McConville—Cross Examination.

man his own witness—he is his own superintendent—well and good.

Mr. Lichtenstein: They have inquired about this blower system and the suction.

The Court: I will permit it.

(Question repeated.)

10

Q. While the old blower system was still in use on this machine and after the accident, did you make tests for the purpose of determining whether there was any suction which would draw your hand or any part of your hand into the machine? A. Yes.

Q. Did you hold shavings—what tests did you make? A. Held shavings and held paper there. Would not take either.

Q. Held shavings? Where did you hold the shavings? A. Right in my hand.

20

Q. In the palm of your hand? A. Yes.

Q. What kind of shavings did you hold? A. Those shavings like those (indicating shavings in a paper bag).

Q. Shavings of that kind? A. Yes.

Q. Just put some back, if you please. Just hold some in your hand. You held some shavings in your hand, in the palm of your hand. Can you move those shavings in the palm of your hand all around the rear of that machine? A. Yes, sir.

30

Q. Will any of those shavings be removed from the palm of your hand, holding it as close to the machine as you can? A. No.

Q. Any part of the rear of the machine? A. No.

By the Court:

Q. How close to the machine did you hold them? A. Why, right up against the—two and a half inches from the knives.

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By Mr. Lichtenstein:

Q. As far as two and a half inches from the knives? A. Yes.

Q. Would they even be affected there? A. No.

10 Q. Could you get any closer to them? A. No.

Q. Holding a piece of tissue paper or a piece of newspaper at the rear of the machine and right in front of the knives, that is in the rear of this bed-plate—

The Court: Which he has called the front, or which is the rear of the machine?

Mr. Lichtenstein: Yes. I will reframe the question.

20 Q. If you were to hold the palm of your hand with shavings in the rear of this machine and move it in the manner in which I am moving it right up to the edge of the machine and touch the machine, would it remove a single shaving from your hand? A. No.

Q. While that machine was in complete operation? A. No.

30 Q. Would it even with the new system in operation? A. Yes, a little, not shavings, no. It would a paper, though.

Q. Would the new blower system, which is more powerful, you say, than the old one—would it remove a single shaving from the palm of your hand? A. No.

Q. If you held it right up close to the machine? A. No.

Q. And moved it up and down? A. No.

Q. Or sideways? A. No.

40 Q. Was there any part of those knives which was not enclosed by this cap? A. No.

Q. Beneath? A. No.

By the Court:

Q. How could you get your hand into these knives from any place at the rear of the machine, that is, the end at which the staves came after being planed? It is really the rear of the machine. How could you, if at all, by any manner, get your hands into the knives, or your hand into the knives, and not into the machine? A. Want me to answer that? 10

Q. Yes; I do want you to answer it? A. Well, there was no way to get your hand into the machine except the top of that hood there, that I have showed you just now, was wore away a little at the top, and you couldn't get your hand in there without you deliberately put it in there. 20

Q. How large was that opening, that wearing away that you speak of, at the time of the accident, if you know? A. I know there was a little bit of an opening on the top; it must have been about three and a half inches.

Q. Long? A. Long; and maybe four inches and about two and a half or three inches deep.

Q. Well, let me ask you another question. Could one in any manner, whether by force or otherwise, put his hand through to the knives on or along the top of the bedplate? A. No; you would have to get down underneath. 30

Q. Why not? Why couldn't he do it on top of the bedplate? A. Because that cap there prevented him, that pressure bar.

Q. That is what I supposed? A. Yes.

By Mr. Lichtenstein:

Q. So that in answer to his Honor's question, the only place a person could get his hand in is 40

Edward S. McConville—Cross Examination.

through that little opening? A. Through that little opening.

Q. Could it be drawn in that opening in any way? A. No, sir.

10 Q. In what manner could a person's fingers or hand be cut off? A. He would have to shove it in.

Q. Have to shove it in there? A. Yes, shove it in.

Q. If he did deliberately shove it in there he would have his fingers cut off or his arm drawn in? A. Yes.

Q. How far would he have to shove his hand into this hole before he would get to the knives?

Mr. Simpson: I object. He has described where the knives are.

20 The Court: No. So as to have it sure, how far along the end of the bedplate?

A. He would have to shove them in about four inches.

Q. From the rear of the bedplate? A. Oh, from the rear? Seven inches.

Q. Seven inches? A. Yes.

30 Q. Is that the only way that a person could possibly have his fingers or hand cut off? A. That is the only way he could get hurt.

Q. Was it possible in any manner for a person's hand to be drawn in there? A. No, it was impossible.

Q. Can that be seen down there to-day when the machine is in operation? A. It can be seen down there to-day.

40 Q. Was there any suction in any part of the outside of that machine in any way that would draw shavings or even a piece of paper into it? A. Not powerful enough, no.

Edward S. McConville—Re-direct Examination.

Re-direct Examination by Mr. Simpson:

Q. You did not produce the hood, the lower hood that was on this machine when this accident happened, did you? A. Yes, sir, I did.

Q. Where is it? A. It is gone; I don't know.

Q. I say you did not produce it to-day? Where is it? A. I don't know where it is now. Just the same as that. 10

Q. You haven't got it, the same or not—you haven't got it, have you? A. I haven't got it, no.

Q. When did you destroy it? A. Well, we didn't destroy it. We had new—

Q. When did you lose it, the hood that was on the machine when this accident happened? A. I don't know; it is a long time, so I put new piping on the machine there. 20

Q. On the same machine immediately after the accident happened? A. Yes, sir.

Q. You took this boy's hand out of the machine? A. I wouldn't swear to that, whether I did or not.

Q. You took the lower hood off, didn't you? A. The lower hood was off when I got there.

Q. Where was the lower hood when you got there? A. I don't know where it was.

Q. Where is it now? A. I don't know where it is. 30

Q. This hood was not on the machine, this lower hood, at the time of the accident? A. No.

Q. All we have is your word that it is the same as this? A. Yes.

Q. The hood would be much more convincing that was on the machine? A. Yes.

Q. Where is that? A. I don't know.

Q. You don't know? A. No.

Q. What part of that was near the knives? Is it 40

Edward S. McConville—Re-direct Examination.

the part here or the part here (indicating)? A. That is the upper hood you have there.

Q. All right, I will take the lower one. Which part was near the knives, this part or this (indicating)? A. Why, that hood was in the center—the knives was in the center of this hood.

10 Q. On here? A. Yes.

Q. And this was down? A. Yes.

Q. This thing was up here? A. Yes.

Q. There wasn't any hole like that cut in it? A. No, but there was a hole like that wore away.

Q. If that hood was on the man would have to put his hand right through that to get it into the knives? A. Yes.

20 Mr. Lichtenstein: He did not say that.
Mr. Simpson: I am asking him.

Q. If this hood was on the machine in the condition that you have described, it would be a physical impossibility for this accident to happen, wouldn't it, unless you took the hood off? A. How do you mean it would be impossible for it to answer?

30 Q. I didn't say it would be impossible for it to answer; I said if this machine was in that condition you describe with this hood on this way and this rear part between the knives and the outside, you could not get your hand into the knives, could you? A. No.

Q. It would be a physical impossibility? A. Yes.

Q. You would have to take this thing off before you put your hand in, wouldn't you? A. Yes.

Q. All right: Now then, with the hood that was the accident did happen, didn't it? A. Yes, sir.

40 Q. You don't know where that hood is, do you?
A. No.

Edward S. McConville—Re-direct Examination.

Q. Now, you say that lower hood had a hole four inches long and two and a half inches deep? A. Yes, sir.

Q. Worn, you said? A. Yes.

Q. What wear could make a hole of that size? A. Just about the same as that is wore there now.

Q. Where is any hole on the top of this worn four inches long and two and a half inches deep? A. That is the new one. The old one was wore away from the shavings striking it.

Q. You said the same as this is worn. Where is that worn? A. I didn't say anything about this is worn. I said it had a hole like that—about like that.

Q. Wear? A. Yes, wear.

Q. What wear? There wasn't anything? A. Heavy shavings striking it.

Q. Show us the shavings that wore a hole? A. No.

Q. These shavings? A. No; heavier shavings than that.

Q. Where are the shavings that wore this hole? You say that these shavings did not. How much heavier than these? A. Oh, a great deal heavier.

Q. How much heavier? Were they ten-pound shavings, each shaving weighing ten pounds? A. I couldn't tell you how many pounds.

Q. You say with a straight face, do you, that the shavings that come off that board wore that hole?

Mr. Lichtenstein: I object.

A. Yes, certainly I do.

The Court: The question as it stands may be stricken out.

Edward S. McConville—Re-direct Examination.

Q. Well, do you say that shavings blowing against this iron of the old hood wore a hole as big as this? A. Yes, I certainly do.

Q. Where was the hole? A. Just about where it is now.

10 Q. Just about where it is? A. Yes.

Q. Just about the same size? A. Just about the same size.

Q. You measured it, of course? A. No, I didn't measure it.

Q. How do you know it is? A. I judge it was about the same size.

Q. When was the last time you saw this old hood? A. I don't know; six or seven years ago—since the accident.

20 Q. Isn't it true that the old hoods that you had on there did not have anything of this kind at all on; that they were on the level of this lower thing here, and had nothing of this kind at all on? A. May not be quite as neat as that, but just about the same, though.

Q. How high was the old hood? A. I couldn't tell you, you know, because I haven't got the hood there.

30 Q. Haven't got either one, the upper one or the lower one? A. No.

Q. Don't know where they are? A. No.

Q. Who put this hood on? A. I don't know.

Q. When did you take the old hood off? A. I don't know who they were—people came from Pennsylvania.

Q. Did the makers of the machine put it on? A. No; the man that put the piping in the shop.

40 Q. You say this picture which Mr. Lichtenstein showed you was the same as this planer was in the shop on the day of the accident? A. Yes.

Edward S. McConville—Re-direct Examination.

Q. What was the nature of the planer? A. John F. Ormes.

Q. I know, but what did they call it? Had a style, didn't it? A. No.

Q. Was it a dreadnought? A. No.

Q. This planer has got a— A. That is practically the same planer. 10

Q. This says, "Ormes' very latest stave planer, Dreadnought"? A. Yes.

Q. Do you mean to say in 1910, Orme was turning out the same planer he is turning out now, in 1915? A. Just about the same.

Q. No improvement on it? A. Very little, if any.

Q. No changes? A. Very little, if any.

Q. Will you point to me on Mr. Orme's picture of the Dreadnought—show me the lower hood on this picture? A. He don't have no hoods. They have to put them on ours. 20

Q. They are not designed; they do not go with the planer at all? A. No, not at all.

Q. There is no lower hood on that planer? A. No; you have to put it on yourself.

Q. And you put it on for the purpose of making a suction, don't you? A. Put it on for carrying shavings away. 30

Q. Now the one that you had on on the day of this accident, it did not work the way it ought to work and you put on a suction that would work the way it ought to work? A. We increased the suction, that is all.

Q. You did increase the suction? A. Why, we—they put more fans in the blower and put different piping up.

Q. And put the hood nearer to the knives, too, didn't you? A. I don't know anything about that. 40

Edward S. McConville—Re-direct Examination.

Q. To make the suction? A. No; you could not get any nearer to the knives.

Q. Why, you could get this nearer to the knives if you put these off? A. Can't get it any nearer than that. She goes up against that.

10 Mr. Lichtenstein: When you speak of "that"—you refer to—

Mr. Simpson: Do you object to my question?

A. Can't get any closer than that at all.

Q. Yes, I know, but if you had no top plate here at all, if it fitted up this way and this whole space was open, there would not be as much suction, would there? A. No.

20 Q. What you were trying to do was to get a better suction, wasn't it? A. We were trying to get a better suction, yes, but we didn't make the improvement for that.

Q. I ask to have that stricken out as not responsive. You were trying to get better suction, weren't you? Were you trying to get a better suction? A. We certainly was, yes.

30 Q. What was the date you installed this device to get a better suction? A. Well, wait—Mr. Mathison over there, he can answer those questions better than I can, if you wish to question him.

Q. You don't know? A. No.

Q. Now, this old pipe that you produce, did it rest on the floor? A. Yes, rested on the floor.

Q. Did it fit over the hood? Was it a close fit on the hood? A. Yes.

Q. This was a close fit on the hood? A. Yes.

Q. I notice this does not fit so close. The other hood must have been smaller than this hood, eh?

40 A. Yes, a little smaller.

Edward S. McConville—Re-cross Examination.

Q. Had the hood a little smaller than this? A. Same size.

Q. The hood was the same as this but the pipe of the old one was smaller? A. Yes.

Q. Was there any blood on the knives when you examined them? A. I could not—I don't know.

10

Re-cross Examination by Mr. Lichtenstein:

Q. Mr. McConville, you were a witness in the former trial of this case, weren't you? A. Yes, sir.

Q. Before Judge Vail? A. Yes.

Q. That case was tried just five years ago, in January—January 26, 1911. Did you at that time have in court the original pipes? A. Yes.

20

Mr. Simpson: I object to that. It is not proper cross examination. It is not for the purpose of contradiction. He is cross-examining my witness as to what my witness said at some anterior time, which is unimportant, unless it is for the purpose of contradicting him.

Mr. Lichtenstein: I want to show where these pipes are.

The Court: It goes toward explaining the absence.

30

Mr. Simpson: He is cross examining.

Mr. Lichtenstein: All right.

Mr. Simpson: He cannot explain on cross examination something which is detrimental to himself or favorable to himself. If he wants to explain why he has not the pipes he can call him.

Mr. Lichtenstein: Oh, you tried to make it appear that these—

40

Edward S. McConville—Re-cross Examination.

Mr. Simpson: I make it appear.

Mr. Lichtenstein: Then I have a right to find out the truth.

The Court: Go on. The question was asked.

10 Q. When the case was first tried before Judge Vail, five years ago, did you have in this very building, the original pipes? A. We did, yes.

Q. Did you have the original caps? A. Yes.

Q. Just as they were on the day the man was hurt? A. Yes.

Q. Did Mr. Simpson handle those caps in court? A. He did.

20 Q. Did you ever expect this case was going to come up again five years later? A. No.

Mr. Simpson: I object. That is not his expectation; that is for his lawyer or his firm. He is simply a witness.

Q. Did you look around, at my request, to try to find those old things? A. Yes, I certainly did.

Q. Could you find any more of them than that old piece there? A. No; that is all we found.

30 Q. The old piece of pipe, the cap that you had in court at the first trial, was it constructed exactly the same as this one is that you have here today? A. Just about the same, not quite so high as that piece is there.

Mr. Simpson: What do you mean by that?

A. That little piece there may not have been quite so high—this here.

Q. Not so high? A. No.

40 Q. Did the cap fit right up to the top of the pres-

Edward S. McConville—Re-cross Examination.

sure plate—underneath—to the left? A. It fitted up here.

Q. Yes; and you said it was worn a little bit?

A. Yes.

Q. From the shavings knocking up against it? 10

Mr. Simpson: He did not say it was worn a little bit, he said it was worn as big as the hole.

Q. All right, sir, as big as the hole? A. Yes.

Q. For how many years had that piece of galvanized iron been on there? A. Oh, been on for quite a number of years. I really don't know how many years.

Q. About how many years? A. Maybe five or six years. 20

Q. When these boards are run through, do you sometimes get large knots and shavings that break off? A. Yes; when there is a knot on the end of the stave, as soon as the knives strike it, it breaks it off and they fall into the bottom or fall into the pipe and break the pipes.

Q. Has that happened right along? A. Oh, happens every day.

Q. How many revolutions do these knives make? 30
A. They make about three thousand revolutions a minute.

Q. And when you cut out this hole did this approximate the general character of the hole that was there at that time? A. Just about the same, yes.

Q. Was it as smoothly round as this or was it jagged? A. It was kind of jagged, you know.

Edward S. McConville—Re-direct Examination.

Re-direct Examination by Mr. Simpson:

Q. Well, if you had these old hoods in court the last time, you knew they were very important, didn't you? A. I never expected to be brought—

10 Q. You knew they were important? A. No; they wasn't important to us at all.

Q. What? A. They wasn't important at all.

Q. Why did you bring them at the last trial if they were not important? A. Well, we brought them because on account of the trial, that is the reason we brought them.

Q. You knew they had something to do with clearing up this case, didn't you? A. I never knowed that they would be used again.

20 Q. Well, you knew then—I don't care anything about again—you knew then they had something to do with clearing up this case? A. Yes.

Q. Yes; very good. When did you lose them then after that?

Mr. Lichtenstein: I object.

A. I don't know where we lost them. We never bothered our heads about the old case after the case was settled.

30 Q. It never was settled? A. Well, after the last trial.

Q. After the last trial you never seen these old hoods again? A. I don't know, I may have seen them. I don't know anything about it, but we did not destroy them purposely, though.

Q. But they are gone? A. They are gone, yes.

Q. You say the hole in this old under hood came by wear? A. By wear, yes.

40 Q. Then it was a condition of slow growth, wasn't it? You had a chance to observe it getting

Edward S. McConville—Re-cross Examination.

bigger and bigger all the time; it did not grow overnight.

Mr. Lichtenstein: I object to it as leading. This is his witness. I have allowed him to go to some extent.

Mr. Simpson: I will withdraw the question. 10

Q. Was this condition which you described, this hole, a condition of growth, long wear? A. Yes.

Q. How long a time do you think it took to make that hole by knocking these knots against the—
A. I don't know.

Q. Could not state? A Year? A. I don't know.

Q. Two years? A. It may have been worn in a year; might have been six months. I really couldn't tell you. 20

Q. Whose duty was it to inspect those hoods and see whether they were getting worn or not?
A. Well, I suppose it was my duty.

Q. Can you state whether it was within six months or a year before the wear did produce this hole? A. Might have been a year; might have been two years; it didn't amount to anything.

Re-cross Examination by Mr. Lichtenstein: 30

Q. Did the fact of this hole existing there from knocking from pieces of shavings make any difference in the operation of the machine? A. No.

Q. Did it make the machine any more dangerous? A. No.

Mr. Simpson: I object. That is for the jury to say. 40

John Smolenski—Direct Examination.

Q. Did the fact that that wear in that piece of pipe was there make any difference in the operation of the machine? A. Not a bit.

Q. Did it make any difference in the suction? A. No.

10 Q. Did it have any effect upon any person being injured by coming in contact with it in any way?

Mr. Simpson: I object.

A. No.

Mr. Simpson: I object. That is for the jury.

The Court: No; that is for the jury.

20 Mr. Lichtenstein: That is all, sir.

JOHN SMOLENSKI, sworn and examined through Polish Interpreter.

Direct Examination by Mr. Kantrowicz:

30 Q. Where do you live, Mr. Smolenski? A. 589 Henderson Street, Jersey City.

Q. Are you employed by the Mathison Cooperage Company? A. Yes, sir.

Q. In what capacity? A. I worked at the joining machine.

Q. Were you so employed on the 13th day of August, 1910? A. Yes, sir.

Q. And were you working with Adolph Kinnert at that time? A. About twenty-five feet from him.

40 Q. Do you know at what time of the day this accident occurred? A. Soon after dinner.

John Smolenski—Direct Examination.

Q. And did you see Kinnert go to get staves from the planing machine? A. Yes, I saw him.

Q. Did you see this accident? A. No, sir.

Q. But you saw him at the planing machine; is that right?

Mr. Lichtenstein: I object to it as being leading. Let him describe what he saw.

10

The Court: That would be better. He said he saw him go to get them. He did not see the accident.

Q. Did you see him near any planing machine in that shop? A. I was working at the machine. I have an idea that I saw him there taking up staves.

20

Mr. Lichtenstein: I object and ask that it be stricken out.

The Court: What did he see. Find out what he did see.

A. Accurately I cannot say.

Q. Did you see the foreman direct him to go to the planing machine? A. I saw him.

Q. What did the foreman do? A. When?

30

Q. On the day of the accident? A. At the time of the accident?

Q. No; before the accident? A. At the time when I worked upstairs the foreman was absent.

Q. You mean at the time of the accident? A. Also at the time of the accident and prior to the accident the foreman was not there.

Q. You said you saw the foreman direct Adolph to go to the planing machine. Now what did he do at that time—the foreman? A. The foreman 40

pointed with his finger and told him he should cut off the staves.

Q. Where did he point to? A. To the planing machine where the staves were lying.

10 Mr. Simpson: Did he say "cut off staves" in Polish?

The Interpreter: Cut off.

Mr. Simpson: Not take out?

The Interpreter: To cut off the staves.

Q. Now where were those staves in reference to the planing machine? A. The staves fell off the machine and fell right the foot of the machine.

20 Q. Were they directly—some of them directly up against the machine?

Mr. Lichtenstein: I object to it as leading.

Mr. Kantrowicz: That is the only way.

The Court: Let him say how near.

Q. How near to the machine were they? A. The staves fell out through the machine as this may be, and the staves fall right at the foot of the machine (illustrating).

30 Q. And when Kinnert got there what did he do?

Mr. Lichtenstein: The witness says he does not recall seeing him there.

The Court: What did he see him do if he saw him do anything?

Mr. Simpson: He says he saw the foreman tell him to get the staves and tell him to cut them off. After the foreman did that he might have seen something.

40 The Court: Find out if he did or not.

John Smolenski—Direct Examination.

A. He took the staves and had them cut off at his machine.

Q. What else did you see him do after that? A. That was all—that was all the same work. When he finished one lot he went and got some more.

Q. And what was he doing at the second time? A. Just the same kind of work. He finished one kind of work and continued to get some more to do the same thing over again. 10

Q. How was he picking up those staves? A. I cannot say that.

Q. Well, what is the first that you knew of the accident? A. I worked at the joining machine and there was a small barrel filled with water that we used to drink—drinking water we used. I went from the machine and intended to get a drink, and as I looked he came and wanted to place his hand in the barrel of water. 20

Q. Was his hand off at that time? A. Sure.

Q. Blood coming from it? A. Very much.

Q. What did you do? A. I felt so that I didn't know what I was doing at the time myself.

Q. Did you call anybody? A. There were workmen there, and there were other men there, workmen, who saw the accident.

Q. Did you call the foreman? A. No, sir. 30

Q. Now did you examine the machine after that or look at the machine? A. After the accident when he was taken to the office without his hand, we went and looked at the machine.

Q. And what did you find at that time? A. The machine stood—when we went to the machine the man who went downstairs, who worked at the machine—when he came and he heard of the accident, he immediately stopped the machine. 40

Q. What did they do with the machine? A. They stopped it.

Q. After they stopped the machine what did they do with it? A. There was an old man appeared that worked in the shop and he pulled out the hand from the hole.

10 Q. Who was that man? A. A man who grinds knives in the shop.

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

Q. Where was that hand taken out? A. Down from underneath.

Q. In the machine?

Mr. Lichtenstein: I object to it as leading. Let him describe it.

20

The Court: Let the witness describe it.

A. The pipe that the shavings go down.

Mr. Simpson: That is where they got the hand?

A. Yes; it was all crushed.

Q. Was it very far into the pipe? A. I did not look to see how deep it was.

30

Q. But it was in the pipe? A. Yes, sir.

Q. What was the name of the man who worked on the machine? A. It was an Italian.

Mr. Simpson: Rosario?

A. Rosmyn.

Q. Did they have to use anything in order to get the hand out of the pipes?

40

Mr. Lichtenstein: I object. Let the witness be permitted to describe how the hand

John Smolenski—Direct Examination.

was taken out, if he wants to. He ought to be in that position if he is qualified to testify, to say where they found it.

Mr. Kantrowicz: I will withdraw the question.

Q. Just tell the Court and jury how that hand was removed from that suction pipe? A. The pipe, which is underneath, the knives running to it—inside of it—he put his hand in and pulled out the hand. 10

Q. Did you examine the machine at the time of the accident? A. Myself and other men who worked with me were—all looked on.

Q. Was any part of the back of that machine open? 20

Mr. Lichtenstein: I object to it as being entirely too general.

Q. Around the knives? I will make it there. Place it where you want to.

Mr. Lichtenstein: I object to it as too general. I think he ought to describe the machine and describe the operation of it and describe the location of the knives. 30

Mr. Simpson: I think we have gone into it far enough. He said he put his hand in and took the dead hand out.

Mr. Lichtenstein: Where did he find it?

Mr. Simpson: You can find that out.

The Court: I think this question goes to a different point.

Mr. Simpson: Of course my judgment is that we do not care what he did. 40

John Smolenski—Direct Examination.

The Court: This goes to show the condition of the rear of the machine, I take it.

Mr. Simpson: All right. What was the question, describe the rear end of the machine?

10

The Court: Let him describe the condition as he found it in the rear end of the machine that day.

Q. What was the condition of the rear end of the machine right after the accident? A. What do you mean, the rear?

The Court: The place where the staves come out, or about that.

20

A. There was one side where the knife runs on top and the other side where the knife comes from the bottom.

Q. Where the bottom knife is—what was the condition of the machine where the bottom knives are located?

The Court: Ask him to describe the condition of that machine on that day at or about the place where the bottom knives are?

30

A. There was an old piece; but it was all broken up.

Mr. Simpson: Where was the old piece? Can you show it on this?

A. This is a new one. There was an old one before that.

40

Mr. Simpson: What was the old one? Describe the old one.

John Smolenski—Cross Examination.

- A. On this side was all broken out.
 Q. Was this thing on it? A. No, sir, that was not there at all.

Cross Examination by Mr. Lichtenstein:

Q. This boy, how many times did you see him go over to take the staves away from the planing machine? A. I cannot say exactly, but quite a number of times. 10

Q. Quite a number of times? During all the time he worked there for the three weeks? A. The first when he started to work there he worked several days in the yard.

Q. Then he worked on the sawing machine, didn't he? A. About two weeks he worked at the zaza—whatever that is. 20

The witness: (In English). Sawing.

Q. During those two weeks you saw him go over to the planing machine to take the staves a number of times? A. No, sir.

Q. How many times did you see him go over there? A. Before that I cannot say—before that I cannot say how many times, but that day he work in the afternoon. 30

Q. Well, how many times did you see him go over to the planing machine altogether? A. To say accurately how many times I cannot say.

Q. Well, five times? A. As I said before, a number of times.

Q. Five times, ten times, twenty times? A. Between five and ten times.

Q. Five and ten times? Was the man working on the machine when this boy was taking the staves away? A. Not always. 40

John Smolenski—Cross Examination.

Q. Not always. Well, now, at the time of the accident the man was not working on the machine, was he? A. No, sir.

Q. Where was the man—away from the machine? A. He went down the elevator for staves.

10 Q. And you did not see the boy hurt; you were not there when the boy was hurt at the machine, were you? A. No, sir.

Q. You only saw him when he came over to the barrel to put his hand in the water? A. Yes, sir.

Q. You said in answer to a lawyer's question that you saw the foreman point over to the planing machine and tell him to go there and pick up staves. Did you hear him or see him do that? A. That is true.

20 Q. Did you hear the foreman talk to the boy? A. I heard.

Q. Now, you were a witness in the last trial, were you not? A. I was.

Q. Let me ask you whether this question was not asked of you by Mr. Simpson: "I don't care anything about the time the accident happened. Did you see the foreman have any conversation with the plaintiff that morning at any time?" And did you not answer: "That I did not see."

30 The Court: Let the stenographer give it to the interpreter.

Q. Were you not at the other trial asked this question: "Did you see the foreman have any conversation with the plaintiff that morning at any time? A. That I did not see."

Mr. Simpson: Didn't he say: "That I didn't see?"

40

John Smolenski—Cross Examination.

Mr. Lichtenstein: "That I didn't see."

Mr. Simpson: Oh!

A. I remember exactly that time the same as I do if it was to-day.

The Court: Was he asked that question and did he so answer? 10

A. I did not see it.

Q. Did not see it. Were you not asked this question at the same trial: "Q. You did not see the foreman? A. I did not hear." A. Yes.

Q. Well, did you hear him or didn't you hear him? A. I noticed—observed he never said a word to him.

Q. That is not the question. Did you hear him talk to the boy? A. I heard. 20

Q. Then did you answer at the last trial that you did not hear him? A. To tell you the truth you don't allow me to express myself.

Q. Well, we are trying to allow you to express yourself, but we wish you would. Didn't you say at the last trial—swear at the last trial that you did not hear the foreman talk to the boy at all? A. I did not hear him.

Q. You did not hear him? A. No. 30

Q. Why do you say to-day that you did hear him?

Mr. Kantrowicz: I object. I think we ought to have an answer to this question as to what he said on the last trial, the fact whether he heard or not.

The Court: That is the question and answer put to him.

Mr. Simpson: He keeps answering as to the facts, not what he testified at the last 40

John Smolenski—Cross Examination.

trial. He says, "I did not hear it." It is whether he said so at the last trial, that he did hear.

10 The Court: You may put the question, Mr. Interpreter. The question is this, was such a question as you will read to him put to him at the last trial and did he answer the way the answer is in the minutes. He can answer yes or no.

(Question repeated through interpreter.)

The Interpreter: He repeats the same question over.

20 Q. Let us have it over. Were you not asked at the last trial this question: "Did you see the foreman have any conversation with the plaintiff that morning at any time?" A. I don't remember.

Q. Well, didn't you answer to that question: "That I did not see." A. I did not say it.

Q. Were you not asked this question at the same trial: "You did not see the foreman? A. I did not hear." A. No, sir.

30 Q. Did not Mr. Simpson ask you this question at the last trial: "I don't care whether you heard anything. Did you see the foreman talking with the boy?" A. I don't remember.

Q. Don't remember? Didn't you answer to that: "I did not hear," Again, the third time? A. I don't remember.

Q. Well, if you did swear that you did not hear were you telling the truth? A. It must have been the truth.

40 Q. Well, is it the truth now? You say you remember it just as well to-day as you did before? A. According to my recollection it must be the truth.

John Smolenski—Cross Examination.

Q. Well, did you hear the foreman talk to the boy? A. I noticed.

Q. Well, did you hear him talk to the boy? A. I cannot say.

Q. You cannot say? Why did you say a few minutes ago that you heard the foreman talk to the boy? A. Oh, I only think so. 10

Q. Oh, you think so? Well, now then, at the time that the boy was hurt, on that day, they had a blower system there, didn't they, that took the shavings away? A. It is a sort of wind machine which blows the shavings.

Q. Well, it takes the shavings away from the planer? A. Yes, sir.

Q. And some of the shavings fall out on the floor, don't they? A. Yes, it blows them to one side. 20

Q. They had a thing like that on the top (indicating)? A. Yes, sir.

Q. They had a thing like this on the bottom (indicating)? A. It was an old one.

Q. Yes; not this same one; it was the old one? A. It was—looked like that, but it was an old one.

Q. Well, you put a new system in there about a year afterwards, didn't you—new pipes? A. After a few months, when they arranged different pipes, they changed these things, too. 30

Q. At the bottom of this pipe that covers the lower part of the machine there is another pipe of wind on the floor, isn't there? A. Yes.

Q. Look at this pipe. Do you remember a pipe like that? A. Yes, sir.

Q. That was the old pipe that was there, wasn't it—a piece of it—on the floor? Look like it? On the bottom? A. Looked like it.

Q. Do you remember this hole that had a cap on it? A. Yes. 40

Q. Remember that? A. To clean out the pipe.

Q. What would they take out of that hole to clean it? A. Sometimes part of the shavings gets inside, when it is necessary to take off the cover and clean out the bottom.

10 Q. They would take the cover out and put the hand in? A. Yes, sir; this is to clean out.

Q. After the boy had his hand cut off did you see the man take a piece of the hand out of the pipe? A. As I said before the man who grinds the knives came there and took out the contents.

Q. Yes, but where did he put his hand,—how far down in the pipe was the hand? A. I stood about three or four paces away from the place.

20 Q. Did he take it out of this hole? A. No, sir—there was some connection that runs straight down.

Q. A connection that runs straight down? Did they pull the pipe away? Did they pull the pipe away? A. There was a hole, because the pipe was broken off.

Q. And that place that was broken, it was broken by the shavings, wasn't it, the big piece of shavings banging up against it?

30 Mr. Simpson: I object. The witness has not been qualified as—

Mr. Lichtenstein: You have asked him all about the hole.

Mr. Simpson: He says it was old and worn, but we have not qualified him to say how it became—

Q. Do you know how it was worn?

Mr. Simpson: The cause of this wear?

Mr. Lichtenstein: Yes.

40 Mr. Simpson: All right.

John Smolenski—Cross Examination.

A. Well, because it was worn out and was spoiled.

Q. Do you know what caused it to get worn?

A. Well, it gets spoiled from wear and use.

Q. You did not say anything at the last trial about the pipe at all, did you?

10

Mr. Simpson: I object. There was no pipe produced at the last trial.

Mr. Lichtenstein: There was a pipe produced and you know there was. The record is here.

Mr. Simpson: I don't know.

Mr. Lichtenstein: The record shows there was.

Mr. Simpson: This one?

Mr. Lichtenstein: Of course not, it wasn't this one.

20

Mr. Simpson: Then I object to the question.

Question repeated.

Mr. Simpson: I object.

The Court: The question is whether you were asked anything about the pipe at the last trial.

Mr. Simpson: This pipe was not produced.

30

Mr. Lichtenstein: Of course it wasn't there. We have explained it.

Mr. Simpson: I object to it on the ground—

The Court: I do not understand the situation. What pipe are you referring to? Are you referring to the elbow or what are you referring to?

40

John Smolenski—Re-direct Examination.

Mr. Lichtenstein: Just let me put my question.

Q. At the first trial did you say anything about pipe being worn?

10 Mr. Simpson: I object on the ground it does not appear he was examined on any pipe at the last trial.

Mr. Lichtenstein: He was your witness at the last trial.

Mr. Simpson: Suppose he did. What evidential effect does that have? It is not a contradiction.

20 The Court: Cannot have any evidential effect, I take it, Mr. Simpson, unless it be shown that some question or questions were put to him.

Mr. Lichtenstein: No, sir; there was no question put. That is all, sir.

Re-direct Examination by Mr. Simpson:

30 Q. When you say you think the foreman said so, is it because what the foreman said was in English and you did not understand English?

Mr. Lichtenstein: I object to it as being leading.

Mr. Simpson: I will withdraw the question.

Q. Did you understand English on the 13th of August, 1910? A. I understood it as much then as I do to-day.

40 Q. Do you understand to-day? A. What the foreman tells me I have an understanding.

Q. What did you mean when you said to Mr. Lichtenstein that you thought the foreman talked to the boy? What did you mean by that? A. He spoke to him about two words and pointed with his finger to the work.

Re-cross Examination by Mr. Lichtenstein: 10

Q. One question about the machine—page 22, sir. Were you not asked this question by Mr. Simpson at the last trial: "Did you see anything occur between Kinnert and the foreman before he was hurt? A. The plane machine was in working order, and he was planing staves, and the boy cut off some staves." Do you remember saying that?

The Court: Better give it to the interpreter. 20

Question repeated through interpreter.

A. That was my answer.

Q. You did answer that—it was in working order? A. Yes.

Mr. Simpson: He says he did. Why go on and elaborate. You will get a worse answer.

Recess. 30

Mr. Kantrowicz: If I may ask your Honor's permission, I would like to ask some questions in direct examination with reference to his earning capacity and what he did with his wages.

The Court: All right.

Mr. Kantrowicz: I will try him without the interpreter, if I can. 40

Re-direct Examination by Mr. Kantrowicz:

Q. How old were you when you came to this country, Adolph? A. Sixteen years.

Q. Did you have any parents in this country?
A. No.

10 Q. After you started to work what did you do with your money? A. Well, I got to buy eat for myself.

Q. Did you give it to anybody else? A. No.

Q. Used it all yourself? A. Yes, sir.

Q. Now, at the time of the accident how much were you getting a week? A. Six dollars.

Q. How long were you out of work after the accident because of your inability to work?

20 Mr. Lichtenstein: Change that word inability.

Q. How long couldn't you work? A. After the accident?

Q. Yes. A. I no work one year eight months after.

Q. One year and eight months? A. No work.

30 The Court: No work one year and eight months. Are you working now?

The Witness: Yes, sir.

Re-cross Examination by Mr. Lichtenstein:

(Through Interpreter:)

Q. Young man, as soon as you were able to work you came back to the shop here, didn't you? A. I went there to ask for work.

40 Q. And they gave you work? A. Yes.

Andrew Boyak—Direct Examination.

Q. You have been working there ever since? A. Yes, I did work but they chased me out afterwards.

Q. Why, you were working there last night, weren't you? A. They took me back again.

Q. For how long have you been working for them the last time again, how many years?

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Mr. Simpson: I object. How is it relevant and material? We are not suing for—

The Court: I heard no objection before.

Mr. Simpson: We are not suing for loss of earning power.

Mr. Lichtenstein: They recalled him for the purpose of showing earning power and so forth.

Mr. Simpson: He has lost his hand on a machine, and how can there be any dispute about his loss of earning power? Well, I will withdraw it. We will admit he gets eight dollars a week.

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Q. You have been working for the company getting eight dollars a week?

Mr. Kantrowicz: We admit he is working as a night watchman.

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Q. How long have you worked for the company as a night watchman? A. About three years.

ANDREW BOYAK, sworn and examined through interpreter.

Direct Examination by Mr. Simpson:

Q. Where do you live? A. 13 Thirteenth Street, Jersey City.

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Andrew Boyak—Direct Examination.

Q. How old are you? A. Twenty-three years old.

Q. Were you working in the Mathison Co-op-
erage Company on the day of this accident? A.
Yes, sir.

10 Q. What were you doing on the day of the ac-
cident? A. I had barrels in the room where I was
working, and in the other room where he was
working I used to go there to get staves.

Q. Did you see anything of the accident? A. I
saw it.

Q. Now just tell what you saw?

Mr. Lichtenstein: When?

20 Q. At the time of the accident, just tell what you
saw. A. He came to the machine and picked up
staves from the pile—from his pile, and I picked
up staves from my pile, and as he was picking up
the staves from his pile I picked up the staves
from my pile, when I heard a noise—somebody hol-
lered, so I looked around; I saw him laying there;
I ran towards him and a good many others came
there, and as I saw him lay there I picked him up
and a lot of other men came there and they took
30 him to the barrel, and there was water in the bar-
rel, and while there were other men coming there,
one man coming—I don't know what kind of a
man he was—this man says, "You have your own
work, never mind this."

Q. Did you see the condition of his arm when
you saw him? A. I see the hand was off and
blood running.

40 Q. Now the last time you saw him before the
hand was off what was he doing? He was stand-
ing and cutting off the staves at his machine.

Andrew Boyak—Direct Examination.

Q. At his machine? How long was that before his hand was off? A. About—soon after dinner.

Q. Well, you say you saw him picking up staves; where did you see him picking up staves? A. Near the machine.

Q. The sawing machine or planing machine, or what machine? A. The planing machine. 10

Q. The planing machine, he was picking up the staves? A. Yes, sir.

Q. How near the machine was he when he was picking them up? A. As indicated, here is the machine, and he went close by where the staves were lying.

Mr. Lichtenstein: Indicating below the—
The Interpreter: Below. 20

Q. How did he pick them up, did he stand up or stoop over, or how did he do it? A. When he stooped down to pick them up I also stooped to pick them up.

Q. Was he near the machine—he stooped down to pick the up near the planing machine?

Mr. Lichtenstein: I object to it as leading. 30

Q. Just tell us with reference to the planing machine where Kinnert was when Kinnert stooped over to pick the staves which were dropping from the planing machine?

Mr. Lichtenstein: I object. There was no evidence that the staves were dropping from the planing machine.

Mr. Simpson: Yes. 40

Andrew Boyak—Direct Examination.

The Court: The machine was not in operation.

Mr. Simpson: Somebody stopped it. The testimony was that the machine was still going.

10

Mr. Lichtenstein: Not operating.

The Court: Not being operated.

(Question repeated.)

Mr. Simpson: I withdraw it.

Q. Just describe how near Kinnert was to the planing machine when he was stooping over picking up these staves? A. I cannot say exactly, but as far as I can measure it was about from here to there (indicating).

20

Q. What is that?

Mr. Lichtenstein: Would you say eight inches?

Mr. Simpson (measures with a rule):
Nine inches.

Q. And did you at the time see the hand that was cut off, after the accident? A. No, sir.

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Q. Who was the man that told you you had other work to do and to go and do it? A. I don't know who the man was. I was working under some man by the name of Vadisky. I don't know whether it was Vadisky told me that or some other man.

Q. You say, as I understand, you saw Kinnert lying on the ground? A. Yes.

Q. How near to the planing machine was he when you saw him lying on the ground? A. As I have indicated before.

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Q. Nine inches. Did you on the day of the ac-

Andrew Boyak—Direct Examination.

cident know anything about this planing machine? Had you been near it? A. No, sir. All I know is was to go over there, but I never worked it.

Q. When you went there did you notice whether there was any suction around the machine? A. The machine was of such a nature that if you passed, and unless you had your coat covered it would shake the lapels from the coat. 10

Q. What would shake the lapels? A. It was such a wind, if you go near to the machine it would shake the front of the coat if you pass it.

Q. Where was that, where the staves came out or where they went in? A. No; from the side where they came out.

Q. Did you know anything about this part of the machine, the underneath part of the planer that was something like this, on the day of the accident? 20

Mr. Lichtenstein: He says he does not know anything about the machine.

Mr. Simpson: He said he never worked at it but he had gone near it.

A. Yes, but this hole was much larger.

Q. What was the condition—show him the lower guard— A. There was this around—there was a square opening, only a narrow, square opening. 30

Q. Anything showing like that on the top? A. Not on the top.

Q. Just here? A. Just like that. That strip, that is all.

Q. Was there any strip on top here? A. No, no.

Q. It was all open on top? A. It was open. Anybody pass could see the knives.

Q. Anybody passing could see the knives? A. Yes. 40

Andrew Boyak—Cross Examination.

Cross Examination by Mr. Lichtenstein:

Q. Let you and me speak English together. Your work was what?

10 Witness indicates he wants to talk through interpreter.

Q. No, no. A. I can't talk English.

Mr. Simpson: Go ahead and talk English. Everybody will be better satisfied. If you cannot, tell us you want to talk through the interpreter.

20 A. No, I can't talk English.

Mr. Simpson: You talked very good English to me when you said, "Anybody that passed could see the knives."

The Court: He will talk it if he can.

Mr. Simpson: He did talk it.

The Court: What work did you do?

Q. What work did you do there in the factory?

30 A. The other side I gave them staves for the barrel.

Q. Where did you get the staves from, from what machine?

(No answer.)

Mr. Simpson: The planer?

40 A. Planing machine, and he worked that machine that set down on the end—that man he work on that machine. He put it around—the other bench—I came from that bench and took them up to my place.

Andrew Boyak—Cross Examination.

Mr. Lichtenstein: Do you understand it, gentlemen? I will use the interpreter.

Q. Did you ever go to this machine to pick up staves, the planer? A. Sure I went there steady.

Q. Steady; and for how many weeks or months?

A. Prior to the accident about two months. 10

Q. Every day? A. Yes, sir.

Q. How many times a day? A. As many times as was necessary.

Q. Well, twenty, thirty, forty, fifty times a day?

A. I can't say. As many times as was necessary.

Q. How many staves could you carry at one time? A. As many I could pick up is as many as I took.

Q. I understand; that don't give us any idea. How many staves could you pick up at one time? 20

A. The various sizes, some are narrow and some are longer.

Q. Tell us if you can approximately how many times you would go to this planer machine a day?

A. This man that worked there worked on piece work and we were very anxious to accomplish much, and the more we worked the more we earned.

Q. That does not answer the question. How many times did he go there a day, approximately, to get staves? How many times did he walk over to the planing machine? A. Maybe ten, maybe fifteen, maybe thirty times; I don't count them. 30

Q. A day? A. Yes, sir; as it was necessary for me to go.

Q. Now, you said that you could see the knives in this machine? A. Yes (in English).

Q. You understand that, do you, or don't you? Do you understand what I say?

The Court: Be perfectly sure. 40

Andrew Boyak—Cross Examination.

A. (Through interpreter) I understand what you say.

Q. Where could you see the knives? A. In the center of the machine.

10 Q. Just where could you see the knives, that is what I want to know? A. As you place the staves to the machine there the knives were.

Q. But where could you see the knives? A. In the machine.

Q. In the machine; in the middle of the machine? A. No.

Q. Where in the machine? A. A little further away from the center.

20 Q. Little further away; was it on top of the machine that you could see the knives where the staves went in? A. One knife was higher and the other was underneath.

Q. Yes. Well, the top knife had a tin thing over the top of it, didn't it? A. I don't remember.

Q. Well, if you don't remember how could you tell where the knives were or what you could see? A. I can't remember because this thing did not happen to-day or yesterday, it is a matter of five years ago.

30 Q. Can't you tell us where you could see the knives? A. They were knives in the machine, that is all.

Q. There was no trouble about your seeing that there was knives, was there? A. I did not look at that machine, but I say I went there and I saw the knives.

40 Q. Where did you see the knives? Tell these gentlemen where it was that you saw the knives? A. I swear over again that I saw the knives, but I cannot now explicitly say where I saw them, or what part of the machine.

Plaintiff rests.

Mr. Simpson: You admit the Mathison Company is incorporated?

Mr. Lichtenstein: Yes. May the jury be allowed to go for a few minutes until I make a motion?

The Court: Yes.

The jury retired to their room pending a motion.

10 01

Motion to nonsuit.

Mr. Lichtenstein: May I ask the plaintiff in this case to inform the court upon what their action is based, and whether it is based upon the statute or under the common law?

Mr. Simpson: Well, both—production of the common law and the statute.

Mr. Lichtenstein: What statute?

20 02

Mr. Simpson: 1909.

Mr. Lichtenstein: Also under the common law?

Mr. Simpson: Yes, and Smith vs. Irwin we rely on, and also we rely on the statute.

Mr. Lichtenstein: Then, if the Court please, I move for a nonsuit in this case:

First, upon the ground that there is no proof in this case of any negligence whatever upon the part of the defendant.

30 03

Second, upon the ground that the plaintiff has not proven any of the acts of negligence alleged in the complaint as a cause of action.

Third, upon the ground that no cause of action has been shown to exist against this defendant, either under the common law or under any statute of this state.

Fourth, upon the ground that the plaintiff

40 04

has demonstrated that he was guilty of contributory negligence.

10 Fifth, upon the ground it clearly appears from the cases that whatever injury came to this young man was brought about directly through his own conduct and not by reason of any defect in the machine or by reason of any negligence on the part of the defendant.

Sixth, on the ground that the accident and injury to the plaintiff arose from risks and dangers which were incident to his employment and obvious and perceivable by him in the exercise of ordinary care.

20 Seventh, upon the ground that the plaintiff has not shown any cause of action arising under the laws of 1909, to which counsel refers, and which he claims he has a right to recover on in this case.

Let us take up this act of 1909. Your Honor will recall that act was in effect for some little time and then our new Employers' Liability Act went into effect. I know of only one case that was ever tried or that was ever carried up under this law, and my firm happened to be in that case, and that is the case of Pappagello vs. Hyde, 82 Law, 690.

30 Mr. Simpson: There is another one—Dix vs. Union Ice Company, 68 Atlantic, 1101. I say that is law.

Mr. Lichtenstein: I do not recall that. Dix vs. Union Ice Company was not under the particular section?

Mr. Simpson: Yes, I think it was. It was guarding vats. It is the same section. This section is the same section which refers to guarding vats.

40 Mr. Lichtenstein: The act of 1909 pro-

vides: "Where, after this act takes effect, personal injury or death results to an employee who is himself in the exercise of reasonable care at the time"—that is section one; now we can pass the rest of it, because it does not concern us at the present time, and come to section two:

"No action against an employer for recovery of compensation for injury or death of an employee under this act shall be maintained unless notice of the time, place and cause of injury is given to the employer within one hundred and twenty days, and the action is commenced within one year after the occurrence of the accident causing the injury or death." 10

This action has not been brought within one year, and I claim that is a condition precedent. 20

The Court: Is that any different from any other act where a party injured may be a minor?

Mr. Lichtenstein: Yes; entirely different. This is not an ordinary statute of limitations. It is a condition, a condition precedent which the legislature imposed upon the party in interest, and that it is a condition precedent is borne out by this very case of mine, the Pappagello case. Although it does not refer to the time, it refers to the question of giving notice, and it is all part and parcel, one thing and they are in the conjunctive. In this case this very second section I have just read was under consideration by the Court. 30

The Court: How was it?

Mr. Lichtenstein: The question here was 40

with reference to the one hundred and twenty day notice. Now the section reads:

10 "No action against an employer for recovery of compensation for injury or death of an employee under this act shall be maintained unless notice of the time, place and cause of injury is given to the employer within one hundred and twenty days, and the action is commenced within one year after the occurrence of the accident causing the injury or death."

20 Both of those things must occur. I say it is not an ordinary statute of limitation. It is an obligation which is imposed by the legislature upon the person who desires to take advantage of the act, and it is in the nature of a condition precedent and one which must be complied with before there can be any recovery, whether the plaintiff is an infant or is not an infant.

30 "It remains, therefore, to determine whether there is liability under this statute, the second section of the act provides that no action shall be maintained unless a notice in writing signed by the person injured, stating the time, place and cause of injury, is given to the employer within one hundred and twenty days after the occurrence of the accident, causing the injury or death."

You see that was the only question involved, whether they gave notice.

"The giving of the proper notice is a condition precedent to the maintenance of the action.

40 The time and place of the accident were undoubtedly sufficiently set forth in the notice. The cause is thus stated"— I merely

cite that to show to your Honor the Court of Appeals held that that was a condition precedent.

One other ground I desired to mention with reference to the motion to nonsuit was that the notice which was served in this case, which I do not know whether they put in evidence or not—

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Mr. Simpson: Yes.

Mr. Lichtenstein: —is not one that complies with the terms of the statute. It does not sufficiently set forth those things which are required under this section with such a degree of certainty as would apprise the defendant of the nature, etc., of the injury, in order to bring it within the intention and meaning of the second section.

So much for this statute. As far as the action is based upon a common law liability—

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The Court: Just one moment. See this in the second section: "But no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby."

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Mr. Simpson: Dix vs. Union Ice Company also construes that part of the statute.

Mr. Lichtenstein: Yes. The courts hold that unless the defendant has been misled, or unless the notice is not sufficiently definite, of course they would hold it good.

The Court: Wherein do you say this notice is not sufficient?

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Mr. Lichtenstein: The entire notice, it seems to me, is not one which—

The Court: I have not seen the notice.

10 Mr. Lichtenstein: It is indefinite. "On the first floor of the building occupied by you as a cooperage, at a machine known as a planing machine, and the cause of injury was that by reason of the negligence of a person in the service of the Mathison Cooperage Company entrusted with, and at the time of the injury, exercising superintendence, whose sole or principal duty was that of superintendence, or of some person who was acting as superintendent, with the authority and consent of the Mathison Cooperage Company, a certain planing machine which was a dangerous machine, was left running, without any person in attendance thereat." There is not anything in this case to show that condition to exist.

20 "And that said machine was not guarded with any safeguards to prevent the person of the employees of the said cooperage company from coming in contact with knives in said planing machine, although there was danger that said person of the employee would come in contact with knives of said machine, because by reason of the operation of said machines there was created a strong suction, the natural effect of which would be to draw the wearing apparel of persons at or near the said machine into the said machinery, and although the undersigned was a minor and unaware of the risk attendant upon his proximity to the said planing machine, he was not instructed by his employers or by any agents or servants of his employers or by any person of the dan-

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gers and risks of personal injury attendant upon proximity to said planing machine; and while the undersigned was at work in said factory his hand was caught and drawn into the said planing machine because of the conditions aforesaid and his right hand was severed."

I claim that there are so many statements there that a person cannot, by reading them, determine with any degree of certainty that it sufficiently describes the manner in which the injury occurred. But that is a matter of minor importance as compared with the question that is raised, and that is that this statute has no application. 10

The Court: Because the suit was not brought within one year?

Mr. Lichtenstein: Because there was no suit brought within one year. And there is another question that arises. This statute is no longer the law of this state at the present time. Then arises the very interesting question as to whether or not this plaintiff, after the repeal of a statute of this kind, can maintain an action under it, even though— 20

The Court: The action was brought after the repeal? 30

Mr. Simpson: Yes, and when they admit he was hurt it was the law.

The Court: Yes, but before he commenced his action?

Mr. Simpson: Yes. I think this was all repealed by the subsequent Employers' Liability Law.

The Court: Suppose this situation? Suppose one met his death six months ago and no action were brought until after the con- 40

vening of the present legislature, and they should repeal the death act, would an action be brought under the death act?

10 Mr. Simpson: Your Honor will see he was given a cause of action, and he certainly could not be deprived of it. It seems to me to be due process of law to say—that deprives him of due process of law to say he had an action and the legislature could take it away without compensation.

My colleague suggests the new Employers' Liability Law saves all causes of action.

The Court: Was it the Employers' Liability Act, or—

20 Mr. Lichtenstein: I do not think there is anything in the law which saves an action which accrued under this chapter 83 of the Laws of 1910.

The Court: The first question I want to settle is this: What act repeals this act of 1909, the Employers' Compensation Act, or is it a special repealer—direct repealer of it?

30 Mr. Simpson: It is the Employers' Liability Law. I think you will have no doubt in finding it.

The Court: That is 1911?

Mr. Lichtenstein: 1911 is the first Employers' Liability Act.

The Court: The real question is whether there is another act which directly repeals that?

40 Mr. Lichtenstein: Aside from that question of repealer, coming right back to section two, this action must be brought within one year. That is a condition precedent.

I cannot see how it can be construed as being anything else, and particularly in view of the construction of that very section by the Court of Appeals in the Pappagello case.

The Court: Let us assume for the balance of your argument, that the action is—

Mr. Lichtenstein: Either dead by virtue of this one year provision or dead by reason of the repealer. 10

The Court: Yes, either one.

Mr. Lichtenstein: I come to the question of common law liability. Based upon all these grounds I claim the plaintiff has not shown any cause of action.

Let us see exactly the strongest possible inference that may be drawn from the testimony of the plaintiff and his witnesses here. Here is a young man, true, a minor, sixteen or seventeen years old, does not understand English language, understands the work sufficiently to be able first to go to work in the yard carrying staves and so forth, then being put to work upon a machine which is obviously a dangerous machine if not properly handled—it is a sawing machine, a table with revolving saw which projects above the surface, and which is used for the purpose of cutting the ends off staves. This young man had been working on this obviously dangerous machine—no injury to him—cutting these ends, and he says, after working about three weeks and on Saturday, the foreman in charge of the work pointed to him and told him to go over and pick up staves from behind the machine. He did understand, either by his words or by his actions, just what this man 20
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meant to do, because he went over there and did pick up staves from behind this machine, took them over to his machine and put them on his platform, and sawed the ends off, and then went over to pick up some other staves.

10 Now, that is his story. The story of the last witness is that he did not only go over on two occasions, but he saw him go over on numerous other occasions covering that whole period of time, and pick up staves any number of times. So there is that discrepancy there. We have the operation of the machine amply illustrated by another witness called by them, and that is the superintendent. The machine is a machine that stands on legs, and is about four feet high, with a top, with a set of revolving knives above the surface of the planer, and a set of revolving knives below the surface of the planer, for the purpose of shaping these staves and giving them smoothness. Naturally and necessarily those knives must be so arranged that the lower surface of the upper knives will be upon a level with this, with the plane of this board, and the upper surface of the lower knives must be on a plane with the lower side of the surface of the board, in order the board may slide through, and plane them off as we see them. The superintendent described the operation of the machine. It is about thirty inches in depth from where the man stands who shoves in these staves to the rear end of this bed plate. The man shoves them in one side and they run off the rear and fall on the floor. We have the description of the manner in which the upper knives are cov-

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ered by this upper pipe. Now, the purpose of this pipe is merely to prevent the shavings from scattering and in order to get some sort of enclosure whereby the shavings will be collected from the top of the knives and drawn up through the pipe to run to the furnace. Of course this is an open machine—I mean the bars are not all in such close proximity that there is not some space. The very nature of the hood and the manner in which it sets shows there is no necessity for a person making an absolute fit so long as it covers the knives, because the knives are supposed to revolve in the center of this hood. That would be the natural and mechanical method of adjustment, in order there may be some center of gravity, in order that the shavings may in some manner reach the center of this hood; and he tells you, and that is undenied, that these knives inside of this hood, the upper one, and the shavings which fall by reason of the shaving of the upper portion of the staves come in this hood and are thrown into the hood and into the air pipes and into the engine room. Now, your Honor had from him a description of the construction of the bedplate, your Honor will remember, because you looked at it, the bedplate is the portion over which the staves come; they are passed in from the front of the machine, they engage the knives which set back of the rear portion of this bedplate—when I say the rear portion I mean the portion nearest the man who operates the machine. We have the distance from the rear portion—from the extreme rear of the bedplate to what I call the front of the

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10 bedplate, and that is about seven and a half inches. The knives revolve towards the center of the machine and behind this bedplate, the lower ones being closer to the bedplate than the upper ones, but the closest point of these knives to the rear of the machine is something about seven and one half inches, as this witness testifies. So that we have knives first revolving to the rear seven and a half inches from the rear of the machine and inside the machine, and then we have these knives—(bring over that hood—the lower one)—encased—(illustrating)—by the lower head, which, as your Honor will see fits up against the flange.

The Court: I recall that very well.

20 Mr. Lichtenstein: It is about four inches to the rear of the rear. Then we have the lower portion of it and the knives revolving in the center of the pipe. There is the center of the pipe, and this would be approximately where the man said the lower knives would fit.

30 Now that is the construction of the machine. These staves fall to the rear of the machine, upon the floor, and this young man says that he walked over there, picked up some staves, and walked away. The next time he went over there he picked up some staves and then his testimony, as I took it down, was this: "One time I pick up the staves. Then again I went to the machine and wanted to pick up the staves. There was a small pile there. There was a hole there. I felt something cold that drew my hand in. I wanted to take out and something drew me. I don't know myself what happened. It tore my hand off." Or language to that

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effect. That is as near as I could get it. I think it is practically what he said.

Where is there any evidence in this case to show that this boy's hand was drawn into this machine in any way. There is not a word of evidence in this case to substantiate it. He does not claim—he does not point out in any particular where this thing happened. He could not give us a description of where the hole was, not a word. He didn't know. All that he knew was, he said, he was picking up staves and he felt some cold air, and in some unaccountable manner his hand was drawn in and his arm cut off. There is not a word of evidence that any such thing could happen. They cannot rest their case upon a mere supposition. You cannot adjudge a man guilty of negligence upon a mere supposition. There must be proof. The plaintiff does not show how this thing happened. He does not show you how it could possibly happen. He does not account for any manner in which it could happen. He does not give us the slightest inkling or intimation of knowledge of how it could happen, nor does he show us any act of negligence on the part of the employer. Here is a machine that is in operation all over the country. They have used this machine for many, many years. This machine was eleven or twelve years in use, as I understand it, and the one before that for probably eight or ten years. A regular standard machine, used in this business. Not a word of expert testimony to show that it was a dangerous machine in any

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respect. The mere fact that a machine has knives does not necessarily make it a dangerous machine, because then it would be said that every machine—any machine that operates by the use of knives is a dangerous machine, but that cannot be so. They, of course rely upon and intend to rely upon this other section of the factory act.

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The Court: 1904?

Mr. Lichtenstein: Yes. Reading the important portions of it that apply here: "Wherever practicable"—that is the test under this statute. It does not have to close in every portion of that machine. It would be absolutely impossible to operate it if you had to close in every working part of it, as Mr. Simpson tried to indicate. There must be some way for this board to come out there; you could not close it all up. That is just the argument. Of course you could not close up the whole machine. "Whenever practicable, all machinery shall be provided with loose pulleys, all vats, pans, saws, planers, cogs, gearings, belting, shafting, set screws, drums and machinery of every description shall be properly guarded."

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The Court: That it was practicable wasn't that shown here, the fact that they did guard it.

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Mr. Lichtenstein: We did not guard these knives. There was no necessity for guarding the knives. This was not there for the purpose of guarding the knives. We do not claim that, nor do they claim it.

Mr. Simpson: Yes, we do. We claim you say it is a physical impossibility to get the hand in with these guards in.

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Mr. Lichtenstein: And we say these knives, and you have not shown that these knives were ever in position that made them dangreuos to a person who had eyes and could see, or a person who used any judgment.

Mr. Simpson: Do you want him to cut off both hands to show it was dangerous? 10

Mr. Lichtenstein: No; could you put his hand into a revolving buzz-saw and have his hand cut off; could you put his hand into fire? Would that constitute negligence?

Mr. Simpson: Asking me the question?

Mr. Lichtenstein: I say the plaintiff does not contend that these were there for guards. We do not contend that they were there for guards, and there is no evidence in the case that they were intended for guards. They are there as part and parcel of the blower system. No necessity for having guards around these knives which are in the bed of a machine. What use would they be there? They are covered up by these heavy rollers. They are covered up by this bed-plate and away in the rear portion of it. What would be the sense of having the guards there to protect an imbecile or anybody who would go and stick their hands— get underneath a machine and who would force his hand in and go in about ten inches or nine inches from the rear of this machine and deliberately stick it in in order to have it taken off. We do not have to guard against contingencies of that kind. 20 30

The Court: Let us see. As I understand you contend that these pieces, these metal pieces, both over and under, were not for 40

the purpose of guarding the knives, but was a part of the system of disposing of the shavings and so forth, that is, your suction system, I think it has been called,—was part of that? If there is anything to be gathered from the plaintiff's testimony, it is that his arm was pulled in some part of this machinery by suction.

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Mr. Lichtenstein: Yes.

The Court: Then you at least admit these parts were put there as a part of the suction system to dispose of the shavings?

Mr. Lichtenstein: Certainly.

The Court: There is testimony that one of these parts was worn and broken.

Mr. Lichtenstein: Yes, one of the suction parts.

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The Court: If that is so, and admitting that it was put there as a part of the suction system, and if it be true that the suction was such as would do this thing that the plaintiff says was done, then wasn't there negligence upon the part of the defendant?

Mr. Lichtenstein: If the Court please, I would not stand here and argue if this suction system had such force that anybody—that this young man came in close proximity to this machine—and it was of such terrific power, that while he was picking up these parts from behind there his arm was by force of this power drawn into the machine and his hand taken off,—I would not have the temerity to stand here and argue for a nonsuit.

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The Court: You have the testimony of the plaintiff to that point, and you have the testimony of the last witness as to what

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would occur when he walked by a machine with his coat.

Mr. Lichtenstein: That does not show what it was from, whether it was from the **rocking of the machine**. He says—we don't know how close he was to it—his coat would shake a little bit. Doesn't say it would draw it in. Because it might result in this. 10
Where the knives are revolving at a terrific speed, as these knives were, three or four thousand revolutions a minute, there would be a propulsion of air outward, and that might have caused some shaking, but it would not draw in.

The Court: Might depend. Does your testimony show which way it revolved?

Mr. Lichtenstein: Yes. There is testimony. If the Court please, here is what 20
we have got to look at, sir, that there is not a single word of evidence as far as the plaintiff is concerned, that his hand was drawn in there by reason of any air pressure that was the result of that machine. He says that he cannot account for the accident. He says he felt some cold air and it appeared to him that his hand was drawn in. He does not say it was drawn in by reason of air. 30
It might be his hand got caught into some part of the machinery. He might have been fooling around the top of this machine in some unaccountable manner, and his hand be drawn in in some way, or he might have gone and put his hand into that hole. That was the only way in which it could have happened, as testified to by the plaintiff's own witness. There is not a word of evidence in the case that there was any suction 40

there, sufficient to draw the hand in. That is mere inference, but you cannot hold persons responsible for an inference drawn by a witness. It is a machine perfectly explainable; they could have proven how it was in operation there; this young man works down there every day in the week; it is not a mysterious thing. But he does not say his hand was drawn in by suction which came from that machine, because he does not know where it was drawn in, so how can you say that? Then on the other hand we have positive proof on the part of the plaintiff, and that positive proof is this, that under no manner of circumstances was it possible for any person's hand to be drawn into that machine. Absolute, convincing proof. It is their case. That is, you can take a handful of shavings with this machine in operation, and run it up and down in front of this opening here, and it wouldn't remove a single shaving from your hand. There is not any suction outside of the blower itself. Therefore, what is the conclusion? This man, who was a practical man, their witness, their expert, if you please, as to the construction of this machine, says there was no means of this young man getting his hand cut off unless he deliberately fooled around underneath that machine and put his hand in through that opening, and got his hand into the machine, and there, of course, we can see in a minute what would happen. If he touched the ends of those knives after running his hand underneath the machine, certainly you cannot say a man has a right to do a thing

of this kind. He was not working on this machine. He was sent there to pick up staves from the side of the machine. He had no business monkeying about the machine itself. He had no right to put his hand inside of the machine.

The Court: Assuming all of that, Mr. Lichtenstein, and yet suppose it should be found that the defendant had not done that or performed that duty of properly advising him or informing him of the danger that there was in and about that particular machine? 10

Mr. Lichtenstein: Will your Honor particularize so I may answer? Danger in what respect?

The Court: Well, of any act he might do in closer proximity to it. 20

Mr. Lichtenstein: On the outside of the machine?

The Court: On the outside of the machine.

Mr. Lichtenstein: If there were any danger?

The Court: Suppose through that lack of instruction he had done that?

Mr. Lichtenstein: If there were any danger inherent in that machine which by reason of that inherent danger this young man in walking around that machine performing his necessary duties of picking up staves from the floor, his hand was forcibly drawn into the machine, no question in my mind there would be a case of liability. But, we are under no obligation, if the court please, to sit down with the young 30
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man and tell him, "Here is a furnace. There is fire in there. You can see it is fire in there. If you put your hand into that furnace you will get the hand burned." We don't have to tell him that.

The Court: Of course that is so. Depends upon the age.

10 Mr. Lichtenstein: He is sixteen or seventeen years of age.

The Court: Seventeen years.

Mr. Simpson: Under seventeen.

The Court: He says he was twenty-two years old on the 28th of July, 1915. That would make him seventeen on the 28th of July, 1910.

Mr. Simpson: He also said—

20 The Court: And this happened on the 13th of August.

Mr. Simpson: Other parts of the testimony he said he was under seventeen years of age.

The Court: No, according to the age he gives—but, of course, what you say is true, that a child two years of age or three years of age might not realize the fact that harm would come to him if he put his hand into
 30 an open fire, and it would be necessary to instruct a child of that age, but a child five or six years or seven years of age ought not to need that instruction. Therefore, considering all the circumstances, whether a boy seventeen years old and all these qualifications, working in that factory, and so forth, should not have known the danger that would be attended in working around
 40 a machine.

Mr. Lichtenstein: Let us see what the dangers were. I claim there were no dangers in and about walking around that machine or picking up the staves. We do not have to warn a man, even though he is sixteen years of age, or fifteen or fourteen years of age, if he drives his hand underneath a machine where there are operations going on, sticks his hand through a hole where he had no business, his business does not call him there, he was not supposed to put it in there—he was not told to put it in there—a man of any intelligence at all sent to pick up staves, he knows he is picking up staves lying on the floor. He was not obliged to pull them out of the machine or anything like that. Therefore we are not obliged to warn him and tell him while picking up those staves, do not drive your hand into these knives, which were put in seven or eight or nine inches from the rear of the machine. Because he is not working on the machine. We have not told him to operate the machine. He was not set to work in the operation of the machine. He was merely sent to work picking up staves. So therefore the only question of negligence that could possibly arise is the one, was there suction there which would draw this boy's hand into that machine? That is the thing. They have not shown anything.

The Court: This is on a motion to nonsuit.

Mr. Lichtenstein: Yes; they have not shown any such thing, but on the contrary it does appear positively in the case that there was no suction there and it could not be drawn in.

The Court: I am not in the position, Mr. Lichtenstein, where I could say that what the plaintiff attempts to say is not the truth.

10 Mr. Lichtenstein: No, sir. I do not want your Honor to go that far, because I do not go that far. I do not claim that what the boy is saying is not the truth. All I say is the boy has not testified to anything which would show there was any negligence on the part of the plaintiff. He does not show—he does not know where his hand was. He speaks of a hole. He does not know what portion of the machine it was in. We are all inferring it must have been this hole. He does not say it was, and there is not a word of proof in this case that there was that hole or any other hole. If it is this hole his hand was drawn in and his hand cut off, then we have positive proof in the case that there is absolutely not a bit of suction there and it was physically impossible for his hand to get in.

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The Court: From the other testimony must it not have been this hole, because of the fact that the hand was found in a part of the piping of the suction system?

30 Mr. Lichtenstein: No. He might have driven his hand, for instance, in between these rollers and might have got in there.

The Court: No; I think that is demonstrated ocularly that that would be impossible.

Mr. Lichtenstein: No, sir, it is not. It is just the reverse.

40 Mr. Simpson: Can he prove that if he did that? His witness can prove that is where the hand was taken out.

Mr. Lichtenstein: No, sir; the knives revolve underneath here. A man might lift up those rollers, a man might drive his hand in between them and have his fingers cut off and his hand drawn in there and his fingers would drop down underneath. That is from an actual examination of the machine itself and a demonstration by this man that he could, if he drove his hand in, he could have had his hand cut off and it would have dropped down there. And so far as this hole is concerned, the man himself says the only way he could have gotten his hand cut off there through that hole was by deliberately putting his hand in it, not by its being drawn in, because there is nothing to draw it in, nothing whatever. So therefore it seems to me that from the plaintiff's case as it stands with his testimony alone, there is no proof to show in what manner his hand was injured; there is no proof that it was drawn in there at all, because he says he does not know just exactly how it came in there. If we are to take the testimony of the expert they called, then it clearly and beyond any question is shown, that the only way this boy's hand was cut off was by his deliberately putting his hand through that hole, examining for some matter of curiosity of his own. Upon those grounds, if the court please, I claim that there ought to be a non-suit.

The Court: Mr. Simpson, what have you to say about the first part of the argument, regarding the act of 1909?

Mr. Simpson: We only put that in to be

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sure. I think we have an action under it. I think that the infancy of the plaintiff prevents that period of limitation running, but I am not standing on that. I would prefer to have your Honor deal with this as a common law case.

10 The Court: From the reading of the case in 82 Law—

Mr. Simpson: That simply had to do with notice. It had nothing to do with the fact of the influence of the infancy of the plaintiff on the limitations. It is a limitation of a year, and if it would seem to go as an elemental matter, why waste time on it; it is academic. We will rely on our common law right of action. We say under the case of Smith vs. Irwin and the case of Tittlebaum vs. Progressive Paper Company, and Horan vs. Rosenthal, we have a complete common law action here. Of course we also rely on the act of 1904. (Reads from the case of Tittlebaum vs. Progressive Paper Company, and cases there cited.) Our position is simply this. Of course it is simply splitting hairs to say there was no liability because he was not working on the machine that injured him. If he was working in a place where there was danger and that danger was not explained to him, then under Smith vs. Irwin, Tittlebaum vs. The Progressive Paper Company and Horan vs. Rosenthal, he has an action on that fact alone, that the master did not instruct him of the hazard. Isn't it simply trifling with words to say there wasn't any danger? The man's hand was cut off. It is for the jury to say, it seems to me, that the man put his hand in, or shoved

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his hand in, whether it was drawn in by the suction, which he, it seems to me, testifies it was, or whether in stopping to pick up the staves, he because he did not know the conditions, got his hand in such position that it was cut off; in addition to the fact that if the thing had been guarded as they now say his hand would not be cut off. Now they show a system—I don't know what they have done with that thing, they show a system where it would have been physically impossible; that is, they show the thing in this position and the knives here where he could not get his hand cut off; in other words that it was practicable to guard those knives. Now, the Act of 1904 says wherever practicable those knives shall be guarded. It picks out a planer, and the Supreme Court has said that it is for the jury to say whether it is practicable or not to guard those knives. Now then if it was practicable to guard the knives and they did not guard them and he was injured because of that, why, that is their negligence. It seems to me perfectly plain, so that I do not want to take up your Honor's time on a long argument as to how he got hurt. Your Honor cannot weigh the testimony at this stage of the case. He says, "I was working upon a dangerous machine, I was working under instructions, and while I was doing the work my hand was pulled in and cut off."

That is for the jury to say, it seems to me, whether or not the master used reasonable care to furnish him a safe place, whether he did instruct him of the danger, whether he was contributorily negligent, and whether

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the risks were explained to him in such a manner that he could have been held to assume them by law.

The Court: I understand you are not going to stand for recovery upon the Act of 1904?

10 Mr. Simpson: Yes. We will take that right out of the case.

Mr. Lichtenstein: Might I call your Honor's attention that every one of these cases that Mr. Simpson has called your attention to were cases in which the instrumentalities—the machine was a machine in and about which the man, the plaintiff, himself was working, and the master's duty is to instruct the servant as to what the inherent dangers which are in that machine which

20 he is about to operate. That is the reason I said I was not confining myself to such an illustration, because this is not that case.

The Court: Supposing it was a saw bench or machine that this plaintiff was working at, and suppose he had a helper who was handling staves, bringing them to his bench, and that lad was hurt, and he was able to show that he had not been apprised or informed or advised as to the danger of that particular machine?

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Mr. Lichtenstein: What danger?

The Court: Such a danger as would be incident to a revolving circular saw.

Mr. Lichtenstein: You see—

The Court: Suppose he had his hand on the table and it came in contact with the saw? Of course it might be said that he was a boy old enough—

40 Mr. Lichtenstein: Your Honor certainly

won't say that this boy, seventeen years old, if he was set to work on the sawing machine, that it was necessary to tell him if he put his hand on that saw that it would cut it off?

Mr. Simpson. This boy was seventeen in the case of Smith vs. Erwin, and he did exactly that thing.

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Mr. Lichtenstein: Read it all. You take this Tittlebaum case, here the boy was set to work fixing up these belts—putting these fasteners on it to fasten it together, and I presume they were the ordinary fasteners which are driven through the ends and then opened up, and there he was not apprised of the fact he had better be careful because these things might rip and pull him into it while he was doing that work. Of course there he was working on the very thing. And the other case that was cited, the Addicks case, they are cases entirely different. There he was set to work pounding clay, or at least they had cylinders, and they probably were making these earthenware pipes that are run through the streets, and they had a lower cylinder and an upper plunger; and that case went to the jury simply upon this theory, that the boy swore that the man who was instructing him how to operate this machine showed him that if the clay got clogged there he should kick it, and it was while he was kicking the clay to put it down into the hole this plunger came down and his foot was taken off.

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Mr. Simpson: We only cited that case because it was a foreigner, the man did not speak the language. Oh, yes. You find every

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one of these cases was a case in which the men were working on the instrumentalities, on the machines on which they were hurt. That does not apply here. We were not obliged to tell him or instruct him how this planer operated. That is what I want to try to make plain to your Honor.

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The Court: If it were a dangerous machine wasn't it necessary for you to advise him it was dangerous?

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Mr. Lichtenstein: I mean this, it was not necessary under the circumstances. We merely had told him—take his story to be true—told him to go over there and pick up staves from the ground. It was not necessary for us to inform him of the mysteries of that machine in so far as its operation was concerned, unless this condition arose—unless it appeared that it was a dangerous thing for this boy to be told to go over there and pick up staves from behind this machine and not warning him that if he did pick up those staves that he was likely to have his hand drawn in because there was a terrific suction there, and if he got in close proximity to that machine that this suction would draw his hand in. Of course it was the duty of the master to warn him against that—to warn him if that condition did exist. Then we come down to the very question I ask, that so far as he is concerned that condition did not exist, because he does not know just exactly how that happened, and he testifies to it, but we have the conclusive proof on the part of the plaintiff, that is, by their expert who described the operation of the machine and the intricacies of it, and he testifies that there was absolutely no suction and his hand

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could not be drawn in, and therefore we have conclusive proof that this accident did not happen in the manner in which they allege in the complaint, that is, that his hand was drawn in by reason of suction. That is the crux of the whole case. It is their own proof.

Mr. Simpson: If you will look at Smith 10
against Erwin, you will see how widely different it is from Mr. Lichtenstein's opinion of the law, for the court there says: "The master will not have discharged the duty in this regard, that is the rule is modified so as to put upon him, when he takes in an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business—" not with the machine he worked on—"and of instructing him how 20
to avoid them."

Now Mr. Lichtenstein says, "No, that is not the law."

Mr. Lichtenstein: I did not say that.

Mr. Simpson: He is only bound to instruct him of the danger of that one machine; but the Court of Errors says that he is bound to instruct him fully of the hazards and dangers connected with the business and of instructing him how to avoid them. "Nor 30
is this all. The master will not have discharged his duty in this regard unless instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant to make him fully aware of the danger to him and to place him in substantially the same position as if he were an adult."

Now, then, can anyone deny there were

10 hazards and dangers connected with this business when they used rapidly revolving knives which cut off the hand of this man? Certainly I cannot reconcile the case of Smith vs. Erwin, with Mr. Lichtenstein's statement that their only duty is to instruct him of the danger of the specific machine he is working on.

Mr. Lichtenstein: The difficulty with Mr. Simpson is he does not understand my argument.

Mr. Simpson: That may be. There may be others in that unfortunate position.

20 Mr. Lichtenstein: I am not quarrelling with the Smith case, because I have not argued against it. Of course, the master is obliged to instruct the servant of the dangers—let us go to the extent that he read there—of all the machinery, but of course not the machinery that the man does not work on. That does not mean that, if for instance, there is a boiler downstairs in the basement which is incident to the operation of the whole plant, and it has a governor on and it has fly-wheels on, and this boy is set to work upstairs, Mr. Simpson certainly does not want us to understand
30 that under this Smith case the master is obliged to warn him against the dangers down in the basement.

Mr. Simpson: Nothing that he cannot come in contact with.

40 Mr. Lichtenstein: So I say, and I argue again, and it is not in contradiction to the Smith case—because the man was not set to work on this planing machine—it was not necessary, for instance, for us to advise

him that in putting in a board that his hand might be cut if he slipped it in.

The Court: Oh, no.

Mr. Lichtenstein: It comes back again, if the Court please, to the language I stated before. When we sent him over there to take boards from that floor it was the duty of the master to warn the boy against the dangers which were inherent in the doing of that work. Now, the only danger that they allege in their complaint is that there was suction there, and that the suction was such that the boy's hand would be drawn in. Now, if there was suction there which was sufficient to draw the boy's hand in—granted, sir,—he would be obliged to warn him against that danger before—that is the extent of the information and the knowledge we were obliged to impart to that boy, if such a condition did exist. The difficulty is that that condition did not exist and they have not shown it to have existed, and there is not a scintilla of evidence in the case to show that condition did exist, but, on the contrary, positive proof to show that it did not exist and it could not have happened that way.

The Court: Well, that goes to a very great extent, Mr. Lichtenstein, upon the way we look at the testimony of the plaintiff and the construction we must place upon it. On the other hand, had he said positively that it was the suction from that machine that drew his hand in there, even though the plaintiff's own witness had positively said on the contrary, would that be a reason why I should nonsuit now?

Mr. Lichtenstein: No, sir; I do not even say that.

10 Mr. Simpson: I am not satisfied with Mr. Lichtenstein's construction of this complaint at all, but I am not going to get up again, because every time I do he gets up, but I do not want to have your Honor assume that I accept his construction of this complaint.

The Court: I do not think Mr. Lichtenstein was contending for any such thing as that. He has not said, nor has he in any way or in any manner, nor would it be reasonable to conclude from his testimony that he does say that the accident happened through the suction from this machine.

20 Mr. Simpson: All he says, something drew his hand in.

Mr. Lichtenstein: Something would draw his hand in and if it touched his finger nails it would draw his hand in.

The Court: Well, I am going to deny the motion for nonsuit at this point. I understand, of course, that I do really nonsuit as to a portion of your motion, and that is as far as the 1909 act is concerned. He is not resting upon that law.

30 Mr. Simpson: We withdrew that portion of it.

Mr. Lichtenstein: We ask an exception.

The Court: Granted.

40 Mr. Simpson: My associate does not think I ought to withdraw the cause of action of the nonsuit. He thinks your Honor should nonsuit me on that 1909 act, because if I am wrong in assuming that

Peter F. McConville—Direct Examination.

we haven't any action on the 1909 act I would be out of court, and as he is the attorney of record I would rather take his view and have your Honor nonsuit us on the 1909 or your Honor instruct the jury that they haven't any cause of action.

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The Court: I won't pass upon that at present, but I will do so before the case is concluded. I want to refer to this case that is referred to. It does not embarrass you in any way?

Mr. Lichtenstein: No, in no way.

 Defendant's Testimony.

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PETER F. McCONVILLE, sworn.

Direct Examination by Mr. Lichtenstein:

Q. Mr. McConville, what is your business? A. Working for the Mathison Cooperage Company.

Q. For how many years have you worked for the company? A. Over twenty-five years.

Q. What are your duties there? A. My present duties is sort of man—general work all around; I work at different work; I generally sort out the different classes of staves at the present time. Before I had other work. If a man is away I take his place.

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Q. You are a brother of the general superintendent of the shop? A. Yes.

Q. The gentleman that was on the stand? A. I was at one time foreman over the heading department for eight years.

Q. Do you know this young man, the plaintiff in this case? A. By sight, I saw him working.

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Peter F. McConville—Direct Examination.

Q. Do you remember where he worked there?

A. Yes.

Q. Before he was injured? A. Yes.

Q. Do you remember the day of the injury? A. Yes, sir.

10 Q. Are you familiar with the construction and the operation of this planing machine upon which he was injured? A. Yes, sir.

Q. How many years has this particular machine been in your plant? A. Something around seven or eight years, I should think.

Q. Did you have a similar machine prior to that time? A. Yes, sir.

Q. For how many years was that other machine there? A. Six or seven years, I think.

20 Q. Is that a standard make of machine? A. I believe so, yes.

Q. How high is the bed of the machine from the floor, approximately? A. I believe it is thirty-one inches or something like that; I did not measure it myself, but I believe that was it.

Q. At the time this boy was injured and for some years prior thereto, did you have a blower system attached to this machine? A. Yes.

Q. For how many years prior to the injury?

30 A. Well, quite a number of years; I can't tell.

Q. Three or four or five years? A. Much more than that.

Q. For how long was this blower system continued after he was injured and before you made a change? A. Oh, I think about a year, something—eight months or a year, something of that kind.

40 Q. Did you increase the power of the blower at the time? A. Yes, I believe so. It takes shavings away much better than it did.

Q. And there are two sets of knives that revolve in this machine, are there not? A. Yes, sir.

Q. The upper set of knives revolve in what direction as far as the man who passed the staves in is concerned? A. They work toward the man that is putting the staves in.

Q. Worked towards the man? A. Yes. 10

Q. That is the upper set? A. Yes.

Q. And the knives that operate and plane the lower surface, how do they operate? A. Towards the man also, only they go around that way.

Q. Both operate that way? A. Yes; they have to strike the stave. The stave comes against them.

Q. How close are the two surfaces, the lower surface of the upper knives and the upper surface of the lower knives,—how close are they together? A. It depends on the thickness of the staves. 20

Q. Are they set and regulated accordingly? A. Yes; the stave presses right against the pressure bar.

Q. When this stave was planed which I hold in my hand, the upper set of knives touched the upper surface and the lower set of knives touched the lower surface; is that correct? A. Yes.

Q. Does it go through automatically? A. 30
Rollers carry it through.

Q. Is it necessary to put hand on it to carry it through? A. No, sir; you press against the roller and it will take it through.

Q. How fast does this machine operate? About how many staves does it send through? A. I believe it was timed the other day, I believe it would take about forty-six feet of timber a minute.

Q. Forty-six a minute; and these staves are about how long? A. They are all sizes; the larger 40
the stave the less the staves.

Peter F. McConville—Direct Examination.

Q. Approximately, the average run of staves?

A. They run from fourteen to twenty-four inches on that machine.

10 The Court: We did not misunderstand you, not forty-six staves, but forty-six feet of timber?

The Witness: That is right.

Q. And when the staves come to the rear of the machine do they pass over what is known as the bedplate? A. Yes.

Q. After they reach the end of the bedplate what happens to them? A. They fall to the floor.

20 Q. Who was the man that was in the operation of this machine, this planing machine, on the day of the injury? A. Mr. Rosenmiller.

Q. How many years has he worked for you? A. Eight or nine years.

Q. Always operate this machine? A. Yes, there was another one he operates once in a while.

Q. Is this bedplate the same bedplate that was on the machine at that time? A. Yes, I believe so.

Q. And the rollers that were in court here, were they on that machine at that time? A. I believe so, yes.

30 Q. Now the rollers, where do they rest? A. Right where the impression is there.

Q. Where the impression is on the top of this bedplate? A. Yes, sir.

Q. Just come down here, if you please. Where do the knives, the lower set of knives, revolve? A. Well, just the point of the knives passes within half an inch of that point there.

40 Q. The lower set of knives—the edge of the knife revolves within about a half an inch of the bedplate? A. Yes.

Peter F. McConville—Direct Examination.

Q. When I say the rear, you mean the point—do you mean to the interior of the machine? A. Inside of it.

The Court: The point towards the operator?

The Witness: Certainly.

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Q. What is the diameter of these knives? A. Something around six inches.

Q. The diameter. I mean from point of blade to point of blade? A. About six inches, certainly.

Q. And the diameter of the upper knives? A. I cannot say. About the same, I should think.

Q. Now, just go back to the stand, please. The day this boy was hurt was the blower system in operation? A. Yes, sir.

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Q. Was it the same blower system that was in operation for some years prior to that time? A. Yes.

Q. Will you tell us, please, how the upper set of knives were arranged, with reference to the blower system, and how the shavings are carried off from the upper set of knives? A. There is a hood fits over the top knives and a pipe runs upwards to the main pipe and carries the shavings off that way from the top knives.

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Q. And the lower knives, how are the shavings carried off? A. They run down to a hood underneath the knives and they go down and across to the post and from the post right into the main pipe.

Q. And the hood that was there on the day of the accident— A. Yes, sir.

Q. In what part of that hood were the knives located, approximately? A. That is the top hood? That is?

Q. This is the top hood. Take the lower hood. Where would the lower set of knives be, approxi-

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Peter F. McConville—Direct Examination.

mately, with reference to this opening at the bottom? A. About in the middle—the spindle would lay about the middle.

10 Q. At the time of the accident and for some time prior thereto were you familiar with the power of this blowing system? A. Yes.

Q. And how it would operate and what it would do? A. Yes.

Q. I show you a piece of piping which lies here on the floor with this elbow? A. Yes.

Q. Is that a part of the old blower system? A. Yes.

Q. Where did you find it, do you know? A. Laying up on the roof. There is pieces of it laying around.

20 Q. When did you find this piece? A. We went looking for it and we found that the other day—the engineer found it.

Q. Did you find any other part of the old system? A. No, we could not find the hood. We looked all over and we could not find it.

Q. Were you in court the last trial? A. Yes.

Q. Over five years ago? A. Yes, sir.

Q. Did you have this elbow and the hoods in court at that time—the old hoods? A. I believe so.

30 Q. Can you recall the general appearance of those old hoods with reference to the appearance of these hoods? A. Somewhat similar to the present ones, yes.

Q. Was there a back to it as there is here? A. I believe—yes.

40 Q. I notice, Mr. McConville, that there is a double sheeting of iron here, the rear portion. What is that about there, the double sheeting? Do you know anything about it? A. I can't tell anything about it. I have an idea, but I can't state positively.

Peter F. McConville—Direct Examination.

Q. The lower portion of the old blower, do you recall on the day of the injury whether there was any opening in it? A. Yes, there was.

Q. Will you just tell the jury and show the jury approximately where the opening was? A. It was just pretty near about the same position that was— it was worn away. 10

Q. Worn away in what manner, by reason of what? A. The shavings striking it.

Q. Since this morning did you have some shavings sent up from the factory? A. Yes.

Q. After Mr. Simpson asked your brother about the kind of shavings that would wear holes, and he said they were pieces. The old blower system that you had there, would it carry off all shavings? A. Not as well as the present system.

Q. What would happen to the heavier shavings? A. They lay in the joints. 20

Q. Is this one of the joints—one of the elbows? A. That is an elbow, yes.

Q. How far from the machine was this elbow? A. That laid right on the floor.

Q. Right underneath the machine? A. Rested right on the floor, yes.

Q. Outside of the machine? A. Well, it went right up—this way—right near the machine. 30

Q. When the heavier pieces fell into this joint and were not carried off, how would you take them out? A. Well, sometimes the pipe would get clogged up there—that would naturally interfere with the shavings and clog the whole top, and we would take the top out and clean it.

Q. Do you refer to this little opening in the center of the elbow? A. Yes.

Q. Was there a cap over that at the time it was in operation? A. Yes. 40

Peter F. McConville—Direct Examination.

Q. I show you some pieces of wood—are these ordinary—the larger pieces that are sometimes drawn up and broken off— A. Yes; they are similar to the pieces that clog up.

Q. That clog up? A. Yes.

10 Q. And when a large piece breaks off of a stave from the under side of the knives what does it strike? A. Well, I presume it strikes the front of the blower.

Mr. Simpson: This man says I assume.

A. I ain't inside of the pipe. I cannot state positively what it does. I can hear it strike them.

Q. You can hear it strike? A. I can hear it strike against the side of the pipe, yes.

20 Q. During all the years that you worked around this plant, did you ever know of any suction being created outside of the machine? A. No, sir.

Q. Was there any suction? A. Not outside of the pipe, no, sir.

Q. Was there anything outside of that machine that would draw a person's clothing or his hand in if he walked by the machine or stood up against it? A. No, sir, not unless he pressed right up against the pipe.

30 Q. What part of the pipe? A. Any part of the opening of the pipe; pressed right up against it.

Q. In what way? A. Why, push his clothing right into the opening.

Q. Push his clothing right into the pipe? A. Yes, sir.

40 Q. And if a person were to hold his hand in front of this—any part of the outside of this machine, with shavings on it, would it draw a single shaving in? A. Not through that hole it would not.

Peter F. McConville—Direct Examination.

Q. When you speak of this hole you refer to this hole in this pan or in this cap? A. In this cap, yes.

Q. Could you hold your hand right close up against it? A. Yes.

Mr. Simpson: I object to it as leading. 10

Q. Tell us what you did? A. We held shavings right in front of it like that, and it would not take them out of the hand.

Q. Yes. Did you hold them up in front of the hole? A. Right in front of the hole.

Q. Would it take a single shaving off? A. Not as I could see.

Q. Was that with the present system? A. The present system. 20

Q. Can you hold your hand in any part of the front of this machine without it being drawn in any way? A. Yes, sir.

Q. Is there any suction outside of this machine which would even draw a piece of paper into it if it was hung on the outside of it?

Mr. Simpson: I object to it as leading.

The Court: It is.

Mr. Lichtenstein: I withdraw it. 30

Q. Can anybody see the operation of this machine at the present time and the effect that it has by holding your hand there at the present time? A. Yes, sir, the machine is there at the present time.

Q. Exactly the same machine? A. Yes, sir.

Q. And the power is greater upon it now? A. Yes, sir. 40

Peter F. McConville—Direct Examination.

Q. How far back from the rear of the bedplate would a person have to get his hand in before he would touch the knives? A. Just the length of that front plate and a half an inch further.

10 Q. Is there any way you could get your hand to these knives excepting by putting your hand underneath the machine and putting it underneath this whole bedplate and beyond this lip of the bedplate and touch the knives? A. Not unless you shove it where the spindle went. There might be a little opening there; you might force your hand in there some way.

Q. Where is that? A. On the side of the spindle.

20 Q. Speaking of the lower knives here now, is there any way that a person could reach these knives with his hand excepting by shoving his hand underneath the bedplate and beyond this lip that is underneath it, and beyond the end of it and then touch the knives? A. Except as I say—except where the spindle was you might force your hand in through a little space there, I don't know.

Q. Let us see what you refer to.

The Court: Refer to the cut that you had.

30 Q. Let us see if you can show us with the machine? Just take the upper rollers. A. The other part comes like that, the lower part (illustrating).

Q. The knives revolve where, where you indicate? A. Right in the middle.

Q. Underneath this pressure bar? A. Yes.

Q. Is that right? A. Yes.

40 Q. And the upper part of those knives is about even with the bedplate, the upper part of the lower knives? A. The upper part of the lower knives, yes.

Peter F. McConville—Direct Examination.

Q. Are about even with this bedplate? A. Yes.

Q. But underneath this bar here? A. Yes, sir.

Q. Could a person get his hand in contact with those knives in any way through here except by shoving his hand underneath here, as I indicate, and then getting over to the knives with his fingers?

A. Well, yes, as I say—you see the blower plate comes over like this, and there is a little space there.

10

Q. Where you indicate in back of the blowers and in back of the bedplate? A. Back of the bedplate.

Q. How could he get his fingers in that? A. Shove them in there.

Q. Over the top of the machine and underneath; is that right; like right where my thumb is? A. Might shove it down through there.

20

Q. Shove it down through there some way—you are indicating a point which is in the rear of the bedplate and underneath the pressure bar and the pressure plate? A. Yes, sir.

Q. And if a person did attempt to stick his hand underneath that, underneath the pressure bar and around the side of it as you indicate, and his hand was cut, where would his hand go to? A. It would drop to the bottom of the pipe.

30

Q. Did you see the boy after he was hurt? A. I ain't sure. He wasn't on the floor when I came up at the time. Whether I saw him before he was taken away I cannot say.

Q. Were you there when his hand was taken up? A. I was coming up in the elevator at the time of the accident and by the time I got up he was taken out the front of the shop.

Q. Did you see his hand taken out or parts of his hand taken out? A. No; I think I went to the front of the shop, and I did not see that.

40

Peter F. McConville—Direct Examination.

Q. Does this lower cap fit closely around the knives or not? A. Yes; right around the knives.

Q. Now, so far as air is concerned, I notice, for instance, this lower cap that you have here is all split open and open on the side. Does that make any difference? A. No.

10 Q. That does not make any difference at all? A. No.

Q. And it is also split open on the other side? A. Yes.

Q. Does it matter whether the upper portions of it are exactly and absolutely close in any way? A. No, I don't—any great difference.

Q. There are little holes and cracks all over this thing; does that make any difference at all as far as the system is concerned? A. Not as far as I know.

Q. This lower piece, is it used for any purpose other than to allow the shavings to drop into it? A. No, that is all. That is all it is put there for, to take the shavings away.

Q. Have you taken the pieces out of this elbow when the machine was in operation? A. I believe so, yes. I have cleaned it out many times, yes.

Q. While the machine was in operation? A. Oh, yes, that is possible.

30 Q. What would you do when you wanted to take it out, put your hand in it or what? A. Just put our hands in it and shake up the shavings, you know, and the wind would carry the finer shavings off, and the heavier shavings—

Q. Was there any difficulty about your hand when you got it in that opening there? A. No; it was too far from the knives.

Q. Any suction in there that would even carry your hand up or anything like that? A. No.

40

Peter F. McConville—Cross Examination.

Q. Have any effect on your hand when you got it in there, at all? A. No.

Cross Examination by Mr. Simpson:

Q. Now this fitted in this way, didn't it; this came down here and the back of the machine was up over here? A. The back—the bed of the plate fitted over that. 10

Q. Was it that way, and was the top up here over this? A. Top of the machine?

Q. I don't quite understand. Take this and fit this on here, will you? (Witness complies.)

Q. Now then, you are at the back of the machine now, aren't you? A. Yes.

Q. Now then, suppose this hole was not here, will you kindly show the jury how you could get your hands to the knives? Go on from here, without this hole? A. I couldn't get my hand to the knives. 20

Q. You could not get it to them if this was all right here? A. No, I could not push them in there.

Q. Well, could you or couldn't you get your hand on the knives if this thing— A. Oh, no.

Q. Then what did you mean when you talked about getting your hand near the spindle? Where is this spindle that you are going to get to the knives through? A. Fits on a box over here and the back plate comes to here. 30

Q. How would you get your hand in the knives? A. Shove it down through here.

Q. Come and put it up over here and shove it all through here? A. That is the only way I could.

Q. And the rollers are going away all the time? A. Yes.

Q. So you would have to wait until the rollers get back here? A. No; the rollers don't move. 40

Peter F. McConville—Cross Examination.

Q. You would have to put your hand all along here under here? A. Yes.

Q. How far down are the knives? A. Well, the knives run—comes on a level with your plate.

Q. About six inches across? A. About six inches across.

10 Q. So there is no way of getting your hand to those knives if this was all solid here? A. No.

Q. The only way is you pick out some way here? A. Yes.

Q. The suction is down here? A. Yes.

Q. The suction is made by blowers, isn't it? A. Yes.

Q. Run by steam? A. Yes.

20 Q. How many revolutions a minute do the blowers make, do you know? A. I don't know.

Q. How large are the wheels? A. I cannot state.

Q. How thick are the blades? A. I don't know.

Q. It is artificial suction, isn't it, for the purpose of carrying off shavings? A. Yes.

Q. You said to Mr. Lichtenstein that if you got your clothes against the machine the suction would pull them in—what part of the machine? A. Not there.

30 Q. Where? A. If that pipe was up a little above, you know, you put a handkerchief or anything like that it would pull it up.

Q. But this pipe is closed, isn't it, in normal operation? A. Yes.

Q. What did you mean when you said to Mr. Lichtenstein, if you push your clothes against the machine there would be suction to pull them in? A. Not that part of it.

Q. What part of it? A. If you take the top—

40 Q. If you take it apart and crawl into the pipe? A. —and holding another up against the upper part of it it would have suction.

Q. When you said there was no suction unless you pressed your clothes up against it you had reference to the taking of the machine apart? A. Part of the blower apart, not the machine.

Q. When he talked to you about the machine and you said yes, if you got your clothes against it you had reference to the blower part, did you? A. Yes. 10

Q. You did not mean the machine at all? A. No.

Q. How far was the blower part from the machine? A. It was right around the machine.

Q. Is this what you call the blower part? A. They are all blower—the whole pipe.

Q. Is this what you mean by the blower? Is this part of the blower? A. Yes.

Q. If this was all worn there, as you have described it, and you got your clothes against it,— is that what you mean? A. No; because the knives shove your clothes away, have a counter action there. 20

Q. What did you mean when you said if you got your clothes against the machine the suction would draw them in? A. There is a pipe runs up above— if you take that part of the blower against you and you hold your handkerchief up against the blower.

Q. How high above the machine? A. The joints there, where there was nothing but suction, then it would carry the handkerchief or anything away. 30

Q. But not down against the knives? A. No; there is a counter action there.

Q. There is no suction at the knives? A. No, not right there.

Q. The knives cut off the shavings that you wanted suck up? A. Yes. You understand the knives is going that way, throwing the shavings right against where that hole is at the present time. 40

Peter F. McConville—Cross Examination.

Q. This arrangement sucked the shavings down and up? A. Yes; it throws them down.

Q. There was enough draft to pull the shavings down here and up? A. It is the natural way for the shavings to fall down without being sucked, and then there is a suction takes them away.

10 Q. When you opened it out it was because this pipe was clogged? A. Yes.

Q. And if it was clogged there would be no suction? A. Not when it is clogged, not at that end of it.

Q. You unclogged that to get the suction? A. That is right.

Q. You did not see any of this accident, did you? A. No, sir.

20 Q. You did not see the hand taken out? A. No, sir.

Q. As I understand you it is an artificial system whereby you throw wheels around and that makes a draft and that makes the suction, isn't that right? A. Yes.

Q. Where do you get the air from to make the suction—to draw the air in? Does it come in here? A. No, I don't know of any air.

30 Q. You don't know how they suck it in or where they get the air? A. No, I don't know.

Q. But the suction does come down here, doesn't it? A. Yes; right under the knives is the suction.

Q. Right there, and it goes down here? A. Yes.

Q. How much of this was worn away, this back plate? A. A hole somewhat similar to that.

Q. There wasn't any edge? This has been cut? A. Yes.

Q. This has been artificially made? A. Yes.

40 Q. The other one was worn by reason of things flying against it? A. Yes.

Peter F. McConville—Re-direct Examination.

Q. How much of it was worn? A. I think a hole just about the same as that.

Q. Was there a very large lip? A. We made that as near as possible to the recollection of it.

Q. You did not have it measured? A. No.

Q. Your best recollection of it? A. Yes.

Q. When was the last time you saw the old shield? A. I don't think I have seen it since. 10

Q. Since the last trial? A. Since the time the blower system was put up. We used it after the trial.

Q. How long did it take to wear out the old shield; one year, two years, five years or ten years? A. I guess over ten years.

Q. Ten years before it was worn out? A. Yes.

Q. Before it was worn into the condition it was on the day of the accident? A. Yes, sir. 20

Re-direct Examination by Mr. Lichtenstein :

Q. When you spoke of something being drawn into it you said that it would be drawn in if you took one of the sections apart and held it right close up to it? A. Certainly, where there was nothing to interfere.

Q. By that do you mean that if you went to a point in the pipe where there were no openings of any kind at all and were to close up the whole opening of the pipe over the machine, then it would draw? A. That is right, exactly. 30

Q. But does that apply to any part of the rear of the machine? A. No; that does not apply to that lower—

Q. Or this lower hopper? A. No, sir, it does not.

Q. Or shield? A. No, sir, does not apply.

Q. Or make any difference at all how close you 40

Peter F. McConville—Re-cross Examination.

get up to this worn out part in the back? A. No, sir; no suction there at all.

Q. Or any part around that? A. No, sir.

Re-cross Examination by Mr. Simpson :

10 Q. Did you ever try getting up close to the worn out shield? A. Yes, sir, we tried it the other day.

Q. You have lost the worn out one? A. I did not—I thought—

Q. Did you ever try, as you testified? A. No; I cannot tell about the old shield.

Q. You don't know anything about it? A. What's that?

20 Q. You don't know whether on the old machine the old shield would draw you in if you went near it, do you? A. I can't say, no, sir.

Re-direct Examination by Mr. Lichtenstein :

Q. Do you recall before the first trial my coming to you to make experiments with that old machine in operation? A. Yes, sir.

Q. Were you there at that time? A. I was there in the shop.

30 Q. Did you see what I did with my hand with reference to these— A. I cannot recall that.

Q. Do you remember my holding any shavings and pieces of tissue paper there? A. I can't recall. I remember you around the shop.

Re-cross Examination by Mr. Simpson :

Q. What apparatus did Mr. Lichtenstein bring when he made his test? A. I was working—I don't remember.

40

Peter F. McConville—Recalled, re-direct.

Q. Did not pay much attention? A. I don't remember whether I was paying much attention or not.

Adjourned to January 13, 1916, 10 A. M.

10

PETER F. McCONVILLE, recalled.

Re-direct Examination by Mr. Lichtenstein :

Q. Mr. McConville, in all of the years that you were connected with the defendant company and during all the years that you have been familiar with this planing machine have you had occasion during those years to observe what effect the machine had upon people passing back and forth in back of it? A. Yes, sir. 20

Q. Is there anything about that machine that will blow your clothes in and out? A. No, sir.

Q. Or have any effect upon your clothes as you pass it? A. No, sir.

Q. Does it make any difference how close you are to the machine? A. No, sir.

Q. Will it have any such effect? A. No, sir.

Q. Or did it have any such effect at any time during the time that you had your old blower system there? A. No, sir. 30

Q. Or at any time during all the years that the machine has been in operation there? A. No, sir.

Q. In stooping down on the floor or picking up things is there anything about that machine that would draw your hand or your clothes into it? A. No, sir.

Q. Or any part of it? A. No, sir.

Q. Would it be possible to do it? A. No, sir. 40

Q. In any way? A. No, sir.

Q. Would it be possible for such a thing to happen in any way? A. No, sir—impossible.

Q. Do you recall shortly before the case came up for trial the first time before Judge Vail— A. Yes, sir.

10 Q. —tests being made in the shop while the machine was in operation? A. Yes, sir.

Q. Was the old blower system attached at that time? A. Yes, sir.

Q. Do you recall what the tests were? Just describe to the jury? A. Took a handful of shavings and held it in our hand and got it as close to the pipe as we possibly could get it, and it failed to take any of the shavings off of my hand or this man's hand.

20 Q. Do you recall how the hand was moved? A. Yes. Up and down—sideways.

Q. In and out towards the machine? A. Yes.

Q. How close did the hand come up to the machine? A. Close up against the pipes.

Q. Up against the pipes? A. Yes.

Q. Did it remove any parts of the shavings? A. No, sir.

Q. Did you have any other tests made with pieces of tissue paper? A. Yes.

30 Q. What tests were made? A. It would not take the tissue paper.

Q. Would it draw the tissue paper in? A. No.

Q. How close was the tissue paper held to the opening in the pipe? A. Close up against it.

Q. Was that the same pipe or hopper that was in use at the time the machine was in operation when this boy claims to have been hurt? It was, yes, sir.

40 Q. Was it the same blower system that was brought into court or the parts that were brought into court at that time? A. Yes.

Peter F. McConville—Recalled, re-direct.

Q. Did you recently, just before this case came up for trial, at my request, make tests on the machine again? A. I did.

Q. Just describe to the jury what tests you made? A. I took and I cut a hole out of that hood there just about the same as it was in the last hood there.

10

Q. When you speak of the hood do you refer to the lower hopper that covered that portion of the back of the machine where the knives are? A. Yes; and I held a handful of shavings there to see if it would take them, and it would not take it.

Q. Now where did you hold your hand? A. Right up against the hole.

Q. Was the blower system in operation and the machine in operation as it is in operation when staves are being planed? A. Yes.

20

Q. Did you also test with pieces of paper? A. Yes; I tested with a piece of paper.

Q. What did you do? A. Well, it would pull the paper in this time.

Q. How far did it pull it in? A. Well, it just pulled it, drew it up against the hole.

Q. Would it take it into the hole? A. No.

Q. You mean that it wobbled the paper? A. It would draw it in towards the hole.

Q. Did it go into the hole at all? A. I wouldn't swear to that.

30

Q. Did it go in at all while you held it there? A. No, I don't think so.

Q. This was with the new blower system? A. This was the new blower system.

Q. That was the new system that you described on your direct examination, I think, when you were called, or, at least, did you describe that when you were first asked by the plaintiff? A. Yes, sir.

40

Peter F. McConville—Recalled, re-direct.

Q. That was the new system that was installed there for the purpose of more effectively drawing the shavings? A. Yes.

Q. And has that system more power than the old system had? A. A little more power, yes, sir.

10 Q. The hood that was attached to the machine, a similar one to that which is attached to the new system and which covers or enclosed the lower part of the machine where the knives—it is a sort of a trough? A. Yes.

Q. Is it into that that the shavings drop? A. The shavings drop into it, yes.

Q. After they drop into this trough or hopper where do they go? A. Why, the blower sucks them up and takes them down to the boiler room.

20 Q. In all of the years that you have been in and about this factory and in and about this machine, while it was in operation, have you ever known of its drawing or pulling anything into the machine itself? A. No, sir.

Q. From the outside? A. No, sir.

Q. While this machine is in operation planing staves, can anybody walk up to the rear part of it where the knives are enclosed, up to this tin part, and hold his hand right up to the opening?

30 Mr. Simpson: I object—

Q. Without it being drawn in? A. Yes, sir; a man can hold his hand there without being drawn in.

Mr. Simpson: I object.

The Court: Have you tried it?

40 Q. Have you tried it? A. I have held shavings there. I have worked around it. I have worked it while running, and I have made alterations on

Peter F. McConville—Recalled, re-cross.

it while running, and nothing ever happened to me.

Q. Is there anything which would draw your hand at all? A. No.

Q. And when you held your hand with the shavings on it at this opening that you cut into this hood, how far was the nearest part of your hand to the knives? A. Right up close to it. 10

Q. About how many inches? A. Why, right up close to the pipe.

Q. How many inches from the knives? A. Oh, from the knives?

Q. Yes? A. About three and a half inches.

Re-cross Examination by Mr. Simpson:

Q. What is the name of this blower system? What is the name of it? A. Well, I couldn't tell you the name. 20

Q. Who installed it? A. Well, I really don't know.

Q. Can it be regulated so as to make a greater or less suction? A. No.

Q. How do you know? A. It has one suction all the time.

Q. How many cubic feet of air does it suck in at the point of these knives a second? A. I couldn't tell you. 30

Q. Don't know that? A. No.

Q. You don't know whether it sucks in thirty-four feet a second or not? A. I don't know.

Q. You made certain tests, you say, with the old system? A. Yes.

Q. You made it with this new system? A. Yes.

Q. When you made it with the new system you cut a hole out of this thing, didn't you? A. Yes, sir. 40

Basilio Giaimo—Direct Examination.

Q. How close have you held your hand to these knives without having it torn? A. Three and a half inches.

Q. Did you measure three and a half inches? A. I know that is the distance from the hole to the knives.

10 Q. From the what? A. From the hole I cut into the knives.

Q. When did you hold your hand within three and a half inches of the knives? A. Because I couldn't get it in there.

Q. Trying to get it in as far as you could? A. I didn't try to get it in on the knives. I held it close to the hole and the hole was three and a half inches from the knives.

20 Q. You did not have it from the other side? A. No; I wouldn't be foolish enough.

Q. You held your hand alongside of this hole which you had made? A. Yes.

Q. And it did not disturb these shavings? A. No.

Q. Did not blow them out of your hand? A. No.

Q. Did not suck them in? A. No.

Q. Did not move them at all? A. No.

30

BASILIO GIAIMO, sworn.

Direct Examination by Mr. Lichtenstein:

Q. Where do you live? A. 597 Fourth Street, Jersey City.

40 Q. Do you work for the Mathison Cooperage Company? A. Yes.

Basilio Giaimo—Direct Examination.

Q. How many years have you worked for the company? A. Thirteen years.

Q. What position have you held with the company? A. The first start I been fireman, worked in the fire room.

Q. These gentlemen want to hear you. A. After that I was—I got a job with machinery—the machine. 10

Q. What did you do about the machinery? What was your business? A. I repaired it.

Q. Repairing the machinery? A. Yes.

Q. How many years have you been doing that around this plant? A. Oh, now eleven years.

Q. Are you familiar with this planing machine on which this young man was hurt? A. Yes.

Q. For how many years has that planing machine been in your place of business? A. This new machine is about eight years ago. 20

Q. The new machine is eight years old? A. Yes.

Q. Has been operating all those years? A. Yes.

Q. Does it work every day that you work there? A. Yes, mostly.

Q. Did you have a similar machine before this one? A. We got one the same thing, the same build.

Q. For how many years did you have that other machine? A. That is about the time I came there was about four years—I guess about thirteen years. 30

Q. It was there when you came there? A. Yes, it was there.

Q. Do you know how the machine is built? A. Yes.

Q. And how it works? A. Yes.

Q. Do you know the place where the knives are? A. Yes. 40

Q. Where they are located? A. Yes.

Q. How they work? A. Yes.

Q. Have you repaired that machine? A. Yes; nobody else repaired it but me.

10 Q. Only you, and for how many years have you been repairing that machine? A. I tell you eleven years now.

Q. How high does the machine stand from the floor? A. Thirty-one inch.

Q. That is the height of the machine from the—
A. From the floor.

Q. From the floor to the top of it? A. Yes.

The Court: What does that mean, the extreme top?

20 Mr. Lichtenstein: I am just coming to it.

Q. When you say thirty-one inches from the floor do you mean to the bed of the machine or the top? A. To the top of the floor.

Q. Do you mean the bed of the machine or the top of the knives? A. No; the top knives is about—is about—it is about five inches—that is about thirty-seven inch altogether.

30 Q. The bed of the knives is about twenty-one inches high? A. Yes.

Q. When these staves are put into the machine by the man who is operating it do they run through without any pressure behind them? That is, do you have to push them or do they run through themselves? A. No; they have rollers, what they call feed rollers, and they take it over themselves.

Q. And then when the staves come out planed where do they fall? A. On the floor.

40 Q. On the floor? A. Yes.

Q. Do they scatter when they fall on the floor?

A. Yes; when they got many—spatter all over the floor.

Q. The upper knives, how high are they above the bedplate? A. About four inch, I think.

Q. Do they stand back of the—are they further towards the operator or closer to the operator than the lower knives? A. No, about thirteen inches, I think. 10

Q. When both sets of knives are revolving and planing the staves, how close are the knives; that is, how close is the lower surface of the upper knives to the upper surface of the lower knives?

A. Just the thickness of the staves.

Q. The thickness of the staves, and how do these knives revolve with relation to the man that is operating the machine? A. The top knife turns out— 20

Q. Turns away from you? A. Yes; and the bottom turn in.

Q. How far in from the rear of the machine do the lower knives revolve? A. Half inch to the rear.

Q. To the rear of the bedplate? A. Inside part, yes.

Q. How far in from the rear of the machine would the nearest part of the knives when be revolved? A. About seven inches. 30

Q. About seven inches. In order for a person to have his fingers touch those knives he would then have to put his hand seven and a half inches—seven or seven and a half inches underneath the end of the machine and into the machine? A. Yes, sir.

Mr. Simpson: I object, on the ground that that is for the jury to say. He cannot 40

give his opinion upon how far a man would have—it is a mathematical certainty. Let the jury say.

10 The Court: Well, I suppose there cannot be any objection if there is a mathematical certainty.

Mr. Simpson: They haven't any right to do that. They are figures. This witness cannot draw conclusions about it.

The Court: There is no harm can come if the conclusion he draws is the correct result of a mathematical calculation.

Mr. Simpson: The jury might draw another conclusion.

20 Mr. Lichtenstein: They could hardly draw another one if it is a mathematical certainty.

Q. Now, Mr. Witness, were you familiar with the old blower system that was there? A. Yes, sir.

Q. Are you familiar with the new blower system? A. Yes, sir.

30 Q. Will you just describe the system that was there at the time the boy was hurt? A. The old blower—the old system that we had was not strong enough to take those shavings—just only fine shavings, and of course, we had a great deal of trouble at that time—always clean pipes—

Q. How would the shavings from the upper set of knives be caught or collected? A. Oh, the upper set of knives about six inches.

40 Q. I know, but how were they collected from the upper knives? A. Oh, the blower—I mean the suction pulled it up.

Basilio Giaino—Direct Examination.

Q. Was there a hood over those knives? A. Yes, sir.

Q. And how would the shavings be collected from the lower knives? A. The lower knives, they caught the hood and the shavings dropped in there.

Q. And after they dropped into that hood? A. Dropped into the pipe there and the pipe laying right on the floor and the suction pull it up. 10

Q. After they dropped into the hood, then they went into a pipe that was on the floor? A. Yes.

Q. You saw an old pipe here yesterday or two days ago, an elbow? A. Yes, sir.

Q. We all saw it. You know what it is? A. Yes.

Q. Was that part of the old pipe? A. Yes.

Q. That was there? A. Yes. 20

Q. Do you recall when the case came up the first time for trial before Judge Vail? A. Well, I was here.

Q. Some years ago, about five years? A. I wasn't called.

Q. You were in court at that time? A. I have been up here, but I never was called as a witness on the stand.

Q. And did you bring up at that time all of the pieces of the pipe—the upper pieces and the lower piece, and also the elbow? A. I did, yes. 30

Q. And were they the pieces that were on the machine at that time? A. Yes, sir.

Q. Now you say that the blower system did not have enough suction to draw off heavier shavings. A. They rest on the pipe, so a man got to take it out.

Q. They rested in the pipe? A. In the pipe.

Q. And a man would have to take them out? A. Take them out and clean the pipe. 40

Q. I show you some pieces of wood and ask you whether they are pieces like these that break off the staves when you are planing? A. Yes—they come off on the end of the staves.

10 Q. Was the blower system sufficiently strong to carry out pieces like that? A. No; not even what we got in now.

Q. Not even the one that you have in there now will carry off pieces as big as that? A. No.

Q. What becomes of the pieces of wood that break off when you are planing that are as large as the pieces of wood which I show you in this box? A. Well, they take them off.

Q. What happens to them? A. Some flying up, you know.

20 Q. What becomes of those that do not fly up? A. Some have to drop in the pipe and rest there and we got to take them off.

Q. Then you have got to take them out? A. Yes.

Q. In the old blower system did you have in that part of the pipe in which these things would rest an opening to take them out? A. Yes, we got a little plug, what they call it.

Q. Is that the plug hole that we showed to the jury in this elbow the other day? A. Yes.

30 Q. Was there a cap on that? A. Yes.

Q. When you wanted to take these pieces out what would you do? A. Take him off and clean them.

Q. How would you clean them? A. Put your hand in and pull all those heavy shavings out.

Q. Would the blower system be in operation when you took them out? A. Yes.

Q. Would it draw your hand in? A. No, never.

40 Q. Was it powerful enough to draw your hand into the pipe? A. Not at all.

Basilio Giaino—Direct Examination.

Mr. Lichtenstein: I offer this box and contents in evidence.

Mr. Simpson: No objection.

Box containing shavings marked Exhibit D-1.

Q. In all the years that this planing machine was in operation and up until the time that the boy was hurt and after the time the boy was hurt and up until the time that the new blower system was put in, was there suction in that machine or in that blower system that would draw in part of your body or your clothes into the machine, as you stood near it? A. No, sir. 10

Q. Was there any part of that machine that this blower system—was there any part of the machine that a person would stand at that would result in his hand or any part of his clothes being drawn into the machine while it was in operation? A. Not at all. 20

Q. If a person stood in back of the machine where the lower knives revolved while the machine was in operation, would it draw his hand or any part of his clothes into it? A. No, sir.

Q. Was there any suction there that would do any such thing? A. No, sir. Not even now, and we have the stronger power there. 30

Q. Do you recall before the last trial tests being made in your factory, holding the hand— A. No; I couldn't very well remember that.

Q. Can't remember that? A. I can't remember that now.

Q. Did you make some tests here at my request? A. Yes.

Q. Just tell the jury what you did? 40

Basilio Giaimo—Direct Examination.

Mr. Simpson: I object to that. It doesn't appear that the system now is like it was then. Still, I will withdraw the objection.

Q. Is there any difference?

10 The Court: The objection is withdrawn.

Q. Just tell the jury what you did? A. We cut a hole through the pipe and we hold a handful of shavings near the hole. Don't draw in at all—never moved the shavings—there last week.

Q. How close did you go up to the hole that you cut into the pipe? A. Close as two and a half inches. I didn't measure it before yesterday.

20 Q. Two and a half inches from what? A. From the knives.

Q. How close up to the pipe did you go with your hand? A. Close to the pipe.

Q. Where was the hole when you held your hand there? A. Hole in the pipe.

Q. The hole was in the pipe? A. In the pipe, yes.

Q. Was the machine in operation at that time? A. Yes.

30 Q. Was the machine running? A. Yes.

Q. And the blower system running the same as it always runs? A. Yes.

Q. When you start the machine running does the blower system start to run at the same time? A. Yes, sir.

Q. Does it run separately from it or does it run as long as the power is on the machine? A. As soon as they start the engine they start that over.

40 Q. What kind of shavings did you hold in your hand? Were they large pieces like this? A. No.

Basilio Giaimo—Direct Examination.

Q. In the box marked Exhibit D-1 or the small shavings? A. Small shavings.

Q. Fine shavings? I show you some shavings in an envelope and I ask you whether the shavings that you held in the palm of your hand and in front of that machine were of any different character than those I have in my hand now? A. No, that is the same. 10

Q. That I take from this envelope? A. Same thing.

Q. And did you hold your hand with the shavings the same as I am holding them in my hand in front of this opening—the opening which was cut in that hopper or pipe which is two and a half or three inches away from these knives while it is revolving and the blower system is running without the shavings being drawn into the pipe? A. Yes; I was hold any time. 20

Q. Hold any time? Can anybody hold them there? A. Yes; anybody can hold them there.

Q. Will it remove any of the shavings from the palm of your hand? A. No, sir.

Q. While your hand is open? A. No, sir.

Mr. Lichtenstein: I offer this envelope of shavings.

Mr. Simpson: No objection. 30

Envelope containing shavings marked Exhibit D-2.

Q. Standing at any part of that machine in the rear or the side of it is there anything about the machine or the blower system that will draw your clothes or hands or any part of your clothes or hands into it? A. No, sir.

The Court: I thought he had been all through that. 40

Basilio Giaimo—Cross Examination.

Cross Examination by Mr. Simpson :

Q. How long have you been working in that factory? A. Thirteen years.

Q. You are the man that does all the repairing?
A. Yes.

10 Q. Are you a regular machinist? A. Yes.

Q. Were you one when you went there, or did you simply learn there? A. No; I learned there in the shop.

Q. Went there as a laborer? A. Yes.

Q. Now, you repair all the machinery? A. Yes.

Q. Whatever you know you learned in that shop? A. Yes; I am an engine—

Q. Go ahead? A. I am an engineer there now.

20 Q. I know, but whatever you know you learned in the shop? A. I learned by helping the men; that is all I knew in the shop.

Q. You never went out and served under another machinist as apprentice? A. No, sir.

Q. Or anything of that kind? A. No, sir.

Q. Sort of a handy man around the shop, is that it? A. Yes.

Q. Did you put this blower system in? A. No, sir.

30 Q. Do you keep it in repair? A. Yes.

Q. What kind of a system is it? It is a blower system? What do you call it? A. It is a kind of a blower—I don't know where it came from. It sucks the shavings and the shavings go through the blower and through that pipe and out again.

Q. What is called the suction? A. The wind—the fan on the blower.

Q. That fan sucks the wind in from outside?
A. Yes.

40 Q. Sucks it in through the bottom of this thing here, does it? A. Yes.

Basilio Giaimo—Re-direct Examination.

Q. Yet when it sucked the wind in through the bottom of this thing you were able to take shavings like this here; is that right? A. Yes.

Q. You could hold those shavings right within two and a half inches of the knives and never move the shavings? A. No, sir—yes, sir.

Q. Never move them? A. No.

10

Re-direct Examination by Mr. Lichtenstein:

Q. Anybody can see that to-day, can't they, if they go down there? A. What say?

Q. You can see that to-day?

Mr. Simpson: I object.

A. Yes, any time at all.

20

Mr. Simpson: He is simply summing up his case by his questions.

Re-cross Examination by Mr. Simpson:

Q. You said you would clean the pipe. Why did you clean the pipe? A. With your hand.

Q. Why did you clean the pipe? A. Because there is not enough suction in the pipe to clear the heavy shavings. 30

Q. The pipe would get stopped up? A. Yes.

Q. When it stopped up the wind could not pass? A. Yes.

Q. When the wind could not pass through there was no suction? A. No.

Q. When there was no suction it could not carry away the heavy shavings? A. Yes.

40

Rosari Madelli—Direct Examination.

Q. Then you cleaned the pipe to get suction?

A. Yes.

Q. That is what you cleaned it for? A. Yes.

10 ROSARI MADELLI, sworn and examined through Italian interpreter.

Direct Examination by Mr. Lichtenstein:

Q. You work for the Mathison Cooperage Company? A. Yes, sir.

Q. For how many years have you worked there?

A. Fourteen years.

20 Q. What do you work at? A. I work on the machine.

Q. What kind of a machine? A. Drying. (The Interpreter) He tried to use an English name, Bryan. This machine here, he says.

Q. He works on this machine here? A. Yes.

Q. The planing machine? A. Yes.

Q. For how many years have you worked on the planing machine? A. Thirteen years.

30 Q. How many years have you worked on this planing machine, referring to the one the parts of which are in court and which have been referred to in the testimony? A. I don't remember. Seven or eight years.

Q. Did you work on the machine that was there before this one was there? A. Yes, sir.

Q. Was it the same kind of a planing machine? A. Yes, sir.

Rosari Madelli—Direct Examination.

Q. So that you have worked on this planing machine all the years that it has been in the shop?

A. Yes, sir.

Q. Have been planing on this machine all the years that it has been there? A. Yes, sir.

Q. Do you know this young man who had his hand taken off? A. Yes.

10

Q. Do you remember that he worked in the shop there one time about five years ago or six years ago? A. Yes, sir.

Q. What machine did he work on? A. On the saw machine.

Q. Do you remember the day that his hand was lost? A. If I am not mistaken I think it was on Saturday.

Q. Yes, but do you recall the day? A. No, sir.

20

Q. Well, were you working on the machine the day that the boy was hurt? A. No—I happened to be outside.

Q. Well, had you been working there during the day, that is what I mean? A. Yes, sir.

Q. Now, at the time the boy was hurt were you at your machine or were you away from your machine? A. I don't know; I think I was downstairs.

Q. Well, what were you doing downstairs? A. I went to get a load of sticks.

30

Q. A load of staves? A. Yes.

Q. That is what we are talking about, staves. A. Staves.

Q. Was the machine running when you left to go downstairs to get the staves? A. Yes, sir.

Q. What is there around this machine that carries off the shavings? A. A pipe.

Q. At the time that the boy was hurt and for a long time before that did you have these pipes there to take away the shavings? A. Yes, sir.

40

Rosari Madelli—Direct Examination.

Q. If a person stood in the back of the machine picking up staves was there anything that would draw his hand into the machine? A. No, sir.

Q. Was there anything, if a man were picking up staves in back of the machine, that would draw his clothing into the machine? A. No, sir.

10 Q. During all the years that you worked on this machine after the staves came through the planing machine and fell on the floor who would pick them up and take them away? A. On that day that boy was getting them.

Q. Yes, but I mean for all the years, the thirteen years that you have been there? A. Sometimes the man don't saw the staves—sometimes I pick them up myself.

20 Q. Most of the time who picked up the staves? A. Myself.

Q. Himself? A. But on this day the boy was there to do it.

Q. And for thirteen years you have been doing that most of the time yourself? A. Yes.

30 Q. During all these years that you worked there picking up staves in back of this machine, did you ever notice while the machine was running that your hand or your clothes or any part of your clothes were pulled into the machine? A. No, sir.

Q. Was your hand or any part of your clothes ever pulled into that machine when you were picking up staves in all these years? A. No, sir.

Q. And did it make any difference how close you were to the machine picking up the staves? A. No; the boy—

40 Q. Listen to my question. In picking up staves from the back of this machine all these years was there any part of the machine in the rear that would pull his hand or pull his clothes in? A. No, sir.

Rosari Madelli—Cross Examination.

Cross Examination by Mr. Simpson:

Q. How many hours a day did you work the day of the accident, at the time of the accident? A. He said all day—ten hours.

Q. Ten hours a day. Were you a skilled mechanic? A. The foreman takes care of the machines. 10

Q. How much a day did you receive?

Mr. Lichtenstein: I object. It doesn't make any difference.

Mr. Simpson: I want to show this man is simply a laborer; he only got a dollar or a dollar and a quarter a day and he wouldn't know anything about a machine, or machine work and all that sort of work. 20

Mr. Lichtenstein: I admit he is nothing but an ordinary laborer.

The Court: He is to simply tell his experience.

Q. And you worked ten hours a day? A. Yes, ten hours per day.

Q. Who started and stopped the machine? A. Myself.

Q. How long were you away from the machine on the day of the accident? A. As I went down stairs and I went up again—about five minutes. 30

Q. How long were you away—about five minutes? You knew this young man, the boy, was working near your machine, didn't you? A. By the saw.

Q. You did testify that on the day of the accident this young boy was to pick up staves near your machine, haven't you? A. Yes, sir. 40

Rosari Madelli—Cross Examination.

Q. And when you went away and left your machine there was nobody else left to work it, was there? A. No.

Q. And you left the knives running when you went away and left your machine running, didn't you? A. The machine was going on.

10 Q. Now you say that you often picked up staves behind this machine, is that right? A. Yes.

Q. On the day of the accident was there any arrangement like this between the knives of the machine, like this (indicating).

The Court: Probably better uncover them; there are two of them.

A. Yes, sir.

20 Q. It was old and worn at the top, wasn't it?

A. Yes, sir.

Q. How long had it been old and worn on the day of the accident? A. I don't know.

Q. A year? Had it been old and worn for a year? A. I don't know.

Q. More than a year? A. I don't know. I could not say. I don't know.

30 Q. Now, when you picked up the staves from the floor how far away from the back of the machine would you keep when you were picking up the staves? A. About eight to ten feet.

Q. Eight or ten feet you would keep away. You were careful not to get your hand near the rear of this machine, weren't you, when you were picking up staves? A. I would go near the machine always.

40 Q. Well, weren't you careful to keep your hands away from this old and worn shield when you stooped to pick up staves at the back of the machine? A. No, sir.

Q. Just put your fingers in and played with the knives, I suppose.

Mr. Lichtenstein: I object. He does not say that.

Mr. Simpson: He says no, he was not careful to keep away from the knives. 10

The Court: The real question would be how close did he go or would he go?

Mr. Simpson: It is so manifestly absurd, the answer.

Mr. Lichtenstein: I say it is not manifestly absurd. I think counsel's answer is manifestly absurd.

Mr. Simpson: Have you made an answer? (Question repeated.) 20

Mr. Simpson: I will withdraw it.

Q. You were not careful then to keep your hand away from the knives or from the part of the machine in which the knives were when you were picking up the staves? A. I was not afraid.

Q. You had been working on the machine a long time, hadn't you? A. Yes, sir.

Q. You knew where the knives were and what they did, didn't you? A. Sure.

Q. Why were you not afraid then? A. Because I do know they do harm. 30

Q. What? A. Because I do know they do harm.

Q. You say on the day of this accident the boy was to pick up staves in the back of your machine; how do you know that? A. He would pick them up from the floor.

Q. How do you know that on the day of the accident he was to pick them up from the floor? A. Because I see the boy do it. 40

Rosari Madelli—Cross Examination.

Q. Did you see the foreman point to him to do it? A. No, sir.

Q. You say there was no wind at all around this rear part of the machine—no wind?

10 Mr. Lichtenstein: He did not say that.
Mr. Simpson: I will withdraw the question.

Q. Do you say there was no wind at all around this part of the machine?

Mr. Lichtenstein: Which part do you refer to?

20 Q. The rear part where the shield fits in?

Mr. Lichtenstein: Do you mean the inside or outside?

Q. I mean right here where the shield fits in.

The Court: At the shield?

Q. At the shield? A. A little bit.

30 Q. How much wind was there? A. Little bit, only to draw little shavings.

Q. Draw shavings? Well, how much wind was there? Would it move and lift up paper?

Mr. Lichtenstein: Where, outside or inside of the hopper?

Q. At the place I asked him.

Mr. Lichtenstein: Outside of the hopper?

40

Q. At the shield?

Mr. Lichtenstein: Outside?

Q. At the shield?

Mr. Lichtenstein: Outside? 10

Mr. Simpson: I am not going to limit this question.

Mr. Lichtenstein: I have a right to ask counsel to be specific.

The Court: I am going to ask counsel, when counsel have an objection to make, to make an objection and not talk back and forth.

Mr. Lichtenstein: I ask counsel to specify so we understand distinctly and intelligently what he means. 20

Mr. Simpson: There is no objection, your Honor, to the question. He simply gives this little caress once in a while, that is all. He would like to have it amended. If it was an objection I could argue it to your Honor.

Mr. Lichtenstein: One moment, sir. I have an objection in.

The Court: What is the objection?

Mr. Lichtenstein: The one that is on the record. 30

Mr. Lichtenstein's objection repeated by stenographer.

Mr. Lichtenstein: I say I ask counsel to specify; to be distinct.

The Court: Your objection is that the question is not sufficiently distinct?

Mr. Lichtenstein: Yes.

The Court: Very well. I will sustain the objection. 40

Q. Now, then you say that at the point in the rear of the machine where the shield fitted in, was there or was there not any wind?

10 Mr. Lichtenstein: I object to that upon the ground that it is not specific.

The Court: Upon the ground, I take it, Mr. Lichtenstein, that it does not convey to the witness whether he means on the inside of the shield towards the knives or on the outside?

Mr. Lichtenstein: Correct.

Mr. Simpson: It is at the point of the shield. How can it be on the inside or outside of the shield, when it is at the shield?

20 The Court: If that is what you mean there cannot be any harm in making it specific.

Mr. Simpson: I cannot make it specific. I cannot say inside or outside when I do not mean inside or outside. I mean at the point on the shield where the shield was; I do not mean on either side of the shield. I mean right where the shield was.

30 The Court: Then I do not understand what you mean, because it might be either inside or outside.

Mr. Simpson: I want to know whether the wind: was at the shield. The shield manifestly fitted in there. Was there any wind there? Does your Honor think it ought to be the thousandth fraction of an inch?

The Court: No. It might be said it applied to the inner side of the hopper. You say at the shield. The shield is a very thin piece of metal.

40 Mr. Simpson: I say at the place where the shield fits in.

Rosari Madelli—Cross Examination.

Mr. Lichtenstein: Inside or outside?

Mr. Simpson: I won't say inside or outside.

The Court: I will sustain the objection.

Mr. Simpson: I ask for an objection.

The Court: You may have it.

10

Q. At the point where I put my finger on this part of the machine, is there any wind?

Mr. Lichtenstein: I object and ask that counsel specify so that the record may show what he is referring to.

The Court: Which is the outside?

Q. The centermost portion of the arch—the exterior surface of this portion at the top-most portion of the arch.

20

Mr. Lichtenstein: I object and ask that it be stricken out as being absolutely unintelligible and making fun.

The Court: Gentlemen, I am going to use some harsh language unless things are straightened out here.

Mr. Simpson: I beg your Honor's pardon. I wished to call the witness' attention to this point on the machine where is my finger, and Mr. Lichtenstein having—

30

The Court: And that point is what has been called the flange, isn't it?

Mr. Simpson: I don't know what they call it.

A Voice: The lip.

Mr. Simpson: It is the exterior topmost part of the arch, as I take it.

40

Rosari Madelli—Re-direct Examination.

Mr. Kantrowicz: They call it the lip.

Mr. Lichtenstein: Counsel indicating that portion of it which is on the hopper—which would be on the inside of the hopper.

Mr. Simpson: All right. I will change if he wants to make my question.

10

Q. Tell me whether there was any wind any place at all anywhere around the machine? A. No, sir.

Q. No wind at all? A. No, sir.

Re-direct Examination by Mr. Lichtenstein:

20

Q. Mr. Witness, when the staves fall off the bed of the machine and fall on the floor, how close to the machine do the staves fall? A. It would fall one on top of the other.

Q. Now when ~~the~~—your Honor will pardon this noise, I want to drop this—when the staves come off the bed of the plate and get loose of the rollers, does it fall on the floor the way I dropped it right off the machine? (Illustrating by dropping stave on floor)? A. Yes.

Q. Is that the way all of them fall? A. Yes, sir.

30

Q. When you picked up staves al the years that you have been picking them up did you pick up all the staves that fell on the floor while you were picking them up? A. Yes, sir.

Q. Did you pick them up wherever they lay on the floor? A. Yes.

Q. Whether they were close to the machine or away from the machine as they fell? A. Yes, sir.

Re-cross Examination by Mr. Simpson:

40

Q. How old are you? A. Fifty-five.

Q. You have been working there thirteen years? A. Yes, sir.

G. Earl Brugler—Direct Examination.

Q. Did you work on the planer the first day you went there? A. The first six months I was working something else.

Q. You worked there six months before you started to work around this planer? A. Yes, and then six months after that I was placed on the planer. 10

Q. Who taught you to run the planer? A. The foreman.

Q. Did he also show you how to pick up the staves?

Objected to as immaterial. Question withdrawn.

G. EARL BRUGLER, sworn. 20

Direct Examination by Mr. Lichtenstein:

Q. You are a clerk in the law office of Weller & Lichtenstein, are you? A. Yes.

Q. Were you sent to the Mathison Cooperage Company's plant in Jersey City, for the purpose of serving some subpoenas on the workmen there, and also to make certain tests for me in and about that machine? A. I was. 30

Q. When was it that you went there for the purpose of making tests? A. I believe it was last Saturday.

Q. Was the machine in operation at the time? A. Yes.

Q. Was there at that time a blower system upon the machine which had a hopper such as the one which I hold in my hand now? A. There was. 40

G. Earl Brugler—Direct Examination.

Q. With the hole cut in there? A. Not when I came there. It was cut in after I came in there.

Q. Did you have it cut in? A. Yes; I directed it to be cut in.

10 Q. And did you while it was in operation, make any tests or see any tests made there at that time?

A. I did.

Q. Who was it that made the tests? A. I made tests and also Mr. McConville.

Q. Tell the jury what tests Mr. McConville made while that machine was in operation? A. Mr. McConville, after the hole was cut in the shield,—the machine was running and the blower on,—held a handful of shavings up against the shield beneath the hole.

20 Q. Yes. A. To see if the suction was sufficient to draw the shavings toward the hole.

Q. Was his hand open or closed? A. No, the hand was open.

Q. The palm of his hand? A. Yes.

Q. Were the shavings on the palm of his hand? A. Yes.

30 Q. Just tell the jury, if you please, where it was that Mr. McConville held his hand open with the shavings on it at the time? Did it remove any of the shavings at all? A. It did not.

Q. Did he move his hand up and down? A. He moved it up and down like this and around like this.

Q. Did it take any part of the shavings off? A. It did not.

Q. Did you, after he got through with his tests, make any tests yourself? A. I tested before he did.

Q. You tested before he did? A. Yes.

40 Q. What did you do? A. I did the same thing.

G. Earl Brugler—Cross Examination.

Q. When you say the same thing, what did you do? A. I had shavings in my hand, in the open hand, and held them beneath the hole against the shield, moving around, to give suction.

Q. Did you hold them in front of the hole? A. I did.

Q. Did it remove any of them while you held it even in front of the hole? A. It did not. 10

Q. How far away from the outside of this shield was your hand? A. At times it was against the shield.

Q. Other times? A. Just a short distance away, half an inch or an inch.

Q. I show you Exhibit D-2 and ask you whether the shavings contained in this envelope are the same character as the shavings you held in your hand at the time of making the tests? A. Some of these shavings are the same shavings I made the tests with. 20

Q. Some of the shavings in the envelope are the very shavings? A. Yes.

Cross Examination by Mr. Simpson:

Q. You are a law student, I think? A. I am.

Q. Have you any experience in the measuring of wind, other than provided by your occupation? 30

Mr. Lichtenstein: I object to that and ask that counsel be reprimanded for putting any such question.

Mr. Simpson: I do not think I need that. This man is in as an expert.

Mr. Lichtenstein: Not an expert.

Mr. Simpson: It is ridiculous to put a lot of questions in to show the weakness of this wind. I want this question of record. I 40

G. Earl Brugler—Cross Examination.

want to know if this man has any experience in measuring wind other than that provided by his occupation, his regular occupation.

Mr. Lichtenstein: I have not put in the question for that purpose, and he had no experience about wind.

10

The Court: I did not understand that he was put on for that.

Q. You made tests, didn't you? You made tests with wind, didn't you—the action of wind, did you?

Mr. Lichtenstein: I object. He says he did not make any such tests, and I merely put him on the stand to prove things that he did, that is all.

20

Mr. Simpson: I will withdraw it.

Q. Did you go there to make tests? A. I did.

Q. What kind of tests did you go there to make?

A. I went there to test the suction of that blower.

Q. Did you make the tests? A. I did.

Q. Had you before that day ever had any experience in making tests for wind? A. Not that I recall.

30

Q. Do you know how many feet of cubic air or wind this machine sucks in at the point of the hopper, a second?

Mr. Lichtenstein: I object to it as immaterial. He has not been called as an expert on the quantity of air sucked into a pipe or expelled from it.

The Court: I do not understand that he has.

40

Mr. Simpson: He is making tests; I have a right to find out what he knows.

G. Earl Brugler—Cross Examination.

The Court: He is simply before us to tell what he actually did.

Mr. Simpson: Suppose he did not know how to make the tests, and suppose he led us in the wrong direction?

The Court: He has described literally and actually as to how he did it. 10

Q. You simply held shavings in your hand at a point outside the shield of these knives, did you?

A. I did.

Q. Now you were then connected with the firm of Weller and Lichtenstein, were you? A. Yes.

Q. You knew that they were trying the case? A. Yes.

Q. And went down there to make these tests for the purpose of testifying, didn't you? A. I didn't know whether I would be called or not. I thought probably— 20

Q. Did you have any indifferent spectators there, that is, anybody that was not employed in the shop and who was not interested in this case to corroborate the tests that you were making? A. I went there alone.

Q. You went there and the only person that was there was you and the foreman of the shop? A. The foreman was there also. 30

Q. But there was no other person, any disinterested person at the making of the tests; is that right? A. I think—I don't know.

Q. You didn't see that there was anybody there, did you? A. I don't know.

Q. Did you use this whole bag of shavings? A. I used some of those shavings.

Q. How much did you use? A. I used more shavings—some of those shavings in that bag are the ones I used at that time. 40

Peter F. McConville—Recalled, direct.

Q. Was there any perceptible current of air passing your hand at all? A. No.

Q. None at all? A. No.

Q. Wasn't any suction there at all then, was there? A. Not enough to draw shavings.

10 Q. There wasn't any suction that you could discern at the time that you were making the tests?

A. Not that I could detect.

PETER McCONVILLE, recalled.

Mr. Lichtenstein: Has he testified to the fact that he was present?

20 Mr. Simpson: I will admit it.

Mr. Lichtenstein: I don't want you to admit it.

Direct Examination by Mr. Lichtenstein:

Q. Mr. McConville, were you present when Mr. Brugler was making the tests that he has described on the stand? A. Yes, sir.

Q. Was the machine in operation? A. Yes.

30 Q. Was the blower running at that time? A. Yes, sir.

Q. Was the machine in operation at that time the same as it was running when staves are put through the machine? A. Yes.

No cross examination.

James Mathison—Direct Examination.

JAMES MATHISON, sworn.

Direct Examination by Mr. Lichtenstein:

Q. Mr. Mathison, you are connected with the Mathison Cooperage Company? A. I am, yes, sir.

Q. The business of your company is what? A. 10
The making of barrels and kegs.

Q. How many years have you been in business in Jersey City? A. A little over twenty years.

Q. Have been in the same place? A. Yes.

Q. And these two men, the McConvilles, have been in your employ during all the time that you have been there? A. Yes, sir.

Q. Were you connected with the concern before these twenty years that you speak of? A. Yes, we were over in Brooklyn before we came to Jersey City. 20

Q. For how many years were you in the barrel business there? A. Well, we have been in business since 1857—that is before my time—with me in business.

Q. And at your plant in Jersey City, Mr. Mathison, how many planers have you got there?

Mr. Simpson: I object.

Mr. Lichtenstein: I will withdraw it. 30

Q. Are you familiar with the planer, the parts of which are in court here? A. I think I may say I know pretty well about all the parts of the planer.

Q. How many years has that planer been in your plant? A. I don't know how many years that planer has been in—I think probably it is about ten years that planer has been in the place.

Q. And do you know the kind of a planer that is, the name of the planer? A. It is the Owen Stave Planer, double side. 40

James Mathison—Direct Examination.

Q. Is that a planer that is commonly used in the barrel business? A. It is a very much approved planer throughout the cooperage business and is used generally through the trade.

10 Q. Do you know that by reason of your contact with the cooperage business? A. Somewhat. I am acquainted with persons who use that planer.

Q. Do you recall when this young man worked at your plant, the man that was hurt? A. Yes, I recognize him.

Q. Were you familiar with the operation of this machine and the blower system which you had at that time, the time the boy was hurt? A. Do I know about it?

Q. Yes? A. Yes, I know about that.

20 Q. Will you tell us, please, what the nature or character of the blower system was that you had there, and how it operated? A. The blower is constructed so it will draw away from the—it is connected with a large pipe to a point where it may be connected with the various machines by smaller pipes; it draws the air through and carries the shavings to the blower and the blower expels them into the conveyor.

30 Q. For years before and at the time that this boy was hurt, and for some months afterwards until you changed your blower system, was there anything about that machine which would draw the clothing or hands in or any part of a person's body into a machine in passing the rear of it? A. No, sir.

Q. Or any part of it? A. No, sir.

40 Q. Was there anything about the operation of this machine or the blower system that would in any way draw in the hand or any part of the clothing or the body—any part of the body of the per-

son who was in the act of picking up staves? Was there anything about the machine at the time the boy was hurt, for years before and for some time afterwards that in anywise would draw in any object from the outside of the machine? A. No, sir.

Q. The blower system that you had there for the purpose of collecting shavings, would it carry off all the shavings or accumulate in the hopper? A. Not entirely. A great many—the finer shavings would go through and some of the coarser would not always go through, though some of them would.

10

Q. I show you a box of shavings marked Exhibit D-1, and pieces of wood, and ask you whether the system that you had in operation at the time the boy was hurt and for some time afterwards, was at all times sufficient to carry off pieces of shavings and wood of this kind? A. Not all of them. Many of them would pass through, but being rather heavy and hard wood they would not go through very often.

20

Q. When they would not go through where would they lie? A. Well, they would lie in the bottom of the pipe through which the shavings passed and up into the blower,—they would remain there and would not pass through.

30

Q. And how would they be gotten rid of? A. Well, occasionally they disconnected the pipe and cleared it out, took the large pieces out.

Q. Do you recall when this case came up for trial the first time? A. Yes.

Q. Were you in court at that time? A. I was.

Q. Do you recall the various pieces of the blower system that were brought to the court at that time? A. Yes, sir.

Q. Were they the same ones that were on the 40

James Mathison—Direct Examination.

machine at the time the boy was hurt and for some time before? A. They were.

10 Q. How many months or how long after the occasion of this boy's injury was it that you put in another blower or changed the blower? A. It might have been about a year after that, possibly.

Q. What was the occasion of your making a change in the blower? A. Well, simply for the sake of reducing the power. Instead of using perhaps thirty horse power for the blower system we would reduce it to probably twenty horse power. That was practically all the change that was made.

Q. Did that have the effect also of carrying off the shavings to better effect?

20 Mr. Simpson: I object to his leading this witness.

Mr. Lichtenstein: I withdraw the question.

30 Q. What effect did the new system have upon the carrying off of shavings? A. Well, very little difference, excepting only in the power. The piping and everything was practically the same in every way, except renewing the parts that may have been worn.

Q. Do you recall before the trial of the first case tests being made in your plant while the old system was still there and the same piping there that was there at the time the boy was hurt? A. Yes, I do.

Q. And seeing the machine in operation at that time and the blower system in operation? A. Yes.

Q. Do you recall who it was that made those tests in your presence? A. No, I do not precisely recall who the persons were.

40 Q. Do you recall how the tests were made? A. I recall very well how the test of the paper was

made that was held up against the opening from the knives.

Q. Yes; what kind of paper was it? A. Well, I saw pieces of newspaper myself.

Q. And what effect did that have? A. It had a very slight effect upon blowing it out.

Q. Sort of blew it out a little bit? A. Outward, yes. 10

Q. Did it have any effect in drawing it in at all? A. Not the slightest.

Q. Was this paper held directly in front of that opening? A. That is right.

Q. How close to the back of the machine was it held? A. Well, perhaps it might have been an inch or an inch and a half, or two inches, just about that. 20

Q. Is there anything about this system, the system that you had there at the time the boy was hurt, while it was in operation, that would draw shavings from the palm of your hand into the pipe, or towards the knives from the rear of the machine? A. No, they would not. It would not be drawn in.

Q. They would not be drawn in. Does it even have any effect at the present time with your new system? A. No, sir; no, they won't. 30

Q. Is there anything about the operation of this machine—the blower system or any part of it—that would in anywise draw the clothing or the hand or any part of the person's body into the machine that was passing the back of it or standing in any part of the rear of the machine? A. No.

Q. Or anywheres near the machine on the outside of it? A. No, sir. 40

James Mathison—Cross Examination.

Cross Examination by Mr. Simpson:

Q. How many planers did you have, Mr. Mathison, on the day of this accident?

Mr. Lichtenstein: I object.

10 Mr. Simpson: He is describing the action of the one. Of course I have a right to test his knowledge. He may have mistaken the planer.

The Court: All right.

Q. How many planers did you have at the factory? A. Let's see. We have two heading planers and three stave planers—on one of those we are using now for planing up headings, so they might probably be said to be three heading planers and two stave planers.

Q. Did you know that the shield which has been described here as having gone in at the rear of this machine—did you know it was worn at all? A. I did not know about the wearing of that sufficiently to testify.

Q. You did not? You did not yourself come into much personal contact with the machines, did you? Yours was more the business part? A. Yes, I do very frequently come in contact with them.

Q. Who was the man in charge, your foreman? A. Yes, Mr. McConville.

Q. He was the man that was running that part of the factory? A. That is right.

Q. You were in the office a great deal, weren't you? A. Yes.

Q. This blower system that you have described, it got air somewhere, didn't it? A. The blower system?

40

James Mathison—Cross Examination.

Q. Yes. It sucked in air, did it? A. The blower system, as I described it, carries away the shavings to the blower and then expels them to the conveyor.

Q. How does it get the air? Does it suck it in? A. The air is sucked into the blower from the machine for the carrying of the shavings.

Q. What sucks it in? What sucks it in? A. 10
The blower fan.

Q. It is a big fan, isn't it? A. Yes, it is a blower.

Q. The current then is made by a fan which is revolved? A. That is right.

Q. And which sends the wind in through the machine? A. That is right.

Q. No matter how much or how little it did suck in some air. Now, can you tell me what horse power that blower was run under on the day of the accident? A. I think that particular blower was probably fifteen horse power, although I will not be certain about it. 20

Q. How large were the fans which made the suction? A. On that particular blower I think it is forty inches in diameter. That would be outside. It might be probable—probably might be inside thirty-eight inches.

Q. Can you tell how many blades there are in the fan? A. No, I cannot recall. 30

Q. Don't know the diameter of the fan or the width of it, do you? A. The diameter of that fan or the width of it, would be about ten inches or eleven.

Q. Can you tell how many revolutions they make a minute? A. Possibly about six hundred and fifty or seven hundred revolutions.

Q. That would make this air current which sucks away the shavings? A. That is what does it. 40

James Mathison—Cross Examination.

Q. Now, after the accident you reduced the power, that is, you cut down from thirty horse to twenty, didn't you? A. We did, but we made the same number of revolutions.

10 Q. When was that, you cut down horse power from thirty to twenty? A. Perhaps it might have been a year after the accident.

Q. And Mr. Lichtenstein has asked you about having the shield at the last trial. Now, this thing that you produce here, this was part of the old blower system, wasn't it? A. It is part—it is the same exactly, if not the same piece of the old blower.

20 Q. It is the same piece of the old blower? A. I don't know positively whether it is the same piece, but it is the same suction.

Q. It is what you had in court the last time, isn't it, the same one? A. Oh, you mean at the former trial?

Q. Yes. A. Maybe it is, I don't know.

Q. You have not got the old shield that some witnesses say was worn,—you haven't got that here, have you? We haven't got that to-day? A. No; I understand they had a new one made.

30 Q. We haven't got the old one, that is all I want to know? A. No.

Q. Isn't there anybody at all in the factory that saw this accident? A. As far as I learned nobody saw it. The boy went up to that machine while the foreman was away.

Q. I object. That is not responsive.

The Court: Nobody.

40 Q. You say nobody saw it? A. Not as I know of.

Both Sides Rest.

Motion to Direct a Verdict.

Mr. Lichtenstein: If the Court please, I move for the direction of a verdict in favor of the defendant in this case: First, upon each and every ground urged upon my motion for nonsuit, and now at the close of the entire case upon the further ground that there is no evidence in the case which would warrant your Honor in submitting this case to the jury. 10

Further, upon the ground that it conclusively appears that the theory of the plaintiff's case is such that there could possibly be no recovery, that is, that it has been demonstrated and established beyond any question that there was nothing in or about the operation of this machine which was in anywise dangerous or which would in anywise have resulted in this boy's hand being taken off by reason of suction of this machine (reads plaintiff's testimony at this trial). 20

The Court: I think I should say this to counsel at this time on a matter that was urged under the motion for nonsuit and which I did not finally pass on at the time, and that was as to the question of whether or not this action could proceed under the 1909 act, I think it was, in that the action did not commence within a year from the date of the happening. 30

Mr. Kantrowicz: I do not think that was pleaded in your answer, and I want to urge it at this time, the statute of limitations is an affirmative defense, and must be pleaded. It is not in the answer. 40

The Court: Of course, that raises the question whether this amounts to the statute of limitations or whether it is an action—

Mr. Simpson: My feeling is we have a common law action.

The Court: That point is being raised now and is not pleaded.

10 Mr. Simpson: I differ with my colleague about it. He insisted we should not withdraw or admit it. You say we should have a ruling on it, so all right, but my own opinion is that we haven't, because we did not begin the action within the year, and it is an action created by statute. It is not a question of limitation.

Mr. Kantrowicz: Then we will withdraw it.

20 Mr. Lichtenstein: I am not concerned with that. I am not arguing on that at all.

The Court: I think that should be cleared up, either by a ruling on my part or it should be admitted, that it is not a ground or a right upon which you can rest.

Mr. Kantrowicz: Yes.

30 The Court: My opinion is, aside from the whole question you have just raised, that you were not entitled to an action under that statute.

Mr. Simpson: That is 1909. Of course, we still claim some rights under the 1904 act.

40 The Court: The reason for my so feeling about it is that infancy is not spoken about in that statute at all as abating the time within which the action must be brought. Physical and mental incapacity is mentioned, but infancy is not, and if it is not mentioned, then of course the cause is not saved

to him because of his minority. That was my conclusion.

Mr. Kantrowicz: Well, we will withdraw it anyhow.

The Court: So you are back to your common law rights?

Mr. Kantrowicz: Common law and the act of 1904, which is the factory act. 10

The Court: Yes, and that only goes to the point whether the machine was protected by proper and sufficient guards, and so forth, under section 11.

Mr. Lichtenstein: Yes.

The Court: All right.

Mr. Lichtenstein: Now then, if the court please, I have, I think, recited to your Honor the entire testimony of the plaintiff himself while he was on the stand as far as it concerns this case. (Argues.) I therefore claim, if the court please, that upon all the ground urged upon the motion for non-suit, upon all the grounds urged by me in my present argument, upon the further ground that the allegations in the complaint have in no respect been proven, that there is a complete variance between the proof and the pleadings, that upon all of those grounds there should be a direction of verdict in favor of the defendant. 20 30

(Mr. Simpson replies.)

The Court: I shall decline to direct a verdict.

Mr. Lichtenstein: Your Honor grant me an exception?

The Court: Yes.

Court's Charge to Jury.

Gentlemen of the Jury:

10 This is an action brought by Adolph Kinnert against the Mathison Cooperage Company for the purpose of recovering damages for injuries and arising out of injuries which he says he received by and through the negligence of the defendant, through a happening by which he lost his hand, or his hand and a part of the forearm, which happening took place on August 13, 1910, at which time he was, as I estimate it from his testimony, slightly over seventeen years of age, having passed the seventeenth anniversary of his birthday some time I believe in the month of July of that same year.

20 For the plaintiff to recover he must have shown that the proximate cause of what happened to him was the negligence of, or was negligence chargeable or imputable to the defendant. The mere happening does not raise any presumption of negligence chargeable against the defendant.

30 Now he alleges that the defendant was negligent in that it did not properly instruct him or inform him or advise him of the dangers incident to his work and employment. It is alleged that he was set to work, not in the operation of this machine which has been known as the planer, but as you will recall from the testimony he was set to work about it in the gathering up of staves which had gone through and been planed by the machine; that it was a dangerous machine, so he alleges, and you have heard the machine fully and thoroughly described. He urges further that the defendant did not perform its duty toward him, because it had not properly guarded the machine by safe-guards such as should have been placed thereon; and
40 again, that there was in use in connection with that

Court's Charge to Jury.

machine a draft system or a system by which the shavings from the machine were drawn by suction from it, and that because of the conditions and circumstances surrounding the safeguards which had been placed at the machine, or the construction of this suction system, the force of that suction was sufficient to have drawn his arm or his hand into the machine, and through that the accident happened.

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Now the first thing, gentlemen, that you will need to be instructed concerning is what the courts have said is the duty which the employer or master owes to a person who is a minor, that is a person who has not arrived at the age of twenty-one years, with respect to the instruction that is or should be given to such a person about the hazards and dangers of the work in and about which the minor is to be employed. An employee—that is such a person as the plaintiff in this action—takes upon himself the risks that are fairly and reasonably incident to the employment in which he engages. That is the general rule of law. It applies in all cases where the employee is an adult—that is over twenty-one years of age—but this doctrine is modified where the employment is of an infant, a minor, and such employment is one that in its nature is hazardous. Then the rule is that the employer is under a duty to give the employee such notice of the danger and such instruction as will enable him to comprehend the dangers that are incident to his employment. Again, it has been said that this general rule is modified so far as to put upon the employer, the master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor

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Court's Charge to Jury.

10 is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him and to place him in substantially the same position as if he were an adult. That law has been recognized further by the courts of our state, and the rule has been expressed in this manner :

20 "Minor servants are also held to assume by their contract of employment those ordinary risks of their service which are obvious to them or have been pointed out in a manner suited to the comprehension of their youth and inexperience. They take upon themselves the ordinary hazards of the service which are obvious to them or which have been pointed out in a manner suited to the comprehension of their youth and inexperience. They cannot ignore the duties of common prudence or the instructions of their superiors to guard themselves from those apparent dangers and charge the consequences upon their employers."

30 The first question, therefore, gentlemen, for you to pass upon is whether or not the plaintiff has satisfied you that the defendant did not do that which those rules I have just read to you required of him, and whether or not if you find that the employer, the defendant in this case, failed therein, whether or not this accident happened as the proximate result of the failure to instruct the plaintiff in the manner that those rules which I have read to you say he must instruct him.

40 There is still another point in connection with

Court's Charge to Jury.

that, gentlemen of the jury, which I will take up, too, with you later as applying to the whole case, and that is the conduct, the actions of the plaintiff himself, as to whether or not he lived up to that rule of conduct which the law places upon him, even though he was a boy under the age of twenty-one years. The burden of satisfying you upon the first point which I brought to your attention is upon the plaintiff. The plaintiff must satisfy you thereof by a fair preponderance of the evidence. If he has not, then of course he is not entitled to recover, because he has not made out his case.

10

Now the plaintiff also says that the knives of this planer or the planer itself wherein it was dangerous, if at any point it was a dangerous machine, should have been guarded and protected, and calls to his assistance the provisions of an act of 1904, which is an act generally known as the "factory act," a portion of section 13 of which reads as follows:

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"Whenever practicable, all machinery shall be provided with loose pulleys, all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, drums and machinery of every description shall be properly guarded."

30

The first question to attract your attention and require your consideration in that particular is whether or not you have been satisfied from the circumstances, considering the purposes, the uses and the manner of construction of this planer, it was practicable to guard it. If you find that it was not, of course your consideration in that direction is then at an end. If you find that it was practica-

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Court's Charge to Jury.

ble to guard it, then the next question before you would be to consider whether or not it was guarded. This question may then present itself for your consideration. It does appear from the evidence that there was some thing, some device which did, either in whole or in part, surround the knives in use in this machine. It is true that it may be said that those things were not placed there for the purpose of being guards. I am referring now, gentlemen, to these metal covers which you have heard spoken of and which have been shown to you. I do not know just what they have been called—in some instances they have been called a hopper—but I refer to those metal shields or pieces which were placed over the upper knives and under the lower knives. It may be that you will find from the evidence and under all the circumstances of the case that the construction of them and that the placing of them upon this machine amounted to and was a practical guarding of the machine under the statute. If that is so, then another question arises, and that is that it is said that at least the lower one of those, by use and wear and tear, had become out of repair and was broken, and that that condition had existed for some time prior to the happening of this accident.

If you find from the testimony that that is a fact, that that condition did exist and had existed for such length of time as to charge the defendant with notice thereof, and that that was the cause, the proximate cause of this happening, then, of course, gentlemen of the jury, you may find that that was negligence upon the part of the defendant.

Again, it is alleged that this suction system was sufficient to have brought about the happening of

Court's Charge to Jury.

the accident; that as the plaintiff approached near to, or in close proximity to this machine the force of that suction drew his hand and arm to and into the machine, and in that manner he met with the casualty. Of course, gentlemen of the jury, whether or not that is true is for you to determine. You will remember what the plaintiff has said, or how he has attempted to describe the manner in which this accident happened. 10

The defendants have placed before you the testimony of several witnesses in the effort and for the purpose of showing you that it was a practical impossibility for the thing to have happened in the way as the plaintiff describes it as having happened.

Now, right there, gentlemen, lest I forget it and you get an improper idea of that testimony, let me say to you that because the defendant did produce that testimony does not in any manner shift the burden from the plaintiff to satisfy you by a fair preponderance of the evidence that what happened to him happened as the proximate result of that negligence upon the part of the defendant. The burden never shifts, even though the defendant did proceed to explain the situation of which possibly the plaintiff was speaking in his testimony. Yet, nevertheless, gentlemen, it does not shift the burden over to the defendant to offset what the plaintiff has said. It does not shift the burden to the defendant to excuse itself. The burden is still upon the plaintiff and he must have established it to your satisfaction by a fair preponderance of the evidence or he cannot recover. 20 30

Now, as I have said to you, gentlemen of the jury, it is true that this plaintiff was slightly over seventeen years of age at the time of this happening. It 40

Court's Charge to Jury.

is true that that makes him a minor, that is, he was under twenty-one years of age. Still, you may remember from those rules which I first read to you that even if he is a minor, he is not excused for each and every thing that he may do. He is chargeable with the exercise of that reasonable care which is to be expected of a person of his age and his ability—and please understand me—in other words, just because he was under twenty-one years of age does not excuse him from every act which he may commit. I speak of negligent acts, particularly. Just because he was under the age of twenty-one years does not absolve him from the result of every negligent act that he may ever commit. The question before you in that respect is this. Taking this boy and considering his age, considering his ability to perceive and know, taking in mind also that experience, whatever it may have been, that he had in this place, the question still is with you, did he act with that degree of care with which in your judgment he should have been acting at the time of this happening? If you conclude that he was not so acting and that because of negligence upon his part this injury was brought about, in other words if he contributed to a happening by negligence which you may find is chargeable to him, that he cannot recover, even though the defendants were negligent. That is the rule of law, gentlemen. The burden, however, as to that, gentlemen of the jury—of satisfying you upon the question of his conduct and as to whether or not under all the circumstances and facts in this case it was negligent and contributed to his injury is upon the defendant. They assert that, and the burden is upon them to satisfy you of it by a fair preponderance of the evidence.

Court's Charge to Jury.

Now, gentlemen of the jury, if, and only if you have been satisfied by the plaintiff by a fair preponderance of the evidence that this injury to this boy was brought about as a proximate result of negligence chargeable to the defendants can you find a verdict in his behalf, and then only, gentlemen of the jury, after you have considered the question of his own conduct, because, as I said to you before, if the defendant has satisfied you by a fair preponderance of the evidence that this boy was negligent and that negligence contributed to his injuries, then he cannot recover. 10

If you get to that point then, gentlemen of the jury, where you find that the plaintiff is entitled to recover, then what may he recover for? He may recover for pain and suffering, past, present or future or all, as he may have satisfied you that such pain and suffering as he has had or may be enduring or will probably endure in the future as the proximate result of the injuries which he received. The burden is upon him to satisfy you as to the pain and suffering which he has had or may have now, if he is having or enduring pain now, or will endure in the future, and as to whether or not it is probable that he will endure it in the future. As he may have satisfied you upon that point, gentlemen, he will be entitled to recover that which will compensate him for that pain and suffering. He is entitled to the loss of earnings which he may have satisfied you he has sustained or probably will sustain in the future, also as a proximate result of this happening and the injuries which he has received. You may limit yourselves, gentlemen of the jury, as to the measurement of those damages, if you get to that point, as commencing at the time that he became twenty-one years of age. If the 20 30 40

Court's Charge to Jury.

burden is upon him as I have suggested before as to pain and suffering, it is still upon him as to this point, gentlemen, to have satisfied you as to what his loss has been and what it will be. You will take in mind and keep in mind his age, and if you find for him upon that score for the future, that
10 sum which you find for the future you will capitalize, or, to put it in another way, you will reduce it to its present worth, because, you see, in considering such an item of damage you are considering it in the future. If he had not been incapacitated he of course would be earning it day by day or week by week or month by month. Now, when it is fixed by you, if fixed by you, it is fixed as to the present time, so that that sum, whatever
20 it may be, if anything, that you give him upon that score he will have at the present time and will have the use of in the future. Therefore you should find first what his total loss, in your judgment, would be, and then reduce that sum to its present worth. He is also entitled to compensation, gentlemen, for the disability under which he may labor or be put because of and as the proximate result of the injuries which he has received.

There is nothing more that I can say to you, gentlemen of the jury, except finally to say to you upon the question of your verdict, if you get to that point, you are to understand and must consider that in your verdict you are not to express any sum, nor can you legally express any sum, which will be a punishment to the defendants. You are only to give to the plaintiff, if he is entitled to have anything at your hands, just that sum of money which will compensate him for the loss which he has shown you he has sustained, if he
30 has sustained any, as the proximate result of this
40 happening.

With that, gentlemen, you may take the case.

The jury retired.

Court's Charge to Jury.

Mr. Lichtenstein: As a matter of record, if these articles have not been actually marked they ought to be marked in evidence.

Mr. Simpson: Yes; they ought to be sent inside.

Mr. Lichtenstein: Let us put it upon the record, so we can have it. I offer in evidence—you can put it at the end of my case—first, the bedplate; second, the pressure bar with rollers; third, the lower hopper; fourth, the upper hopper; fifth, the old pipe elbow, and also the staves.

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Defendant's Exceptions.

Mr. Lichtenstein: I except to that part of the Court's charges where the Court said to the jury that the plaintiff alleges the suction system employed by the defendant was such that the force of it drew his hand into the machine. My point being that that is no part of the plaintiff's case, cannot be a part of the plaintiff's case, and that so far as that is concerned it should not be left to the jury, inasmuch as there is nothing in the case to warrant the Court in allowing it to go to the jury.

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The Court: Upon what theory do you mean; that the evidence so preponderates in your favor that there is no question to go to the jury?

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Mr. Lichtenstein: That there is nothing in the case that warrants it going to the jury.

The Court: I do not understand.

Mr. Lichtenstein: That is, it is not part of the plaintiff's case: it is not in accordance with the theory of the plaintiff's case, nor is it any part of the complaint in the case.

The Court: All right.

Mr. Lichtenstein: Second, to that part of the charge of the Court where the Court instructed the jury with reference to the instructions a master

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Court's Charge to Jury.

must give an employee and an infant. The point being that the charge in these respects are not involved, nor are they applicable to the facts or the issue in the case as presented by the plaintiff.

10 Third, to that part of the charge where the Court, after reading from the books and instructing the jury as to the duty of the master to instruct servants and infants, said: "Has the defendant done that which those rules (referring to those rules that your Honor read to the jury or instructed the jury on) require the master to do." My contention being that those questions are not involved in the issues involved in this case; that they have no part in the charge to the jury, because the jury could not consider those rules of law, because they are
20 not applicable to the facts in the case.

Fourth, to that part of the charge where the Court said in effect—referring to the first point that your Honor instructed them on with reference to those rules—as to the first point, if by fair preponderance of evidence he, referring to the plaintiff, has established the first point he can recover, otherwise not.

30 Fifth, to that part of the charge where the Court instructed the jury with reference to the factory act and the section of the act in particular which the Court read. The Court left it to the jury to say whether it was practical or practicable to guard the knives, and if they find that it was practicable, then it was for the jury to say whether it was guarded.

Sixth, to that part of the charge where the Court said that the jury may find that the placing of a hopper amounted to a practical guarding of the knives.

40 Seventh, to that part of the charge where the Court said if they found from the testimony that

Court's Charge to Jury.

the condition of the hopper, that is, by reason of the worn surface, was the proximate cause of the accident, that they might find that that amounted to negligence on the part of the defendant.

The Court: That is not exactly what I did say. I did say, provided that the condition had existed or was known to them or existed for that length of time which charged them with it. 10

Mr. Lichtenstein: Yes. I did not get that exact language down, but it is that portion of the charge I have reference to.

Eighth: To that part of the charge in which the court spoke of the blower system, and the plaintiff's claim that the suction system caused the accident. The defendant contending that the plaintiff could not claim that the suction system caused the accident, inasmuch as there was no evidence in the case to substantiate any such fact, nor is there anything in the pleadings to warrant the plaintiff in making any such claim. 20

Ninth: To that part of the charge where the court in effect said that he, referring to the plaintiff, must have established to the jury's satisfaction by a fair preponderance of the evidence that the accident happened by reason of the suction system.

Tenth: To the rules laid down by the court as to the burden of proof which rested upon the defendant in order to defeat the plaintiff's right of recovery. 30

Mr. Simpson: That is on contributory negligence.

Mr. Lichtenstein: To that part of the charge where the court laid down the rules as to the measure of damages to which the plaintiff is entitled.

The Court: All right. 40

Faint, illegible text, possibly bleed-through from the reverse side of the page. The text is arranged in several paragraphs and appears to be a formal document or letter.

New Jersey Court of Errors and Appeals

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ADOLPH KINNERT, Plaintiff-Respondent,	}	
vs.		
MATHISON COOPERAGE Co., a corporation, Defendant-Appellant.		Action at Law.

BRIEF FOR DEFENDANT-APPELLANT.

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This is an appeal from a judgment obtained by the plaintiff in the Hudson Circuit Court and affirmed by the Supreme Court (opinion filed March 6, 1917). The plaintiff—seventeen years of age—was employed by the defendant, and on the 13th of August, 1910, was injured while in such employ. The present suit was commenced shortly thereafter, and came on for trial in January, 1911 (page 63) resulting in a non-suit. The case then slept until January 10, 1916 (page 16) when it was tried before Judge Campbell and a jury. A verdict of \$12,000 was obtained, whereupon Judge Campbell granted a rule to show cause (page 8) why the verdict should not be set aside, only permitting the defendant to reserve “the objections and exceptions of the defendant to the ruling of the Court on the motion for non-suit and direction of verdict” (page 9).

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Notwithstanding the fact that, as a reading of the proofs will demonstrate, the verdict was plainly against the weight of the evidence and excessive, the learned Trial Judge refused to make the rule to show cause absolute, and so the defendant is here confined solely to the question whether or not the learned Trial Judge erred in refusing its motion for a non-suit, and for a direction (pages 93 and 187).

The complaint sets up a three-fold cause of action, namely: (1) the alleged failure of the defendant's common law duty to the plaintiff, its employe; (2) the defendant's alleged failure to comply with the provisions of the so-called Factory Act, P. L., 1904, page 156, sections 13 and 30, in not having guarded its machinery in compliance with that act; (3) the defendant's alleged violation of the Employers' Liability Act, then in existence, P. L., 1909, page 114.

Plaintiff at the trial (page 118) abandoned the second claim for the alleged violation of the so-called Factory Act of 1904, and in plaintiff's brief on the rule to show cause which was signed by both counsel, they said:

"Point 5. The Factory Act of 1904 was entirely withdrawn from the case."

Plaintiff at the trial (page 124) also abandoned the last claim of the alleged violation of the then existing Employers' Liability Act of 1909.

The cause of action therefore is one based upon the alleged violation of the defendant's common law duty to the plaintiff, and plaintiff will lot, it will be found, argue thereupon. As to this duty the plaintiff alleged (Paragraph 3, page 1):

"The said defendant, at its factory, operated a certain machine known as a planing ma-

chine, which consisted in part of a number of knives, attached to wheels revolving at a great speed, *thereby creating a great suction, which suction is sufficient to draw in the part of the person or clothing coming into proximity thereto.*"

And also (Paragraph 7):

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"that the said plaintiff's hand came into contact with the knives of the said planing machine which were revolving at a great speed, and creating a great suction, causing it to be drawn into said machine * * *."

Defendant was engaged in the manufacture of barrels and on August 13, 1910, plaintiff, who as before stated was then 17 years of age (page 112) had been employed by the defendant three weeks and three days. He first worked in the yard carrying boards and staves, and after that was put to work operating a sawing or cutting machine. He worked for about three weeks and up to the time of the accident (page 19, line 30) at this cutting machine. Plaintiff cut the barrel staves into proper lengths. This planer in which plaintiff lost his hand was operated by a man who took boards from the yard and ran them through the machine from which plaintiff observed them fall to the floor planed (page 27) and plaintiff frequently picked up staves to be cut on his machine. The planing machine stood about 15 feet away from the machine at which plaintiff worked (page 25). On the day he was hurt he had been directed by the foreman to go over to the rear of the planer and pick up the planed staves from the floor and carry them away for future use.

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The planer is described as follows:

It is an iron structure standing 31 inches high from the floor (42-25). The distance from the front of the machine, at which the operator stands, to the rear thereof, is about 30 inches (41-1). The top of the machine consists of what is termed a bed plate, which bed plate is about 10 inches wide and extends to the extreme rear of the machine (45-10). Two sets of knives, $7\frac{3}{4}$ by 4 inches, revolve on a spindle or shaft so placed, one set above the other, that a stave is planed on both sides by one operation (36-10). The upper set of knives revolve, about the thickness of the stave, above the bed plate and about 17 inches in from the rear of the machine (45-30). The lower set of knives revolve about $7\frac{1}{2}$ inches in from the rear of the machine or bed plate (46-13'). Then there is what is termed a pressure bar consisting of rollers which partly cover the knives, bear down upon and rests on the bed plate. The purpose of the pressure bar is to hold the stave down firmly on the bed while it passes between the revolving planing knives (39-1). The upper set of knives in addition to being partially covered by the pressure bar are entirely covered by a galvanized iron hood (part of a blower system) which is so cut out as to fit in and conform to the upper machine parts, and entirely covers the top knives (46-1). The lower set of knives is also covered by a similar galvanized hood (37-8), placed underneath the pressure bar and bed of the machine (47-30). The knives, both upper and lower, are so placed that they revolve at a point in the center of the hoods (48-1). Underneath the bed of the machine, and about 3 inches in from the rear of the bed plate, there exists an iron "lip" forming part of the bed plate casting and against this "lip" the lower hood rests (48-10).

These hoods are part of a blower system and used for the purpose of preventing shavings from scattering, and directing them into smaller pipes connected with the hoods (49-22). The lower hood acts as a sort of hopper into which the shavings from the lower set of knives fall, and at the lower end of this hood an "elbow" pipe was attached which rested on the floor, and to this, other pipes in sections were connected, leading to the boiler room below (45-15; 50-25). The shavings are drawn through these pipes to the boiler room by means of blowers (37-12). To plane a stave, the operator, standing at the front of the machine, inserts it between the upper and lower knives, which revolving draw it forward to the bed plate where it lifts the pressure bar from the bed plate and passes along the same, held down by the pressure bar until it is finally planed and falls from the rear of the bed plate to the floor.

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At the time of the accident and for some years prior thereto the blower system was not of sufficient capacity to carry off all the shavings which dropped into the lower hood. It would only carry off small light shavings, the heavier, after falling into the hood would lay in the first or elbow joint which was attached to the under side of the hood and rested on the floor. As a matter of convenience in the removal of these heavier shavings this elbow joint had an opening which was fitted with a cap. The removal of this cap permitted of the hand being inserted and the heavier shavings removed (50-51). The heavier shavings, knots and ends of staves which broke off while being planed were propelled by the lower knives toward the rear of the machine, and striking the upper part of the lower galvanized hood surrounding these knives gradually pounded a rough hole about 4 by 3 inches

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through the upper part of it just underneath the bed plate (65-20).

10 Actual tests showed that while the machine and blower system were in operation, absolutely no suction existed about any part of the rear of the machine. Not only was it impossible for a hand or any part of the clothing to be drawn into the machine, but shavings and paper held in the palm of the hand and moved in every direction about and against the rear of the machine and underneath it as close as $2\frac{1}{2}$ inches from the knives were not affected by, drawn in or removed from the hand (53 and 54). Even in the removal of the cap of the elbow pipe there was not sufficient suction to draw the hand into the pipe while the machine was in full operation and the operator was removing the heavier shavings therefrom (51-12). Similar tests made with a new and more powerful blower system, which was installed and connected up with the machine in question about six months after the accident, for the purpose of overcoming the weakness of the old system, had no different effect.

20 At the time of the accident there was only one way to get one's hand into the machine and that was by one deliberately putting his hand directly underneath the bed plate and into this opening in the rear of the hood to a distance of about $7\frac{1}{2}$ inches as above stated, and far enough inside of the hood to reach the knives (55 and 56).

30 The hoods above referred to were part of the blower system, installed for the purpose of disposing of the shavings resulting from the operation of the planer. They were in no sense a part of the planer (pages 61-40), having been put on to the planer—a machine of standard make—by the defendant at the time the machine was installed, and

years before the accident, for the sole purpose of connecting the planer with the exhaust fan (pages 146-158).

POINT I.

The Court erred in refusing to grant defendant's motion for a non-suit. 10

At the close of the plaintiff's case the defendant moved for a non-suit (page 93, line 23), principally upon the grounds:

1. That no proof had been given of any negligence on the part of the defendant.

2. That the plaintiff had not proven any of the acts of negligence alleged in his complaint as a cause of action. 20

3. That no cause of action had been shown against the defendant either under the common law, or any statute of this state.

4. That the plaintiff had demonstrated that he was guilty of contributory negligence.

5. That it clearly appeared that whatever injury had come to the plaintiff was brought about directly through his own conduct, and not by reason of any defect in the machine or by reason of any negligence on the part of the defendant. 30

6. That the accident and injury to the plaintiff arose from the risks and dangers which were incident to plaintiff's employment and obvious and perceivable by him in the exercise of ordinary care. 40

The only evidence submitted on the part of the plaintiff was as follows [we are giving all his evidence on the subject (page 20, line 32)]:

10 "I went to the machine, I went to pick up the staves. There 'were' a small pile there. There was a hole there near the machine. I went there intending to take some staves. I felt something cold draw my hand in. I wanted to take out and something drew me in. *I don't know myself what happened at that moment. It tore off my hand.*"

20 He does not say what he felt—whether it was a cold substance, cold air or the revolving knives, after putting his hands through the opening underneath the machine for some purpose of his own. Neither does he say *where* near the machine the hole was—whether above or below the table; nor how near the machine he was standing; nor where his hand was; nor what he was doing with his hand there.

On cross examination (page 32, line 8) he said:

"Q. Well, you say you don't know where your hand was caught, do you?

30 A. I only know that it happened *near* that machine, but as to describe how it happened *I cannot say.*"

On page 34, line 10, he was asked the following question:

"Q. So that you did not see the hole at all, did you?

A. No, I didn't look at the place where the hole was."

Andrew Boyak observed the plaintiff just before the accident. He was stooping over picking up the staves and was about nine inches from the rear of the machine (page 88). This witness had never worked the planer, but (page 89) was asked:

“Q. When you went there did you notice whether there was any suction around the machine? 10

A. The machine was of such a nature that if you passed, and unless you had your coat covered it would shake the lapels from the coat.

Q. What would shake the lapels?

A. It was such a wind, if you go near to the machine it would shake the front of the coat if you pass it.”

He does not testify that there was any suction 20
and there surely is nothing from his testimony that would indicate in the slightest degree that there was suction from the hole in the hood underneath the table. The wind he felt, if there was any, must necessarily have been above the hole and propelled outward, and most likely at a point above the top of the machine, if it shook the lapels of his coat, because:

(1) The table is only thirty-one inches high 30
(page 42, line 21);

(2) The hole in the hood over the lower knives was below this table and $7\frac{1}{2}$ inches in from the rear edge thereof (page 46, line 14) and the knives operated inside of the hood; and

(3) The revolution of the knives was towards the rear, because the shavings were propelled in that direction forcing an opening in the galvanized iron hood.

There is nothing to indicate where the alleged wind came from whether from any part of the planer, the pulleys, belting or shafting above or below it.

The plaintiff called also Edward S. McConville, the Superintendent of the factory. He testified (page 37, line 34) :

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“Q. Well, is there any suction, or any suction in the space through which they were forced out? Any air drawn in? Any suction in?

A. No.”

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In his cross examination he describes the planing machine with great particularity, and shows (page 51) that in the bottom hood connected with the blower system there was a cap, which frequently was opened for the purpose of cleaning out the shavings which remained there, and that no suction had ever been experienced on such occasions; and (page 53) after the accident, and the defendant had been apprised of the plaintiff's claim, he had held snavings in the palm of his hand right close up against the machine, and within two and one-half inches of the knives, and (page 54) the shavings remained in his hands, not being in any way disturbed by the so-called suction. He further testified that there

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was no way (page 55) by which the plaintiff could have gotten his hand into the machine, except by deliberately putting it through a hole that had worn on the top of the lower hood; and (page 56, line 30) that that was the only way the plaintiff could possibly have gotten hurt. It would have been impossible for his hand to have been drawn in there; that there was no suction in any part of the outside of that machine that would draw shavings,

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or even a piece of paper, into it. In this state of the proofs the plaintiff closed his case, and a motion to non-suit was made and denied (page 124).

As already shown, plaintiff was directed to pick up and carry away the staves from the floor at the rear of the planer. The defendant was under no obligation to instruct the plaintiff how to operate the planer; another man did that.

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It was essential for the plaintiff to show that the defendant was negligent. The plaintiff's theory is that there was a suction in and around the planer sufficiently strong to have drawn the plaintiff's hand into the machine. The evidence utterly fails to establish any such thing. The plaintiff's testimony above quoted, is entirely lacking in proof, and his witness McConville expressly says that there was no such suction. Where, then, is the evidence of the defendant's neglect? The case does not show it. The hole in the lower hood, worn by the impact of the heavy shavings and knots, had been there for a number of years, and everybody passing the machine could see the knives (page 89, line 40; page 91, line 38). The plaintiff spent three weeks (page 19) at work on the cutting machine, which was only 15 feet from the planer (page 25). During these three weeks he would frequently take the staves from the floor at the rear of the planer, and take them to the cutting machine, and cut the ends off (page 30). Notwithstanding the visibility of the knives the plaintiff swears (page 34) that at the time he was hurt he did not observe the machine when he approached it to pick up the staves from the floor, and could not say (page 23) whether it was covered or not.

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When plaintiff rested his case there was not a scintilla of evidence that his hand was drawn into the machine by suction or through any negligent act or omission of the defendant.

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In the case of *Bien vs. Unger*, 64 N. J. L., 597, the Court of Errors, speaking through Justice Garrison, said:

10 “Now the issue tendered by the *narr* placed upon the plaintiff the burden of proving something by preponderance of proof—something that was, to say the least, more consistent with the negligence of the defendants than it was with their innocence.

20 “A course of recent decisions, most of which are referred to in *Ryder vs. Wombwell*, has established a more reasonable rule viz.: that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.”

Baldwin vs. Shannon, 43 L., 603.

POINT II.

30 **Plaintiff assumed the risks that were obvious and necessarily incident to his employment.**

“A minor assumes the risk of the dangers connected with his employment which are obvious, and cannot hold his employer responsible therefor, though the latter has failed to point out such dangers to him.”

Hesse vs. National Casket Co., 66 L., 652.
Dunn vs. McNamee, 59 L., 498.

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“Minor employees assume the risk of those dangers attendant upon their work which are obvious to them.”

Bender vs. N. Y. Glucose Co., 72 L., 218.

“A duty of a master to a servant in his employ is to take reasonable care and precaution not to subject the servant to other or greater dangers than those which are *obvious or naturally incident to the employment, the risk of which* the servant takes by accepting employment.” 10

Essex Co. Electric Co. vs. Kelly, 57 N. J. L., 100, and cases cited.

“It is a general principle that an employer cannot be held liable for a breach of his duty to instruct unless he knew, actually or constructively, that the servant was unable to comprehend the danger of his work without instruction.” 20

Klochinski vs. Shores Lumber Co., 99 Wis., 417 (41 L. R. A., 48 note).

“A servant 16 years old working with a straw chopper was guilty of gross carelessness in putting his hands out of sight under the hood, into a place where he knew some appliances were cutting the straw, in an attempt to keep it clean.” 30

Wyman vs. Burry, 75 At., 123.

“An employer is not required to warn his servants against such dangers as are open to 40

ordinary observation and subjects of common knowledge."

Cracraft vs. Bessemer Limestone Co., 59
Atl., 432.

10 The case of Orr vs. Crown, 140 N. Y., 450; 35 N. E., 648, is nearly parallel to the case before the Court.

Plaintiff was 19 years of age; had been employed in defendant's machine shop about three weeks, his duty being to stand in front of a planing machine and remove the dressed lumber. He testified that the foreman in charge of the machine directed him to place a hood over the knives of the same (this being denied by the defendant). In so doing his hand was caught and severed by the knives.

20 In a very excellent opinion rendered it was held that assuming plaintiff received the orders to which he testified, the failure to give instructions did not charge the defendants with personal negligence; that the plaintiff had had full opportunity of observation.

30 The master does not insure the servants against all accidents and mishaps that may befall him in the business. If he voluntarily enters into or continues in the services without objection or complaint having knowledge *or the means of knowing the dangers involved*, he is deemed to assume the risk and to waive any claim for damages against the master in the case of personal injury to him.

This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant, he took upon himself the ordinary risks of the service and all dangers from use of machinery which were known to him, or obvious to persons of ordinary intelligence. He is bound to

use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so, he cannot charge the consequences upon the master.

The liability of the master for injuries to the servant received in the service is based upon his personal negligence and evidence must establish some personal fault or neglect of duty on his part, in order to justify a verdict, and he is entitled to the presumption that he has performed his duty until the contrary is made to appear. 10

This boy unquestionably knew that there were knives in this machine that planed these boards; that was as plain to his understanding as it was to his employer. Instruction was not necessary to impart that information.

It would be manifestly unjust to subject the master to damages in such case where, under the most favorable view that can be taken of the evidence in favor of the plaintiff, that injury was a result of an accident which could not have been anticipated or prevented by the exercise of ordinary care, and which occurred without the fault of the master. 20

“The risk of having a hand caught by revolving knives in a planing machine is a *patent* danger of which the master is not bound to notify the servant.” 30

Lumber Co. vs. Bethea, 57 Ark., 76; 44 L. R. A., 52, note.

“‘Latent’ means not discernible by examination.”

Anderson vs. Van Riper, 128 N. Y. S., 66. Vol. 3, Words and Phrases (2nd Series), page 31.

“Whether a master is negligent in failing to notify a servant of a danger depends upon whether a peril involved was patent or latent—such as could be seen and known by ordinary care and prudence,—or such as was obscured and could not have been seen or appreciated.”

10 Holland vs. Tennessee Coal I. & R. Co., 91
Ala., 444; 11 L. R. A., 619.

Beckham vs. Hillier, 18 Vroom., 12; Dixon, J.,
said, page 14:

20 “Although the plaintiff’s intestate was still
a minor, he had attained years of discretion,
when he became chargeable with the exercise
of due care. Such care is not, indeed, that re-
quired from persons of full age, but is to be
ascertained with reasonable regard to the ordi-
nary conditions attendant upon his years.
* * * Minor servants also are held to assume,
by their contract of employment those ordi-
nary risks of their service which are obvious
to them or have been pointed out in a manner
suited to the comprehension of their youth and
inexperience. They cannot ignore the dictates
30 of common prudence or the instructions of
their superiors to guard themselves from these
apparent dangers, and charge the consequences
upon their employers. * * * Beckham, how-
ever, did not ask for aid, but alone attempted
to adjust the belt. In so doing we think he
acted at his own peril. * * *

If Beckham was not attempting to place
the belt upon the pulley, then it does not ap-
pear how the alleged defects in the machinery
could have caused the accident or how he could

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have become entangled in the belt, without carelessness."

Brown vs. Paterson Parchment Paper Company, 36 Vr., 111 (1900). The plaintiff, between fourteen and fifteen years old, operated a printing press having large rollers. The plaintiff was instructed whenever the pattern upon the paper coming from the press looked blurred he should throw a powder upon the rollers as they were moving up and down. He testified that while powdering the rollers they gave a sudden jump, and by reason of their sticky condition caught his hand, pulled it down and crushed it. A verdict obtained for the plaintiff was set aside as being against the weight of the evidence on the ground that either the accident could not have happened as testified to by him or else the danger was obvious. 10

Carrington vs. Mueller, 36 Vr., 244 (E. & A., 1900). The plaintiff was thirteen years old and was working for the defendant upon an egg noodle cutting machine. A motion to non-suit was made and granted upon the ground that negligence upon the part of the defendant had not been shown. This ruling was affirmed by the Court of Errors. The Court cited with approval the language of Dixon, J., in *Beckham vs. Hillier*, supra, and said: 20

"It is to be observed in the application of this rule that the primary question is not as to the manner in which the risk was pointed out to the minor, or whether it was pointed out at all, but whether the danger was obvious to him. That is to say, *the duty to instruct is a secondary one and does not arise when the danger is obvious.* Whether the danger is obvious is, when entirely clear, a 30

court question, bearing in mind that it is the danger of doing that which the minor is set to do, or permitted by the master to do, that must be obvious. If that which he is set to do be not dangerous in itself, but be fraught with dangers that are more or less matters of inference, or if it be dangerous or not, according to the circumstances, the question whether such intercurrent dangers were obvious to one of the plaintiff's age and capacity is generally for the jury. * * *

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In the present case the danger of placing his hand upon the cutting board when the knife was in operation was perfectly obvious to the plaintiff. He did not need to be told that if his hand was on the block when the knife came down that it would injure him. He was not hurt because he did not know that, but because he did not know that the knife would come down after the power had been thrown off and the momentum was spent. No instructions that the defendant could have given him would have told the plaintiff anything that he did not already know, unless the master had informed him that what actually happened, according to the state of the case, was among the possibilities to be apprehended. To this there are two answers: First, that if the machine be as it is described by the plaintiff's testimony, such a thing was not among the mechanical possibilities in the absence of some defect or disorder of which there is no suggestion; the second, that the master is not shown to have been possessed of any information from which he knew or ought to have known that such an occurrence was possible. The law applicable to this phase of the con-

troversy has recently received the attention of this Court in the case of *Bien vs. Unger*, 35 Vr., 596. Briefly restated and applied to the present case, it is, *in order to charge a master with negligence in permitting the use by a minor servant of a machine, the ordinary danger of which is obvious, something must be shown than the fact that the machine, by its unusual and unaccountable behavior, upon a single occasion, injured the plaintiff in a way that was not obvious; something in the nature of scienter must be proved, from which it may be inferred that the master, by the exercise of reasonable caution, could have apprehended such an occurrence.*" 10

Hesse vs. National Casket Co., 37 Vr., 652 (E. & A., 1901). The plaintiff, sixteen years old, was injured by coming in contact with a circular saw which ran through an iron table, and was so high that the plaintiff, when at work, had to stand upon a wooden bench which was not fastened to the floor, and the legs of which were so placed that if the plaintiff stood on a certain part of the bench it would tip. The plaintiff was familiar with this construction. He was hurt by the tipping of the bench on the fifth day after he had commenced to work upon the saw. He lost his balance and fell upon the saw table and was hurt. Just what caused the bench to tip, testimony does not disclose. Gummere, J., said, at page 653: 20 30

"At the close of the plaintiff's case a non-suit was directed. We find no error in this action of the Trial Court. It is manifest that the tipping of the bench must have been caused by the plaintiff having assumed a position so

10 near to the end of the bench as to destroy its equilibrium, and that the plaintiff assumed this position either of his own volition or by reason of a push given, intentionally or unintentionally, by Sullivan, to the bench or to the plaintiff himself. If Sullivan, a fellow servant, contributed to the bringing about of the accident, by pushing the plaintiff or the bench upon which he was standing, thereby causing him to lose his balance, the master is relieved from liability, upon well settled principles. If the accident resulted from the plaintiff having, of his own volition, moved too near the end of the bench, the master is equally relieved from responsibility. The fact that the bench would tip over if a person standing upon it should move beyond its centre of gravity, 20 was perfectly obvious, and the plaintiff, although a minor, was chargeable with notice of that fact. He was old enough to fully appreciate the danger of having the bench tip, and the likelihood of its tipping if he stood too near to one or the other of its ends, and, consequently, took these risks upon himself to the same extent as a person of more mature age. *Dunn vs. McNamee*, 30 Vroom, 498."

30 Moreover, the theory of the plaintiff that the defendant failed in its duty to have warned the plaintiff of the likelihood of his hand to be drawn in cannot avail because there is a total lack of proof of *scienter* on the defendant's part of any such possibility. *As already shown, not a soul connected with the defendant's plant had ever dreamt of any such possibility, nor does the testimony warrant the idea that the circumstances were such as that by the exercise of reasonable care the defendant ought to have apprehended such likelihood.*

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Diehl vs. Standard Oil Company, 41 Vr., 424 (1904). This case came up on rule to show cause.

The plaintiff was less than fourteen years of age, and had obtained a verdict. Pitney, J., said:

“The jury had a right to find that the machine was somewhat out of repair, but the defect in it was not of such a character as naturally to produce the accident that occurred to the plaintiff. 10

Moreover, if his injury was received in the way he describes, the occurrence was quite unaccountable as well as unprecedented, there being nothing in the apparatus or in the method of its operation that would have led an ordinarily prudent employer to suppose that there was any probability of injury occurring to the plaintiff in the manner alleged. 20
If there was nothing to charge the master with notice of such a probability, there was no duty resting upon it to warn the plaintiff of such a danger.”

This statement of the principle of law is well applicable to the case at bar.

Rhobovsky vs. N. J. Worsted Spinning Co., 47 Vr., 542 (E. & A., 1908). In this case the plaintiff, whose age does not appear, was injured the second day on which he worked at the said defendant's place of business by the sudden moving of a new machine under which he was told to go and assist in putting in cylinders. It was held error to have denied a motion for non-suit and direction. *Voorhees, J.*, for the Court, said, at page 544: 30

“In the absence of notification to the master of the employee's ignorance, the servant as-

10 sumes the inherent risks of the employment
 and those obvious risks which the law would
 presume he ought to know. Assuming, how-
 ever, that in this case the master had implied
 notice of the ignorance of the plaintiff, yet the
 plaintiff cannot rely upon the failure of the
 employer to instruct him. *The doctrine of*
 instruction by the master does not extend to
 those dangers which the employer himself
 cannot be deemed to have foreseen. It ap-
 pears that this machine was in its normal
 condition, with its brake set properly to main-
 tain the carriage in a state of rest, and with
 the power unapplied; that is, the belt was on
 the loose pulley and the clutch was disengaged
 from the cone, each designed to prevent move-
 ment of the machine. While the brake and
 20 belt were in this condition there was no move-
 ment of the machine to be expected or danger
 to be apprehended. No abnormal condition
 of the machine was shown, and it cannot be
 said that the master should have foreseen any
 danger in this particular so as to charge him
 with negligence in not giving warning to
 the employe. Such being the case, the place
 where the plaintiff was sent was not one of
 peculiar danger. *There was no danger attend-*
 ant upon the working under this machine
 30 *which was reasonably to be apprehended by*
 anyone. Hence, the duty to warn did not
 *arise. * * **

 So, here it cannot be said that the master
 ought reasonably to have anticipated that the
 carriage, secured as it was by two appliances
 designed for the purpose, was likely to move,
 or could move except by reason of unwar-
 ranted interference not to be presumed. Nor

is it clear under the circumstances of this case what instruction the master could have given which would have been effectual to guard the servant.

But the plaintiff, in his proof, has not sustained the burden which the law casts upon him. In *Suburban Electric Co. vs. Nugent*, 29 Vroom, 658, it is said: "The plaintiff must do more than show possible responsibility of the defendant, and in the absence of direct evidence, he must show such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected." There was no direct evidence as to what caused the injury, and the plaintiff, by failing to exclude other possible causes for which the master would not be responsible, has simply left it to be conjectured by the jury that the defendant was responsible." 10 20

Plaintiff's counsel in the case at bar evidently worked upon the sympathies and prejudices of the jury by reason of the fact that the defendant, after the cause had slept for five years, was unable to find the pipes connected with the old blower system, although they were present in court at the first trial in 1911 (pages 63, 66, 179, 180). He went so far as to say to the witness: 30

"We are compelled to accept your word that the pipes you now produce are the same."

On page 89, Andrew Boyak, plaintiff's witness, was asked the following questions and gave the following answers, viz.:

"Q. Did you know anything about this part of the machine, the underneath part of the 40

planer that was something like this, on the day of the accident?

A. Yes, but this hole was much larger.

Q. What was the condition—show him the lower guard?

10 A. There was this around—there was a square opening—only a narrow square opening.

Q. Anything showing like that on the top?

A. Not on the top.

Q. Just here?

A. Just like that—that strip, that is all.

Q. Was there any strip on the top here?

A. No, no.

Q. It (the lower hood) was all open on top?

A. *It was open. Anybody passing could see the knives.*

20 Q. *Anybody passing could see the knives?*

A. *Yes.*”

From the above testimony it is clear that the risk, if it may be called a risk, was obvious. If anybody passing could see the knives it is clear that plaintiff needed no instruction that they would cut if he touched them.

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POINT III.

The Court erred in refusing to direct a verdict in favor of the defendant when requested so to do.

40 At the close of the whole case the defendant moved for a direction of a verdict in its favor “upon each and every ground urged on the motion for a non suit (page 185, lines 4, etc.), and on the further grounds that there was no evidence in the

case to warrant the Court in submitting the case to the jury. Also upon the ground that as the evidence then stood it had been demonstrated beyond question that there was nothing in or about the operation of the machine that was dangerous, or which would have in any way resulted in plaintiff's hand being taken off by reason of any suction of the machine."

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The Court refused to direct a verdict and granted an exception.

Plaintiff could not say how it happened that his hand was taken off.

EDWARD S. McCONVILLE, plaintiff's witness, who had charge of the machinery and worked for defendant 40 years, testified as follows (page 53, line 7):

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"Q. While the old blower system was still in use on this machine, and after the accident, did you make tests for the purpose of determining whether there was any suction which would draw your hand, or any part of your hand, into the machine?

A. Yes.

Q. Did you hold shavings—what tests did you make?

A. Held shavings and held paper there. Would not take either. 30

Q. Held shavings? Where did you hold the shavings?

A. Right in my hand.

Q. In the palm of your hand?

A. Yes.

Q. What kind of shavings did you hold?

A. Those shavings—like those (indicating shavings in a paper bag).

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Q. Shavings of that kind?

A. Yes.

Q. * * * Can you move those shavings in the palm of your hand, all around the rear of that machine?

A. Yes, sir.

10 Q. Will any of those shavings be removed from the palm of your hand holding it as close to the machine as you can?

A. No.

Q. Any part of the rear of the machine?

A. No.

By the Court:

Q. How close to the machine did you hold them?

A. Why, right up against the—two and a half inches from the knives.”

20 “Q. If you were to hold the palm of your hand with shavings in the rear of this machine and move it in the manner in which I am moving it right up to the edge of the machine and touch the machine, would it remove a single shaving from your hand?

A. No.

Q. While that machine was in complete operation?

A. No.

30 Q. Would it even with the new system in operation?

A. Yes, a little—not shavings, no. It would a paper, etc.”

Page 55, line 10:

“Q. Yes; I do want you to answer it.

A. Well, there was no way to get your hand into the machine except the top of that hood

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there, that I have showed you just now, was wore away a little at the top, and you could not get your hand in there without you deliberately put it in there.

Q. How large was that opening, that wearing away that you speak of, at the time of the accident, if you know?

A. I know there was a little bit of an opening on the top; it must have been about 3½ inches. 10

Q. Long?

A. Long; and maybe four inches, and about 2½ or 3 inches deep."

Peter F. McConville, who had been connected with the plant for a great many years, testified (page 126) that the old blower system continued in operation on the planer for about a year after plaintiff's injury and that thereafter a new blower system was installed with an increased capacity for carrying away the shavings. The upper set of knives revolved in the direction of the operator and the lower set in the opposite direction and towards the rear. 20

Page 132, line 20:

"Q. During all the years that you worked around this plant, did you ever know of any suction being created out side of the machine? 30

A. No, sir.

Q. Was there any suction?

A. Not outside of the pipe, no, sir."

Page 133, line 1:

"Q. When you speak of this hole you refer to this hole in this pan or in this cap?

A. In this cap, yes. 40

Q. Could you hold your hand right close up against it?

A. Yes.

Q. Tell us what you did?

A. We held shavings right in front of it like that, and it would not take them out of the hand.

10 Q. Yes. Did you hold them up in front of the hole?

A. Right in front of the hole.

Q. Would it take a single shaving off?

A. Not as I could see.

Q. Was that with the present system?

A. The present system.

Q. Can you hold your hand in any part of the front of this machine without it being drawn in any way?

20 A. Yes, sir.

Q. Can anybody see the operation of this machine at the present time and the effect that it has by holding your hand there at the present time?

A. Yes, sir; the machine is there at the present time.

Q. Exactly the same machine?

A. Yes, sir."

30 On page 141 witness explains that if you would go to a point in the pipes which connected up with the hood and took the pipes apart suction would be found to exist there, and then says:

"Q. But does that apply to any part of the rear of the machine?

A. No; that does not apply to that lower—

Q. Or this lower hopper (referring to the lower hood)?

40 A. No, sir; it does not.

Q. Or shield?

A. No, sir, does not apply.

Q. Or make any difference at all how close you get up to this worn out part in the back?

A. No, sir; no suction there at all.

Q. Or any part around that?

A. No, sir."

At the bottom of page 139 he says that the ac-
tion of the air at the point where the knives are
is outward rather than inward, because of the di-
rection in which the knives are moving.

On page 143, line 15, he says, that in all the
years he has been connected with the defendant
company, and during which the machine in ques-
tion was in operation, he has had occasion to ob-
serve the effect of the machine on persons passing
back and forth behind it and that there was nothing
about the machine that would pull the clothing
inward or outward, or to have any effect upon the
clothes of a person passing by.

"Q. Does it make any difference how close
you are to the machine?

A. No, sir.

Q. Or did it have any such effect at any
time during the time that you had your old
blower system there?

A. No, sir.

Q. Or at any time during all the years that
the machine has been in operation there?

A. No, sir.

Q. In stooping down on the floor or pick-
ing up things is there any thing about that
machine that would draw your hand or your
clothes into it?

A. No, sir.

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Q. Or any part of it?

A. No, sir.

Q. Would it be possible to do it?

A. No, sir.

Q. In any way?

A. No, sir.

10 Q. Would it be possible for such a thing to happen in any way?

A. No, sir—impossible.”

On page 144 witness states that shortly before the case came on for trial in the first action, in which a non-suit resulted, he made various tests with shavings and paper held in the palm of the hand at every conceivable point in the back of the machine and near the knives and that they were in no degree disturbed.

20

BASILIO GIAIMO, whose testimony will be found on pages 154, 155, 156 and 157, testified to the same effect. He had worked in defendant's factory a great many years. He says that there was no suction created by the operation of the planing machine that could be discerned outside the pipe. He also made tests and held fine shavings on his hand close to the opening in the hood and they were not even moved.

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ROSARI MODELLI (page 161, line 1) :

“Q. So you have worked on this planing machine all the years it has been in the shop?

A. Yes, sir.”

He testified (page 162) that there was no suction that would draw anyone's hand or even his clothing into the planing machine no matter how close to it he stood.

40

G. EARL BRUGLER, testified as follows (page 171, line 23 &c.) :

“Q. When was it that you went there for the purpose of making tests?

A. I believe it was last Saturday.

Q. Was the machine in operation at the time?

A. Yes. 10

Q. Was there at that time a blower system upon the machine which had a hopper such as the one which I hold in my hand now?

A. There was.

Q. With the hole cut there?

A. Not when I came there. It was cut in after I came in there.

Q. Did you have it cut in?

A. Yes, I directed it to be cut in. 20

Q. And did you while it was in operation, make any tests or see any tests made there at that time?

A. I did.

Q. Who was it that made the tests?

A. I made the tests and also Mr. McConville.

Q. Tell the jury what tests Mr. McConville made while that machine was in operation.

A. Mr. McConville, after the hole was cut in the shield,—the machine was running and the blower on,—held a handful of shavings up against the shield beneath the hole. 30

Q. Yes.

A. To see if the suction was sufficient to draw the shavings toward the hole.

Q. Was his hand opened or closed?

A. No, the hand was open.

Q. The palm of his hand?

A. Yes. 40

Q. Were the shavings on the palm of his hand?

A. Yes.

Q. Just tell the jury, if you please, where it was that Mr. McConville held his hand open with the shavings on it at the time? Did it remove any of the shavings at all?

10

A. It did not.

Q. Did he move his hand up and down?

A. He moved it up and down like this and around like this.

Q. Did it take any part of the shavings off?

A. It did not.

Q. Did you, after he got through with his tests, make any tests yourself?

A. I tested before he did.

Q. You tested before he did?

20

A. Yes.

Q. What did you do?

A. I did the same thing.

Q. When you say the same thing, what did you do?

A. I had shavings in my hand, in the open hand, and held them beneath the hole against the shield, moving around, to give suction.

Q. Did you hold them in front of the hole?

A. I did.

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Q. Did it remove any of them while you held it even in front of the hole?

A. It did not.

Q. How far away from the outside of this shield was your hand?

A. At times it was against the shield.

Q. Other times?

A. Just a short distance away, half an inch or an inch.

40

Q. I show you Exhibit D-2 and ask you whether the shavings contained in this envelope are of the same character as the shavings you held in your hand at the time of making the tests?

A. Some of these shavings are the same shavings I made the test with.

Q. Some of the shavings in the envelope are the same shavings? 10

A. Yes."

JAMES MATHISON (pages 178 and 179), testifies to the same effect.

Moreover it is uncontradicted that prior to the accident not a single person connected with the plant had ever dreamt or heard of anything being drawn or sucked in by the blower system. See the evidence of Peter F. McConville, pages 143-146; Giaimo, page 155; Mandelli, page 162, and Mathison, page 178; and this, too, notwithstanding the hole had been worn in the pipe for a year or two (page 67). 20

With the imperfections of the plaintiff's case having been thus strengthened, a motion for a direction was made (page 187), and denied, the Court, so far as the common law liability was concerned, leaving it to the jury to determine whether the defendant had performed its duty to apprise the plaintiff of the latent danger attendant upon the performance of his duty. 30

There is but one conclusion from the evidence. Inasmuch as by the testimony adduced by the plaintiff, as well as that offered by the defendant, there is no suction that could have drawn his hand into the knives, we have a case where the plaintiff, seventeen years of age, approached the planer, whose knives were conspicuous and in operation, and either unnecessarily and carelessly put his 40

hand into the opening in the hood, near enough to the knives, which were at least thirty-one inches from the floor on which the staves lay and seven and one-half inches in from the rear of the planer, and underneath the table, or else did it deliberately. There was no occasion whatever for him to go near the knives, and there is no proof to show that suction drew his hand there. In fact, all the evidence is to the contrary. In such a situation the plaintiff, although a minor, cannot recover.

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“The unimpeached testimony in the case is conclusive upon this point, and the verdict for the plaintiff cannot be supported without disregarding it. This being so, it was the duty of the Trial Court to control the jury in its action and direct a verdict for the defendant.”

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Lippincott vs. Royal Arcanum, 64 L., 311.
Crue vs. Cadwalader, 23 Vr., 215.

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“A course of recent decisions, most of which are referred to in *Ryder vs. Wombell*, has established a more reasonable rule, viz: that in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.”

Baldwin vs. Shannon, 43 L., 603.

**We respectfully submit, therefore,
that the judgment of the Circuit
Court should be reversed.**

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New Jersey Court of Errors and Appeals

ADOLPH KINNERT,
Plaintiff-Respondent,

vs.

MATHISON COOPERAGE COMPANY,
Defendant-Appellant.

On Appeal.

BRIEF FOR PLAINTIFF- RESPONDENT.

This is an appeal from the judgment recovered by the plaintiff against the defendant in a negligence action for the sum of \$12,000. The case is a case of master and servant, the servant being the plaintiff, who was an infant when hurt, and complaining that the master had not used reasonable care to warn him of the dangers of the employment, which were not obvious to him by reason of his youth, and which were not incident to the employment.

After the verdict and judgment, a rule to show cause was obtained why a new trial should not be granted and all questions of excessive damages, weight of evidence, etc., were argued on the rule and the rule was dismissed. Thereafter the defendant took an appeal to the Supreme Court which affirmed the judgment.

The only question reserved in the rule was the objection to the failure of the trial court to direct a verdict on the application of the defendant in favor of the defendant.

A great part of the defendant's brief is an argument on weight of evidence, but the only question here is as to whether there was any evidence which would require submission by the court to the jury.

ARGUMENT

The plaintiff, an ignorant Polish boy, who did not speak or understand English, 17 years of age at the time of the accident, August 13, 1910, was working at the Madison Cooperage Company, at Jersey City. He had been working at the cooperage three weeks and three days at the time of the accident. (Page 18 of printed case.) He first worked in the yard, working there three days. He never had any experience with machinery (page 19). He worked in the yard three days carrying boards and staves, after that he was put inside on a sawing machine. He was not hurt at the machine at which he worked. The machine at which he was hurt was composed of four knives, enclosed by cover. He was working about three weeks. He was not given any instructions when he went to the machine (page 20). He was directed to go to the machine by the foreman, by pantomime, the foreman pointing his finger at the machine. The plaintiff's work at the machine was to pick up little staves and carry them to the machines and cut them (page 20). On the day of the accident (page 20) he went to a small pile of starves near a machine, other than the machine on which he was working, to take some staves and, as he stooped, his sleeve

was drawn in, and his hand cut off. The machine to which his sleeve was drawn in, was a machine at which there was a suction to draw out sawdust up an exhaust pipe.

The jury could have found as fact, that the plaintiff, an ignorant boy, was put to work near a dangerous machine, as before described, and injured. That plaintiff was never instructed by the master of the danger of the business. If the jury found these facts it was sufficient to warrant an inference of negligence and to establish the liability of the defendant.

Smith v. Erwin, 22 Vr. 507.

Christoph v. Addicks, 33 Vr. 786.

The machine at which the plaintiff was hurt had four knives, two on top and two below, which operated on a shaft. The knives were about $7\frac{3}{4}$ inches in width and about four inches long. The knives planed a rough board. There was suction connected with the machine to take away the sawdust. (Pages 36 to 41). The cover of the machine was worn and defective. (Page 55). A witness in addition to the plaintiff, John Smolensky, (Pages 69-70) corroborated the plaintiff as to the manner in which he was put to work and the lack of instruction. The machine was not properly guarded; a portion of the cover which should have been the guard, was old and all broken up. (Page 74, line 30).

The jury might have found there was considerable suction in the machine. Andrew Boyak (Page 89, l. 10-20) says the suction was so strong that if you passed, unless you had your coat covered, it would shake the lapels from the coat.

If the jury found these facts, they had a right from these facts to infer the negligence of the

master in failing to use reasonable care to warn the plaintiff, a minor, of the dangers of the employment.

See the following cases:

Smith v. Irwin, 22 Vr. 507, page 509:

“This rule is modified so far as to put upon himself, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor is this all. The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him, and to place him in substantially the same position, as if he were an adult.” Plaintiff in *Smith v. Irwin* was 17 years old at time of accident.

In the case of *Horandt v. Rosenthal*, in the Court of Appeals, 81 N. J. Law 474; 79 Atl., 321, the Court says:

“Hence, they (the jury) might well have found that no explanation whatever was given to him as to the hazards and dangers which he encountered in doing the thing which resulted in the explosion. In such a situation it was erroneous to withdraw the case from the jury on the theory that adequate instructions were given.”

In the case of *Tittlebaum v. Progressive Paper Box Co.*, 77 N. J. L. 596, it was held that it was the duty of a master to warn a minor servant, and, the minor servant did not assume the risk

of injury, unless the danger was pointed out to him in a manner suitable for the understanding of one of his years.

In the case of *Addicks v. Christoph*, 33 Vr. 786, the master was held liable for injury to a minor who was injured by kicking a crust of clay in a pressing machine and had his foot injured, because adequate instructions were given.

If the jury believed the witnesses of the plaintiff, the jury were warranted in finding that the plaintiff was put to work at a dangerous machine or in the vicinity thereof, without any warning of the danger; that the machine was of such construction and operation, that it drew his clothes into the machine and so his hand was cut off; that the master did not instruct him in any manner as to his duties, and that he was unaware of the danger. Under these circumstances, both the negligence of the master and the contributory negligence of the plaintiff were for the jury, and it would have been error to direct a verdict.

POINT II

Suction, a jury question.

There was a great deal of testimony as to whether or not there was suction at the machine.

The evidence produced for the plaintiff as before set forth herein if believed, showed that there was suction sufficient to pull the boy's coat sleeve into the machine.

Defendant's evidence showed that there was not sufficient suction; that the suction was very little. But what was the weight of evidence was thoroughly discussed on a rule to show cause

why a new trial should not be granted before the trial court, and there is no reason, founded on weight of evidence, for the direction of a verdict.

Uvalde v. Central Co., 86 Atl., 426;
Dickinson v. Erie Co., 90 Atl., 350;
Sefler v. Vanderbeck, 96 Atl., 1009.

It would therefore have been error for the trial court to direct a verdict on weight of evidence as to suction sufficient to pull the sleeve into the machine.

On the rule to show cause all objections were eliminated except that as to the direction of the verdict.

See printed case, rule to show cause, page 8.

There was also evidence that the machine was dangerous and it was known to the master. Also the defective condition of the cover and the suction, if there was suction, were all of such long continuance that the master should have known it, and if he did know it, it was for him to properly explain it to the plaintiff, a minor. If he failed to do so, the jury might have found negligence. See *Gallagher v. Lehberger*, 87 Atl., 450; 84 N. J. L., 712.

POINT III

Proof of suction not necessary.

Indeed, the plaintiff urges it was not necessary to prove suction. That it was sufficient to prove that the plaintiff, a minor, ignorant of the danger, was placed at work in the vicinity of a dangerous machine and injured because of his ignorance of the dangerousness of the machine. It was not necessary to prove what the plaintiff did prove, or what the jury might have found he did prove,

that there was suction; and the cases before cited are authority for the statement as a matter of law, that if the master puts a minor servant at work in the vicinity of a dangerous machine, he is bound to use reasonable care to instruct the minor servant of this danger, and not only to instruct him, but to instruct him in such a manner that the instructions will be understood by the minor servant, being within the range of his understanding. *Smith v. Erwin*, *Christoph v. Addicks*, before cited, are authorities for this proposition as a matter of law. So, that as before stated, it was not necessary to prove the plaintiff's sleeve was drawn in by suction, but the plaintiff did prove this, at least the jury might so find, which makes his case stronger than the mere proof that he was injured by a dangerous machine, without explaining how he was so injured.

POINT IV

Contributory negligence of the plaintiff.

The plaintiff being a minor and not aware of the danger and being uninstructed, as the jury might have found, was not guilty of contributory negligence because he did not know that the machine in the vicinity of which he was working was dangerous. He was not advised to keep away from the suction and how his hand came in contact therewith, whether as the result of suction or because he, as the boy in *Smith v. Irwin*, placed his hand in the vicinity of the machine without such knowledge, were all questions for the jury, and even if it was resolved as a matter of fact by the jury, it was not necessary for them to resolve under the testimony that he placed his

hand near the knives, he would not as a matter of law be guilty of contributory negligence, but it would be for the jury to say whether he had used the reasonable care of a person of his age and experience in the dangerous situation in which he was placed.

See

Hauser v. American Smelting & Rfg. Co. 90 Atl., 264; N. J. L., 685.

So, the plaintiff, respondent on this appeal, urges that both *Smith v. Irwin* and the case of *Hauser v. American Smelting & Rfg. Co.* are authorities for the statement that contributory negligence, under circumstances such as these, is a jury question, not a question for the court.

POINT V.

Assumption of risk.

The plaintiff being a minor and not instructed, as the jury might have found, and ignorant of the dangers of injury which resulted to him, did not assume the risk as a matter of law. Whether he appreciated the danger, was for the jury.

See

Gallagher v. Lehberger, 78 Atl. 450;
84 N. J. 712;
Smith v. Irwin, 22 Vr., 507;
Polo v. Palisade Constr. Co., 70 Atl.,
161; 75 N. J. 873.

Answer to Defendant's Brief.

The defendant contends that the acts charged in the complaint were not proved. The complaint charged there was suction around this machine and that it was unguarded and unattend-

ed and dangerous; that the plaintiff was an infant who was not instructed by the defendant and put to work at this dangerous machine and by reason of the facts aforesaid, was hurt. This was proved at the trial.

The plaintiff respectfully submits that the matters argued in the brief were matters properly considered by the jury, and whether or not the facts claimed were established, are not matters to be considered on appeal, being matters of fact, on weight of evidence.

The danger was not incident to the employment, and if the danger was caused by the defective condition of the machine, the jury could so find under the evidence; and they also could find that the plaintiff was unaware of the danger, without fault on his part and was not instructed by the defendant. Under these circumstances, under the cases before cited, whether or not he assumed the risk, was a jury question.

Knowledge of the physical situation does not necessarily as a matter of law impute knowledge of the danger.

Burn v. Telegraph Co., 41 Vr., 475;
Polo v. Palisade Constr. Co., 75 Law,
873.

The plaintiff in error therefore respectfully submits that the evidence being such as described, the negligence of the defendant and the contributory negligence of the plaintiff were jury questions, and it would have been error to withdraw them from the jury, and that the judgment should be affirmed.

Respectfully submitted,
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