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TESTIMONY.

Summons.

(Filed March 6, 1916.)

New Jersey Court of Errors and Appeals

EDWIN J. CHURCHILL,
Plaintiff-Appellee,

vs.

WILLIAM E. STEPHENS,
Defendant-Appellant.

Action at Law.

The State of New Jersey to William E. Stephens.

(LS)

You are summoned to answer the annexed complaint of Edwin J. Churchill in an action-at-law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Chief-Justice, of the Supreme Court, at Trenton, this second day of March, nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

PIERSON & SCHROEDER,
Attorneys.

Complaint.

(Filed March 6, 1916.)

SUPREME COURT OF NEW JERSEY

BERGEN COUNTY.

EDWIN J. CHURCHILL, Plaintiff, vs. WILLIAM E. STEPHENS, Defendant.	Action at Law.

Edwin J. Churchill, plaintiff, of Palisades Park, Bergen County, New Jersey, says that:

1. On March 4th, 1914, and for a time prior thereto, plaintiff was employed as a shipsmith by the Tietjen & Lange Dry Dock Company, a corporation, in and about its business of repairing vessels and managing a dry dock at Seventeenth Street and Park Avenue, Hoboken, N. J.

2. Defendant, William E. Stephens, was employed by the said Tietjen & Lang Dry Dock Company, as a foreman to superintend and direct the work done by plaintiff and the other men employed as shipsmiths by said company and those helping and assisting them.

3. On March 4th, 1914, said defendant undertook in behalf of his employee said Tietjen & Lange Dry Dock Company and in the performance of his duty as such foreman to superintend the said em-

ployees of said Tietjen & Lange Dry Dock Company in welding on a new end on a rudder.

4. In order to weld a new end on the said rudder, it was necessary to put a rigging on said rudder by which it might be supported by cranes and other devices while it was being fixed and by which it might be moved about by means of said crane and other appliances so that said process of welding might be properly performed.

5. It was the duty of said defendant to superintend the adjustment of said rigging and to use proper appliances therefor, which were furnished him by his said employer and to see that said rigging was properly adjusted and was fitted and supported by proper strong arms and appliances so that employees of said Tietjen & Lange Dry Dock Company might with safety work on and about said rudder in welding on said end, but defendant neglected his said duty and carelessly and negligently superintended the adjustment of said rigging and negligently selected and caused to be used therefor strong arms or appliances by which said rudder was held, which were unsuited for the purpose and which would not hold said rudder when the process of welding was undertaken, although the said Tietjen & Lange Dry Dock Company had in stock strong arms or appliances suitable for the purpose, which were available to the defendant.

6. While plaintiff was so employed by said Tietjen & Lange Dry Dock Company and on March 4th, 1914, aforesaid, it became his duty as such employee to assist in welding the said new end on said rudder supported by said rigging so improper-

ly adjusted; and it became the plaintiff's duty to hold the crane to which was suspended a large part of said rudder by one of said improper and insufficient strong arms or appliances and the rigging, being insufficient to hold said rudder because of the negligent fitting thereof by defendant and the careless and negligent selection of said strong arms or appliances, slipped and gave way and caused the rudder to fall and the hand of plaintiff was as a result thereof caught between a part of the said rudder and said crane and its appurtenances and the right hand of plaintiff was greatly injured, cut, broken and bruised.

7. By reason of said injuries plaintiff was forced to undergo an operation for the removal of the thumb of his right hand and also the meta-carpal bone of said right hand and said right hand was otherwise injured and bruised; and plaintiff suffered much pain and was forced to pay a large sum of money for medicines, and for hospital, medical and surgical services and treatment; that is to say the sum of $150.

8. Plaintiff's injuries were the result of the negligence of the defendant herein in that said defendant negligently superintended the erection of the said rigging and negligently permitted plaintiff and his fellow-workmen to undertake to weld said rudder while fastened and held by such unsafe rigging as herein set forth.

9. Plaintiff besides the injuries set forth in paragraph 7 herein, has suffered and continues to suffer great mental and physical pain, and will be disfigured for life and will suffer men-

Q. Yes; do you remember? A. Yes; me and my helper gave a hand to pull it in.

Q. Who was supervising the pulling it in and so on? A. The foreman.

Q. Who was the foreman? A. Mr. Stephens.

Q. Is Mr. Stephens, the defendant in this suit? A. He is.

Q. He was foreman of what, in these works? A. Foreman of the blacksmith shop.

Q. State what you saw him do or heard him say about bringing this rudder into the forge? A. I heard nothing.

Q. Was he directing the bringing of it in? A. Yes.

Q. Did he say anything to you then about helping bring it in? A. No.

Q. Now, what did you see there around noontime relative to the rigging of this rudder? A. I did not see anything noticeable; it wasn't my job and I wasn't paying any attention to it.

Q. Let us get back and describe the rudder; get an idea of that before we go any further. How big was this rudder? Just describe it as near as you can in words, how big and how it was constituted? A. Well, I should say that the body of the rudder was about—

Mr. Tiffany: I object to this man testifying to the condition of the rudder. He has already testified that he paid no attention to it and it was not his job. I do not think he is the proper person to tell us how big the thing was.

Mr. Pierson: He said it wasn't his job to watch the rigging of it. He is going to say—

Mr. Tiffany: I object to your telling what he is going to say.

I will withdraw the objection.

Q. Which gets the bigger pay? A. Why, the man that does the heavy work.

Q. Coming back to the 4th of March, the day of this injury, state what was being done that day which afterwards resulted in this injury? A. There was a rudder came in there, one of the company boats of the New York Central, with the shaft broke off, and it was taken in the shop and started to work on that rudder. I was at the time making a bushing when the thing was being rigged up and towards the end of the afternoon, why—

Q. I don't want to get at the end of the afternoon, just right away; what time of day was this rigging put on? A. I should say around noontime.

Q. Were you there when this was put on? A. I was working there.

Q. What were you doing when that was being put on? A. I was making a bushing.

Q. Working in the same shop? A. Yes.

Q. How big is this shop? Give us an estimate? A. I should say it was 40 x 30; very small shop.

Q. It was a small shop in proportion to the kind of work that was being done there? A. Yes.

Q. About how many forges, if you can tell, were in there? A. I think about 9.

Q. What did they consist of, fire and anvil or what? A. There is an anvil—fire and anvil; anvil to each fire, and two steam hammers.

Q. Two steam hammers for the whole shop? A. Yes.

Q. Do they vary in size or were they— A. No, practically the same weight.

Q. Did you have anything to do with bringing this rudder to the shop? A. I think I—

Mr. Tiffany: I object to what you think.

Mr. Tiffany: I object to that as not being material, what the nature is of ship blacksmithing. He can tell what his duties were at the time he was employed.

The Court: Isn't that the important point, Mr. Pierson?

Mr. Pierson: Why, it may be indirectly; but nevertheless it may bear on the damages in this case.

The Court: In that respect, Mr. Tiffany—

Mr. Tiffany: I will withdraw the objection.

A. Well, there is different makes of iron work, of forging, of old ships to make the fittings and machinery, steering apparatus and anything that they require to be forged, from a small nut to a rudder frame; it all runs from about half a ton in weight to about five tons in weight; sometimes more, according to the size of the ship.

Q. How does the proportion of the work compare, that half-ton work, with the work of one, two or three tons? A. Well, there is quite a difference in the weight.

The Court: Is the greater proportion of the work light work or is the greater portion of the work heavy work, and then what is that proportion? That is what you mean?

Mr. Pierson: Yes, that is what I mean.

A. Well, I should say there is more light work than heavy work.

Q. How do the wages compare for light work and heavy work? A. Well, there is a matter of $2.50 a day difference between the heavy work and the light work.

Q. Which gets the bigger pay? A. Yes.

EDWIN J. CHURCHILL, sworn in his own behalf, testifies as follows:

Direct Examination by Mr. Pierson:

Q. Mr. Churchill, you are the plaintiff in this suit? A. I am.

Q. Where were you working on the 4th of March, 1914? A. Tietjen & Lang Dry Dock Company.

Q. Where is this Tietjen & Lang Dry Dock Company situated? A. In Hoboken.

Q. Along the shore of the Hudson? A. Yes.

Q. Where were you living then? A. I was living at that time in Brooklyn.

Q. Oh, you were coming over from Brooklyn to work? A. Yes.

Q. Where were you living when this suit was instituted? A. Palisades Park, N. J.

Q. In this county? A. Yes.

Q. How long on the 4th of March, 1914, had you been working for Tietjen & Lang Dry Dock Company? A. A matter of four to five weeks.

Q. What was your line of employment there? A. Blacksmith.

Q. What sort of blacksmithing? A. Ship work.

Q. How long had you been in that kind of work? A. About 22 years.

Q. Learned the trade as such? A. Yes.

Q. Had you followed it during those years? A. Yes.

Q. Working in a number of different ship-building shops during that time? A. Yes.

Q. You followed your business practically steady during that time? A. Yes.

Q. In a general way what is the nature of ship blacksmithing?

SUPREME COURT OF NEW JERSEY,

BERGEN COUNTY.

EDWIN J. CHURCHILL, Plaintiff, vs. WILLIAM E. STEPHENS, Defendant.	Action at Law.

Transcript of shorthand notes of testimony taken at the trial of the above entitled cause, at the Court House, Hackensack, N. J., on September 22, 1916.

Before—Hon. LUTHER A. CAMPBELL, Judge, and a jury.

For the Plaintiff, PIERSON & SCHROEDER.

For the Defendant, WELLER & LICHTENSTEIN; J. RAYMOND TIFFANY, of counsel.

Mr. Tiffany: May it please the Court, there was a motion pending in this matter at the instigation of the plaintiff to strike out the third, fourth and fifth defences of the answer filed. That motion was heard by Justice Parker in April. He struck out the third, fourth and fifth defences. It is my purpose now to enter an objection on the record to that motion in accordance with that action. In my opinion that would be the proper course. I ask for an objection and exception to that now—to that action of Justice Parker.

The Court: You may have your exception.

Reply.

(Filed March 29, 1916.)

Plaintiff replying to the answer of the defendant says that:

1. Plaintiff denies the allegations of the first separate defense set forth in the answer of defendant.

2. Plaintiff denies the allegations of the second separate defense set forth in the answer of defendant.

PIERSON & SCHROEDER,
Attorneys of Plaintiff.

We consent that the within reply be filed as of time.

WELLER & LICHTENSTEIN,
Attorneys for Defendant.

Order Striking Out Portions of Answer.

(Filed April 28, 1916.)

This matter coming on to be heard before me in the presence of John D. Pierson, of counsel with the plaintiff, and J. Raymond Tiffany, who appeared in behalf of Weller & Lichtenstein, attorneys of the defendant; and it appearing that due notice of this motion was given; and the Court having considered the objections to the third, fourth and fifth separate defences, and being of the opinion that the said defences do not disclose any defence to the cause of action set forth in the complaint and are not good at law, but should be struck out: It is on this 25th day of April, 1916, ordered that the third separate defence, the fourth separate defence and the fifth separate defence as contained in the answer of the defendant to the complaint be and the same are hereby struck out with costs to abide event of the suit.

And it is further ordered that the attorneys of the defendant have ten (10) days after service upon them of a copy of this order, which may be certified to by the attorneys of the plaintiff, within which to file and serve an amended answer, and that the attorneys of the plaintiff have ten (10) days after the service upon them of such amended answer, or if no amended answer is filed, then ten (10) days after the expiration of the time within which such amended answer might be filed and served within which to reply to the answer of defendant.

Let this rule be entered.

C. W. PARKER,
J. S. C.

We hereby consent to the form of the foregoing order.

WELLER & LICTHENSTEIN,
Attorneys of Defendant.

striking out said fourth separate defence on the following grounds:

1. Because the complaint sufficiently discloses a cause of action against the defendant.

2. Because the said matter alleged in this portion of the answer discloses no defence to the cause of action set up in the complaint.

THIRD.—For an order determining the question of law raised by the fifth separate defence set up in the answer and striking out said separate defence on the following grounds:

1. Because nothing in said defence set up deprives this court of jurisdiction of the subject matter of the suit in question.

2. Because this action could not have been brought in accordance with the act of the legislature therein referred to because it is not an action between employer and employee.

3. Because the said act set up in said fifth separate defence particularly reserves to the injured party the right to bring suit against a third person.

Dated, April 11th, 1916.

Yours respectfully,

PIERSON & SCHROEDER,
Attorneys for Plaintiff.

To

WELLER & LICHTENSTEIN,
Attorneys for Defendant.

Service of the within notice is hereby acknowledged this 11th day of April, 1916.

WELLER & LICHTENSTEIN,
Attorneys for Defendant.

Notice of Motion to Strike Out Portion of Answer, etc.

(Filed May 4, 1916.)

Gentlemen:

PLEASE TAKE NOTICE that we will move before Hon. Charles W. Parker, one of the Justices of the New Jersey Supreme Court at the County Court House, Jersey City, on Saturday, the 22nd day of April next, at 10 o'clock in the forenoon, or as soon thereafter as we can be heard, for an order striking out portions of the answer of the defendant in the above matter and for the determination of certain questions of law raised by certain of the separate defences set forth in said answer and for other relief as hereinafter set forth.

FIRST.—For an order striking out the third separate defence as stated in said answer on the following grounds:

1. Because said portion of said answer does not disclose any defence to the action alleged in the complaint.

2. Because it appears from the pleadings that the statute of limitations has not run adversely to any cause of action that may have accrued against the defendant.

3. Because the said defence is improperly pleaded in that it merely avers a conclusion of law and does not state facts showing the defence or specify the provisions of law providing for the limitations which it is claimed has run adversely to plaintiff's cause of action.

4. Because said defence is improperly pleaded in this case.

SECOND.—For an order determining the question of law raised by the fourth separate defence and

FIFTH SEPARATE DEFENCE.

Defendant will object at the trial of the above cause that this Court has no jurisdiction of the subject-matter of this suit in that if any cause of action arose by reason of the facts alleged in the Complaint, such action should have been brought in accordance with an act of the legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder." Approved April 4, 1911.

WELLER & LICHTENSTEIN,
Attorneys for Defendant.

We consent that the within answer be filed as of time.

PIERSON & SCHROEDER,
Attorneys for Plaintiff.

Answer,

(Filed April 6, 1916.)

Defendant, residing at 112 Maple Street, Weehawken, New Jersey, answering the complaint of the plaintiff, says that:

1. He admits paragraph 1.
2. He denies paragraph 2.
3. He denies paragraph 3.
4. He denies paragraph 4.
5. He denies paragraph 5.
6. He denies paragraph 6.
7. He denies paragraph 7.
8. He denies paragraph 8.
9. He denies paragraph 9.

FIRST SEPARATE DEFENCE.

Plaintiff was guilty of contributory negligence.

SECOND SEPARATE DEFENCE.

Plaintiff, at the time of his alleged injury, had left his regular place of employment without authority or direction from the defendant, and, negligently and without cause, placed himself in a position of danger.

THIRD SEPARATE DEFENCE.

The statute of limitations has run adversely to any cause of action that may have accrued against the defendant.

FOURTH SEPARATE DEFENCE.

Defendant will object at the trial of the above cause that the complaint discloses no cause of action against the defendant.

tal anguish because of said disfigurement and was prevented for a long time, that is to say, for five months, from performing any labor, and since that time has been unable to procure steady employment at his trade as shipsmith and has not been able and will not in the future be able to obtain nearly so much wages as formerly and will not be able in the future to continue the work of a shipsmith and will be deprived of wages which he might otherwise earn and is otherwise damnified.

Judgment will be claimed for damages as aforesaid in the sum of ten thousand dollars.

PIERSON & SCHROEDER,
Attorneys of Plaintiff.

I hereby deputize John Daly to serve the within Writ. Witness my hand and seal 3 day of March, 1916.

EUGENE F. KINKEAD,
Sheriff.
By Jas. H. Clark,
Under Sheriff.
(Seal)

Served within summons and complaint March 3/16, personally on the defendant William E. Stephens at foot of 17th Street, Hoboken.

EUGENE F. KINKEAD,
Sheriff.
By John Daly,
S. D. S.

The Court: I will say, Mr. Tiffany, that I will leave him answer the question and show what knowledge he has. Tell us, if you know, and can describe what this rudder was, how it was made up and so on and so forth; if you cannot and do not know, say so.

Witness: I should judge the body of the rudder was about ten feet long and about six feet wide.

Q. Now, the length of it consisted of what? A. That was without the shaft.

Q. This is the rudder part? A. This is the rudder part.

Q. The thing that the shaft was on there—how long is the shaft? A. Well, I should say the shaft was only about 8 or 10 feet.

Q. That is, counting from the head of the rudder to the top? A. Yes, in the neighborhood of that.

Q. So that the whole length of the shaft would be about how much? A. I should judge about 15 feet.

Q. How big around was the shaft? A. In the neighborhood of 6 inches around.

Q. By 6 inches around you mean 6 inches in diameter? A. 6 inches in diameter.

Q. This frame-work, what was the general shape of that frame-work? A. Square.

Q. That is, you mean the material? A. The material was square.

Q. How big square, as near as you can tell? A. In the neighborhood of 4 inches, 4½ inches.

Q. Now, this frame-work was fixed in what sort of shape? That is, the outline of the rudder, away from the shaft, was what sort of shape? A. Well, in the shape of a half moon, I guess. Of course, there is a square on the top and one on the bottom, but it would run naturally square so many feet

down; then it would start to curve in again at the bottom.

Q. That is, there were straight parts and then curves and then run straight again? A. Yes.

Q. And then curve and straight? A. Curved again at the bottom.

Q. What was put on this frame-work to come against the water? A. Two large plates of sheet iron.

Q. Were these plates removed when it was being repaired? A. They were taken off before they come to us.

Q. They did not come into the shop at all? A. No.

Q. What is your estimate of—

Mr. Tiffany: I object to his estimate.

Q. Do you know how much such a rudder, about how much such a rudder would weigh?

The Court: The question is, do you know? If you do not know, say so. If you don't know, say no.

A. Yes.

Q. I will ask you about the complete rudder, without the shaft and without that frame-work, just as it was and would have been, completed, after the welding had been done in that shop; what do you think that would have been? A. From 2½ to 3 tons.

Q. Now, just the part that was afterwards put into the crane, without the other part of the shaft, how much would that weigh? A. About 2 tons.

Q. Explain how this rudder was put into the

frame-work for these cranes? A. The rudder was fixed up with two strong arms, hung in links supported from the cranes.

Q. Where were these strong arms adjusted to the rudder? A. On the square part of the frame of the rudder.

Q. And what determined in what part of this square part of the frame these were put on? A. On the two ends, one on each end.

Q. Would that be pretty near the shaft or a little away from the shaft? A. Well, they were put in such a position that the rudder would have a balance in the welding.

Q. That is, so adjusted that it would practically be balanced? A. Yes.

Q. And then, as I understand it, one strong arm was put on each end of that square frame-work? A. Yes.

Q. Did you have a chance at any time during this day to see what strong arm was put on that rudder? A. No, I could not remember noticing anything.

Q. I mean, at any time during the day? A. No.

Q. Describe these strong arms as best you can? How many kinds were there generally of strong arms?

The Court: He has already stated that he did not see what strong arms were put on; he did not notice; so how is the description going to avail us?

Mr. Pierson: I will leave that question out for the present.

Q. Did you see this rigging being adjusted?

Mr. Tiffany: I object; it has already been answered. He said he did not.

The Court: I will give him another opportunity.

Mr. Pierson: I will withdraw the question.

Q. Did you know that a rigging was being adjusted to that rudder around noon-time that day? A. I did.

Q. How did you know that? A. Why, it was right alongside of me, where I was working.

Q. Had you anything to do with the adjusting of the rigging? A. No.

Q. Who was, as far as you can remember, doing the work, the actual work, physical work? A. The fixing of the whole rigging?

Q. Yes? A. I could not tell you.

Q. Did you see Mr. Stephens—

Mr. Tiffany: I object to the leading question.

The Court: The question is, did you see Mr. Stephens—what?

Q. Did you see Mr. Stephens about there in the machine shop while this rigging was being put on? A. Seen him in the blacksmith shop.

Q. What did you see him do there? A. Superintending the work.

Q. What work? A. Fixing of the rigging.

Q. Was that among his duties, to do such work? A. Yes.

Q. Was he there, if you know, during all the time that this rigging was being adjusted? A. I should say so.

The Court: Well, do you know? That is the question. Have you in mind, when

I ask you that question, Mr. Witness, what you said before, that you did not pay attention, as I understand you, to the adjustment or placing of this rigging upon this rudder? You see, you are only to answer as you may have knowledge.

With that in mind, read the question, and answer it, after what I have said to you.

A. Yes, he was there.

Q. How far, actually, were you away from where this work on the rudder was being done? A. From 4 to 5 feet.

Q. Were there any forges between your forge and the forge that this rudder was being worked at? A. No.

Q. Did Mr. Stephens stay around after this rigging was put on? A. Yes.

Q. You mean, all around, he was, in the machine shop? A. In the blacksmith shop.

Q. How long after? A. An hour or so.

Q. Was he there at the time of the injury that you were going to tell about? A. No.

Q. Now, what was done to this rudder frame after this rigging had been put on? Tell what you saw; not what you don't know. What you saw as you were working at the other forge? A. Well, it was taken to the fire and they started to work on it, getting the end warm, ready to work on it.

Q. How many welds were necessary to fix that?

Mr. Tiffany: I think, if the Court please, this man is not competent to testify to those things, because he has already testified that he did not work on it; it was not his duty, and that he did not pay any attention to

the rigging of the rudder; did not take part in it.

Mr. Pierson: He said he helped bring it in.

The Court: As to work being done upon this particular rudder?

Mr. Pierson: Yes, sir.

The Court: Having in mind what that question imparts to you, Mr. Witness, you are only to tell us what you saw, not what you think should have been done or in the ordinary course of events would have been done, but the question to you now is, what if anything you saw was being done to this rudder. What you did not see done, you cannot tell.

A. Well, what I seen was putting in the fire to get it hot.

Q. What is the usual process in making a welding of this kind?

Mr. Tiffany: I object to that. He says his business is that of blacksmithing. Did you ask him if he knows?

The Court: That is, as to whether or not that class of work was within the line of his work, and with which he is familiar.

Mr. Pierson: I am asking this of course to help clear the subsequent explanation; that is all. I think it will appear perfectly competent later, and that it will make the record clear. He has already testified that he has been in that business for 20 years. I will ask about this particular line of work and withdraw the question temporarily.

Q. Have you ever done work upon ship rudders of this general character? A. I have.

Q. During how long a period of time? A. During the last 12 years.

Q. What has that work consisted of? A. From rudders down.

Q. I mean on rudders particularly; what line of work have you made weldings of this kind on? A. Made them complete.

Q. Complete rudders? A. Complete rudders.

The Court: Now, Mr. Tiffany, is there any objection?

Mr. Tiffany: None whatever.

Q. Describe the process of making such a welding as was called for on this occasion? Describe it briefly and generally? A. On a weld that way, why it has to be pounded up to make the substance a little heavier, so that there won't be waste in the heating; and then it has got to be put in shape so the two pieces will come together, and then the whole thing is put in the fire and heated all over and brought out and pounded together.

Q. Before it is put in shape, is it heated? A. Is it what?

Q. Before it is put in shape, as you say, is it heated? A. Oh, sure.

Q. Softened? So that for that purpose it was put in the fire? A. Yes.

Q. I think that you have described that this hung in cranes and put in the fire in that way? A. Yes, carried to the fire in the crane.

Q. Brought out in the same way? A. Yes, brought out in the same way.

Q. Now, how is this setting up, or this handling

of the ends done? What is the method of doing that? A. That arm?

Q. Describe this arm? A. The arm is hung on a thing that carries it horizontally with the piece that you are going to use it on, and then it has to be pulled backward and forth, and when they pull it back, they let it go and that pounds on the end of the shaft.

The Court: It isn't contended that this thing happened in this operation that you have described?

Mr. Pierson: Yes, that is the very next.

The Court: It is very interesting to hear all these things, but it doesn't apply to the situation.

Mr. Pierson: It seems to me that it may not be necessary, but we did feel that in order to understand the facts on this crucial point, it should be gone into in minute detail.

The Court: All right.

Q. Now, how about the number of men that it takes to take this arm out and so on, as compared with the number it would take to rig it for instance? A. Well, the operating would take about 8 or 10 men.

Q. How many were working around the rigging if you know, on that day?

Mr. Tiffany: I object to this. The witness did not disclose anything about the lack of men necessary to do this work.

The Court: Don't let us waste time, Mr. Pierson. I am depending upon counsel not

to spend any time that can be avoided. It makes no difference to me, gentlemen, but it makes a difference to your colleagues at the bar, because it may probably prevent them from having a trial. Let us be working to that end.

Q. Did you have anything to do with this phase of the work that you have been now describing, taking it out of the fire and welding it up? A. I was holding the end of the rudder.

Q. How did you come to be holding the end of the rudder? A. I was called upon to give a hand.

Q. And you were called on by whom?

Mr. Tiffany: I object unless they show that the man that called upon him had the right to call upon him.

The Court: We will come to that.

A. By the blacksmith that had charge of the work.

The Court: Who was he; what was his name if you know?

Witness: Thompson—Mr. Thompson.

Q. What was the practice in this shop and other shops about men having a heavy job calling upon other men?

Mr. Tiffany: I think that the other shops—

The Court: The other shops are of no consequence.

Q. Well, in this shop?

The Court: In this shop, was there a practice?

Witness: Yes, there was.

The Court: What was it?

Witness: When a man is ready to come out with it, he has got to have help on it quick, and get the work done, while the stuff is hot.

Q. What is the custom about the men being called upon, naturally help in such work? A. Well, if they see that a man wants any, they go and give him a hand.

Q. State whether or not that is part of the duty of the men? A. That is a part of the business.

Q. What had you been doing prior to that, just prior to that? A. Making a bushing.

Q. What was the state of that work at that time? A. Of what work?

Q. Of the bushing that you were forging? A. Practically being finished.

Q. Well, what was the next process? A. Well, had to take another heat on it.

Q. How long did that take? A. In the neighborhood of half an hour.

Q. And what would you have to do while that was being heated? A. Stand up and wait.

Q. State what you did while you were helping with this ramming up? A. I held the back of the rudder.

Q. And by the back you mean the end opposite? A. The end opposite to where the ramming was.

Q. How were you holding? A. Against the rudder.

Q. Pushing it toward the ramming? A. Pushing it toward the ramming; that is, holding it against the ram.

Q. Were you told to do anything while you were there holding? A. Yes.

The Court: By whom?

Q. By whom? A. By the blacksmith.

Mr. Tiffany: I submit that it was not in the presence of the defendant, and we are not to be bound by it.

The Court: He has gone so far as to show that there was a custom in the shop; that is, to show that there was an order or direction given to this plaintiff by some person. The question or rather, the answer to the question by the plaintiff is to show that the person had authority to give, and on this plaintiff was the duty to take it. That is the way I understand it. I will leave the question be answered for the present. Whether or not it is connected up properly will be another question.

Mr. Tiffany: Subject to my motion to strike out?

The Court: Yes.

A. By the blacksmith.

Q. What was that? What did you do as a result of that direction?

Mr. Pierson: I will eliminate the hearsay, if it is such.

The Court: What did you do as the result of what directions were given to you? A. I lowered the rudder, for the pounding by the crane.

Q. How was that raised and lowered, by what sort of contrivance? A. By a guide chain hanging perpendicular with a chain that way (illustrating), holding the rudder.

Q. How close were these guide chains to the chain that was holding the rudder? A. Laid practically alongside of it all the way down.

Q. Now describe what happened at that time? A. I was lowering the rudder down; the blacksmith wanted it lowered down on the anvil to cut the piece out; I was lowering it down when the strong arm gave way and the rudder fell to the floor and my hands were caught in the chain.

Q. What part of the chain? Which chain, I mean? A. Why, the chain that was holding the strong arm.

Q. How big was the length of that chain? A. About an inch and a quarter round; an inch and a quarter in diameter, you know.

Q. Heavy chain? A. Yes.

Q. Where were you caught? I don't mean by what. What part of your body was caught? A. Well, I was caught in this way (illustrating), in the shape of a vise.

Q. How long were you so caught before you were released, as near as you can tell? A. Why, two or three, three or four minutes.

Q. How did you get loose? A. One of the men had to lower the whole weight of the rudder from the end.

Q. What were you doing while that was being done? A. Standing there.

Q. What did you notice, if anything, at that time? A. I noticed the shape of the strong arm that was on the rudder.

Q. What strong arm was on that rudder? A. In the shape of a V.

Q. How many kinds of strong arms are there? A. Well, two.

Q. Now, describe first the one that was used on this occasion? A. The one that was used on this occasion, before the accident was in the shape of a V; it is only natural to get the squares of the material on the rudder. There was nothing ripping, only the four corners of the squares.

Q. You say that this long part, the shaft or the handle—what would you call that? Have you any name for that in your business? A. Any what?

Q. This shaft part that was in the length? A. Well, that is the strong arm.

Q. That is the arm? A. That is the arm.

Q. You call that the arm? A. That is the arm.

Q. Then at the end of that, the arm was Y shaped, two sides of an angle? A. Yes.

Q. So that it formed a Y? A. Yes.

Q. And then meeting that—

Mr. Tiffany: I think you had better let him tell us.

Mr. Pierson: Well, I have crude models here, that are not drawn to a scale.

Mr. Tiffany: Then I object to them.

Mr. Pierson: I don't know that I can use them.

The Court: If the witness is familiar with the apparatus, can he not describe it to us?

Mr. Pierson: I suppose he can; but it is pretty hard.

The Court: Ask him to describe it as best he can. First, how long was the so-called strong arm? Describe it to the jury. What was it? What was its shape or form and how was it adjusted to the rudder?

Witness: The strong arms are adjusted to the rudder by two halves, in the shape of a Y, with an arm here and on the other side it came down and then this (indicating) was bolted up; that is, bolted good and tight so that the cranes may swing them up or down and twisted wherever they want to put it. It is iron against iron.

Q. Those pieces, whatever they were, when they came together, made a square, did they not, practically a square when they came together? A. Practically square.

Q. Why weren't those put on so that they were right square against the square shaft? A. Because they wouldn't be parallel with the rudder.

Q. That is the cause of this Y shape, if they had to go on the square like that? A. The arm would be sticking out at the end.

Q. Would be at an angle with the rudder? A. Yes.

Q. And in order to make it hot, they had to put it in so that the square of the shaft hit the middle or one side? A. Held it on four corners.

Q. Something like that (illustrating)?

Mr. Tiffany: I think I object, if the Court please. I do not think that is fair. I object to counsel doing that.

The Court: The objection is well taken. You ought to ask the witness.

Mr. Pierson: I only want to get it clear. I don't want to take any undue advantage.

Q. There are how many points of contact, then, between the shaft in that position and the strong arm, from iron to iron? A. Four points.

Q. Do they sometimes help these to hold in some other way? A. Yes, if they use them, they sometimes put wooden wedges in there.

Q. What is the special use of that particular kind of strong arm that you have now described? A. The proper strong arm would be in the shape of a T.

The Court: Will you ask that question again?

(Question read.)

A. In the shape of a T.

Q. How about the material? A. Round material.

Q. What is the proper kind of strong arm for work of this kind where the material is square? Where the axis is horizontal with the plane of the rudder—that is, as in this case—describe that sort of a strong arm? A. It would be in the shape of a T.

Q. That is, the— A. The arm would be like that (illustrating); there would be a straight surface with the plate bolted on the other side; when you bolt those together there is nothing can slip.

Q. How would the bolts be? What would determine the distance apart of the bolts? A. What would what?

Q. What would determine the distance apart of the bolts? How would that compare with the size of the shaft that was put into it? A. Well, you would have to make your hose to fit, or make the hose fit the size of the material.

Q. Then there would be two of those surfaces right up against the two sides? A. Yes.

Q. With the bolts close against the other side? A. Yes.

Q. With your 20 years of experience in blacksmithing, and your experience with welding and making rudders and so on, do you consider that the strong arm that was used in that particular instance was the proper one for that purpose? A. No, it was not.

Q. Have you any other reasons than those—what are your reasons? A. Why, they wasn't working five minutes on the rudder when the thing slipped.

Q. What I want to know is, why is it likely to slip? A. Because it hasn't the proper grip.

Q. What is the custom in this shop about the cutting of an appliance, such appliances as are necessary for the work that you are to do? A. Well, if you haven't got what you need, you have to make them.

Q. Are there people for that purpose, for the purpose of making appliances, tools and so on? A. Yes, sir.

Q. After these four or five minutes you say that you were there, they got you loose, did they? A. Yes.

Q. Where did you go to next? Where were you taken for treatment? A. Well, I was taken to the office until they got an ambulance, and then I was naturally taken to the hospital.

Q. How long were you in the hospital? A. Well, all told, I guess I was there from 10 to 12 weeks.

Q. What was the condition of your right hand before this accident? A. Good.

Q. Anything wrong with your hand? A. Nothing at all.

Q. And thumb? What was done to your hand in the hospital as a result of this injury? A. Well, had two or three bones besides the thumb taken away from it.

Q. What about the pain that you had during that time? A. Well, I had blood passing, I guess, for ten days; besides I was strapped in bed for such a time that I had to—I was very feverish.

Q. You say you were strapped in bed? A. I was held in bed, yes.

Q. Why was that? A. Well, I suppose I was—

Mr. Tiffany: I object to suppose.

Q. Yes; if you don't know don't tell us. A. I wasn't in condition to know the why or wherefor.

Q. How long did that condition last? A. A matter of a week or ten days.

Q. That was because of what? A. Because of this hand, the accident.

Q. Any particular development of the accident? A. Blood poisoning.

Q. How long was that before you were able to do any work? That is, any regular work, holding a position? A. Five to six months.

Q. What were at that time the wages of a blacksmith doing the lighter sort of work, of a ship's blacksmith? A. At that place?

Q. Well, yes, at that place? A. $4.05.

The Court: $4.05 per day?

Witness: $4.05 per day, at that place.

Q. For how many hours? A. Nine hours.

Q. Nine hours' work; what was the rate for over time? A. Double time.

Q. Double time for over time? What did the men that did the heavy blacksmithing work at that place get at that time? A. All the same rate.

Q. All the same rate throughout? A. Yes.

Q. How does the price of work at this shop compare with the price of work at other shops? A. A great deal of difference.

Q. What is the nature of that difference? A. Well, the shops that I have been working in, have paid from $4.25 to $7.00 a day.

Q. $4.25 for what kind of work? A. Same, ship work.

Q. That is for a blacksmith that is you are talking about now, is it not? A. Yes.

Q. $4.25 for— A. Eight hours.

Q. For 8 hours? A. For 8 hours.

Q. For what grade of work? A. For light work.

Q. How much is it for the heaviest work? A. Runs up to $7.00.

Q. About the time, or at the time I will put it, that this injury occurred, what were your average weekly wages? A. About $24.00 a week.

The Court: At the time of the happening?
Witness: At the time of the accident, yes.

Q. Is there any reason why they should have been diminished for the next five or six months, if there had been no accident? A. Certainly not.

Q. Now, when you went back to work again, where did you go? A. Back to the same shop.

Q. And you continued there for about how long? A. In the neighborhood of 10 months, I guess.

Q. What do you find now about the use of your hand compared with the use you had before? A. Well, I find this, I find that I could not get along as well as I could before; not half as good.

The Court: Tell us, Mr. Witness—that is the reason for this question—in what respect don't you?

Witness: Well, I miss more than 75 per cent. of my hand.

Q. How does that inconvenience you, if you have to use it, that makes it difficult for you to do the work? A. Well, the hammer of course is the main thing.

Q. How must you hold the hammer now? A. Well,—

The Court: Suppose that this (indicating) was the hammer?

A. Yes (illustrating).

Q. Are you right-handed of left-handed? A. I am right-handed.

The Court: Take hold of the big end of it.

Witness: (Illustrating.)

Mr. Pierson: I think I will ask the witness at this time, probably, to let the jury see the hand.

The Court: Well, go ahead, Mr. Pierson, with any other testimony that you have, and then as he retires from the stand, he may show them. Wouldn't that be just as well?

Mr. Pierson: Yes, if I don't forget it.

Q. Were you able to do, when you went back there for those ten months or whatever it was, the same kind of work that you were doing before, as well as you were doing it before? A. No.

Q. Were you able to do the same kind of work? A. No.

Q. Did you testify—the fact is that you got the same wages when you went back? A. I did.

The Court: That is testified to, that he got the same wages.

Q. After those 10 months, what did you do then? Why did you leave? A. I was laid off.

Q. I want to ask you another thing. Was there considerable extra work in connection with the work around the dry dock shop? A. There was what?

Q. Considerable overtime work, I mean? A. No, nothing extra.

Q. Is there any reason why there is more over time work around a dry dock, for instance, than there might be around some other plant with reference to the amount of work and so on?

Mr. Tiffany: I object to that.

The Court: Isn't that already in, Mr. Pierson, what he has already said? The previous question was was there any overtime work in that class of work, which I understood him to say there was not, is that correct?

Witness: No, there is not so much there.

The Court: That is what I understood him to say. Therefore it seems that the other question is not necessary.

Q. After you were laid off, what took place? After you were laid off, state what took place with reference to getting employment? A. Well, I had a hard time getting work; walked around for several weeks.

Q. How many weeks, as near as you can tell? A. Two or three.

Q. How many places did you try, can you remember? A. A good many places.

Q. In what locality? A. In the port of New York, and outside of the port of New York.

Q. Wherever around New York there were ship building dry docks? A. Yes, sir.

Q. What was the demand for labor at that time? A. Good.

Q. Were any reason assigned why you could not get employment by the people whom you asked? A. They said they wouldn't—

Mr. Tiffany: I object.

Mr. Pierson: The reasons assigned may not be the reason of course. But the plaintiff, if entitled at all, is entitled to compensation, not only for the loss of wages but for humiliation of the probability of not being able to get employment. The jury must take all those things into consideration—the very fact that he has something to make it easy to turn him down, seems to me must be taken into consideration.

The Court: Well, the trouble is that if we go into that line of testimony, it opens a very wide field. We should have to go into the ways and wherefores of each and every instance he was turned down.

Mr. Pierson: Well, I will show that we have repeatedly tried for three weeks before we got a job.

Q. Had, before this injury, you had such trouble finding positions when times for labor were good? A. No.

Q. Have you ever encountered like trouble before under such circumstances, except after the injury? A. No.

Q. Where did you next become employed?

The Court: Where were you next employed, the question is.

A. Greeley, Halliday & Co.

Q. Where is that? A. South Street, New York.

Q. How long did you stay there? A. Two or three weeks.

Q. What happened then? A. Laid off.

Q. How were you in the habit of doing your work? Did you have your hands protected in any way? A. Usually wear a glove.

Q. When you were employed there, do you know whether or not they knew your thumb was off?

Mr. Tiffany: I don't see that that is material.

Mr. Pierson: I ask if he knows. If he does not know, he can say.

The Court: If he says he does not, that is the end of it. The question is, do you know?

A. At that place, yes.

Q. They knew that. Now, do you know why you were laid off? If you don't say so? A. Well, the work got quiet and I was the one to be dropped until it started up again.

Q. Was that a big place or small place? A. It is the same kind of a place as Tietjen & Lang Dry Dock.

Q. Then how long was it before you got another position? A. A week or so. Well, I went back there for a week.

The Court: Back to the same place?

Witness: Back to the same place, yes.

The Court: After you were laid off, then how long were you there?

Q. How long did you stay then? A. About a week or so.

Q. Were you laid off then for the same reason? A. Yes.

Q. How many men would be laid off when you were laid off?

The Court: Is that of any consequence? He said he was laid off because of slack work.

How many men?

Witness: No more.

Q. You were the only one that was laid off? A. Yes.

Q. Did you go back there again? A. No.

Q. Where did you go then, if you remember? A. I could not remember.

Q. Do you remember how long you were without employment at that time? A. I was out quite a while.

Q. What efforts did you make at that time to get employment? A. Why, I was sent to different positions, but they would not hire me.

Q. Places where there was a vacancy for a ship's smith? A. Yes.

Q. Can you tell what portion of the time since you left Tietjen & Lang you have been out of a position?

Mr. Tiffany: I object to the form of the question. He has already testified he was laid off for lack of work in one place. I sub-

mit that we are not to be charged with lack of work.

The Court: The real question is, what length of time, if any, there has been that he was without work because of his inability to work because of the injury.

Q. Fix, as near as you can, the amount of time you have been idle since you left Tietjen & Lang Dry Dock, the last time?

Mr. Tiffany: I think that is objectionable, as near as he can fix it.

Mr. Pierson: I will withdraw the question and try to get it in more complete shape.

Q. You have said that you do not remember now where you next went after you left this Greeley place. How long was it as near as you can fix the time, before you then got another position? A. I should say a week or so.

Q. Do you remember how long you stayed at that next place? A. About a month or five weeks.

Q. What happened then? A. Laid off.

The Court: After that, do you remember where you went, where you were next employed?

Witness: Yes.

The Court: Where was that?

Witness: The dry docks.

The Court: How long after this occasion when you were last laid off was it that you got this position that you were speaking of?

Witness: I was out then about a week or ten days.

The Court: And this third job that we are last speaking of, how long did you remain there?

Witness: Ten weeks.

The Court: And what happened?

Witness: Laid off.

The Court: Got another position?

Witness: After a while, yes.

The Court: How long afterwards?

Witness: About ten days.

Q. Where was that position? A. Brooklyn.

The Court: How long did you hold that?

Witness: Well, about a week or so.

The Court: And then what happened?

Witness: Was out again.

The Court: For how long?

Witness: Another week.

The Court: And then what?

Witness: Came back to work again.

The Court: In the same place?

Witness: No.

The Court: Another place?

Witness: Yes.

The Court: How long were you there?

Witness: I am there up to the present.

Q. How long has that been about? A. Two months.

Q. For the last year or year and a half, what has been the demand for ship's smiths? A. Very good.

Q. Can you explain why it has been very good? A. The largest part of the shipping is repaired on this side now, where it used to be repaired on the other side.

Q. What effect has that had upon the ease of getting a position? A. Well, it has helped me considerably.

Q. It would help anybody out of a position, would it? A. Yes, it has helped old men 90 years of age.

Q. Do you know of cases where men who have been out of employment for age, have been taken back? A. Yes, I do.

Q. Has your hand developed strength, these fingers, so that you can use a hammer better? What is your experience as to that? A. My experience is that it is not as strong to-day as it was 12 months ago.

Q. How do you explain that? A. Well, I think I have—

Mr. Tiffany: I object, if the Court please. I do not think this man is qualified to explain.

The Court: To give a reason for it—I do not think he is.

I will hear the answer. I may strike it out. I do not quite see how it can help us. I will let him answer the question.

You said that you did not have the same strength in the four fingers of your right hand that you had 12 months ago, something of that sort?

Witness: That is right.

The Court: You are asked to explain that; explain what you mean by that?

Witness: I think I have overworked the hand; I strained it too much.

Q. Compared with the ease with which you did the work before the accident, what is your experience?

Mr. Tiffany: I move to strike the answer out, if the Court please, as suppository on the part of this witness. I do not think it is proper evidence to go before any jury.

The Court: I will reserve my judgment as to striking it out, Mr. Tiffany, until I have heard it all.

Now, Mr. Witness, the ease or effort with which you carried on your line of work before this thing happened to you, having in mind now the ease or the effort with which you do the same kind of work, you are asked to describe to the jury what the difference is if any? Do you understand what we are reaching for?

Witness: Yes. There is a big difference in it.

The Court: That don't mean anything to us, Mr. Witness. Tell us what you mean by a big difference.

Witness: Well, the part of the hand that we use, that is required to be used in our business, is gone.

Q. Now, explain why that is so? A. That hand is like a Stilson wrench; if you have the back shot off, you could not turn a nut with it, and I could not hold the handle there of a hammer or anything else in the same manner as I could with the thumb and the bone there.

Q. Have you experienced any effect from continuing work—that is by feeling? A. I do.

Q. Describe the condition? A. The hand swells up occasionally and I have to take things easy to let it go back in its natural position again.

Q. What line of work, compared with the weight

of the work, have you been doing in this last place where you have been employed? A. Very light work.

Q. What do they pay there for that light work? A. $4.25.

Q. For how many hours? A. Eight hours.

Q. What do they pay for the heavy work? A. Seven dollars.

Mr. Tiffany: I do not think that is material. This man don't do heavy work. We did not employ him on heavy work. That is not his line of work.

The Court. I understand he has stated that he has done both classes of work.

Mr. Tiffany: If that is so, I will withdraw the objection.

The Court: What is the fact about that, Mr. Churchill. During your employment as ship's blacksmith, did you do both classes of work at any time or have you been devoting yourself exclusively to the lighter work throughout your experience?

Witness: Mostly heavy.

The Court: Mostly heavy work?

Witness: Yes.

Q. What is your weight? What was your weight about the time of the injury? A. About 190.

Q. Do you know how tall you are? A. About 5 feet 11.

Mr. Tiffany: I want to get on the record that he is a man of strong physique; that he could do heavy work; that he is doing light work because he is injured.

The Court: He has answered the question; 5 feet 11, and 190 pounds in weight.

Q. Did you consider yourself, before the accident, in every particular a strong man? A. Good.

Q. Strong in proportion to your weight and height? A. Yes.

Q. Is there a vacancy in this place where you now are for a ship's blacksmith for heavy work? A. Is there what?

Q. Is there a demand in your place where you now are for a ship's blacksmith for this heavy work? A. No; they are filled up there.

Q. Filled up with all kinds of work? A. Yes.

Q. Could you do heavy blacksmithing or hold down a job that required heavy work? A. Not now, I could not.

Q. Are you able to do what you consider a full man's work at the light work which you are doing? A. No, I do not.

Q. Is there any pain in your hand at any time? A. Mostly all the time.

Q. Where is that? Can you indicate the part? A. Yes, the wrist.

Q. Have you applied for any positions since this injury that required physical examinations? A. I have.

Q. Where were those? A. Navy yard for one.

Q. Where was the other? A. The navy yard and the city department.

Q. What line of work in the city department? A. Well, it is general work, what we call general blacksmithing.

Q. What department of the city was it? A. Well, of course, you don't know what department you would go before they would send you. You put in an application; they might need you in one department.

Q. Did you apply for any other positions that re-

quired physical examinations or physical tests? A. Yes, I applied for instructor in a school.

Q. In what school was that? A. Stuyvesant High School.

Q. Did you take a mental test in these places, any of them? A. No.

Q. That is, I mean, tests as to— A. Technical matters—

Q. As to knowledge? A. Yes, in the school.

Q. Written test? A. Written test.

Q. In the school? A. Yes.

Q. Did you in any of the other places? A. No.

Q. What was the result?

Mr. Tiffany: I object to that. The best evidence is the record of such test.

The Court: I suppose that is so, Mr. Pierson.

Mr. Pierson: I am only going to ask him whether or not he passed the written test.

The Court: Doesn't it go to the same point?

Mr. Pierson. I don't think so. We don't have to carry our diplomas around to show that we have passed the bar examination and produce the bar examination to show what our papers have marked on. We ask a man if he is admitted.

The Court: To what test is this question directed?

Q. Did you take a written test for the Stuyvesant High School position? A. Yes.

Q. State whether or not you passed the written test?

The Court: The first question is, do you know whether you passed or not, and then

how he got his knowledge. It may be entirely hearsay.

Q. Well, do you know whether or not you passed the written test? A. By word from the principal.

Mr. Tiffany: Then I object to the asking of the question.

The Court: That would come in the line of hearsay, Mr. Pierson.

Q. Did you undertake the physical test? A. I did.

Q. Now, just state what happened when you were taking that test? Not whether or not you passed, but what you did? A. I was called on to make certain tools, articles that they had before you, and during the operation I had to use a hammer there that wasn't the right kind for my hand, and the result was that I had a blood blister in about five minutes and I had my hand covered with blood and I was turned down on account of—

Q. What happened that made your hand covered with blood? A. Well, I was gripping a hammer so tight that it caused a blood blister.

Q. Well, what caused the blood?

The Court: The break of the blister, I suppose?

Witness: Yes.

Mr. Pierson: That is the natural inference, but I wanted that out, how it was caused.

Q. Did you take a physical test at the Navy Yard? A. No.

Q. Why not, if you know? A. I was told before I went up—

Mr. Tiffany: I object to what you was told.

Mr. Pierson: I withdraw the question.

Q. Now, coming back again to Mr.—what was the duty of Mr. Stephens in this shop, if you know? Do you know what his duties were there as foremen of the smith shop? A. Superintendent of the work.

The Court: Yes or no, do you know what his duties were?

Witness: Yes.

Q. State what his duties were? A. Well, to give us the work; see that it was made properly and send it out on the different jobs.

Q. Did he have authority—

Mr. Tiffany: I object to your leading, Mr. Pierson. He has already testified as to what the different men's duties were; said he knew; I submit that binds.

Q. What was the duty of the men employed there relative to the obeying or not obeying of the directions of Mr. Stephens? A. Well, if you did not do what he told you, you would get fired.

Q. Well, in your opinion, will you be able to continue in the future, the work of a ship blacksmith? A. No, I do not.

Q. Why not? A. On account of my hand.

Q. In what particular? A. Well, I could not get the work out as quick as I was able to, and

another reason is that I have too much pain. When I am working I have just continual pain, similar to a tooth-ache, or like a sprained wrist.

Cross Examination by Mr. Tiffany:

Q. How old are you, Mr. Churchill? A. 37.

Q. This accident happened on the 4th day of March, 1914; you brought this action on the 2nd of March, 1916? A. Yes.

Q. You say you had been working 22 years prior to the time you were hurt? A. Not prior; that was all told, 22.

Q. Then you were about 15 years of age when you began to work as a ship blacksmith? A. Yes.

Q. Served your apprenticeship? A. Yes, sir.

Q. In that time I understand that you worked in ship-building places and construction places for a period of about 11 years? A. Eleven or twelve years.

Q. During that time you engaged in welding, things of that kind? A. Yes.

Q. You were perfectly familiar with all that kind of work, is that true? A. Yes.

Q. Familiar with the placing of these braces, these strong arms, on materials that are to be welded? A. Yes.

Q. And they place one on each end, do they not—in this particular case, they placed one on each end? A. Yes.

Q. And then attached to the crane that ran above, so that, as you say, it gave the rudder a perfect balance? A. Yes.

Q. So that it could move around for the purpose of letting it in and out the fire? A. Yes.

Q. You are a Union man? A. Yes.

Q. Blacksmith? A. Yes.

Q. Furnished with helpers? A. Yes.

Q. The other blacksmiths are all furnished with helpers? A. Yes.

Q. How many men were working on this rudder at the time it was put in the fire for welding, heated? A. At the time it was put in the fire for welding?

Q. Put in the fire to get heated, before they rammed it? A. What do you mean, all the men that worked on the job?

Q. How many men worked on the rudder? Who was the blacksmith in charge of that job? A. Thompson.

Q. In charge of the rudder job? A. At that time?

Q. At that time in charge of the job? A. Mr. Stephens.

Q. Was Mr. Stephens in the shop? A. When the rudder was put in the fire?

Q. Yes? A. I think so.

Q. Do you know? A. I would not be positive.

Q. Don't you know that he was not there, that he had gone out on the dock? A. I could not say if he was out that time.

Q. Well, will you swear that he was not in the shop? A. No, I could not swear that he was not.

Q. As a matter of fact, you don't know where he was at that time? A. At that particular time, no.

Q. I understand you were making a bushing with your helper; how many helpers did you have? A. One.

Q. What was his name? A. Rudd.

Q. Is he here this morning? A. Yes, he is here.

Q. How many men were working on this rudder at the time it was being fixed?

Mr. Pierson: I think this is pretty indefinite.

Q. What time did the accident happen, Mr. Churchill? A. In the neighborhood of a quarter to four, I think.

Q. And this rudder was then put in the crane about noon? A. Around noon time.

Q. And they worked on it continuously until about a quarter to four? A. Yes.

Q. How long before your hand was caught, was it that you first went over to the rudder? A. I helped to pull the rudder in.

Q. Very possibly. A. I helped to pull the rudder in.

Q. Did you testify on direct examination that you did not? A. No.

Q. That you did not notice anything, that it was not your job and you were not paying any attention to it? A. At the time the rigging was fixed.

Q. At the time that they brought it in? A. No.

Q. That was not your testimony? A. No, I helped to fetch it in.

Q. Who was there at the time the rudder was brought in? Who brought it in besides yourself and your foreman? A. Most everyone in the shop.

Q. Can you mention them by name? A. No, I could not.

Q. How many men were on the fire of this job? A. There must have been a dozen or fourteen.

Q. One man and helper in a fire? A. No, some fires has two helpers.

Q. Were all the fires going? A. I believe so.

Q. How many fires were in the shop—nine, I think you said, didn't you? A. Yes.

Q. Is that right? A. Nine.

Q. That would be about twenty some men in the shop; that is, if some men had more than two helpers? A. No, there was one fire that was not going.

Q. Why did you say a minute ago that there were nine? Are you certain, Mr. Churchill, just what took place at the time the rudder was brought in? A. Am I certain what time I was there?

Q. Do you know what took place or what was there at the time this rudder was brought in from the outside? A. I know that I had to give a hand myself.

Q. That is all that you know? A. Yes.

Q. That you had to give a hand. Who told you to give a hand? A. Mr. Stephens.

Q. Mr. Stephens himself? A. Yes.

Q. And that was at noon? A. Around noon time, yes.

Q. Then you went back to your fire and worked on whatever work you were doing? A. Yes.

Q. Until about what time? A. Up to the time that the rudder was brought up to the fire.

Q. What time was that? A. In the neighborhood of—

Q. Do you remember putting it in the fire? A. No.

Q. How long was it in the fire, 15 or 20 minutes, half an hour? A. No, it was more than that. It takes some times half an hour to build one of those fires for the job.

Q. Now, when they are swinging this rudder and it is on this crane, there is a chain running parallel with the crane, a chain on each end, on each strong arm? A. Yes.

Q. And there is a man on each one of these chains? A. Oh, yes, there has to be someone.

Q. He is known as a chain man? A. Never seen a chain man there yet.

Q. You never heard of a chain man? A. Not a chain man.

Q. Aren't there men operating those chains? A. I was operating one on this end.

Q. Who was operating the one on the other end? A. I don't know.

Q. You want us to believe that you were operating that chain? A. I operated that chain.

Q. Wasn't it a helper's job? A. Anyone's job that was there.

Q. Anybody could do that? A. Anybody would have to do it.

Q. Who told you to do t? A. I was called over there.

Q. Who called you over? A. The blacksmith that was taking charge.

Q. Who was the blacksmith? A. Thompson.

Q. He is here this morning? A. Yes, Thompson is here.

Q. He is the foreman when Stephens is away? A. Oh, I don't know about being a foreman.

Q. Who is in charge when Stephens isn't about? A. Everyone has charge of his work.

Q. Well, who has charge of all the work when Stephens isn't around? A. I have never known Stephens to be out of there.

Q. You have never known him to be out of that shop? A. No.

Q. Didn't you testify that you knew his duties, a part of his duties were to go out of the shop? A. No, I did not.

Q. You did not testify to that? A. No.

Q. If you did, you are mistaken? A. I did not testify.

Q. Now, just tell us what are the duties of Mr. Stephens? A. To supervise the making of the forges connected with the jobs.

Q. And stay in the shop? A. Goes up to the different men to see that it is straight, and so forth.

Q. Now, Mr. Churchill, these plates that are fixed to the ends have an arm that goes out like that (illustrating)? A. Yes.

Q. On the end of that arm there is what? A. Which end do you mean?

Q. The end of the arm extends away from the end of the rudder; what is on the end here (indicating)? A. A nut, I guess, to keep the crane from slipping off.

Q. Something like that (illustrating)? A. You mean what goes against the rudder?

Q. No—o— A. The other end of it?

Q. The other end. Here (illustrating) is the rudder? A. Yes.

Q. And that (indicating) is the end of the arm? A. Yes.

Q. There is a large nut here (indicating) to keep the crane chain that goes around here from slipping off? A. Slipping off; just so.

Q. The chain that goes around that arm has about an inch link? A. An inch and a quarter.

Q. Do I understand you mean in diameter? A. In diameter.

Q. Rather heavy links? A. Very heavy.

Q. What distance is there between the rudder and this nut out here (indicating), about how many inches? A. 18 inches.

Q. Do you know why there is 18 inches there? A. Well, the nut is probably for to give more play.

Q. Play to what? A. Made of what?

Q. Play to what? A. In case you want to move it.

Q. Do you mean so that the chain that goes through the crane arm can move back and forth as they move the rudder one way or swing it down the other, to give the chain play? A. That is right.

Q. Is that the fact? A. That is the fact.

Q. Have you ever had anything to do with the fastening of those arms on to pieces of metal, prior to their being in suspension from the crane? Have you ever done that kind of work? A. I have.

Q. Do you know how it is used? A. I do.

Q. Do you know how they ought to be put on? A. Yes.

Q. You put them on yourself? Were you there when they put this on? A. I was working there.

Q. Did you see them put that on? A. No, I did not.

Q. When you were there, did you look at the arm? A. No, I did not pay any attention to the arm.

Q. You did not pay any attention to it? A. No.

Q. But you operated, I understand, a chain? A. Operated a chain.

Q. That is a windless chain? You can stand away from it as it is moved? A. Yes.

Q. Either to lower or raise the thing; when it has been lowered, this chain will be against the rudder, and if they lower it, it slips up to the nut which is there to keep it on, that is a fact? A. That is if you lower it that much.

Q. That is the purpose of that nut there? A. Yes.

Q. So that the chain, when they do lower one end, will bang up against that nut and won't come off and drop both ends, isn't that the fact? A. Yes; that is the idea the nut is there for.

Q. You know McCabe, don't you? A. Yes.

Q. What was he doing there that day? A. Standing alongside of me.

Q. Standing alongside of you? He was one of the gang that was working on the rudder? A. He was one of the helpers on the big fire.

Q. Wasn't he the chain man that operated the chain on the end that you were standing on? A. No, he was not there.

Q. Didn't he have hold of the chain? A. No.

Q. Just prior to the time that you were hurt? A. No.

Q. Isn't it a fact that you went to him the night before last and asked him if he was going to testify in this case? A. I went to him, yes.

Q. And didn't you tell him when you went to him in Hoboken, that if he would testify in your behalf, that you would pay him? A. I said I would pay his expenses, which I have a perfect right to do.

Q. And didn't you ever serve a subpoena on him to be here? A. I had a subpoena in my pocket.

Q. And you did not serve it? A. No, I did not.

Q. Why? A. Because he told me he was going up with the other side.

Q. You told him that if he testified in your behalf, you would pay him? A. He could not afford to come up for fun.

Q. Then what did you say to him? A. I said, "very well."

Q. Didn't you tell him you would pay him if he would come for you? A. I said, "I will pay your expenses."

Q. You say the foreman told you to come over and help push that rudder frame? A. Come over to hold it, yes.

Q. What was the first thing you did—how long did you hold it? A. Three or four minutes, I should say it took to ram the end up.

Q. Then what did you do? A. We started to lower it, to cut the slag out.

Q. That required one man on the chain to lower it; they work very easy? A. Very easy.

Q. There was a man on the other chain? A. Yes.

Q. Lowering that end, is that right? A. That is right

Q. You were on the end that was being held stationary, isn't that right? A. Being held stationary?

Q. Yes? A man on this end (indicating), and then another man on this end (indicating); they were lowering this end (indicating), is that right? A. No, they were lowering the whole thing, taken together.

Q. Lowering the whole thing? A. To keep it perfectly level.

Q. Were you moving down, do you know? A. I was going down at the same time.

Q. Wasn't McCabe doing it? A. No.

Q. Weren't you talking with McCabe? A. I was talking with McCabe.

Q. Where did you have your hand when it was hurt? A. Right on the chain.

Q. What chain? A. The guide chain.

Q. The chain that is fastened to the arm? A. No, no; the chain that raises and lowers the crane.

Q. Why did you have your hand in such close proximity to the arm and that guide chain if you were pulling it? A. Because it is necessary to have it right there.

Q. Now, tell me how much is the circumference of the bar or iron that goes out through the rudder, about which the chain went around? A. The size of it?

Q. Yes, about how long?

The Court: The circumference or diameter?

Mr. Tiffany: Circumference or diameter?

A. 12 inch; 2½ inches in diameter.

Q. How far above that bar does the nut extend? For instance, if this were the bar coming out there (indicating), how much is the difference between the circumference here (indicating) and the upper edge of that nut? A. I could not place you.

Q. You see on this arm, for instance, this rudder here (indicating), and this arm, on which the chain goes around; on this end (indicating) there is a nut that goes up above to keep the chain which goes around from slipping off? A. Yes.

Q. What is the distance from there (indicating) to here (indicating)? A. Oh, I should say—

Mr. Pierson: How much bigger is the nut?

Witness: How much bigger is the nut?

Q. Yes? A. I think it was a bolster; a bolster was put on there.

Q. They put a bolster on? A. Yes.

Q. So as to be sure the thing would not slip off? A. Yes.

Q. How much was the difference in the top edge of the bolster and the place where they had the strong arm? A. Oh, I should say about 2 or 3—I do not think it was 2 inches.

Q. So that it made quite a space between that and this place here (indicating)? A. Yes.

Q. You were pulling down the chain, you say? A. At my end.

Q. We will say in this position (illustrating): For instance, we will say this (indicating) is an 18 inch arm and this (indicating) is a chain which goes down around the arm that is holding the rudder here? A. Yes.

Q. And you were standing right here (indicating)? A. Yes.

Q. How far in was that chain from the outer edge of that 18 inch arm? A. I could not remember.

Q. About? A. I could not remember that.

Q. Was it a foot inside or was it near this nut or was it near the rudder? A. I could not remember that.

Q. Did you pay any attention? A. No, not to that.

Q. It did not interest you at all? A. No.

Q. Now, where did you stand when you had hold of that chain, in relation to this arm? A. That side of the arm (indicating).

Q. Over here (indicating)? A. On that side.

Q. How far from the arm? A. Well, very close.

Q. How close? A. Close enough to reach the chain.

Q. Which chain were you pulling, the one on the right-hand side of the arm or the left-hand side? A. The one that lowers down.

Q. Which is that? A. Well, you can turn that either way.

Q. In the position that I am standing now from you, that rudder is extending out this way (indicating), and with this arm extending over here, and this (indicating) is the chain; which chain did you have hold of, this one or this one? A. I could not remember; you can turn the block around when you lower on one side.

Q. Place yourself in my position. Suppose you were sitting here; which hand were you pulling down on the end, or were you using both hands on one chain? A. No, right hand.

Q. Which chain was it, the one that normally hangs at this side or this side (indicating)? A. That I could not say. You can turn the block around and pull down one or the other.

Q. Then did you reach over the corner of this thing? A. Yes.

Q. Reached over like that (illustrating)? A. Yes.

Q. How far below that bar do those chains extend that you operate? They are movable and you can move them 5 feet, can you not? There is enough play? A. Not so much.

Q. Well, 14? A. Yes.

Q. And you stood close to the bar and holding it down, like that (illustrating)? A. Yes.

Q. Don't you know that you took hold and pulled it over here (indicating) out of the way, and were pulling it down, isn't that a fact? A. Usually do that.

Q. Did you not in this case? A. Well, I would not say.

Q. Is it not a fact that Mr. McCabe stood over here (indicating) pulling this bar down and you stood over there with your hands on that arm, talking to him? A. No.

Q. And as they pulled down on this chain, the other end, the chain was flush up against that nut and caught your hand? A. No.

Q. That is not the fact? A. No, it is not the fact.

Q. Now, Mr. Churchill, who was there at the time you were hurt, Mr. Stephens? A. No.

Q. Mr. Thompson? A. Yes.

Q. Who told you to pull down on the chain? A. Mr. Thompson.

Q. You are sure of that? A. Yes.

Q. You were engaged at the time in fixing a bushing? A. Making a bushing.

Q. I understand you had to wait half an hour while it was getting hot? A. Yes.

Q. And had nothing to do? A. Nothing to do.

Q. And standing around there waiting for that thing to get hot? A. Yes.

Q. And your helper attended to that? A. Yes.

Q. And your helper is here this morning as a witness in this case? A. Most likely.

Q. He is here this morning, isn't he? A. Sure.

Q. What was his name? A. Roach.

Q. What were you talking to McCabe about? A. I cannot remember; about the work probably.

Q. Work on the rudder? A. Most likely.

Q. Did you look at the rudder to see what they were doing on it? A. Yes.

Q. It is necessary, is it not, when you are pulling on the chain to lower the rudder, to watch the position of the rudder to see that it is straight? A. We watched the position of the rudder they work on.

Q. To see that it is straight? A. Yes.

Q. So that it won't move and the chains will not move from end to end? A. That is the idea.

Q. Were you watching the rudder? A. The end I was on.

Q. Were you paying any attention to see whether your chain was in a vertical position or not? A. Well, no, I did not pay any attention to the chain end of it.

Q. You were not paying any attention to what you were doing, but watching the end they were working on? A. That is what we have to do.

Q. That is what you were doing? A. That is what we have to do.

Q. Did the rudder fall to the floor? A. The rudder fell.

Q. Did it fall to the floor? A. I don't think it touched the floor by about 10 or 12 inches.

Q. How far was it from the floor when it started to fall, about? A. About 3 or 4 feet.

Q. It fell down that much? A. Yes.

Q. Both ends? A. No, only the end that I was on.

Q. Only the end that you were on? A. Yes.

Q. What caused the end that you were on to fall? A. The arm gave away.

Q. What arm? A. The arm that was on my end.

Q. Whereabouts did it give away? A. Right on the angle.

Q. And then the strong arm went in what position, up or down? A. The rudder went down and that arm came up.

Q. And that arm is 18 inches long? A. In the neighborhood of 18 inches.

Q. Don't you know that it is a physical impossibility for the chain to slip far enough to allow the rudder on that end to drop the difference between 10 inches from the floor and 4 feet high, a distance of over 3 feet? A. It may be an impossibility, but I wasn't there to look on to that.

Q. You don't know how far the rudder dropped, do you? A. I know that they had to lower it down before they got me out.

Q. Is it not a fact that you were talking to McCabe and that your hand became caught and that is the only thing you know? A. No, it is not so.

Q. Well, what else do you know about it? A. I know that the rudder fell.

Q. How far? A. Fell to within 10 or 12 inches.

Q. Is it not a fact that after your hand became caught, your right hand became caught, that this rudder fell? A. No, it did not.

Q. Do you know? Was your hand caught before it fell or after it fell? A. While it fell.

Q. You let go of the chain? A. Did I let go of the chain? My hand was in the chain.

Q. You worked for Tietjen & Lang Dock Company for 10 months after you came out? A. Yes, in that neighborhood.

Q. And received the same wages there that you did then? A. Yes.

Q. And were laid off on account of slack work? A. That is the excuse.

Q. Didn't you believe it? A. No, I did not.

Q. Then you went and sued the Tietjen & Lang Dock Company for compensation, didn't you?

Mr. Pierson: I object.

A. No, I did not.

Q. Do you want us to understand that you did not sue the Tietjen & Lang Dry Dock Company?

Mr. Pierson: That is not what the answer implied at all.

Q. Did you settle?

Mr. Pierson: I object to that; it is immaterial whether he did or not; not an issue in this case at all.

Mr. Tiffany: I will withdraw it.

Q. Now, Mr. Churchill, you knew the danger of this thing slipping back and forth, did you not?

You knew that if these arms were not on properly, they were dangerous arms to put on a piece of work of that kind? A. No, I did not.

Q. Well, were they dangerous? A. They proved dangerous to me.

Q. In that case? A. Yes, certainly did.

Q. What you mean by that testimony is that you did not know that they were on properly? A. Why, I did not pay any particular attention to what arms are put on.

Q. You were familiar with putting arms on those things? A. Yes.

Q. Now, then, you knew at that time that an arm such as you say was on that thing was a dangerous arm to be on there, isn't that the fact? A. It was a dangerous arm to be on.

Q. You knew that at the time you were hurt and before that? A. Not before that.

Q. And you knew that the kind of an arm that was on there at the time you were hurt was a dangerous kind of an arm to put on any piece of material of that kind? You knew that? A. That is what I seen.

Q. Aside from the fact of being dangerous, you knew that arms generally of that kind were not adapted to that use? A. Yes.

Q. And if used, they were dangerous? A. Yes.

Q. You did not pay any attention to the kind of arm that was on there when you took that chance? A. No.

Q. Those arms you can see them very plainly? A. Oh, yes.

The Court: Now, you may step down and show your hand to the jurors, Mr. Churchill.

Call your next witness. We can have him sworn while he is doing that.

Mr. Pierson: That is my case.

Mr. Tiffany: We move for a non-suit on the ground that they have not shown any negligence whatever in Stephens. Stephens was the superintendent, he says, in this plant. He knows the character of the arms that ought to be put on there. He knew this kind of arm was dangerous at the time he went there, yet he paid no attention as to what kind of arm was there or where he was working. I say to the Court that there is no negligence shown on our part whatever. I think that there certainly ought to be a non-suit in this instance as against Mr. Stephens.

The Court: As I understand the plaintiff's testimony, Mr. Tiffany, it is this: Mr. Stephens was superintendent in charge of this shop. One of his duties was to superintend the rigging up or placing the rigging upon just such a piece of work as this was; and as far as the testimony goes, Mr. Stephens did superintend the work. And his contention is that the thing that happened to him was caused by the fact that the strong arm that was used presumably—taking his testimony as it is given—by the direction of Mr. Stephens, was an improper strong arm to be used for that purpose upon that particular job or piece of work.

Mr. Tiffany: But he stopped there. That is where the testimony stopped. He does not say to this Court that we had a right to have any other strong arm there. We are simply the superintendent. We must work with what we are provided with; and he does

not say to this Court that we provided anything different than that piece of work. He says in one part of his testimony that they could make what they did not have.

Mr. Pierson: That is their business, to make what they did not have.

Mr. Tiffany: My point is, that he has not connected us with anything negligent; that we were trying to hold Tietjen & Lang Dry Dock Company; that we did the work with certain implements they gave us; that he went there, and knowing this condition, he did not protect himself or did not use enough care—in fact, from his own testimony it shows that he was certainly guilty of contributory negligence.

The Court: That, of course, may be so, Mr. Tiffany; but up to this time there is nothing before me excepting that which comes from his testimony, of course, and that is that this particular class or kind of strong arm was not proper or adaptable for uses and purposes it was put, as he said, by direction and under the superintendence of the defendant in this case.

Mr. Tiffany: Which, however, he knew; and yet he went and did this work.

The Court: That may be so. On the other question that you raise, it does appear from his testimony that he was directed, not by Stephens, to do this work, which he was engaged in at the time of the happening, but by the blacksmith, Thompson, I think it was; that there was the work in the shop, and when a piece of work was obtained, he could call to his aid and assistance any

others in the shop. This is his testimony. And it was upon such a direction and such a request that he went on the work.

Now, then, if he was a volunteer, of course then he could not recover as against this defendant—if he was not a volunteer, then, as I understand the contention and as I gather from the testimony of the plaintiff, it is, that what happened to him as the result of the negligence directly traceable to the instructions of Mr. Stephens in allowing or permitting or directing the rigging up of this particular strong arm to that particular piece of work.

Mr. Tiffany: Granting that to be so; he testified that he had been in this work for eleven years; that he was familiar with this kind of strong arm, and yet knowing that he went there and worked, knowing the conditions.

The Court: Now, you are arguing upon the question of assumption of risks. What is the answer as to that?

Mr. Tiffany: I think where it is obvious, the danger is obvious to a man who has worked in the capacity as he was employed, and knows the obvious dangers, as he has testified that he does, and we are bound only to use ordinary care in the erection of a safe place for him to work and safe appliances. If it is obvious to him that there is danger there and he still goes there to work without asking that that danger be changed or complains of it, he assumes the risk.

Mr. Pierson: There is no such a thing, as I understand it, any more in New Jersey—

assumption of risk. Assumption of risk never existed except as between employer and employee, and that has been abrogated by statute and does not exist between employer and employee. It is contributory negligence, if it is anything. Assumption of risk as such does not exist.

The Court: I think, Mr. Tiffany, there is enough in the case to prevent me from granting the non-suit. I will decline to non-suit.

Mr. Tiffany: I ask for an exception.

The Court: You may have it.

ERNEST THOMPSON, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. Thompson, you were employed in the latter part of 1914 as a blacksmith for Tietjen & Lang Dry Dock Company? A. Yes.

Q. Do you know this man Churchill? A. I do.

Q. What was the capacity in which you were employed as blacksmith at that time? A. On the heavy fire.

Q. On the heavy fire? A. Yes, sir.

Q. Did you have charge of this rudder that was being welded? A. I did.

Q. Did that rudder fall to the floor? A. No, sir.

Q. How far did it fall, if it fell at all? A. Fell about a foot.

Q. Fell about a foot? A. Yes, sir.

Q. Did you superintend the putting up of the strong arms? A. Not exactly superintend them; I saw them doing it.

Q. Were you there when they were putting them on? A. Yes.

Q. Do you know what strong arms were put on? A. Yes, sir.

Q. Were they the kind of strong arms that had been used for that kind of work? A. Yes, sir.

Q. Were they the kind of strong arms that were used for that work down there? A. Yes.

Q. How long had you been using those arms? A. I used them off and on for nearly four years.

Q. How long had you been employed there? A. About four years and two months.

Q. Just explain to the jury the working of the arms; they are attached to the rudder for the purpose of holding that in balance and lowering or raising one end? A. Yes, sir.

Q. Is there a man stationed at each of those chains? A. Generally the work of a helper's job; the helper generally does that.

Q. The helper takes care of that? A. Yes.

Q. Do you know the arm near which Churchill was standing? A. Yes.

Q. Was anybody there with him? A. With the helper.

Q. Was anybody with Churchill? A. Yes, sir; my heater was with him.

Q. Who? A. The helper.

Q. Who was he? A. McCabe.

Q. What was he doing there? A. Attending to the chain.

Q. Was he attending to the chain? A. Yes, sir.

Q. Was it a part of Churchill's duty to attend the chain? A. No, sir.

Q. Did you ask him to? A. I did not.

Q. Was Mr. Stephens there at the time the accident happened? A. No, sir.

Q. How long did Churchill attend at this chain just prior to the time the accident happened? A. About two or three minutes; take it to the fire.

Q. How long? A. About two or three minutes.

Q. What was he doing there with McCabe? A. Well, I did not see him; I saw him from time to time.

Q. He wasn't there for the purpose of operating the chain? A. He went off, and went to the chain to operate it.

Q. Before Churchill went there? A. As far as I can recollect.

Q. You heard Mr. Churchill testify that you asked him to go there? A. Yes, sir.

Q. Is that so? A. I never asked him; don't remember it.

Q. Well, are you sure that you did not? A. I did not say I did not.

Q. Did anything break there that day? A. No.

Q. What caused the thing to drop, do you know? A. I could not tell you; just slipped.

Q. Do they slip that way? A. The links slip backwards and forward, all depends on what you are doing with it.

Q. They can drop a little bit? A. They may drop.

Q. Were you there the moment that his hand was caught? Do you know how his hand was caught? A. No; I had my back to him.

Q. Did you see his hand? A. I seen his hand afterward.

Q. When it was still in— A. In the—

Q. In the chain? A. Yes, sir.

Q. How was it caught? A. Caught by the thumb.

Q. Where? A. In between the nut and the link.

Q. In between the chain that goes around the crane? A. And the large link there.

Q. In between that link, rather? A. And the nut.

Q. In between the link and the nut on the end of the arm? A. Yes.

Q. Was the chain flush against that nut? A. Drove right up to the nut.

Q. And his thumb was between them? A. His thumb was between them.

Q. In such a position as it would be in if the chain had slipped to that nut? A. Just the same.

Q. Did you know where Mr. Stephens was at that time? A. In and out of the shop.

Q. Was he in the shop? A. No, sir.

Q. Do you know what Stephens' duties are? A. I suppose he has got to go down and see if he can be of help to carry it up.

Q. Do you know what his duties are? Do you know? If you don't, simply say so? A. No.

Q. Who has charge of the shop when Stephens is not there? A. Well, through a period of the day I took charge. I took charge at that time.

Q. Were you in charge when Stephens wasn't there that day? A. Anything that comes in, I just tell them to wait there; I look after it and pass it on to the foreman when he comes in.

Q. You had charge of this particular rudder job? A. Yes, sir.

Q. Is it the custom in your shop when you need help to hold these rudders when they are being rammed, pounded with this rod, to call upon the blacksmiths or their helpers? A. No, generally do that with good grace.

Q. What is it? A. Generally go at it with good grace.

Q. Go at it, is that right? Is that what they do? They go there as often as required? A. As often as required.

Q. They volunteered their services? A. No, just walk over and give a push.

Cross Examination by Mr. Pierson:

Q. How many helpers had you? A. Five.

Q. All the time? A. Not all the time.

Q. How many helpers have you regularly? A. Two as a rule and a heater.

Q. Two and a heater? A. Yes, sir.

Q. How many helpers had you on this particular day? A. Well—

Q. All the day? A. On the whole job?

Q. No, I don't mean on this job; how many did you have that were working there? A. I had four helpers—

Q. No, on this day? A. Four helpers and another.

Q. Did you have more helpers on this particular day than generally? A. Certainly.

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

Q. You had more helpers there that day? A. Four helpers and another blacksmith.

Q. Another blacksmith besides yourself? A. Yes, sir.

Q. How many did it take or would it take at such a rudder on the strong arms and in the crane? A. Two is sufficient.

Q. Two is sufficient for that? A. Yes, sir.

Q. Did you have more than two when that work was being done? A. Two what?

Q. Two helpers. When the strong arms were being adjusted, did you have more than two helpers on that? A. Generally.

Q. Were you there when it was adjusted? A. Yes, sir.

Q. Well, when the strong arms were being adjusted, how many helpers were there there? One helper and blacksmith to put the strong arms on.

Q. Were you helping at all or doing something else at that time? A. I was making new stock.

Q. Now, when this was taken out of the fire it was then rammed, was it? A. The first heat, yes.

Q. After the first heating? A. Yes, sir.

Q. It was while they were ramming it up and down that the accident happened, was it not? A. No, sir.

Q. Wasn't it about that time? A. No, sir.

Q. When was it? A. In the second heating.

Q. In the second heating? A. Yes, sir.

Q. At what stage of the second heating? A. Just took it out and set it on the anvil and started to go at it.

Q. It was on the anvil on the second heating? A. Yes, sir.

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

Q. It was lying on the anvil? A. Stationary.

Q. Stationary on the anvil? A. The end I was working on, yes.

Q. In the second heating, as I understand it, you put the two parts in together, do you not, and heat them together? A. Oh, no; one heat to ram and the other heat to cut the scarf.

Q. On the outer edge. And the third heat? A. Second heat.

Q. And the third heat to do the welding? A. Yes, it takes more than three heats.

Q. That is what we want to clear up. Then this was the heat where you were doing the cutting? A. Cutting the scarf.

Q. And you had this part stationary on the anvil? A. Yes, sir.

Q. Then this was the heat where you were doing the cutting? A. Cutting the scarf.

Q. And you had this part stationary on the anvil? A. Yes, sir.

Q. And it was resting there and you was ramming it or getting ready to do the cutting? A. Cutting the scarf.

Q. Was that the time that the accident happened? A. Yes, sir.

Q. When this was stationary on the anvil, there wasn't anything necessary to be done to the crane, was there? A. No, sir.

Q. How many men were there around there at that time? A. May have been four or five.

Q. How many men would it take to do that phase of the work? A. Just two did the work.

Q. At that time? A. At that time.

Q. Now, when the ramming up is done, how many men does it take? A. For all the ramming we done, two or three, three or four men would hold it.

Q. Hold the ram? A. Hold the rudder, and it would take two or three others to operate the arm.

Q. And you would naturally do the whole job with one man and three helpers? A. Yes, sir.

Q. The whole of it? A. Yes, sir.

Q. Ramming and everything? A. Oh, not the ramming.

Q. Well, you could not do the whole job without having some extra assistance? A. Extra as-

sistance on the ram; want two or three helpers for that.

Q. Now, it is necessary to have these rudder helpers on the arms, is it not? A. Just at that particular moment.

Q. Is it the custom of the man in charge of the work, to call on the people, on all who are free to do that and see that it is necessary, and do it as part of their work? A. The ramming part?

Q. Yes? A. You could not keep them away from the ram; don't have to call them.

Q. Oh, they like that? A. Sure.

Q. They like to get on this ram? A. Just like a sailor with a rome; something the same.

Q. Is it possible to handle these two cranes on this rudder with only one man and three helpers? A. One man and three helpers.

Q. With four helpers altogether? A. Yes.

Q. What would they be doing? A. One on each crane, and the other two or three, whatever it would be, pulling the rudder out of the fire or pushing it in the fire.

Q. During the ramming process those men would all have to be at the chains and holding the rudder as they do? A. Holding it up.

Q. And the ramming is done in that way? A. Yes, sir.

Re-direct Examination by Mr. Tiffany:

Q. This crane is run on wheels that run over the floor? A. Yes, sir.

Q. All you have got to do is to push the rudder to the heat or fire and runs on these wheels into the fire; when you want it, you pull it back, is that the fact? A. Same thing.

Q. Why is it that the men like to be at the ramming, do you know? A. Something funny about it?

Q. Some fun? A. Yes, sir.

Q. It is away from the fires, is it? A. Yes, sir.

Q. And they like to get out into the center of the shop to run that ram, just for the fun of it? A. Just for the fun of it.

The Court: This piece of work you were on, Mr. Thompson, in the ramming process, was it necessary to have others present than those who were regularly employed with you? That is, as I understand it, these three helpers and the heater were your regular force that day?

Witness: That day, yes.

The Court: Was it necessary in this ramming process to have others than those four men and yourself?

Witness: It makes it easier.

The Court: And that process, that thing had been done, if I understand you correctly, before this thing happened?

Witness: Yes, sir.

The Court: After that ramming, it went back in the fire?

Witness: Then it went back in the fire.

The Court: And it was after it came out of the fire the second time and was on the anvil that this thing happened?

Witness: Yes, sir.

The Court: After the ramming, and up to the time when this accident happened, was there need for more men—need for you to have more men than those four, three helpers and the heater?

Witness: No, sir.

The Court: Had you called upon anybody to assist you?

Witness: I called upon no one to assist me; just a blacksmith and helper was at that time to come there and go with me to the fire; that constituted my helpers.

Q. In your judgment as a blacksmith—how long have you been a blacksmith? A. Nineteen years.

Q. In your judgment as a blacksmith, and with your knowledge and experience in fixing rudders and using these arms, was the arm that was used at the end or on either end, a proper arm for that kind of work? A. We used that on the—

Q. Was it, in your estimation, a proper arm? A. Yes, sir.

By Mr. Pierson:

Q. Why wouldn't it be better to use an arm that fitted up square against the cap? A. A V clamp as a spring; and by tightening those bolts, it springs the points in and tightens the top and bottom corners.

The Court: Let me ask you again with reference to that strong arm as it has been termed. This particular kind of one which was used in this work, do you know from your experience in that line of work as to the style of arm that is customarily used in that kind of work? Do you know from your experience? You can answer that yes or no?

Witness: I don't quite understand.

The Court: You say that you have had experience for a number of years as a blacksmith of this character; that you have had experience during that time in the tightening of these strong arms as they are called upon the different pieces of work, and the manner in which they are placed, as well as the kind of strong arm that is used for the work; now, having that in mind, what can you say as to whether this thing that was used upon this work was such a one as is ordinarily and customarily used in that class of work?

Witness: Yes, sir.

The Court: You say it is?

Witness: Yes, sir, it is; a practical tool.

The Court: It is a practical tool?

Witness: Yes, sir.

The Court: Did you notice the manner in which it was attached to this rudder?

Witness: It was screwed up just the same as any other one, with bolts.

The Court: From what you saw of this particular clamp or strong arm, as it was attached to this rudder, what can you say from your experience as to whether or not it was properly attached to this rudder?

Witness: It was properly attached.

By Mr. Pierson:

Q. After the accident, was this strong arm put back on again? A. Yes, sir.

Q. The same one? A. The same arm.

Q. You did not use the flat one; did not use the

other kind? A. No, sir, the same arm at that job.

Q. You are sure about that? A. Positively.

Q. Now, you could not use the strong arm that was used in this particular case; you have either got to have it so that the corners catch or else you would have the shaft in the wrong position, would you not? A. If you put it on the corner of the clamp, the shaft would be wrong.

Q. I say, if you put it on so that it fitted square, then the shaft would be in the wrong direction? A. If the corner fitted on like that (illustrating) —a dangerous thing to be that way.

Q. And this part (indicating) would be up this way (indicating) which would not answer? A. If you put it on the corner?

Q. If you put it on that way (indicating)? A. Yes, sir.

Q. On a round shaft you can put that in so that it will be in any direction? A. You cannot put a V clamp on any round shaft.

Q. You can get this arm in any position you want? A. Any position.

Q. Of course it will always be at right angles to the shaft? I mean in your plant, you can put it around in any direction, as indicated by my finger? A. No, sir.

Q. Have to take it loose? A. Yes, sir.

Q. Do you mean to tell me that this V-shaped clamp when it hits the iron in these four corners, and possibly wedged in, that the wedge is stronger than a square piece, two single pieces all around, and a bolt coming tight against it? A. Yes, sir, with a spring.

Q. What spring do you mean? Do you have a spring in there? A. This V acts as a spring.

Q. How big are these arms, those V's whatever

you may call them? A. They are about five by an inch and a half.

Q. Five inches? A. Five inches wide.

Q. By an inch and a half thick? A. By an inch and a half, or an inch and three-quarters, something of that kind.

Q. And that is the best explanation you can give, is it, that these sides of iron—they are iron, are they not? A. Yes.

Q. Five inches wide by an inch and a half thick, has a lot of spring? A. It has a spring on the nut; nut and bolt.

Q. They are all bolted, are they not? A. All bolted tight.

Q. This kind that you used was bolted? A. Yes sir, they are all bolted.

Q. When did you first know that Churchill was around that rudder, at what stage of the welding? A. Did not notice him at all until this.

Q. Until when? A. Until I looked around and seen his thumb caught in the chain.

Q. That is the first you saw him? A. Well, the first that I took notice of him; he was in the shop, I know.

Q. That is the first you saw him around there? A. The first that I took notice.

Q. What happened that you knew somebody was hurt? A. I heard a dreadful shout.

Q. What did they shout, do you remember? A. Oh, I could not remember exactly what they shouted.

Q. Now, you had your back to him, heard somebody shout and then you went there and found him caught? A. I looked around and seen him caught, yes, sir.

Q. And you helped to get him loose? A. Yes, sir.

Q. So that you did not see how it happened or what he was doing? A. I had my back to him.

By Mr. Tiffany:

Q. This spring business seems to be confused. When this arm is put on, I understand it has a spring of that shape (illustrating)? A. Yes, sir.

Q. And then the rudder post goes in there (indicating)? A. Oh, no.

Q. Now, just show us; where does the rudder post go? A. It is V shape there about three inches, and then it is bent flat, up this way (indicating); that flat piece goes up against the square iron; this small V gives it a certain amount of spring, which causes the bolt to tighten up more.

Q. Then this shaft would be like that; there are two arms that come up straight this way (indicating)? A. Certainly.

Q. And here is the rudder post and the bolt in back of it? A. Go right across there.

Q. It is due to this same effect that causes the deflections on the bolt to be greater, having the strong arm there (indicating) and having it bent again? A. Certainly.

Q. And if that bolt should become loose, why the arm in question will also give way? A. It will not give way.

Q. And that is the reason you say this is the better appliance to use than the flat one? A. It is a better appliance.

By Mr. Pierson:

Q. When these (indicating) come together, they make a square, do they not? A. No.

Q. Or the space in there is square? A. Very small square.

Q. Well, it is square? A. We call it square.

Q. These two arms are at right angles to each other? A. Suppose so.

Q. So that they make a square? A. Yes.

Q. They are not acute angles, like I am indicating now? A. They are inside the square.

Q. Of the right angle? A. No, they are inside the square.

Q. They are angles inside of the square? A. It was inside, 90.

Q. 90 degrees? A. Inside of 90 degrees.

By Mr. Tiffany:

Q. You are still using this same V shaped arm? A. Yes, sir, the same V shaped arm.

Q. How heavy are some of the rudders that you have used that on? A. The last rudder we had it on was between 8 and 10 tons.

Q. How much did this rudder weigh Mr.— A. Between 1 and 2; not more.

Recess until 2 P. M.

PATRICK Mc CABE, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. McCabe, how old are you? A. Forty years old.

Q. On the 2nd of March, 1914, with whom did you work? A. I was working with Earnest Thompson.

Q. With Earnest Thompson? A. With Earnest Thompson.

Q. Who did you work for? A. Mr. Stephens—Tietjen & Lang.

Q. Tietjen & Lang Dry Dock Company? A. Tietjen & Lang Dry Dock Company.

Q. Do you know Churchill? A. Yes.

Q. He was hired as a blacksmith there? A. Yes, sir.

Q. Do you remember the day that he was hurt? A. Yes, sir.

Q. What were you doing? A. I was operating on the crane.

Q. You were operating on the crane? A. Yes, the blacksmith told me to go down and help raise that crane.

Q. Did you have a chain? A. I had a chain in my hand.

Q. Did you have the chain in your hand at the end of the rudder where Churchill was hurt? A. Opposite where Churchill was hurt I had the chain.

Q. Did Churchill operate those chains? A. No, sir.

Q. At any time? A. At no time.

Q. What was Churchill doing? A. He was there talking to me and had his hand between the nut and this other chain.

Q. Do you know how his hand was hurt? A. How he was hurted?

Q. Where was his hand hurt? Yes, how was it hurt? A. I could not tell you.

Q. How long was his hand in there? A. About —it would not be more than two minutes.

Q. What position was his hand in? Was it just—just tell us where his hand was in regard to

the arm? Just tell us where his hand was in regard to the chain that ran around the arm up to the crane, the end of the arm? A. It was between the link and the nut he had his hand; the link slipped back.

Q. The nut? A. Yes.

Q. Was that when the rudder was away from the arm? A. It was off of the rudder, on the end of it.

Q. On the end of it? A. Yes.

Q. You mean the end that was to keep the chain on? A. Yes, the end that was to keep the chain on.

Q. Was it between that and the nut? A. That link and that nut he was caught.

Cross Examination by Mr. Pierson:

Q. What was your position there? A. My position there was heating and attending to this crane.

Q. You were heating helper of Mr. Thompson? A. Yes.

Q. Were you there all morning, all day? A. What?

Q. You were there all this day? A. Yes, sir.

Q. How long after that did you work for Tietjen & Lang? A. Oh, I have worked for a long while; I worked there back and forth three or four times.

Q. You are working there now, are you? A. Yes, sir.

Q. How long have you been working there this time? A. I am after a year up there.

Q. You have been a year there steady? A. What?

Q. Have you been a year there steady? A. No, not this last time.

Q. I am asking you about this last time; how long this last time? A. I am there about a month now.

Q. Isn't it about a week? A. No, a month there now.

Q. You are sure it is about a month, or half a month? A. Yes, pretty near a month.

Q. Isn't it about a week? A. No, this will be my third pay, Monday night.

The Court: How often are you paid?
Witness: Every Monday night.

Q. So that you have been there a little over two weeks? A. This will be the third pay.

Q. Where were you working immediately before that? A. A year before that?

Q. No, where were you working just before that? A. I was working with Terry & Tench.

Q. A week ago last Monday? A. I think I am making a mistake; no, it will be the second pay this week. This will be the second pay.

Q. Where were you working a week ago last Monday? A. I was in Lang's; I was in Lang's.

Q. Are you sure about that? A. Yes.

Q. That was your first day? A. Tuesday was my first day with Lang.

Q. Tuesday? A. Tuesday a week, yes.

Q. So that it has been just a little over a week? A. Yes, this will be my second week.

Q. You are in your second week? A. Yes.

Q. You were hired back by Mr. Stephens, were you? A. Yes, I asked for my job and he gave it to me.

Q. You met him on the street some time ago? A. Yes, and asked him for the job.

Q. Did you tell anyone about what you saw there that day? A. No, I did not.

Q. You never told anybody? A. Never told anybody nothing. This man (indicating) came for me three times. I told him.

Q. You never told anybody? A. I never told anybody.

Q. Not counsel? A. Not counsel.

Q. You never talked to anybody? A. No, nothing about it; only what he talked to me about it.

Q. But my question was that you never talked to anybody? A. No.

Q. About what your testimony was to be in this case? A. No.

Q. To nobody? A. Nobody.

Q. Nobody knew what you were going to say when you got on the stand? A. No.

Q. Nobody? A. No.

Q. You are sure about that? A. Yes, sure about that.

Q. The lawyer did not ask you anything about it? A. No; no lawyer asked me.

Q. Nor Stephens did not? A. No.

Q. And nobody ever telephoned to you? A. Nobody asked me at all.

Q. He took you and offered to pay you, did he? A. Never anybody asked the question.

Q. You did not ask about the fact that you were coming up for at all? A. No; I did not know what I was coming up for.

Q. Do you remember having a conversation with Mr. Churchill about what took place there that day—

The Court: The question is did you have a talk with Churchill?

Witness: Yes, I had a talk with Churchill.

The Court: You had a conversation with Churchill?

Witness: Yes.

Q. You were talking about the adjustment of these strong arms, weren't you? A. No, never spoke to him about it.

Q. Never spoke to him about it? A. Never spoke to him about that at all.

Q. There wasn't anything said about strong arms at all? A. No, never said nothing about that.

Q. To Mr. Churchill? A. Because it wasn't my place; it was the mechanic's place to talk about that.

Q. He talked to you about testifying? A. Yes, and I told him when he come to me and asked me to come for a witness, I told him if I come I would tell the truth. I said I did not want to come at all.

Q. You did not want to come at all? A. He come up and told me Wednesday night that I would be well paid if I come.

Q. He offered to pay you for your time? A. No, did not; said I would be well paid, and would not lose my job.

Q. You would not have your job down at Tietjen & Lang? A. No.

Q. What did you think he meant when he said that you would not lose your job? A. I did not know what he meant by that.

Q. As a matter of fact, you had told Mr. Churchill that you knew that this was a wrong kind of strong arm, did you not? A. Never did.

Q. You told Churchill that they put in another kind afterwards? A. I never told him nothing of the kind.

Q. You did not? A. No, sir. My word is as good as his.

Q. You had been hired back a little over a week ago, and you told him that you could not help him, is that right? A. He come over and said that I would be well paid.

Q. I say, after you had been hired back by Tietjen & Lang? A. Well, I went for the job and they hired me. I suppose I can work anywhere.

Q. You say that Churchill was talking to you when this happened? A. Sure.

Q. In front of you, isn't that a fact? A. How?

Q. In front of you or back of you or alongside of you? A. He was standing alongside of me that way (illustrating) talking to me; I had hold of the crane; he had his hand here (indicating) and talking to me, and the links moving they caught him.

Q. The links moving were put on the anvil? A. Yes.

Q. Was Mr. Thompson at the anvil? A. Yes.

Q. And this was hanging in this crane (illustrating)? A. No, a link slipped and caught him.

Q. It was left in the crane? A. Yes.

Q. How big is this link? A. I could not tell you just exactly how big it is.

Q. How far was it away from the nut before that? A. About 4 inches or 5.

Q. It slipped towards the anvil? A. No, it wasn't near the anvil; it was a way down—

Q. I understand it was— A. The anvil was further up.

Q. Which way did this whole rudder slip, towards the anvil or away? A. It turned to the anvil.

Q. The rudder slipped towards the anvil? A. Yes.

Q. Mr. Churchill had nothing to do there at all, but was talking to you? A. Talked to me up there. He had nothing to do there; I had charge of that.

Q. You were the boss on that? A. I wasn't the boss on that; I was doing what Thompson told me, to use this chain to lower it; he had his hand that way (illustrating).

Q. Who else was around the rudder? A. There were five men right around it, and blacksmith—two blacksmiths; five men around it altogether.

Q. Five men and two blacksmiths? A. Yes.

Q. That makes seven altogether? A. Yes.

Q. What were these all doing—one on one end? A. Yes.

Q. And another at the other? A. Yes.

Q. What were the others doing? A. Working at it, to scarf it; they were scarfing it for the weld.

Q. Scaffolding? A. Scarfing, for to weld it.

Q. How many men were holding on to this rudder? A. About three of them, and the rest were guiding; did not need to hold at all, because the crane held it; only need to balance it.

Q. As a matter of fact, were you there when the iron was put in the fire? A. Yes, I helped to put it in the fire.

Q. And you helped to take it out? A. Yes.

Q. It was taken out and rammed up? A. It was rammed up and then put in the fire and took it out again and cut with a chisel.

Q. Was Mr. Churchill there when it was rammed up? A. He wasn't up at the ramming of it; he only came around when we were cutting with a chisel.

Q. When you were cutting with a chisel? A. Yes.

Q. They were cut and fitted into this end, were they? A. Yes.

Q. The V shaped into the ends of it? A. Yes.

Q. Who was cutting that? A. Mr. Thompson.

Q. He was chiseling that end? A. Yes.

Q. And he stood here (indicating)? A. Yes, around this way (indicating).

Q. I suppose he was on the right of it? A. They can do it right or left; can be done both ways.

Q. It can be done one way or the other? A. Yes.

Q. He was pounding towards this way (indicating)? A. He was not pounding at all; he was holding the chisel.

Q. Somebody else was hitting? A. Two men struck it.

Q. He was holding the chisel and the two men struck it? A. Yes.

Q. And they struck it this way (illustrating)? A. Yes.

Q. And notwithstanding this the rudder slipped out towards him? A. Yes.

Q. Why did the rudder slip towards him when he was pounding the other way? A. Churchill hadn't any business there at all—

Q. I say, why did it slip towards him when he was pounding it the other way?

The Court: Do you understand the question?

Witness: Yes.

The Court: Answer it if you can.

A. Well, I have nothing to say only that Mr. Churchill had no right there.

The Court: Read the question to the witness.

(Question read.)

A. Well, that chain is supposed to go around on that rudder, and the chain is bound to move on the rudder. I am working on that business for 10 years and you are supposed to keep your hand away from that chain always. That is the first thing that the boss will tell them to keep their hands away from that chain. He is a mechanic and he should know enough to keep his hand away.

Q. When did you first see me in this case to tell me about your story? A. Never seen you until I seen you here.

Q. Yesterday? A. Yesterday.

WILLIAM HICKMAN, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Tiffany:

Q. Just tell us your name and your age? A. William Hickman, 45 last December.

Q. You work for the Tietjen & Lang Dry Dock Company and were working for them in March, 1914? A. Eleven years last March I worked for Tietjen & Lang Dry Dock Company.

Q. You hold a position; what were you doing? A. Blacksmith's helper.

Q. And you were working on this rudder that they were working on that day? A. Yes, sir.

Q. What were you doing in the afternoon about the time that Churchill was hurt? A. I was at the head of the rudder, striking for Mr. Thompson, helping to V it.

Q. Did you help to put the strong arms on this rudder? A. Yes, sir, I assisted the blacksmith to put it on in the morning.

Q. You told the blacksmith to put it on in the morning?

The Court: He assisted the blacksmith in putting it on in the morning.

Q. You were the blacksmith that put it on? A. Thompson's helper.

Q. Is he here this morning? A. No, sir.

Q. Do you know where he is? A. He is working down in Jersey City.

Q. Working somewhere? A. Yes.

Q. Did you see him put it on? A. I assisted him in putting it on.

Q. You know when they are on properly, do you —when these arms are put on right? A. Well, I am a mechanic; he was a mechanic and supposed to put it on right.

Q. Do you know when they are put on right? A. Yes, sir.

Q. And you assisted in putting this thing on right? A. Yes.

Q. In your judgment as a mechanic working 11 years in putting on arms, was this appliance put on right? A. It was welded safe.

Q. And was on right? A. In my estimation.

Q. Was it the proper kind of appliance for that job? A. Yes, sir.

Q. Did you see Churchill there at the time just before he was hurt? A. At the rudder?

Q. Yes? A. He was for a few minutes.

Q. Where was he? A. At the lower end of the rudder.

Q. Near whom? A. Near Mr. McCabe.

Q. Do you know what he was doing there? A. He was talking to Mr. McCabe.

Q. Do you know who had hold of the chain? A. Mr. McCabe had hold of the chain.

Q. Is that what he was doing there? A. Yes, sir.

Q. Do you know what Churchill was doing besides talking? A. Had one hand on the rudder like that (illustrating), and the other on the strong arm.

Q. One on the rudder and the other on the strong arm? A. Yes.

Q. And stood there talking? A. Yes, sir.

Cross Examination by Mr. Pierson:

Q. What time of the day was this accident, Mr. Hickman? A. Between half-past three and four.

Q. What is your quitting time there? A. 5 o'clock that time.

Q. 5 o'clock? A. It was rather late in the afternoon.

Q. Was it? Was it rather late in the afternoon? A. Oh, well, had an hour or so to go, to 5 o'clock.

Q. As I understand it, Mr. Thompson, the blacksmith had a chisel up against the end of this—the end of the shaft and the rudder, is that right? He was holding the chisel, did you say that? A. The blacksmith's place to hold the tools.

Q. That is what I am asking; Thompson was holding that tool? A. Certainly.

Q. How many men were doing the hitting? A. Two.

Q. Two and who else? A. Well, I don't know who the other man was now.

Q. How big a hammer were you using? A. 13 or 14 pounds.

Q. You were hammering with a 13 or 14 pound

hammer toward the end where Churchill was? A. On the other end.

Q. He was on the other? A. He was on the other side.

Q. And you were cutting a V out of this? A. Yes, sir.

Q. With the point towards Churchill, the point of the V? A. Oh, no.

Q. Which way was the point of the V? A. The point of the V was on the top end of the rudder.

Q. Well, the top end of the rudder was away from Mr. Churchill? A. He was on the lower end.

Q. Yes, he was on the lower end. You were cutting the V into the end of the rudder, like this (illustrating), were you not? A gash like that, in there? A. Not as big as that.

Q. Well, that shape, something like that? A. V shaped, yes.

Q. Did you have any other position there than a blacksmith helper? Did you at that time? A. Well, on the steam hammer sometimes when I have a chance; look after the time.

Q. You are a time keeper, are you not?

Mr. Tiffany: Is that your answer?

Witness: Yes, sir.

Q. Of whom did you keep the time? A. I don't get you.

The Court: Whose time did you keep?

Witness: All the time of that shop, the blacksmith's time, forges,—all the work that was done during the day.

Q. In order to make bills up, you have to know what you spend the whole day on, do you? A. Certainly.

Q. And how much time is put on each forging? A. Yes, sir.

Q. For these 9 forges and so on, is that right? A. I put in the men's time only to do the work.

Q. You go around to each man and find what he was doing during the whole day? A. Yes.

Q. So that you can make a report of that to the people above? A. Yes.

Q. On the strength of that, you make out bills of the different things, is that right? A. Yes.

Q. How long does it take in a day to do all that sort of work? A. About two hours.

Q. And what time of day do you usually begin?

The Court: Isn't it the time of the accident that is of evidence here?

Mr. Tiffany: I am cross examining him.

A. You mean at the present time?

The Court: Well, go ahead. The question is, what time of day?

(Question read.)

A. At the present time?

Q. No, no.

The Court: What time do you want him to give you?

Mr. Tiffany: At that time, what time did he usually begin? At that time?

A. At that time?

Q. Yes?

The Court: At the time of the accident, what time did you usually begin to do that?

Witness: 7 o'clock in the morning.

Q. That was not the question. You said that it took you about two hours a day to keep the time? A. Yes, sir.

Q. What time of the day would you take the time? A. In the morning.

Q. Always in the morning? A. At that time.

Q. You are sure about that? A. Yes, sir.

Q. Weren't you taking the time at the very time that Mr. Churchill's accident happened? A. No.

Q. Weren't you in another part of the shop? A. No.

Q. Sure about that, are you? A. I am sure.

Q. I understand you to say that Mr. Churchill stood on this upper end, with on hand on the strong arm and one on the— A. Rudder.

Q. Like this (illustrating), with the strong arm here (indicating), and the rudder here on the other side? A. The rudder coming around like that (illustrating); here was the strong arm; Mr. Churchill put his hand out like that, between the nut and the chain, and the other hand around the part of the rudder.

Q. And then this link that was around this strong arm and this nut came together? A. Exactly.

Q. And that was while you were hammering there on this wedge, is that right? A. Yes.

Q. Did anything fall? A. The link slipped. The link slipped; that is all. Nothing fell.

Q. Nothing dropped? A. Not the time they lowered the rudder—

Q. What is that? A. Nothing dropped.

Q. Everything stood just as it was except where it slipped, is that right? A. The rudder was lowered.

Q. After he got caught or before? A. After he got caught.

Q. But until he did get caught, everything was just as it was except that the link slipped, is that right? A. It stood right in its place.

Q. The rudder stood right in its place? A. Yes.

Q. All except the link slipped, until after you lowered it, is that right? A. The link flew back.

Q. I understand the link flew back. The link flew back towards the end on the nut and caught him, but everything else stayed just as it was, is that right, or isn't it?

The Court: Do you understand the question?

Witness: That is true.

The Court: Very well, answer it. If you cannot, say that you cannot. Now, do you say you understand the question? That is the reason I have asked you. If you do not understand any question, why just make that known and we will see that you do. If you understand it, why just answer it.

Witness: Let me have the question again.

(Question read.)

A. Yes.

Q. This strong arm that he had his hand on is iron, is it? A. Yes, sir.

Q. How big around is it about? A. Oh, about an inch and a half, an inch and three-quarters.

Q. An inch and a half? A. An inch and a half or three-quarters is about the size of it.

Q. That is, it was an iron shaft and was an inch and a half or an inch and three-quarters around, extending from where the strong arm was fastened to the shaft back to where this link was? A. Yes, sir.

Q. Just where was Churchill's thumb caught? A. Between the nut and the link.

Q. Well, what part? What place on the strong arm? A. The end at the back end of the strong arm; the end of the strong arm.

Q. Say this is the top (illustrating) of the shaft or the arm and this is the nut; his thumb was caught in there (indicating)? This is the link; here is the thumb caught in there, like that? A. That is where his thumb was caught.

Q. Resting his hand on this arm? A. Resting his whole weight right there, talking.

JAMES ROACHE, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. Roache, you were the helper of Mr. Churchill, on the day he was hurt? A. Yes, sir.

Q. Working on a forge with Mr. Churchill? A. Yes.

Q. About 4 or 5 feet, for instance from this rudder, they were welding? A. Yes, sir; 5 or 6.

Q. And just prior to the time that Mr. Churchill was hurt, did you and Mr. Churchill have any conversation? A. We were talking together.

Q. Did he go away from his forge? A. He did.

Q. At the time he went away, did he say anything to you? A. Told me to go and heat his bushing up at the other fire.

Q. Go and heat the bushing that he had on the fire? Did he tell you what he was going to do? A. Going over to talk to McCabe.

Q. Said he was going over to talk to McCabe? A. Yes.

Q. You came here under subpoena, did you? A. Yes.

Cross Examination by Mr. Pierson:

Q. You are still working for the Tietjen & Lang Company? A. Yes, sir.

Q. And you came up with the others, or for the other side? A. Yes, sir.

Q. And Mr. Hickman is still working there, is he not? A. Oh, yes.

Q. The last witness is still working there. The helper is the man that does the blacksmith work, that does not require blacksmith skill, that is right, isn't it? A. Yes.

Q. This bushing was pretty heavy, 70 or 80 pounds? A. No, I think it weighs about 20 pounds; 25 at the most.

Q. And you had that heated out on the trip hammer? A. No, had it hot and laid in the fire.

Q. Well, you had heated it before, had you not? A. It had been heated three or four times previously.

Q. Well, Mr. Churchill had been doing work on it? A. Yes, sir.

Q. And then you had occasion to again heat it? A. Yes.

Q. And Mr. Churchill told you to put it in the fire? A. It was in the fire; he had it in the fire himself.

Q. Oh, he had it in the fire himself. You say he did not help you put it in? A. No.

Q. And you were attending the fire? A. I was standing with him outside the anvil, talking.

Q. Isn't it the business of the helper to attend to the fire while these things are being heated? A. No, it is not.

Q. To kindle the fire? A. No, it is the blacksmith's place.

Q. The blacksmith does the skilled work and the rough work too? A. That is not rough work; heating is its own work; striking is the helper's work; and building the fire in the morning.

Q. That is the way you remember it, is it? A. Yes.

Q. Then he said he was going there to talk to McCabe? A. Yes.

Q. You remember that very distinctly, do you? A. Very distinctly.

Q. That is all you know about it? A. That is all.

WILLIAM E. STEPHENS, sworn in his own behalf, testifies as follows:

Direct Examination by Mr. Tiffany:

Q. Mr. Stephens, you are the defendant in this case? A. Yes, sir.

Q. You were superintendent of the blacksmith shop on the 2nd of March of 1914, when Churchill worked there? A. Yes, sir.

Q. Were you in the shop at the time Churchill was hurt? A. No, sir.

Q. Did you tell Churchill to work on this rudder? A. No, sir.

No cross examination.

Testimony closed.

Mr. Tiffany: If the Court please, I renew my motion for a non-suit and incorporate a motion for a direction of a verdict on the ground that the plaintiffs have failed to prove the allegations of their complaint.

They allege the negligence to be that we furnished an improper appliance, and that they were not proper appliances that we selected for this work; that we did not furnish a proper and safe place to work. I submit to your Honor, without argument, that they have not proved that Stephens was in any way negligent, that he did anything that was in any way negligent; that he did not do anything that he should have done. The testimony as it stands before your Honor is that this man was hurt; he says by reason of the fact that his hand was caught in the chain which he had pulled. Defendant's testimony is that it was caught between the chain and the nut, and that he was there by reason of the fact that he came there voluntarily to talk to these men.

I submit, without further argument on that point, that the plaintiffs have not made out a case and that there should be a direction of a verdict.

The Court: I feel, however, that I should not direct a verdict, and that it is a matter which in its present situation requires me to send it to the jury, because it would require me to pass upon the weight of the evidence on this point, as I recall the evidence, on the part of the plaintiff. I decline to direct a verdict.

Mr. Tiffany: I ask for an exception.

The Court: You may have it.

Charge.

The Court: Gentlemen of the jury, this is an action brought by Edwin J. Churchill against William E. Stephens and has for its purposes the recovery of damages for the loss which the plaintiff alleges he has met with or in reasonable probability may meet with in the future as approximate result of a negligent act upon the part of the defendant.

It is well at the outset that I should bring prominently to your attention the position in which these two parties stood to each other. The common employer was a ship-building or ship-repairing concern named Tietjen & Lang. The defendant was the superintendent of the shops or shop as I think it has been called. The plaintiff was one of the blacksmiths employed in the shop.

The allegations of negligence are these, as I understand them—and there are two in number—first, that this appliance known as the strong arm which was employed on this particular piece of work was an appliance that was not proper for the work in which it was used, and that because of that, this thing happened. Secondly, irrespective of this allegation or in conjunction with it, whichever the testimony may show, or as it may show, the appliance was so attached to the rudder in question, so improperly attached thereto, so negligently attached thereto that because of the attachment in a negligent manner, this accident happened and the injury to the plaintiff was received.

Now, at the outset, gentlemen, there are two things which you must consider and which you must keep in your minds throughout the whole entire deliberation that you shall have on the matters before you. First, that the mere happening of an accident raises no presumption of negligence. That is, just because this thing happened, just be-

cause of the fact that it happened, is not sufficient, nor does it raise any presumption that the happening was the result of some negligent act. That is the first thing you start out with, and it is a thing which you must have before you throughout your entire consideration of the case. Consequently all of the allegations of the plaintiff must be substantiated by the plaintiff, and the plaintiff himself, by a fair preponderance of the evidence. There will be an element in the case which I will present to you later on, where the burden is upon the defendant to establish the allegation, and he must establish it by a fair preponderance of the evidence. The point I want to make to you is, and the thing I want to explain to you is briefly what is preponderance of evidence. Wherever a proposition, or wherever a thing is asserted as a fact by either the one side or the other, the party who asserts it must prove it or must establish it, and he must establish it by a fair preponderance of the evidence, and that means that you are to take the evidence which has been produced upon both sides of that proposition and you are to weigh it up. If the evidence in favor and the evidence opposed weigh equally, then there is no preponderance in favor of the proposition as you can see. It is only when you take all of the facts on each side of the proposition and weigh them up and find that the evidence in favor of the sustaining of it—or to use more common language, the evidence in favor of proving the thing urged outweighs that which is against it, that you have preponderance of evidence.

Now, gentlemen, don't be misled by what I am saying to you, because I say to you that it is your province to judge of the testimony and weigh it. It is your province to do so, but you are not to be carried away by either favor or partiality or

prejudice in so doing. You have a right to consider, and determine what weight is to be given to the testimony of each and every witness. There are several ways in which you have a right to reach that point. You may consider the manner in which the testimony was given by the several witnesses, their demeanor upon the stand, the interest or lack of interest that the witness or witnesses may have in the issue and the outcome of it. You have a right also to consider, in determining the weight, what the opportunity of each witness was to know of that of which he or she speaks. You have a right to consider the number of witnesses, but the number of witnesses or numbers of witnesses do not necessarily control and make more weight; because after you have applied all of the tests in determining what weight is to be given to the testimony of each and every witness, you may find that the weight you finally accord and give to the greater number of witnesses is far less than that which you give to a lesser number of witnesses on the other side of the proposition. It may be, on the other hand, that you will find that you have, after you have scrutinized and passed upon all the testimony, that which bears the greater weight comes from the greater number of witnesses; so, what I want to say to you is that the greater number of witnesses do not control necessarily in arriving at the weight of testimony.

Now, understand, gentlemen of the jury, wherever I shall use the term fair preponderance of evidence, whether I say that the duty rests upon the plaintiff or whether I say it rests upon the defendant, I mean by fair preponderance of evidence just what I have been indicating to you, and the

manner in which you shall arrive at it is that manner which I have already indicated.

To come back to the two separate allegations of negligence; the first is, as I have intimated, that this appliance which was used was not a proper appliance to be used, and that the defendant in this action did not use that reasonable care with which he was charged in selecting a reasonably proper and safe appliance. Now, gentlemen of the jury, first, as to that, one who is charged with or upon whom the duty may rest to select and furnish appliances and tools, is not charged in law with the selecting of the most modern or most up to date, the newest and the very best obtainable; he is only charged with selecting and providing such as are reasonably safe and suitable for the purposes for which they are to be used. Therefore, in passing upon the teestimony that is before you, apply that rule. The rule is not that one, as I have already stated, charged with the supplying of tools and appliances, must get the very best obtainable; must get the latest and newest devices, but his obligation in law is only to supply just those which are reasonably safe and suitable for the purposes for which they are to be used. We are then brought to another point—having in mind that this defendant was not the employer or the master of the plaintiff; he, the defendant, has not in law and did not in law have upon him the obligation of supplying proper and reasonable tools and appliances unless it has been shown by the plaintiff by a fair preponderance of the evidence that it was a part of the duty of the defendant as a superintendent to furnish and supply tools and appliances. Now, I hope I make myself plain upon that point. Putting it in another way, if you have not been satisfied by the plain-

tiff by a fair preponderance of the evidence that a part of the duty, or a part of the work, or a part of the things that this defendant was employed to do by the master, Tietjen & Lang, was to furnish and provide tools and appliances, then he cannot be held, if you find that this particular appliance was not a reasonably safe and suitable one—unless the plaintiff has satisfied you that he had at hand or at his command another appliance usable and suitable for the same purpose, and which other appliance matched up more exactly with that rule which I have just given you than the one used,—in other words, if he had two or more appliances, one of which was better because it was reasonably safe and suitable for the purposes for which it was to be used and the other one was not, and he used the one which was not suitable in preference to the one which was,—if you have been satisfied as to that and of his doing that—then you may find that he was negligent in so doing. But if he had but the one and he used that and you find that you have not been satisfied that he had the power or if it was his duty, rather—which is the better way of putting it—to supply one which was more suitable, then upon that score you could not hold him for negligence, and therefore the verdict should be, under those circumstances, for the defendant. But that brings us then to another point for consideration; because, you see this allegation of negligence is twofold; it is not only that a reasonably proper and suitable appliance was not used, but that either one of these things happened: Either that the appliance was not a proper and suitable one, the neglect to furnish which is chargeable to the defendant, but besides that it was improperly attached to the rudder in question or

negligently attached. So that your next inquiry will be this: This appliance that was there, have you been satisfied by the plaintiff by a fair preponderance of the evidence that it was not properly applied, that the defendant, the superintendent, in his direction as superintendent of the work in applying it was negligent in the manner in which he directed or permitted it to be applied, and because of that negligence this thing happened? The burden is upon the plaintiff to satisfy you of that and by a fair preponderance of the evidence. So that all of those matters, gentlemen of the jury, that I have spoken to you about requires your satisfaction in their favor by the plaintiff by a fair preponderance of the evidence. If you have not been satisfied of any of them in that manner, then you may stop right there. Your inquiry ends there, because then under no circumstances can there be a verdict for the plaintiff; because first, and foremost, the plaintiff must establish by a fair preponderance of the evidence that the defendant was guilty of some negligent act, or some negligent act as charged and that that negligence was the proximate cause of what happened. If the plaintiff has not done that, the plaintiff has failed to make out his case and is not entitled to a verdict at your hands. But even if you find upon those points that you have been satisfied by the plaintiff in the manner in which I have indicated, your attention must go in another direction, and that is to know what the plaintiff was doing at the time when he met with the alleged injury. The burden is upon him also, gentlemen of the jury, to satisfy you by a fair preponderance of the evidence that that which he was doing, that thing about which he was occupied

was a duty which it was his duty to perform. It has been said in this case that he was there to assist in some movement or some operation connected with the work upon this rudder, and that he was called there by the blacksmith who was in charge of the work—I think Mr. Thompson—and it is further said that Mr. Thompson had the authority to call upon him, and that it was one of the duties of the workers in the shop when so called upon, to give their services for the purposes for which they were called upon. And it has also been suggested or testified to that it was one of the rules of the shop that when aid or assistance was needed, any person in the shop was in duty bound, or it was his duty to proceed to do that which was required to be done. Upon that score, gentlemen of the jury, as I have just indicated, the burden is still upon the plaintiff. He must satisfy you where he was at the time this thing happened by right and in furtherance of some duty that he owed his master, in the performance of the service that he was expected to give to the master. If he was there voluntarily, or out of mere curiosity and not concerned about any part of the work which it was his duty to perform, then this defendant is not responsible to him, even though you may find upon the points of negligence that the defendant was guilty of some negligent act, either in the apparatus that was used or in the method by which it was attached to this rudder. If you find that he was there in the line of his work and in the line of his duty, had a right to be there for that reason, then again before he is entitled to a verdict, there is another thing which you must consider. Now, all the way up to this point, gentlemen, you must keep in mind that the burden is upon the plaintiff to satisfy you of all

the facts by a fair preponderance of the evidence. The point I am coming to is one which it is the duty of the defendant to satisfy you of by a fair preponderance of the evidence, and that is this: That one in the position of this plaintiff had also a duty to perform toward himself, and that is that he was required by the law to use that reasonable care which a reasonably prudent person would under the circumstances, so that he would not bring harm upon himself; that is, he was required to do that, to observe that and take that action with respect to himself that a reasonably prudent person would take under the circumstances. If he did not and was negligent—if he did not use the care of a reasonably prudent person, either as to where he stood or how he stood or what he did or with reference to the article or thing with which he was dealing, then he was guilty of negligence upon his part; he transgressed a rule of law which was applicable to him; and then the rule of law is that he cannot recover irrespective of the question as to how you may find upon the question of negligence, if any, of the defendant. The law is that he who himself is guilty of a negligent act which in any manner, in any degree contributes to what happened to him, cannot recover. So therefore it is not a question with you as to how guilty, if he was guilty of negligence, the plaintiff was. The only question before you is, was he, under the circumstances, considering the time, place and conditions, guilty of a negligent act upon his part which contributed in any degree to what happened to him. If you find that the defendant has established that by a fair preponderance of the evidence, then your verdict must be for the defendant. That is the rule, gentle-

men; and that is what you and I must obey and must follow. If you find under the rules and instructions I have given you, gentlemen of the jury, that the plaintiff is entitled to recover, then the next question before you will be, for what he may recover; and you will not be concerned in this at all, of course, unless you find, as I say, under the rules which I have given you, and under the evidence in the case, he is entitled to recover. If he is entitled to recover, he is entitled to have compensation, that reasonable compensation or that sum which will reasonably compensate him for pain and suffering, both mentally and physically, in the past, in the present and in the future as and if all of those things have been shown, which must be shown to entitle him thereto; that is, if he has satisfied you that he has had pain and suffering in the past, he is entitled to be compensated for it to the extent which will reasonably compensate him, considering the quantity thereof. If he has established that and also established that he is still at the present time suffering, he is then entitled to be compensated for both past and present. If he has satisfied you that he will in reasonable probability suffer pain in the future, then he is entitled to be compensated for both past, present and future. He is also entitled to be compensated for any disability which he may have satisfied you he has, is having or in reasonable probability will have in the future as a proximate result of this happening. Likewise he must have satisfied you upon the question of pain and suffering, that it is the proximate result of the thing which happened to him. He is entitled to loss of earnings; likewise, in the past, present or future as he may have satisfied you upon those points.

So that you will not misunderstand, gentlemen, upon that point, loss of earnings, he is entitled to have that which he has shown you he has lost, if he has shown you he has lost anything as the result, the proximate result of this happening. He is entitled to have, not only for the past, but for the present and the future, provided he has satisfied you as to the present and future by a fair preponderance of the evidence, or in reasonable probability he will lose, because of any disability that he may have satisfied you that he is under as the proximate result of this happening. As to the future loss of earnings, I have this much more to say to you. The sum which he is entitled to for that purpose, in your verdict, is not the lump gross sum which you may find his loss will be, but it is that gross sum if any you find, reduced to its present worth; that is what that total sum would be worth net to-day. The reason for that is this gentlemen: That if it were not for the disability of which he complained, bringing to him such loss, he would in the future be working from week to week, receiving his compensation from day to day, week to week or month by month; and now if he is to be satisfied for any loss thereunder, you see he gets that satisfaction by your verdict at this time, and therefore the sum of money he is entitled to now is a lesser sum than the total sum that he would otherwise have earned in the future. In other words, it is the present worth of any such gross sum that you may find.

Now, gentlemen of the jury, your verdict, if there is a verdict for the plaintiff, will be in a lump sum; that is, you will not say there is so much for pain and suffering and so much for disability and so much for loss of earnings. But those items were given to you by me because they are the items,

and the only items, as I understand from the testimony—there was no testimony at all as to expenditures for cure—they are the only items that you can possibly consider in a case of the kind that is before you. Of course it is natural to suppose and expected that you will treat both and consider them separately while you are deliberating upon your verdict. But when you express your verdict, if there is to be a verdict for the plaintiff, you will express it in one lump sum.

Gentlemen of the jury, I do not know that there is anything further to say to you that will assist you. I have tried to cover each and every phase and item of the case, as I understand it. I have only this much finally to say to you: If the Court has suggested to you anything from the evidence or if counsel has, and that which has been suggested does not match up with the testimony as you recollect it, you will disregard it entirely. Comments coming from the Court are of no greater weight than if they came from counsel. The test of the testimony is your recollection of it as it came to you from the lips of the witnesses, and you will deal with it as you find it and apply it to the rules of law which I have given you, and in that manner find your verdict; not giving any consideration to any matter in the case growing out of sympathy, favor or prejudice. That is not a part of your duty. It is something that you have no right to consider. Your whole duty is only performed when you have arrived at a verdict in the manner indicated, taking the testimony as given to you and determining the truth and credibility of it and the weight to be given to it and then apply the principles of law that the Court has given you. That makes for a legal verdict; nothing else will. With that you may take the case.

POSTEA.

This case was tried before Judge Luther A. Campbell, with a jury at the Bergen Circuit, on September 22, 1916.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for two thousand dollars ($2,000).

Luther A. Campbell, Judge.

ON POSTEA.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand dollars besides costs to be taxed nisi.

Entered October 2, 1916,
On motion of

Pierson & Schroeder,
Attorneys.

Notice and Grounds of Appeal.

(Filed April 9, 1917.)

To the above-named plaintiff
or
Pierson & Schroeder, his Attorneys.

TAKE NOTICE, that the defendant appeals from the whole of the judgment entered in this cause on or about October 2nd, 1916, to the New Jersey Court of Errors and Appeals.

Respectfully yours,

WELLER & LICHENSTEIN,
Attorneys of the Defendant.

Dated, April 7th, 1917.

The appellant states the following grounds of appeal in this cause:

1. Because the Court erred in that it failed to grant this defendant's motion for a non-suit which should have been granted on the following grounds:

(1) There was no negligence shown on the part of the defendant.

(2) That the plaintiff was guilty of contributory negligence.

(3) That the plaintiff assumed the risk of receiving such injuries.

(4) That the plaintiff voluntarily left his own work and placed himself in a position of peril uncalled for by his employment.

2. Because said verdict was contrary to the evidence.

3. Because said verdict is excessive.

4. Because said verdict is contrary to law.

5. Because the said verdict is against the weight of the evidence.

6. Because the Court refused to grant the defendant's motion for a direction of a verdict on the following grounds:

(1) There was no negligence shown on the part of the defendant.

(2) That the plaintiff was guilty of contributory negligence.

(3) That the plaintiff assumed the risk of receiving such injuries.

(4) That the plaintiff voluntarily left his own work and placed himself in a position of peril uncalled for by his employment.

7. Because the Court on the motion of the plaintiff, and over defendant's objection, struck out the fourth defence in the answer of the defendant:

"Defendant will object at the trial of the above cause that the Complaint discloses no cause of action."

8. Because the Court on the motion of the plaintiff, and over the objection of the defendant, struck out the fifth defence in the answer of the defendant:

"Defendant will object at the trial of the above cause that this Court has no jurisdiction of the subject-matter of this suit in that if any cause of action arose by reason of the facts alleged in the Complaint, such action should have been brought in accordance with an act of the legislature of the State of New Jersey, entitled: "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder" (approved April 4th, 1911).

9. Because the said judgment was in many and divers other respects illegal and contrary to law.

WELLER & LICHENSTEIN,
Attorneys for Defendant-Appellant.

Service of a copy of the within notice and grounds of appeal is hereby acknowledged April 7, 1917.

PIERSON & SCHROEDER,
Attorneys for Plaintiff.

New Jersey Court of Errors and Appeals.

EDWIN J. CHURCHILL, *Plaintiff-Appellee,* *vs.* WILLIAM B. STEPHENS, *Defendant-Appellant.*	Action at Law.

BRIEF OF DEFENDANT-APPELLANT.

Facts.

The plaintiff was in the employ of Tietjen & Lange Dry Dock Co., a corporation, engaged in the business of repairing vessels.

The defendant was also employed by the said Tietjen & Lange Dry Dock Co. as a foreman to superintend the work done in and about the shop.

On March 4th, 1914, said corporation was engaged in welding and repairing a rudder, and in the process of such welding, the rudder was carried to the fire by means of a certain crane and rigging, and brought out from the fire and welded or pounded. Through the slipping of the rudder, plaintiff's hand was caught between it and a chain, and for the injuries he brought suit against a fellow servant, who he alleged was a superintendent of the Tietjen & Lange Dry Dock Co.

The allegation of negligence set forth in the complaint is that it was the duty of *the defend-*

ant to superintend the adjustment of said rigging and *to use proper appliances* therefor, *which were furnished him* by his said employer, and to see that said rigging was properly adjusted and was fitted and supported by proper strong arms and appliances so that employees of said Tietjen & Lange Dry Dock Company might with safety work on and about said rudder in welding on said end, but defendant neglected his said duty and carelessly and negligently superintended the adjustment of said rigging and *negligently selected and caused to be used therefor strong arms or appliances by which said rudder was held, which were unsuited for the purpose and which would not hold said rudder when the process of welding was undertaken, although the said Tietjen & Lange Dry Dock Company had in stock strong arms or appliances suitable for the purpose, which were available to the defendant.*

The plaintiff was a ship's blacksmith, who had been so engaged for many years (p. 49, l. 15), and was perfectly familiar with that kind of work and with the work of placing braces and strong arms to support the rudder and give it a perfect balance (p. 49, l. 27). He had previous experience in adjusting and fastening arms or pieces of metal to the objects which were suspended from the crane (p. 55, l. 10), and knew how the arms should be put on, and had in fact put them on himself (p. 55, ll. 13 to 20). He was familiar with the means taken to prevent the crane chain and rudder from slipping (p. 54, l. 20). For twelve years he had done work upon ship rudders and thoroughly knew the process of rigging up the rudder for the purpose of heating and welding it (p. 23, ll. 3 to 30; p. 24, ll. 3 to 10).

The plaintiff testified that the rudder was fixed up with two strong arms hung in links supported from cranes (p. 19, l. 1). That he was forging

a bushing and while standing and waiting for this to heat (p. 26, l. 30), he took hold of the rudder to push it toward the ramming (p. 26, line 40). He was called over from his work at the bushing to do this by the blacksmith in charge of the rudder job, whose name was Thompson (p. 53, ll. 20 to 30). It was Thompson who directed him from his bushing work to pull down on the chain (p. 61, ll. 1 to 10). Thompson was in charge and present when plaintiff was hurt, but the defendant Stephens was absent from the shop (p. 60, ll. 38 to 40); p. 27, ll. 10 to 30).

Plaintiff, from his twenty years' experience with welding and making rudders, knew the rudder was likely to slip because the arms did not have the proper grip (p. 32, ll. 1 to 15). He knew the arms were not adapted to the use they were put to, and if so used were dangerous (p. 64, ll. 28 to 30) and that the arms could plainly be seen (p. 64, l. 35).

The only evidence given to connect the defendant with the accident was that he was seen by the plaintiff in the blacksmith shop superintending the fixing of the rigging (p. 20, l. 30). That Stephens was in the shop for an hour or so but was not there at the time of the accident (p. 21, l. 25).

When plaintiff left his work and took hold of the chain at the rudder, the foreman Thompson was in charge and directed him to do so (p. 25, ll. 15 to 29; p. 27, ll. 1 to 30).

The plaintiff's description of the accident is found on page 28, line 11. He testified: "I was lowering the rudder down, the blacksmith (Thompson) wanted it lowered down to the anvil to cut the piece out. I was lowering it down when the strong arm gave way and the rudder fell to the floor and my hands were caught in the chair." Plaintiff was caught for two or three minutes before he was released

(p. 28, l. 30), and during this brief interval he noticed the shape of the strong arm on the rudder. That it was in the shape of a V (p. 28, l. 40). The plaintiff gave a minute and lengthy description of the strong arm which was adjusted on the rudder (pp. 29, 30 and 31), and described a proper strong arm which should have been in the shape of a T (p. 31, l. 23).

Plaintiff said that he could not remember noticing what strong arm was put on the rudder (p. 19, l. 24), although the work of adjusting the rigging was done right along side of him (p. 20, l. 12).

Defendant took an objection and exception to the order striking out his third, fourth and fifth defenses (p. 12, l. 25), and at close of plaintiff's case moved for a non-suit (pp. 65, 66 and 67). An exception was taken to the Court's refusal to nonsuit (p. 68, l. 15). The motion for non-suit was renewed at the close of the case and a motion to direct a verdict for the defendant on the ground that plaintiff had failed to prove the allegations of his complaint and had not proved that Stephens was in any way negligent. To the denial of this motion an exception was taken (p. 101, l. 38).

We make the following contentions:

POINT I.

Plaintiff at the most only proved nonfeasance on the part of the defendant. Misfeasance was not proven.

The distinction made between nonfeasance and misfeasance is laid down in Vol. I, Am. and Eng. Ency. of Law, 2nd Edit., pages 1131 to 1133, as follows:

> "In determining the liability of an agent to third persons for damages resulting from his conduct as agent, a distinction is usually drawn between those cases in which the in-

jury complained of is the result of mere nonfeasance or omission of duty on the part of the agent in the course of his employment, where such default does not amount to misfeasance, and those in which the injury arises from some act of misfeasance or positive wrong on his part.

"With reference to the former class of cases the established doctrine is that the agent's liability is solely to his principal, there being no privity between him and third persons, but only between him and his principal. Hence, as to all such negligences and omissions of duty, the agent is not liable to third persons, but the general maxim *respondeat superior* applies." Citing the case of

Delaney v. Rochereau, 34 La. Ann., 1123, 44 Am. Rep., 456.

In the opinion written in this case, C. J. Bermudez said:

"Everyone, whether he is a principal or agent, is responsible directly to persons injured by his own negligence in fulfilling obligations resting upon him in his individual character, and which the law imposes upon him independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If in the course of his agency he comes in contact with the person or property of a stranger, he is liable for any injury he may do either by his negligence, in respect to duties imposed by law upon him in common with all other men. An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible. The whole doctrine on that subject culminates in the proposition that wherever the agent's

> negligence, consisting in his own wrong doing, therefore in an act directly injures a stranger, then such stranger can recover from the agent damages for the injury."

Where the injury results not from mere nonfeasance or omission of duty by the agent but from his positive misfeasance, or where according to the better authority, it results from such an omission of duty or act of negligence on the part of the agent as partakes of the character of a misfeasance, the agent is personally liable to third persons, the actual perpetrator of the positive wrong not being permitted to relieve himself from liability by showing that the wrong was done while he was acting in the course of his employment as agent for another. In all such cases he is personally liable, whether he did the wrong intentionally or ignorantly by the authority of his principal; for the principal cannot confer on his agent any authority to commit a tort upon the rights or property of another.

The New Jersey decision cited is

Horner vs. Lawrence, 37 N. J. L., 46.

In that case the act of the defendant was in opening a gap in the fence, in purposely letting down the fence and trusting to watch the gap, so as to prevent the hogs from going through, J. Bedle, in delivering the opinion of the Supreme Court said:

> "Whether Horner was engaged in an independent employment, or whether the immunity of an agent to a third person extends beyond mere neglects in the scope of an agency arising out of or in reference to matters in the nature of contracts between the principal and third parties (Shearm. & Rea. on Neg., §§111, 112) or what the exact limit of responsibility may be, need not now be settled, for the evidence is such that the court below could have considered Horner as having wilfully left down

> the bars and thereby became responsible for his own tort, without reference to the question of agency. * * * His conduct was not mere neglect—it was intentional and wilful violation of his authority. It was misfeasance, for which, as servant, he cannot, in any respect, claim exemption against the party injured."

The complaint charged non-feasance. The act of omission was that the defendant as a superintendent for the Tietjen & Lange Dry Dock Company failed to use the proper appliances for the rigging of the rudder which were furnished by the company, and that he negligently selected a strong arm or appliance which was unsuited for the purpose and which would not hold the rudder, although the company *had in stock* strong arms or appliances suitable for the purpose.

There was no evidence in the case to back up the pleading. Plaintiff failed to prove that any other kind of strong arms were furnished by the company or were on hand for a selection to be made therefrom. The nearest approach to proof that another kind of an arm was in existence is found in the question put to plaintiff by his counsel (p. 32, l. 15).

> "Q. What is the custom in this shop about the cutting of an appliance, such appliance as are necessary for the work that you are to do? A. Well, if you haven't got what you need, you have to make them."

This was not the act of omission alleged in the complaint. The defendant was not charged with a failure to make a proper strong arm, but was charged with selecting an improper kind of an arm although proper ones had been furnished him and were in stock.

According to the elementary writers, one servant was not liable to a fellow servant for negligence of an act of non-feasance.

Wharton neg. sect. 245.
Wood, Master & Serv., Sect. 325.

In the case of *Hare vs. McIntyre* (Me.), 8 L. R. A., 450.

J. Virgin in delivering the opinion of the Supreme Court said:

> "There is no subsisting contract between fellow servants, and neither receives any compensation from the other. Neither is a party to, or has any interest of privity in, the others' contract with their common master. Their separate, independent contracts with him are only material as showing that they are, individually, rightfully on the premises, and engaged in the performance of their service there. The action cannot, therefore, be founded on any contract, but, if at all, on the defendant's misfeasance, which, even if it could be deemed a breach of this contract with his master, would not for that reason exempt him from liability to others injured thereby, provided such misfeasance was a violation of a duty springing from the relation between them."

POINT II.

The court erred in refusing to grant the defendant's motion for a non-suit although duly requested so to do.

At the close of the plaintiff's case the defendant moved for a non-suit on the ground that the plaintiff had not proved any negligence on the part of the defendant and that the risk of the injury was an obvious one and was known to the plaintiff. The court refused to grant the motion and an exception was allowed the defendant.

The courts of this State have repeatedly held that where the dangers which a physical condition or situation produce are obvious, the servant assumes the risk of injury therefrom.

Burns vs. D. & A. Tel. Co., 70 N. J. L. 745;
Foly vs. Jersey City E. L. Co., 54 N. J. L. 411;
Riddle vs. Alpha etc. Co., 73 N. J. L. 594;
Durant vs. N. Y. etc. R. Co. 65 N. J. L. 656;
Henggler vs. Cohn, 68 N. J. L. 240;
McDonald vs. Standard Oil Co., 69 N. J. L. 445;
Coyle vs. Griffin Iron Co., 63 N. J. L. 609-611;
Capon vs. D. L. & W. Rd. Feb. Term 1916, per curiam.

The plaintiff knew of his dangerous position; he knew the proper kind of an arm to use for such work and could readily have seen the difference between the "V" arm in use and the one which he deemed the proper one, a "T" arm; he knew the purpose of the nut at the end of the arm and that the intervening space was to allow the chain holding the rudder to slip back and forth as it was lowered or raised. These facts were apparent and obvious by his own testimony. (P. 18, ll. 39-40);

"Q. Explain how this rudder was put into the frame-work for these cranes? A. The rudder was fixed up with two strong arms, hung in links supported from the cranes.

"Q. Where were these strong arms adjusted to the rudder? A. On the square part of the frame of the rudder.

"Q. And what determined in what part of this square part of the frame these were put on? A. On the two ends, one on each end.

"Q. Would that be pretty near the shaft or a little away from the shaft? A. Well, they were put in such a position that the rudder would have a balance in the welding.

"Q. That is, so adjusted that it would practically be balanced? A. Yes.

"Q. And then, as I understand it, one strong arm was put on each end of that square frame-work? A. Yes."

(P. 20, ll. 9-13);

"Q. Did you know that a rigging was being adjusted to that rudder around noon-time that day? A. I did.

"Q. How did you know that? A. Why, it was right alongside of me, where I was working."

(P. 21, ll. 4-17);

"Q. How far, actually, were you away from where this work on the rudder was being done? A. From 4 to 5 feet."

(P. 29, ll. 1-12);

Edwin J. Churchill—Direct Examination:

"Q. How many kinds of strong arms are there? A. Well, two.

"Q. Now, describe first the one that was used on this occasion? A. The one that was used on this occasion, before the accident was in the shape of a V; it is only natural to get the squares of the material on the rudder. There was nothing ripping, only the four corners of the squares."

(P. 31, ll. 1-10);

"Q. Do they sometimes help these to hold in some other way? A. Yes, if they use them, they sometimes put wooden wedges in there.

"Q. What is the special use of that particular kind of strong arm that you have now described? A. The proper strong arm would be in the shape of a T."

(P. 32, ll. 1-18);

"Q. With your 20 years' of experience in blacksmithing, and your experience with welding and making rudders and so on, do you consider that the strong arm that was used in that particular instance was the proper one for that purpose? A. No, it was not.

"Q. Have you any other reasons than those —what are your reasons? A. Why, they

wasn't working five minutes on the rudder when the thing slipped.

"Q. What I want to know is, why is it likely to slip? A. Because it hasn't the proper grip."

And on cross-examination he said:
(P. 49, ll. 20-36);

"Q. In that time I understand that you worked in ship-building places and construction places for a period of about 11 years? A. Eleven or twelve years.

"Q. During that time you engaged in welding, things of that kind? A. Yes.

"Q. You were perfectly familiar with all that kind of work, is that true? A. Yes.

"Q. Familiar with the placing of these braces, these strong arms, on materials that are to be welded? A. Yes.

"Q. And they place one on each end, do they not—in this particular case, they placed one on each end? A. Yes.

"Q. And then attached to the crane that ran above, so that, as you say, it gave the rudder a perfect balance? A. Yes."

(P. 54, ll. 35-37);

"Q. What distance is there between the rudder and this nut out here (indicating), about how many inches? A. 18 inches.

"Q. Do you know why there is 18 inches there? A. Well, the nut is probably for to give more play."

(P. 55, ll. 17-22);

"Q. You put them on yourself? Were you there when they put this on? A. I was working there.

"Q. Did you see them put that on? A. No, I did not.

"Q. *When you were there, did you look at the arm? A. No, I did not pay any attention to the arm.*"

(P. 59, ll. 11-20);

"Q. How far in was that chain from the

outer edge of that 18 inch arm? A. I could not remember.

"Q. About? A. I could not remember that.

"Q. Was it a foot inside or was it near this nut or was it near the rudder? A. I could not remember that.

"Q. Did you pay any attention? A. No, not to that.

"Q. It did not interest you at all? A. No."

(P. 61, ll. 23-38);

"Q. It is necessary, is it not, when you are pulling on the chain to lower the rudder, to watch the position of the rudder to see that it is straight? A. We watched the position of the rudder they work on.

"Q. To see that it is straight? A. Yes.

"Q. So that it won't move and the chains will not move from end to end? A. That is the idea.

"Q. Were you watching the rudder? A. The end I was on

"Q. Were you paying any attention to see whether your chain was in a vertical position or not? A. Well, no, I did not pay any attention to the chain end of it."

(P. 64, ll. 10-40);

"Q. What you mean by that testimony is that you did not know that they were on properly? A. Why, I did not pay any particular attention to what arms are put on.

"Q. You were familiar with putting arms on those things? A. Yes.

"Q. Now, then, you knew at that time that an arm such as you say was on that thing was a dangerous arm to be on there, isn't that the fact? A. It was a dangerous arm to be on."

"Q. You knew that at the time you were hurt and before that? A. Not before that.

"Q. And you knew that the kind of an arm that was on there at the time you were hurt was a dangerous kind of an arm to put on any piece of material of that kind? You knew that? A. That is what I seen.

"Q. Aside from the fact of being dangerous, you knew that arms generally of that kind were not adapted to that use? A. Yes.

"Q. And if used, they were dangerous? A. Yes.

"Q. You did not pay any attention to the kind of arm that was on there when you took that chance? A. No.

"Q. Those arms you can see them very plainly? A. Oh, yes."

The plaintiff himself testified that although he had not noticed that the strong arm used was a "V" shaped one before he was injured, he noticed while his hand was caught that it was a "V" shaped arm which in his opinion was an improper and dangerous one. The arm was in plain view and plainly seen (64-38) and it cannot be doubted that if the "V" shaped arm (if it constituted a defect in the rigging) so easily seen would have been discovered by him had he used ordinary care in observing if the rudder was properly adjusted and rigged.

Coyle vs. Griffin Iron Co., 63 N. J. L. 609-611.

Had the plaintiff used proper watchfulness and exercised a reasonable degree of care and caution he would not have been injured.

The danger of the situation in which he placed himself was apparent and obvious and the motion should have been granted.

POINT III.

The verdict was contrary to the evidence.

The only witness for the plaintiff was himself and it is needless to repeat his testimony. He was vitally interested and his story was in every essential detail contradicted by the four eye-witnesses to the accident.

It is true mere numbers do not count, but "The testimony of the plaintiff was so profoundly affected by his personal interest in the result. The very fate of his cause depended upon his individual testimony, and as his claim for damages was very large, and the costs and expense of the trial were necessarily considerable, it is not possible to conceive of a case in which the effect of a heavy pecuniary interest in the result could exercise a more powerful influence upon the mind of the witness than this. As the review of the evidence shows, he stood entirely alone, not a solitary witness corroborated him in the least degree in this vital feature of his case, and of this fact he, being the plaintiff, was necessarily aware."

Holden vs. Penna. R. R. Co., 169 Pa. 16; 32 Atl. 108.

In *Davis vs. Philadelphia Rapid Transit Co.,* 77 Atl. 451, it was said:

"Only one witness, and that the plaintiff herself, testified that the car was at rest before she attempted to alight. Eight eye-witnesses of the accident testified directly to the contrary, stating that the plaintiff attempted to get off while the car was yet in motion. The credibility of the witnesses for the defendant was unimpeached, and, with eight of them testifying in positive contradiction of the plaintiff's unsupported statement, the evidence gave the defendant a marked advantage to which it was properly entitled under the rules, and which should not have been minimized to its disadvantage in the charge of the court. Where the testimony of so many credible witnesses is in direct contradiction of that single witness, the probabilities are strongly in favor of the evidence of the larger number. Where witnesses are equally intelligent and equally truthful and free from bias, and have equal opportunities for knowledge of the facts to which they testify, the many are less likely to be mistaken than the

few. In a conflict of evidence, mere number is not in itself controlling, but it certainly is entitled to great consideration, *and should control unless there be special reason to credit the evidence of the smaller number.*"

And again, in *Katzenbach et al. vs. Holt, et al.,* 43 Eq. 536, V. C. Bird says: "Unless circumstances control, when witnesses are equally entitled to credit, a greater number must control."

The witnesses for the defense were men of equal intelligence to that of the plaintiff, and were disinterested in the outcome of the case, and unbiased.

ERNEST THOMPSON testified (p. 69, ll. 1-30):

"Q. Did you superintend the putting up of the strong arms? A. Not exactly superintend them; I saw them doing it.

"Q. Were you there when they were putting them on? A. Yes.

"Q. Do you know what strong arms were put on? A. Yes, sir.

"Q. Were they the kind of strong arms that had been used for that kind of work? A. Yes, sir.

"Q. Were they the kind of strong arms that were used for that work down there? A. Yes.

"Q. How long had you been using those arms? A. I used them off and on for nearly four years.

"Q. How long had you been employed there? A. About four years and two months.

"Q. Just explain to the jury the working of the arms; they are attached to the rudder for the purpose of holding that in balance and lowering or raising one end? A. Yes, sir.

"Q. Is there a man stationed at each of those chains? A. Generally the work of a helper's job; the helper generally does that.

"Q. The helper takes care of that? A. Yes.

"Q. Do you know the arm near which Churchill was standing? A. Yes.

"Q. Was anybody with him? A. With the helper.

"Q. Was anybody with Churchill? A. Yes, sir; my heater was with him.

"Q. Who? A. The helper.

"Q. Who was he? A. McCabe.

"Q. What was he doing there? A. Attending to the chain.

"Q. Was he attending to the chain? A. Yes, sir.

"Q. Was it part of Churchill's duty to attend the chain? A. No, sir.

(P. 70, ll. 1 to 7):

"Q. Did you ask him to? A. I did not.

"Q. Was Mr. Stephens there at the time the accident happened? A. No, sir."

(P. 78, ll. 1-40). (P. 79, ll. 1-2):

"THE COURT: You say that you have had experence for a number of years as a blacksmith of this character; that you have had experience during that time in the tightening of these strong arms as they are called upon the different pieces of work, and the manner in which they are placed, as well as the kind of strong arm that is used for the work; now, having that in mind, what can you say as to whether this thing that was used upon this work was such a one as is ordinarily and customarily used in that class of work?

"WITNESS: Yes, sir.

"THE COURT: You say it is?

"WITNESS: Yes, sir, it is; a practical tool.

"THE COURT: It is a practical tool?

"WITNESS: Yes, sir.

"THE COURT: Did you notice the manner in which it was attached to this rudder?

"WITNESS: It was screwed up just the same as any other one, with bolts.

"THE COURT: From what you saw of this particular clamp or strong arm, as it was attached to this rudder, what can you say from your experience as to whether or not it was properly attached to this rudder?

"WITNESS: It was properly attached.

"BY MR. PIERSON:

"Q. After the accident, was this strong arm put back on again? A. Yes, sir.

"Q. The same one? A. The same arm.

"Q. You did not use the flat one; did not use the other kind? A. No, sir, the same arm at that job.

"Q. Are you sure about that? A. Positively."

PATRICK MCCABE (p. 83, ll. 14 to 40; p. 84, ll. 1-19):

"Q. Do you remember the day that he was hurt? A. Yes, sir.

"Q. What were you doing? A. I was operating on the crane.

"Q. You were operating on the crane? A. Yes, the blacksmith told me to go down and help raise that crane.

"Q. Did you have a chain? A. I had a chain in my hand.

"Q. Did you have the chain in your hand at the end of the rudder where Churchill was hurt? A. Opposite where Churchill was hurt I had the chain.

"Q. Did Churchill operate those chains? A. No, sir.

"Q. At any time? A. At no time.

"Q. What was Churchill doing? A. He was there talking to me and had his hand between the nut and this other chain.

"Q. Do you know how his hand was hurt? Yes, how was it hurt? A. I could not tell you.

"Q. How long was his hand in there? A. About—it would not be more than two minutes.

"Q. What position was his hand in? Was it just—just tell us where his hand was in regard to the arm? Just tell us where his hand was in regard to the chain that ran around the arm up to the crane, the end of the arm? A. It was between the link and the nut he had his hand; the link slipped back.

"Q. The nut? A. Yes.

"Q. Was that when the rudder was away from the arm? A. It was off of the rudder, on the end of it.

"Q. On the end of it? A. Yes.

"Q. You mean the end that was to keep the chain on? A. Yes, the end that was to keep the chain on.

"Q. Was it between that and the nut? A. That link and that nut he was caught."

(P. 91, ll. 1-16):

"A. Well, that chain is supposed to go around on that rudder, and the chain is bound to move on the rudder, I am working on that business for 10 years and you are supposed to keep your hand away from that chain always. That is the first that the boss will tell them to keep their hands away from that chain. He is a mechanic and he should know enough to keep his hand away.

"Q. When did you first see me in this case to tell me about your story? A. Never seen you until I seen you here.

"Q. Yesterday? A. Yesterday.

WILLIAM HICKMAN (p. 92, l. 16 to p. 93, l. 15):

"Q. Did you see him put it on? A. I assisted him in putting it on.

"Q. You know when they are on properly, do you—when these arms are put on right? A. Well, I am a mechanic; he was a mechanic and supposed to put it on right.

"Q. Do you know when they are put on right? A. Yes, sir.

"Q. And you assisted in putting this thing on right? A. Yes.

"Q. In your judgment as a mechanic working 11 years in putting on arms, was this appliance put on right? A. It was welded safe.

"Q. And was on right? A. In my estimation.

"Q. Was it the proper kind of appliance for that job? A. Yes, sir.

"Q. Did you see Churchill there at the time just before he was hurt? A. At the rudder?

"Q. Yes? A. He was for a few minutes.

"Q. Where was he? A. At the lower end of the rudder.

"Q. Near whom? A. Near Mr. McCabe.

"Q. Do you know what he was doing there? A. He was talking to Mr. McCabe.

"Q. Do you know who had hold of the chain? A. Mr. McCabe had hold of the chain.

"Q. Is that what he was doing there? A. Yes, sir.

"Q. Do you know what Churchill was doing besides talking? A. Had one hand on the rudder like that (illustrating), and the other on the strong arm.

"Q. One on the rudder and the other on the strong arm? A. Yes.

"Q. And stood there talking? A. Yes, sir."

(P. 96, l. 31 to p. 98, l. 16):

"Q. Did anything fall? A. The link slipped. The link slipped; that is all. Nothing fell.

"Q. Nothing dropped? A. Not the time they lowered the rudder—

"Q. What is that? A. Nothing dropped.

"Q. Everything stood just as it was except where it slipped, is that right? A. The rudder was lowered.

"Q. After he got caught or before? A. After he got caught.

"Q. But until he did get caught, everything was just as it was except that the link slipped, is that right? A. It stood right in its place.

"Q. The rudder stood right in its place? A. Yes.

"Q. All except the link slipped, until after you lowered it, is that right? A. The link flew back.

"Q. I understand the link flew back. The link flew back towards the end on the nut and caught him, but everything else stayed just as it was, is that right, or isn't it? A. Yes.

"Q. This strong arm that he had his hand on is iron, is it? A. Yes, sir.

"Q. How big around is it about? A. Oh, about an inch and a half, an inch and three quarters.

"Q. An inch and a half? A. An inch and

a half or three-quarters, is about the size of it.

"Q. That is, it was an iron shaft and was an inch and a half or an inch and three-quarters around, extending from where the strong arm was fastened to the shaft back to where this link was? A. Yes, sir.

"Q. Just where was Churchill's thumb caught? A. Between the nut and the link.

"Q. Well, what part? What place on the strong arm? A. The end at the back end of the strong arm; the end of the strong arm.

"Q. Say this is the top (illustrating) of the shaft or the arm and this is the nut; his thumb was caught in here (indicating)? This is the link; here is the thumb caught in there, like that? A. That is where his thumb was caught.

"Q. Resting his hand on this arm? A. Resting his whole weight right there, talking."

JAMES ROACHE, after testifying that he was the helper for the plaintiff on the day he was hurt, said (p. 98, l. 30 to p. 99, l. 8):

"Q. And just prior to the time that Mr. Churchill was hurt, did you and Mr. Churchill have any conversation? A. We were talking together.

"Q. Did he go away from his forge? A. He did.

"Q. At the time he went away, did he say anything to you? A. Told me to go and heat his bushing up at the other fire.

"Q. Go and heat the bushing that he had on the fire? Did he tell you what he was going to do? A. Going over to talk to McCabe.

"Q. Said he was going over to talk to McCabe? A. Yes.

"Q. You came here under subpoena, did you? A. Yes."

As against this testimony we have only that of the plaintiff who testified that he had nothing to do for about three hours while his helper was heating a bushing (26-20, 30), that he had never seen a chain man there and that he was operating

the chain (53-1, 12); McCabe was there but was standing talking to him.

(P. 55, ll. 10 to 16):

"Q. Have you ever had anything to do with the fastening of those arms on to pieces of metal, prior to their being in suspension from the crane? Have you ever done that kind of work? A. I have.

"Q. Do you know how it is used? A. I do.

"Q. Do you know how they ought to be put on? A. Yes."

(P. 55, l. 40 to p. 56, l. 15):

"Q. You know McCabe, don't you? A. Yes.

"Q. What was he doing there that day? A. Standing alongside of me.

"Q. Standing alongside of you? He was one of the gang that was working on the rudder? A. He was one of the helpers on the big fire.

"Q. Wasn't he the chain man that operated the chain on the end that you were standing on? A. No, he was not there.

"Q. Didn't he have hold of the chain? A. No.

"Q. Just prior to the time that you were hurt? A. No.

(P. 57, ll. 25 to 27):

"Q. Wasn't McCabe doing it? A. No.

"Q. Weren't you talking with McCabe? A. I was talking with McCabe.

(P. 61, ll. 7-13):

"Q. You were engaged at the time in fixing a bushing? A. Making a bushing.

"Q. I understand you had to wait half an hour while it was getting hot? A. Yes.

"Q. And had nothing to do? A. Nothing to do.

"Q. And standing around there waiting for that thing to get hot? A. Yes.

"Q. And your helper attended to that? A. Yes."

It would thus appear that the testimony as to just how the accident occurred as related by the

plaintiff is flatly contradicted by the four disinterested witnesses for the defense; that in order to have found for the plaintiff the testimony of all the defendant's witnesses had to be ignored. We feel that the testimony on the part of the plaintiff was such as should have been the controlling factor and that the verdict is therefore against the weight of the evidence.

POINT IV.

The Court erred when it struck out the Fifth Defense in the Answer of the defendant.

The fifth defense of the Answer as originally filed by the defendant was:

> "Defendant will object at the trial of the above cause that this Court has no jurisdiction of the subject-matter of this suit in that if any cause of action arose by reason of the facts alleged in the complaint, such action should have been brought in accordance with an act of the legislature of the State of New Jersey, entitled: 'An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder" (approved April 4th, 1911)."

It was conceded during the argument on the motion to strike out this defense that should the motion have been denied then the plaintiff would have been barred from prosecuting his action, for he was then, or had been, receiving compensation for his injuries from the Tietjen & Lange Dry Dock Company, the employer of both the plaintiff and defendant in this action, under the aforesaid Act.

Section 3 paragraph 23 of the Act, as amended in 1913, says:

> "Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damage therein." * * *

The original Act of 1911 contained no such paragraph.

The question is, who in contemplation of this paragraph are "third persons?"

The respondent's contention in brief is, that a fellow-servant hired by the same master, engaged in the same or similar work, is not such a "third person" as the Act contemplates.

We, of course, are familiar with the decisions rendered in *Bryant vs. Fissell,* 86 Atl. 458; *Klotz vs. Newark Paving Co.* and others holding the liability of third persons—those cases are all differentiated by the fact that in each instance the defendant was in truth a "third person," one not engaged under the same employer as the petitioner and in the same work etc.

The compensation Act by paragraph 6, abolished the so-called "fellow-servant rule" (it didn't say "third-persons") and compelled the Master to compensate the employee for all his acts arising out of and in the course of employment, etc., thus insuring the employee against all acts of the employer or his own co-workers, where the accident arose out of and in the course of the employment.

Later and under Section 23 supra, it reserves to the employee the right of action for negligence on the part of *"a third person or corporation,"* but requires a proportionate repayment to the em-

ployer in the event of a recovery against such "third persons or corporations."

It is difficult to conceive how a corporation could be a fellow-worker—and this fact, together with the facts that the original act did not contain the reservation of the rights against third persons with the common knowledge that actions against fellow-servants are comparatively rare, due to the oft-time inability on the part of a fellow-employee to respond financially to an action for damages and the abolition of the "fellow-servant rule," leads us to believe that the legislature did not have in mind or intend, when it used the words "third persons" in this section, to permit an action to lie against a fellow-servant for his negligence either by misfeasance or non-feasance.

Fellow-servants are not, as a rule considered third persons by text writers or commentators, for it will appear by an examination of the books dealing with liability of various persons that the text and authorities are invariably separated under the distinct heads of "Fellow-servants" and "Third Persons."

In speaking of the case of *Peet vs. Mills,* 136 Pac., 685, Circuit Judge Morrow, of the Circuit Court of Appeals for the Ninth Circuit, in *Mills et al. vs. Northern Pacific Railroad Co.,* 211 Federal Reporter 254, at page 263; 4 N. C. C. A. 819, said:

> "We are unable to agree with counsel that the Supreme Court of the State of Washington in that case reached a conclusion different from that reached by us in the present case. In the Washington case the plaintiff, Peet, while in the employ of the Seattle, Renton & Southern Railway Company, as a motorman, was injured in a collision between two of the railway company's trains. The defendant, Mills, was then the president of the railway company, and the plaintiff in his suit sought

to hold him personally responsible for the injuries because of the allegations that, when Mills assumed control and management of the railway company, it was equipped with a block signal system for use in foggy weather, which the defendant failed to operate; and that, when complaint was made by the train operators of the great danger of operating the trains without the aid of the block signals, a promise was made by the defendant, Mills, to have the block signals working during foggy weather, which promise the defendant failed to keep, and as a consequence of his negligence in so failing, the plaintiff was injured. The trial court sustained a demurrer to the complaint, and, the plaintiff electing to stand upon his complaint, the action was dismissed and an appeal taken to the Supreme Court. The decision of the lower court was affirmed. In whatever light the Supreme Court of the State of Washington may have viewed the case, no portion of the language used by it in that case can be claimed to cover the facts of the case which we now have under consideration. *In the Washington case the injury was alleged to have been caused by the negligence of the defendant, who was the president of the railway, that is, in the same employ with the plaintiff.*"

It would seem, therefore, that the Court distinguished in that case between an action against persons not engaged in the employment with the injured party and those engaged in the same employment, or in other words, sustained an action against third persons, but not against fellow servants or employees.

We respectfully submit that the motion to strike out this defense should have been denied.

We therefore respectfully submit that the judgment should be reversed.

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—1917—

New Jersey Court of Errors and Appeals

EDWIN J. CHURCHILL, Plaintiff-Appellee, vs. WILLIAM E. STEPHENS, Defendant-Appellant.	On Appeal From New Jersey Supreme Court.

BRIEF OF PIERSON & SCHROEDER, ATTORNEYS FOR THE PLAINTIFF-APPELLEE, IN HIS BEHALF

Nature of Case

This case is an appeal by the defendant from a verdict rendered against him in a case tried in the Bergen Circuit. The suit was brought by the plaintiff against the defendant, a fellow workman, for the negligence of the defendant, resulting in the injury of the plaintiff.

Among the questions brought up for review are those relating to the refusal of the Trial Court to grant defendant's motion for nonsuit at the close of plaintiff's case and to the refusal of the Court to grant defendant's motion for direction of a verdict at the close of the case. Precisely the same

reasons are urged by defendant in the grounds of appeal (pp. 114 and 115), why each of these motions should have been granted. There was no evidence produced by defendant of a conclusive character which would make it proper to direct a verdict if the motion to nonsuit was properly refused. Hence it is deemed best to discuss these two points together, namely: 1 and 6 of the Grounds of Appeal, page 114, l. 25 and page 115, l. 13.

POINT I

The motions for a nonsuit and for the direction of a verdict were properly refused.

In order to determine if this is so, it is necessary to consider the testimony of plaintiff. This will not be quoted to any great extent in this brief, but only outlined. The plaintiff was the only witness in his behalf, and his description of the accident and how it occurred is found on pages 15 to 32 in his direct testimony and on pages 52 to 64 in his cross-examination.

The plaintiff testified that he was a ship blacksmith and had been in that kind of work for 22 years and had worked at a number of ship-building shops during that time, (p. 13, l. 26, *et seq.*).

It appears that on the day of the injury the defendant was acting as foreman in the blacksmith shop (p. 16, l. 13), and had directed the rigging of a ship's rudder for the work of welding an end thereon (p. 20, l. 25). This rudder was about eight feet long and six feet wide (p. 17, l. 10, *et seq.*). The shaft projected about eight feet from the end of the rudder so that the whole length

of the shaft including the part extending along the rudder was about fifteen feet and was six inches in diameter. The framework of the rudder was square iron about four or four and one-half inches each way.

The part of the rudder that was afterwards put in the crane weighed about two tons. In order to hold the rudder in place between two cranes, the frame of the rudder was fitted up with what are termed strong-arms. These are fastened one on each end of the rudder and have an end or shaft extending in the same plane as the face or surface of the rudder and extending in opposite directions so as to form an axis on which the rudder might be suspended so that it could be raised or lowered on either end and also could be moved around like the axle of a wheel so that the face or surface of the rudder might be moved into any position.

There are two kinds of strong-arms which might be used for this purpose (p. 28, l. 39, *et seq.*). No models of these were permitted to be shown (p. 29, l. 23). Part of the description was indicated but it was clear to the jury as to what the difference of these two types were. The first type and the one used may be described roughly as a Y with the V part of the Y at right angles to each other, the base of the Y forming the part of the strong-arm which was used as the axis. This base had a knob at the end which kept the link of the crane from slipping off. This end or axis was inserted in the link of the crane. At the extremity of each leg of the V was a flange extending outward in a direction which would be at right angles with the line of the axis. Each flange had in it a bolt hole. Meeting this Y on the opposite side were two similar sides of a square with the

same sort of flange, that is, it was a V, or Y without the base. When these two parts were bolted together through the bolt-holes, it formed a square. Of course the shaft was on a line with one of the diagonals of this square. If these were placed on the square shaft of the rudder surface to surface, the shaft of the strong-arm would be at an angle with the surface of the rudder (p. 30, l. 17; p. 79, l. 10).

In order to have the two axes in a line with each other, so that they could permit the rudder to be moved around, it was necessary to place this Y-shaped strong-arm so that the middle of each side of the square formed by the strong arm pressed upon one of the corners of the square rudder frame. It was precisely the same position that a wrench would be in, if applied to a nut so that the sides of the wrench and the sides of the bolt did not fit together but so that the wrench only touched the nut at the corners.

The other kind of strong-arm was shaped in general like the letter T. It consisted of a shaft at right angles to the part that went against the frame to be held. There was then another flat surface going against the opposite side of the frame. There were in these bolt holes, the bolts fitted therein completing the square. This kind when the bolt holes were properly adjusted fitted snugly against the four sides of the frame. It fitted around the frame with surface against surface precisely as a wrench, when properly used against a nut.

The plaintiff testified with his 20 years of blacksmithing that the former kind of strong-arm was not the proper one to be used on a square frame. It could be used on round frames because it could be put around so that the shaft could come in a

proper line and in line with the opposing or opposite shaft if fitted for use in cranes. The plaintiff further testified that the T-shaped strong arm was the proper one to be used for the work so being done on the day of the accident (p. 32, at top).

The plaintiff further testified (p. 32, l. 16), that it was the custom of that shop to furnish appliances; that if a person has not the appliances he needs, it is his duty to have them made and that there are people there for the purpose of making appliances, tools and the like.

Plaintiff's testimony further shows that the rudder in question on the day in question was fitted with Y-shaped strong arms under the direction of defendant (p. 20, l. 26, *et seq.*, p. 28, l. 39). It appears from the foregoing testimony that the defendant had the duty of procuring the proper sort of appliances and that there were workmen for the express purpose of producing them. The negligence, therefore, in using the wrong kind of strong arm was that of the defendant and not of the master.

Plaintiff's testimony further showed that he was working at an adjoining forge, saw the rigging being done under the direction of defendant, but had no occasion to inspect it, and did not know the exact kind of strong arm that was put on and did not know the way the strong arms were put on and the care with which they were adjusted (p. 19, l. 23; p. 282, l. 36; p. 55, l. 18).

The work to be done on the day in question was to weld an end on the rudder. The rudder had been heated, taken out of the fire and was suspended by the cranes for the purpose of preparing it for the welding (pp. 24 and 25). This required more workmen than were in the gang at the particular forge where the welding was being

done. The defendant was not present at that time, but the work was being done in charge of the foreman of that particular forge. He, by virtue of the custom of the shop and his right as foreman, directed the plaintitff to assist in this operation; and plaintiff by that direction was at one of the cranes and had a hold of the guide chain so that he could raise or lower that end of the rudder as he was directed by the foreman of that forge, who for the time being could direct plaintiff's work (p. 25). The rudder was being rammed, and after the first blow or two, the Y-shaped strong arm nearest plaintiff slipped and turned around so that the side of the square came against the side of the shaft. This permitted the shaft on that strong arm to tilt up at an angle of about 45 degrees and lowered the rudder frame on that side. This caught the thumb and hand of plaintiff in the chain holding the crane and inflicted the injury (p. 28, l. 12).

There is no allegation or claim on the part of any witness that the work which was being done at the time was improperly or negligently done in any way. If it was not due to the giving away of the strong arm, it was an ordinary accident that might occur at any time.

We submit that on this state of facts amplified and enlarged by testimony not directly referred to there was a complete case for submission to the jury.

The jury could certainly find that the strong arms were of improper kind; that it was the duty of the foreman to see that proper strong arms were put on; that he failed in that duty; and that that failure was the cause of the injury.

It certainly did not appear as a matter of law that the plaintiff was guilty of contributory neg-

ligence. He did not help in adjusting the strong arms. It was not his privilege or duty certainly to go all over this rigging when called upon in an emergency to help. It was his duty to respond, and he certainly had a right to assume that everyone who owed him a duty had performed that duty. To hold that as a matter of law plaintiff was bound to see the kind of strong arm that was used and to refuse to work about the rudder would be putting a tremendous burden upon workmen in general. It would require every workman to examine every rigging or scaffold or derrick, a defect in the equipment or fitting of which might cause him injury.

He testifies as indicated above that he did not notice the kind of strongarm that was used until after the injury; he certainly could not have seen whether or not the wrong kind were properly adjusted. It of course is not claimed that the wrong kind never held. Both negligent selection and negligent adjustment were alleged in the complaint (p. 3, l. 15 and p. 4, l. 8). The question of the negligence of the defendant in both particulars was submitted to the jury without objection (p. 106, l. 33).

If the testimony of plaintiff was believed there was not only no contributory negligence at law but there was none as a matter of fact, and the jury so found. And why should they not have so found? He was called in an emergency to operate the crane, and naturally to that his attention was called and his observation directed.

Whether or not plaintiff under the above facts was guilty of contributory negligence was clearly a question for the jury.

Clark Thread Company vs. Bennett, 58 N. J. L., 404.

Newark Passenger Railway Company vs. Block, 55 N. J. L., 605.

Mahnken v. Freeholders, 62 N. J. L., 404.

29 Cyc., 631.

"But it was for the jury to draw inferences (to establish contributory negligence) from the facts, and a peremptory instruction could not be given by the trial judge unless in a case where but a single inference could be drawn."

Clark Thread Company vs. Bennett (E. & A.), 58 N. J. L., 404.

In the case of *Newark Passenger Railway Company vs. Block*, 55 N. J. L., at page 607, Mr. Justice Magie in speaking for this Court uses the following language in a case where it was alleged in behalf of defendant that no negligence was proved against it and that defendant was negligent:

"In reviewing a judgment founded on a verdict directed by the trial judge after the whole evidence was in, this Court declared that a jury should only be controlled in its verdict by a peremptory instruction when the testimony is of such a conclusive character as would compel the Court, in the exercise of a sound legal discretion, to set aside a verdict in opposition thereto, or, as the learned Chancellor who delivered the opinion said, 'to put it more forcibly and more accurately, if the evidence be such that the Court would set aside any number of verdicts rendered against it, the jury may be controlled.'" * * *

"The power to direct a verdict is identical with and rests upon the same foundation as the power to nonsuit.

"When, in such cases, the trial judge is requested to nonsuit, or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairnes, in *Metropolitan Railway Co. v. Jackson,* L. R. 3 App. Cas., 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury; but if from facts established negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence *ought to be inferred.*"

"Where the evidence is such that different minds may reasonably draw different conclusions as to contributory negligence the question is for the jury. But where the Court can say from the evidence that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that plaintiff was acting as an ordinarily prudent person would have acted under the circumstances, the question of plaintiff's contributory negligence is for the Court."

29 Cyc., 631.

"When the facts claimed to constitute contributory negligence depend upon the credibility of witnesses, in respect of which honest men might differ, the question is for the jury. *Brooks v. Sommerville,* 106 Mass., 271; *Swoboda v. Ward,* 40 Mich., 420; *Hackford v. New York Cent. etc., R. Co.,* 53 N. Y., 654."

29 Cyc., 631, note 53.

The case of *Mahnken v. Freeholders,* 62 N. J. L., 404 is quite similar in principle to the case at

bar. There a woman in alighting from a bicycle on a bridge over which she had ridden many times stepped in a hole nine inches long by five inches wide between the end of a plank and a timber guard. Here she had not only the immediate opportunity of seeing but had had many opportunities. A nonsuit was reversed in this Court.

The plaintiff did not assume the risk of receiving these injuries.

This brings up for discussion the third ground alleged for the motion to nonsuit and for the direction of a verdict. If this means in this particular case more than is involved in the question of contributory negligence, it means,

(*a*) That plaintiff by virtue of the fact that he was an employee assumed as a matter of law the risk of injuries arising out of the negligence of a co-employee; or, to put it in another way, that one of the incidental risks of his employment, which he assumed, was that he would receive injuries from the negligent act of a co-employee; or

(*b*) That the danger was obvious and known to plaintiff and appreciated by him; and that as a matter of law he is estopped from recovery thereby as against the defendant.

We insist that neither proposition is tenable. The former is not well founded in law and the latter is not well founded in fact.

This is an action between fellow-servants, and assumption of risk as used by the attorney of defendant and embraced in (*a*) *supra* does not apply to such actions. The plaintiff as part of his contract of employment, did not assume as against the defendant the risk of injuries which he might receive from defendant's negligence.

Assumption of the ordinary risks of employment as usually understood including the risk of

injury from the negligence of a fellow servant lies only in suits between master and servant and has been abolished in New Jersey by statute.

As to its abolition in New Jersey, see P. L. 1911, p. 135, Sec. 2.

The doctrine of assumption of risk as usually defined and applied is limited to actions between master and servant.

See language of the definitions of Assumption of risk in words and phrases.

See also assumption of risk in 5 C. J., 1412.

This is the understanding of the author of Holmwood N. J. Employers Liability Law, p. 6.

In our digest title "Negligence" we find a decision of contributory negligence only, while assumption of risk is treated only under the title, "master and servant."

See also the following cases:

Pennsylvania R. R. Co. v. Backes, 133 Ill., 255; 24 N. E., 563.

Chicago etc. Ry. Co. v. Randolph, 199 Ill., 126; 65 N. E., 142.

Shoninger v. Mann., 219 Ill., 242; 76 N. E., 354; 3 L. R. A. N. S., 1097.

Conrad v. Springfield Cons. Co., 240 Ill., 12, 17; 88 N. E., 180.

The doctrine of the Illinois cases as to the entire elimination of assumption of risk except in cases between master and servant may not be supported by the weight of authority, but the cases bear out the general proposition under discussion.

The authorities do, however, speak of assumption of risk in negligence cases generally. On this see Shearman and Redfield on Neg. (6th Ed.)

Sec. 114 b. The author in this section among other things says:

> "The essential elements of assumed risk are knowledge, actual or implied, by the plaintiff of a specific defect or dangerous condition caused by the negligence of the defendant in the violation of some duty owing to the plaintiff, the public or persons in his position, together with the plaintiff's appreciation of the danger to be encountered and his voluntary exposure of himself to it."

This author in the same section says:

> "Where no contractual relation exists between the plaintiff and the defendant this assumption of risk rests on the general principle expressed in the maxim *volenti non fit injuria,* which is broad enough to cover all cases where an injury results from a risk knowingly and voluntarily incurred."

To this effect see also note to *Shoninger v. Mann* (Ill.), 3 L. R. A. N. S., 1097.

See also here a discussion of the case of *Thomas vs. Quartermaine* L. R. 18 Q. B. Div., 685, in which it is held that the doctrine of assumed risk of negligence cases not between master and servant is the same as that doctrine in negligence cases between master and servant, where the doctrine has been abolished by statute and must depend solely on the doctrine *volenti non fit injuria.*

It is in such connection that the term is used in the recent case of *McGrath v. D. L. & W. R. R. Co.,* 100 Atl., 753. In that case the risk was clearly obvious and was admitted. If this differs from

contributory negligence as usually applied, it does not affect the legal situation of the case at bar.

It will be noted in the above references that knowledge, actual or implied, of a specific defect or dangerous condition and plaintiff's appreciation of the danger are the tests. If we grant that this doctrine is applicable to the case at issue, it would leave a case for the jury. Plaintiff denies that he had any knowledge of the defect until after the injury. No knowledge was proved. Negligent fitting of the strong arm rather than negligent selection of it would be most difficult to know with anything but very close inspection. It was in no sense an obvious risk. There was, no matter what view we take, a jury question.

In an action by a servant against his master before the assumption of risk was abolished by statute, it was a jury question when there was conflicting evidence whether injury resulted from the master's negligence or from causes of which the servant has assumed the risk.

See N. J. Dig. Title Master and Servant, Sec. 113, and particularly the following cases:

Comben vs. Belleville Stone Co., 59 N. J. L., 226.

Belleville Stone Company vs. Mooney, 61 N. J. L., 253; affirming 60 N. J. L., 323.

Flanigan vs. Guggenheim Smelting Co., 63 N. J. L., 647.

Kalker vs. Hedden, 72 N. J. L., 239.

See also the case of *Dowd vs. Erie R. R. Co.*, 70 N. J. L., 451, 456, 457, where the doctrine of *volenti non fit injuria* is discussed.

The negligence of plaintiff was submitted to the jury in the Court's charge (p. 109, l. 7); and no exception was taken to it; and no request to charge otherwise was made.

The sole right of defendant to object and the only objection he makes is that the Court should have nonsuited or directed a verdict because the plaintiff is barred as a matter of law because of the doctrine of assumed risk. We respectfully submit that plaintiff is not so barred.

The plaintiff was not a volunteer who left his own work and placed himself in a position of peril uncalled for by his employment.

Plaintiff testified that he was called there to assist by the blacksmith who had the right so to do (p. 25, *et seq.*). Plaintiff was thus in the master's service. It was clearly a jury question whether this was the fact, or whether plaintiff voluntarily placed his hand in a small space where it was injured by a mere accident, without any negligence of any one. We think the jury very properly found that the latter explanation was not the true one. This is discussed more fully hereafter.

We submit, therefore, that none of the reasons for a nonsuit or for the direction of a verdict can avail defendant. It was clearly a question for the jury. If the jury believed the testimony of plaintiff, as they had a right to believe, the jury could find, as they in fact did find:

1. Negligence on the part of the defendant.
2. That the plaintiff was not guilty of contributory negligence.
3. That the plaintiff did not assume the risk of receiving such injuries.
4. That the plaintiff did not voluntarily leave his own work and place himself in a position of peril uncalled for by his employment.

Of course a great deal of plaintiff's testimony was denied by the witnesses of defendant. There would have been no issue of fact if it had not been. It became therefore, a question for the jury whether they would believe the plaintiff or the witnesses of defendant.

It may be said in passing, however, that there were many reasons appearing in the testimony of the witnesses of defendant why they should not have been believed.

The defendant, though called as a witness, did not deny that he directed the adjustment of the strong arms (p. 100). In fact there is no testimony of any kind in denial of that.

There was the testimony, of course, of witnesses that the appliances used were proper for the purpose. Churchill stated they were not and that that one in fact slipped. It certainly seems logical to us, and we think to any one, that a strong arm that fits securely against a shaft would be better than one that only gripped at the corners. No one would think of using an adjustable wrench and only adjusting it so that it touched the corners of the nut. He would adjust it so that it fitted securely against the sides of the nut.

The only reason given by defendant's witnesses why the strong arm used was proper was that of the blacksmith Thompson at page 77, line 22, in which the witness says:

> "A V clamp has a spring; and by tightening these bolts, it springs the points in and tightens the top and bottom corners."

Again, on page 79, line 39, the witness says the V acts as a spring. He testified that these clamps, (p. 80, l. 3), are about 5 inches wide by 1 1/2 inches thick. It can be seen that when fastened around

an iron shaft about 4 or 4 1/2 inches square, each corner of the shaft would touch against the center of one of the sides of the strong arm so that there would be a leverage of 2 or 2 1/4 inches on a piece of iron 5 inches by 1 1/2 inches. When confronted with the improbability of any spring in this he said (p. 80, l. 15) "It has a spring on the nut; nut and bolt."

It seems to us that if there was any spring or give to a strong arm fastened as this one admittedly was, it would cause to happen just what plaintiff testified did happen.

It seems to us manifest nonsense to argue that Thompson's explanation is so logical that a jury cannot legally believe the plaintiff's.

Another matter in which there was a conflict of testimony is that relating to the manner in which the accident occurred. Testimony of the witnesses for the defendant on this point is to the general effect that the plaintiff placed his hand on the shaft of the strong arm between the link of the crane and the knob at the end of the shaft and that he was caught there without any slipping or giving way of the strong arm. One of the witnesses stated that the distance from the link and this end was about four or five inches (p. 88, l. 32). This 190-pound man (p. 44, l. 31), could hardly get his hand in there. It is highly improbable that an experienced workman would put his hand in such a position and hold it there for any length of time while hammering was going on, which immediately thereafter indirectly caused the injury; yet this is what he did, if defendant's version is the true one.

Witness Thompson, the first witness for the defendant, at page 68, line 37, testified as follows referring to the rudder:

"Q. How far did it fall, if it fell at all? A. Fell about a foot.

"Q. Fell about a foot? A. Yes, sir."

This was upon questioning by defendant's counsel.

Considering the fact that the rudder according to his testimony, was on the anvil and there was not any occasion to shift the cranes (p. 73, l. 28, *et seq.*), it is impossible to see how a mere slipping of the strong arm through the link of the crane could have occurred or caused the rudder to fall if it did. Later in his cross-examination at page 80, line 20, this occurs:

"Q. When did you first know that Churchill was around the rudder, at what stage of the welding? A. Did not notice him at all until this.

"Q. Until when? A. Until I looked around and saw his thumb caught in the chain."

At top of page 81 he testified as follows:

"Q. So that you did not see how it happened or what he was doing? A. I had my back to him."

Thompson stated that he did not ask Churchill to help him. He testified as follows to the questions of defendant's counsel:

"Q. You heard Mr. Churchill testify that you asked him to go there? A. Yes, sir.

"Q. Is that so? A. I never asked him; don't remember it.

"Q. Well, are you sure that you did not? A. I did not say I did not."

The witness, therefore, did not directly contradict plaintiff on that point.

The witness McCabe in discribing how the accident happened, explained it by saying that Thompson was holding the chisel and that two men were cutting in a V-shaped gash at the end; that Churchill's hand was between the link of the crane and the nut on the opposite end, so that they were pounding toward the link of the crane near him. Witness then said that the rudder slipped away from Churchill through the link toward the persons who were doing the pounding and this caught the hand of the plaintiff between the link and the nut or knob at the end.

Manifestly this explanation is not scientific or probable. In fact it seems an impossible one. If the blows of the hammers could conceivably cause a slipping it would cause the slipping to take place when the blow was given and would cause the rudder to slip toward the plaintiff, widening the distance between the link of the crane and the knob at the end. If the sudden blow would not cause this slipping, manifestly any gradual swing back by gravity towards the end where the pounding was being done would not cause a slipping. The witness was also at a loss to explain it, (p. 90, l. 27):

> "Q. Why did the rudder slip towards him when he was pounding the other way? A. Churchill hadn't any business there at all.
>
> "Q. I say, why did it slip towards him when he was pounding it the other way?
>
> "The Court: Do you understand the question?
>
> "The Witness: Yes.
>
> "The Court: Answer it if you can.

"A. Well, I have nothing to say only that Churchill had no right there."

William Hickman, testified on page 97 at the top that until the plaintiff got caught everything was just as it was except that the link slipped and that the rudder stood right in its place. He testified that the link flew back but everything else stayed just as it was. He further testified (p. 97, l. 31, *et seq.*), that the shaft of the strong arm was about 1 1/2" or 1 3/4" in diameter, and that the plaintiff was resting his whole weight on that arm standing talking. It is clear that if the plaintiff was resting his weight on that arm, he would have his whole hand over it and if there was any quick slipping it would catch his hand and not merely his thumb. His thumb would be entirely under. If it is conceivable that he could under such circumstances partly withdraw his hand, the thumb would clear the space between the link and the knob or nut before his fingers would. These are the only three witnesses of the defendant that purport to state how the accident happened.

There was clearly a question of fact for the jury and we insist the jury very properly believed the clear and logical testimony of the plaintiff, rather than the impossible or improbable and contradictory testimony of defendant's witnesses. The more witnesses that were produced, the worse defendant's case became.

There were other reasons why a jury properly discredited the testimony of defendant's witness as where the witness McCabe tried to make it appear that he had worked at the dry docks for a year, when as a matter of fact, he had been hired back by Stephens a little over a week before the

trial (p. 84, l. 35, *et seq.*). There are other points of conflict in the testimony, but the jury were, of course, justified in finding as to them as they did on the vital points of the testimony.

The testimony therefore clearly presented an issue of fact for the jury and the finding of the jury on that issue cannot be disturbed on appeal.

Jackson vs. Dilks (E. & A.), 100 Atl., 231, 232 and cases there cited.

Klitch vs. Betts, 98 Atl., 427, 431 and cases.

Newark Passenger Ry. Co. vs. Block, 55 N. J. L., 605.

D. L. & W. R.R. Co. vs. Shelton, 55 N. J. L., 342.

The following is taken from the case of *Klitch vs. Betts,* 98 Atl., at page 431:

> "In every case where the issue depends upon the determination of facts, the existence of which is not admitted, the jury not the Court, must determine. *Schmidt vs. Marconi Wireless Tel. Co. of America,* 86 N. J., Law, 183.
>
> "A trial judge is only justified in granting a nonsuit or directing a verdict upon a Court question arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony should always be submitted to a jury for their consideration and determination. *Dickinson v. Erie R. R. Co.,* 85 N. J. Law, 586, 90 Atl., 305; *Fulton v. Grieb Rubber Co.,* 72 N. J., 35, 60 Atl., 37; *Clark v. Public Service Electric Co.,* 86 N. J. Law, 151, 91 Atl., 83; *Til-*

ton v. Pennsylvania R. R. Co., 86 N. J. Law, 709, 94 Atl., 304; *Devicenzo v. John Sommer Faucet Co.*, 87 N. J. Law, 646, 94 Atl., 573."

POINT II

The question as to whether or not the verdict was contrary to the evidence or against the weight of the Evidence cannot be considered on appeal if there was evidence for submission to the jury.

This embraces the second and fifth ground for appeal. We think that our discussion of Point I makes it very clear that there was evidence for submission to the jury.

If there was evidence for the jury the Court will not consider on appeal questions of fact at all.

Klitch v. Betts, (E. & A.), 98 Atl., 427.
Mick v. Corp. of Royal Exch. Assur., 94 Atl. 808, 811.
D. L. & W. R. R. Co. v. Newark, 63 N. J. L., 310.

Our present form of appeal brings up only questions of law in lieu of writs of error.

Practice Act 1912, Sec. 25.

POINT III

This Court will not consider on appeal the question of the amount of damages in a suit for personal injuries.

"The Court will not consider the question of excessive damage on appeal from a a judgment at law."

Klitch v. Betts, (E. & A.), 98 Atl., 427.

"That (the question whether a verdict was greater than the evidence would warrant) is not a matter which can be considered on this appeal, for if the verdict was contrary to the evidence, an application should have been made for a new trial."

Mick v. Corporation of Royal Exch. Assur. (E. & A.), 94 Atl., 808, 811.

THE VERDICT, AS A MATTER OF FACT, WAS NOT EXCESSIVE.

The plaintiff by reason of his injury lost the entire thumb and bone of the hand at the base of the thumb known as the meta-carpal bone of the hand, (p. 32, l. 36). This took away what is sometimes called the ball of the thumb. There was nothing with which to grip a hammer but with the strength of his four fingers and the palm of the hand (p. 43, l. 28).

The witness was in the hospital over ten weeks (p. 32, l. 31). Plaintiff had blood poisoning for 10 or 12 days so that he had to be strapped to his bed (top of p. 33). He was for six months unable to work. The witness at that time was earning about $24.00 a week (p. 34, l. 19). For six months he would then actually lose in wages $624.00. The witness testified that notwithstanding the very great demand for laborers in his line since the accident he has had difficulty in getting and holding jobs (p. 37 to 41). He can now only do light work while the pay is much greater for heavier work. Because of the pain the hand swells, (p. 43, l. 34). In all probability he will be reduced when the present demand for labor in his line becomes normal from a position of skilled laborer to that of watchman in which his loss may be $10 or $12 per week.

It can readily be seen that a man who is physically strong and right-handed with his right thumb and the ball of his thumb or hand gone cannot get or hold a position in competition with a laborer that is physically perfect. He will not be able to do heavy work at all nor light work well. Then, too, of course there is the pain and humiliation. Manifestly $2000 was a verdict that was low rather than excessive.

The 4th reason assigned for a reversal is, that the verdict is contrary to law. No specific objection is urged and we think none can be urged except such as are raised in other reasons. We feel, therefore, that this requires no discussion except what is had elsewhere herein.

POINT IV

The Court properly struck out the fourth and fifth defences in the answer of the defendant.

These defences set up the fact that the plaintiff was barred from recovery because he had his remedy under the act usually known as the Workmen's Compensation Act.

This was the only point urged in defense of the motion to strike out these two separate defences. This can be inferred from the language of the Court, which is quoted at length below.

No other specific objection was raised to the complaint. Any defect, therefore, would be cured by verdict unless one employee cannot recover for the negligence of another resulting in his injury either at common law or because barred by the provisions of the Workmen's Compensation Act.

The right of one workman to recover for the in-

jury resulting from the negligence of a co-employee was not directly raised by the defendant, but it would be unavailing.

ONE EMPLOYEE CAN RECOVER FOR AN INJURY RESULTING FROM THE NEGLIGENCE OF ANOTHER.

O'Brien v. Traynor, (E. & A.), 69 N. J. L., 239.
Lawton v. Waite, 103 Wis., 244, 79 N. W., 321, 45 L. R. A., 616.
Rogers v. Overton, 87 Ind., 410.
Griffith v. Wolfson, 22 Minn., 185.
Steinhauser v. Spraul, 114 Mo., 551.
Atkins v. Field, 89 Me., 281, 36 Atl., 375.
Hare v. McIntire, 82 Me., 240, 17 Am. St. Rep., 476, 19 Atl., 453, 8 L. R. A., 450.
Durkin v. Kimpton Coal Co., 171 Pa. St., 193, 33 Atl., 237, 29 L. R. A., 808.
Sherman & Redfield on Neg. (6th Ed), see 245 and cases.
26 Cyc., 1544 and cases.

This matter is summed up very tersely in Shearman and Redfield on Neg., (*supra*).

> "The authorities are now unanimous in favor of holding a servant liable to his fellow servants for injuries suffered by them through his personal negligence in the performance of those duties which each man owes to his fellow men."

The negligence in this case was clearly misfeasance and not merely non-feasance.

When the liability of the master depends on common law principles both the master and ser-

vant can be sued jointly. The objection of the defendant is based on the presumed liability of the master under the second section of the Workmen's Compensation Act. This clearly cannot prevail.

THE WORKMEN'S COMPENSATION ACT NOT ONLY DOES NOT PROHIBIT SUCH RECOVERY BUT IT DOES IN EXPRESS TERMS PERMIT IT.

Section 3, paragraph 23, as amended P. L. 1913, page 311, uses the following language:

> "Where a third person or corporation is liable to an employee or his dependents for an injury or death, the existence of a right of compensation from the employer under this statute should not operate as a bar to the action of the employee or his dependents, nor be regarded as establishing a measure of damages therein."

Manifestly a third person must mean any person not the employer or employee who would be liable for the injury.

Third person is defined by Bouvier's Law Dictionary as "any person other than one of the parties to the contract or his representatives," citing *Pollack Contr.*, 209. By representative the author refers to executors and the like.

Anderson in his Law Dictionary treats of third persons under the title "Strangers" and says in part:

> "Strangers are 'third persons' generally —all persons in the world except parties and privies. For example, those who are in no way parties to a covenant nor bound by it, are said to be strangers to the covenant."

The above definitions are referred to and discussed in *Balfour v. Burnett,* 28 Or., 72, 41 Pac., 1.

Under the second section of the act the liability of the master grows out of the contract independent of negligence. The liability of a co-servant grows out of a tort and is founded on negligence. The co-employee could not be made a party to the compensation suit against an employer, he could not intervene therein, or obtain a review of a judgment therein. He is as clearly a third person as any other person could be.

There is no reason in policy for holding different. Such liability tends to make fellow servants careful, and this acts as their own protection and as well saves the master from paying compensation for injuries caused without any negligence on his part.

We think the reasoning of the Court in the motion to strike out is a conclusive discussion of the matter. As it is not printed in appellant's case, we quote it herein in full:

Opinion of Court on Motion to Strike out so far as Relates to the Fourth and Fifth Defences

> "The fourth separate defence is that defendant will object at the trial of the above cause, that the complaint discloses no cause of action against the defendant. The argument made in support of this defence seems to be comprised in that made in support of the fifth separate defence and will therefore be treated in connection with that.
>
> "The fourth separate defence requires a general statement of the subject matter of the complaint.

"Plaintiff's allegation is that he was employed by a certain named corporation, and that the defendant was also employed by the same corporation as foreman-superintendent and directed the work done by plaintiff and others; and that on March 4th, 1914, plaintiff and the defendant (and I suppose other workmen) were engaged in welding a new end on the rudder of some vessel, and that by reason of the defendant's negligence in the superintendence of certain rigging and appliances intended to be used in this work, the appliance gave away, and as the result thereof plaintiff was injured. It will be observed, therefore, that in this action plaintiff is suing his former foreman for damages by reason of negligence of said foreman in the performance of work in which they were both engaged for a common master.

"Now, the fifth separate defence is that the Court has no jurisdiction of the subject matter because if any cause of action arises by reason of the facts alleged in the complaint, such action should have been brought under the act commonly known as the Workmen's Compensation Act of 1911.

"The argument made by defendant in support of this paragraph of his answer is a simple one. It is that the relation of master and servant being shown, the Workmen's Compensation Act of 1911 and supplements applies, and the right of the injured employee is confined to compensation from his master under the terms of the act. To this the plaintiff responds that by Section 23 of the Act as amended by Chapter

174 of the Laws of 1913, it is provided among other things, that: 'Where a third person or corporation is liable to the employee or his dependents for an injury or death, the existence of the right of compensation from the employer under this statute shall not operate as a bar to the action of the employee or his dependents nor be regarded as establishing a measure of damage therein.

"The defendant rejoins that the language 'third person or corporation' taken in conjunction with other provisions of the act, requires a construction which would lead to the conclusion that this defendant was not a third person within the intendment of the act.

"I think that, assuming the facts stated in the declaration to be true, as we must on such a motion as this, it is quite plain that the foreman would, under our decisions be held to be a fellow servant for the purpose of recovery at common law against the master. Whether this be so or not the question to be determined is whether he is a third person in the intendment of the act. My conclusion on this motion is that a fellow servant is such a third person. At common law, although an action would not lie against the employer by reason of the negligence of the fellow servant, it is quite plain that an action would lie against the fellow servant for such negligence. And the reason why there are not more cases of this character in the books is the obvious one that the fellow servant has usually not been financially responsible for the dam-

ages. A third person, for the purpose of an action is, I should say, anyone not a party to the action. A third person, for the purposes of a contract, is anyone who is not a party to the contract; certainly one who is neither a party nor a privy to the contract. Now, in the contractual relation of master and servant; I think it cannot be said that a fellow servant is either a party or a privy to that contract; and it is upon the contractual relation of master and servant that the Workmen's Compensation act is based. In fact it creates a contractual relation or at least the irrebuttable presumption of such a relation that renders the employer liable in a contract sense for any injury to the servant arising out of and in the course of his employment, whether such injury resulted from the negligence of the employer or not, whether it resulted from the negligence of the fellow servant or not, and purely from the fact of the injury, that the injury arises out of and in the course of the employment. I am unable to see how a fellow servant can be regarded as within the scope of this contractual relation in any sense. The present action is based upon a claim of negligence, and negligence on the part of the party who was not in any way legally concerned in the question of compensation except so far as brought in by the statute which provides that where there is a recovery against a third person or corporation, such recovery operates *pro tanto* to relieve the employer under the Compensation Act. This, however, is beneficial to the employer and not to the third

person who consequently is in no way interested in the right of recovery against the employer under the act, or in the amount of such recovery.

"I think it is fairly plain that the Legislature by the term 'third person' intended to include fellow servants and immediate superintendents in the work of doing the master's business, who, under our law, are also fellow servants; and consequently the motion to strike out the fifth separate defence must be granted.

"What has been said seems to cover also the fourth separate defense, which will be struck out with the fifth."

We respectfully submit that the judgment below should be affirmed with costs.

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