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TESTIMONY.

For Plaintiff.

NOTICE OF APPEAL.

Filed.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* *vs.* SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.* *Notice of Appeal.*

William C. Gebhardt & Son,
Attorneys of Plaintiff.

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

WILLIAM P. BRAUN,
Attorney of Defendants.
7/6/25

I hereby acknowledge service in the above case.

WM. C. GEBHARDT,
per G. A. RONAN.

Notice of Appeal.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

WALTER L. CLARKSON, of full age, being duly sworn on his oath according to law, deposes and says that I served the within Notice of Appeal on the attorneys of the plaintiff by delivering a true copy of the same to G. A. Ronan, the person in charge of their office at 239 Washington street, Jersey City, N. J., on the sixth day of July, 1925.

WALTER L. CLARKSON, JR.

Sworn and subscribed before me
this ninth day of July, 1925.

E. A. WORK.

Stipulation

STIPULATION.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* vs. SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.* *Stipulation.*

It is hereby stipulated by and between the parties hereto through their respective counsel that the giving and filing of a bond as security on the appeal taken by the defendants herein shall not be necessary for the purpose of staying proceedings by the plaintiff on the judgment rendered herein, and the filing of the notice of appeal by the defendant shall have the same force and effect as though the same were accompanied by a bond as security on appeal.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

WILLIAM P. BRAUN,
Attorney of Defendants.

Dated July 18, 1925.

GROUNDS OF APPEAL.

Filed.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* vs. SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.* *Grounds of Appeal.*

To William C. Gebhardt & Son, attorneys of plaintiff:

TAKE NOTICE that the defendants appeal to the New Jersey Supreme Court from the whole of the judgment entered in the above-stated cause on the following grounds:

1. Because the Court refused to strike out the testimony of the plaintiff as follows:

"he seemed to be superintendent of the building."

2. Because the Court permitted the plaintiff to testify over objection as to conversations had with Wayne Nester.

3. Because the Court permitted the plaintiff to testify as to protection of any dangerous place in or around a building in course of construction.

4. Because the Court permitted the plaintiff to testify as to the amount paid for physicians' and hospital services.

Grounds of Appeal.

5. Because the Court permitted plaintiff to introduce into evidence his books of account for the years 1923 and 1924.

6. Because the Court permitted the plaintiff to use and testify from memorandums taken from the books of account for the years 1923 and 1924.

7. Because the Court permitted the plaintiff to testify to the amount of available work during the years 1923 and 1924.

8. Because the Court permitted the plaintiff to give his conclusions as to what the reasons were for the difference in his profits for the years 1923-1924.

9. Because the Court permitted the plaintiff to testify as to what his men did after the accident.

10. Because the Court refused to strike out the following question and answer:

"Q * * * and who paid you? A Mr. Nester."

11. Because the Court permitted Dr. Frederick A. Scherrer to testify as to the percentage of the disability of the plaintiff, and plaintiff's incapacity for carrying on his work as painter and paperhanger.

12. Because the Court permitted Witness La Bar to testify as to the connection of Wayne Nester with work on the school building.

13. Because the Court permitted the Witness Throp to answer the following question:

"What was the condition in that hallway in the vicinity of this hole on a cloudy day with respect to light?"

14. Because the Court permitted the Witness Throp to testify as to who hired him.

15. Because the Court permitted Witness Harper to testify as to who was "boss" on the job.

16. Because the Court permitted Dr. Hunt to testify on an hypothetical question which did not contain all the facts.

17. Because the Court permitted Mrs. Kinsey to testify as to what Wayne Nester did and said after the accident.

18. Because the Court refused to grant a non-suit on the ground that there was no evidence of any invitation by the defendant.

19. Because the Court refused to grant a non-suit on the ground that there was no invitation by an authorized agent of the defendant.

20. Because the Court refused to grant a non-suit on the ground that there was no evidence of any invitation, even on the part of Nester.

21. Because the Court refused to grant a non-suit on the ground that there was no evidence of invitation to inspect the premises at the particular time at which the plaintiff went in there.

22. Because the Court refused to grant a non-suit on the ground that the plaintiff knew of the unfinished condition of the building and by the use of due care could have seen the hole, and thereby assumed the risk of going in on the premises.

23. Because the Court refused to grant a non-suit on the ground that the plaintiff was guilty of contributory negligence as a matter of

law in not waiting until his eyes adjusted themselves to the change of light.

24. On the ground that the Court refused to permit Dr. Plume to testify as to what he found as the result of his examination of the X-rays film which he took of the plaintiff Kinsey.

25. On the ground that the Court refused to permit the defendants to introduce into evidence the X-ray reports and the hospital records of the Dover General Hospital.

26. On the ground that the Court permitted plaintiff's counsel to ask Dr. Cahill the following question:

"Q Doctor, who pays you for coming here to testify?"

27. On the ground that the Court permitted plaintiff's counsel to ask Dr. Cahill who would furnish the money to pay him.

28. On the ground that the Court refused to direct a verdict in favor of the defendants on the ground that there was no evidence of any invitation by the defendants personally.

29. On the ground that the Court refused to direct a verdict in favor of the defendants on the ground that there was no evidence of any invitation by the defendants through their authorized agent or servant for that purpose.

30. On the ground that the Court refused to direct a verdict in favor of the defendants on the ground that the denial of the agency, uncontradicted by the defendants rebuts the presumption raised by any possible testimony which would raise an inference as to the agency that was introduced on the part of the plaintiff.

31. On the ground that the Court refused to direct a verdict in favor of the defendant on the ground that there was no invitation to inspect the premises at the particular time on which the accident happened.

32. On the ground that the Court refused to direct a verdict in favor of the defendant on the ground that plaintiff knew, should have known, or could have known by the exercise of reasonable diligence of the unfinished condition of the building and the existence of the hole and he therefore assumed the risk.

33. On the ground that the Court refused to direct a verdict in favor of the defendant on the ground that he was guilty of contributory negligence as a matter of law since if there was not sufficient light for him to see clearly, he should have waited until his eyes adjusted themselves, or secured better light.

34. On the ground that the Court refused to direct a verdict in favor of the defendant on the ground that by the use of reasonable care and diligence he could have observed or known that the hole was there and was therefore guilty of contributory negligence as a matter of law.

35. Because the Court refused to strike out the evidence as to the choreaic condition as not having been definitely proven to be a result of the alleged accident.

36. Because the Court charged the jury as follows:

> "If you feel that by the greater weight of the believable testimony, Kinsey's recital of what took place in his interview with Nester is true, then you would be warranted in find-

ing that in a legal sense Nester invited Kinsey to enter the building."

37. Because the Court charged the jury as follows:

"Independently the evidence as to loss of income, diminished earning capacity, is a proper feature to be considered in awarding damages in a personal injury action such as this."

38. Because the Court refused to charge that part of the fourth request to charge requested by the defendant, reading as follows:

"The mere fact that a man has charge of workmen in a certain operation does not raise any presumption that he had authority to solicit bids from sub-contractors or invite them on the premises for that purpose and absence of definite proof of such authority relieves his employers from any liability arising out of such solicitations."

39. Because the Court refused to charge that part of the fifth request to charge requested by the defendant, reading as follows:

"Even where there is a bona fide invitation, the liability of the person or persons extending the invitation is only co-extensive with the invitation and when the limits of the invitation are exceeded, the duty to exercise reasonable care ceases, so that if you find that there was an invitation, and that invitation was for a particular time, and the plaintiff did not take advantage of the invitation at that particular time, but went on the premises at a subsequent date, there is no liability and he cannot recover."

40. Because the Court refused to charge that part of the sixth request to charge requested by the defendant, reading as follows:

"If the plaintiff on entering the building knew of its unfinished condition and the consequent dangers arising therefrom, or by the use or ordinary care could see and understand them, he assumed the risks which arose therefrom and is not entitled to recover from the defendants."

41. Because the Court refused to charge that part of the seventh request to charge requested by the defendant, reading as follows:

"The plaintiff had no right to assume that an unfinished building, still in the course of construction was perfectly safe in every respect, and if, on entering such a building, he proceeds blindly through a section where it is impossible for him to make observations for his own safety, he is guilty of contributory negligence and cannot recover damages for any injury resulting from his continuing under such conditions."

42. Because the Court refused to charge that part of the tenth request to charge requested by the defendant reading as follows:

"* * * in even the slightest degree of the injuries complained of."

43. Because the Court refused to charge that part of the eleventh request to charge requested by the defendant, reading as follows:

"Even if the plaintiff is entitled to a verdict he cannot recover for any loss of business or professional profits proceeding from invested capital and involving the labor of others."

Writ in Attachment.

44. Because the Court refused to charge that part of the sixteenth request to charge requested by the defendant, reading as follows:

"If the plaintiff, by making reasonable observations could have seen the hole in the floor, but failed to see it, you may assume that he did not make proper observations and was, therefore, guilty of contributory negligence, and cannot recover."

WILLIAM P. BRAUN,
Attorney of Defendants.

Service of the within grounds of appeal is hereby acknowledged this twenty-fifth day of July, 1925.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

WRIT IN ATTACHMENT.

Filed February 2, 1924.

WARREN COUNTY, *ss.*

The State of New Jersey to the Sheriff of the County of Warren,

(SEAL) GREETING: We command you that you attach Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, of and by all its rights and credits, moneys and effects, goods and chattels, lands and tenements, safely keep, so that it be and appear before the Warren County Circuit Court at Belvidere, in the County of Warren aforesaid on the twenty-ninth day of February, next ensuing, to a answer unto the Butz &

Writ in Attachment.

Clader Company in a suit in attachment for the sum of ten thousand dollars. And have you then and there this writ.

WITNESS, Clifford L. Newman, Esquire, Judge of our said Court, and the seal of said Court, at Belvidere aforesaid, the thirtieth day of January, in the year of our Lord one thousand nine hundred and twenty-four.

RAMSEY REESE,
Clerk.

WM. C. GEBHARDT & SON,
Attorneys.

BY VIRTUE OF A WRIT OF ATTACHMENT hereto annexed, on Friday the first day of February, A. D. 1924, at two-thirty o'clock in the afternoon of that day, in the presence of Edward J. Vosler a credible person, I, William Jones, Sheriff of the County of Warren, executed the said writ of attachment by going to the residence of Edward Kilpatrick at Hackettstown, Warren County, New Jersey, he being the President of the Board of Education of the Town of Hackettstown in the County of Warren, and he not being at home a copy of the said writ of attachment was left with Elizabeth Kilpatrick, his wife, a member of his family over the age of fourteen years, and by going to the store of James A. Harris in the said Town of Hackettstown, he being the custodian of Schoom Moneys of the said town of Hackettstown; served a copy of the within attachment upon William M. Mitcham by leaving a copy of the same with Helen Mitcham, a member of the family over the age of fourteen years; I declared that I attached the rights and credits, moneys

Writ in Attachment.

and effects, goods and chattels, lands and tenements of Solomon Butz and Alv*ah* H. Butz, partners trading as Butz and Clader Company, at the suit of John S. Kinsey.

Inventory and appraisement of all the property and estate of Solom*en* Butz and Alv*ah* H. Butz, partners trading as Butz and Clader Company, by me attached on Friday the first day of February, 1924, by virtue of the writ of attachment hereto annexed, made the day and year aforesaid by William Jones, sheriff, with the assistance of Edward J. Vosler, a discreet and impartial freeholder of the County of Warren.

Cash in hands of James A. Harris, stated by him to be between $6,000 and $10,000.

WILLIAM JONES,
Sheriff.

EDWARD J. VOSLER,
Freeholder.

I executed the within writ on the first day of February, 1924, at 2:30 o'clock in the afternoon of th*at* as a*pear*s in the schedule of service in inventory and appraisment hereto annexed.

WILLIAM JONES,
Sheriff.

Sheriff's fees $8.34.

Order for Attachment.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* *vs.* SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Order for Attachment.*

John H. Dahlke, a Supreme Court Commissioner of New Jersey, upon reading the affidavit of John S. Kinsey in the foregoing stated matter and having duly considered the same, and being satisfied by the proofs submitted in the said affidavit that the above-named plaintiff, John S. Kinsey, has a good and just cause of action for personal injuries received through the negligence of the above-named defendants, Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, the particulars of which are specified in the said affidavit attached hereto and that the defendants, Solomon Butz and Alvin H. Butz, are non-residents of the State of New Jersey but are residents and are engaged in business in the City of Allentown and State of Pennsylvania and that a summons cannot be served upon either defendant in the State of New Jersey; do order and hereby award to the above-named plaintiff a writ of attachment in the Circuit Court in the sum of ten thousand dollars ($10,000) against the goods and lands, rights and credits, moneys and effects belonging to the defendants in this State; and I do further order that the said plaintiff give bond

to the said defendants in the sum of five hundred dollars with sufficient sureties to indemnify said defendants for all damages resulting from the attachment and the taxed costs of suit if the suit shall be discontinued or dismissed, or if judgment therein shall be given for defendants.

Dated this thirtieth day of January, nineteen hundred twenty-four.

JOHN H. DAHLKE,
Supreme Court Commissioner.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* *vs.* SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.* *In Attachment.* *Affidavit.*

STATE OF NEW JERSEY, COUNTY OF WARREN, } *ss.*

John S. Kinsey, being duly sworn on his oath according to law, deposes and says that he has a good and just cause of action for personal injuries received through the negligence of Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, the facts and particulars of which are hereinafter specifically set forth in detail and that there is due to deponent from the above-named defendants

the sum of ten thousand dollars ($10,000) as nearly as this deponent can specify for damages as the result of the injuries received through the negligence of the said defendants; that the said Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, are engaged in business in the City of Allentown, in the State of Pennsylvania, and that neither of the said defendants is a resident of the State of New Jersey at this time; that a summons cannot be served upon either of the said defendants in the State of New Jersey. The particulars and facts of the aforesaid named cause of action are as follows, to wit:

On the twenty-second day of August, 1923, the defendants were engaged in building and constructing certain additions to, and making certain alterations to, the public school building of the said Borough of Hackettstown.

On the said day the said defendants then and there invited the plaintiff to come to the said premises where the said additions and alterations to the said building were being built and made and to examine and inspect the said additions and alterations for the purpose of estimating the cost of decorating, painting and finishing the said additions and alterations.

The defendants had then and there finished and completed all the said floors in the said additions and alterations but the said defendants then and there carelessly, negligently, willfully, maliciously and unlawfully maintained, and permitted to be and remain, in the floor of one of the hallways, of the said additions and alterations a large hole in the floor at a point in the said hallway where it was then and there extremely dark and impossible to see the said hole, and

then and there carelessly, negligently, willfully, maliciously and unlawfully maintained the said hol*d* and permitted the said hole to be and remain in the said place without giving the plaintiff any warning of the presence of the said hole or placing any guard rail or other protection to the plaintiff around or near the said hole so as to warn the plaintiff or protect him from falling therein.

The plaintiff on the said day then and there went to the said building and to the additions and alterations thereto in response to and in compliance with the said invitation of the said defendants and the plaintiff then and there entered the said additions and alterations and was then and there going through the said additions for the aforesaid purpose of estimating the cost of painting, decorating and finishing the said additions and alterations as aforesaid and the plaintiff was then and there walking along the said hallway and was then and there engaged in his duties of making the said estimates as aforesaid and was then and there proceeding in a careful and prudent manner and was approaching the said hole in the floor of the said hallway when by reason of all of the aforesaid negligence, carelessness, willfullness, maliciousness and unlawfullness of the defendants the plaintiff then and there fell into the said hole down to the floor below with great force and violence and was greatly bruised, wounded and injured thereby.

By reason of the injuries received as aforesaid the said plaintiff has suffered and will in the future suffer, great pain, and has been unable and will in the future be unable, to attend to his necessary business and affairs

Bond.

and has lost and been deprived of, and will in the future be deprived of, great gains and profits which he otherwise would have received, and has spent and will in the future spend, large sums of money in endeavoring to be cured of the injuries received as aforesaid.

JOHN S. KINSEY.

Sworn and subscribed to before me this thirtieth day of January, 1924.

JOHN H. DAHLKE,
Supreme Court Commissioner.

KNOW ALL MEN BY THESE PRESENTS, that we, JOHN S. KINSEY, JOHN J. JAGER and LESLIE I. COOKE, of the County of Warren and State of New Jersey, are held and bound unto Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, of the City of Allentown, in the State of Pennsylvania, in the sum of five hundred dollars to be paid to the said Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, their executors, administrators or assigns, to which payment we bind ourselves, our and each of our heirs, executors and administrators, jointly, severally and firmly by these presents. Sealed with our seals. Dated this twenty-ninth day of January, nineteen hundred twenty-four.

The condition of the above obligation is that whereas the above bounden John S. Kinsey is about to begin in the Werran County Circuit Court a suit against the said Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, by writ of attachment to

Bond.

be issued in the sum of ten thousand dollars; now, therefore, the said John S. Kinsey doth agree to indemnify the said Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, their executors, administrators or assigns, for all damages resulting from said attachment and taxed costs of suit if the suit shall be discontinued or dismissed or if judgment therein shall be given for defendants, and upon compliance with this condition this obligation shall be void; otherwise to remain in full force.

JOHN S. KINSEY (SEAL)
JOHN J. JAGER (SEAL)
LESLIE I. COOKE (SEAL)

Signed, sealed and delivered
on the date aforesaid in the
presence of
MABEL B. LEIGH.

JUSTIFICATION OF BONDSMEN.

We, JOHN S. KINSEY, JOHN J. JAGER and LESLIE I. COOKE, hereby certify that we are freeholders residing in the Borough of Hackettstown, in the County of Warren and State of New Jersey, and that we have each of us property subject to execution located in the said County of Warren worth double the amount of the aforesaid bond above all our just debts and liabilities.

JOHN S. KINSEY,
JOHN J. JAGER,
LESLIE I. COOKE.

Certificate of Clerk.

STATE OF NEW JERSEY, }
COUNTY OF WARREN. } *ss.*

I, Ramsey Reese, Clerk of the County of Warren, in the said State of New Jersey, do hereby certify that the foregoing is a true, full and correct copy of a certain writ in attachment order and affidavit in attachment between John S. Kinsey, plaintiff, *vs.* Solomon Butz and Solomon Butz and Alvin H. Butz, partners trading as Butz & Clader Company, defendants, as the same is taken from and compared with the original thereof as filed in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of (SEAL) the said County of Warren, at Belvidere, in said County, this thirteenth day of February, in the year of our Lord One thousand nine hundred and twenty-four.

RAMSEY REESE,
Clerk.

Complaint.

COMPLAINT.

Filed.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* *vs.* SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER CO., *Defendants.*	*Action at Law.* *Complaint.*

The plaintiff, who resides in the Borough of Hackettstown, County of Warren, State of New Jersey, says:

1. On the twenty-second day of August, 1923, the defendants were engaged in building and constructing certain additions to, and making certain alterations to, the public school building of the said Borough of Hackettstown.

2. On the said day the said defendants then and there invited the plaintiff to come to the said premises where the said additions and alterations to the said building were being built and made and to examine and inspect the said additions and alterations for the purpose of estimating the cost of decorating, painting and finishing the said additions and alterations.

3. The defendants had then and there finished and completed all the said floors in the said additions and alterations but the said defendants then and there carelessly, negligently, willfully, maliciously and unlawfully maintained, and permitted to be and remain, in the floor of one of

the hallways of the said additions and alterations a large hole in the floor at a point in the said hallway where it was then and there extremely dark and impossible to see the said hole, and then and there carelessly, negligently, willfully, maliciously and unlawfully maintained the said hole and permitted the said hole to be and remain in the said place without giving the plaintiff any warning of the presence of the said hole or placing any guard rail or other protection to the plaintiff around or near the said hole so as to warn the plaintiff or protect him from falling therein.

4. The plaintiff on the said day then and there went to the said building and to the additions and alterations thereto in response to and in compliance with the said invitation of the said defendants and the plaintiff then and there entered the said additions and alterations and was then and there going through the said additions for the aforesaid purpose of estimating the cost of painting, decorating and finishing the said additions and alterations as aforesaid and the plaintiff was then and there walking along the said hallway and was then and there engaged in his duties of making the said estimates as aforesaid and was then and there proceeding in a careful and prudent manner and was approaching the said hole in the floor of the said hallway when by reason of all of the aforesaid negligence, carelessness, willfulness, maliciousness and unlawfulness of the defendants the plaintiff then and there fell into the said hole down to the floor below with great force and violence and was greatly bruised, wounded and injured thereby.

5. By reason of the injuries received as aforesaid the said plaintiff has suffered, and will in

the future suffer, great pain, and has been unable, and will in the future be unable, to attend to his necessary business and affairs and has lost and been deprived of, and will in the future be deprived of, great gains and profits which he otherwise would have received, and has spent and will in the future spend, large sums of money in endeavoring to be cured of the injuries received as aforesaid.

Plaintiff demands $30,000 damages.

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff.

ANSWER.

Filed.

Defendants in answer to the complaint of the plaintiff say:

1. Paragraph one is admitted.
2. Paragraph two is denied.
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Paragraph five is denied.

First Separate Defense.

Defendants were not guilty of any negligence which was the proximate cause of any injury to the plaintiff.

Second Separate Defense.

Plaintiff was guilty of contributory negligence which was the proximate cause of any injuries which he may have sustained.

WILLIAM P. BRAUN,
Attorney of Defendants.

Judgment.

JUDGMENT.

WARREN COUNTY CIRCUIT COURT.

JOHN S. KINSEY, *Plaintiff,* vs. SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Case No. 837.* *Action at Law.* *Judgment after Verdict.*

Wm. C. Gebhardt & Son,
Attorneys for Plaintiff.

This action was tried before Judge Frank B. Jess, with a jury, on June 24, 1925.

The cause having been heard and submitted to the jury, they return their verdict as follows: We find for the plaintiff and assess his damages at the sum of Five Thousand Dollars ($5,000).

Whereupon it is adjudged that the plaintiff, John S. Kinsey, recover of the defendants, Solomon Butz and Alvin H. Butz, partners, trading as Butz & Clader Co., the sum of Five Thousand Dollars ($5,000), and his costs which are taxed at the sum of One Hundred Ninety-eight Dollars and Thirty-eight Cents ($198.38), making in the whole the sum of Five Thousand One Hundred Ninety-eight Dollars and Thirty-eight Cents ($5,198.38).

On motion of
WM. C. GEBHARDT & SON,
Attorneys of Plaintiff.

Entered June 24, 1925,
at 3:20 P. M.,
RAMSEY REESE,
Clerk.

Opening.

WARREN COUNTY CIRCUIT COURT.

No. 15, April Term, 1925.

JOHN S. KINSEY, *Plaintiff,* vs. SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.*

Transcript of shorthand notes of testimony, etc., taken in the above-entitled cause before Hon. Frank B. Jess, Circuit Court Judge, and a jury, at the Court House, Belvidere, New Jersey, on Friday, June 19, 1925.

Appearances:

Mr. William C. Gebhardt and Mr. W. Reading Gebhardt (William C. Gebhardt & Son), for the plaintiff.

Mr. William P. Braun and Mr. Claude E. Cook, for the defendants.

(Jury empaneled and sworn.)

(Mr. W. Reading Gebhardt opened for the plaintiff.)

Mr. Braun: If the Court please, unless Mr. Gebhardt has something more to add to his opening, I move at this time to strike out the allegations or that portion of them which allege that the defendants wilfully, maliciously and unlawfully maintained the hole. Nothing has been said about malice.

Mr. W. Reading Gebhardt: I do not see any reason why they should be stricken out. It may develop from the evidence that is the case; if it does not develop that question should not go to the jury, but we object to it being stricken out at this time.

The Court: I will reserve any decision on that.

Mr. Braun: If the Court please, I think it should be included in the opening. I think counsel are usually obliged to set forth anything they maintain as an element of their claim. This is an element, under certain circumstances, as your Honor knows.

The Court: Yes; it is an element.

Mr. Braun: The count, as it stands now, is really attempting to straddle and become multifarious here in charging all kinds of obligations, an obligation as an invitee and an obligation as a licensee, because of malice or wilful injury. Now, they propose to stand on the invitee and then put in the other things.

Mr. W. Reading Gebhardt: It may possibly save some time and difficulty about the matter, and we will withdraw or consent that the allegation as to the wilfulness and maliciousness be stricken out, but not the allegation as to the unlawfullness.

The Court: The allegation as to wilfulness and maliciousness may by consent be stricken out.

Mr. William C. Gebhardt: Just in order to put ourselves right before the Court, with respect to these words being used: when this complaint was prepared it was a mooted question as to whether or not all actions of tort, or judgments

obtained in tort, in any action in tort, except where it was malicious or wilful, were dischargeable in bankruptcy. We had a case of that kind and we took it to the United States Circuit Court of Appeals and a rather evasive decision was handed down from there; but since that time the matter has been cleared up by a decision of the United States Supreme Court, settling beyond question that in any action in tort a judgment obtained in an action in tort was dischargeable in bankruptcy; once, of course it was wilful and malicious, and for that reason it was put in there.

Mr. Braun: I object to that statement. The Senator knew what evidence he had, and if he had evidence of wilfulness he should have pleaded it and if he did not he should not have.

The Court: The statement is in now.

Mr. Braun: I move to strike the statement from the record.

The Court: The motion is denied.

Mr. Braun: You will allow me an exception?

The Court: Yes.

(Mr. Braun opened for the defendants.)

JOHN S. KINSEY, the plaintiff, sworn.

Direct examination by Mr. W. Reading Gebhardt.

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

Q Where do you live? A Hackettstown.

Q How long have you lived there? A About fifty-five years.

Q How old are you? A Fifty-five.

Q What is your business now or what was it at the time that this accident happened, on August 22, 1923? A Painter and paper hanger.

Q Did you carry on that business merely as an individual or did you work alone or did you do contracting work? A I did contracting.

Q Did you at that time? A Yes, sir.

Q How many men did you have working for you at that time? A I think four or five.

Q On August 22, 1923, and for some time prior thereto what had been going on next to the schoolhouse or in connection with the schoolhouse at Hackettstown? A Well, there was an addition being built to it.

Q How big an addition? A I do not remember, but it had ten classrooms into it, and two halls, besides the basement.

Q In addition to the then existing high school building in Hackettstown? A Yes, sir.

Q What street was that on? A Madison street.

Q How long had this work been going on before the twenty-second of August, 1923, approximately? A I think it commenced along in the spring. I do not remember just how long, but several months.

Q The spring of 1923? A Yes, sir.

Q Who was doing the work?

Mr. Braun: I object to that until it is shown he knows.

Mr. W. Reading Gebhardt: I understand they admit the first paragraph of the complaint, which alleges that this work was being done by the defendants.

Mr. Braun: Then I will withdraw the objection.

John S. Kinsey, direct.

Q How far had the work progressed by the twenty-second of August, 1923? A Well, the outside seemed to be about completed, except the sash; and they were lathing and plastering on the inside and getting ready to plaster in there and to case it inside.

Q Was the frame of the building up? A Oh, yes. It was a brick building.

Q Were the floors in? A Yes, sir.

Q How far was it completed with respect to the interior work, the finish and trim and so on? A There wasn't any of the trim on yet. There was some plastering on; and some of it was not lathed yet, and then they had to put the trim on afterward, and I do not think there was any trim on.

Q On that date, August 22, 1923, did you meet with an accident? A Yes, sir.

Q Did that occur in the addition to this schoolhouse? A Yes, sir; in this new addition.

Q What floor did it occur on? A Well, the first floor, in a sense. There was a back basement, kind of like an over-shot, a basement on the back end, and there was a pretty high basement there, and there were classrooms in this basement, but not in this new part; and in the old building there is a gymnasium and classrooms; and this might be called the first floor or second floor, I do not know which you would call it; and the ground floor is the basement, or, I should think, the basement and first floor and second floor; that is what I would call it.

Q This accident occurred, then, on the first floor above the ground floor? A Yes, sir.

Q Did you know a man named Nester at that time? A Yes, sir.

Q Who was he? A He was the superintendent—

Mr. Braun: I object to that, if the Court please, because this man has to show how he knows. He cannot confer authority in an individual merely by attaching him with some name.

The Court: Yes. He has to show some knowledge of it.

Mr. W. Reading Gebhardt: Does your Honor overrule the question?

The Court: Yes.

Q Well, had you seen this Mr. Nester prior to August 22, 1923? A I had seen him around the building.

Q Around what building? A The new building.

Q This addition to this schoolhouse that was being constructed? A Yes, sir.

Q What was he doing when you saw him? A He seemed to be superintendent of the building. Charlie Osborne, of the firm of Osborne & Company, had the plumbing and steam fittings, and he told me, "Why don't you see Nester about the work on the schoolhouse—"

Mr. Braun: I object and move to strike out the entire answer. That is a conclusion.

The Court: No. I will strike out the last part as to what somebody told him. I will permit to stand his answer, "he seemed to be superintendent."

Mr. Braun: Will your Honor hear me on that, please?

The Court: What is there to be heard about it?

Mr. Braun: My objection is that is a conclusion and not a description of what he saw. "He seemed to be the superintendent—" that is a conclusion and I object to it.

The Court: It is not a conclusion. It is an expression of opinion of what he was. He says he seemed to be. He does not say he was the superintendent, and it does not prove he was the superintendent.

Mr. Braun: I object to this witness expressing any opinion or giving any opinion testimony in that respect.

The Court: I will permit it to stand.

Mr. Braun: Will your Honor allow me an exception, please?

The Court: Yes.

Q Now tell us what you saw him doing around the building. A Well, he wasn't working. He was directing the other men.

Q Who were working on this building? A Yes, sir.

Q When was it that you saw him doing this, prior to the 22nd of August, 1923, or when? A Several times. I had business up and down past the schoolhouse there; and he didn't do any manual work himself, but he directed the men.

Q Who was in charge of this work?

Mr. Braun: If the Court please—

The Court: Do you object?

Mr. Braun: I object to the form of the question.

The Court: I sustain the objection.

Q Who directed the work, then, around there?

Mr. Braun: If the Court please, I think that this should be led up to by seeing if he knows of his own knowledge who was directing the work. The mere fact that he passed there and saw a man giving apparent instructions does not show that man was in entire charge of this work.

The Court: Do you object?

Mr. Braun: I object to this question.

The Court: Objection sustained.

Q Did you have some conversation with Mr. Nester prior to August 22, 1923? A No; I never spoke to him before.

Q That was the day before the accident happened? A Oh, yes, the day before.

Q Where did you see him? A At the rear of the schoolhouse.

Q What was the conversation?

Mr. Braun: If the Court please, I object to any conversation between this man and Nester, as it is purely hearsay and it is not binding on these defendants.

Mr. William C. Gebhardt: We will consent that it all be stricken out if we do not connect it.

Mr. Braun: If the Court please, I think that should be connected properly, because I object to its influence on the jury at this time.

The Court: I will overrule the objection now. Of course, it must be connected up later.

Mr. Braun: Will your Honor hear me on another ground?

The Court: Yes.

Mr. Braun: I also object to it on the ground that any conversation with Nester would not be binding on these defendants because Nester is not the man charged in the complaint with inviting this plaintiff into the premises. The pleadings state that he was invited by the defendants, and nothing is said through their agents or servants. They charge the defendants with inviting him on the premises.

(After discussion.)

The Court: I have ruled.

Mr. Braun: Your Honor will allow me an exception on that?

The Court: Yes.

Q Now, then, will you proceed and state the conversation and all that took place? A I walked up to him and I said, "Is this Mr. Nester, the superintendent in charge of this building?" And he said, "I am." Then I says, "Who does your painting and finishing in this building, or do you bring men down from Allentown?" He says, "We have nobody." "Well," I says, "if you want any local bids I would be pleased to give you a bid on it, and for reference I refer you to Osborne & Company—" They were doing the steam fitting and heating in this building—"or the Hackettstown National Bank, either one." He says, "That is all right. Now," he says, "Mr. Kinsey, I tell you what I wish you would do—go in the building, look it over or measure up, or whichever way you figure, and

see what you can do it for, and meet my boss tomorrow morning and tell him." I said, "I do all the estimating and everything by the square yard and I cannot do it today, because I have another little job to finish, but I will be here tomorrow morning." He says, "All right."

Q Now, you have referred in the relating of this conversation to "the building." Please state what building the reference is to. A I do not know that I understand you.

Q You have referred in this conversation to "the building." What building do you refer to? A The new addition to the schoolhouse.

Q Was it about that this conversation was? A Yes, sir; and we were right at the rear end of it.

Q Now, did you go to the schoolhouse that day? A No; I went the next morning.

Q Which was on the 22nd of August, 1923? A Yes, sir.

Q What time in the morning did you go? A I should think probably half-past nine or ten o'clock or something like that when I got there.

Q In the morning? A Yes, sir.

Q How was the weather that day? A It was cloudy and it rained early that morning, and it was still cloudy, and I went in the rear of the building. There was a driveway where they drive in for refuse or garbage or ashes and like that, there. I went in this place, and first I saw somebody, and I said, "Where is Mr. Nester?" He says, "He is in the—"

Mr. Braun: I object to this.

The Court: Yes.

Q Do not give any conversation except with Mr. Nester. Now, just tell us what you did. A

I went in there, and Mr. Nester with two other men was at the rear of the old building, and they were making a form or something or other and he seemed to be occupied, and I waited a while, and he looked up and saw me, and I think I threw my hands up like that (illustrating) to him—

Mr. Braun: I move to strike out "he saw me." That is a conclusion.

The Witness: He looked at me, anyway.

The Court: That may be stricken out; but the statement that he looked toward him may stand.

Mr. Braun: That I do not object to.

Q Did you see Mr. Nester? A Yes, sir.

Q Did you speak to him? A No, sir. I merely throwed my hand up like that to him.

Q Did you wave your hand to him? A Yes, sir.

Q What response, if any, did you get from him? A I do not remember if he acknowledged it or not.

Q What is your best recollection about it? A I do not think he did. I do not think he said anything. He just merely looked up.

Q In which direction? A Right toward me.

Q Was there any obstacle or obstruction between you and him? A No, sir; perfectly clear, except the bricks on the ground, and, of course, he could see over them.

Q How long did you wait there? A Oh, probably two or three minutes; maybe five minutes. I know I stood there quite a little while, and I seen he was busy.

Q Then what did you do? A Then I went on in the building.

Q And you went up to the floor where this accident happened? A Yes, sir; I went in the building and up on this floor.

Q What part of the room or what part of the building did this accident happen in? A This accident happened on what I would call it the north corner of the building, the north end of this new part, anyway.

Q What room or what part of the building? A Right in the hallway, in a corner of the hallway.

Q Give us the approximate length of that hallway. A Well, this hall probably might have been eighty feet.

Q Eighty feet long? A Yes, sir.

Q And about how wide? A I think around about nine feet, eight feet eight or nine inches, or approximately nine feet.

Q What direction, in a general way, north, south, east or west, did this hallway run? A I think it run from south to north.

Q At the time this accident happened, in which direction were you going? A North.

Q You were going from the south end to the north end? A From the south end to the north end; yes, sir.

Q What did you do when you got up on this hall on the second floor or first floor? A When I first got up on that floor I went in and measured up one of the old classrooms.

Q Where was that classroom with reference to this hall? A That was on the old part, on the south side of the old part. I went in there and I measured up that room.

Q Why did you measure up that room? A Because the others were about just like that, and I multiplied it by ten and I had the rooms, and then I started out through the hall.

Q What were you measuring this room for? A For the finishing of it.

Q Finishing with what? A With stain or varnish and filler and like that; that is, all the woodwork.

Q Please state whether or not that was what was referred to in this conversation with Nester.

Mr. Braun: I object to that, if the Court please, on the same ground I have already stated.

The Court: Yes; objection sustained.

Mr. W. Reading Gebhardt: Your Honor, I am not quite clear about the ground of that objection.

The Court: Because you are talking about a conversation and asking him to simply characterize what was said.

Q Well, go back for a moment, to this conversation you had with Mr. Nester. What was the work that you talked about giving an estimate on?

Mr. Braun: I object to that on the same ground I have previously stated, that Nester cannot bind these defendants; and it is hearsay.

The Court: I overrule the objection.

Mr. Braun: And allow me an exception?

The Court: Yes.

(Last question read.)

The Witness: The finishing and painting of this building.

By the Court.

Q What do you mean by "the finishing"? A The woodwork had to be stained, shellacking, filled and then varnished.

By Mr. W. Reading Gebhardt.

Q Please state for what purpose it was then that you were doing this measuring and doing this estimating at this time. A Why, to meet his boss the next day and tell him what I would do this for.

Q Now, then, after you measured up this one room in the old part of the building, what did you next do? A Then I went out into the hall and there was a stairs on the end and the stringers in the rear were of iron and the upper part is slate and that was painted two or three coats, I forget which, and I got that and I started along the hall toward this north end, and there is another entrance and I done the same thing there. Then I looked over my shoulder. Then I stepped close to the window and wrote this down and then I started ahead and then I took a step or so and I happened to think that I had not counted the doors on the side of the hall and I looked over my shoulder and counted the doors and then I looked ahead and the floor all appeared alike to me and I started and then next thing I knew I was falling. The last thing I remember was throwing out my arms to catch something and I don't know any more.

Q What did you fall through? A Well, they told me it was a hole.

Mr. Braun: I object to what they told him.

Q You cannot tell what they told you afterward? A They showed me where I fell.

Q Just tell us where you fell on this occasion. Did you fall down a stairway or what? A I do not think it was a stairway or it would not have knocked me unconscious.

Q Well, what was it? A I fell in the hole.

Q Where was this hole? A Right in the corner of the hallway.

Mr. Braun: I object to this if he is testifying from what someone told him.

Mr. William C. Gebhardt: He is not.

Mr. Braun: He said he was told afterwards.

Mr. William C. Gebhardt: We told him not to tell that and I consented that it be stricken out.

The Court: He is stating now that he fell in the hole.

Mr. Braun: Yes, and he is locating the hole. He only knows what he has been told afterward. Unless it appears that he knows of his own knowledge now what was there—

The Court: I will deny the motion.

Q You were walking in what direction at the time that you fell? A Toward the north. Then I was going out into the old part, going possibly east, I would think. That is where I started for to go into the old part and see what new work was going in the old part.

Q At the time you actually fell which direction were you heading, north, east, south or west? A I think north, as near as I remember.

Q At the time you fell you were walking on what, just the moment before you fell? A On a concrete floor.

Q In what part of the building? A In this north corner.

Q In the same hallway? A In the same hallway, yes, sir.

Q What kind of a floor was this? A A concrete floor.

Q Was it finished or not? A Yes, sir; it was finished; it was kind of a dull gray, quite a dark gray finish.

Q Was or was not the hallway completed so far as the concrete floor was concerned, with the exception of this hole? A I think it was.

Q How about the other floors in the building? Please state whether or not they were closed in? A They were all roughed in. They had the rough flooring and finished floor on top of that. I do not remember whether the finished floors were in, all of them.

Q Were all the other floors in the building closed in or not? A Yes, sir.

Mr. Braun: If the Court please, this man has not testified he was in any other part of this building except this one hallway and the two class rooms.

The Court: He says they were closed in.

Mr. Braun: Well, I will recall the objection, but I wish counsel would hold him down to what he knows.

John S. Kinsey, direct.

Q How far had you gotten from the north end of this hall before you fell, at the time that you fell? A I was in the corner of this hall when I fell.

Q Had you reached the end of the hall or not? A Just about—well, there was another end went on farther; there was another end on past this hole, and that is a room now.

Q Was it a room then? A It looked as though it might be a part of the hall at that time.

Q How far from the extreme end of the building then, was it? A About twenty-two feet.

Q What was the condition with respect to light in the vicinity of this hole and in the vicinity of the floor at the time this happened? A Well, the building was gloomy; the hall there was gloomy. I cannot just describe it, but it was like a gloom of daylight; that was the natural condition of the hall, and in this corner there was a shadow; it seemed to be darker where this hole was than in the other part of the hall yet. I do not mean to say as dark as night, but quite dark, and it was caused by the shadow from this scaffold. This end room had a scaffold running from the edge of this hole right back to the end of it, and it was a lather's scaffold; there were bundles of lath laid on it and pieces of lath sticking over the edge of it, but there was nobody working there. A mason's or lather's scaffold is generally about the width of your hand above your head—

Mr. William C. Gebhardt: No, not that.

The Witness: Well, the room was about twelve feet high and the scaffold was about half way up and that threw a shadow across this hole.

Q Was there any railing around this hole? A Not a thing.

Q Were there any signs up with respect to danger or anything of that character? A No, sir.

Q Were there any lights on in the hall? A No, sir.

Q Any electric lights? A I do not think they were connected up yet. They were working at them.

Q Did you see any planks over the place where this hole was located? A There was no plank there, I don't think; I did not see any.

Q How long had you been in this painting and contracting business? A Forty years.

Q And you have carried on that business in the vicinity of what place? A In Hackettstown. I worked for my father for about thirty years and for about ten years I have been working for myself.

Q How long all together then have you carried on this business in the vicinity of Hackettstown? A Why, about forty years.

Q Previous to the time this accident occurred had you done work in and around other buildings that were in process of construction? A Yes, sir; lots of them.

Q In that vicinity, where the circumstances were like they were in this case, when a building was in process of construction and had approached the same stage of completion that this building had, namely, that the floors were closed in and there was a hallway on the first floor above the ground floor, with the concrete laid, if there was a hole left open about eight feet square in any part of the floor of that building, any part of the hallway, what was usually done?

Mr. Braun: If the Court please, I object to that. What was usually done in other cases has no bearing on this case.

The Court: Let me hear the question.

Mr. William C. Gebhardt: I think the question should be withdrawn and another one put.

The Court: All right. The question is withdrawn.

Q I will reframe that question by adding to the previous question, assuming the conditions as stated in the previous question, what was the custom in the building trade under those circumstances with respect to such a hole?

Mr. Braun: If the Court please, I object to that. If they are trying to qualify this man as an expert, after they have submitted their qualifications, I would like to examine him on his qualifications before he is permitted to testify. But at this time I object on the ground that he has not yet qualified.

The Court: I think that objection is good.

Mr. W. Reading Gebhardt: Your Honor sustains the objection?

The Court: Yes.

Q I will ask you this question then, Mr. Kinsey: How often have you worked around buildings that were in process of construction? A Oh, a great many of them.

Q Covering what period of time? A All of this time. My father done a big business when he was there, and I have been doing it all these years.

John S. Kinsey, direct.

Q Are you familiar with the various customs and practices that were generally followed in that vicinity with respect to how the work was carried on while a building was being constructed of this character? A I think I ought to know something about it.

Q Well, were you or were you not? A Yes, sir, I was.

Q Are you familiar with the customs, if any, and the practices, that existed in that vicinity with respect to protecting dangerous places around a building in process of construction, as this was? A They are most generally covered over.

Q No. Answer yes or no to that. Are you familiar with such customs? A Yes, sir, I am.

Q And how did you acquire that familiarity? A From experience. I have worked on buildings where they have had them and they covered them over.

Mr. Braun: If the Court please, I move to strike that out.

Mr. W. Reading Gebhardt: We consent that it be stricken out.

The Court: It may be stricken out.

Q Have you observed or seen, or not, what was usually done? A Yes, sir.

Mr. W. Reading Gebhardt: Now, if the Court please, the witness I submit has qualified himself.

Mr. Braun: I would like to cross examine, if the Court please.

John S. Kinsey, cross.

By Mr. Braun.

Q Are you a builder? A No, sir; I am a painter and paperhanger.

Q That is all you do? A No. I have worked at carpentering a little bit.

Q Have you ever contracted as carpenter? A No, sir.

Q As builder? A No, sir.

Q As a mason? A No, sir.

Q As a concrete worker? A No, sir.

Q Have you ever worked on a school building of this nature as a mason, carpenter or contractor? A No, sir. I have worked as a carpenter some.

Q Have you had anything to do with cement work? A Very little.

Q Or with buildings generally, as far as schools are concerned? A Well, the finishing of them and like that I have.

Q How many schools have you finished? A I have worked on several.

Q How many? A I could not exactly tell you, but I know five or six.

Q In the course of thirty years? A Yes, and probably more; and I have worked on hotels and like that.

Q I am talking about schools. This was a school, wasn't it? A Yes, sir. Well, I have worked on several schools; the seminary, and the Oxford School.

Q Any concrete building?

Mr. William C. Gebhardt: This was not a concrete building.

A Not the concrete part of them.

John S. Kinsey, direct.

Q Well, any buildings with concrete floors in them? A Yes, sir.

Q How many? A I could not tell you. It is a good many. I could tell from the records, probably, but I could not tell you offhand. I worked on a good many of them.

Mr. Braun: If the Court please, I wish to continue my objection on the ground this man has not qualified as an expert on this particular question.

The Court: I will overrule the objection.

Mr. Braun: I might take an exception. It is purely a discretionary matter.

The Court: Yes.

By Mr. W. Reading Gebhardt.

Q Now, Mr. Kinsey, what was the custom, if any, with respect to the protection of any dangerous place in or around a building such as this in process of construction in the vicinity of Hackettstown at the time this accident happened? A Well, they generally cover them over with plank.

Q Cover what over with plank? A Cover the hole over with plank; and then if they have any occasion to work around the hole they pull the plank back and when they get through they put them back again.

Q You say they put plank over the hole—the hole in what? A A hole in the floor.

Q At the time that this accident happened were there any men working or otherwise located in and around this hole? A Nobody around there at all.

Q What was your condition of health prior to this accident, Mr. Kinsey? A Fine; good all the time.

Q What happened to you when you fell down, with respect to whether or not you were rendered unconscious? A The last thing I remember was falling or throwing out my arms.

Q When did you come to? A The next thing I remember was somebody saying, "Who is it? Who is it?"

Q Where were you then? A I seemed to be in Dr. Osmun's office, but I didn't know where I was. I recognized Dr. Osmun's voice and then I got off again and didn't know any more.

Q Then when did you regain consciousness again? A They were taking me off of a stretcher and putting me on a bed.

Q Where were you then? A I did not know at the time, but a day or two afterward I found out I was in the Dover Hospital.

Q Have you at any time since this accident any recollection between the time you just stated you remembered falling and when you came to some time later and heard somebody saying, "Who is it?" Have you ever had any recollection of what transpired in between those two times? A Not a thing.

Q How long were you in the hospital? A Two weeks.

Q Where were you taken then? A They brought me home.

Q What condition were you in when you were brought home? A Well, I was helpless.

Q Please state whether or not you went to bed after you got home. A Sure, I went to bed.

Q How long were you confined to your bed? A Well, I could not just tell how long, but it was quite a little while.

Q Well, give us some idea. A Well, probably a couple of weeks yet. They would put me

up in a chair and they would have to help me out of bed into a chair.

Q After you got around in the chair how long were you in that condition? A Several weeks. I do not remember.

Q What treatment did they give you in the hospital? What part of your body was affected by this accident? A They didn't do anything much with me. They bathed me with alcohol and took my temperature, and about every day they would give me pills or something of that kind. That is about all there was to it.

Q Did you have any broken bones? A Yes, sir; my ribs were all broken and my collar bone.

Q On which side? A On the right side.

Q Was there any other part of your body injured? A My back seemed to be helpless. I was perfectly helpless in my back.

Q What was the condition of your right side and your collar bone and ribs and your back before this accident? A I was good; I never had an injury in my life.

Q How long were you laid up all together then before you were able to get back to any kind of work? A I think around twelve weeks.

Q At the end of twelve weeks what condition were you in? A I wasn't in much condition, but I had to go to work.

Q Did you work actively or not? A No. I worked sometimes part of the day or maybe a few hours, getting men together and supervising them. They took me around in a car and I did what I could. There was lots of work I could not do at all.

Q I wish you would please state to what extent you endured any pain and suffering as a result of these injuries? A I do not quite get you.

Q How much pain and suffering did you have, if any, as a result of these injuries? A Of course, my ribs and that part, that gradually healed, and nothing more than they would be sore and like that; but my back seemed to be weak and gone. If I could raise anything up here (indicating) I was nearly as strong as I ever was, but to raise anything off the floor, I couldn't do it; anything very heavy I could not raise it at all.

Then when I started to work I would just get exhausted. My legs would refuse to work and I would have to go home. Sometimes they took me home in a car and sometimes I would walk home. And when I went home and sat down in a chair I could not get rest. I had to go and lie down; I had to lie down on my stomach on the bed.

Q Were you able to work continuously then after you got back to work at the end of twelve weeks? A No, sir, only spasmodically, by spells; I could not work continuously.

Q How have you been down to the present time? Have you been working since? A I have done quite a good deal of work this year, this spring.

Q What condition have you been in? A About the same thing, only it has not been quite so extensive as before. I might work today part of the day or all day, and tomorrow maybe a few hours, but I cannot work continuously day after day.

Q Do I understand that that applies to the present time? A Yes, sir.

Q What do you complain of at the present time? What seems to be your trouble? A Where the ribs were broken, that don't bother

me except when it is stormy, but this seems to be my back, and when I get tired it is a drawing in, it kind of draws like that; and when I sit in a chair like this it makes me feel tired and I sometimes feel as if I would like to lie right across a barrel.

Q Does the back condition interfere to any extent with your work? A Yes, sir; I cannot do anything. I have just simply got to go and lie down.

Q When you start out to work in the morning and try to work how does this condition of your back affect your work? A I generally work pretty good every time after I have had a night's rest sometimes up to two or three o'clock, and then it seems I just simply cannot do any more and I go home.

Q How does your back feel after you have worked like that so you have to stop? A Well, it is kind of a numb feeling, a funny bearing down feeling, and I can feel it throb kind of like that.

Q What do you do when you go home then, to your back, if anything? A Well, finally I went to work and several times went home and filled the bath tub partly full of hot water, just as hot as I could stand it and laid down on my back in the tub and get up and dry myself and go downstairs and lay across the bed, and my wife has a liniment Dr. Dalrymple gave me and she rubs that on my back and takes a towel and doubles it and puts it on my back and takes a hot iron and irons it and that gives me relief for quite a long while.

Q How much pain and suffering, if any, did you sustain as a result of this accident, right after you were injured, and down to the present

time? A I don't know; it bothers me a great deal.

Q How was it for the first twelve weeks you were laid up? A I wasn't good for nothing then.

Q Did you have any pain and suffering? A Yes, sir.

Q How much? A A lot of it. It annoyed me all the time. Sometimes I could hardly sleep for it; and when I would sit down or be around there was kind of a dull aching pain, and it would be very annoying. Even if I sat down to read or like that it would annoy me.

Q What doctor bills have you incurred in trying to be healed of your injuries? A Well, Dr. Osmun's.

Q Will you give us the total amount of doctor bills?

Mr. Braun: If the Court please, I object to that. I think the doctors are the proper parties to say what the reasonable value of their services is. It is not the amount of the bill; it is the amount of the reasonable value of the service that is the proper charge.

The Court: Yes, that is true. But, nevertheless, the witness may show what he actually paid for doctors' services.

Mr. Braun: Of course, if it is going to be followed with testimony that it is reasonable, that is true; but I object to it going to the jury that he spent so much for doctors' services. He was asked about how much he has spent for doctors' services, and I further object on the ground that the question is too general.

The Court: Yes. You may have an exception.

Q Just give us the various items of your doctor bills that you incurred in endeavoring to be healed of these injuries? A At the Dover Hospital I think it was fifty-eight dollars.

Q Yes. A And Dr. Osmun's bill was seventy-five dollars.

Q And the next? A I paid Dr. Dalrymple—I forget what, now—something like six or seven or eight dollars, for what he done for me.

Q What else? A Then the X-rays and like that, you mean?

Q Have you made any calculation as to what your loss of time was, the value of that, what the loss of earnings has been rather, since this accident on account of the accident? A Yes, sir.

Q What system do you employ of keeping account of your income from your business? A I have a statement there from the books.

Q You keep books? A Yes, sir.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

John S. Kinsey, direct.

AFTER RECESS.

JOHN S. KINSEY, the plaintiff, resumes the stand.

Direct examination continued by Mr. W. Reading Gebhardt.

(Last question and answer read.)

Q What items do you enter up in your books? A Well, material and labor on the job.

Q You mean, I suppose, the cost of the material? A The cost of the material, yes, and what I pay the men. I make money on all the men.

Q Then what does the balance between those two figures, if any, show? A It shows what I get out of the job and my own earnings and the profit. It shows my net earnings on that job.

Q Profit or loss as the case may be? A Yes.

Q I show you a book marked on the binding, "Ledger." A Yes, sir.

Q And ask you whether or not that is the book of account which you have reference to? A Yes, sir.

Q What does that contain, just briefly? A It contains the items of material used and the days' labor on all these jobs.

Q For what year? A 1923 and 1924.

Q I wish you would please state who made the entries in those books. A I did.

Q Were they what you call the original entries? A They are; yes, sir.

Q As far as you know are the accounts therein contained kept correctly? A Yes, sir.

Mr. W. Reading Gebhardt: I offer the book in evidence as the foundation for other testimony as to his calculation based on the books.

Mr. Braun: If the Court please, I object to this. I do not think that they are material to prove the damages sustained by this plaintiff, on the ground that they do not cover a sufficient period of time, even if they were admissible for the purpose of showing losses and profits; and on the second ground that loss of profits are not the proper measure of damages in a case where a man is engaged in business and receiving an income on invested capital and on the labor of others.

The Court: What is the offer now, Mr. Gebhardt?

Mr. W. Reading Gebhardt. Perhaps I did not, as I should have done, state when I made the offer that the purpose of offering this book is as a foundation for calculations which he has made, and I would like to have him testify, using the book as the foundation, showing the amount of the profits from his business for the year 1923, which will be pertinent on the extent of his loss for the twelve weeks during 1923 that he was laid up. Also for the year 1924, it would be pertinent on the issue as to the amount which he has lost for the year 1924, as compared with 1923, due to his inability to pursue his occupation as he did before the accident.

The Court: I will overrule the objection.

Mr. Braun: Your Honor will allow an exception?

John S. Kinsey, cross.

The Court: Note an exception.

(Book referred to is marked Exhibit P. 1.)

Q Have you gone over your books and made certain calculations as to the amount of profit that you made for the year 1923? A Yes, sir.

Q And for the year 1924 also? A Yes, sir.

Q I show you a paper marked "1923," with the name John S. Kinsey, and ask you whether or not you made those calculations for the year 1923 on that paper? A I did.

Q Where did you get the information on which you based those figures? A From that book.

Mr. W. Reading Gebhardt: I now ask that the witness be permitted to use the papers and bills for the purpose of refreshing his memory and giving the calculations, to save time.

Mr. Braun: I would like to cross examine on the entry.

Mr. W. Reading Gebhardt: We have no objection.

By Mr. Braun.

Q When did you make this calculation, Mr. Kinsey? A Well, just recently. I had them made before, but I went over them again just recently; I do this every year to settle with the income tax man.

Q Let me see them, please. Now, just what is the nature of these items? A Well, there is the total amount for the job, and then the material used at cost and the labor, what I pay the men; and then the rest of it includes my labor

and whatever I make on the job, it includes my own earnings and what I make on the job.

Q Is there anything here to show what the estimate was? A In the books?

Q Anything on these papers. A On the left-hand corner is the total amount of the job.

Q Is there anything to indicate what is a contract job and what is an estimate job? A In the book, yes.

Q It is not on this memorandum? A Sometimes it is a contract and sometimes extra work, which is all included together. For instance, I did some work for Mr. Cook there. That includes all the work I did on his job. You see this work was by the day. I did quite a little work for him and that is the total job. And then I take out the labor and what the material costs me and the rest of it is mine.

Q What years do these represent? A That is 1923, I think. I have got 1923 and 1924. I think it is written on the top of it, isn't it?

Q Can't you testify from the book? A Well, I could, but it is quite a job. It took me three or four days to do this.

Q And this is what you have taken from the books? A Yes, sir, to save time and trouble.

Q Every item is here? A Yes, sir.

Mr. Braun: Aside from my objection which I will enter as to this paper, and which constitutes the same effect as my objection to the books, it is not competent to show the measure of damages in this case and it does not extend over a proper period of time, I have no other objection to the use of this memorandum.

The Court: I will overrule the objection.

Mr. Braun: And your Honor will allow an exception?

The Court: Yes.

By Mr. W. Reading Gebhardt.

Q Now, refer to the two papers marked "1923" and tell us what the net profit was from your business for the year 1923. A The total business done that year was—

Q Give us the net earnings. A Yes, sir. $9,090.41; that is the total business.

Q Go ahead. A And then the material, $1,679.73; labor $3,329.41; leaving net earnings for me of $4,080.87, for forty weeks.

Q Why do you say forty weeks? A That is all I worked that year.

Q Where were you during the other twelve weeks? A I was laid up with this injury.

Q I show you two more sheets, one marked "1924" and the one that goes with it and ask you to use that and refresh your memory as to any calculation which you made based on those books as to your net profits for the year 1924.

Mr. Braun: If the Court please, I merely want to enter the same objection to this as I did to the other memorandum.

The Court: All right. There will be the same ruling.

Mr. Braun: Your Honor will allow an exception?

The Court: Note an exception.

Q Give us the same figures that you did before. A The total was $5,695.70; the material I have $1,051.51; labor $2,261.66; leaving net earnings for me of $2,383.64.

John S. Kinsey, direct.

Q Now, will you please state what the conditions were as to the amount of work which there was available for you during the years 1923 and 1924?

Mr. Braun: I object to that, if the Court please. This man is not an expert on conditions and the amount of work. I think it should be more specific. I think it is too general.

The Court: Objection overruled.

Mr. Braun: Your Honor will allow an exception?

The Court: Yes.

A Why, lots of it. I generally have more than I can do most all the time.

Q Was that the case during 1923 and 1924?

A Yes, sir. I turned away lots of work in 1924.

Q Will you please state, if you can, what was the reason why your net profits during the year 1924 were only $2,383.64?

Mr. Braun: I object to that. That calls for a conclusion.

Mr. W. Reading Gebhardt: I have not finished the question yet.

Mr. Braun: I ask counsel's pardon. He stopped and I thought he had finished.

Q Can you give us the reason why it was that your net profits for the year 1924 were only $2,383.64 as opposed to $4,080.87 for the year 1923?

Mr. Braun: I object to that as calling for a conclusion.

The Court: Objection overruled.

Mr. Braun: Your Honor will allow me an exception?

The Court: Yes.

A Well, a great deal of my business is paper hanging—myself.

Q Give us the reason. A I was not able to do it. I had to turn away lots of work coming up because I could not do it, and that affected my other work, too. I done a great deal of paper hanging and decorating, papering and painting, and if I cannot do it myself they generally go to somebody else.

Q What have you to say briefly as to your being able to carry on your work in the year 1925, down to date? A It has been very much the same, only not quite so bad. I have been better this year, a whole lot better than I was last year.

Q Will you please tell us what the average wage for paper hangers of the ability of yourself was in Hackettstown and vicinity on the twenty-second day of August, 1923, per day? A Ninety cents an hour.

Q What was the average day? A That is seven dollars twenty cents a day, and I work a great deal on piece work.

Q Seven dollars and twenty cents a day? A Yes, sir; that is for daily work.

Q That is based on a wage of ninety cents an hour? A Yes, sir.

Q Did you do any work on this schoolhouse after you were hurt? A Yes, sir.

Q You personally? A Not I personally; no.

Q Did your men do any work on it? A Two of my men, yes, sir; my son and another man.

Q Your son and another man were your employees? A Yes, sir; employed by Mr. Nester.

Mr. Braun: I object to that, if the Court please, and move to strike it out.

The Court: Yes, I think unless he made the contract—

Mr. William C. Gebhardt: With Nester. That is what happened.

Mr. W. Reading Gebhardt: We will consent to that being stricken out because it may be possible that being laid up he did not have personal knowledge of all of it, and I do not want him to testify to anything that is not entirely proper.

Q These two men who did this work on the schoolhouse, were they your employees at the time or not? A Yes, sir.

Mr. Braun: If the Court please, I object and move that be stricken out as not material in this issue. What he did or what his men did after this accident has no bearing on what happened at the time of the accident or prior.

The Court: I do not know. It might have. It might have considerable bearing; I cannot say. I cannot strike it out now.

Mr. Braun: Will your Honor allow an exception?

The Court: Yes.

Q Were these men your employees at the time they did this work on the schoolhouse or not? A Yes, sir.

John S. Kinsey, direct.

Q I want you to limit your testimony to what you actually know, Mr. Kinsey. Do you know who made the arrangements for the doing of this work, of your own knowledge? A Mr. Nester.

Mr. Braun: If the Court please, I move to strike that out.

The Court: Yes.

Mr. W. Reading Gebhardt: We consent to it being stricken out.

Q Please answer the question yes or no, as to whether you know whether the arrangements for doing this work were made with Mr. Nester or not, of your own personal knowledge?

Mr. Braun: I object to that question, as it has not been shown that the arrangement was made by Mr. Nester.

The Court: Objection sustained.

Q Well, did Mr. Nester make any arrangements for the doing of any work on this schoolhouse by your employees with you personally after the accident? A No; I think he made it with my wife.

Mr. William C. Gebhardt: Wait. That was not asked at all. Just answer the question. Who was paid, if anybody, for the doing of this work by your men?

The Witness: The money was sent down to the house to me and I paid the men.

Q You paid the men? A Yes, sir.

Q And who paid you? A Mr. Nester.

Mr. Braun: I move to strike that out as not binding on these defendants.

The Court: Motion overruled.

Mr. Braun: I pray an exception.

The Court: Yes.

Mr. W. Reading Gebhardt: Now, if the Court please, we would like to expose the plaintiff's back to the jury.

The Court: Do you think it is necessary?

Mr. William C. Gebhardt: Very necessary, indeed.

Mr. W. Reading Gebhardt: We think it will be material to the plaintiff's case; yes, sir.

Q Will you please indicate on your back the approximate spot where the injury to your back was and where the suffering that you now have comes from? A (Indicates) Right back there.

Mr. W. Reading Gebhardt: Indicating in the lower region of the back, if your Honor please.

Q At the time that you fell through this hole what were you going to do next? A I was going up in the old part of the building to see what new work was there, connected up with the old work.

Q What did that have to do with the making up of this estimate? A All I was to do was the new work.

Q What did that have to do with that? A All I had to figure on was doing the new work.

Q Was it a part of maikng up the estimate on that? A Oh, yes; it was part of the making up of the estimate.

John S. Kinsey, cross.

Mr. Reading Gebhardt: Cross examine.

Cross examination by Mr. Braun.

Q How many times did you go to this building all together, Mr. Kinsey? A Just this once.

Q That was the only time you were in the building? A Yes—while it was being constructed, yes.

Q I think you testified that the plastering and lathing on the inside were finished and the floors were in and no trim, but some plastering done and some plastering not quite finished? A Yes, sir.

Q Did you mean that that referred to the entire building? A Well, yes. There were some of the walls were plastered.

Q You had not been through the entire section, had you? A No. That refers to what I have been into. There wasn't nothing on the basement floor at all; there was nothing to be done there.

Q How do you know that? A Mr. Nester told me so.

Q Did you say there was nothing done there or nothing to be done? A Nothing to be done on the ground floor. There was just the first and second floor.

Q How many floors? A Two floors.

Q You don't know what the condition of the basement was as to completion, do you? A Well, it was not completed.

Q Answer the question, please. Do you? A Well, it is just about the same now as it was then.

Mr. Braun: I move to strike out the answer.

The Court: Yes.

(Previous question read as follows: "You don't know what the condition of the basement was as to completion, do you?")

The Witness: No.

Q You had not been in the basement until you fell in? A I didn't fall in it. I fell in the gymnasium.

Q Well, the ground floor? A Yes, sir.

Q You had not been in there until you fell into it, had you? A I went in that way, around to the old part of the building.

Q Had you gone through the old part of the building before you got into the new part? A I went through in the south side around to get up into this building.

Q Then how did you get into the new section? A Well, there was an opening in the wall. I just forget kind of about that, but there was an opening somewhere in the wall.

Q Had you gone into the old building first? A Yes. I went into the old building and up the front way.

Q Then where did you go? A Then I stepped out in the janitor's room a little while and I didn't see none of them around, and I went on up the front stairs and up into the building.

Q The front stairs of the old building? A Yes, sir. And then I went up through the hall and came into one of these rooms.

Q How did you get into the new section? A Why, I went in from the outside. There was a driveway in where they now have a wheel barrow to go in and cart ashes out and like that.

Q You could not get into the new section from the old building at that time, could you? A I could not get into the old section there, no.

Q You were in the old section, were you not? A I went into the new section first and from there into the old section.

Q Didn't you just testify a few minutes ago that you went into the old section first and went upstairs into the janitor's room and did not find any one there and went out into the new section through this driveway? A No; I said I went into the new section first. That was the only entrance open at that time, and then I went off to the right and went off under the old building and up the front stairway. I did not bother with anything in the basement, because there was nothing to be done there.

Q That was the only time you had been around there? A Yes.

Q How many times had you been around the job? A Since this?

Q No; before this accident occurred? A I had not been there at all.

Q You had not been near the job at all? A No, sir.

Q How do you say Mr. Nester directed the men around there then? A Oh, going past the building. I thought you meant something different than that. In passing by the building when they first commenced to construct it.

Q How much of this outside work had been done on the day of this accident? A Just some of the cornice primed, I think is about all.

Q Had all the brick work been completed? A I think it was.

Q Were there any windows in? A No window lights in the new part at all.

Q Any doors in? A I think the outer doors were in. There was no glass in them. That was one of the things he wanted to put out. He wanted to have the glazing put out, too.

Q I show you a photograph and ask you if that represents the approximate condition of the outside of that building at this time with respect to the windows and doors?

The Court: At that time or this time?

Mr. Braun: At that time.

A Yes, I think it does.

(Photograph referred to is marked Exhibit D. 1 for identification.)

Q Does that show the view from the north, looking from the north or from the south end of the building? A From the north.

Q In other words, that shows the end of the building? A Yes, sir.

Q Looking from the end of the building at which you say this hole was located? A Yes, sir.

Q When you were in that building were you on— The floor which shows the second row of windows? A That one right there (indicating).

Q The lower row of windows? A Yes, sir. There is the gymnasium down there (indicating).

Q Then there were more than two floors to this? A Well, that has been questioned. The first floor I say I would call it, the ground floor, and then two floors.

Q And you were on the first of the two floors above the ground floor? A Yes, sir.

Q Had you been on the top floor? A No.

Q You did not know anything about the conditions there? A No.

Q How often had you seen Mr. Nester there? A Oh, a number of times. I have been up and down past the schoolhouse.

Q How many times approximately? A Oh, probably thirty or forty; maybe more than that.

Q When was the first time you saw him there? A Oh, I couldn't tell you.

Q Did you go around there quite frequently? A Yes, I worked all around that part of the town and passed it frequently.

Q You were quite interested in this school, weren't you? A The same as in any other building.

Q You wanted the job. A Well, I hadn't thought much of it until that time. I had all I wanted. I didn't particularly care whether I got it or not.

Q You were watching it pretty close to see how the work was progressing? A No.

Q But you had seen it thirty or forty times? A Yes, sir; but I merely went by and glanced at it.

Q Had you stopped long enough to see who was directing the men and so forth? A Yes, I saw him in passing by.

Q You saw him every time you went by? A Not every time; no; sometimes. I would go past it two or three times in one day.

Q And always stopped and saw he was directing the work? A No. I just looked as I went along.

Q Had you ever met Mr. Nester before? A No.

Q Did you ever meet either one of the defendants? A Never. I never saw them before until just the other day.

Q You never saw them before this occurrence took place? A No, sir.

Q And never did any work on any job that they were on? A No, sir.

Q When you came there the day of the accident you say you saw Mr. Nester talking to some men and you waited? A Yes.

Q What for? A I thought maybe he would come down where I was.

Q What for? A Well, to see about—I don't know; I just thought I would stop and see; but he had told me the day before all that there was to be done and what I should do.

Q He told you to see his boss about it? A He told me after I got it figured up to see his boss.

Q Did you ever figure from plans and specifications? A Yes, sir; lots of times.

Q In fact, that is the best way to figure, isn't it? A Not always.

Q When there are plans and specifications it is a whole lot easier to take the measurements from the plans than to go around with a foot rule, isn't it? A Well, yes and no.

Q Well, which? A Sometimes, like this work, there is old work and new work together and then it is better to see.

Q Well, on new work? A On all new work it don't make any difference, either way, it don't make any difference to me which.

Q It does not make any difference in new work whether you go with a foot rule and measure each individual part of the work or whether you sit down with the plans laid out with the measurements before you and figure from them? A No, sir.

Q It does not make any difference? A No, sir.

Q One is just as quick as the other? A Yes, sir.

Q Did you ever ask for any plans and specifications on this? A No. I done just as he told me to. They always say a good soldier does as he is told.

Mr. Braun: I move to strike out the answer as not responsive.

Mr. William C. Gebhardt: I object to striking out anything except the latter part of it.

The Court: What was the question and answer?

(Last question and answer read.)

Mr. Braun: I move to strike it out.

The Court: Strike it out.

Q Answer the question, yes, or no.

(Previous question again read.)

A No, sir.

Q Were you ever told to get any? A No, sir.

Q You are sure about that? A Yes, sir; I am sure of it.

Q Now, as you went upstairs what was the first thing you did? A I walked back towards this new part.

Q What do you mean by "walking back towards this new part?" Didn't you say you went in from the new building? A From the new building into the end of the old building.

Q Why did you go into the old building? A To get up to the second floor.

Q Couldn't you get up into the second floor of the new building? A I don't know. I did not see any place around there.

Q Weren't the stairs completed? A No. The iron work was up there, but it had no steps on it; and the doors were shut on the side.

Q Then this building was not in as completed condition as you indicate on your direct examination? A No.

Q There was a lot of work to be done around there, wasn't there? A Sure, there was a pile of work.

Q In construction as well as finishing? A Yes, sure.

Q Now, as you went along the hall you had already measured one of the rooms, had you not? A Yes, sir.

Q Did you measure any others? A No, sir.

Q Did you know the length of the building? A No, I hadn't found that out yet.

Q Were you measuring the length of the building as you went along the hall? A No, sir. I had to measure that from the outside.

Q Why were you going along the hall? A I told you I wanted to go to the end of the hall to see what was on the other end.

Q Couldn't you see from one end of the hall to the other? A You could just see to the end of it, but you couldn't see where you went around the corner a ways.

Q This hall on the east side joined on to the old part of the building, did it not? A Yes, sir.

Q And this addition was just a rectangular section built right on the rear, was it not? A Yes, sir.

Q So there could not be anything to your right as you walked along the hall, except the hall? A That is all; but the hall is on the right of the room.

Q You were walking through the hall? A Yes, sir.

Q There wasn't anything to the east of where you were, was there, except the old building? A That is all.

Q Why did you have to go to the end of the hall to see what was there? A To see what the other end of the hall was like.

Q How long was this hall? A I just forget. I should think probably maybe sixty or eighty feet or seventy feet, something like that.

Q It was all open, wasn't it? A No.

Q Couldn't you see from one end to the other? A Oh, yes, I could.

Q Couldn't you see what it was like? A Not enough to suit me.

Q What was there about it that was necessary for you to go there? A There was a room on the end of this hall, for instance, and then the hall went around and connected with the other hall.

Q Wasn't the hall straight? A Well, yes, it was in a sense, but it forms a complete square all the way around through the building.

Q Well, the other was the old hall, wasn't it? A Yes, but from the corner in there there was twenty-five or thirty feet where they come together there.

Q How many measurements did you take? A (Witness refers to book.)

John S. Kinsey, cross.

Q What is that book? A That book is what I done my figuring in and measured it.

Q At that time? A Yes, sir.

Q All right, sir. I am glad you have got it. A The first was a classroom.

Q How many measurements did you take in there? A I measured up the whole room, three or four or four or five measurements.

By the Court.

Q The question was how many measurements you took. A I measured up the room. I have seven measurements of that. I figured the room; each room was forty-five dollars and ten rooms, four hundred and fifty dollars.

By Mr. Braun.

Q What did you measure that with? A A rule.

Q And did you put your measurements down immediately? A Yes.

Q You are sure about that? A Yes, sir.

Q How was the light in the rooms? A There was lots of light in the rooms.

Q Did each room open out on to the hall? A Yes, sir.

Q And each room had a door in it? A Yes, sir.

Q A doorway? A A doorway, yes, sir.

Q There was nothing else to obstruct it? A No.

Q And those rooms stretched up the full length of the building on the west side, did they not? A Yes, sir.

Q And there were windows in the north and south ends of the hall as well? A Yes, sir.

Q And there were hallways running in at the north and south ends of the hall about twenty-two to twenty-five feet from the ends? A Yes, sir.

Q Facing east? A I don't quite get you. They were facing west, the way I would figure it.

Q As you walked along this hall from south to north, at the south end there was a passageway to the right that led to the old part of the building, was there not? A Yes, sir.

Q And at the north end there was another one to the right? A Yes, sir.

Q And those ran directly into the front part of the building? A Yes, into the front hall.

Q The front part of the building has windows in it? A Yes, sir.

Q What was this obstruction that you were speaking about on your direct examination, Mr. Kinsey? You spoke about an obstruction that cast a shadow. A It was a lather's scaffold across this end, from the hole to the end of the hall, a solid plank scaffold that the lathers had been working on. And, naturally—

Q A solid plank scaffold? A Yes, sir.

Q How wide was it? A The whole width of the hall.

Q That filled in the whole end of the hall? A Yes, sir.

Q You are sure about that? A Yes, sir; I am sure of it.

Q And you saw that? A Yes, sir; I did.

Q What was it resting on? A I think horses.

Q Don't you know? A I cannot tell you that part. I saw the scaffold and bundles of lath on it and lath on it where a man had been working, but he was not there.

Q And that filled the whole end of the hall? A Yes, from the window back to the end of the hall.

Q The full width across? A Yes, sir.

Q How high was this? A About six feet.

Q Was there any apparent means of getting on to it? A I did not take notice of that. I don't know how it was.

Q How wide was that hall? A About nine feet.

Q And this was the full width of the hall? A Yes, sir.

Q How high was the window from the floor? A That I don't know. I didn't see that. I could just see the top of the window.

Q Did this give light up to the edge of the hole? A Yes, sir.

Q You are sure about that? A Yes, sir, I am sure of it.

Q So you could see it? A Yes, sir; I saw it.

Q Did you see the hole? A No, sir.

Q Then how do you know it came up to the edge of it? A Well, I know now where it is. It took the end of this wall along there from the hallway back into the old part, just the same as this here (indicating), and here was this scaffold up to here and here the wall went out, to here.

Q How did you know where the hole was? A I didn't know. I didn't see the hole at all. I saw this scaffold and that cast a shadow right down where this hole was.

Q I show you a paper and ask you if that is your signature? A Yes, sir.

Q Do you remember signing that? A Yes, sir.

John S. Kinsey, cross.

Q Do you remember in this statement saying that "as I was walking from a room into the hall on the second floor I was writing on a pad some measurements I had made and I did not notice an opening in the floor and fell through to the first floor"? A I do not remember about that, but I was not writing on a pad, or there would be something unfinished.

Q Do you remember this? A I don't remember that.

(Paper referred to is marked D. 2 for identification.)

Q But you did sign this? A I remember signing it, yes.

Q Did you read it before you signed it? A No, sir. He read it off to me.

Q Are you in the habit of signing things you have not read? A Sometimes.

Q Can you read? A Yes, sir.

Q Why didn't you read this? A I took his word for it and he read it off apparently as I was telling him.

Q Did he read it that way? A I don't know, I don't remember.

Q He might have? A He might have, yes, but I don't remember.

Q After he read it you signed it? A Yes, sir.

Q Which is the fact, were you writing on a pad and didn't see it? A No, sir, I was not.

Q Why didn't you see the hole? A Because I did not see it. That is all I can tell you.

Q Could you see what you were walking on? A I looked ahead and I saw nothing. It looked all right to me.

Q What do you mean it looked all right? Could you see the floor? A Yes. I couldn't see it.

Q You didn't see any floor there, did you? A I don't know. There was a floor where I was walking. The only thing I can see was this shadow darkened this hole across there.

Q I am not asking for explanations. I am asking you, did it? A I didn't see it; no, sir, I did not.

Q But you saw the scaffold? A Yes.

Q And you could see the walls? A Yes, sir.

Q And you could see what the scaffold rested on? A I couldn't say, but I think horses.

Q You say it extended right up to the edge of the hall? A Yes; it was directly in front of me.

Q And you could see all that? A Yes, sir.

Q But you did not see the hole? A I did not see the hole.

Q Was it so dark you could not see what you were walking on? A No.

Q You could see what you were walking on? A I do not understand just how it was. I looked ahead and I didn't see no hole. I saw nothing; and then next thing I was falling and that is all I know.

Q Now you say when you came to your sense you were in Dr. Osmun's presence? A Yes, sir.

Q Did Dr. Osmun treat you? A Yes, he done me up. He gave me first aid.

Q Well, he treated you afterward, didn't he? A Yes, sir.

Q He saw you at the hospital? A Yes, sir.

Q What hospital? A Dover.

Q Dover General? A Yes, sir.

Q How often did he see you there? A I don't know. His time is on the bill there. I

forget how many days; five or six or seven days.

Q While you were at the hospital weren't you bandaged? A They bandaged me with the same bandage I had on when he brought me that day.

Q You were bandaged several times, weren't you? A No, sir.

Q Only once? A No, sir.

Q Was that all they did for you? A Yes, sir.

Q The rest of the time you stayed in bed? A Yes, sir; just laid there in the bed.

Q They did not do anything for you? A No, sir.

Q They did not take any X-rays? A Yes, sir; they took two X-rays.

Q What else did they do?

Mr. William C. Gebhardt: That is not treatment.

A That isn't no treatment. I don't call that treatment.

Q Well, they did something for you. What else did they do for you? A They bathed me with alcohol and they fed me.

Q Where did they bind you or bandage you? A (Indicating) Right around me here, with adhesive tape.

Mr. W. Reading Gebhardt: Indicating around the stomach and abdomen, if your Honor please?

The Court: Yes.

The Witness: From clear up under my arms clear down to my stomach.

Q After you got home did Dr. Osmun continue to treat you? A He came down there a time or two. One time I got my collar bone out of place and he came down and reset it again.

Q When did you do that? A That was after I came home.

Q How did you do it? A Trying to get up, I think.

Q How long did the doctor treat you after you got home? A He only came there two or three times, I guess, or something like that.

Q How many visits did he make to you at the hospital all together? A I do not know; it is on the bill; I think probably six or seven.

Q How many at the house? A I think around about two.

Q When did he last see you for treatment? A Oh, I guess the last time was when he came down and took that tape off my body.

Q When did he do that? A He came to my house.

Q How long after the accident was it? A Several weeks. I do not just remember; I guess four or five or six weeks or like that.

Q When did you go to see Dr. Dalrymple? A Just about a year afterward, I guess.

Q About a year after the accident? A Yes, about a year after the accident.

Q What did you go to see him for? A Well, I got so bad I couldn't work, I couldn't get around, and I spoke to Dr. Osmun about it two or three times and he said, "Well, I think it is torn ligaments and they are very painful and it will be quite a while before they heal." And it got worse and I finally got afraid to go uptown for fear I would get down and couldn't

get back and I went to Dr. Dalrymple. My wife said, "Why don't you go see Dr. Dalrymple and let him examine you and see whether there is something else the matter with you?"

Q When did you go there? A I think about the 10th of August.

Q Did Dr. Osmun say anything to you about your ribs being broken on your right side? A No.

Q Is there any other doctor that you are charging bills for? A No, only Dr. Dalrymple.

Q Did he take the X-rays that you started to talk about? A No. I went down to Dr. Sherrer. Dr. Dalrymple was going to take me to Dr. Miller and in the meantime I saw Mr. Gebhardt and told him about it and he told me to go to—

Q They were taken by someone else? A Yes, sir.

Q Did any other doctor treat you? A No.

Q How long have you been in business for yourself? A About nine or ten years or something like that.

Q Do you hire anybody to work for you? A Yes, sir.

Q And you work on contract? A Yes, sir; both ways.

Q Do you make estimates and stand behind your estimates? A I do, yes, sir, whether I make or lose.

Q Sometimes you make and sometimes you lose? A I very seldom lose.

Q Well, sometimes you do? A Once in a great while, yes.

Q Why didn't you take some of this work— A Some of it was work I would have to do and I could not do it.

Q Isn't there anybody else around town as good as you? A Yes, but you can't get them; they are working for themselves or somebody else.

Q You have no men working for you? A Yes.

Q How many? A Three of them; but in that year I had seven.

Q You had seven men working for you? A Yes, sir.

Q Because you were injured those seven men couldn't do nearly as much work? A They wouldn't go on with it; they simply went to other people. Even my own boy got another job.

Q Couldn't they go on and work without you? A No.

Q Couldn't you get anybody else to supervise that work? A I didn't try. I simply gave up my work.

Q Did you try? A Yes, sir.

Q What did you do? A I didn't do anything for a while, for I made up my mind for about five weeks that I would never work.

Q And you made absolutely no effort to keep your business together? A I couldn't.

Q Well, did you or didn't you? A No, I did not.

Q Do you know of any jobs that you could have gotten? A Yes, sir; I had three or four jobs and I gave them up.

Q Did you make any effort to get any more after you got out of the hospital? A Not right away. In about four or five weeks—

Q You immediately discharged all of these men? A They left while I was in the hospital.

Q Did you make any effort to get them back again? A When I got ready to start in work they all came back to me.

Q When you were ready to work personally? A To supervise it myself, yes.

Q When was that? A I think probably five or six weeks.

Q How many did you get back? A I think I started in with two or three; two, I think.

Q Did you try to get more? A That was all I could attend to. I couldn't attend to them, and I left it in charge of this one fellow that used to do it for me so many years and who worked for my father.

Q Well, then you had a man who was pretty dependable? A Yes, sir.

Q Why didn't you leave him on the job and let him run the work while you were laid up? A No business can run itself, I don't care if it is painting or what it is.

Q Then he was not capable of seeing that these jobs you had were completed? A Yes, on that part.

Q Did you try to have him do it? A As soon as I got able I did. I let everything go. I even gave up some of the jobs I had.

Q When did you start looking for new work? A Well, they came to me. I did not have to start looking for it. I should judge possibly five or six weeks after I had been hurt they came to me and I took the work and put this man in charge.

Q Now, you say you turned away lots of work, that you always had more than you could do? A Most generally all the time.

Q Did that apply to the period after you got out of the hospital as well as before the accident? A Yes, sir.

Q Then you did do all the work that you were able to do? A Yes, sir.

Q With the force of men that you had? A Yes, sir.

Q Did you make any effort to increase your force and take on any of this work you were turning down? A I don't call a lot of men unless we have lots of work.

Q Well, you were turning work away, weren't you? A Sometimes, yes.

Q Well, right along? A Well, yes, sir. Not every day, but in the course of a week or two weeks or so I would turn away work. I remember one time this spring I turned away four jobs in one day. They wanted it done right away and I could not do it. When they come on in a great big sweat if I can't do it I tell them so.

Q Your work is seasonable, isn't it? A No. I most generally work all the time.

Q People have paperhanging done all the year around? A Well, most generally, yes.

Q Lots of them? A Yes, sir.

Q And you say that paperhanging is your principal line? A Yes, sir.

Q You don't do much big work? A I am an all-around man.

Q You are ready for anything, but you don't get it, do you? A Well, I get my share of it.

Q You do not do a lot of paperhanging on big buildings, do you? That is principally painting business? A Yes, sir.

Q Now you have said something about this money which was sent to the house to pay off these men? A Yes, sir.

Q Who gave it to you? A Mr. Nester.

Q Personally? A I think he did once; he gave it to me once.

Q And it was sent by someone else? A No; if I am not mistaken I think he brought it in person, himself.

Q It was not his money, was it? A No; it came from the firm.

Mr. Braun: I move to strike that out as not responsive to my question. I asked if it was his money and he said no and that was enough.

The Court: It may be stricken out.

Q Now, this total business in 1923—you haven't your records here for 1922 have you? A No, sir.

Q And you haven't them here for 1925, have you? A No.

Q You are just taking 1923 and 1924? A The year it happened and last year, from January to January.

Mr. Braun: I think that is all.

DR. FREDERICK A. SHERRER, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Dr. Sherrer, you are a practicing physician? A Yes, sir.

Q In what city? A Easton, Pennsylvania.

Q You are a graduate of what medical college? A Medico-Chirurgical.

Q How long have you been practicing medicine? A Thirty-seven years.

Q How much of that time were you engaged in the general practice of medicine? A About seventeen years.

Q At the present time are you engaged in any specialty or not? A Yes, sir.

Q What specialty? A X-ray work.

Q How long have you specialized in X-ray work? A For the last fifteen years.

Q And exclusively for how long? A The last two years.

Q Are you connected with any hospitals? A The Easton Hospital.

Q Have you made one or more examinations of Mr. Kinsey, the plaintiff, for the purpose of testifying in this case? A Yes, sir.

Q Have you also made some X-ray pictures of any part of his body? A Yes, sir.

Q If so, what part? A The lumbar spine; the right chest.

Q I show you an X-ray picture, which I will ask to have marked for identification—

(Marked P. 1 for identification.)

Q —which has been marked P. 1 for identification, and ask you whether or not you took that picture? A Yes, sir.

Q What part, if any, of Mr. Kinsey's body, does that portray? A The lumbar spine.

Q Was that taken by you personally? A Yes, sir.

Q And developed by you personally? A Yes, sir.

Q I wish you would please state whether or not you followed the usual and proper procedure

and technique and practice in taking this picture? A Yes, sir.

Mr. W. Reading Gebhardt: I offer the picture in evidence.

(Marked Exhibit P. 2.)

Q Now tell us what that picture shows. A That picture shows a fracture of the transverse process of the second and third lumbar vertebrae on the right side.

Q Now the vertebrae are what part of the body? A The vertebrae are the parts of the body forming the spinal column.

Q I show you another X-ray picture—

(Marked P. 2 for identification.)

Q —and also a third picture, which I will ask to have marked for identification.

(Marked P. 3 for identification.)

Q I show you, first, P. 2 for identification, and ask you whether that portrays some part of Mr. Kinsey's body and, if so, what part? A Yes; this in an anterior-posterior view of the right chest of Mr. Kinsey.

Q That means taken how? A With the back of the patient to the plate and the tube toward the chest.

Q Did you take that in the same manner you have related that you took the other picture, marked P. 1? A Yes, sir.

Mr. W. Reading Gebhardt: I offer that.

(Marked Exhibit P. 3.)

Q I ask you what this picture now marked Exhibit P. 3 portrays. A This shows a fracture of the collar bone at the junction of the outer and middle third, with an overlapping of the fragments. A fracture of the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth ribs on the right side, with a vicious union and with separation of the ninth rib about one-third of an inch.

Q What does "vicious union" mean? A Angulation; instead of the ribs being end to end they are on an angle.

Q Does that mean a good union or not? A A poor union.

Q I show you Exhibit P. 3 and ask you whether or not you took that in the same manner that you took P. 1 and P. 2? A Yes, sir.

Mr. W. Reading Gebhardt: I offer that.

(P. 3 for identification is marked Exhibit P. 4.)

Q I ask you what the picture marked Exhibit P. 4 shows. A This is a picture of the right chest made in the reverse position, the back toward the film and the chest toward the X-ray tube. This shows a fracture of the collar bone, and, in this position the fracture of the ribs does not show very plainly.

Q What position is the fracture of the collar bone in? A The fragments overlap.

Q Is that good union or not? A A poor union.

Q This condition of the back, can you tell us more definitely and in plain language so we understand it, what that is? A The back bone is composed of small bones called vertebrae and

extending to the right and left of these vertebrae on each side are these processes called the spinal processes. The various muscles which support the trunk are attached to these processes and if that is broken it weakens the muscles of the back.

Q What, in your opinion, has been the effect of this condition upon Mr. Kinsey, upon his back? What has been the effect of this fracture of these two vertebrae upon the back? A I would say it would cause an atrophy of certain muscles of the back.

Q By "atrophy" what do you mean? A Wasting away of those muscles.

Q Does that account for the hollow in the back? A It would account for the hollow in the back.

Q Now, assuming that at the time before the accident on the 22nd day of August, 1923, Mr. Kinsey was in good health and had no trouble with the collar bone or the ribs on the right side or the back, and assuming that on that day he fell through a hole in a floor, the hole being about eight feet square, and he fell on a hard surface below, about twenty feet, to what would you attribute the condition you found in these various pictures? A To the accident.

Q Will you please state whether or not the conditions you found in your opinion are permanent or not? A I believe they are permanent.

Q Can you tell us how this injury to his back would affect his ability to carry on the work of paperhanging and painting, which would involve working with his hands above his head? A I would say it would lessen his capacity to work considerably.

Q Why? A Primarily the shoulder muscles are interfered with by the fracture of the collar bone and ribs, and the muscles attached to the spine, the girdle, are interfered with on account of the fracture of the clavical and ribs and the muscles of the lower portion of the spine are interfered with by the fracture of their attachment at the process of the lumbar vertebrae.

Q Would that condition of the back be likely to cause him any pain, particularly if he uses his back to work much? A Yes, sir.

Q Did I ask you whether or not this condition as portrayed by these three pictures is permanent or not? A Yes, sir; it is permanent.

Q Can you give us any estimate, in the way of percentage, of the extent to which these injuries as portrayed by these pictures have incapacitated Mr. Kinsey for carrying on his work of painting and paperhanging? A I should say approximately fifty per cent.

Mr. Braun: I object, because it has not been shown that the doctor knows what the nature of painting and paperhanging is. How can the doctor say unless he shows himself familiar with it? What we are interested in is how much the man is physically incapacitated as far as his body is concerned.

The Court: Objection overruled.

Mr. Braun: Exception.

The Court: Yes.

Q Now, will you give us the percentage, doctor? A I should say approximately fifty per cent.

Dr. Frederick A. Sherrer, cross.

Cross examination by Mr. Braun.

Q When did you examine Mr. Kinsey? A I examined him September 20, 1924, for the spine and yesterday for the chest.

Q Is that when you took the pictures? A Yes, sir.

Q I ask you to look at this picture again, doctor, and see whether you did not make a slight error when you said the second and third lumbar vertebrae processes were fractured.

Mr. W. Reading Gebhardt. Referring to what picture?

Mr. Braun: Either one of them, I believe it is.

A (Indicating.) Here is the second and here is the third. Here is the articulation of the twelfth rib and the twelfth dorsal. I insist I was correct.

Q The second and third. A Well, I have always been taught that the twelfth rib articulated with the twelfth vertebrae, and there it is. There is the first dorsal, the second, and there is the fracture and there is the third and fourth.

Q Which one of the processes are broken? A The second and third.

Q All right. Now, what muscles are attached to the various processes? A My dear sir, I am in the same position as a lawyer when he has to look up some point of law; I could not tell you that without looking at the anatomy.

Q You do not know? A No; I do not know.

Q What muscle bends the back forward and what one bends it backward? A I do not know.

Q What one bends it laterally? A I do not know.

Q Then how do you know there is any function lost? A By examining him in a bending position, bending him over laterally and anteriorally-posteriorally.

Q You say there is some lost function in bending? A Yes, sir.

Q Why? A Because he bends very imperfectly.

Q Why does he bend very imperfectly? A I suppose he has pain.

Q Then it is not because of lost function? A Pain or spasm.

Q It is because he has got a little pain there yet? A Yes, sir.

Q What muscle did he have spasm in? A I really could not tell you the names of the muscles there. Do you know?

Q I am not a doctor. A Pardon me.

Q Are the lumbar vertebrae straight? A What part do you mean?

Q All of them. A I cannot answer that question. You must be more specific.

Q Well, there are five lumbar vertebrae, are there not? A Yes, sir.

Q Are they straight? A Now, there is a certain natural curvature there, anterior-posterior, with a concavity toward the back.

Q Is there any lateral curvature there? A There should not be.

Q Well, is there in this case? A No perceptible curvature, no, sir; no, sir.

Q Then why do you ascribe this hollow in his back to the injury to the vertebrae? A Because it is pronounced; it is more pronounced than in the normal.

Q If there was such an injury there that made a muscular spasm and weakened the muscle on one side, wouldn't there be a curvature there, if that was sufficient to throw the spine out of line? A Not necessarily.

Q These processes are on the sides? A Yes, sir.

Q They are not front and back? A No, sir.

Q They have nothing to do with the front or back muscles, have they? A Yes, sir.

Q What have they to do with the front and back muscles? A There must be some connection on the crest of the ilium from these processes.

Q Are they near the crest of the ilium? A That attachment is.

Q Show the jury where that is and where the crest of the ilium is. Show the jury first where the crest of the ilium is, and I ask you to mark "A." A (Indicating) That is the crest of the ilium.

Q Mark that "A." A (Witness marks on X-ray.)

Q Now show them where the lowest of the fractured processes are, and mark that "B." A (Witness marks on X-ray.)

Q And where is the next fractured process? A (Witness marks on X-ray.)

Q Mark that "C." How much space is there between A and B? A About two inches and a half.

Q About two inches and a half? A That is all.

Q And do you think that would cause some curvature of the spine which would produce this hollow in this man's back? A An anterior-posterior concavity.

Q Mr. Kinsey is pretty fleshy, isn't he? A Yes, sir.

Q He has what you call a pendulous abdomen, isn't that so? A Slightly.

Q Would you say that had any effect on his back? A Yes, sir.

Q Would you say that was the result of the accident, too? A No, sir.

Q Now, I show you Exhibit P. 2 and ask you to mark with a cross the exact locations of the fractures of these ribs that you spoke of. A (Witness marks on X-ray.)

(Adjourned until Monday, June 22, 1925, at 10:30 o'clock in the forenoon.)

Belvidere, N. J., June 22, 1925.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

Mr. W. Reading Gebhardt: If your Honor please, I understand that the cross examination has not yet been completed. Dr. Sherrer has intimated since he left the stand that he desires to make a slight correction in his testimony on direct examination, and I would like to ask permission to interrupt the cross examination at this point to permit the doctor to make that correction.

The Court: All right.

Dr. Frederick A. Sherrer, cross.

By Mr. W. Reading Gebhardt.

Q Doctor, do you desire to correct any part of your testimony given on Friday afternoon? A I do.

Q Just state the correction that you desire to make. A I testified Friday afternoon there was a fracture of the transverse process on the right side of the second and third lumbar vertebrae. It should have been the transverse process on the right side of the second, third and fourth lumbar vertebrae.

Q Is there any other correction? A No, sir.

Cross examination resumed by Mr. Braun.

Q When did you discover that, doctor? A When I made the picture.

Q Didn't I call your attention to that particular picture at the time I was cross examining you Friday? A Yes, sir.

Q And didn't you say, "I still stand on the fact that it is the second and the third?" A Yes, sir.

Q And didn't I ask you if it was not the third and the fourth? A I see the second there plainly and the last one.

Q What made you change your mind over the week-end? A Examining the films over again carefully.

Q Well, are they any plainer now than they were on Friday? A No, sir.

Q Why couldn't you see it Friday? A You were asking me about the second on Friday.

Q About the fourth. A That is there all right, very plainly.

Q The fourth is quite plain, isn't it? A Yes, sir.

Q Even a layman could see that, couldn't he? A Yes, sir.

Q And yet when I pointed that out to you Friday you still insisted it was the second and third and not the third and fourth? A That is correct.

Mr. William C. Gebhardt: He says the second, third and fourth, making it three, I understand.

Mr. Braun: If the Court please, I insist on counsel directing his remarks to the Court and not to me or to the witness or the jury.

The Court: Yes.

Q I also called your attention to the second on Friday, didn't I, doctor? A Yes, sir.

Q And you still insist that the second is fractured? A Yes, sir.

Q There is no question about that now? A Not in my mind.

Q Is there anything else in your testimony that you want to change, doctor? A No, sir.

Q You stand on that record? A Yes, sir.

Q Now this picture of the ribs, which you say is Exhibit P. 3, when did you take that picture? A Last week.

Q What date? A I have it on the envelope.

Q I am talking about the picture; we are not talking about envelopes.

Mr. Braun: If the Court please, I insist on the doctor using the X-ray and not the envelope.

The Court: Can you tell without reference to the envelope?

The Witness: Yes, but I will have to count back.

Mr. W. Reading Gebhardt: There is a calendar right behind you, doctor, if you want to refer to it.

The Witness: On the 18th of June.

Q What time did you take it? A In the afternoon about five o'clock.

Q About five o'clock in the afternoon? A Yes, sir.

Q And where did you take it? A At my office, 32 North Third street, Easton, Pa.

Q What means have you of identifying this particular picture as that of Mr. Kinsey? A By the X-ray marker.

Q What is the number of that? A 3895.

Q Did you make any other examination of Mr. Kinsey besides taking these pictures? A Yes, sir.

Q Where does the number show on there, doctor, in those little circles? A Yes, sir.

Q What position is that picture taken in? A That picture was taken lying on his abdomen, the tube above his back and the film underneath the abdomen or chest.

Q Did you use screens or a Buck diaphragm in taking these pictures? A Double screens.

Q And this one, P. 3, was taken when he laid on his stomach? A If that is the one you have reference to, yes.

Q That is the one with all the marks on it? A Yes, sir.

Q How was the other one taken, P. 4? A Lying on his back.

Q That was taken lying on his back? A Yes, sir.

Mr. W. Reading Gebhardt: If the Court please, there is no picture in evidence marked P. 4. I think counsel should look at the pictures correctly and identify them correctly.

Mr. Braun: I think if you will read that you will find "Exhibit P. 4" marked on there in the stenographer's handwriting.

Mr. W. Reading Gebhardt: All right. I was under the impression they were Exhibits P. 1, P. 2 and P. 3.

Q What size film did you use, doctor? A Eleven by fourteen.

Q That is for the rib pictures? A Yes, sir.

Q Do those pictures include all of the twelve ribs? A No, sir; they included ten of them.

Q Did you measure the man? A No, sir.

Q What is the average size of the normal human male frame from the top to the lowest rib? A I cannot tell you, sir.

Q What is the size of Mr. Kinsey's frame from the top to the lowest rib? A I didn't measure it.

Q Can you tell approximately? A No, sir.

Q He is a big man, isn't he? A Yes, sir.

Q A big frame? A Yes, sir.

Q Isn't it customary to use a larger film than this for a picture of this nature? A It is not my custom, no, sir.

Q I mean, isn't it csutomary throughout the profession? A It may be.

Q Don't you know? A I do not know; no, sir.

Q You do not know what the custom is? A No, sir.

Q You did not use the Buck diaphragm, did you? A No, sir.

Q Why not? A It was not necessary.

Q You did not think it was necessary? A I know it was not necessary.

Q He is a big, heavy man, isn't he? A He is.

Q That makes it more difficult to take the pictures than in the usual way, doesn't it? A Not in a chest case, no, sir.

Q What kind of a machine did you use? A Victor Snook special.

Q What voltage? A I used 72 kilo volts; 72,000 volts.

Q What schools did you attend in the preparation for the medical profession? A Lafayette College and Medico-Chirurgical College, Philadelphia; Post Graduate, University of Pennsylvania.

Q Yes. Are you referring to a memorandum there? A No, sir. I am referring to the calibration of my transformer to see if I am correct on the kilo voltage you asked me, and I am correct.

Q You are correct? A Yes, sir.

Q What has your practice been—X-ray? A X-ray work and radium work.

Q How long? A Exclusively for the last two years.

Q Have you done nothing else? A No, sir.

Q No surgery? A No, sir.

Q Did you examine the man, beside the taking of the X-ray? A I made an inspection of him, yes, sir.

Q Will you demonstrate to the jury just the manner in which these films were placed when you took the pictures of Mr. Kinsey?

Mr. Braun: Step up there and let the doctor show the jury just how they were placed, Mr. Kinsey.

A (Illustrating.) This first picture, showing the fracture, he was laid on the table and the film placed on his chest like this and the X-ray tube was back here, thirty-six inches.

Q Let the jury see how it was placed on his chest. A It was laid flat on his chest, in that position.

Mr. Braun: All right. That will do.

Re-direct examination by Mr. W. Reading Gebhardt.

Q Are you doing X-ray work for any hospital at the present time? A Yes, sir; Easton Hospital.

Q And have been how long? A In the last year and a half.

Q And do you do all their X-ray work or not? A No; I do half of it.

Q How long have you been doing X-ray work altogether? A About fifteen or sixteen years.

Re-cross examination by Mr. Braun.

Q Doctor, when you examined Mr. Kinsey did you intend to furnish any treatment or was it purely for the purpose of testifying here? A Purely for the purpose of diagnosing and testifying.

Mr. Braun: That is all.

ELIAS W. PYSHER, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Pysher, where do you live? A I live in Hackettstown.

Q What is your business? A Carpenter.

Q Were you employed by the Butz & Clader Company to work on this addition to the schoolhouse in August, 1923? A Yes, sir.

Q What kind of work were you doing on that building? A Carpenter work.

Q Can you give me some idea of how large an addition it was? A The addition, I think it was ten rooms, about ten rooms.

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

Q Were you working there that day? A I was.

Q How far along had the building gotten at that time? Was it completed yet or not? A No.

Q Did you ever see this hole in the north end of the hallway on the first floor above the ground floor? A I have.

Q Did you see it before the accident? A I did.

Q How large a hole was it? A About eight feet square.

Q And about how far away from the north end of the hall? A It was about twenty feet.

Q At the time that this accident happened was there any railing around this hole?

Mr. Braun: If the Court please, it has not been shown that he knew what the condition was at the time of the accident. I think the question is leading and I object to it.

Elias W. Pysher, direct.

Q I understood you to say that you were working on this addition to the schoolhouse on the day that this accident happened? A I was.

Q And I understood you to say also that you had seen this hole previous to that time? A I had.

Q Did you see it on the day that this accident happened? A I did.

Q Was there any railing up around it or not? A That day?

Q That day. A I do not think there was that day.

Q Had there been any railing put around it at any time before that? A There had.

Q Who put that railing up before? A I did.

Q What was the purpose of putting that railing up?

Mr. Braun: If the Court please, unless it is shown that he put it up on his own initiative, I do not think he can say what the purpose was. Let the jury draw the inference. That is a conclusion and I object to it.

The Court: Objection sustained.

Q Who ordered you to put the railing up? A Nester.

Q Did he say to you for what purpose it was put up? A No, sir.

Q What kind of a railing was it? A It was a furring lath.

By the Court.

Q A what? A A furring lath.

Elias W. Pysher, direct.

By Mr. W. Reading Gebhardt.

Q What sort of a stick of wood is that? A Well, it is about an inch thick and it is about two and a half inches wide.

Q How high was that railing from the floor up? A I imagine it must have been around thirty inches.

Q Where was it with reference to the hole? A It was around the hole.

Q Now you have stated that you do not think there was a railing there at the time the accident happened. Do you know anything about the railing being taken down? A The railing was taken down.

Q Before or after the accident? A Before.

Q About how long before? A I imagine about a week or so.

Q About a week before the accident? A About a week.

Q I wish you would please state whether or not at any time between that week, between the time that the railing was taken down and the time the accident happened, whether or not you saw Mr. Nester anywhere around this hole? A I had.

Q During that week? A During that week.

Q How near was he to the hole? A Well, he was right to it.

Q Right alongside of it? A As near as he could get.

Q Which way did you see him look? A He was looking at that entrance, at the stairs.

Q Was he at any time looking in the direction of this hole or not? A Well, now, I think he was.

Q I wish you would please state whether or not at the time that this accident happened with the exception of this hole, the other floors in the building were closed in or not? A Yes, sir; they were all closed in.

Q I wish you would please state whether or not any concrete had been laid with the exception of this hole in this hallway where this hole was at the time the accident happened? A Yes, there was concrete in the hole.

Q Had the concrete floor been finished with the exception of this hole or not? A Well, it was not completed. They had the rough coat on, then there was a finish coat to go on top of that yet.

Q At the time that this accident happened how was the weather? A It was kind of gloomy out.

Q Was it cloudy or not? A Yes, sir.

Q Now, at the time that this accident happened, were there any planks over this hole? A I had not seen any.

Q Were you where you could see them if they had been there? A No, sir.

Q Could you have seen if there had been any planks over this hole, if they had been there? A Yes, sir; I could have seen them if there was any over it.

Q There wasn't any over it? A There wasn't any over it.

Q What condition was this concrete that had been laid in the floor of this hallway in, was it hard or not? A It was hard.

Q Previous to the accident were people walking on it or not? A Yes, sir.

Q Now, do you recall anything about a scaffold that Mr. Kinsey referred to in the north

end of the hall, between this hole and the north end of the hall, the extreme north end? A There was.

Q What kind of scaffold was that? A A lather's scaffold.

Q Made out of what kind of timber? A It was trestle benches.

Q How big was the scaffold, how big were the boards in it? A I don't know how big the boards was, but the scaffold was the whole width and length of the room.

Q How high was it? A Well, I imagine it was about—it must have been five or six feet from the floor.

Q Please state where it was, with reference to this window that was in the north end of the hall. A The window?

Q Please state where this scaffold was with reference to this window that has been referred to as being at the extreme north end of the hall? A It was in the classroom.

Q The scaffold you have reference to was in the classroom? A In the classroom.

Q Where was the classroom with reference to this hole? A It was north of the hole.

Q Who hired you on this job? A Nester.

Q Who paid you? A Nester.

Q Who directed the work there? A Nester.

Q Who was in charge of the work? A Nester.

Q Who was in charge of this addition that was being built to this building?

Mr. Braun: Now, if the Court please, this man cannot testify as to that. He can testify as to who directed him and the men that were working with him. I object, un-

less he can show who was actually in charge of the whole business.

The Court: Yes; I sustain the objection.

Mr. W. Reading Gebhardt: Will your Honor hear me on that a moment?

The Court: Yes.

Mr. W. Reading Gebhardt: The question is directed first to the question of who had charge of this building, that is to say who exercised authority over it, who exercised authority to tell people to come in and go out or have the direction of the building.

The Court: Let me hear the last question.

(Last question read.)

The Witness: Nester.

The Court: Just a moment. I sustain the objection as to the question.

Mr. W. Reading Gebhardt: Your Honor sustains the objection?

The Court: Yes.

Mr. W. Reading Gebhardt: I ask an exception.

The Court: Yes.

Q Where did Mr. Nester get the money from that he paid these men?

Mr. Braun: I object to that unless it is shown that this man knows of his own knowledge.

Mr. W. Reading Gebhardt: If he does not know he can say so.

Mr. Braun: If the Court please, I object to the question as not proper at this time.

The Court: He may know; I do not know. He may say that he got it from so and so, but you have to show that he knows that of his own knowledge.

Mr. W. Reading Gebhardt: To save time I will withdraw the question.

Q Whom, if anybody did you see give Mr. Nester any money to pay yourself or the other men with?

Mr. Braun: If the Court please, I object to that question, unless he can say— How can this man testify as to what the purpose of giving this money was? He cannot testify to what was in the mind of someone else.

The Court: He can testify to anything he saw there. If money was given to him by anybody he may say so.

Mr. Braun: That I do not object to.

(Last question read.)

A Mr. Butz.

Q One of the defendants in this case? A One of the head men.

Q Please state whether or not he was one of the firm of Butz & Clader Company? A Yes, sir.

Q Please state what Mr. Nester did with this money that Mr. Butz gave him. A He paid the men.

Q How often were either of the two Mr. Butz there on the job during the progress of this work? A Once a week.

Q Do you mean that one of them was there once a week or both of them? A One of them.

Q When this one, which ever one it was, was there once a week, how long did he stay as a rule? A I could not say.

Q Can you give us any idea whether it was an hour or a day or several days or what it was? A I imagine when he came there he stayed a couple of hours.

Q A couple of hours? A A couple of hours.

Q I think I have already asked you as to who directed the men on this job? A Mr. Nester.

Q Did anybody else higher up than Mr. Nester direct the men? A No, sir.

Cross examination by Mr. Braun.

Q You were a carpenter. A Yes, sir.

Q And you worked directly with Butz & Clader, didn't you? A I worked with Nester.

Q Well, you worked directly for the company that was putting up this job, didn't you? A Well, Nester hired me.

Q Well, they paid you, didn't they? A Butz never paid me.

Q He brought the money there to pay you, didn't he? A Yes, sir.

Q It was his money, wasn't it? A I imagine it was.

Q Well, you said a few minutes ago that it was. A Why, sure.

Q He was not giving anybody else's money away, was he? A No.

Q You were on salary there, weren't you? A I worked weekly.

Q Wages? A Wages.

Q You had no contract? A No contract.

Q You made no estimate for what work you were going to do there? A No.

Q No flat sum? A No, sir.

Q So much according to your time? A So much according to my time.

Q All the carpenters worked that way, didn't they? A Yes, sir.

Q You never saw anybody else come there and make a contract with Mr. Nester, did you? A Not as I can remember.

Q Well, do you think there possibly was and that you have forgotten about it, or is your memory pretty good on this? A Yes, sir.

Q Where were you working on the day of the accident? A Underneath that hole.

Q Alone? A No, sir.

Q Who was with you? A Mr. Hill.

Q And was he there at the time of the accident? A He was.

Q Were you there at the time of the accident? A Yes, sir.

Q How wide was this hallway that the hole was in? A I imagine about nine feet.

Q How much clearance was there on either side of the hole? A I do not think there was—well, about two feet.

Q You say that there was a lather's scaffolding up on the other side of the hole? A There was.

Q Was that part of the hall lathed at all? A I couldn't say.

Q You did not notice that? A No, sir.

Q And did that extend clear to the window at the end of the hall, that scaffolding? A No, sir. It was—in that one classroom it was all over the whole room.

Q It was over the whole room? A In the classroom.

Q How high was it? A I imagine it must have been about five or six feet high.

Q Now, you speak of the classroom. Do you mean that whole corner of the building including the hall? A No, sir.

Q Was this scaffolding in the hallway at all? A No, sir. The planks from the door come out in the hallway.

Q Then it was not in the hall? A It was not in the hall.

Q It was in the classroom? A It was in the classroom.

Q You heard Mr. Kinsey testify there was a scaffolding in the hallway, didn't you? A I haven't seen any in the hall.

Q Did you hear him testify on Friday? A I did.

Q And did you hear him testify about the scaffolding? A I heard him say something about a scafford, but I don't remember—

Q On your direct examination didn't you tell Mr. Gebhardt that you heard Mr. Kinsey testify about this scaffolding? A I did not.

Q You did not say that? A No, sir.

Q If you did you were mistaken? A Yes, sir.

Q You did not know what scaffolding he was talking about when he asked you what scaffolding was there, that Mr. Kinsey had described? A I did not; no, sir. I know he was talking about a scaffold.

The Court: He said that the scaffolding he referred to—he specifically said that it

was in the classroom and covered the classroom. He did not say it was in the hall.

Mr: Braun: Yes, but, if your Honor please, Mr. Kinsey described it as being in the hall, and in answer to his direct examination he said that he heard Mr. Kinsey testify and he knew what scaffold he was referring to, and now I'm trying to find out why he mistook it for the one in the classroom.

Q Then there wasn't any in the hall? A Not that I can remember on that day.

Q I show you this picture, which is marked D. 1 for identification, and ask you if that is a pretty fair representation of that end of the building? A Yes, sir.

Q How far apart are those windows? A (Indicating.) These windows here?

Q Yes; right there—we will call it the north side of the building, toward the south, on the west side. Do you know how far apart those windows were? A I do not remember.

Q Can you tell us about? A They must have been three feet from the corner.

Q How many windows were there in a classroom? A Six.

Q Six in a classroom? A Six in a classroom.

Q What were the dimensions of the classrooms? A I could not say.

Q Could you tell us about? A No, sir; I could not.

Q How long did you work on the job? A Ever since the job started.

Q Do you know who took down this railing you were speaking about? A I do not; but I suppose the lathers.

Q You are sure that there had been a railing there? A There sure had.

Q Was there anything else there? A That was all.

Q That was all that there was in that hole? A Do you mean in the hole?

Q Yes. A There was nothing in the hole.

Q There was never anything in the hole at all? A There was, sure, once.

Q What? A Air.

Q You know what I mean. I am not talking of ridiculous things. I am talking of some material things, wood, metal, stone or anything in the building material line. A No, sir.

Q There was never any joists there to support the floor? A Not in the hole.

Q Not coming up through the hole? A No, sir.

Q Never any planks across there? A I never saw any.

Q Were there ever any there? A I don't know.

Q There might have been without you seeing them? A There might have, but I didn't see any.

Q You were not particularly interested in this hole, were you? A No, sir.

Q You were not interested in that floor at all at the time this accident took place? A No, I was not.

Q How long had you been working downstairs? A Just that day.

Q Where had you been working the day before? A I think I was working on the roof.

Elias W. Pysher, re-direct.

Q You had been working on the roof? A Yes, sir.

Q How did you get from floor to floor there? A You had to go in the old building and come in the new.

Q Was there any stairs in the new building? A No, sir.

Q Was there any signs up? A No, sir.

Q Nowhere? A No, sir.

Q Never? A There was, sure, after Mr. Kinsey fell.

Q Never before? A No, sir.

Q You are sure about that? A I had not seen any.

Q The doors were all open? A Yes, sir.

Q You are a friend of Mr. Kinsey's, aren't you? A I know Mr. Kinsey, yes, sir.

Q You know him quite well? A No, I don't know him quite well.

Q You are a neighbor of his? A Now I am.

Q And have been for some time? A No, sir.

Q How long? A From the first of the year.

Mr. Braun: That is all.

Re-direct examination by Mr. W. Reading Gebhardt.

Q Will you please tell me now where this classroom was that you referred to? Where was that located in or about this hall? A The door came right out in that hole.

The Court: In the hole or hall?

The Witness: In the hole.

Q Then as you walked from the south end to the north end of the hall it would be on the right-

hand side or the left-hand side? A The left-hand side.

Q Was there anybody working around this hole at the time this accident happened on that floor, the first floor above where you were?

Mr. Braun: If the Court please, I do not think this man can testify to what was happening upstairs. He said he had not worked upstairs that day.

Mr. W. Reading Gebhardt: If your Honor please, he was right under this very hole.

The Court: The question is allowed.

(Last question read.)

A I don't think there was.

CARTER M. LA BAR, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. La Bar, where do you live? A Hackettstown.

Q Were you on the 22nd day of August, 1923, connected with the Board of Education of Hackettstown? A I was.

Q In what capacity? A A member of the building committee, also a member of the Board of Education.

Q Please state whether or not the building committee which you have referred to had anything to do with this ten-room addition which was being constructed to the schoolhouse there.

A I didn't get that.

Q Please tell us whether or not your building committee had anything to do with this addition to the schoolhouse. A We did.

Q What? A Why, supervising the construction of the building.

Q Did you at that time know Mr. Nester? A I do not know what date you refer to.

Q The date that this accident happened, August 22, 1923. A Was that the day of the accident?

Q Yes. A Yes, sir.

Q How long had you known him previous to that time? Just in a general way. A I could not give you the exact time, but I can tell you when I first knew Mr. Nester. I cannot give you the dates.

Q Had it been some time previous to that? A Yes, sir.

Q What connection did he have with this work?

Mr. Braun: If the Court please, I want to make a general objection. I do not want to keep objecting all the time, but I want to note a general objection as to any testimony as to Nester's connection with the work, on the same grounds as I previously advanced, on Friday.

The Court: And what is that?

Mr. Braun: That is that there is no allegation that the negligence or the invitation was through an agent or employee.

The Court: The objection is overruled.

Mr. Braun: Will your Honor allow me an exception?

The Court: Yes.

(Last question read.)

A Mr. Nester?

Q Yes. A Superintendent for Butz & Clader.

Q Who directed the men in their work on the schoolhouse? A At the different times I was there, Mr. Nester.

Q As far as the Board of Education was concerned, who had charge of this addition that was being built at this time?

Mr. Braun: Object to that as immaterial. So far as the Board of Education was concerned, it has nothing to do with this particular issue.

Mr. W. Reading Gebhardt: If your Honor please, if this Board of Education makes a contract and we allege these contractors put a man in charge of this building—certainly this man is competent to testify as to who did have charge for these contractors, and, being so competent, it seems to me it is highly material to the issue as to who was responsible for this condition.

The Court: Yes. I overrule the objection.

(Last question read.)

A Mr. Nester.

Q Mr. Nester? A Yes, sir.

Mr. W. Reading Gebhardt: Cross examine.

Mr. Braun: No questions.

GEORGE THORP, sworn for the plaintiff.

Direct examination by Mr .W. Reading Gebhardt.

Q Mr. Thorp, where do you live? A Hackettstown.

Q How long have you lived there? A About twenty years; eighteen or twenty.

Q What is your business? A Carpenter.

Q Please state whether or not you at any time were employed by the Butz & Clader Company to work on the addition to the schoolhouse there in Hackettstown? A I was.

Q What kind of work did you do? A Well, it was carpenter work generally, and building forms and making window frames.

Q Did you see at any time this hole that has been referred to here as near the north end of the hallway on the first floor above the ground floor? A Yes, sir.

Q How large was that hole? A About eight feet square.

Q And about how far away from the north end of the hallway? A About ten or twelve feet—about ten feet.

Q Had you ever been in this hallway before this accident happened, on a cloudy day? A Yes, sir.

Q What was the condition in that hallway in the vicinity of this hole on a cloudy day with respect to light?

Mr. Braun: I object to that, if the Court please, on the ground that what the condition was before had nothing to do with the condition at the time of the accident. That is the only condition that we are interested in.

The Court: There has been testimony that this day was cloudy.

Mr. Braun: Exactly, your Honor, but there was also testimony that work was going on there right along, and there is nothing to show that the conditions were the same as on the day when he said it was dark.

The Court: Objection overruled.

Mr. Braun: Your Honor will allow me an exception?

The Court: Yes.

(Last question read.)

A It was rather dark.

Q Now, Mr. Thorp, how long previous to the time that this accident happened had you been a carpenter by trade, about how long? A Why, sixteen or eighteen years.

Q And you had worked at your trade as carpenter in the vicinity of what place during that time? A Well, Hackettstown, about twelve years.

Q And had you during that time worked around buildings in process of construction, as this one was? A I had.

Q On how many different occasions do you suppose? A Well, I could not tell you as to that; a good many different buildings.

Q Please state whether or not you are familiar with any custom there may have been in Hackettstown and vicinity with respect to protecting a hole in the hallway of a building which was in process of construction as this building was at the time that this accident happened. A Well, they generally cover them up with planks

so the men can walk over them or carry a load over them if they wish without any danger of falling through; put something on there that will hold them—if it is a small hole it is board and if it is a larger hole it is plank.

Q Were you working in this building on the day that the accident happened? A No, sir.

Q Who hired you on this job?

Mr. Braun: I object to that on the same ground.

The Court: Objection overruled.

A Nester.

Q Who paid you? A Nester.

Q And who directed the work there? A Nester.

Q Please state whether or not before this accident happened, with the exception of this hole, all floors were closed in in this building. A They were as fast as they got the floor joists on.

Q Do you know whether or not, with the exception of this hole, the floors had all been closed in, with the exception of this hole, before this accident happened? A I think they were; yes, sir.

Q And had all the concrete been put down in this hallway before it happened, except this hole? A At the south end it had, yes, sir; about two-thirds of the way through the hall.

Q Had it been finished long enough so that people were walking on it or not? A Yes, sir.

Q Please state whether or not Mr. Nester came around over the building frequently? A He did. He was around over the building.

Mr. W. Reading Gebhardt: Cross examine.

George Thorp, cross.

Cross examination by Mr. Braun.

Q You say sometimes they plank the hole over? A Yes, sir.

Q Why do they do that? A So that a man would not fall down through.

Q Suppose there is no one working there? A There wouldn't be any hole there then.

Q Well, suppose there is no one working in the vicinity of the hole, what is the custom then? A I couldn't tell you then.

Q You don't know? A Not when there is nobody around the hole, no.

Q You never saw Mr. Nester make any contracts, did you? A I did not.

Q You never saw him invite anybody in there to make an estimate on a contract, did you? A I did not.

Q On that or any other job. A I never was on any other job where he was.

Q Where do you live? A Hackettstown.

Q How long have you known Mr. Kinsey? A I have known Mr. Kinsey about eighteen years.

Mr. Braun: That is all.

Mr. W. Reading Gebhardt: We desire at this time, if your Honor please, to offer the mortality table, as shown in Dickinson's Chancery Precedents. Counsel has agreed to waive formal proof, I believe, and I ask that it be marked in evidence.

(Table referred to is marked Exhibit P. 5.)

GEORGE W. CLAWSON, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Clawson, where do you live? A Hackettstown.

Q What is your business? A Laborer.

Q Were you employed at any time on this addition to the schoolhouse? A How's that?

Q Were you employed at any time on this addition to the schoolhouse in Hackettstown? A Yes, sir.

Q Were you so employed there on the day that this accident happened to Mr. Kinsey? A Yes, sir.

Q You had been employed there about how long before that? A Well, I started in April and I was there until around Labor Day.

Q Before this accident happened at any time did you see this hole that has been referred to here, near the north end of the hall? A Yes, sir.

Q How large a hole was that? A Eight feet square.

Q Was that the hole that was on the first floor above the ground floor? A Yes, sir.

Q Were you working on the job the day that Mr. Kinsey fell? A Yes, sir.

Q Did you see this hole the day that he fell? A Yes, sir.

Q Was there any railing around it? A No, sir.

Q Any danger signs up? A No, sir.

Q What was the condition around the vicinity of this hole with reference to light at the

time that this accident happened? A Kind of dark.

Q And at the time that this accident happened, how about the floors, were they all closed in with the exception of this hole or not? A I believe they were.

Q Do you remember whether or not this concrete was down in the hallway with the exception of this hole? A Yes, sir.

Q Had you ever before this occasion worked around buildings in Hackettstown or vicinity where they were in process of construction? A Yes, sir.

Q And how many such buildings? Can you give us any idea? A Two.

Q Prior to this, before this? A One prior, before this one.

Q Were you familiar with any custom that there might have been with respect to protecting a hole in a hallway left open in a building of this kind in process of construction?

Mr. Braun: If the Court please, I do not know whether counsel is trying to qualify this witness as an expert on two buildings or not. His experience on two buildings would seem rather meager to establish custom. I object to the question.

The Court: Objection sustained.

Q Who was the boss on this job, Mr. Clawson? A Mr. Nester.

Q Who hired you and the other men? Mr. Nester.

Q Who paid you? A Mr. Nester.

Q Who directed the work? A Mr. Nester.

George Harper, direct.

Q Was there any work being done around this hole on this floor where the hole was at the time that this accident happened? A No, I can't just remember.

Cross examination by Mr. Braun.

Q Where were you working in the building, Mr. Clawson? A Well, I was working all over. I was a laborer.

Q Up and down? A Yes, sir.

Q How did you get up and down? A I climbed up a ladder.

Q Have you been to the building since its completion? A Not since it is completed.

Q Were you there when it was completed? A No.

Q You did not stay on the job until it was completed? A I didn't stay on the job until it was completed.

Q You saw this hole there? A Yes, sir.

Q That is why you didn't fall into it? A Yes, sir.

GEORGE HARPER, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Harper, where do you live? A Hackettstown.

Q How long have you lived there? A About seventeen or eighteen years.

Q What is your business? A Laborer.

Q Were you employed as a laborer on this addition to the schoolhouse? A Yes, sir.

Q Were you employed there on the day that this accident happened? A Yes, sir.

Q How long had you been employed there before that time? A Ever since the job started.

Q It was some months previous to that, or before that? A Yes, sir.

Q Did you know of this hole that was near the north end of the first floor above the ground floor? A Yes, sir.

Q How large a hole was that? A About eight feet square.

Q How far about from the north end of the hall? A About twenty feet.

Q Did you see this hole on the day that the accident happened? A No, sir.

Q You did not? A No, sir.

Q Had you seen it at any time before that? A Yes, sir.

Q How long before about? A A couple of days.

Q Before the accident happened at any time did you see a railing up around that hole? A Yes, sir.

Q Do you know whether that railing was taken down before the accident happened? A I do.

Q How do you know that? A Well, I happened to see it down.

Q You saw it down? A Yes, sir.

Q And about how long before the accident happened was this railing taken down? A Well, I could not say exactly how long.

Q Well, give me the best you can. A About a week.

Q And did you at any time before the accident happened see this railing up there again, after it was taken down? A No, I did not.

George Harper, cross.

Q Were you around where you could have seen it if it had been there? A Well, I was all through the building.

Q Who was the boss on the job? A Nester.

Mr. Braun: I object to that, if the Court please.

The Court: Yes.

Mr. Braun: Will you allow me a general exception on the record?

The Court: Yes.

Q Who paid the men? A Mr. Nester.

Q Who hired the men? A Mr. Nester.

Q Who directed the work? A Mr. Nester.

Q In his work of directing the work please state whether or not Mr. Nester got around over the building. A He went through it every day.

Q Please state whether or not at the time this accident happened the floors of this building, with the exception of this hole through which Mr. Kinsey fell, were closed in or not? A They were.

Q Was there any concrete laid in the hall? A Yes, sir.

Q Was it hard enough to walk on? A Yes, sir.

Q Before the accident happened did you see any danger signs up around this hole? A I did not.

Q Were there any there? A I don't know.

Q Not that you saw any there? A No, sir.

Cross examination by Mr. Braun.

Q When did you first see the hole, Mr. Harper? A Well, I do not know exactly.

Louis A. Hart, direct.

Q How did you come to see it? A By being through the building.

Q It was quite evident, wasn't it? A Yes, sir.

Q Anybody with two eyes could see it, couldn't they? A Yes, sir.

Mr. Braun: That is all.

Re-direct examination by Mr. W. Reading Gebhardt.

Q How soon after the accident happened, Mr. Harper, did you see this hole? A The next day.

Q The next day? A Yes, sir.

Q Did you see it at any time either before or after the accident on the day that the accident happened? A I didn't get that.

Q Did you at any time, either before or after the accident happened, see this hole, on the same day that the accident happened? A No, I did not.

LOUIS A. HART, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Hart, what is your business? A I am a laborer.

Q Where do you live? A Hackettstown.

Q Were you employed on this schoolhouse job in Hackettstown? A I was.

Q Were you employed there at the time that this accident happened? A No. I was em-

ployed there but I was not working there at the time it happened.

Q On that day? A I was not there that day.

Q Had you been employed there before that day? A Yes, sir.

Q In what capacity? A As carpenter's helper.

Q Did you see this hole that was in the hallway which has been referred to here? A Yes, sir.

Q How large a hole was that? A Well, I could not say. I do not remember the exact size of it.

Q Could you give us approximately the size of it? A No, I could not. I know there was a hole there. That is all I can say about it.

Q How long before the accident was it that you saw this hole? A A day or two. I was not there the day it happened. About two days before I saw it.

Q And who hired the men there on this job? A Mr. Nester.

Q Who paid them? A Mr. Nester.

Q Who directed them? A Mr. Nester.

Q Did you at any time see either of the Mr. Butz, the defendants in this case, give Mr. Nester any money? A I did.

Q What did Mr. Nester do with that money? A Paid the men.

Cross examination by Mr. Braun.

Q You did not hear these other witnesses testify about the size of the hole, did you? A This morning I did, yes.

Q You do not know whether it was eight feet or how big it was? A No, sir; I could not say.

Q And you are testifying to the best of your recollection? A Yes, sir.

Q How long did you see this hole there? A I did not come back to work until a week afterwards. The following Tuesday I came back.

Q I mean before the accident. Did you see it there before that? A Yes, sir.

Q Did you have any trouble in seeing it? A Well, on a dark day or a cloudy day it was hard to see.

Q It was hard to see? A Yes, sir, because there was a lot of scaffolding there in the other room that cut off the light and there wasn't any too much light in the hall.

Q There was not too much light in the hall? A No, sir.

Q There were windows all along the side of the hall, weren't there, the west side? A No, not on the west side. On the east side the windows were.

Q On the east side? A Yes, sir.

Q Well, there were six windows to a classroom all along there, weren't there? A Yes, but there was only one door leading to a classroom.

Q This hole was right opposite the door, wasn't it? A Yes, sir.

ROSS H. MILLER, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Miller, where do you live? A Hackettstown.

Q What is your business? A Janitor of the public school at Hackettstown.

Q Were you so employed on the day of Mr. Kinsey's accident? A Yes, sir.

Q Were you employed there previous to that? A Yes, sir.

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

Q Where were you at the time? A Up in the auditorium.

Q How soon after did you get there? A About ten minutes.

Q Did you see this hole that he fell through? A Yes, sir.

Q How large a hole was that? A About eight and a half by nine feet.

Q When you got there about ten minutes afterward what was the condition in the vicinity of this hole with respect to light? A It was dark. It was a cloudy day.

Q Can you give me any idea how long this hole had been there? A I could not; probably a week, maybe longer. I could not say.

Q How long? A A week, I would say; maybe longer; I don't know.

Q When you got there ten minutes after the accident please state whether or not there was any railing around this hole. A There was not.

Q Were there any danger signs up? A No, sir.

Q At the time this accident happened, please state whether the other floors, with the exception of this hole, including this hallway were closed in or not? A They were.

Q Was the concrete down in the hallway? A Yes, sir.

Q Was anybody working around this hall at the time the accident happened? A I could not

say about that; I do not think there was. There was nobody there when I went down.

Q Was there anybody there when you got there, ten minutes after? A No; I did not see anybody there.

Q Do you know who directed the men who were working around this job? A Mr. Nester.

Q Did you at any time before this accident happened see Mr. Nester anywhere near this hole in the hallway? A Well, I could not say about that. I practically saw the man all over the building at times, but I could not say about that.

Q Well, did you at any time see him in or about or go through this hole or anything like that? A I think I saw him on the scaffold under this hole one time.

Q Directly under the hole? A Yes, sir.

Q Please state whether or not at that time any part of his body extended up through the hole? A I do not think so.

Q How far away was the top of his head from the hole? A Very near to the floor. They had a scaffold under there and were putting an iron girder through.

Q Through this hole? A No, not the hole—not exactly under the hole, but right along the edge of it.

Q Was that before the accident happened? A Yes, sir; I think it was.

Q What, if anything, did you notice around the hole after the accident?

Mr. Braun: If the Court please, I do not think that is material unless he fixes the time.

Ross H. Miller, cross.

The Court: He has already testified that he was there within ten minutes after the accident.

Mr. Braun: I think the question should say at what time.

The Court: Yes.

Q Well, did you see this hole at any time within the next few days after the accident? A Yes, sir.

Q Now, I will ask you this question and you need not answer it until counsel objects. What, if anything, was there around this hole at that time?

Mr. Braun: Now, if the Court please the condition of the hole a few days after the accident has nothing to do with it at the time of the accident. That is all we are interested in. If it was soon enough afterwards to show approximately the condition, then it would be perfectly proper, but counsel knows that that question is objectionable, by his instruction to the witness.

The Court: You have not objected to it yet.

Mr. Braun: I did object to it.

The Court: I sustain the objection.

Mr. W. Reading Gebhardt: Cross examine.

Cross examination by Mr. Braun.

Q You say it was dark around this hole? A Yes, sir.

Q How dark? A It wasn't very dark. They had the scaffold up in the room next to it, the teachers' room, and in the classroom.

Q Do you remember having a conversation with me last fall when I went around the building and you showed me where this hole had been? A No, I do not remember that.

Q You do not remember telling me how things were at that time? A I do not remember telling you, no.

Q It was dark all over that day, wasn't it? A Well, more or less, yes.

Q It was a gloomy day? A It was a cloudy day.

Q Was it so dark that you could not see the floor? A No, I do not think it was. I could see it.

Q Could you see from one end of the hall to the other? A Well, you couldn't see the hole in the floor from one end of the hall to the other.

Q How far could you see that hole? A Well, I couldn't say.

Q There was a room directly underneath this hole, wasn't there? A Yes, sir.

Q Were there any lights strung in that building at all, in that part of the building, rather, the new addition? A No, not at that time.

Q The men were working under daylight, weren't they? A Yes, sir.

Q And there were men working downstairs in the room directly below this hole? A Well, they said there were; I don't know; I was not down there.

Q But the men were working all through the building without lights, weren't they? A Sure.

Ross H. Miller, re-direct.

Re-direct examination by Mr. W. Reading Gebhardt.

Q You referred to a scaffold as being in the teachers' room. At the time this accident happened was this teachers' room partitioned off? A I think the partition was in; I ain't going to say for sure, but I am positive it was, and it was lathed up.

Q Where is this teachers' room located? A Right at the end of the corridor.

Q At the end of the hall? A Yes, sir.

Q Which end, the north or south end? A The north end.

Q Where was this scaffold with respect to this hole there? A Just inside of this partition in the teachers' room.

Q Where was that with respect to the window at the north end of the hall? A I didn't get you.

Q Where was this scaffold with respect to the window at the north end of the hall? Can you locate it for me? A Well, this scaffold was in this teachers' room. There was also a scaffold in the classroom at the left of the hole.

Q I want to find out now where the scaffold was with respect to the hole and the window? A It was between the hole and the window, in the end of the teachers' room.

Q Where was the teachers' room with respect to the window and the hole?

By the Court.

Q I am a little bit confused now myself. Do I understand that there is a room or was a room at that time immediately at the end of the hall? A Yes, sir.

Ross H. Miller, re-cross.

Q The hall opened right into a room, right north? A Yes, sir.

Q And then in addition to that there was a room at the left of the hole? A Yes, sir.

Q Opening into the hall? A Yes, sir.

The Court: Then there were two rooms.

Mr. W. Reading Gebhardt: Yes, sir.

By Mr. W. Reading Gebhardt.

Q In other words, this teachers' room was simply the end of the hall cut off and made a room out of, is that it? A Yes, sir.

Q How large a scaffold was this in the teachers' room? A I think the scaffold was large enough to lath the whole room from it practically; it was five or six feet from the floor and boarded up tight.

Q How high was it? A The scaffold?

Q Yes. A Oh, probably five or six feet up from the floor.

Re-cross examination by Mr. Braun.

Q You heard Mr. Pysher testify this morning, did you? A Yes, sir.

Q And did you hear Mr. Kinsey testify Friday? A Yes, sir.

Q Did you hear Mr. Kinsey say anything about the hall being closed off? A Leading into the old building?

Q No. This teachers' room, as you call it, at the end of the hall? A Do you mean closed off so you could not get into it?

Q You just testified that was all shut off and there was a room there and they had it lathed

off? A They did, excepting the door and over the door where the light is now.

Q Wasn't the hall open through with the exception of this scaffolding? A I do not think so.

Q Well, do you know? A I say I think this partition was into the door and lathed.

Q If that partition was in how could you see the scaffolding? A Through the door.

Q Did you go there and examine it? A Oh, I was in there every day practically, through the building every day.

Q So you could not say what particular progress had been made at this particular time, could you? A No, I could not. They were lathing—

Q You were around the building all the time? A Sometimes.

Mr. William C. Gebhardt: Let him finish the answer.

The Witness: They were lathing in these two rooms at the time. I do not know whether they were working in both rooms that day, but both rooms were in construction, the lathing, at the time.

Q Was any one working in the two rooms at the time of the accident? A I could not say; I was not there.

Mr. Braun: That is all.

Mr. W. Reading Gebhardt: Now possibly we can save some time. We have, I think, a correct copy of the contract under which this building was constructed and I am inclined to think that perhaps counsel will be

willing after he examines that, to have it go in evidence without our producing proof of it. We can prove it all right but we thought it would save time, perhaps if counsel will consent to that.

The Court: Do they not admit that the defendants were constructing this addition at the time?

Mr. W. Reading Gebhardt: Yes, sir; they do. But I think it is material to our side of the case to have the actual contract in evidence, and I desire to offer it. We will prove if it counsel will not—

Mr. Braun: I do not know anything about the contract, if your Honor please, what purpose it can have in this connection. We have admitted that we were doing the work there.

Mr. W. Reading Gebhardt: The purpose, I might say at this time, of introducing the contract in evidence is because we are informed that it contains some provision with respect to the protection of holes of this character.

Mr. Braun: I do not see how that can benefit this plaintiff. He is not a party to the contract and has no privity in it.

The Court: If the contract is offered for and specific purpose—and you say that now is the purpose.

Mr. W. Reading Gebhardt: Yes, sir.

The Court: If it contains any such provision I will consider it. Unless it is offered for some purpose of that sort, I cannot see that it is material.

Mr. W. Reading Gebhardt: That is the purpose, if your Honor please.

Mr. Braun: Then I will object to the contract as not material to this issue, since this plaintiff is not a party with any privity in the contract or the provisions of the contract unless they were made for his special benefit and under the doctrine of Lawrence against Fox it could not apply here.

(Mr. Braun examines papers.)

Mr. W. Reading Gebhardt: We will withdraw the offer for the present, your Honor please. We may change our minds.

DR. EDGAR HUNT, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Dr. Hunt, you are a practicing physician? A Yes, sir.

Q In what place? A In Hampton, New Jersey.

Q You have practiced for how many years? A Forty-seven.

Q You are a graduate of what medical school? A Belvidere Hospital Medical College, New York.

Q Have you made an examination of Mr. Kinsey for the purpose of testifying in this case? A Yes, sir.

Q When did you make that examination, or examinations if you made more than one? A I examined him twice, yesterday in the forenoon or afternoon, and then again today.

Q I assume that you mean Friday instead of yesterday? A I should say Friday; yes, sir; the last day of the court session.

Q What condition did you find? A He is suffering from the effects of a combination of injuries, a series of them. The first is that he is suffering from concussion of the brain, the after effects of a brain concussion. Concussion of the brain is a violent shaking up which stunts the functions of the brain. The next is an injury to his spine, a contusion of the spine, down in the lumbar region, in the lower part of the spine. He has a fractured clavicle, a fractured collar bone; a fracture of nine ribs; all on the right side.

Q Which side of the collar bone was broken? A On the right side, the right collar bone.

Q Assuming that on the twenty-second day of August, 1923, Mr. Kinsey met with an accident in which he fell through a hole about eight feet square, sustaining a fall of about twenty feet, landing on some hard substance below, to what would you attribute the condition which you find? A To the injury.

Q Now will you take it perhaps a little bit more in detail, doctor, and tell us what the condition of this collar bone is now with respect to union and so forth? A It is not properly united. It is united by a boney union but very unevenly; there is quite a lap. The ribs are not properly met; they are angulated, and the ninth rib has failed to unite at all, which the X-ray shows.

Q Now, when you say that it has failed to unite, do you mean that is not united at all now, or what do you mean by that? A It is not united at all.

Q Is there anything to hold it down, so to speak? A Except by fibrous union.

Q In other words there has been no boney union? A There has been no boney union; no, sir.

Q What condition did you find his back to be in? A His back is in quite a weakened condition and there is quite a hollow there.

Q What do you attribute the hollow to? A Well, to the injury.

Q What have you to say as to whether or not the conditions that you found are permanent? A That would be impossible to tell. It may be permanent; it may grow in severity; his condition; and yet in time he might show some improvement. But the one great thing against him is the long duration. Now it is almost two years since he met with the accident and he still is in this condition.

Q What do you think is the probability as to the future? A The probability is not good at all of his recovery.

Q To what extent, if any, would these injuries that you have found interfere with his carrying on his trade of painting and paperhanging, in which trade it would be necessary for him to use his arms in different locations, around his body and above his head, and so on?

Mr. Braun: If the Court please, I object to that unless it is shown that the doctor is familiar with the work of a painter and paperhanger or has had experience in calculating that particular disability. I think what we are interested in here is what the man's general condition is and not the doctor's guess.

The Court: The question is somewhat hypothetical in form and I think it is permissible to get the doctor's opinion. I will overrule the objection.

Mr. Braun: Exception.

A He is unable to carry it on, that is, fully; he can work part of the time.

Q Why is that? What is the explanation for it? A By reason of this severe injury; that is, the after effects of it. Now, when you consider that this man was unconscious for two days—he was unconscious continuously for twenty-four hours, the clinical history of the case shows, and then he rallied for a few moments and relapsed again into unconsciousness, and that condition signifies a great deal; it is a very serious thing.

Mr. Braun: If the Court please, I move to strike out the doctor's testimony as to the clinical history. That is not competent evidence.

The Court: The motion is allowed.

Q Assuming, doctor, that Mr. Kinsey sustained an injury, falling through a hole in the floor a distance of about twenty feet down below and landed on a hard substance, and assuming at that time that he was a man of about two hundred pounds, and assuming he was picked up unconscious and was taken to the hospital during the day, and assuming he remained unconscious except for one or two intervals when he regained consciousness momentarily, for a period of about a day or a day and a half; assuming those facts what have you to say as to how an injury of that

kind would affect his ability to carry on his trade of painting and paperhanging?

Mr. Braun: I object to the form of the question. There is no evidence in the case as to how long Mr. Kinsey was unconscious.

The Court: As to the length of time I think there is not. There is some evidence that he came to, I think he said momentarily, and then relapsed; but as to the time that he was unconscious I think the evidence does not show that.

Mr. W. Reading Gebhardt: I will reframe the question.

Q Assuming that he suffered an injury from falling through a hole in a floor a distance of about twenty feet below, and assuming that he was unconscious for some time afterwards, leaving the time that he was unconscious indefinite, and assuming that he as a result of that accident sustained the injuries you have described, the fracture of nine ribs on the right side, a fracture of the clavicle on the right side, and assuming he also sustained a fracture of the second, third and fourth lumbar vertebrae in his back, how would a thing of that character affect his ability to carry on his trade of paperhanger and painter, which would involve, or we will assume which would involve the using of his arms in various positions with respect to his body, and of course, over his head and so on?

Mr. Braun: If the Court please, I object to the question as not sufficiently definite as to the nature of the injuries. Counsel has incorporated the fact this man had a

fracture of the vertebrae. That does not describe the nature of the fracture or the process of the vertebrae that was fractured. This man might have a fracture of the vertebrae that would paralyze or kill him instantly.

Mr. W. Reading Gebhardt: I think that is a little indefinite and I will add to the question as already stated: A fracture of the second, third and fourth lumbar vertebrae, with respect to the tranverse process; that is to say, that the fracture was of the transverse process of the second, third and fourth lumbar vertebrae.

A How that would affect him for work in the future?

Q As to the work of painter and paperhanger, as I have described the operation that would be necessary for him in that work.

Mr. Braun: Now, if the Court please, I do not think that question is sufficiently definite because it does not give the date of the accident or the man's present condition. It does not incorporate the facts. Now, he is asking the doctor to apparently form a conclusion as to certain facts, and he wants the doctor to use knowledge which he has gained through some other source, which is not permissible in this court to form his opinion. If he is going to rely on the hypothetical question I insist that the question be framed so that it contains all of the facts.

The Court: Objection overruled.

Mr. Braun: And your Honor will allow an exception?

The Court: Exception allowed.

Mr. W. Reading Gebhardt: I will ask the last question, with the second addition.

(Last question read.)

A As a result of his combined injuries he would be greatly handicapped in carrying on the work, with the injuries as already detailed.

Q How was it possible for you to detect his broken collar bone? Could you detect that by an examination? A By a palpation; by feeling.

Q And is the union of such a nature at the present time the condition there would be plainly discernable to even a layman or professional man? A It would handicap him to that extent; yes, sir.

The Court: You did not get the question, doctor.

(Last question read.)

The Witness: Yes, surely.

Mr. W. Reading Gebhardt: Now I desire to have one matter clear for the sake of the record. Is it understood that the hypothetical question the doctor was asked was unanswered, and not only my original question, but the addition later put on to it?

The Court: I think the record will show that.

Mr. W. Reading Gebhardt: Yes, sir; I want that understood. I do not want any misunderstanding about it. Cross examine.

Cross examination by Mr. Braun.

Q Doctor, what sort of a practice have you? A A general practice.

Q Do you do any surgical work? A Yes, sir.

Q How much? A Well, all through my forty-seven years of practice.

Q How much do you do now? A I am not doing surgery just at present.

Q What are you doing right now? A A general practice outside of surgery.

Q Have you ever been engaged in any industrial surgical work? A No, sir.

Q All your surgical work has been confined to your practice at Hampton? A Yes, sir; Hampton and the surrounding country.

Q What is the nature of the cases you have had there? A Well, everything you can think of, almost.

Q Spinal cases? A Yes, sir.

Q Have you ever operated for a spinal injury? A No, sir. I always send them to the hospital for anything of that kind.

Q Do they ever operate for a fracture of the transverse process? A No, sir.

Q That is a minor injury, isn't it? A A minor injury as far as the fracture of the process is concerned. But the bruising of the spine is not a minor injury.

Q I am asking you to please confine your answers to my questions, doctor. A I understood the object of your question is to bring out the facts, and I am simply stating the facts.

Q That is what I want, and I want you to answer my questions. A Yes.

Q Now, what evidence did you find that gave you the opinion that there was concussion of the brain there? A His unconscious state and the condition he was left in since then.

Q Was that purely on the history as it was given to you? A Not the effects. The clinical history—

Q What effect do you find there at the present time? A He has a tenderness along the spine on pressure and upon work, upon bending his back to do anything like shoveling or handling things or lifting—

Q Is that the result of concussion of the brain? A I did not say he was suffering from concussion of the brain. I said he was suffering from a series or combination of injuries.

Q Didn't you say in your direct examination the man was suffering from the effect of concussion of the brain? A Yes, sir, along with the fracture of the collar bone—

Q That is what I am talking about— A I started out with the statement that he was suffering from a combination of injuries, everything combined, including the after effects of concussion of the brain.

Q What after effects or what symptoms have you found on your examination on Friday and this morning that are the result of concussion of the brain? A First, his inability to show any staying powers in his work. He can work a little and he will give out; along with that feeling of exhaustion he has pain in the back, deep seated aches, whenever he attempts work of that kind.

Q Do you say that is the result of injury to the brain of concussion of the brain? A Not solely, no, sir.

Q What did you find that was the result of concussion of the brain? A This weakened condition, this inability to stand up under manual labor. That is one of the best evidences of all.

Q That is your opinion? A Yes, sir; that is my opinion.

Q What kind of an examination did you give him for this concussion symptom? A You mistake me now. I did not say that the result of the injuries he has got now was due to concussion of the brain.

Q I am asking you how you know he had concussion of the brain from your examination. What did you find there? You said you made this examination and we want to know what you found. A I said from the history of the case.

Q Purely from the history? A Purely from the history and the result and the condition he was in today.

Mr. Braun: Then, if the Court please I move that the doctor's testimony as to concussion of the brain be stricken out. It is based upon purely history.

The Court: It will have to be if it is based purely upon history.

Mr. Braun: That is what the doctor says.

Mr. William C. Gebhardt: There has been evidence of his unconsciousness in the case, your Honor, sworn to on the witness stand in his presence.

The Witness: May I address the Court a minute? That is one of our best means of forming—

The Court: Yes, but it is a rule of law that where a medical man is called on to testify purely upon an examination made for the purpose of testifying, he cannot rely on the history or what the patient may have

told him. If you were treating him for that purpose, then the history would be relevant and material.

Q What sort of an examination did you give him, doctor? A Just a general examination, the whole body.

Q Did you make any urinalysis? A No, sir.

Q This man has a pendulous abdomen, hasn't he? A Yes, sir.

Q Is that the result of the accident? A No, sir.

Q Why not? A There is no evidence that he has been injured in that way to any extent, or, at least that form of injury.

Q It just is a case of a hollow in his back, isn't it? A It is to a certain extent, yes.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

Q Doctor, what evidence did you find with respect to the clavicle? A The clavicle?

Q Yes. What subjective evidence did you find as to the fracture of the clavicle—or objective, rather? A You can feel it very readily, the break in the continuity of it, or evenness of it.

Q Could you get any crepitus? A No, sir.

Q That shows there was good solid boney union there, doesn't it? A It shows there was boney union, but it united unevenly.

Q It is quite common in fractures of the clavicle, isn't it, that the union is uneven? A It frequently occurs.

Q In fact, it is almust usual to have some over-riding there, some unevenness. A There is apt to be some.

Q And that does not necessarily mean there is any lost function in the arm, does it? A No, sir.

Q Now, how about the ribs, what objective symptoms could you find of fracture of any of the ribs? A The ninth rib, you can feel the fracture very readily.

Q What physical signs did you find? A The unevenness in the line of the ribs. One end projects higher than the other end.

Q Is there any motion there? A Yes, there is motion.

Q You spoke about fibrous union. What do you mean by that? A It frequently occurs, in fact it is usually the case, that where there is no boney union nature throws out a soft material, what we term a fibrous tissue and yet there is motion.

Q If there was fibrous union there that would overcome any play in the ribs, wouldn't it? A It would not.

Q It would not? A No, sir.

Q What is the usual time for a broken rib to unite? A Twenty-one days.

Q Then if this man had only two broken ribs he would be better in about two months' time, wouldn't he? A They should be united, provided union takes place.

Q Would you say that there wasn't any union in this rib? A The ninth rib has not united.

Q Not at all? A No, sir; it is still ununited.

Q Could you tell that without the examining X-rays? A Yes, sir.

Q What other symptoms did you find that led you to the conclusion that this man's ninth rib

was broken without any healing? A Boney union?

Q Boney union. A Simply that there is motion there, an uneven surface. You can feel the end project.

Q And that is all? A That is all the signs we have.

Q What, if anything, did you do besides just running your hand over that side? A I tried the ribs, pressing on first one and then the other one to get the motion.

Q Is that all you did? A Yes, sir; together with feeling of it, to feel that there was no union.

Q What other evidence did you find as to fracture of the rib? A Well, the X-ray examination.

Q Is the rest of your diagnosis purely on the X-ray examination? A As to the other ribs.

Q You could not feel anything there, could you? A No; they are covered up with too much muscle to feel those that are united.

Q Now, would you say that this condition of the rib created a permanent disability? A It would be an aid.

Q In what way? A The movements—for instance, the movement in breathing, every time there is a breath taken the ribs are elevated and there would be motion there and naturally it would press on the intercostal nerves and create a general irritation.

Q Where was this rib broken? A A little beyond the center.

Q That would bring it up under the arm pit? A No, sir. It is way down; it is the ninth rib.

Q Well, I mean directly below the arm pit? A A little forward of that, yes.

Q A little forward of the lateral line? A Yes, sir.

Q If the man did not complain of any pain in that region would you say that he was disabled in any way by that rib? A A man is—

Q Answer the question yes or no, doctor, please. A Whether I would have any evidence that he was disabled if he did not tell me? Yes; I would have.

Mr. Braun: I move to strike that out as not responsive, if the Court please. Will the stenographer please read the question?

(Last question read.)

The Witness: To a certain extent he would.

Q Even though he did not complain of any pain there? A Even though he did not complain of any pain.

Q What would disable him if he had no pain then? A The movement of a broken bone never is conducive to a good physical condition, I don't care where it is.

Q How would it incapacitate him if there was no pain there? A It would weaken his general condition by the constant irritation of the movement of the rib.

Q If there was irritation there would be pain, wouldn't there? A Not necessarily.

Q Wouldn't that set up some unusual condition in the man's body there? A Not necessarily.

Q Any inflammation? A Not necessarily so, in the way of inflammation.

Q Is there any evidence of friction to the pleura? A No, sir.

Q Did you take his temperature? A No, sir.

Q Did you measure his chest wall? A No, sir.

Q You did not watch it for respiration? A His respirations were normal.

Q What was wrong there then, doctor, with the ribs? A There was a displacement of the ribs.

Q How did it affect him so that he was disabled in his work? A I say that that along with his other injuries has got him in a condition in which he is not able to do a full man's work, full time.

Q Now, just confine yourself to this particular injury. What was it that this injury did, what particular thing or condition was created by this injury that leads you to believe that the man has been affected as the result of it? A Do you mean the injury resulting from the fall?

Q The injury to the rib. We are confining ourselves to the ribs. A No, sir. It would only partially affect him.

Q How, to what extent? A Reacting on his general system.

Q Then assume there is a condition there, but no pain and no temperature and no inflammation of any kind and no interference with his breathing and no pressure on the pleura, or friction, you say that nevertheless there is some effect on the man's general condition? A To a certain extent, yes, sir; that is my assertion.

Q Well, how much? A I am not going to give the proportion simply because, as I said before—

Q Just a minute, doctor. How much? A I won't say that.

Q Can you say? A No doctor can. If he has a combination of injuries you cannot tell one is doing the work, or both.

Q Have you ever taken X-ray pictures? A No, sir. I am not in that line of work.

Q Do you know how to read them? A Yes, sir; I have read a number of plates.

Q How many? A Quite a good many. I have never kept an account of them. I have been doing it for a number of years.

Mr. Braun: Is Exhibit P. 1 here, the large X-ray?

Q Is this the X-ray from which you made your diagnosis, this Exhibit P. 1? A No, sir.

Q You did not use that? A No, sir.

Q I show you Exhibit P. 4. Is that the X-ray from which you made your diagnosis as to the other broken ribs? A This is one of them. There were two plates.

Q And Exhibit P. 3. Is that the other one? A Yes, sir. This shows the un-united one.

Q Did you have any assistance in making your diagnosis, doctor? A No, sir; I did not.

Q Who was present when you examined these plates? A I was alone.

Q And except from reading those X-rays you cannot say what the trouble is, if anything, with the other ribs, outside of the ninth rib? A No. You can feel that.

Mr. Braun: If the Court please, I move to strike out the doctor's testimony as to the other ribs, as he is not qualified as an X-ray specialist and is not competent to form an opinion from X-ray pictures.

Dr. Edgar Hunt, re-direct.

Mr. W. Reading Gebhardt: If the Court please, we have produced a physician of forty-seven years experience, a man who says he has read a great many X-ray plates, and done that in the course of his treatment and in his general practice, and we submit, if your Honor please, that this man is well qualified to testify as to what these X-ray pictures show.

The Court: I think, Mr. Gebhardt, that you may have an opportunity further to qualify the doctor, if you wish. As it stands, he is a doctor of general practice in medicine and surgery, and he has just said now that he has examined quite a number of X-rays. I am not satisfied yet that he is qualified to read them, as the matter stands now.

Mr. W. Reading Gebhardt: Will your Honor hold the motion then, until—

The Court: Yes; you may now examine him if you wish.

By Mr. W. Reading Gebhardt.

Q Just tell us, doctor, what experience you have had in reading and examining X-ray pictures of various parts of the body, including the ribs, collar bone and back. A I have examined all parts of the body by the plates, X-ray plates, for many years. As to the number, I have no idea. There are a great many, of course.

Q For how many years have you been doing that? A Ever since the X-ray came out.

Q That has been approximately how long? A I could not say just how long ago the X-ray came into use. It is many years ago.

Dr. Edgar Hunt, re-cross.

Q Can you give us any idea at all of the number of X-ray pictures that you have examined? A No; I haven't any idea.

Q Has it been a great many or not? A A great many.

Q From your experience in reading and examining X-ray plates, can you tell what conditions in X-ray pictures such as these which have been offered in evidence portray? A Yes, sir.

Q And are you able to tell from your experience what conditions these X-ray pictures disclose? A I certainly am.

Mr. W. Reading Gebhardt: If your Honor please, we submit the doctor has qualified himself.

By the Court.

Q And for what purpose have you examined these X-ray plates? A For court work and other work in private practice.

Q You diagnosed the cases? A Yes, sir.

Q And you have used the result of your examination in diagnosing conditions? A Yes, sir.

The Court: Do you wish to ask anything further?

Mr. Braun: I would like to ask the doctor a few questions, if your Honor please.

By Mr. Braun.

Q When did you look at the X-rays last before you looked at this, doctor? A A few days ago; maybe two weeks.

Q Who takes these pictures that you examine? A Different ones from different cities.

Q Around here? A Yes, sir.

Q Well, who took the pictures that you examined last week or two weeks ago? A One in Flemington I think was the last one, taken by Dr. Tompkins.

Q And you say you examined these for court work? A I have examined these, yes, sir.

Q At whose request, Mr. Gebhardt's? A No, at my own, my own wish.

Q Well, for court work I am talking about. A Yes, sure.

Q How many times have you done that? A Very many times. I have examined them fairly often.

Q Very many times? A Yes.

Q In fact, that is about the only time you do look at X-rays, isn't it, doctor, for court work? A No; in private practice.

Q Now, I show you this picture and ask you if you can find anything on there which is subnormal or abnormal in that boney frame work? A Anything on this picture I have not made any statement about.

Q Well, I am asking you. I want to see if you can find anything else.

Mr. W. Reading Gebhardt: Referring to what picture now?

Mr. Braun: P. 1.

(Witness examines Exhibit P. 1.)

Mr. W. Reading Gebhardt: If you need any better light, doctor, you may step down to the window.

The Witness: Yes, sir; there is one, two, three I make out here that cast a defective

shadow. I am comparing that (indicating) with the sound side.

Q Is this the first time you ever saw this picture? A No; I have seen this picture before.

Q Who was present when you saw it? A I think I had it alone. I had the three of them to examine them.

Q Then you did have these before? A Yes, sir.

Q When? A Today and on Friday.

Q When Friday? Friday afternoon? A I think it was in the afternoon. I know it was this forenoon I had it.

Q After court had adjourned? A I think afternoon also.

Q Did you talk to Dr. Sherrer? A No, I did not.

Q Did you know what his diagnosis was? A Excepting on the seat there.

Q You were here all day Friday, weren't you? A Yes, sir.

Q You heard his testimony? A I did not hear it. He spoke low and I did not hear that part of it.

Q Did you hear it this morning? A No; I couldn't hear but very little of it.

Mr. Braun: That is all.

The Court: I think the doctor is qualified.

Mr. William C. Gebhardt: That is all.

DR. LOUIS C. OSMUN, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Dr. Osmun, you are a practicing physician? A Yes.

Q And have been for how many years? A Thirty-three.

Q You are a graduate of what medical school? A Physicians and Surgeons, New York.

Q Are you the Dr. Osmun who has been referred to as having treated Mr. Kinsey for a time after this accident? A I treated him.

Q When did you first see him after the accident? A I saw him August 22nd, the same day he was hurt.

Q Where did you see him? A At my office.

Q At Hackettstown? A Yes.

Q What condition was he in at that time? A Extreme shock.

Q What do you mean by "shock"? A Well, he was—he did not know anything when they first brought him in and he was an ashen pale or almost blue in color in his face. His heart action was very weak. Of course, that was due to shock.

Q What was the shock due to? A It was due to the injury.

Q How long have you known Mr. Kinsey? A Thirty-three years.

Q When he was brought into your office in this condition did you recognize him or not? A No.

Q Why not? A He was all dirt, and the peculiar color of his face, at first I did not know who he was.

Q What did you say the color of his face was? A Well, it was dark in color and very dirty.

Q Did you examine him? A Yes, sir; after I gave him something to try to revive him or bring him to.

Q A stimulant of some kind? A Yes, sir.

Q What condition did you find? A I found broken ribs and also the collar bone fractured.

Q On the right-hand side? A On the right-hand side.

Q Did you have him sent home or to the hospital or what? A I took him to the hospital at Dover. I am on the staff down there and I took him down and treated him there.

Q How long was he in the hospital, about? A Oh, a week or ten days, I think, something like that. About ten days, I guess.

Q During that time was he under your care or not? A Oh, yes.

Q Then after he left the hospital he was brought home, I presume? A Yes.

Q Did you attend him after he was brought home? A Yes.

Q You stated that he had broken ribs and broken collar bone. Did he have any other general injuries, bruises or anything of the kind? A Well, some bruises on his hip, a black and blue spot, and the flesh was discolored on his side where the broken ribs were. That is all I noticed.

Q Had he been seriously injured or not? A Well, I thought he could get better nursing care down there, perhaps, and that is the reason I took him there.

Q How long did you continue to treat him? A I treated him until he was fully recovered; I presume it was about eight weeks altogether.

Q Have you treated him any since that time? A For some little minor things, not for this, though.

Q Has he consulted you with reference to the condition of his back since the injury? A Once he told me that he had a great deal of pain in his back, since the injury, that his back bothered him a whole lot.

Q Did you prescribe some treatment for that? A I do not remember. I do not think I gave him any medicine.

Q Well, was there any treatment that you could give him for an injury of that kind for his back? A No, I do not think medicine could do much good.

Q It would have to rather depend on the forces of nature? A Yes, sir.

Q Are you his regular examining physician? A No, I am not.

Cross examination by Mr. Braun.

Q Doctor, when Mr. Kinsey was brought to you he evidenced the usual symptoms of shock, did he not? A Yes, sir.

Q That is common in any severe case of shock? A Yes, sir.

Q Was he unconscious at the time? A He was at first, yes.

Q How long was he unconscious? A Oh, well, it wasn't so very long after they brought him in that he was unconscious. Of course up until the next day he was more or less dazed, you know. He could not just collect his thoughts very well, but he was not what you would say unconscious constantly.

Q That was from the general shaking up and the shock in general? A Yes.

Q Did he respond to the usual treatment for shock? A Yes.

Q What would you say as to his recovery from shock? A He came out of it all right.

Q In the normal course of events? A Yes.

Q After he left the hospital do you know why he left the hospital in ten days? A He was very anxious to get home with his family and he asked me if he could not go and I told him he might, that I could wait on him at home just as well as there.

Q Did you take him home? A Yes, sir. I was with him. I went with his son down.

Q Did you consider it dangerous to move him at the time? A No.

Q It was a perfectly logical thing for him to do as long as he felt that he ought to be home? A It was all right, of course.

Q What was your treatment for him after he got home, doctor? A Nothing especial, only just in a general way. At first he was treated with a broad strip of adhesive plaster around his chest, for the fractured ribs and clavicle, they used the Sayre method to put that up, and those were both fixed and there wasn't anything to do after he got home.

Q Nothing but rest quietly? A That is all.

Q Was he in bed after he got home? A Yes, for a while.

Q How long, doctor? A Oh, I do not remember exactly; maybe a week or more. He was up and down. He laid on a lounge, I think, for quite a while.

Q That is the usual treatment for fractures of the ribs, isn't it, doctor? A Yes.

Q What is the usual time for a fractured rib to mend, doctor? It is usually about four weeks, isn't it? A About that, yes.

Q And you considered that he was fully recovered in eight weeks? A Well, yes, pretty well, as far as the injuries were concerned. In any fracture you cannot say it is entirely well in four weeks. The bones are united, but I never remove the splints until about the end of eight weeks, to be safe.

Q By that time you are positive of a solid boney union? A Yes.

Q Did you make any examination of his back, doctor? A I did.

Q When? A Well, at that time when I first saw him.

Q Did you find any peculiarity about his back at that time? A No; there was nothing showed then.

Q Have you looked at it since? A Yes, sir.

Q Is there anything peculiar about the formation of it? A Other than it has a little depression there is all I notice.

Q That might be a result of his pendulous abdomen, as the doctors say? A It might, yes, sir.

Q Did you ever take the urinalysis, doctor? A I made it myself.

Q Did you find anything other than normal there? A I found a little sugar twice.

Q That would indicate what, a little kidney trouble? A No, the kidneys are perfectly normal.

Q Any diabetes? A That indicates a digestive disturbance only.

Q When did you make that? A I think it was last fall.

Q Was it just a transient condition? A I think so. As soon as I advised him about his diet it all cleared up.

Q While you treated him at the hospital was there any record kept of this condition and your treatment? A Yes.

Q Would you recognize the record if you saw it, doctor? A I think so.

Q I show you a series of papers and ask you if that is the record? A Yes, I think it is.

Mr. Braun: I ask that that be marked for identification.

(Papers referred to marked D. 3 for identification.)

Mr. Braun: That is all.

Re-direct examination by Mr. W. Reading Gebhardt.

Q You say you did find a depression in his back? A Yes, sir.

DR. G. WYCKOFF CUMMINGS, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Dr. Cummings, you are a practicing physician? A I am.

Q In what place? A Belvidere.

Q You have practiced how many years? A Since 1890.

Q You are a graduate of what medical college? A College of Physicians and Surgeons, New York.

Q Have you had any special surgical study? A I have.

Q What is that? A The last year of his life I was the assistant of Dr. Henry B. Sands, the foremost surgeon of New York at that time; and I have had a good deal of surgical work of my own since that time.

Q Do you occupy any official position in the county? A I am county physician.

Q Have you made one or more examinations of Mr. Kinsey, the plaintiff, for the purpose of testifying in this case? A I have.

Q How recently did you make the last examination? A Yesterday; and this morning I saw him, too.

Q What condition did your examination reveal? A I found the man in generally good physical health who had sustained a severe injury which showed in the shape of a badly united fracture of the right collar bone, the fragments overlapping, and a badly united fracture of a rib where the fragments overlapped, and an inward curvature of three ribs above this one, showing that they had been fractured at some time also. I found a depression in the small of the back, in the lumbar region where there was an atrophy of the muscles at that place. I found the man suffering from chorea, a nervous disease, whereby his nerves twitched, a nervous twitching of his neck and his eyes and his chin. I found his reflexes normal, and, outside of what I have stated, I believe his general condition is good.

Q I think you used the word "atrophy" with reference to the condition of his back. What does that mean? A That means shrinking or drying up; the farmers use the word "swinneying" of the muscles of the neck of a horse. It is a dried-up muscle, that was there

once and is not there any more, it has shrunk away, due to an injury to the nerve.

Q In your opinion, what is this wasting away of the muscles of the back due to? A To the wasting away of the nerve supplying that muscle or those muscles, rather.

Q Would you say that this union of the collar bone is a good or bad union? A Well, I call it a bad union. It is not in line; the fragments overlap and reach past each other, as you can see yourself if you look.

Q Will you show us how they overlap? A (Illustrating.) In that direction, about a half inch overlap, and they are not pointing straight toward each other.

Q Did I understand you to say there was a bad union in one of the ribs? A Yes, sir, a bad union in a rib.

Q What could you say about various other ribs? A The ribs right above that are curved in. The overlapping of the rib makes the whole thing there shorter. That is due to the overlapping, and the others are also shorter by bending in, showing some crushing force that had forced the ribs in.

Q Now, assuming that prior to the twenty-second of August, 1923, Mr. Kinsey was in good health and on that day he fell through a hole in a floor, a distance of about twenty feet below, say, on a large surface, to what would you attribute the conditions you have just described? A To that fall.

Q Please state whether or not these conditions which you found are permanent? A The overlapping of the collar bone is permanent; the overlapping of the rib is permanent; the curvature in of the rib is permanent; the atrophy

of the muscles is permanent; the chorea movement, I believe, will be permanent, too.

Q Will you please state to what extent, if any, the conditions which you have found will interfere with Mr. Kinsey's pursuing his occupation of painter and paperhanger, in which he would have to use his arms in various positions over his head and so on? A It would certainly interfere to some extent. It would tend to make him get tired very easily and be able to work fewer hours of the day; and the atrophy of the muscles of the back would make him able to lift weights not so heavy as before.

Cross examination by Mr. Braun.

Q An overriding of a collar bone after a fracture is a common result, isn't it, doctor? A I am sorry to say it is only too common.

Q In fact it is almost general, isn't it? A Well, I would not say that, no. It is common, we will say.

Q And it does not usually interfere very much with a man's use of his arms, does it? A Well, he complains of soreness; as a rule the patient does, and it is not as strong as it was before, of course.

Q After the callous is thrown out there it eventually becomes, practically becomes as good as new, doesn't it? A It depends on whether it is a bony callous or fibrous callous. If it is fibrous callous at first, I believe it is ossified now.

Q So that bone is practically as strong as it was before, isn't it? A I would not want to say that it is or that it is not. It is not the same as before, that is sure, and the shoulder is a little bit farther in than before.

Q What would you say as to the function of his arm? A I should say he would be able to do with his arm, as far as that collar bone is concerned, nearly anything that he did before.

Q You say that his health appears to be generally good? A His general health is pretty good.

Q Now, this depression in the lumbar region, what muscle was that, doctor? A It seems to be the longissimus dorsi, on each side. It seems to be more pronounced on the right side and some on the left side, too.

Q Assuming that the only injury he received to his back was a fracture of the process of the lumbar vertebrae on the right side, the transverse process, rather, what have you to say as to the cause of this condition on the left side? A The cause of the atrophy of the muscle is due to an injury to the nerve and not to anything else.

Q What nerve? A Well, the atrophy would be due to the interior portion of one of the spinal nerves which issue at that point.

Q What nerve would you say was injured in this case? A Well, it seems to be the one that enters just below the last dorsal. But you remember I have not had hold of that man and I do not like to tie myself down to just which nerve it is. It is the one that supplies the muscle that is atrophied and that is a spinal nerve.

Q Wouldn't that atrophy be restored if he exercised a little bit? A Usually not, no.

Q Would you say that an injury to the process would injure his nerve, to the transverse process? A That would be a question of whether it did or whether it did not.

Q Does the nerve leave the spinal column anywhere near the process? A Right at the base of those processes there the holes are through which the nerves come out.

Q There are no nerve frames through these processes, are there? A Not through the processes proper.

Q You don't know about the extent or length of time that Mr. Kinsey has had this condition of chorea, do you, doctor? A No. I simply know that he has it.

Q Can you say whether or not that is the result of the accident? A It would all depend on when it started.

Q And you do not know when it started? A I do not.

Q If he had it two years before the accident would you say it was the result of the accident? A No.

Q What is the usual cause of that? A There is no usual cause, but it is often caused by a nerve shock. If you want an example, for instance, a girl happened to see a man cut his throat and forever afterward she had very bad chorea. She was not hurt a bit herself.

Q What is the common name for chorea? A St. Vitus dance.

Q Exactly. And that can come from heredity, can't it? A It often occurs, yes.

Q It can come from rheumatism, can't it? A It can come from anything that will injure a nerve.

Q It can come from any local infection, can't it? A I would not say as to that.

Q Tonsils frequently bring it on, don't they, doctor? A If they affect the nerve, any poisoning of a nerve anywhere in the body.

Q Well, a bad case of tonsilitis frequently does develop a chorea, does it not? A I have never seen it myself.

Q It is common in children, isn't it? A It surely is.

Q And from tonsilitis? A It might come coincidentally with tonsilitis. I would not say that caused it.

Q Isn't it a common cause? A I would not say it is a common cause. It may be coincident.

Q How about rheumatism? A If by rheumatism you mean an affection of the nerves which causes pain, yes. If by rheumatism you mean something that affects a joint, I say no.

Q You have to affect the nerves before you get pain, don't you? A There are lots of things that are necessarily painful, and there are lots of things called rheumatism that are really affection of the nerves, neuritis, and so forth.

Q You say his reflexes are all normal, doctor? A I found them all normal.

Q Did you find any evidence of concussion of the brain? A I would not hardly expect to find any at the time I made my examination.

Q It is rather a long time for such symptoms to remain in existence, is it not? A They might be able to remain, but I would not be able to prove that they did though.

MRS. LUCY C. KINSEY, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mrs. Kinsey, are you the wife of the plaintiff, John Kinsey? A Yes, sir.

Q How long have you been married? A Twenty-eight years.

Q Please tell us whether or not Mr. Kinsey had this shaking of his head which is quite observable now before he had this accident? A Never.

Q I wish you would please state whether or not Mr. Nester came to you at any time after this accident with reference to the doing of any work upon the schoolhouse? A Yes.

Mr. Braun: If the Court please, I object to any testimony as to what Mr. Nester did in the case on the same ground as I advanced before and ask for a general exception; and on the further ground that what Mr. Nester did as to work on the school building after this accident is no evidence of what his authority was before.

The Court: I will overrule the objection.

Mr. Braun: Your Honor will allow me an exception?

The Court: Yes.

(Last question and answer read.)

Q When did he come to see you about that? A Well, about a week after Mr. Kinsey was in the hospital.

Q Do I understand you to say Mr. Kinsey was in the hospital at that time? A He was in the hospital at that time.

Q What did Mr. Nester say to you?

Mr. Braun: I object to that as hearsay, if the Court please, and as not binding on these defendants.

Mr. W. Reading Gebhardt: The purpose, if your Honor please, is to show— We allege that in this conversation there was a request concerning some work to be done, which has already been alluded to as Mr. Kinsey testified that he was paid for such work afterward at least on one occasion, and we now desire to connect it up and get the fore part, as it were, of that story to show that this transaction did take place.

The Court: Objection overruled.

Mr. Braun: Your Honor will allow an exception?

The Court: Yes.

(Last question read.)

A When he first came he asked me what the wages were.

Q Go ahead. What did he say about any men to work on the schoolhouse? A He asked me if a couple of the men couldn't come over and do some priming and some staining on the inside, that he was ready, and I told him I would let him know, and I asked the boys and I got Mr. Kinsey's brother to mix the stain and they went over and did the work.

Q Who went over? A Bob and one of the other men.

Q Who is Bob? A My son.

Q Who was the other man? A Mr. Skinner.

Q Please state whether or not he was a regular employee of your husband? A Yes, he was.

Q As far as you know did they do this work on the schoolhouse? A Yes, sir; they worked three days at one time, and, I think three days on another week.

Q Who paid for this work? A Mr. Nester brought the money to me and I signed for it.

Q Who paid the men? A I did. The money was brought to me the first time, and the next time to Mr. Kinsey but I signed for it.

Q Did you see it paid to Mr. Kinsey the second time? A Why, yes. I was right there.

Q What condition of health was Mr. Kinsey in before this accident happened to him? A The very best.

Q What change, if any, as it appeared to you, did you notice in his condition since the accident? A Quite a good many.

Q For the better or worse? A Worse.

Q Have you assisted in giving any treatment of any kind to his back? A Yes, sir.

Q What have you done to his back? A Well, he gets these spells with his back and sometimes he gets in a tub of hot water and then I take and bathe his back with a liniment or a prescription the doctor gave me and then I iron his back. I have had to do that three times a day when he is real bad.

Q Did he ever have any difficulty like this with his back before the accident? A Oh, no, never.

Q How often, can you give us some idea on an average, since he has been back to work since the accident, does he come home early from his work before the usual quitting time? A Some-

times it is two o'clock and sometimes half-past two or three, and sometimes at noon he gives up.

Q Then when he comes home early please state whether or not as a rule you give him this treatment. A Yes, and he has to go and lie down; he has to lie right on his stomach.

Cross examination by Mr. Braun.

Q Did you give him any treatments last week? A I think last week— Yes, last week.

Q When, Mrs. Kinsey? A Well, the first part of the week. Whenever it is stormy or cloudy weather then he is almost laid up entirely.

Q Now, this money that you speak of, what was that, wages for the men who worked? A Wages for the men.

Q Mr. Kinsey did not get any of that, did he? A No, he did not. It was brought to me and I gave it to the men.

Q To give to the men? A Yes, sir.

Q How many men? A There were only two; but I think the second week three men were there.

Q How many days did they work altogether? A I cannot exactly tell, but I think they were there about three days one week and three or four days another.

Q They were helping out, weren't they? A Well, yes.

Q They did not do the whole job themselves, did they? A Oh, no; that is all they did.

JEROME F. KINSEY, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Kinsey, are you a brother of John Kinsey, the plaintiff in this case? A Yes, sir.

Q Where do you live? A Hackettstown.

Q What is your business? A Painter and decorator.

Q After this accident occurred to your brother did you have any conversation with Mr. Nester? A Yes, sir; I went over there and—

Q How soon afterwards? A Well, I could not tell you just how soon but I rather imagine it was something like eight days; something like that; eight or nine days.

Q In that conversation did Mr. Nester make any reference to whether or not he had requested your brother John Kinsey, the plaintiff, to come to the schoolhouse for any purpose?

Mr. Braun: If the Court please, I object to that question on the ground it is leading, on the ground that it is not binding on these defendants and on the further ground that it is an admission that they are trying to show an employee or servant made, and they cannot bind his principal with that unless they show that he had authority to make admissions.

Mr. W. Reading Gebhardt: If your Honor please, on the question of it being leading, I have done that for the purpose of excluding anything else that may possibly come out in this conversation, and I might perhaps have asked him to state the whole conversation which took place.

I confined it to the issue in question here. I did make the question perhaps a little leading, but I do not see how it was sufficiently leading to be really objectionable. We do not seek by means of this witness, if your Honor please, to prove direct authority on the part of—that is, the giving of authority or an admission to that effect on the part of the defendants to this superintendent. We merely want to prove an admission on his part of the invitation which he gave the plaintiff to come upon those premises. I think whether or not the superintendent, Nester, is qualified to make admissions, he certainly is as to the actual acts which he himself did.

Mr. Braun: I think I have a case on that, your Honor, if you will indulge me just a moment. I have not the reference to it here, but I distinctly recall a case against the Public Service in which the Court excluded evidence of any admission made by the superintendent on the ground that it must be shown that he had express authority to make admissions which were binding on his principal.

Mr. William C. Gebhardt: If your Honor please, it is not a question of admission at all. It is a question of a statement he made to this man.

The Court: I think it is objectionable at this time. I sustain the objection.

Mr. W. Reading Gebhardt: May we ask an exception, your Honor?

The Court: Yes.

Mr. W. Reading Gebhardt: If your Honor please, senior counsel in the case thinks that perhaps I have not made myself clear.

The Court: I would be glad to hear you, but I think you are entirely clear in what you are getting at. You are seeking to prove by this witness that Mr. Nester made a statement to him by which he admitted, or in which he admitted, that he had invited this witness to go upon the premises.

Mr. W. Reading Gebhardt: That is the purpose.

The Court: I thoroughly understood that.

Mr. W. Reading Gebhardt: And we pray an exception.

The Court: You may have an exception.

Q What condition of health was your brother in previous to this accident, Mr. Kinsey? A Very good.

Q Did you at any time work with him or for him? A Oh, yes; a good many years.

Q What kind of a workman was he, with respect to the amount of time he put in? A A very steady worker and a very hard worker.

Q Please state whether or not as a general rule before this accident he worked every day the full number of hours. A Oh, yes, sir, steady, all the time.

Q Did he ever complain of any trouble with his back or ribs or collar bone? A No, sir; none that I know of.

Q What change, if any, have you noticed in his condition of health as he appeared since this accident? A Well, his health is broken down. He cannot do a day's work any more.

Q Have you worked with him since the accident? A Yes, sir.

Q And has he ever stopped work before the day's work was completed? A Yes, he did.

Q How often does he do that? A Well, it will vary. Some days he would not be able to work more than two or three hours. He doesn't have no speed any more, and I would say he is broken down, I should say, where his mechanical ability would be—

Mr. Braun: I move to strike that out as a conclusion.

Mr. W. Reading Gebhardt: About the percentage?

Mr. Braun: Yes.

Mr. W. Reading Gebhardt: Strike that out.

Q Did you ever assist at any time in giving him any treatment, as far as his back is concerned? A I didn't catch that.

Q Have you ever assisted at any time in giving him any treatment as far as his back is concerned? A No, sir.

Cross examination by Mr. Braun.

Q Do you work for your brother? A No, sir.

Q What is your business? A Painter and decorator.

Q You do not work for him? A No.

Q Then how do you know that he cannot work as well as he did? A Because he helped me on a job last fall.

Q Have you worked together since? A No, sir.

Q Then how do you know? A Well, he helps me—

Q From what he told you? A No, on the job. He helped me—

Q That was last fall though. We are talking about now. A Well, yes, and I have met him when he would be on his way home and couldn't work no more. On this job he helped me with, that I saw.

Q And that was last fall? A Yes, sir.

Q You do not know how he is now, as far as you know from your own knowledge? A Only from what I see when I see him going home from a job.

Q You do not know why he is going home except from what he tells you? A No. I say last fall I am speaking of.

Q You are drawing conclusions from what you saw last fall as to what his condition is now? A That was last fall; that is what I am speaking of when I tell you I saw him work. He was working for me last fall.

Re-direct examination by Mr. W. Reading Gebhardt.

Q What, if anything, did you have to do with mixing the stain for this work done on the schoolhouse after the accident? A Well, they came after his men to do the job. They gave the job to him and—

Mr. Braun: If the Court please, I move to strike that out as not responsive.

The Court: Yes. Just listen to the question.

(Last question read.)

Q Please confine your answer merely to the matter of the stain.

Mr. Braun: I object to that question as there is no evidence to show that he had any work there.

The Court: Let the question stand and strike out the brother's part of it.

Mr. W. Reading Gebhardt: I will reframe the question.

The Court: Yes.

Q Please state what you had to do if anything in connection with fixing some stain for work done on the schoolhouse after the accident. A Yes, sir; I mixed it.

Q You mixed the stain? A Yes, sir.

Q Who requested you to? A John's wife.

Q What did you do with the stain after it was made? A Took it to the schoolhouse and applied it on the woodwork.

Q Did you apply the paint yourself or put it on yourself? A No, sir; his men.

Mr. Braun: If the Court please, I move to strike out what his men did or what anybody else did. He did not do it himself.

The Court: He said he mixed it and took it there—didn't you?

The Witness: And delivered it to his men.

William M. Mitcham, direct.

By the Court.

Q By "his men" which men do you mean? A My brother's men.

Q Mr. Kinsey's? A Yes, sir. I delivered the stain to my brother's men.

Q At the schoolhouse? A No; at my shop.

Mr. W. Reading Gebhardt: That is all.

WILLIAM M. MITCHAM, sworn for the plaintiff.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Mitcham, what is your profession? A I am a priest.

Q Where are you located? A Hackettstown.

Q What church are you connected with? A St. James.

Q Were you on the 22nd day of August, 1923, clerk to the Board of Education in Hackettstown? A I was.

Q Will you please state whether or not on that day the building, this addition to the schoolhouse building, had yet been turned over to the Board of Education by the Butz & Clader Company? A Will you give me the date again, please?

Q The twenty-second day of August, 1923, the day this accident happened. A No; the building had not been turned over for many months subsequent to that.

Mr. W. Reading Gebhardt: Cross examine.

Mr. Braun: No cross examination.

Mr. W. Reading Gebhardt: The plaintiff rests.

Mr. Braun: Now, if the Court please, I would like to make a motion at this time.

(The Court and counsel withdrew.)

Mr. Braun: I wish to make a motion for a non-suit, first, on the ground that there is no evidence of any invitation by the defendant or an authorized agent in their behalf. My authority for that is Saunders *vs.* Smith Realty Company, 26 Atlantic 404; 84 Law, 276.

(After argument.)

Mr. Braun: There is no evidence of any invitation even on the part of Nester, because Kinsey was on the premises at his own instance, at his own instigation. He went there himself and asked if he could put in a bid. Now, I do not think that that was a request for an invitation.

(After argument.)

Mr. Braun: Then on the ground there is no evidence of an invitation to inspect the premises at the particular time at which the plaintiff went there. The defendants' liability is only co-extensive with the invitation itself.

My next ground is that since the plaintiff knew of the unfinished condition of the building, and by the use of due care could have seen the hole, he assumed the risk. And I refer to Saunders *vs.* The Smith Realty Company, in which a man went down in a darkened cellar to deposit rubbish.

And the same thing is cited in Rooney *vs.* Siletti, 96 Law, 312.

And my next ground for a non-suit is that the plaintiff was guilty of contributory negligence as a matter of law, since he should have waited until his eyes adjusted themselves to the change of light.

And I also refer to the Saunders and the Rooney case, and I have also Leufer *vs.* Shapiro, 72 New York Law Journal, page 1. I think that comprises all the grounds.

The Court: I am not impressed at all by the last two grounds because I think that would be purely a question of contributory negligence and under the evidence would be for the jury. He did not say he could not see it. He said it was dark and gloomy, and whether he used reasonable care, I think—The question about which I want to hear you, especially, is this matter of invitation.

(After argument.)

The Court: I do not think I would be authorized, as the evidence now stands, in taking the question from the jury. I think it may well be a very much mooted question and I do not think I should decide it against the plaintiff as it stands.

(After argument.)

The Court: I am going to deny the motion.

Mr. Braun: I pray an exception.

The Court: I will allow an exception.

DR. CLARENCE A. PLUME, sworn for the defendants.

Direct examination by Mr. Braun.

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

Q Are you connected with any institution? A Dover Hospital.

Q In what capacity? A I do the X-ray work there.

Q Do you take and interpret pictures? A I do.

Q Did you take a picture of the plaintiff in this case? A I did.

Q Did you interpret the picture? A I did.

Q Have you the picture here? A No, sir.

Q Do you know where it is? A I do not.

Q Do you know what happened to it? A I do not.

Q Have you made a search for it? A I have.

Q At the time you interpreted the picture did you make any memorandum or record or report of your findings? A I did.

Q Was that record made in the usual routine work of the hospital? A It was.

Q Has it been preserved? A Yes, sir.

Q In the hospital records? A Yes, sir.

Q Can you produce that record? A Yes, sir.

Q Can you testify without refreshing your memory as to the findings that you made on this picture or is it necessary for you to refer to the record? A Well, I have already referred to that and I remember the incident without referring to the record.

Q What part of the man's body did you X-ray? A He was sent up to the X-ray room with orders for an X-ray of the upper right chest.

Q Did you take that? A I took a picture of the upper right chest, with the plate on the back.

Q How large an area would that take in?

Mr. W. Reading Gebhardt: Did it take in.

Q Well, did it take in—how large an area did that picture take in? A It took in the shoulder and probably the upper five or six ribs.

Q What was the size of the film? A This particular film was eleven by fourteen inches.

Q And that included the upper five ribs? A I think so. I do not remember exactly, but a plate of that size should include that number of ribs.

Q Would it be possible to get the eighth and ninth in on a film of that size, including the clavicle? A It would be possible, but it would be close figuring to get them both on the same film.

Q What, if anything, did you find as a result of your examination of that film?

Mr. W. Reading Gebhardt: I object to that.

The Court: What is the objection?

Mr. William C. Gebhardt: There is a question in our minds, your Honor, whether we, being deprived by the absence of these pictures from cross examining about them,

using them as they have used our pictures, with our consent, so that our doctors might contradict what the pictures show— We do not want to appear unfair, and that is the reason we took a moment to confer about it and see whether we would or would not object. We do not want to deprive the doctor from testifying, and yet your Honor can see it is no fault of ours that the pictures disappeared, and there is no explanation of their disappearance. If somebody stole them or something of that sort, it might be a different case, if it could be proven, but the doctor comes here and says he does not know where they are or what has become of them, without any explanation for their disappearance. I would be willing the doctor should testify from any physical examination he made of the body with his hands, but to be able to refer to the pictures, which we are deprived of seeing and our doctors are deprived of seeing, does not seem to me quite fair, and therefore we object to this testimony with respect to what the pictures did show.

Mr. Braun: Does your Honor want to hear me on that?

The Court: Yes, because I have never heard of any X-ray pictures used in evidence where the pictures are not produced.

Mr. Braun: I am not offering to prove the pictures. I have shown the pictures cannot be produced. I have explained the reason why, and this evidence is not introduced at this time—I have explained the reason why the best evidence is not introduced at this time, and I am taking ad-

vantage of the secondary evidence rule which permits me to put on, when I have explained the reason for not introducing, and the impossibility of producing the best evidence, secondary evidence.

The Court: It is not a question of producing a copy of something that has been lost, and it seems to me that the objection that Mr. Gebhardt raises is one that must have some consideration. Now you are putting in evidence what the X-ray picture shows without an opportunity to submit the picture to any other witness for examination.

There is no way of meeting it.

Mr. Braun: I can only show what the doctor found. Doctor Osmun requested Dr. Plume to X-ray the man. Doctor Osmun admitted that and said here is the hospital record, that the records were kept under his supervision and were correct.

Mr. William C. Gebhardt: It would not be admissible then.

Mr. Braun: I want to show what the X-ray showed at the time the man was first taken to the hospital.

The Court: Have you any authority for that aside from the rule which permits you to put in secondary evidence?

Mr. Braun: No. If they object to that I will offer the hospital records.

Mr. William C. Gebhardt: We will object to that.

Mr. Braun: Which will include the report.

Mr. William C. Gebhardt: It is never admissible unless you can produce the person who made it.

Mr. Braun: We have the doctor here.

Mr. William C. Gebhardt: Whatever part of it he made, we will not object to.

Mr. Braun: Doctor Osmun said these records were correct; that they were made under his supervision.

Mr. William C. Gebhardt: We could not object to them. You have not offered them in evidence.

Mr. Braun: They are identified as such. I offer the hospital records at this time.

Mr. William C. Gebhardt: I object to the records insofar as they were not made by Dr. Plume. If they were made by a nurse or anybody else, I will object to them, of course. Any part that he made himself we have no objection to.

The Court: Well, I can only admit the records if they are proved. They have not been proved yet.

Mr. Braun: We have already proven the other parts.

The Court: By Dr. Osmun?

Mr. Braun: By Dr. Osmun.

The Court: No, I do not think so. He identified them as records, but he did not see who kept them or made them.

Mr. Braun: He said they were made under his direction and that they were correct.

Dr. Clarence A. Plume, direct.

By Mr. Braun.

Q Now, doctor, did you make any part of those records? A I made the X-ray report.
Q Is that there? A Yes.

Mr. Braun: I offer that in evidence.

Mr. William C. Gebhardt: I object to that. The doctor could tell what he did without referring to it. Your Honor could see how X-ray pictures could by somebody interested easily be made to disappear because they showed something contrary to what they wanted to show, because it was in their interest to— The evidence could be destroyed which would be possibly conclusive of the case and the question involved.

Mr. Braun: I hope Mr. Gebhardt is not inferring that I had anything to do with destroying these records.

Mr. William C. Gebhardt: Not at all.

Mr. Braun: I object to any such comment at this time.

Mr. William C. Gebhardt: I say it could be.

Mr. Braun: Yes, it could be done by both sides.

Mr. William C. Gebhardt: Yes, but I do not think Mr. Braun would come anywhere near being guilty of any such thing as that.

Mr. Braun: Then I see no necessity, if the Court please, for any such remarks at this time. If I have a clean bill of health he has no reason to refer to it.

The Court: I am very loath, Mr. Braun, to rule this evidence out and yet I am inclined to doubt whether I can admit it. I

do not believe there is any precedent in this state for that situation. I never heard of it.

Mr. William C. Gebhardt: May I make a suggestion, your Honor?

The Court: Yes.

Mr. William C. Gebhardt: Under the circumstances, I would suggest that the doctor be brought back tomorrow, and if Mr. Braun can show any authority for the admission of this kind of evidence in the absence of the X-ray, we will withdraw our objection. He can put other witnesses on this afternoon. If he can show any such authority I would be very glad to wait and withdraw our objection.

The Court: Well, the suggestion would also have the advantage of giving the Court a little time to think it over, Mr. Braun. I am afraid, if I am compelled to rule now, that I will rule against you.

Mr. Braun: If the Court please, I do not know whether I can very well get Dr. Plume back again tomorrow. That is the reason why I put him on now.

Mr. William C. Gebhardt: What does the doctor say to that?

Mr. Braun: If counsel will stipulate that the doctor will testify as to this record here, and hold this record which has been marked for identification—

The Court: Just examine the doctor as to what the record shows as to the picture or pictures.

Dr. Clarence A. Plume, direct.

By Mr. Braun.

Q Doctor, is that a report of your findings? A Yes, sir.

Q Is that exactly what you found there? A Yes, sir.

Q And that is made in your handwriting? A Yes, sir.

Q Signed by you? A Yes, sir.

Q At the time you made the inspection of the picture? A It was.

Mr. William C. Gebhardt: I would suggest that he has not shown at all that the doctor can not be here tomorrow. I am trying, I think, to offer a very fair suggestion, to give the Court further time to think it over, and if there is any authority in the state that says that under these circumstances this kind of testimony is admissible, we will withdraw the objection. We do not think it is legal.

Mr. Braun: I think that instead of bringing the doctor back, I can just show what he would testify to.

Mr. William C. Gebhardt: And we would have no chance of cross examining the doctor if he is not here.

Mr. Braun: Cross examine him now.

The Court: Find out whether the doctor can return tomorrow, Mr. Braun.

Mr. William C. Gebhardt: If you subpoena him he will have to return.

The Court: If you prefer to have a ruling on it, I will rule now. Of course, as I say, if you feel that the doctor might return tomorrow, I would prefer to have a

little opportunity to think it over and investigate the question.

Mr. Braun: I will ask the doctor one or two more questions, and get your Honor's ruling now, because I do not think it is fair because the doctor has lost enough time as it is.

Q Doctor, what is your usual practice when taking X-ray pictures at the hospital? What becomes of the picture after it is taken? A The usual procedure in the hospital is that the patient is sent up to the X-ray room with an order from the nurse in charge of the patient to X-ray certain parts of the body. After the pictures are taken they are filed alphabetically.

Q And they are kept in those files permanently? A They should be kept in those files. In this particular case it is missing from the file and we cannot find anyone who claims to have taken it from us.

Q Have the pictures even been requested by the attending physician? A That was my impression, but I cannot testify to that as a fact.

Q No. I mean is it possible that a picture is turned over to the attending physician permanently or must it be returned to the hospital even though it is paid for? A It is usually given to the attending physician if he requests it.

Q Otherwise it is kept permanently in the file? A Yes, sir.

By Mr. William C. Gebhardt.

Q Did you ask Dr. Osmun whether he had taken them away? A I asked Dr. Osmun if he had them.

James M. Hill, direct.

Q What did he say? A He said he did not have them. It was my impression that he had them.

Mr. Braun: That is all. Now, I offer the record again, your Honor.

Mr. William C. Gebhardt: I object to it, of course.

The Court: You are offering now, the record of the X-ray photograph made by Dr. Plume?

Mr. Braun: Yes, sir, the memorandum of his interpretation of what the picture shows at the time it was taken, as secondary evidence, since we are unable to introduce the original itself.

The Court: You object, do you?

Mr. William C. Gebhardt: I object to it.

The Court: The objection is sustained.

JAMES M. HILL, sworn for the defendants.

Direct examination by Mr. Braun.

Q Mr. Hill, where do you live? A Budd Lake.

Q What is your business? A Carpenter.

Q Were you working on the schoolhouse at Hackettstown when Mr. Kinsey was hurt? A I was.

Q What part of the building were you working in? A I was working in the gymnasium, in the basement.

Q What part of the gymnasium? A In the new part.

Q Did you know of any hole in the floor above you? A Yes, I did.

Q Where were you with respect to that hole? A I was at the bottom of the hole, putting a form in for a cement stairway.

Q You were right under the hole? A Yes.

Q What was the condition there, so far as light was concerned? A Well, it was a little dark through a cloudy day. When it was nice and clear it was like anywhere else.

Q What was the condition on this particular day? A It was a little cloudy that morning.

Q What was the light where you were working? A Well, the light where I was working was different than the light in the hall where he dropped off. It was a little bit darker in the cellar than up above.

Q Was it light enough for you to work without any artificial light? A Sure it was light enough to work.

Q Where did the light come from that you were working by? A From a door that was the outlet from the gymnasium and four windows.

Q Did you or did you not get any light through this hole? A Oh, I got some light in the hole, but it was eighteen feet up above, you know. The ceiling was eighteen feet from the gymnasium floor to the ceiling.

Q Were you there at the time of the accident? A Yes. He struck me when he fell.

Q Who else was there? A Nobody.

Q Did you hear Mr. Pysher testify this morning that he was working with you? A He was working with me, but he was outside of the building when the accident happened.

Q He was not there when Kinsey fell? A No, because when he fell I went out and fetched him and Nester in to help carry him out.

Mr. Braun: Cross examine.

Mr. William C. Gebhardt: No questions.

ALVIN H. BUTZ, sworn for the defendants.

Direct examination by Mr. Braun.

Q Mr. Butz, where do you live? A Allentown.

Q You are one of the defendants in this case? A I am.

Q What is your business? A Contractor.

Q Under what name do you do business? A Butz & Clader Company.

Q How do you come to use that name? A The firm was formerly comprised of Butz & Clader, which was my dad and Mr. Clader, and after his death I assumed his end of the business and the firm was formed then as Butz & Clader.

Q You still kept up the old name for business reasons? A That is right.

Q Do you remember this job at Hackettstown? A I do.

Q By the way, had you a man working for you then by the name of Nester? A We did.

Q Is he still working for you? A He is.

Q Was he connected with that job in any way? A He was.

Q What was his work there? A Superintendent of construction.

Q By that over what did he have jurisdiction? A He had jurisdiction over the contract, in other words, over the supervision of the work of men who were directly under his control.

Q These men directly under his control were—

Mr. William C. Gebhardt: Now, do not get leading.

Q These men who were directly under his control, were they sub-contractors or laborers or what? A They were men that were directly engaged in the several trades that were not sublet.

Q In other words you did part of the work and sublet part of it? A That is correct.

Q Is that your usual custom? A That is our usual custom.

Q Now, as to sub-contractors, who has charge of them? A I have charge of them.

Q Has Mr. Nester any authority to make sub-contracts? A No authority whatever.

Q Has he any authority, or had he at that time any authority to solicit bids for sub-contractors? A He did not.

Q Had he been requested to solicit any bids for this job? A No, sir.

Q Who has charge of that? A I have charge of that.

Q Had you contemplated soliciting any bids at that time? A Not at that time; no.

Q Did you have anything to do with the hiring of these two men that worked for Kinsey prior to the accident? A I did not.

Mr. William C. Gebhardt: Prior?

Mr. Braun: They worked for Kinsey prior to the accident, yes. I think that question is proper. There is testimony that two men who formerly worked for Kinsey were engaged by Nester on the job. They were working for Kinsey prior to the accident.

Mr. William C. Gebhardt: Will you repeat the question?

(Last question read.)

The Witness: No, sir.

Q Did you sublet the painting work after the accident? A We did.

Q Who to? A To an Allentown concern.

Q And did they furnish their own men? A They furnished their own men.

Mr. Braun: Cross examine.

Cross examination by Mr. William C. Gebhardt.

Q Now, will you just give us all the particulars of the sub-letting of this painting contract, and everything about it; what was done and who did it and everything? A Well, when the time came for receiving painting bids on this work we called in the painter who usually did our work, and we found—

Q Wait. I asked you to give the details. Now, you say "We." Did you or your partner call them in? A No; I did, myself. I say "we" as the firm, because I acted for the firm.

Q You individually did it? A That is right. I called in the painter who generally does our class of work, and got a bid from him on this painting. In the meantime, however,

there was some priming work to be done on this building and I asked him to give us a bid for the work as the work had to be started immediately, and we got a bid from him, and it was while we were considering this bid that we were told by Mr. Nester that he was getting a bid from Mr. Kinsey, at Hackettstown; and I told Mr. Nester that in getting this bid the bid should be in accordance with the plans and specifications, as that would be the only way we would accept it; and we never did get a bid from Mr. Kinsey on the work and that was the last I had heard of that situation until this accident occurred.

Q Then all this was done, that you have related now, before the accident? A Before the accident; that is right.

Q And you did say to Mr. Nester that he should get a bid? A That he should solicit bids; yes, sir. We told him that he should get a painting bid on this work.

Q That is before the accident? A Before the accident.

Q And Mr. Nester was the superintendent? A That is right.

Q He hired the men there? A That is right.

Q Discharged the men and paid the men with the money that you supplied him with? A Yes, sir.

Q And you authorized him to get bids on this work before the accident? A Before the accident.

(Adjourned until Tuesday, June 23, 1925, at 9:30 o'clock in the forenoon.)

Belvidere, N. J., June 23, 1925.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court: Counsel may proceed.

Mr. Braun: If the Court please, I was under the impression that Mr. Gebhardt had not finished yet and I expected Mr. Butz here, but evidently he has been delayed, and I would like to have some re-direct examination when he arrives.

The Court: You may put on another witness.

DR. CLIFFORD MILLS, sworn for the defendants.

Mr. W. Reading Gebhardt: If the Court please, in order to save time, we are willing to admit the doctor's qualifications.

Direct examination by Mr. Braun.

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

Q What branches of the medical profession do you practice? A Surgery and obstetrics.

Q Do you make a specialty of those? A Yes, sir.

Q In your practice of surgery and obstetrics are you connected with any institutions? A Yes, sir. I am attending surgeon at All Souls and at the State Hospital at Morris Plains, and I have my own private hospital.

Q Where is that? A Morristown.

Q In connection with your work as surgeon have you any occasion to use X-rays? A Yes; I have an X-ray plant.

Q You have a plant of your own? A I do.

Q Do you use it yourself? A Yes, sir.

Q Are you familiar with X-rays? A I am.

Q The theory and practice of it? A I am.

Q And the interpretation of pictures? A Yes, sir.

Q Have you had occasion to interpret many pictures? A Yes, sir.

Q On December 22nd, did you have occasion to examine and X-ray the plaintiff in this case? A I did.

Q I show you some X-ray pictures and ask you if those are the pictures that you took.

Mr. William C. Gebhardt: If the Court please, I presume the doctor took these pictures.

Mr. Braun: I asked if those were the pictures he took.

Mr. William C. Gebhardt: No, you did not ask that.

(Last question read.)

The Witness: They are; yes, sir.

Q And do they show the true condition of the plaintiff's boney framework at that time? A They do.

Q What part of his body do they show? Suppose we take one at a time. A The smaller one shows a fracture of the—

Q What part of his body does that show? A The upper chest.

Mr. Braun: I offer that.

(X-ray is marked Exhibit D. 1.)

Q (Witness is shown another picture.) A This was taken to show the lumbar vertebrae.

Q And that does show the lumbar vertebrae? A Yes, sir.

Mr. Braun: I offer that in evidence.

(X-ray is marked Exhibit D. 2.)

The Witness: This (indicating) was taken to show the ribs.

Q And does that show the ribs? A It does.

Mr. Braun: I offer that.

(X-ray marked Exhibit D. 3.)

Q Now, I show you Exhibit D. 1 and ask you what you find there with respect to any injury to the boney framework shown on that picture. A This one shows a fracture, a united fracture of the clavicle.

Q What is the condition as to the position? A The position is good. It shows a good union of that fracture.

Q Is there anything else shown on that picture? A No.

Q I show you Exhibit D. 2 and ask you what that shows. A This is a picture of the lumbar vertebrae showing a fracture of the lateral process of the third and fourth vertebrae.

Q Is there anything wrong with the second— A No, I do not think so.

Q —lumbar vertebrae? A I don't think so.

Q What are these things that are fractures there? A They are projections out at the side of the body of the vertebrae.

Q What are their purpose? A For attachment of muscles.

Q Muscle to what? A The lumbar muscles of the back are attached to those processes.

Q Are they attached to the ends of those processes or to the base? A Both. No. 1 lumbar vertebrae sometimes grows a rib, a little rib. No. 2 does not. It has those processes with the lumbar muscles attached to them, and at the base of them they attach to ligaments of the spine.

Q If those processes are broken does it affect the spine itself? A It does not.

Q Are they of any great importance? A After the first pain has left them they don't appear to have any special importance. They get some pain at first along.

Q Are there any nerve centers in those particular processes? A Not in the process itself.

Q Are there any nerve centers or any nerves that leave the vertebrae at the base of those? A At the base of them?

Q Through the body? A There is no nerve comes out through this bone itself.

Q So it would be perfectly possible to break off the end of these processes and—

Mr. William C. Gebhardt: Now—

A Outside of the first pain, the muscle pain, after that stops ordinarily there is no further distress from this fracture.

Q Would it or would it not be possible to break off the end of these processes without injurying the nerve feeding that muscle? A Absolutely.

Q Assuming, doctor, that the nerve feeding that muscle that runs along the spine were in-

jured to such an extent that it no longer fed that muscle and set up what doctors call an atrophy, what would you say as to the area over which that condition would exist? A Causing atrophy of that muscle—there are some hundreds of individual muscles in there. There are very few men who have ever dissected them out. The nerve supply of that muscle does not come out where that fracture is; it comes out many vertebrae above. I could not say exactly where it came out, between which ones, but it comes out higher up.

Q Then an injury to these processes which you found in there would not affect the muscles surrounding them. A Not those muscles, no.

Q Assuming that a nerve was injured, that fed that muscle, would that affect one particular section of the muscle? A No, I do not think so.

Q Would it be concentrated in the small of the back, over a small area of three or four inches? A No, I do not think so.

Q Did you examine Mr. Kinsey for any lost function in his body? A I did.

Q What did you find the loss, if any, in the function of his arm, as a result of the fracture of the clavicle? A I do not think there is any.

Q Did you test his arm for motion? A Yes.

Q And use? A Yes, sir.

Mr. William C. Gebhardt: Did he say he did?

The Witness: Yes, I did.

Q Did you make him use his arm? A Yes, sir; he used it.

Q Did you examine Mr. Kinsey for any loss of function or motion in the back as a result of

that fracture of the— A He said he had pain in his back.

Q How about the tenderness of the back? A He could move his back but he flinched when you touched his back, and he undoubtedly had some pain in his back at the time I examined him.

Q What did he flinch from? A On pressure over the lumbar region.

Q What kind of pressure do you call that? A Pressure with the fingers.

Q Pressure with the fingers upon his back? A Yes, sir.

Q Could he bend his back? A Yes, sir.

Q Forward? A Yes, sir.

Q And backward? A And sideways.

Q Doctor, assuming that the muscles surrounding these processes, these lateral processes, were injured, what function would they affect? A You mean permanent?

Q Well, assuming— A I think temporarily there is an injury to the muscle. You cannot break off a bone without injury to the muscle secondarily. It takes some time to heal up, but after it is healed I do not think they get any pain whatever.

Q Exactly, but what function have those muscles? A Simply to hold the body erect.

Q Would they have any tendency to cause a curvature of the spine? A No.

Q Would they cause an indentation in the spine? A No, I do not think so.

Q Did you find any symptoms of concussion of the brain, doctor? A No, I did not.

Q Now, referring to Exhibit D. 3, what did you find there, doctor? A This picture shows fractures of three ribs.

Q What ribs? A They were either the seventh, eighth and ninth or eighth, ninth and tenth; I could not tell here without proper light and study and I do not recall in my report, at that time—to which I gave, but I would say there was a fracture of three ribs.

Q What is the condition? A They are in very good position and they have united. They have united in very good position. The fractures were on the right side.

Q Did you find any evidence of vicious union? A I do not know what vicious union is.

Q Is there such a term known in the medical profession? A I do not know of any such term as "vicious union"; it is either a good union or a poor union or overriding; there is no overriding as far as I can see.

Q There is such a thing as delayed union? A Yes, sir, but I do not know what they mean by the term "vicious."

Q Did you examine Mr. Kinsey with respect to the condition that you found in his ribs? A Yes, sir.

Q What was the result of your examination? A He did not show any trouble in his chest.

Q Was there any restriction of respiration? A No.

Q Was there any evidence of pain? A No.

Q Was there any evidence of non-union there? A No.

Q Did you test him in any way besides taking the picture and feeling of the surface? A Feeling, that is all, and listening to his chest.

Q Did your examination with respect to pain and so forth have any bearing on the condition of his ribs, or was that purely for the purpose of deciding what was wrong with his back? A That was all.

Q Would it be possible for a man to have an un-united fracture of the rib with a space of approximately half an inch between the fragments and not have any pain on respiration? A How long after the fracture?

Q Well, we will say that the fracture happened ten months before. A No; I do not believe so; absolutely not.

Q Could the ninth rib be fractured in such a way that there was a space between the fragments of half an inch and still be apparently in apposition? A I know of no way.

Q Why not, doctor? A You would have to have a special fracture. It could be done surgically, going in and separating the rib and pulling it apart, but I do not believe you could keep it apart. The ribs spring back together. They are the easiest of all the bones of the body to unite. They grow in two months' time, and I do not believe it would have been possible to have an un-united rib at the end of ten months.

Q Do you mean by that that the other ribs form a support? A Yes, sir; they are interlaced in muscle and a thick periosteum coat and they don't spring apart; at least I have never seen them, and I have seen a great many fractured ribs, and I have never seen where the ribs were pulled apart. I do not believe it would be possible to do it.

Q Did you find any evidence of chorea in Mr. Kinsey? A No, I did not.

Q Assuming that a man had nine broken ribs, a broken collar bone or clavicle, and a fracture of two or three of the lateral processes of the lumbar vertebrae, would you say that he would be in a condition to leave the hospital inside of ten days, to be moved? A No; I do not see how he was moved.

Q And return to his work in two months, in an advisory capacity? A He might have returned to his work, but I do not see how he was well enough to be moved in ten days.

Q Nine broken ribs would be a rather serious fracture, would it not? A A rather serious fracture.

Q What complications usually arise in a case of that kind, doctor? A Pleurisy and pneumonia.

Q Frequently? A I should think from that amount of fractured ribs, if he had nine fractured ribs. I did not see any evidence of nine fractured ribs when I took the pictures, but I should think if he received a blow sufficient to fracture nine ribs that that was a very serious injury.

Q That is almost a collapsing of the entire side, isn't it, doctor? A Yes, sir.

Q What did you find as a result of your entire examination, doctor, as to Mr. Kinsey? A I found this man had received a serious injury and that he was recovering very nicely from it.

Q Do you consider that as a result of the accident Mr. Kinsey has suffered any permanent lost function? A No, I do not think there is anything permanent to it.

Q What method do you use for identifying your pictures? A I mark them while they are still wet, before they are developed; I write the name on to them and see that they are developed.

Cross examination by Mr. William C. Gebhardt.

Q How did you come to make this examination, doctor? A This company asked me to examine him.

Q What company? A The insurance company.

Q Do you remember what insurance company? A No, I don't.

Q That was not what I expected to draw out, however. What I wanted to know is how you got in touch with Mr. Kinsey. A Mr. Kinsey came to my place for an examination.

Q Voluntarily? A Yes, sir.

Q Knowing that you were employed by the opposition. A I suppose so.

Q Now you say that D. 1— Have you got those pictures there? Which is D. 1?

Mr. Braun: The small one, I believe.

Q Does that show the shoulder? A It shows the clavicle.

Q Well, we ordinary people do not know much about— A The clavicle is the collar bone.

Q And you say that that is united? A Yes.

Q What do you mean by that? A Grown together.

Q At the ends or overlapping? A No, where the fracture was.

Q I know, but have the bones come together as they naturally would? A No; there is some overriding.

Q It is plainly to be felt as you run your finger along the collar bone, isn't it? A Yes, sir.

Q One sticks up above the other one, like that (illustrating)? A Yes, sir.

Q And you say that is a good clavicle? A Yes, sir.

Q Do you think nature made a mistake when it had those bones all solid once? A Well, it has got good union there. There are very few

fractures that ever heal in perfect alignment. Not ten per cent. of all fractures heal in perfect alignment, and by that I mean getting exactly in alignment.

Q When they don't do that they are not as good as if they had never been broken, are they? A They are just as good; they are just as strong, or probably stronger.

Q Then you think nature made a mistake in not making them that way originally, do you? A No, but they are stronger.

Q Do you think then that if a man has broken bones and they do not unite and one overlaps the other that you have improved on nature? A You start off wrong with the question. You say if you have a fracture that did not unite you have improved upon nature. I do not think so.

Q I will withdraw the question and put another one. You think then that where the bones overlap instead of uniting at the end, that that is an improvement on nature, do you? A It is conceded that they are stronger. The shaft is heavier and they are stronger. It is not an improvement.

Q If it is better it is an improvement, isn't it? A No, not necessarily. Nature knew how strong to make them.

Q All right. Now you did find on his back a fracture of the process of the third and fourth vertebrae? A Lumbar vertebrae.

Q Won't you tell this jury what a vertebrae is? A It is the bones that make up the spinal column.

Q And were they fractured? A The body of the vertebrae were not. These bones for purposes of description are divided in the body, these bearing processes for the attachments for

the muscles, and on up for the attachment of ribs and certain openings coming out through to allow the branches of the spinal cord to come out through.

Q If there was a nerve caught there it would give a man pain, wouldn't it, in the healing process? A No. Then these processes would have been driven downwards. If these processes were not straight out—

Q What is pain? A An irritation of the nerves.

Q If you did not have any nerves you would not have any pain would you? A That is right.

Q In other words, when a man has pain, it is because a nerve is affected in some way? A Yes, sir.

Q Now, assuming that this man has had pain ever since this accident, which is now almost two years, I think it will be two years next August, would you say that there had been some injury to a nerve there or not? A Well, he might have pain in his back and not be due to that.

Q That is not the question. A I think it is impossible to tell now, whether his pain at this time was due to the injury or not; I would not say that it was or that it was not.

Q As long as you say that you won't say either way, why, of course, your evidence on that particular point cannot be as strong as if you were positive one way or the other. But the fact that there is pain there, shows that a nerve has been injured, doesn't it, if there is pain? A No. He could have pain from his kidneys through the back. There are other things that could give him pain there. I doubt very much if he is having any pain at all from the effects of this injury.

Q Did you examine his kidneys? A Yes.

Q You found them all right, didn't you? A No.

Q What did you find? A I found he had an intersticial nephritis, a chronic Bright's disease.

Q Chronic Bright's disease? A Yes, sir.

Q This man here? (Indicating.) A That man there.

Q What examination did you make? A Examined his urine and took his blood pressure.

Q Assuming that to be true then, this sort of an injury would be all the worse for a man that was afflicted with some serious disease, wouldn't it? A No, I do not think it had any bearing on it.

Q Would you say that he had this Bright's disease before this accident? A Yes, I think so. Intersticial nephritis or chronic Bright's disease is not a thing that comes on in ten months or so. That is years coming on.

Q Well, but it was more than ten months, wasn't it, when you made this examination? A I made the examination December 22, 1924.

Q And he was hurt in August, 1923. That is about fourteen months, isn't it? A Yes.

Q Now a blow of this character could bring on Bright's disease? A Not an intersticial nephritis, no.

Q Could it bring on any kind of— A Yes; he could have had blood in his urine at the time of the accident and he could have had an injury to his kidneys; that is not intersticial nephritis.

Q How do you differentiate that kind of nephritis from any other? A There are various ways. There is a difference in the specific gravity of the urine; there is a difference in the findings, that you find under the microscope.

Q Would it affect your judgment with respect to his having a chronic Bright's disease if it were shown to you that for at least thirty years this man had been a hard worker at his trade of painting and paperhanging, never losing a day? A I would say that was the cause of his intersticial nephritis, working in lead and turpentine. It will cause it.

Q Do you swear that that was the cause in this case? A No; I say that is one of the causes of it.

Q If he had chronic Bright's disease, would he have been able to work that way? A Yes.

Q He would, eh? A Yes, sir.

Q Then it don't hurt a man to have Bright's disease, does it? A It has not hurt him an awful lot. His blood pressure is about normal. Many people of his age have an intersticial nephritis.

Q Then do you understand that Bright's disease is an absolutely fatal disease, sooner or later? A Eventually, I think it is.

Q Do you mean to tell the Court and jury that Bright's disease is not a serious disease? A I did not say so.

Q I say, do you mean to—

Mr. Braun: If the Court please, I think that is putting words in the doctor's mouth that have not been there before and I object to the form of the question.

A You say, is Bright's disease a serious disease?

Q Yes. A Yes, sir; it is a serious disease. You may live years with it, and have it as a child and live to be eighty years old and have it when you die. It may destroy one kidney and leave the other kidney perfectly normal.

Q Now, this fracture of the process of the third and fourth bones— A Of the process of the third and fourth lumbar vertebrae.

Q You did not find any trouble with the second? A No.

Q The only way you could tell about that was the X-ray? A That is all.

Q You could not tell by the use of the fingers or manipulation of any kind? A No.

Q You noticed this big hollow in his back, didn't you? A Not a big hollow, no.

Q Was there any atrophy of the muscles in the back? A I did not see any.

Q Now, I understood you to say a while ago that these bones of the vertebrae could be broken off from the muscles without doing any harm. A Well, I did not say that. I said the bones were broken off and the muscles torn from the bone, but there is no evidence that the muscle is torn from the bone. The process of the bone being broken does not necessarily say the muscle is torn off from it.

Q Did you state before that these bones could be broken from the muscles without harm, in answer to counsel's question? A No, I did not say that.

Q You did not? A No.

Q Then I cannot write correctly, that is all. However, what is the matter down there, then; what is the matter with his back? A I have said he had a fracture of the lateral process on the right side and of the third and fourth—

Q I do not believe all the jury will understand what you mean by "process."

Mr. Braun: We have a chart here, Mr. Gebhardt, if you want to show the jury.

Mr. William C. Gebhardt: Never mind. I do not think I need any help from counsel on the opposite side. I shall be glad to ask for it when the time comes.

A Well, you have the main bone of the vertebrae. The nicest way to explain it is on the chart. Then running off from those there are certain what is known as processes, a roughened surface or pieces of bone running off for certain attachments, processes for the ribs to fasten to and for the muscles, and when you get below the ribs then these rudimentary processes run out, to which the muscles of the back are attached.

Q You did not have any doubt when you made this examination that he had this pain in his back, did you? A Well, he said he did.

Q Did you have any doubt about it, from the way he flinched? A No. I know of no way of telling. If a man says he has got pain I will take his word for it.

Q You have been practicing for how long? A Twenty-five years.

Q You have had a good deal of experience in many examinations and telling whether they had pain or not? A No, not to know whether they have pain. If they say they have pain I have no way of telling whether they do or not, any physical examination. There is no way you can tell.

Q I once heard one of the most prominent physicians in the State of New Jersey say that nobody could have any pain but what he could detect it by a physical examination. Would you agree with that? A No, sir.

Mr. Braun: If the Court please, I move to strike the question and answer out.

The Court: I will strike it out.

Q Then, you think the breaking of the process of the third and fourth vertebrae is not a matter of any importance? A Not of permanent importance.

Q Now, do you want to qualify it that way? A They get pain, yes.

Q Now, through those muscles in the back, about where you found these broken vertebrae, or the processes—I want to be correct about it—there certainly were nerves running through those muscles. A Nerve filament.

Q And an injury or a blow sufficient to cause this breaking would certainly be accompanied with a good deal of pain, wouldn't it? A Well, as to the amount of pain he had, I could not say. He said he had pain, and I think he did have pain. As to the amount I could not tell.

Q If a man is suffering pain he cannot work as he could work if he were not suffering from pain, can he? A I do not think he is suffering any pain at this time from those fractures of the lateral processes.

Q You have not examined him since last December, have you? A No.

Q You do not know what his condition is now, do you, with respect to pain? A No.

Q And what you do mean to say is— Well, you did say he was suffering pain then; and it is a fact, isn't it, doctor, that any man who is past middle age and is constantly suffering from pain, that it impairs his ability to do physical labor, doesn't it? A I think that is right.

Q Now, going back to this overlapping of the collar bone, that collar bone; now, if you were to measure from end to end it would not be quite as long as it was before, would it? A Well, now, I would have to see those pictures again.

The reason for the small picture was that on the large picture it showed. They both showed practically the same.

Q It showed overlapping? A Yes. These are shadows, with the light about twenty inches from the object that you are going to take the shadow of, and the bone was about six inches above the plate, and mathematically no X-ray pictures are accurate. To begin with, the size of the bone is not the size of his bone. Now, the amount of enlarging of the bone meant anything up to a third. These are shadows; these are not photographs; these are shadows of bones and it all depends on where the X-ray light is or where the plate is as to the accuracy.

Q You examined this fracture of the collar bone with your fingers, didn't you? A Yes.

Q How much did that overlap? A You can feel a nodule there where there is overlapping, and the X-ray shows there is overlapping.

Q In other words, that collar bone is shortened by this overlapping? A Yes, it may be from a quarter to a half inch; but in my opinion it don't amount to anything at all; it all depends on the occupation of the man, whether he is a hod carrier—

Q Could you tell of any occupation that a man can possibly go into that would require more free exercise of the collar bone and the shoulder and arm than reaching overhead and putting paper on a wall or paint on a ceiling? A No. It only applies to men who carry heavy weights on their shoulders, hod carriers.

Q Do you mean to tell the Court and jury that with a shortening of that collar bone half an inch that he would have just as good function as if it had never been shortened? A Yes.

Q Now, will you tell the Court and jury to what extent this shortening might occur without affecting it? Suppose it was four or five inches? A That is impossible.

Q Suppose it was an inch? A I do not think it would do any harm.

Q Suppose it was two inches? A I think it is impossible to shorten the shoulder two inches.

Q Well, an inch and a half. A I don't believe you could possibly get it shortened more than an inch at the most.

Q Then you think if it was an inch shortened he could move his shoulder and his arm doing all kinds of overhead work or any kind of physical work then as well as if it had not been shortened? A Yes, sir; I think so.

Q What is the use of having it so long then? A Well, you are remedying the accident. You are not trying to improve upon nature when you set the clavicle. You are trying to get the bones in that position and hold them there, but it is a very hard thing to hold the clavicle in position.

Q We are not criticizing the doctors who treat the cases at all, but we laymen ask a lot of questions because we don't know. I would just like to know when the shortening of that collar bone would begin to have an effect on this man's ability to do painting, overhead. A I have seen hundreds of cases of fractured clavicles and I have never seen one where the overriding was an inch. I do not believe it is possible to get an overriding of an inch in the clavicle, because the chest wall holds the shoulder up.

Q Can you give us the dividing line, when the shortening of the collar bone would affect a man's ability to do the kind of work he did? A I do not think it would affect a man's

ability, except it is a very hard occupation, requiring them to carry heavy loads on the shoulder.

Q He could carry them on the other shoulder, couldn't he? A A hod carrier carries them on both.

Q And as long as he did not get this very place where the overlapping was a hod carrier could still use this shoulder, couldn't he? A Yes, sir.

Q And it would not affect him? There would be no danger of pulling it apart or breaking it over again? A No.

Q Suppose he put a hod filled with bricks or mortar on top of this fracture, what would be the result? A I do not think it would do any harm after a time.

Q You do not think it would hurt him? A No.

Q He would never know it? A No. These bones gradually shell off.

Q What did you mean a while ago when you said it would not affect anyone except a hod carrier? A Those are the only ones I can possibly conceive that it might cause them trouble to.

Q Now the muscles in the shoulder that are attached to this collar bone then, what proportion in size by nature is about proper— A Your hypothesis is wrong to start with. There is no muscles in the shoulder that I know of that are attached directly to the clavicle.

Q Well, any bone that the clavicle meets with? A This bone can be removed entirely and they have a perfectly serviceable arm.

Q How does the condition such as we find in this man affect the muscles of the shoulder,

any of the muscles? A Well, now he had a fracture of some of his ribs and a fractured clavicle, and I do not say he did not have pain at the time in his shoulder.

Q No. How would it affect these muscles? A I do not think it affected them. The way this fracture is located, it has nothing to do with any of the muscles of the shoulder.

Q This bone is connected with other bones? A Yes, sir.

Q And they are connected with muscle? A Yes, sir.

Q And it sets them somewhat out of place, doesn't it? A No.

Q It does not? A No.

Q Now you examined this man in 1924, December 22nd, when he was hurt August 22nd, that is, about fourteen months after the injury, or sixteen months after it— A When was this man injured?

Q He was injured sixteen months before you examined him. A What was the time?

Q August 22, 1923. Now you found when you made it sixteen months after the accident, you found from the X-ray pictures that three ribs had been fractured, the evidence of that plainly showed? A Yes, sir.

Q Now would the other ribs that were fractured show sixteen months afterward, by your X-ray? A They should have shown as much as the three did.

Q Just as much? A Yes.

Q You know Dr. Osmun, don't you? A Of Hackettstown?

Q Yes. A Yes.

Q If he said there were more than three ribs fractured, you would believe him, wouldn't you?

Mr. Braun: Objected to.

The Court: Objection sustained.

Mr. Braun: Dr. Osmun did not say how many ribs were broken.

Mr. William C. Gebhardt: I know he did not—and you did not ask him either.

Mr. Braun: Neither did you.

Q Do you testify that in this accident there were not more than three ribs fractured? A In my opinion.

Q Would your opinion be better if you had made an examination a few weeks after the accident or when he was in the hospital? A I do not think it would have made any difference. I do not think the pictures would have been any different.

Q What do you mean by chorea, doctor? A I am not a medical man. It is a special nerve condition of the brain producing choreaic movements or twitchings of certain muscles of the face and head, arms and the rest part of the body. I don't know much about that.

Q You did not see any evidence of that in this man? A No.

Q Did you look for it? A There wasn't anything to call my attention to it at the time I examined him.

Q Do you say that he hasn't it now? A I would not say that. I have not done any medicine in fifteen years.

Q Do you think this man should not have been moved from the hospital in ten days? A I think he was pretty seriously sick. I was testifying that the man was seriously injured and I do not see how they moved him at the end of ten days.

Dr. Clifford Mills, re-direct.

By the Court.

Q Would that be true, doctor, if he had had only three fractured ribs and a broken clavicle? A There isn't any question this man was badly injured. He had a lot of pain and he ought to have been kept perfectly quiet in my opinion for at least six weeks or two months, flat on his back. I see many of these cases of fracture of the lateral processes, due to muscular spasm, and they are very sore and they have a lot of pain and distress for a time. But I do not see how he was moved. Some people can be moved and some cannot.

Re-direct examination by Mr. Braun.

Q And there would be still more doubt in your mind about the possibility of moving him if it were nine broken ribs and not three, wouldn't there? A Yes, sir.

Q Now, I show you this chart and ask you what that is? A It is a chart of the boney structure of the body and showing the lungs and kidneys.

Q Is that chart recognized by the medical profession as correct in its anatomical positions and the size of the various— A Oh, I should think it was about right.

Mr. William C. Gebhardt: About right.

The Witness: I mean so far as—I suppose it is drawn to scale.

Q Do you recognize the— A Yes, sir; it is a chart of the human body, showing the bones, and a section showing the muscles and joints.

Q Does it depict the spinal column? A It does.

Q Correctly? A Yes.

Q Does it depict the transverse processes? A It does.

Mr. Braun: I offer that for the purpose of allowing the—

The Court: For the purpose of illustration?

Mr. Braun: Yes, sir.

Mr. William C. Gebhardt: I object to it unless the doctor goes on and shows where these processes were broken.

Mr. Braun: That is what I expect to use it for, Mr. Gebhardt, but I cannot until I offer it.

Mr. William C. Gebhardt: Oh, yes, you can, if I do not object, and I do not object to your doing that. I want him to do it.

Mr. Braun: I think that the jury could better understand what these medical terms meant if the doctor would point it out.

The Court: It may be admitted for the purpose of illustration.

(Chart referred to is marked Exhibit D. 4.)

Q Now, doctor, will you— A (Indicating.) This is the clavicle bone, running across here, joining with the sternum here in front and with the scapula in back. This bone was fractured about in the middle, so far as I was able to tell. In my examination—

Q Which are the lumbar vertebrae? A The lumbar vertebrae are these five (indicating).

Q What are the transverse processes? A These ends coming off the side are the transverse

processes. Here is what I described. This is the vertebrae taken by itself. These are the spinal bones or vertebrae. Then they come down until they get down to the first, second, third, fourth and fifth lumbar vertebrae, which are much heavier than any other portion of the vertebrae in the body. We could lecture for a day on the various ones. They are all made different as they go down. The first vertebrae has no body to it at all. The second vertebrae has a body, and both vertebrae known as the atlas and axis; and you come on down and this (indicating) is what is known as the body of the vertebrae; this being the dorsal vertebrae, the one coming just above the lumbar; and as you get on down the body gets heavier, to carry the weight of the body above it. These are the processes coming off. This projection coming out here are where the ribs are attached, that is, at the back of the body, the lungs and the liver showing here, cutting off the view of it; and these are processes. Now, when you get down to the lumbar vertebrae the ribs stop and you have these projections coming off from the side. This corresponds to these projections here. This is the lumbar vertebrae and this is the process here and here. Now it was the third and fourth processes, as I recall it, that were broken. These bones were pulled off here on the right side.

Q Now, doctor, right as you face that there is what appears to be a profile of the spine. A That is a profile of the spinal column, showing the various curves.

Q Will you show on there where the lumbar vertebrae come in? A The first and second is not marked. They are marked here first, second, third, fourth and fifth; and there is this hollow

in the back, at that portion, indicating that is a natural curve. It is a double "S" curve. This curve is perfectly all right until a line drawn through and taken through this one—you don't have a curve until the curve developes way out of a perpendicular line drawn through.

Re-cross examination by Mr. William C. Gebhardt.

Q Now, doctor, I notice a line right there in this picture, what is that? A That is the carotid process. That has nothing to do with the clavicle whatever.

Q Just show the jury on that picture where the shoulder bone begins and ends. A When you are talking about three bones, the humerus, the scapula and the clavicle.

Q I am talking about the clavicle? A This clavicle does not join directly in the shoulder joint.

Q Is this the beginning and this the ending here? A No. Beginning at the sternum and ending at the scapula. And this is the process of the scapula which forms the socket for the head of the humerus to turn in.

By Mr. Braun.

Q What bones form the shoulder joint? A The scapula and the humerus.

Q Has the clavicle anything to do with the shoulder joint? A No.

Q What kind of a joint is that? A It is a ball and socket joint, having the ability to turn in all directions. The elbow is a hinge joint which can only move in two directions.

Dr. Clifford Mills, re-cross.

Q Has the clavicle anything to do with the movement of that joint in any direction? A I do not think so. I do not think the injury at that has any effect on that at all.

By Mr. William C. Gebhardt.

Q Doctor, I call your attention to this illustration down here of the shoulder joint. What muscles are shown in that? What have those muscles to do with the collar bone? A Well, the deltoid is the one big muscle that comes across and joins onto the scapula and there may be some rudimentary branches of this muscle, as I said, that attach into the collar bone. This is not a picture; it is a section of the body. There may be some fibres of the deltoid muscle that attaches.

Q Attaches to the collar bone? A Yes.

Q And you say that by the shortening of that collar bone a half inch it would not affect those muscles? A No, I do not think so.

Q Can you tell the jury what those things—what do you call them, transverse processes? A Yes.

Q What they were put there for by nature, what the purpose of them is? A Well, attached to them are the muscles. There have been very few men that have ever dissected out the complete muscular system of the spine. You have here various muscles, running from here to here, and then longer ones going in bands and I personally have dissected them out twice, but I have never had the courage to dissect out those muscles because it is a two or three months' job to get all those individual muscles and how they are attached. The lumbar muscles are the muscles that hold the body; they are big wide muscles

and run on top of those, of these, rather (indicating), and the muscles known as the solus muscles that run from here across here. They are important muscles; there is no doubt about it.

Q And these muscles that are attached to the little bones that stick out from the spinal column, they are all attached to the vertebrae, aren't they? This is all one bone here? A No. That is not all one bone. It is five bones.

Q This fourth vertebrae here and these processes running out are all one solid bone? A Yes.

Q Until they are broken off? A Yes, sir.

Q And you think the breaking of them would not make any difference? A No. I say that it gives the pain for a time, but I do not think there is any permanent injury from it.

Q What becomes of the muscles under those circumstances that are attached to those bones? A They form new attachments.

Q What to? A To each other and to scar tissue.

Q Could those breaks be clearly shown by your pictures— Are those breaks clearly shown? A Yes, sir.

By Mr. Braun.

Q Were those processes completely broken off, the entire processes? A It is impossible to tell that. They may not have been.

Q Was the entire length of the process severed right short at the spine itself? A No; they were not way back in.

Q They were not broken off right close— A There was no injury to the body of the vertebrae.

Dr. Clifford Mills, re-cross.

Q Would or would it not be possible for these muscles to grow fast—even if there was no union between the broken fragments, was there enough left on the vertebrae itself for the muscles to attach? A Oh, yes.

Q And is that the usual thing? A Yes, sir.

By Mr. William C. Gebhardt.

Q If that happened then this piece of bone, that would be still in there? A Yes, sir.

Q And with nothing to feed it, it would decay, wouldn't it? A Oh, no. It does not get its blood supply from the bone.

Q It is all one solid piece of bone, you say. A The blood vessels do not run through bone, but the bones have certain holes in them where vessels running from the muscle runs in and supplies the blood to the bone. If its blood supply was cut off entirely then that bone would decay and form an abscess and come out. The mere fact that it did not form an abscess and come out shows the blood supply was all right and it is all right. It is a live bone.

Q It may float around in there loose? A No. There are one hundred and twenty-eight pairs of muscles fast to that.

Q You could not tell about it now? A If some pictures were taken it might show it became united.

Q But the picture don't show any such thing as that? A No.

Q You could have taken all the pictures you wanted to take, but you did not do that; the man did not object? A The man did not object.

DR. LAWRENCE H. CAHILL, sworn for the defendants.

Mr. William C. Gebhardt: I would like to ask counsel what Dr. Cahill is put on the stand for.

The Court: I suppose he will develop that.

Mr. William C. Gebhardt: I know, your Honor, but there was a fair and square agreement between counsel and ourselves that if Dr. Washington and Dr. Mills were permitted to make the examination, that Dr. Cahill would not be produced. I ask that agreement be kept by counsel.

Mr. Braun: If your Honor please, there was some understanding at the time this examination took place, and the senator told me at the time he thought there was some effort to get the doctor to testify as to the examination that was made at that time—in other words that we were trying to pile on medical testimony, and I told the senator there was no such intention on my part, but if he insisted on it I would not produce the doctor. I since that time had a conversation with his son and he told me that if they had known the circumstances then as they existed there would not have been any objection whatever, but if the senator intends to object to the doctor's examination on this, I will not introduce him on that, but I do want to examine him on the X-rays.

Mr. W. Reading Gebhardt: I do not think I ever consented to the examination. I might have indicated that I might do so or something like that.

The Court: That is a matter between counsel.

Mr. Braun: I will not question the doctor on the examination at all. I will confine myself strictly to X-rays and hypothetical questions. I certainly made no agreement to keep him off the stand entirely. Because there was some misunderstanding as to who was to examine Mr. Kinsey and Dr. Cahill happened to be present at the time, they thought I was trying to put it over, but I had no such intention.

Direct examination by Mr. Braun.

Q Doctor, you are a practicing physician in this State? A Yes, sir, since 1911.

Q What has been your practice? A Chiefly surgery.

Q Along what lines? A Industrial surgery.

Q Does that include— A Taking care of injured workmen, principally.

Q Are you connected with any institutions? A Yes, sir. I am the surgeon and medical director of the East End Hospital in Newark, the medical director of the Hudson County Rehabilitation Clinic in Jersey City.

Q Any other institution? A Yes, sir. I am also the medical director of the Passaic County and Middlesex County Rehabilitation Clinics.

Q Have you occasion to use the X-ray machine? A Yes, sir; daily.

Q Do you take pictures yourself? A Sometimes, and other times I supervise the taking of them.

Q Do you interpret pictures? A Oh, yes.

Q And have you for any length of time? A Yes, sir, ten years or more.

Q You are familiar with the interpretation of X-ray pictures? A Yes, sir.

Q I show you Exhibit D. 1 and ask you what that discloses? A It shows a fracture of the right clavicle, some overriding, with good boney union.

Q What is the usual result in a fracture of the clavicle as to overriding? A There is usually some overriding.

Q Is that a common thing? A It is the usual thing.

Q And does that affect the motion of the arm or the function of the arm joint at the shoulder? A It has nothing to do with the function of the shoulder joint.

Q Why not? A It does not enter into the formation of the joint.

Q What would you say as to the strength of this bone after the healing as indicated in the picture, as compared with what it was before? A Why, it is just as strong as before; there is good boney union.

Q What process took place there after the fracture? A That bone, or the covering of the bone known as the periosteum, throws out new bone cells which cement the break, all around the break, and ossification takes place, and the bone is cemented together and the bone is just as good as before.

Q Similar to the welding of a piece of metal, is it? A Similar to wiping a joint in plumbing, you might say.

Q Now, doctor, I show you Exhibit D. 2 and ask you what that shows? A That shows a

fracture of the transverse process of the third and fourth lumbar vertebrae on the right side.

Q Do you see anything wrong with the second? A The second transverse processes are intact; they are all right.

Q What would you say would be the result of such a fracture on a man's back, doctor? A In the beginning it produces a muscular spasm on that particular side where the transverse process is broken and this spasm is very painful for a time, but after a time the muscle relaxes and the healing process becomes completed and the man is perfectly well again.

Q Would you say that that would have any tendency to affect the nerves feeding the surrounding muscle tissue? A No.

Q Are there any nerves that pass through the processes of these particular vertebrae? A There are the feramina.

Q What do you mean by the feramina? A Those are holes where the nerve escapes from the spinal cord.

Q Do you find any evidence of injury to the vertebrae itself, the body of the vertebrae? A No; the body of the vertebrae is perfectly normal.

Q Now I show you D. 3 and ask you to interpret that picture for us. A There is an evidence of fracture of the eighth rib there. Whether or not the others are fractured is hard to say, because if they were they have healed and in good apposition, and no deformity.

Q Is there any depression visible there in the ribs, doctor? A No.

Q Is there any vicious union shown there? A Well, that is a term we don't use.

Q Did you ever hear that term used in medicine before? A No. It is usually good union or bad union or non-union or delayed union, fibrous or boney union.

Q What evidence is there as to the union of those parts? A This eighth rib shows very distinctly that it was fractured and it shows good boney union there; it shows all the fragments in good alignment and in good apposition and no separation of the two fragments.

Q Would it be possible for a man to have a fractured rib that had not united and which was separated by a space of about half an inch and still have no pain on respiration after sixteen or eighteen months? A No. A fractured rib gives very acute pain, sharp pain.

Q What causes that pain, doctor? A Well, if the fragments are separated, the friction on the pleura and nerves passing along the rib. That is why we immobilize the rib by strapping it tightly.

Q In other words there is a jagged end there that— A Keeps prodding all the time.

Q What would you say as to the ability of a man fifty-four years of age with a fracture of nine ribs on his right side, a fracture of the clavicle, a fracture of two or three of the lateral processes of the lumbar vertebrae, suffering from severe shock as the result of a fall? What would you say as to the advisability or possibility of safely moving the man without any complications from a hospital after a period of ten days, taking him the distance of from Dover to Hackettstown? A Well, I do not think any man that suffered that amount of injury could be moved. My experience teaches me that men who have fractured ribs set up a congestion of the lung

a few days after and unless they are carefully taken care of it is apt to produce pneumonia; and a man with nine fractured ribs would very likely die as the result of such a severe blow.

Q Do you find any injury evident in that picture to the second, third, fourth, fifth, sixth, seventh, eighth or ninth ribs? A I find evidence of a fracture to the eighth rib. There is some evidence of the rib above— There is no evidence of any injury to those ribs.

Q What is the usual duration for the healing of a fractured rib? A When the body is immobilized with adhesive straps a boney union takes place in four weeks' time.

Q And where there is boney union, doctor, what is the usual result as to any disability of bodily function? A There is no permanent disability resulting from a fractured rib.

Q What would you say as to the probable loss of function in the back or spine as the result of the fracture of the lateral process of the third and fourth lumbar vertebrae, as indicated by you in that picture? A There will be no permanent disabilities.

Q Do you have occasion to treat such cases frequently? A We always have these cases under our care. They come from lifting something suddenly, or a sudden strain snapping them off.

Q What is the structure of these processes, is it vigorous or strong or sturdy or what? A No; they are not strong. They are different in individuals; they are merely outgrowths of bone from the body and they break off very readily.

Q What is the natural tendency of the surrounding tissue after such an injury? A Why,

the tendency is to heal after the man has had sufficient rest.

Q In what way? How does nature take care of it? A It undergoes various pathological changes. First there is the throwing out of some serum from the blood vessels, and then the healing process starts and it finally comes back to normal.

Q Assuming that there was an injury which cut off the nerve and blood supply of these two particular processes that you have mentioned, what visible evidence would there be? A If you have death of the bone it would be followed by an abscess formation.

Q Is that invariable? A Yes, sir.

Q Assuming no such abscess had formed, what would be your opinion, doctor? A That the bone is perfectly healthy.

Q What is concussion of the brain, doctor? A Why, it is a condition that follows a shaking up of the brain substance, usually characterized by semi or some form of unconsciousness temporarily.

Q Does it leave any permanent indications? A No.

Q What is the normal period of the effects of this concussion? A In some cases two or three minutes, five minutes, an hour, several hours, or a day or two.

Q What are those manifestations? A The man is alseep; he is unconscious as to what is going on around him.

Q Does that leave any permanent evidence? A No. Once they regain consciousness they are all right. They never relapse into unconsciousness again.

Q Is that the only evidence of concussion—unconsciousness? A Oh, no; there are many signs such as the Romberg sign which is characterized by the swaying of the body when a man stands with his eyes closed and his hands by his sides; there is muscular incoordination; there is the test of pointing to the nose. Those are the chief ones.

Q Those symptoms, are those visible for any length of time after the concussion? A No. The man might complain occasionally of being a little dizzy.

Q How long would that condition last? A That may recur periodically for perhaps two or three months and in some cases a little longer.

Q Would it go a year? A Dizzy spells—no, I do not think so.

Q A year and a half? A No, sir.

Q Doctor, what causes chorea? A It is usual in children. Of course, in many cases it is due to overwork; children apply themselves too closely to their studies, which upsets the nervous system. In older children it is usually due to local infection of the tonsils or teeth.

Q Does rheumatism ever cause chorea? A Yes, it is usual to see it with it, especially in children.

Q Is it ever caused by an accident or an injury? A I never heard of such a thing, no.

Mr. Braun. Cross examine.

Cross examination by Mr. William C. Gebhardt.

Q Doctor, who pays you for coming here to testify?

Mr. Braun: I object to that, if the Court please. There is no indication yet that the doctor has been paid.

The Court: Objection overruled.

Mr. Braun: Will you allow an exception?

The Court: Yes.

A I expect Mr. Braun will see that my bill is paid.

Q Do you know who furnishes the money or will furnish the money to pay you? A Yes.

Q Who is it?

Mr. Braun: I object to that as not material to this issue.

Mr. William C. Gebhardt: It is very material.

Mr. Braun: The senator is trying to do something that he knows he cannot do in any other way.

The Court: I will sustain the objection.

Mr. William C. Gebhardt: I ask an exception.

The Court: Yes.

Mr. William C. Gebhardt: I might say to your Honor, however, that the Court of Errors and Appeals has held distinctly in many a case which we can show your Honor later when we will ask your Honor to permit us to press the question, that this kind of questioning has been admissible. My purpose in asking this question is to follow it up with other questions to show this man's interest. In other words, that he very largely depends upon certain employment for his living and therefore his in-

terest, of course, would affect or tend to affect or bias his testimony. That is the purpose.

The Court: If you have the case now, I will be glad to see it.

Mr. W. Reading Gebhardt: (Indicating.) There is the case there.

The Court: Well, Mr. Braun, you can read this case. It is De Vincenzo *v.* John Sommer Faucet Company, 87 N. J. Law, 645; 94 Atl. 573.

Mr. Braun: There is nothing in there that permits the question to show the source of the money. He has been requested, as he said, by me. Now if you are going back you can go into a thousand matters as to what interest there is behind it.

The Court: That case goes further than that.

(After argument.)

(Last question read.)

The Court: I will withdraw my ruling and you may take an exception. I will allow the question and note an exception.

A Why, the company that Mr. Braun is employed as counsel for.

Q What company is that? A The United States Fidelity & Guarantee Company.

Q Now, isn't it a fact, doctor, that you make a specialty of examining people that are injured frequently for this company? A Yes.

Q And don't you also examine for a number of other companies? A Yes.

Q Insurance companies? A Yes, sir.

Q And isn't that sort of business a very considerable part of your practice? A Yes, sir.

Q Now, doctor, haven't you been assisting counsel during the trial of this case? A Why, I have been sitting there, yes, making suggestions.

Q Telling him what questions to ask and so on. A Occasionally I make suggestions.

Q That is perfectly proper. I am not criticizing you at all. A I am answering you candidly.

Q Now if the X-ray pictures in this case had been taken a short time after the accident the number of fractured ribs would have been shown more distinctly than pictures taken sixteen months afterwards, wouldn't it? A It wouldn't show any more fractured ribs if they were not there.

Q No, but if they were there it would show more distinctly, wouldn't it? A Well, I might say it would, un-united fractured ribs, but if taken later on it shows the same fractures united. That is the only difference.

Q Can you give any explanation to the Court and jury because we are just ordinary people, you know, why Doctor Mills— You heard him testify, didn't you? A Yes, I heard him testify.

Q Why he could see three fractured ribs there and you can only see one on that picture? A Well, this one is a pronounced fracture, and the other, I said that I thought I saw some bone injury to the one above it.

Q That would only make two, wouldn't it? A Yes, sir, two. Well, the other, as I explained, the apposition was so perfect that I am unable to observe any fracture. Dr. Mills per-

haps can interpret his own pictures better than I can.

Q He took the pictures? A Yes.

Q And he could tell better than you could, you think? A Not because he took them.

Q Well, for any reason? A Well, he is more accustomed to reading his own films, probably.

Q You say that chorea was never caused by an accident? A Yes, sir.

Q Suppose that the plaintiff in this case had never had chorea before this accident and it followed immediately thereafter, would that change your opinion in any way?

Mr. Braun: If the Court please, I do not think there is any evidence in the case that this chorea followed immediately afterward. The only doctor who testified as to the chorea was the doctor who examined him yesterday, I believe.

The Court: Dr. Cummings?

Mr. Braun: Dr. Cummings.

Mr. William C. Gebhardt: If the Court please, it is cross examination, to start with—

The Court: The objection is that you embrace in your question a fact which does not appear in the evidence.

Mr. William C. Gebhardt: I understand, but we propose by rebuttal to contradict this man. I am laying the foundation to contradict him by numerous witnesses.

The Court: If you make that offer now—

Mr. William C. Gebhardt: Well, I certainly do.

The Court: Thus far there is no evidence of chorea except the testimony of Dr. Cummings at the time of the examination, but on the basis of your offer that you will show it, it is admissible.

Mr. William C. Gebhardt: That is what we propose to do.

Q Would that affect your opinion in any way?

Mr. Braun: If the Court please, I want to get the record straight. I do not think that would be proper subject matter for rebuttal. If the Court allows the senator to reopen his case and introduce evidence that he forgot to put in, all well and good, but I do not think evidence of when this chorea developed has anything to do with rebuttal. There is no evidence in the case as to when it started. There is no evidence on our part about it at all, except what could cause it.

Mr. William C. Gebhardt: You have evidence here that shows he hasn't got it at all. One of your medical witnesses testified to it.

Mr. Braun: That he did not have it at the time that he was examined.

Mr. William C. Gebhardt: Well, it has taken a great deal of time and in order to avoid losing so much time we will withdraw the question, your Honor, and have it out of the way.

Q You spoke of sleep and unconsciousness as being synonymous words. Do you mean to be so understood, doctor? A Practically, yes.

When a man is unconscious he acts as though he is asleep.

Q Do you mean to say they are both the same? A No, I do not.

Q Well, you used those words though, didn't you? A I do not think I did exactly.

Q You don't? A I think I said a man acts as if he is asleep.

Q Didn't you on your direct examination speak of his being asleep or unconscious? A I don't recall saying it that way.

Q All right. Do you say that they can only be so for a day or two at the most with concussion of the brain? A No; it may be a little longer.

Q Suppose that the concussion results in lesion of the brain, then what? Unless the blood clot caused by the lesion is absorbed he will always be more or less affected mentally, won't he? A No.

Q Eh? A No. If a man has got any amount of lesion of the brain he bleeds to death. It is usually associated with a fractured skull. We are talking about unconsciousness from a blow on the head.

Q If a man has a lesion of the brain, which means a blood clot on the brain, blood flows out of the brain cells, doesn't it?

Mr. Braun: If the Court please, I do not think there is any evidence of lesion in this case at all. I think it is a waste of time and I object to it as immaterial and improper at this time.

Mr. William C. Gebhardt. The reason I am doing it is because this man has testified that concussion of the brain could not

keep a man unconscious for more than a day or two at the most; that it might be a few minutes or hours or a day or possibly two days.

The Witness: It might be three days.

Q It might be three months, too, might it not? A Oh, no.

Q If he had a lesion of the brain and the blood clot does not disappear? A A man does not have a blood clot with concussion.

Q What do you call it then? A That is just simply a shaking up of the brain, just as two men fighting and one gets knocked out temporarily.

Q When there is a lesion what do you call it?

Mr. Braun: I object. There is no evidence of any lesion in the case and I object to it.

The Court: There is no evidence of a lesion. There is evidence of concussion.

Q If the concussion is severe enough it will result in a lesion, won't it? A It will be more than a concussion then.

Q What would it be? A It would be a lesion.

Q Is that what you call it? A Yes.

Q It usually results from a blow, doesn't it? A What?

Q Lesion. A If the blow is severe enough.

Q Exactly. By this X-ray showing the parts you cannot see the upper ribs at all, can you? A I did not know there was but one set of ribs.

Q But I say, from this X-ray picture that you have been testifying about, the upper ribs are not shown at all? A I thought you said outer ribs.

Q I am not quite as stupid as that, doctor. A I can see the upper ribs there distinctly.

Q Did you hear Dr. Mills testify he could not? A I did not hear Dr. Mills say anything about this film. He may have said it about one of the others.

Q Didn't he say he could not tell about just which ribs were broken; that there were three that he could not tell it from the picture? A He may have said that; I am not sure.

Re-direct examination by Mr. Braun.

Q Doctor, how large a picture do you usually take for all the ribs? A A 14 x 17 film. You have to take it large enough to get the man's body on it.

By Mr. William C. Gebhardt.

Q This is not large enough, eh? A No.

By Mr. Braun.

Q What size is that? A I will measure it for you. About sixteen and a half one way and that is— That is what is known as 14 x 17.

Q What is the usual distance from the upper to the lower rib? A It depends on the man's height.

Q Suppose you measure Mr. Kinsey and show us where his upper rib is and where his lower rib is.

Mr. Braun: Mr. Kinsey, will you go to the stand, please?

Dr. Lawrence H. Cahill, re-direct.

By Mr. William C. Gebhardt.

Q Can't you tell without looking at the picture, doctor? A Oh, yes.

Mr. Braun: I object to the senator breaking in on my part of the case.

The Court: You can take him in the back room and make the measurements, doctor.

Mr. William C. Gebhardt: I would rather he stay out here.

The Court: Counsel may go in there, and if he is going to remove the clothing it is not necessary to do that here. We will recess for five minutes.

(A five-minute recess was taken.)

By Mr. Braun.

Q Doctor, did you measure Mr. Kinsey? A Yes, sir.

Q What is the distance from the upper to the lower rib? A Posteriorally, from the first dorsal to the end of the twelfth rib is twenty inches; anteriorally sixteen inches, down as far as the tenth rib. The eleventh and twelfth ribs are floating or short ribs.

Q What do you mean by "posteriorally"? A Along the spinal column, posteriorally, and in front, anteriorally.

Q Doctor, something has been said about your testifying as to an examination that you made. Did you have a conversation with Mr. Gebhardt, Junior, since this case was started? A Yes, sir, on last Friday.

Q What was the conversation? A Why, Dr. Washington introduced me and he said "Oh, is

this Dr. Cahill? I did not know you." I said, "Yes. I could never understand why you object to my making an examination." He said, "We would not have had any objection if we understood things as we understand them now."

Mr. William C. Gebhardt: How is this material?

The Court: Yes, how is this material?

Mr. Braun: The senator has made a speech here before the jury about my trying to take advantage of them by putting the doctor on when I promised not to, and I am trying to show what we did.

The Court: The jury can disregard anything that has been said by counsel as to any agreement between them. It has no materiality in this case.

Mr. Braun: I am trying to explain why I am not questioning the doctor on the actual physical examination, because I am keeping that promise now.

By Mr. William C. Gebhardt.

Q Doctor, you say that the length from the upper rib to the lowest rib is twenty inches by your measurement? A Yes, sir.

Q Now just look at those two large X-ray pictures there and tell us what portion of the ribs in front or behind are shown in the picture, both of them? A (Indicating.) This is the picture with the chest on the film, lying down.

Q And you say the space between the first rib and the lowest rib is twenty inches by measurement; did you actually measure it? A I said on Mr. Kinsey, yes. I said from the first

dorsal vertebrae to the end of the twelfth rib is twenty inches.

Q On him? A Yes. On his body.

Q And this film is only sixteen and a half? A Seventeen.

Q Sixteen and a half, you measured it before, didn't you? A Yes. It may be seventeen.

Q Then does it show all the ribs? A No.

Q Which ones does it not show? A It does not show the lower ribs.

Q Do you know any reason why it should not if it is properly taken? A Yes; it was taken to get in the most of the upper ribs.

Q Wouldn't it also take in the lower ribs if it was big enough? A If it were big enough.

Q How many ribs does it show? A About nine ribs. This picture was shoved up so as to get in the collar bone. That is up beyond the clavicle. If it was taken to show the lower ribs particularly it would be placed a little differently.

Q You say this shows nine ribs? A Yes, sir.

Q Then whether the other three, down to the twelfth, were fractured or not, you cannot tell? A Not from this picture.

Q Well, you have not made any physical examination, have you? A I have.

Q What? A I have.

By Mr. Braun.

Q When did you made the physical examination, doctor? A December 22, 1924.

Q Did you come prepared to testify to that today? A Yes, sir.

Dr. George G. Mills, direct.

DR. GEORGE G. MILLS, sworn for the defendants.

Direct examination by Mr. Braun.

Q Are you a practicing physician in this State? A Yes, sir.

Q Where is your office? A Hackettstown.

Q How long have you been practicing? A Over twenty years.

Q Are you familiar with fracture cases and the human skeleton generally? A Yes, sir.

Q Did you examine Mr. Kinsey? A Yes, sir.

Q At my request? A Yes, sir.

Q When did you examine him? A September 24th.

Q What did you find? A I found evidence of calcification or fracture of three ribs and a partial dislocation of the clavicle.

Q Anything else? A Well, there was some injury to the vertebrae too, in the sacral region.

Q Did you find that by examination? A Yes, sir.

Q What did you find as to the man's reflexes? A The reflexes were normal.

Q What did that indicate as to any injury to the spine or the spinal column? A Well, as far as— The reflex itself would not indicate any evidence of injury to the spine; that is, it showed normal function. As far as the mobility of the individual, he was perfectly normal. It showed there was no pressure upon any nerve.

Q Was there any indication of paralysis? A No, sir.

Q What would you say as to the stage of the man's recovery from these injuries? A Well, there is indication, of course, that as far as these

fractures are concerned they are permanent but they will do no harm to him.

Q Is there any lost function in his body? A No lost function.

Cross examination by Mr. William C. Gebhardt.

Q You say you discovered on your examination that there was an injury to the vertebrae? A Yes, sir, the sacral vertebrae. There was evidence of some fracture there or probable dislocation. You see it was a year after the accident.

Q Who asked you to make this examination? A Mr. Braun.

Q Was it done with our consent? A I do not know; I couldn't say. It was done with the consent of Mr. Kinsey.

Mr. William C. Gebhardt: That is all, doctor.

Re-direct examination by Mr. Braun.

Q Doctor, did you make a written report of this? A To the insurance—

Q To me. A Yes, sir.

Q (Showing witness paper.) Is this the written report? A Yes, sir.

Q Will you read it to yourself a minute and then I will ask you a question about it? A (Witness examines paper.)

Q Calling your attention particularly to paragraph 4, the next to the last paragraph. A Yes, sir.

Q Do you remember making that report, doctor? A I remember making this report, yes.

Q Is that report correct?

Mr. William C. Gebhardt: I object to that.

Mr. Braun: Why?

Mr. William C. Gebhardt: Because the doctor is here to testify to what he found.

Mr. Braun: I have not offered the report yet. If there is an objection I would like to have the reason so I can answer it.

Mr. William C. Gebhardt: I object to any reference to that paper, except the doctor wants to use it to refresh his memory. We have no objection to that at all. If there is anything they have not got out of the doctor—get it out. You can ask him whether he did not find so and so; but to use that report in that way is highly improper, I think, and I object to it.

Mr. Braun: I have not used the report yet. I have asked him if that report is correct.

The Court: If there was an objection it is overruled.

Q Doctor, do you remember in that report saying, in paragraph 4, "claims injury to sacral—"

Mr. William C. Gebhardt: Wait. I object to that.

The Court: I think the only purpose for which this can be used is for the purpose of refreshing the recollection of the doctor. He is here to testify, and if he needs that paper to testify as to certain facts that you have not covered on your direct examination the Court will allow it.

Mr. Braun: I will withdraw the question if the senator objects to it. I can get it in on another line, I think.

Mr. William C. Gebhardt: Get it in properly.

Mr. Braun: Well, they are both proper.

Q Did you make any X-ray examination? A No, sir.

Q Did you see any X-ray? A No.

Q Did the man tell you anything about an X-ray examination? A He said he had an X-ray taken.

Q What did he say the X-ray showed?

Mr. William C. Gebhardt: I object to that. What in the world would a layman of that kind know about what a picture showed? I object to it.

The Court: Objection sustained.

Mr. Braun: If the Court please, can I be heard on that a moment?

The Court: Yes, if you think it is worth while.

Mr. Braun: It is merely to show what directed the doctor's attention to certain things.

The Court: That does not make any difference, does it, if the doctor can testify about them?

Mr. Braun: He can testify to any admissions or conversations that are material, with a party to the suit.

The Court: Not as to what he may have said about an X-ray. How could that be binding upon him?

Mr. Braun: It can be introduced to show what directed the doctor's attention to a certain thing.

The Court: I do not think we are interested in that, Mr. Braun. We are interested in what the doctor found, the doctor's testimony as to what we found.

Q Well, doctor, did you actually find evidence of this dislocation of the spine because of something that you were told?

Mr. William C. Gebhardt: I object to that, because that is trying to contradict his own witness now. He says he found on his examination this injury to the vertebrae, and now that evidence evidently does not suit him and he is trying to have the doctor contradict it.

The Court: After refreshing his recollection by reference to this paper, if he wishes to correct his testimony—

Mr. William C. Gebhardt: That is another matter.

Q Does that paper refresh your recollection?
A Yes.

Q Now, after reading that, particularly paragraph 4, do you still say that you personally found injuries or evidence of dislocation in the spine?

Mr. William C. Gebhardt: I object to that as contradicting his own testimony.

The Court: I will permit it and overrule the objection.

Mr. William C. Gebhardt: We ask an exception.

The Court: Yes.

(Last question read.)

A Evidence of dislocation, yes.

Q You personally found that, doctor? A Well, it was either a fracture or dislocation, because of the thickening of the bone. It had nothing at all to do, as far as the function is concerned, with the human body.

Mr. Braun: That is all.

Mr. William C. Gebhardt: That is all.

DR. WALTER S. WASHINGTON, sworn for the defendants.

Direct examination by Mr. Braun.

Q Dr. Washington, are you a practicing physician in the State of New Jersey? A Yes, sir.

Q How long have you been practicing medicine? A This is my fiftieth year.

Q What education have you had along medical lines? A I am a graduate of Trinity, Toronto, in 1876.

Q Since that time have you been connected with any institutions? A Yes, sir.

Q What ones? A I was connected with St. Michael's Hospital in Newark for about ten years. I am an associate member of the staff of the Presbyterian Hospital and I am on the consulting staff of St. James' Hospital. I also had charge of one section of the Emergency Hospital during the epidemic of influenza.

Q What public office or positions have you held in a medical way? A County physician of Essex County for eight years.

Q Have you followed any special line of practice or subjects under your profession? A Well, for thirty years I have made a specialty of insanity or psychiatry, as we call it, and of neurology, in connection with my other work. I also have had a large experience in the reading and examination of X-ray plates ever since they were started.

Q How about fracture cases and things of that sort? A Oh, yes, a large practice. In my first years of practice we had no hospitals where I was and we had to take care of them ourselves. We did not know what it was to have X-rays or have things of that character.

Q Now, I show you Exhibit D. 1 and ask you if you can tell from that what the condition of Mr. Kinsey's shoulder was at the time the picture was taken? A (After examining X-ray.) That shows a fracture of the right clavicle with some overriding.

Q Can you tell approximately how much overriding there is? A Anywhere from a quarter to half an inch.

Q Is it possible to tell from an X-ray the exact length of the bone which casts the shadow which appears on the plate? A No.

Q That is because of the mechanical operation in taking the picture? A Yes.

Q What would you say as to the probable disability or injury of the shoulder joint and the movement of the arm resulting from such an overriding? A The shoulder joint is not involved in any way at all with the movement of the arm, in a fracture of the clavicle.

Q What is the usual result? Is there overriding or isn't there? A There is almost always overriding. It is a very difficult matter, in the first place, to get the fragments back, and particularly to retain them. In the last few years, since the war, they have adopted later methods of retaining the two fragments in apposition and they get better results as far as that is concerned. They get the ends of the bones and keep them there so that they unite in a better position.

Q How long does it usually take a clavicle to heal, doctor? A Four to six weeks.

Q Is there usually any permanent injury resulting from a fractured clavicle? A I never heard tell of such a thing.

Q I ask you to examine that large X-ray picture nearest you, the one, the large one, D. 2. A (After examining X-ray.) That shows a separation of the ends of the third and fourth lateral processes of the lumbar vertebrae on the right side.

Q Have you examined that picture before, doctor? A No.

Q Will you make a careful study of the second lumbar vertebra on the right side? A I looked at it there. I did that.

Q Could you see any evidence of injury to the transverse process on the right side of the second lumbar vertebra? A No; I was unable to see that; only the third and fourth.

Q Those processes show sufficiently clear for you to say whether or not there is an injury there? A Well, the third and fourth rib. I cannot see it on the other one.

Q How about the second one? Does that show it sufficiently clear so you could say

whether or not there is? A Yes, I think it would show the same as the third and fourth ribs.

Q Now, we have had quite a little explanation of the use of those processes. Suppose you tell us what disability, if any, would result from such a fracture. A Well, that, of course, varies in each case. They are usually torn off or separated by muscular violence, not by direct violence. The end is simply imbedded in the muscle which is attached to it, which is part of it; it goes into the muscle, then it holds it the same as anything else. It usually becomes encisted if it does not become united. Occasionally they become united and it is a body there that is perfectly well and healthy and in time does not produce any disability. It is the same as if you get something in some other muscle and it remains there for years or a lifetime without there being any disability as a result of it.

Q How many muscles are there in this region of the spine, attached to the spine? A There are a very large number. There are five layers of spinal muscles, or muscles of the back, rather. There are a very large number. Of these this particular muscle involved here is the first layer. It is on the outside, where the muscles is attached. It is not the deep one.

Q I call your attention to the chart here, showing a profile view of the spinal column, particularly the section from the first to the fifth lumbar vertebrae, and ask you whether or not that is a true depiction of the normal human spine? A (After examining chart.) Do you mean this (indicating)?

Q Yes. A Yes, that is perfectly normal. The double curve is perfectly normal in every one.

Q Is the normal back concave or convex or absolutely straight? A No, it is concave. It would be convex in the upper part.

Q I am speaking of in the lumbar region. A Concave.

Q Is that the normal situation? A Yes, sir, always.

Q Does that vary any? A Oh, yes; in different people it varies. The back, as a whole, varies in different people. Sometimes the concavity is very much larger than that; and sometimes you get what they call round shoulders.

Q Assuming that a man has a very large abdomen, what is commonly called by doctors a pendulous abdomen, would you say that that would have any effect on the size or extent of this concavity? A It would increase it. The tendency would be that in all very corpulent persons. It always does.

Q What would you say as to the fracture of those processes of the lumbar vertebrae? Would they have any effect on this concavity? A Oh, no; no relation to it whatever.

Q Is the fracture of these processes a serious or a minor injury? A It is a minor injury of itself. It is very painful, of course, when it first occurs, the same as any other injury to muscles is. There is no pain from injury to the bone; it is only from the injury to the muscles and the filaments of the nerves that are in the muscles. It is acute from swelling and pressure, but that disappears after a time. Ordinarily it disappears entirely.

Q Then would you say that it would normally leave any permanent disability? A I would not think so.

Q I call your attention to the X-ray D. 3. A (After examining X-ray.) I think there is evidence there of a fracture of three ribs on the lower side of the right side of the chest.

Q What ribs would you say, doctor? A I would think about the seventh, eighth and ninth. They are not so very clear.

Q What would you say as to the apposition? A Very good.

Q Is there good union? A Oh, yes.

Q What kind? A A boney union, except the ninth, there is a possibility of there being some fibrous union.

Q What is the difference between boney union and fibrous union? A In one case the bone unites the ends and in the other case the ends of the bones are united by fibrous tissue. Of course, this fibrous tissue is very small in amount, because the ends of the bones are together and a fibrous tissue is formed instead of being true bone. You cannot shorten the ribs. They are held by the other ribs; and if the ninth riib is broken you cannot make it any shorter in any way whatever unless you take out a part of it, and we have fibrous union sometimes instead of a bony union.

Q Would it be possible for a man to have an incomplete or no union at all in the ninth rib and have that condition since August, 1923, and not feel some pain on respiration? A Oh, no.

Q Would it be possible for him to work? A Yes, certainly; as far as that is concerned there is no disability from the fracture of those ribs.

Q Would it be possible for him to work with a rib un-united? A Yes, I think it might.

Q Without any pain? A Well, he might have some pain, but I do not think the pain

would last that length of time. If there was no union whatever the ends of the ribs would be covered over with some sort of tissue in that length of time and that would not irritate the pleura or nerves; and if that were not so then irritation of the nerves and pleura would cause pain; but I think by this length of time it would disappear.

Q What would you say as to the advisability of removing a man from a hospital in ten days who was fifty-four years of age and who suffered a fracture of the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth ribs on his right side, his clavicle on his right side, and the second, third and fourth transverse processes of the lumbar vertebrae? A Do you mean to get him to the hospital?

Q No; to take him from the hospital to his home, from Dover to Hackettstown? A Well, I think it is possible, of course, to take him in an ambulance anywhere, as far as that is concerned. They ride very easily in ambulances nowadays. But it seems to me the most difficult thing would have been to get him there in the first place, with such a terrible injury as that; and after he had ten days' rest in a hospital it seems to me it would be injudicious and bad practice to do it, but I do not think it would be—

Q What usually follows in an injury as severe as that with a man of his age? A Pleurisy and pneumonia, pleural pneumonia.

Q That would be a very serious injury, wouldn't it? A It would be a very dreadful injury to have so many ribs as that broken, a terrible injury. I never saw it except in a rail-road accident or a severe crushing injury. I never saw so many as that broken.

Q Did you ever see that as a result of a fall? A I do not remember seeing one that was so extensive as you speak of.

Q Suppose the man had three broken ribs, would it be possible to move him in ten days without any severe pain? A Yes, it might.

Q What is chorea, doctor? A It is a nervous disease.

Q What is it usually caused by? A The most frequent and common cause is in children; they are the larger proportion of the cases we have, and it is a result of overwork, overstudy, under nutrition, combined in a great many cases with an hereditary tendency to nervous diseases. Outside of that it is sometimes caused by infection, such as from the tonsils or teeth, and also sometimes follows rheumatism.

Q Is it ever caused, or have you ever seen a case where it was caused by a trauma or a blow? A A trauma has no relation to it whatever.

Q Is it accidental in its character? A No, not at all. It comes on as a result of some cause which is usually known and can be recognized at the time in the patient.

Mr. Braun: I think that is all.

Cross examination by Mr. William C. Gebhardt.

Q Doctor, who pays you to come here? A I suppose probably I will be paid by the United States Fidelity & Guaranty Company; that I expect, anyway.

Q You are regularly employed by them, aren't you? A Oh, no; very seldom.

Q Your principal business for a number of years has been to examine people injured by

accidents, for corporations, and then to testify in court? A Yes, very largely.

Q So that you are, aside from any private means that you may have— A That is very nice of you to say that.

Q —your living would very largely depend upon the money that you get out of these examinations and testifying in court? A Oh, yes, just the same as if I was in private practice, my bread and butter would depend on how many patients I had.

Q You have very largely given up general practice, haven't you? A Oh, yes; entirely, as a matter of fact. I do not have more than one patient a month. Some old people come to see me; they are nearly all dead. One or two hang on yet. I do not think there are a half dozen hanging on yet.

Q And the rest of your time is taken up examining people who are injured and testifying in court? A Yes, and in addition to my psychiatric work, you know, I also do a great deal of work in criminal work in addition, in almost all the courts in this State.

Q This injury to these transverse processes is very painful at first? A Yes, sir; very.

Q How long would that pain last? A It would probably last for a good many months.

Q You would not be surprised to find he still has the pain? A I would not be surprised to find he possibly has some soreness or pain, but it ought to be a great deal less by this time.

Q To have three broken ribs and one broken collar bone and these fractures of these transverse processes of the vertebrae all at once means a severe injury, doesn't it, doctor? A Yes, sir; a severe and painful one.

Q Chorea is a nervous disease, isn't it? A Yes, sir.

Q There is something irregular or out of place with the nervous system when a person has chorea? A Yes, sir.

Q Would it have any relation to neurasthenia? A Oh, no. It is an entirely different thing. It is entirely different from neurasthenia and hysteria, which are quite often traumatic.

Q When a person is very severely injured by a blow or fall it may upset his whole nervous system, may it not? A Oh, yes.

Q The nerves that control this twitching of the head, called chorea, as well as the other parts of the body? A No, it is not confined to one particular nerve or nerves.

Q I do not say it is, but the whole system may be affected by a very severe fall? A Oh, yes; it may be.

Mr. William C. Gebhardt: That is all.

Re-direct examination by Mr. Braun.

Q But would that cause a chorea? A Oh, no; never. Traumatic chorea is absolutely unknown and unheard of.

Re-cross examination by Mr. William C. Gebhardt.

Q Except in this case. A This is the first time I ever heard of it.

Mr. Braun: If the Court please—

Mr. William C. Gebhardt: I thought you were through.

The Court: Proceed, Mr. Braun.

Dr. Walter S. Washington, re-direct.

By Mr. Braun.

Q When you speak of pain at the present time, do you mean that the man evidences pain as he moves around here, or do you mean on pressure? A I do not mean anything at all about it that way. All I know is that the man complains some of pain, and the testimony is that there was some tenderness on pressure, and that is all I know about it outside of that. No one can tell whether one has pain or not, unless it is an injury like a fractured thigh—you do not need to be told that a man has pain who has a fractured thigh, because that is self evident itself; that is sufficient, but when there is nothing left to be found physically it is purely a subjective symptom which can be told you and you do not know whether it is true or not.

Q Wouldn't it show some evidence by spasm in the muscles if it was severe? A Oh, yes, if it was local, a local spasm is very marked.

Q Aside from your work for insurance companies and corporations you have also represented the State of New Jersey in various criminal matters, haven't you, doctor? A Oh, yes, extensively for over thirty years.

Q And private lawyers? A Yes, sir.

Q Both for the plaintiff and defendant? A Yes, sir.

Q Both for plaintiff and defendant? A Not very often for the plaintiff; just occasionally.

By Mr. William C. Gebhardt.

Q You did not make any physical examination of the plaintiff in this case? A No, sir.

Mr. Braun: He was not given an opportunity.

Mr. W. Reading Gebhardt: You could make application to the Court at any time.

ALVIN H. BUTZ, resumes the stand.

The Court: Is there any further cross examination of Mr. Butz?

Mr. William C. Gebhardt: No. We are through with him.

Re-direct examination by Mr. Braun.

Q Mr. Butz, on your cross examination you said that you and Mr. Nester had some conversation about getting an estimate from Mr. Kinsey. Was that the day before the accident? A No; that was after the accident, because before that I had not went into any painting at all. Before that there was no discussion about painting.

Q Just when did you tell Mr. Nester to get an estimate from Mr. Kinsey? A That was about probably a week after that.

Q A week after the accident? A About a week after the accident.

Q How did you come to do that? How did you know to go to Mr. Kinsey? A Through the fact that he had come to Mr. Nester and asked him to have an opportunity to give an estimate on this work.

Q Was that reported to you? A That was reported to me.

Q And prior to the day before the accident or on the day before the accident had you said

anything to Mr. Nester about getting an estimate? A No. I did not know Mr. Kinsey at that time.

Q Did you know anybody else around there that was in the papering and painting business? A I did not.

Q How did you come to ask him to get an estimate from Mr. Kinsey? A Mr. Kinsey had come to the building and asked Mr. Nester to have an opportunity to bid on the job.

Q What did you tell Mr. Nester here with reference to Mr. Kinsey's application? A I told him to get a bid in accordance with the plans and specifications.

Q What did you mean by that? A That applied to the building as the complete article.

Q Did you have plans and specifications on the building job? A At the building site.

Q Where were they? A Adjacent to the building, in the office which we had provided for that purpose.

Q Were they there all the time? A All the time.

Q I show you—(handing papers to the witness)—these two papers and ask you what they are? A Those are the drawings.

Q And those were there at the time? A All the time.

Mr. Braun: I offer them in evidence.

The Court: They may be admitted.

(Papers marked Exhibit D. 5.)

Q Are those plans complete as to the measurements? A Oh, yes; they were the complete set of plans.

Q And from those could an experienced man figure the wall space, the square yards? A The nature of the work is all described on these plans.

Mr. Braun: That is all.

Re-cross examination by Mr. William C. Gebhardt.

Q Mr. Butz, when did you first hear of the accident to Mr. Kinsey? A Why, we got a report of that accident the time that he was hurt.

Q And you knew that he was taken to the hospital? A I did not. All the details that we got was that Mr. Kinsey was hurt.

Q Well, you some time got the information that he was in the hospital, didn't you? A By a report which Mr. Nester made in detail to us. That came a few days later.

Q A few days later? A Yes, sir.

Q You knew then that at the end of a week after the accident he was in the hospital, didn't you? A Well, I think we got the report at the office, but I am not sure whether I knew that he was sent to the hospital. I knew he was hurt and that he was under the care of a physician but I did not know that he was taken to a hospital. I did not know the extent of his injury.

Q When did you first learn the extent of his injury? A Well, to be frank about it I never did learn the extent of the injury.

Q Well, you said a while ago that it was a week after the accident? A Yes.

Q When you first had this talk with Mr. Nester about getting Mr. Kinsey to make a bid. Now you knew that at that very time he was

in the hospital, didn't you? A No, I did not. I did not know he was taken to the hospital. I knew he was hurt, but I did not know he was taken to the hospital.

Q You understood that he was very seriously injured, didn't you? A I did not. I did not know the extent of his injuries.

Q You knew he was not able to come there and figure on the building one week after the accident, didn't you? A Well, I could not say. I did not know how bad he was hurt.

Q But you testified yesterday that all this talk about Mr. Nester and the giving out of this bid for the painting, over and over again that it was before the accident, didn't you? A Yes, sir; but I've refreshed my memory since, and it is after.

Q Did you, yes or no? A I did; yes, sir.

Q Did you say only yesterday that "While we were considering this bid from our regular painter who generally does our work Mr. Nester told me that he was getting a bid from Mr. Kinsey of Hackettstown." Did you say that yesterday? A That is right.

Q And did you say "I told Mr. Nester that in getting this bid," that is, Kinsey's bid, "the bid should be in accordance with the plans and specifications, as that would be the only way we would acept it; and we never did get a bid from Mr. Kinsey on the work and that was the last I have heard of that situation until this accident occurred." A This was all after the accident.

Q Yes, but did you testify as I have just read to you just now, yesterday, on the witness stand? A That is right.

Q And in answer to the question, "Then all this was done, that you have related now, before

the accident?'' You answered, ''Before the accident; that is right.'' ''And did you say to Mr. Nester that he should get a bid?'' Answer: ''He should solicit bids; yes, sir. We told him that he should get a painting bid on this work.'' Question: ''That is before the accident?'' Answer: ''Before the accident.'' Question: ''And Mr. Nester was the superintendent?'' Answer: ''That is right.'' Question: ''He hired the men there?'' Answer: ''That is right.'' Question: ''Discharged the men and paid the men with the money that you supplied him with?'' Answer: ''Yes, sir.'' Question: ''And you authorized him to get bids on this work before the accident?'' Answer: ''Before the accident.'' Did you so testify yesterday? A I did.

Mr. William C. Gebhardt: That is all.

Re-direct examination by Mr. Braun.

Q How did you come to testify that way, Mr. Butz? A Well, we at all times told Mr. Nester to—

Mr. William C. Gebhardt: I object to that, what he told him on other occasions.

The Court: Objection sustained.

Mr. Braun: He is trying to explain why he said that at this time.

The Court: I will permit him to explain.

The Witness: In this painting situation I did not know of Mr. Kinsey until after the accident. Mr. Kinsey's name never appeared before the firm; and Mr. Nester's report to us was that Mr. Kinsey was

desirous of giving a bid on this building and asked whether it would be agreeable, and I told him it would be provided he would bid on the job in accordance with the plans and specifications which were on file in the office.

The Court: We have been all over that. He testified to that yesterday.

Mr. Braun: What confused you as to the dates?

The Witness: Well, this has been quite a time after this accident, quite some time since the conversation that I had with Mr. Nester about getting a bid on this painting work; so it is simply because Mr. Nester was there on a particular day and I didn't know whether this was before the accident or after the accident.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

The Court: Have you finished with Mr. Butz?

Mr. W. Reading Gebhardt: Yes, sir, I think so.

WAYNE NESTER, sworn for the defendants.

Direct examination by Mr. Braun.

Q Where do you live, Mr. Nester? A Allentown.

Q What is your business? A Superintendent of construction.

Q Were you superintending some work for Butz & Clader, the defendants in this case, on the day that Mr. Kinsey met with this accident? A Yes, sir.

Q Were you there the day before? A Yes, sir.

Q Did you have any conversation with Mr. Kinsey on the day before? A I did.

Q What was that conversation, what did Mr. Kinsey first say to you? A Mr. Kinsey came there and asked me if the painting contract was let. I told him I did not think so, because Butz would be down the next day and I would get something from him.

Q By that who did you mean? A Butz, the contractor.

Q Which one? A Alvin, the son.

Q Was the father active in this particular contract? A I never saw him on the Hackettstown job.

Q What did Mr. Kinsey say to that? A Mr. Kinsey told me that he painted the old building and he would like to have a chance to paint the new one.

Q Did he say anything about an estimate? A Yes. He told me he would like to have a chance.

Q What did you say? A I told him that the plans and specifications was there in the little office that we had on the outside and he could have them.

Q Yes. What did he say to that? A Well, he told me he was busy that morning and he would be around the next morning.

Q Did you see him the next morning? A Not until this accident happened.

Q Did he speak to you again about it? A No; I didn't meet him after that.

Q Did you have any conversation with Mr. Butz about the estimate of Mr. Kinsey prior to the day that Mr. Kinsey came there? A I told him that Kinsey had painted the old building and he would like to paint the new one, he would like to put an estimate in.

Q When did you tell him that? A That might have been the same day, over the long distance telephone.

Q Do you remember when that accident took place? A Around the next day I think it was.

Q Did you ever ask Kinsey to go through the building? A I never did.

Q Are you familiar with the usual custom of figuring on estimates of this sort? A I am not.

Q Do you have anything to do with securing estimates or getting contracts, sub-contracts, on this kind of work, for Mr. Butz? A Why, being out in the field sometimes a local man would come around and ask to put an estimate in and I would give him the information.

Q Were you ever told to do that? A I was not.

Q Did you know Mr. Kinsey before this accident? A The day before when he came there on the job first.

Q Is that the first time you ever met him? A The first time I ever met him.

Q Did you ever see him before? A I did not.

Q What was the condition of the building on the day of this accident, as to completion; was the construction part finished? A The construction—why, the plumbers were in it, the steam fitters were in it, and lathers and there were a few carpenters in it and some laborers working around the building cleaning up.

Q How did they get from one floor to the other in the new section? A In the new section they had to use ladders.

Q Were there any stairs in it then? A No stairs in it at that time.

Q Did the plans and specifications call for stairs? A Well, stairways as a rule always go in—

Q Well, did they in this case? A In this case the stairs were not in yet.

Q Were there stairs to go in? A Yes, sir.

Q Were they put in subsequently? A They were put in later on.

Q What was the purpose of this hole that has been described? A In the north end?

Q In the north end, yes. A That hole there was left for the purpose of doing some fabricating of steel there. There was a cross "I" beam standing there and I couldn't run the concrete floor through on account of that fabrication.

Q What, if anything, was done with the hole? A On the second story I will say, the second story hallway, there was floors built through there, for a concrete floor and over this hole was all the work put in there to support the floor above.

Q What sort of work was that? A There was some six by six or eight by eight stringers across there and three by four uprights to support the floor above.

Q Why was that necessary? A In order to get the top floor finished and move the top floor ahead until this steel would be fabricated down below on the first floor.

Q What was the condition of the doorways from the old building into the new building?

A The doorway, the end of the old building in the hall, the hall adjoining the new building from the old to the new, was taken out and there was no doorway there.

Q Had you been in this hallway where this hole was situated on the floor from which Mr. Kinsey says he fell? A Yes, I came through there about every day.

Q Did you know the condition there as to light? A Well, I think the light was pretty fair. The men working around there could see, and, if I ain't mistaken I think there was a window right where the old building adjoins the new one, a window about six feet away from the new addition, bringing light through there.

Q I show you this photograph and ask you if that is a fair representation of the building as it existed at the time of this accident? A That is a picture of the new and the old addition.

Q Does that window show on there? A It is not shown on here.

Q Why not? A Because the hallway of the old and new building is right in back of it. That is around the outside.

Q That is a true representation of the outside? A This here is the bridge between the old building and the new one.

Mr. Braun: I offer that picture in evidence.

(Photograph heretofore marked D. 1 for identification is marked Exhibit D. 6.)

Q Had you been through there before this accident occurred, on that day? A This accident, I think, happened around nine o'clock. I might not have been through; I don't know.

Wayne Nester, cross.

Q Were you there the day before? A Yes.

Q Was there any scaffolding or any other construction in the end of the hall? A Why, the lathers had been working in that end of the building at that time.

Q What had they been working on? A Well, if they were working on the ceiling they had a scaffold in there.

Q Did you see that scaffold? A I can't remember.

Mr. Braun: Cross examine.

Cross examination by Mr. William C. Gebhardt.

Q I understood you to say, Mr. Nester, on your direct examination that you never saw the father of the young Mr. Butz on this job at all; is that right? A I didn't see him any on this particular job.

Q How long had this job been going on? A I started that job on the third of April of the same year.

Q Was the father that you spoke of a partner in this business?

Mr. Braun: If the Court please, I do not object to it, but this man is not competent to testify as to that.

The Court: I do not suppose he is, but it is not disputed.

Mr. Braun: It is not disputed and we admit it in our pleadings.

Mr. William C. Gebhardt: I am not familiar with the pleadings.

The Court: That paragraph is admitted.

Q Now who did come to this job? A Why, Alvin Butz, the son.

Q That is the man who was on the witness stand this morning and yesterday? A Right.

Q Is he the only one that came? A That is the only one that came down on the job. I understand that this young Butz takes care of the outside work and the old man Butz of the town work.

Q How often did Alvin Butz come? A He came once or twice a week.

Q How long did he stay when he came? A Oh, one time he stayed an hour and sometimes he stayed two hours.

Q And the work went right on just as if he never came at all, didn't it? A That was what I was there for.

Q You had entire charge of the work? A Yes, sir.

Q You hired the men? A I hired the laborers and the carpenters; that is about all I hired; and sometimes a cement finisher.

Q You paid them with Mr. Butz's money? A He always brought the money in envelopes and I paid off the men as they were named on the envelopes.

Q And you discharged the men when you saw fit? A Yes, sir.

Q Mr. Butz had nothing to do with that part of it at all, did he? A If he came around and saw a man that wasn't right, he fired him himself.

Q But he was only there an hour or two a week? A Sometimes he came around twice a week.

Q How often? A Oh, that might happen about once or twice in a month.

Q It had been a custom in working for this firm for you to put parts of the work up to bidders? A The sub-contract was always let through the office, through the main office.

Q Didn't you in this very case get instructions from Mr. Butz to get a bid or at least to receive a bid from Mr. Kinsey? A I told him over the long distance telephone that Kinsey had been there and would like to estimate on the work and he told me it would be all right.

Q He told you it would be all right? A Yes, sir.

Q Did you afterward ask for bids on this painting work? A When Mr. Kinsey was in the hospital I think I was down to the house and asked Mrs. Kinsey if he would be able to get his estimate out.

Q Didn't you ask others to bid on this painting work? A He was the only man that inquired about this painting from that district.

Q Mr. Kinsey was there on the morning of the day before the accident? A That is right.

Q And then you had a talk with him? A He told me who he was and what he was after.

Q Then you called up Mr. Butz on the telephone that day and told him about Mr. Kinsey being there, didn't you? A Right.

Q And Mr. Butz then told you to go on and get his bid, didn't he, to get Mr. Kinsey's bid. A I told Mr. Kinsey that Mr. Butz would be around the next day and he could meet him and give him his figure.

Q I am talking about over the telephone. You talked with Mr. Butz over the telephone? A I did.

Q And you told him that Mr. Kinsey had been around talking about putting in a bid, didn't you? A I did.

Q Then you told Mr. Butz that and what did he say in reply when you told him that? A I guess he said that he would accept the bid.

Q Didn't he tell you to go on and get his bid? A No.

Q Accept his bid? A No.

Q Well, didn't he say that it would be all right to take his bid? A All right to take his bid and put it in the office and let him check it up.

Q Just answer my question. If you want to make other explanation all right. Didn't he tell you to go on and accept his bid? A No.

Q I am not asking you whether he then and there—Mr. Butz—authorized you to make a contract with Mr. Kinsey. I am asking you if he did not on the telephone tell you to go on and permit Mr. Kinsey to make his bid. A He told me he would be over the next day and he would take it up with Mr. Kinsey. That is what he told me.

Q Did he tell you that in getting this bid from Mr. Kinsey the bid should be in accordance with the plans and specifications as that was the only way he would accept it? A He might have said that to me.

Q In other words, after you talked with him on the telephone that day you had the power to accept a bid from Mr. Kinsey if he saw fit to make one.

Mr. Braun: If your Honor please, I object to the form of that question: "The power to accept the bid." That is ambiguous.

Mr. William C. Gebhardt: All this is cross examination, your Honor.

Mr. Braun: That is putting words in the man's mouth. There has been no testimony to that extent.

The Court: I think there may have been some confusion over the words "acceptance of the bid."

Mr. William C. Gebhardt: Strike out the other question then.

Q Then after the conversation with Mr. Butz over the telephone that day didn't you have the authority to receive a bid from Mr. Kinsey? A No, because the arrangement was made that Mr. Kinsey should meet Mr. Butz the next day, the time he had the accident; that was his time to be in Hackettstown. It was pay day.

Q How did that interfere with your receiving the bid, with your having authority to receive this bid? What difference did it make whether Mr. Butz was there or not? A I had no authority to receive bids.

Q What were you there for? A To look after the work, and any information that the sub-contractors wanted to know I should give them.

Q Didn't you have, so far as the painting itself was concerned—wouldn't you have had the power or didn't you have the power to hire and discharge men to do the work? A Not for the painting. That was sub-contract work, except on a special occasion. When I am tied up he gives me authority to get a painter.

Q Didn't you have the power to hire Mr. Kinsey by the day to do the painting? A No. Mr. Butz told me he was going to sub-let that work.

Q That he was going to put it out by contract. A He was going to put it out by contract. He told me he would sub-let it.

Q And you tell the Court and jury now that you did not have authority to even receive a bid from Mr. Kinsey? A I did not.

Q You arranged for him to come the next day and make his estimate, didn't you? A The next day was—

Q Answer the question, yes or no. A What do you want to know?

Q I want to know whether you did not arrange with Mr. Kinsey for him to come and make his estimate the next day. A I told Mr. Kinsey that Mr. Butz would be down the next day.

Q Didn't you tell him he should come the next day to make his estimate? A I might have told him I would introduce him to Mr. Butz and get him acquainted.

Q Didn't you tell him that the next day he should come and make his estimate of what he would do the work for? A I didn't care what he would do. I told him where the plans were.

Q Do you agree with Mr. Butz's testimony, given on the stand yesterday, to the effect that you should solicit bids, and that was before the accident?

Mr. Braun: If the Court please, whether he agrees with it or not is not material to this issue. He has stated what he said and did and I do not think he should be called upon to characterize what the other witness stated and I object to it.

The Court: I will sustain the objection.

Wayne Nester, cross.

Q Didn't you subsequently to the accident say to Mrs. Kinsey that you had invited Mr. Kinsey to come there that day and make this estimate?

Mr. Braun: If the Court please, I object to that unless it is purely for the purpose of laying a foundation for contradiction.

Mr. William C. Gebhardt: That is the purpose of it exactly.

A What was the question please?

(Last question read.)

The Witness: I had notified him to come there and get acquainted with Mr. Butz.

Q You have not answered the question.

Mr. William C. Gebhardt: Please read it again.

(Question again read.)

A To that I will say, "No," then.

Q And didn't you also say in her presence that you recognized Mr. Kinsey as the man—This was after the accident—say to Mrs. Kinsey that you recognized Mr. Kinsey as the man you had invited to come there and maks his estimate?

Mr. Braun: Unless the time and place is fixed I object to the question.

A In the doctor's office—

Mr. Braun: Just a minute.

Q Counsel wants the time fixed, so I will reframe the question. Didn't you on the day of the accident and after the accident happened, say to Mrs. Kinsey in her house and in Mrs. Kinsey's presence or in the presence of others, that you recognized him as the man that you had invited to give a figure on the building? A I did not.

Q Or words to that effect? A The first time I recognized him—

Q Or words to that effect? A I do not know anything about it.

Q Well, did you or didn't you say that? A I did not.

Mr. William C. Gebhardt: That is all.

Mr. Braun: That is all, Mr. Nester. At this time I would like to read into the record and offer the statement in evidence of Mr. Kinsey which was marked D. 2 for identification, and the signature to it was admitted by Mr. Kinsey.

The Court: The statement has not been proved yet. I understood that the witness, when he was confronted with the statement, denied that he had said certain things in there.

Mr. Braun: He said that he signed it.

Mr. William C. Gebhardt: He said that he signed a paper.

Mr. Braun: And that the statement had been read to him.

The Court: Yes. Did he say he had made it?

Mr. Braun: He said he signed the statement.

The Court: He said he signed the statement, that that was his signature, but he denies, as I recall it, having made the statements that appear in that document.

Mr. Braun: He said he did not remember whether that was in it or not.

The Court: I think in order to put it in you would have to prove it in some way by the party who took the statement.

Mr. Braun: Not for the purpose of contradicting him or attacking his veracity.

The Court: That would be so if he admitted that he made the statement, but if he did not admit it then I cannot admit the statement, in the face of his denial.

Mr. Braun: When the statement is in writing and over his signature?

The Court: Yes. If there was a witness to it—

Mr. Braun: I am not offering the statement as evidence of the actual occurrence. I am offering it to attack his veracity.

The Court: How does that affect his veracity unless you can show—

Mr. Braun: If a man signs a statement it is some evidence that he meant to say what is in there. People don't sign things without knowing what is in them.

The Court: Is there any objection to that statement going in?

Mr. William C. Gebhardt: We are just discussing it.

The Court: Let me see the statement.

Mr. Braun: It is not necessary to prove the statement by the subscribing witness.

The statement is offered for the purpose of affecting the credibility of the witness.

The Court: I think it is, the witness denies making certain statements contained in it and where the statement itself has a subscribing witness.

Mr. William C. Gebhardt: Will your Honor indulge us a moment while we read it? Maybe we will withdraw our objection.

(Counsel for the plaintiff examines paper.)

Mr. William C. Gebhardt: We withdraw the objection to the admission of the paper, your Honor.

The Court: That disposes of it then; it may be admitted by consent.

Mr. William C. Gebhardt: I would rather not put it that way, but we withdraw our objection.

The Court: All right.

(Paper referred to is marked Exhibit D. 7.)

(Mr. Braun reads Exhibit D. 7 to the jury.)

(Defendant rests.)

MRS. LUCY KINSEY, recalled for the plaintiff in rebuttal.

Direct examination by Mr. William C. Gebhardt.

Q Were you by on the twentieth of September, 1923, when this statement was signed by your husband? A I was.

Q Before your husband signed it was it read over to him? A Well, I don't think it was.

Mr. Braun: I object to that question, if the Court please. It is a question of what she knows.

The Witness: I do not think it was read. I think it was passed over the table for him to sign it.

Mr. Braun: Well, I will withdraw the objection.

Q Was there any mention that day of the words "as I was walking from a room into the hall on the second floor I was writing on a pad some measurements I had made and did not notice the opening in the floor."

Mr. Braun: I object unless there is something shown as to what he was talking about, what conversation he is referring to.

Mr. William C. Gebhardt: I am reading from this statement.

The Court: The question is whether it was made in that statement.

A There wasn't anything of the kind brought up that day.

Q Did your husband say to the man who was there any such thing as writing on a pad? A No, sir, not at that time.

Q There seems to be down on the left-hand corner, "Witness, B. A. Hardeman." Do you know who that is? A That must have been the man who brought the paper. There wasn't anyone else except Mr. Kinsey and myself there.

Q Have you any information as to who this man represented? A An insurance company.

Q Were you there when he first came in? A I was.

Q What did he say? A He said that he was the insurance adjuster—

Mr. Braun: If the Court please, I move to strike that out as not binding on this defendant, and what somebody came in and said is pure hearsay.

Mr. William C. Gebhardt: That is correct ordinarily, but here is a witness to this instrument who has not been produced. They have rested their case and have not produced this man.

Mr. Braun: Certainly not. You held us up twice when we brought him on from St. Louis.

Mr. W. Reading Gebhardt: You could have taken his deposition or had him here at this time.

Q Do you remember Mr. Nester being at your house a day or two after? A Yes, sir.

Q After the accident? A Yes, sir; it was after it, and he helped bring Mr. Kinsey home. He came with the doctor.

Q Did you have a conversation with him? A I did.

Q What did he say to you in the beginning?

Mr. Braun: I object on the ground that what Mr. Nester said is not binding on these defendants.

The Court: It is to contradict the man's testimony.

Mr. Braun: I won't object if it is purely for that purpose.

The Court: The specific question is whether he did say what he denied saying.

Q Did he say to you on that occasion that he recognized Mr. Kinsey as the man that he invited to come and figure on the building? A That is the very words he said.

Cross examination by Mr. Braun.

Q What were the very words? A He said that no one knew him and—

Q What were his exact words? A He said like this, he recognized him in the doctor's office as the man that he had invited to come over and do the figuring.

Q You are not telling the exact words, are you? A Yes, sir, I am telling just the way he said it to me.

Q What did he say when he first came in? A He didn't say anything for a while, and they brought him in and laid him in the bed and after a while I came out of the room and he said, "Mrs. Kinsey, broken ribs are very painful. I had two one time myself." And he said how Mr. Kinsey was such a big man, and how they had taken him to all the doctors and finally found this one at home and he said none of the doctors knew him and he said, he was so black that no one would know him and the doctor kept asking, "Who is it? Who is it?" and he said to himself, "Kinsey" and then he said, "Then I recognized him as the man I had told to come over and do the figuring."

Q You remember that very distinctly? A Yes, sir.

Q It is very clear in your mind? A Yes, sir.

Q You were not excited, were you? A I was excited, but I thought the time had come when I had better look out for myself and I let

all the other things go by and remembered anything. Mr. Kinsey told me himself that any time anything happened to him that he wanted me to do something and I began to think the time had come when I'd have to do it.

Q That was all after the accident? A No; he never had an accident before, but in case anything should happen any time he has told me that for years certain things he wanted me to do in case of an accident.

Q Did you write this down? A No, I did not.

Q You remembered it? A Yes, sir, it is stamped right on me.

Q Indelibly? A Yes, sir.

Q Where was that statement written? A In the sitting room.

Q At the table? A Yes, sir.

Q And there were just three of you present? A Yes, sir.

Q Where were you? A I sat in the room. Mr. Kinsey sat on one side of the table, it was a large table, and this man on the other.

Q You sat down near your husband? A Yes, sir.

Q Was this given to your husband to sign? A Yes, sir, passed over for him just to sign.

Q Nothing was said about what was in it? A No, sir. He began to talk about something else.

Q He merely handed that over and said, "Sign this?" A Yes, sir.

Q You sat there, and did you say anything? A No, sir, because I thought it was all right. He said he was the insurance adjuster.

Q You thought it was all right for your husband to sign this paper? A I did. He said he was the insurance adjuster.

Q You have said that about six times already. I think the jury heard you. You sat right there and said not a word? A No, I said I thought it was all right.

Q You did not say a word, did you? A No.

Q And you let your husband take this paper and sign it? A Yes, sir.

Q What did he do with the paper then? A He passed it back to the man.

Q Was the writing on the paper when he signed it? A Yes, sir.

Q There was writing on the paper when he signed it? A Yes, sir.

Q And there was writing all the way down to the bottom? A Yes, sir.

Q And that is where he signed it? A Yes, sir.

Q Was it handed to him open or folded? A It was just passed over to him.

Q Just as it is now? A Yes, sir. He didn't have any glasses on and—

Q Now wait, please. It was handed over to him openly? A Yes, sir.

Q With the writing up? A Yes, sir.

Q And he signed it? A He signed it, but he didn't have any glasses on.

Q He could see to sign it, couldn't he? A To be sure.

JOHN S. KINSEY, the plaintiff, recalled in rebuttal.

Direct examination by Mr. William C. Gebhardt.

Q Mr. Kinsey, do you remember the day you signed that paper? A Yes, sir.

Q Did you know at the time you signed it that these words were in it, "As I was walking from the room into the hall on the second floor I was writing on a pad some measurements I had made and did not notice the opening in the floor."

Mr. Braun: I object to that question as not proper rebuttal at this time on the part of this witness. He has already testified and identified the statement and testified on it.

The Court: As I recall the testimony, he testified as to that specific statement and said he did not know whether that was in it or not. That is my recollection.

Mr. Braun: That is what he testified.

The Court: So I think it is not rebuttal.

Mr. William C. Gebhardt: It was not in evidence then, your Honor. The paper was not in evidence then; it was not in evidence until a few minutes ago.

The Court: No, but that portion of the statement was read to him.

Mr. William C. Gebhardt: Well, if we have gone over it we do not desire to go over it again, but I have no recollection of it.

The Court: Yes. It was on that ground that I raised the question of its admissibility without proof, because he did deny having made or at least was not sure of such a statement.

Q On that occasion, did the claim agent ask you whether you were writing on a pad at the time?

Frances Marie Kinsey, direct.

Mr. Braun: If the Court please, I object to this question on the ground there is no evidence here that there was a claim agent there.

Mr. William C. Gebhardt: We will withdraw the question. That is all.

FRANCES MARIE KINSEY, sworn for the plaintiff in rebuttal.

Mr. William C. Gebhardt: If the Court please, I should like to after this witness leaves the stand, to ask a question or two of Mr. Nester, that we overlooked on cross examination.

So, Mr. Nester, please do not leave.

Direct examination by Mr. W. Reading Gebhardt.

Q You are a daughter of John Kinsey, the plaintiff? A I am.

Q Were you present when your father was brought home the day after the accident, to your home? A I was.

Q Were you present during the conversation that took place between Mr. Nester and your mother? A I was.

Q On that occasion please state whether or not Mr. Nester said that he recognized your father as the man that he had told to come over to the schoolhouse and figure on the painting? A He did say that.

Wayne Nester, further cross.

Cross examination by Mr. Braun.

Q How old are you, Miss Kinsey? A Eighteen.

Mr. Braun: That is all.

WAYNE NESTER, recalled for further

Cross examination by Mr. William C. Gebhardt.

Q Mr. Nester, did you state subsequently to the accident, within a very few days of the accident, at the schoolhouse, to the brother, Jerome Kinsey, a brother of Mr. Kinsey, the plaintiff, and his son, Bob Kinsey, that you had invited John Kinsey to come there and figure on or make an estimate on this painting job?

Mr. Braun: I object to this unless it is purely for the purpose of impeaching him.

Mr. William C. Gebhardt: Yes.

The Court: It is admisible for no other purpose.

Mr. Braun: When was this?

Mr. William C. Gebhardt: Just two or three days after the accident.

A I haven't got the question.

(Last question read.)

The Witness: I did not.

Mr. William C. Gebhardt: That is all.

Jerome Kinsey, direct.

Re-direct examination by Mr. Braun.

Q You don't usually speak of inviting people to do business, do you?

Mr. William C. Gebhardt: I object to that. It is a question of what he did on this occasion.

The Court: Yes.

By Mr. William C. Gebhardt.

Q Did you use any words to that effect on that occasion? A If I said something I told the man to come over and meet Mr. Butz and get acquainted with him.

Q Did you use words to that effect to these two men? A No.

JEROME KINSEY, recalled for the plaintiff in rebuttal.

Direct examination by Mr. W. Reading Gebhardt.

Q Mr. Kinsey, you are a brother of Mr. Kinsey, the plaintiff? A Yes, sir.

Q I wish you would please state whether or not Mr. Nester said to you at the schoolhouse in Hackettstown a few days after the accident, in a conversation you had with him, that he had invited or told Mr. Kinsey to come over to the schoolhouse and make an estimate on the painting job. He told me that at his house—

Mr. Braun: I object to the form of this.

The Court: Yes. It should be yes or no.

Q Did Mr. Nester tell you that or not? A Yes, he did.

Cross examination by Mr. Braun.

Q Those were the very words he used? A I asked the question of him and he answered it to me.

Q Then he did not say that. A I asked him.

Q You went around and asked him that? A At his home.

Q Who told you to do that? A Mr. Kinsey's wife talked it over and wanted to know if they had made any application for any liability insurance.

Q That is what you were interested in, eh? A To see if there was going to be any application made.

Q When you went there it was purely for the purpose of securing all the data you could to help bolster up a claim, wasn't that so? A No, sir; not necessarily.

Q That is all that was in your mind, wasn't it? A Not necessarily.

Q You did not care how your brother happened to fall, did you? A Well, I knew that he had fallen.

Q You did not care how he got on the premises, did you, personally? Did it make any difference to you how he got there as long as he fell and was in there? A I knew he had got there. I didn't know how he got there.

Q It did not interest you particularly how he came to get there, did it? A It naturally would.

Q You think it was very important in view of the fact he got hurt, to find out just how he

happened to get on the premises. A It naturally interested me. He was hurt.

Q And you wanted to find out how he came to be there in the first place. A Yes, sir.

Q Did you ask your brother? A My brother was not home.

Q You did not think it necessary to go see him about it. A My brother was not home from the hospital yet.

Q You did not try to find out from your brother did you? A I had been to the hospital to see him.

Q Did you ask him how he happened to be there, when you saw him at the hospital? A Yes.

Q And did he tell you? A Yes, sir.

Q Then why did you go see Nester? A I went up to see if he had made any application for insurance.

Q Then you did not ask him if he had invited your brother there. A Yes, sir.

Q You asked him that, too? A Yes, sir.

Q Even though your brother had already told you how he got there? A Yes, sir.

ROBERT V. KINSEY, sworn for the plaintiff in rebuttal.

Direct examination by Mr. W. Reading Gebhardt.

Q Are you a son of the plaintiff? A Yes, sir.

Q Were you along with Jerome Kinsey on the day that this conversation took place with Mr. Nester? A I was.

Q Please state whether or not in the course of that conversation Mr. Nester stated that he had invited or told your father to come to the schoolhouse and make an estimate on this painting.

Cross examination by Mr. Braun.

Q Did you go there for the same purpose that the other gentleman went? A I was along with him.

Q Did you join in the conversation? A No.

Q Then he did not say that to you, did he? A I was there and I heard it.

Q But he did not say it to you. A No, sir.

Q When you said he did, you did not mean that. A I heard it.

Q You heard him say it to someone else. A Yes, sir.

Q Were those his exact words? A Yes, sir.

Q Just exactly as counsel stated it to you? A Yes, sir.

Q How long ago was that? A I do not know how long ago it was.

Q You do not know when it was? A I do not know how long ago it was.

Mr. Braun: That is all.

Mr. W. Reading Gebhardt: That is our case.

Mr. Braun: If the Court please, I should like to make a motion at this time.

The Court: The Court will recess at this time.

(The Court and counsel retired.)

Mr. Braun: If the Court please, I respectfully move for a direction of verdict in favor of the defendants on the ground that there is no evidence of any invitation by the defendants personally, and on the further ground that there is no evidence of any invitation by the defendants through their authorized agent or servant for that purpose; and on the further ground that the denial of the agency, uncontradicted, by the defendants rebuts the presumption raised by any possible testimony which would raise an inference as to the agency that was introduced on the part of the plaintiff, and, therefore, the presumption being rebutted, or the inference rebutted, by uncontradicted testimony, the agency has not been proven and should not go to the jury.

On the further ground that there is no evidence of an invitation to inspect the premises at the particular time on which the accident happened; and on the further ground that the plaintiff knew or should have known or could have known by the exercise of reasonable diligence, of the unfinished condition of the building and the existence of the hole and he therefore assumed the risk.

On the further ground that he was guilty of contributory negligence as a matter of law since if there was not sufficient light for him to see clearly he should have waited until his eyes adjusted themselves or secured better light.

And on the further ground that by the use of reasonable care and diligence he could

have observed or known that the hole was there, as testified to by his own witnesses and was therefore guilty of contributory negligence as a matter of law.

I move to strike out the evidence as to the choreaic condition, as not having been definitely proven as a result of this accident, under the case of Cheste *vs.* Cape May Real Estate Company, 73 Atlantic, 836.

The Court: Is that all?

Mr. Braun: Yes, sir.

The Court: Dealing with the last motion first, that is, the motion to strike out the testimony dealing with the condition of chorea, do you oppose that?

Mr. W. Reading Gebhardt: We oppose it.

(After argument.)

The Court: I think, that on the motion to direct a verdict, that on the present state of the evidence the question of invitation and negligence of the defendants, and contributory negligency of the plaintiff are all fact questions and must go to the jury. Therefore the motion for a directed verdict is denied; and also the motion to strike out that portion of the testimony with respect to the condition of chorea is denied.

Mr. Braun: And your Honor will allow me an exception.

The Court: Yes.

(Mr. Braun summed up for the defendants.)

(Mr. William C. Gebhardt summed up for the plaintiff.)

The Court: I will charge the jury tomorrow morning in this matter. In the meantime you will not permit anyone to discuss this case with you, and if anyone approaches you I wish you would report it to the Court.

(Adjourned until Wednesday, June 24, 1925, at 9:30 o'clock in the forenoon.)

Belvidere, N. J., June 24, 1925.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

CHARGE OF COURT.

The Court (Jess, *J.*): Ladies and gentlemen of the jury. The plaintiff, John S. Kinsey, brings this suit against the defendants, Solomon Butz and Alvin H. Butz, trading as Butz & Clader, to recover damages for personal injuries which he claims to have suffered as a result of the negligence of the defendants.

The defendants, in the year 1923, were engaged in constructing for the Board of Education of Hackettstown a ten-room addition to a public school building of that borough. On the twenty-second day of August in that year, while the work was in progress, the plaintiff, Kinsey, entered the building, the uncompleted structure, and while in the hall on the first floor above the ground floor fell through an opening about eight or nine feet square to the floor below and received the injuries upon which this suit is based.

The fact that the plaintiff was injured by an accident in a building which the defendants were

erecting does not of itself entitle him to recover from the defendants in this suit. In order to hold the defendants liable the plaintiff must show by the greater weight of the evidence three things. First, that he was in the building where he was hurt by the invitation of the defendants either expressed or implied. Second, that the defendants were negligent. Third, that he received his injuries as the natural and proximate result of the negligence of the defendants.

The theory of the plaintiff's case is that he was in the building in which he met with the accident in response to the invitation of the defendants. He does not claim that the defendants or either of them personally invited him to enter the building. His insistment is that the agent or servant of the defendants gave the invitation and that the defendants are bound by that act of their servant. This is true, if the servant extended the invitation and if in doing so he was acting within the scope of his employment. Those questions are for you to determine from the evidence.

The plaintiff says that he approached Mr. Nester, the defendants' superintendent in charge of the construction work, and stated that he would be pleased to give a bid on painting and finishing the building, and that Nester thereupon invited him to go into the building, look it over and measure it up to see what he could do the work for and submit his estimate to one of the employers of the superintendent.

Mr. Kinsey testified that he told Nester he could not make the estimate that day but would be there the following morning, and that Nester said, "All right." The plaintiff, according to his testimony, returned to the building the next day and while, as he says, he was engaged in

making an examination as a basis for his estimate, fell through a hole in the floor of the hall on the second floor.

Nester, the superintendent, denies that he invited the plaintiff to enter the building for any purpose, and says he did tell him that he might prepare a bid for the painting work to be submitted to one of the employers of Nester, and to enable him to do so referred him to the plans and specifications.

Nester, admittedly, was the superintendent in charge of the construction work on the school building; but the defendants deny that Nester had any authority to ask for bids on the painting.

The evidence upon this primary matter of an invitation raises two questions of fact to be decided by the jury. The first is whether the plaintiff, Kinsey, was invited upon the premises, and the second is whether if he was invited the invitation was extended by the servant of the defendants, acting within the scope of his employment.

If you find that by the greater weight of the believable testimony Kinsey's recital of what took place in his interview with Nester is true, then you would be warranted in finding that in a legal sense Nester invited Kinsey to enter the building. If you find that Nester did not invite Kinsey to come upon the premises, then Kinsey's presence there was not by invitation and he could not recover in this suit, since the plaintiff relies upon an alleged invitation of Nester as giving him an actionable status against the defendants. If, however, the evidence leads you to the conclusion that Nester did invite the plaintiff to enter the premises, the next question

that will confront you is whether in extending the invitation Nester was acting within the scope of his employment. Here again the determination of that question depends upon what you find from the evidence, viewed in the light of the legal rules applicable to the situation. The rule of law is that for all acts done by a servant in obedience to the express orders or directions of the master or in the execution of the master's business within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions and the circumstances under which the act is done, the master is responsible. For acts which are not within these conditions the servant alone is responsible and the master is not liable.

If by the application of these rules of law to the evidence you find that the superintendent, Nester, acted outside the scope of his employment in inviting Kinsey upon the premises, if he did invite him, then that disposes of the case and your verdict should be for the defendants.

If, on the other hand, you find there was an invitation given by Nester to Kinsey to enter the school building for the purpose of making a bid, and that such invitation was within the scope of Nester's employment, then you come to the next question, namely, were the defendants negligent.

Negligence is the failure to exercise that degree of care which an ordinarily prudent person would observe to avoid injury to himself or to others. Negligence is never presumed; it must be proven. The happening of an accident such as occurred in this case raises no presumption

of negligence. There must be proof of a neglected duty. The owner or occupier of premises who by invitation expressed or implied induces a person to come upon the premises is under a duty to exercise ordinary care to render the premises safe for the purpose embraced in the invitation. To a person upon the premises not by invitation but as a trespasser or as a mere licensee, the owner or occupier owes no duty to make the premises safe for him. In that case the owner or occupier is liable only for any wilful act resulting in injury to the invitee.

If Mr. Kinsey went upon the premises in question by the invitation of the defendants or their duly authorized agent or servant, did they discharge the duty they owed him to exercise ordinary care to render the premises safe for the purpose for which the invitation was given?

You must predicate your answer to that question upon the evidence. The evidence is uncontroverted that there was an opening in the hall of the new school building. The evidence tends to show that this opening was a possible source of danger to persons in the building if left uncovered and unguarded. There is testimony in the case that at some time prior to the accident a railing had been placed around this opening, but that for about a week, as I recall the testimony, before the accident, the railing was not there. If the absence of the railing contributed to the accident and its absence had continued for such a length of time that the defendants in the exercise of due care and reasonable diligence should have discovered its absence, it would be for the jury to say whether the absence of a railing or any other protective device is a fact

from which may be inferred a failure upon the part of the defendants to observe that duty which they owed to invitees, to make the premises reasonably safe for such invitees.

Unless the plaintiff has shown by the greater weight of the evidence that he was in that school building by the defendants' invitation or the invitation of their duly authorized agent, expressed or implied, and that his injuries were due to their negligence, he cannot recover. If he has borne that burden, then you should return a verdict for the plaintiff unless you find that he was guilty of negligence upon his part that contributed to the accident and without which he would not have been injured.

It was the duty of the plaintiff to take reasonable care for his own safety. He testifies that on the day he entered the school building it was cloudy. That fact, and some scaffolding that had been erected, he says, made the hall somewhat dark and the presence of the lurking menace of the hole in the floor not easily discernable. That fact, and the condition that he was in a building then in the course of construction imposed upon him the duty of using reasonable care commensurate with those circumstances. Did he under those circumstances do anything that a reasonably prudent man would not have done, or fail to do what a prudent man would have done in the exercise of due care for his own safety under the circumstances then surrounding him? If he did, and that act of omission contributed to his injury he cannot recover even though the defendants may have been negligent. The plaintiff, however, does not bear the burden of proving that he was not guilty of contributory negligence. It is for the defend-

ants to show that he was guilty of such negligence.

If you find for the plaintiff on the issues of invitation, negligence and contributory negligence, it would be your duty then to assess damages against the defendants.

The elements of damage in a case such as this, which the jury may consider, are the bodily injury sustained, the pain undergone, the effect on the health of the plaintiff and its probable duration, as likely to be temporary or permanent, the expense incidental to attempts to cure or lessen the amount of injury, the pecuniary loss sustained through inability to attend to business that again may be of a temporary character or may be more or less permanent in their effect upon one's earning capacity.

Upon the question of physical injury you are to determine the nature, extent and effect of the injuries by carefully weighing the evidence of the medical men who have testified in the case. One of the elements of damage claimed by the plaintiff is the loss of profits in his business. Such loss is recoverable when it is the natural and proximate consequence of the injury and is capable of being estimated with reasonable certainty. The proof must be such as will show the jury with reasonable certainty what the profits alleged to have been lost or which it is alleged will in the future be lost would have been but for the injury to the plaintiff. Evidence that the plaintiff's profits were greater before the accident than they were for a corresponding period after the accident of itself is not sufficient to show a loss of profits accrued or to afford a basis for estimating the future loss unless it is coupled with proof which will enable the jury

to find that such past loss was the result of the injury and that such estimated future loss will be the result of the injury. Expected profits are in their nature contingent upon many changing circumstances, uncertain and remote at the best. They can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount. Two things must concur in order to justify the jury in awarding any damages for loss of profit: Preponderating evidence that the loss of profit is proximately attributable to the plaintiff's injury, and evidence which will enable the jury to ascertain with reasonable certainty the amount of such losses. Independently the evidence as to loss of income, diminished earning capacity, is a proper factor to be considered in awarding damages in a personal injury action such as this. If, therefore, you find a clear physical disability reducing the earning capacity of the plaintiff, you may award what in your best judgment as reasonable men and women should be awarded, even though you are unable to ascertain from the evidence with reasonable certainty what the alleged loss of profits amounts to. You will understand, of course, that what I have said as to damages is solely for your guidance in case you first find that the plaintiff under the evidence and the law of the case is entitled to a verdict.

I am requested by the plaintiff to charge the jury, and do charge you, as follows:

"1. If you find that the defendants, or their servant or agent, who had authority so to do, gave to the plaintiff an invitation, express or implied, to come to this addition to this school-

house and make an estimate as to the cost of doing certain work upon the said addition, then it was the duty of the said defendants to exercise reasonable care to render the premises reasonably safe for the purposes embraced in the invitation. By reasonable care is meant such care as an ordinarily prudent person would use under the same circumstances. If you find that there was a failure on the part of the defendants, their servants or agents, to use such care, this would be negligence on the part of the defendants.

"2. If you find that the defendants, or their servant or agent who had authority so to do, gave to the plaintiff an invitation, express or implied, to come to this addition to this schoolhouse and make an estimate as to the cost of doing certain work upon the said addition, then it was the duty of the said defendants to exercise reasonable care to render the premises reasonably safe for the purposes embraced in the invitation. If you find that there was a hole left by the defendants, their servants or agents, in the floor of this hall without any protection around it and that no warning was given to the plaintiff of the presence of the hole there, and if you find that this amounted to a failure on the part of the defendants, their servants or agents, to exercise such reasonable care toward the plaintiff, then this would be negligence on the part of the defendants.

"3. If you find that the hole into which the plaintiff fell had been there without a rail around it for such length of time that the superintendent of this building would have discovered this condition by the exercise of reasonable care, then the superintendent would be charged with notice of

this condition whether he actually knew of this condition or not.

"4. You are to remember that in order for the defendants to take advantage of the defense of contributory negligence, you must be satisfied by a preponderance of the evidence that the plaintiff was guilty of contributory negligence. If the strength of the evidence on this point of contributory negligence does not measure up to this test, the defendant cannot avail itself of this defense, and such defense would not be a bar to the plaintiff's recovery of damages.

"5. There has been offered in evidence a table as to the value of one dollar for the probable length of life, but, of course, that table is only a general rule, based upon the average expectation of life, and there are a great many elements which enter into your verdict in that respect, or which should enter into it. Of course, Mr. Kinsey might live longer than the table provides; on the other hand he might be killed in an accident tomorrow or next week, or might die of disease at a much shorter period than the average expectation of life. He might suffer some accident whereby his earning capacity would be much further depreciated. He might, of course, earn more, but that is for you to take into consideration. If he should in the future earn more than he was earning, then you may ask yourselves whether he suffered any loss or not. All those things you must exercise your good judgment in determining. If he was ill, of course, he could not earn money. So you see there is absolutely no fixed rule, but it is a question and a situation where you must exercise your very good judgment and common sense, and if you render a verdict for the plaintiff, you must ren-

der your verdict in one lump sum for all of these elements of damage which I have outlined to you."

The defendants request me to charge the jury as follows:

"FIRST: Unless the plaintiff has established as a fact that he was on the premises as the result of an invitation from the owner or the defendants, he was a trespasser or at best a mere licensee, and the defendants owed him only the duty of refraining from acts wilfully injurious."

Request number two is declined.

Request number three I charge you, as follows:

"Any invitation which would place upon the defendants the burden of exercising reasonable care for the safety of the plaintiff must have been given by one of the defendant partners, or else by a representative of the defendant partner who was acting within the scope of his authority at the time such invitation was given."

Request number four I charge, as follows:

"The mere fact that a man has charge of workmen in a certain operation does not raise any presumption that he had authority to solicit bids from sub-contractors or invite them on the premises for that purpose."

Number five I decline to charge.

Requests numbers six and seven are declined.

Request number eight I charge:

"Even if the plaintiff was invited onto the premises by the defendants, he is only entitled to have them exercise such a degree of care for his safety as the ordinarily prudent man would exercise under similar circumstances."

Request number nine I charge, as follows:

"The plaintiff cannot recover unless he has established by a preponderance of evidence that the defendants owed him a duty, that they violated this duty, and that as a result of such violation he suffered damage or injury."

Request number ten I charge:

"Even if the plaintiff has established the violation of a duty owed to him by the defendants, he cannot recover if you find that he himself was guilty of negligence which contributed to the injuries complained of."

Request number eleven is declined, except as covered in the instructions already given.

I charge request number twelve, as follows:

"It was the duty of the plaintiff to do everything in his power to mitigate or reduce any loss or damage which he may have sustained as the result of the accident, and even if you find that he is entitled to recover, if you also find that he did not endeavor to mitigate or reduce the amount of his loss or damage, you must take that into consideration when arriving at your verdict."

Request number thirteen is charged:

"Should you find that the plaintiff is entitled to an award for future damages, you are not permitted to speculate, but must base your award upon facts proved to your satisfaction by evidence submitted in the case, and not upon mere possibilities."

The fourteenth request is charged:

"If you find that the injuries sustained by the plaintiff were the proximate result of an accident and not the result of negligence on the part of either of the parties, the plaintiff cannot recover."

Exceptions to Charge.

The fifteenth I charge, as follows:

"In order for the defendant to be chargeable with negligence, the plaintiff must show by a preponderance of evidence that the defendant was guilty of either the omission to do something which a reasonably prudent man would do under the circumstances existing at the time and place of the accident, or the doing of something which an ordinarily reasonable prudent man would not have done under the conditions and circumstances existing at the time and place of the accident, and this right of the defendants to have the plaintiff bear the burden of the affirmative is a substantial one and is not a mere matter of form."

Request number sixteen is declined.

The seventeenth I charge as follows:

"The mere happening of an accident is not *prima facie* evident of negligence on the part of either party."

I charge the eighteenth request, as follows:

"The fact that either of the parties might be insured should have no bearing on your decision as to the liability in the case and cannot be taken into consideration by you in arriving at your verdict."

Now, ladies and gentlemen, if upon the consideration of the evidence and the instructions given to you by the Court you find for the plaintiff you should render a verdict for a lump sum of damages. If your verdict should be for the defendants it would be a verdict of no cause of action. You may now retire to consider your verdict.

Mr. W. Reading Gebhardt: We respectfully ask your Honor for an exception to so much of your Honor's charge in which

your Honor charged that the plaintiff could not recover if the jury did not find that the plaintiff was an invitee.

And we also respectfully ask an exception to your Honor's charging the various requests of the defendants that your Honor charged.

Mr. Braun: Defendants respectfully except to that part of your Honor's charge in which your Honor said, "If you find that Kinsey's story is correct then Nester invited him in a legal sense."

And also to that part of your Honor's charge dealing with loss of earning power in addition to loss of profits.

And also to your Honor's refusal to charge that section of the fourth request, as follows: "And absence of definite proof of such authority relieves his employers from any liability arising out of such solicitation."

And your Honor's refusal to charge the fifth request and the sixth request and the seventh request and your Honor's refusal to charge that part of the tenth request, as follows, "In even the slightest degree to the injuries complained of."

And to your Honor's refusal to charge the eleventh request and the sixteenth request.

(Plaintiff's counsel requested the Court to charge as follows:)

1. If you find that the defendants, or their servant or agent, who had authority so to do, gave to the plaintiff an invitation, express or implied, to come to this addition to this school-

house and make an estimate as to the cost of doing certain work upon the said addition, then it was the duty of the said defendants to exercise reasonable care to render the premises reasonably safe for the purposes embraced in the invitation. By reasonable care is meant such care as an ordinarily prudent person would use under the same circumstances. If you find that there was a failure on the part of the defendants, their servants or agents, to use such care, this would be negligence on the part of the defendants. Seffler *vs.* Vanderbeek & Sons, 88 N. J. L., 636.

2. If you find that the defendants, or their servant or agent who had authority so to do gave to the plaintiff an invitation, express or implied, to come to this addition to this schoolhouse and make an estimate as to the cost of doing certain work upon the said addition, then it was the duty of the said defendants to exercise reasonable care to render the premises reasonably safe for the purposes embraced in the invitation. If you find that there was a hole left by the defendants, their servants or agents, in the floor of this hall without any protection around it and that no warning was given to the plaintiff of the presence of the hole there, and if you find that this amounted to a failure on the part of the defendants, their servants or agents, to exercise such reasonable care toward the plaintiff, then this would be negligence on the part of the defendants for which the defendants would be answerable. Fort *vs.* Reid Ice Cream Co., 119 Atlantic, 638. Kappertz *vs.* The Jerseyman, 121 Atlantic, 718.

3. If you find that the hole into which the plaintiff fell had been there without a rail around it for such length of time that the super-

intendent of this building would have discovered this condition by the exercise of reasonable care, then the superintendent would be charged with notice of this condition whether he actually knew of this condition or not. McKeown, *et al. vs.* King, *et al.*, 1 Adv. Rep., page 1344.

4. You are to remember that in order for the defendants to take advantage of the defense of contributory negligence, you must be satisfied by a preponderance of the evidence that the plaintiff was guilty of contributory negligence. If the strength of the evidence on this point of contributory negligence does not measure up to this test, the defendant cannot avail itself of this defense, and such defense would not be a bar to the plaintiff's recovery of damages. Smith *vs.* Atlantic City R. R. Co., 66 N. J. L. 307 at p. 311.

5. There has been offered in evidence a table as to the value, of one dollar for the probable length of life, but, of course, that table is only a general rule, based upon the average expectation of life, and there are a great many elements which enter into your verdict in that respect, or which should enter into it. Of course, Mr. Kinsey might live longer than the table provides; on the other hand he might be killed in an accident tomorrow or next week, or might die of disease at a much shorter period than the average expectation of life. He might suffer some accident whereby his earning capacity would be much further depreciated. He might, of course, earn more, but that is for you to take into consideration. If he should in the future earn more than he was earning, then you may ask yourselves whether he suffered any loss or not. All those things you must exercise your

good judgment in determining. If he was ill, of course, he could not earn money. So you see there is absolutely no fixed rule, but it is a question and a situation where you must exercise your very good judgment and common sense, and if you render a verdict for the plaintiff, you must render your verdict in one lump sum for all of these elements of damage which I have outlined to you. Dickerson *vs.* Mutual Grocery Co., 2 Adv. Rep., p. 921 at p. 925.

(Defendants' counsel requested the Court to charge as follows:)

First: Unless the plaintiff has established as a fact that he was on the premises as the result of an invitation from the owner or the defendants, he was a trespasser or at best a mere licensee, and the defendants owed him only the duty of refraining from acts wilfully injurious.

Second: If the plaintiff was on the premises as the result of his own solicitation, he was a mere licensee and he cannot recover.

Third: Any invitation which would place upon the defendants the burden of exercising reasonable care for the safety of the plaintiff must have been given by one of the defendant partners, or else by a representative of the defendant partner who was acting within the scope of his authority at the time such invitation was given.

Fourth: The mere fact that a man has charge of workmen in a certain operation does not raise any presumption that he had authority to solicit bids from sub-contractors or invite them on the premises for that purpose and absence of definite proof of such authority relieves

his employers from any liability arising out of such solicitation.

Fifth: Even where there is a bona fide invitation, the liability of the person or persons extending the invitation is only co-extensive with the invitation and when the limits of the invitation are exceeded, the duty to exercise reasonable care ceases, so that if you find that there was an invitation, and that invitation was for a particular time, and the plaintiff did not take advantage of the invitation at that particular time, but went on the premises at a subsequent date, there is no liability and he cannot recover.

Sixth: If the plaintiff on entering the building knew of its unfinished condition and the consequent dangers arising therefrom, or by the use of ordinary care could see and understand them, he assumed the risks which arose therefrom and is not entitled to recover from the defendants.

Seventh: The plaintiff had no right to assume that an unfinished building, still in the course of construction was perfectly safe in every respect, and if, on entering such a building, he proceeds blindly through a section where it is impossible for him to make observations for his own safety, he is guilty of contributory negligence and cannot recover damages for any injury resulting from his continuing under such conditions.

Eighth: Even if the plaintiff was invited onto the premises by the defendants, he is only entitled to have them exercise such a degree of care for his safety as the ordinarily prudent man would exercise under similar circumstances.

Ninth: The plaintiff cannot recover unless he has established by a preponderance of evidence

that the defendants owed him a duty, that they violated this duty, and that as a result of such violation he suffered damage or injury.

Tenth: Even if the plaintiff has established the violation of a duty owed to him by the defendants, he cannot recover if you find that he himself was guilty of negligence which contributed in even the slightest degree to the injuries complained of.

Eleventh: Even if the plaintiff is entitled to a verdict, he cannot recover for any loss of business or professional profits proceeding from invested capital and involving the labor of others.

Twelfth: It was the duty of the plaintiff to do everything in his power to mitigate or reduce any loss or damage which he may have sustained as the result of the accident, and even if you find that he is entitled to recover, if you also find that he did not endeavor to mitigate or reduce the amount of his loss or damage, you must take that into consideration when arriving at your verdict.

Thirteenth: Should you find that the plaintiff is entitled to an award for future damages, you are not permitted to speculate, but must base your award upon facts proved to your satisfaction by evidence submitted in the case, and not upon mere possibilities.

Fourteenth: If you find that the injuries sustained by the plaintiff were the proximate result of an accident and not the result of negligence on the part of either of the parties, the plaintiff cannot recover.

Fifteenth: In order for the defendant to be chargeable with negligence, the plaintiff must

show by a preponderance of evidence that the defendant was guilty of either the omission to do something which a reasonably prudent man would do under the circumstances existing at the time and place of the accident, or the doing of something which an ordinarily reasonable prudent man would not have done under the conditions and circumstances existing at the time and place of the accident, and this right of the defendant to have the plaintiff bear the burden of the affirmative is a substantial one and is not a mere matter of form.

Sixteenth: If the plaintiff, by making reasonable observations could have seen the hole in the floor, but failed to see it, you may assume that he did not make proper observations and was, therefore, guilty of contributory negligence, and cannot recover.

Seventeenth: The mere happening of an accident is not *prima facie* evidence of negligence on the part of either party.

Eighteenth: The fact that either of the parties might be insured should have no bearing on your decision as to the liability in the case and cannot be taken into consideration by you in arriving at your verdict.

Exhibit P. 5.

Exhibit P. 5.

TABLE OF MORTALITY.

Present value at five per cent. interest of an annuity of $1 during life, first payment to be made at the end of the year; also showing the widow's percentage of the net proceeds arising from the sale of land in which she is entitled to dower, her age at the time of the sale being given.

Age.	Present Value of $1 Per Annum.	Widow's Percentage of Sale.	Age.	Present Value of $1 Per Annum.	Widow's Percentage of Sale.	Age.	Present Value of $1 Per Annum.	Widow's Percentage of Sale.
15	16.228	27.047	44	12.805	21.342	73	5.4344	9.0573
16	16.145	26.908	45	12.648	21.080	74	5.1888	8.6497
17	16.067	26.778	46	12.480	20.800	75	4.9892	8.3153
18	15.988	26.647	47	12.300	20.500	76	4.7920	7.9867
19	15.904	26.507	48	12.107	20.178	77	4.6091	7.6818
20	15.818	26.363	49	11.892	19.820	78	4.4221	7.3702
21	15.727	26.210	50	11.660	19.433	79	4.2101	7.0168
22	15.629	26.048	51	11.410	19.017	80	4.0144	6.6907
23	15.525	25.875	52	11.153	18.588	81	3.7993	6.3322
24	15.418	25.697	53	10.892	18.153	82	3.6057	6.0095
25	15.304	25.507	54	10.624	17.707	83	3.4058	5.6763
26	15.188	25.313	55	10.348	17.247	84	3.2114	5.3523
27	15.065	25.108	56	10.062	16.770	85	3.0085	5.0141
28	14.942	24.903	57	9.7707	16.2845	86	2.8303	4.7172
29	14.828	24.713	58	9.4781	15.7975	87	2.6848	4.4747
30	14.723	24.538	59	9.1989	15.3315	88	2.5967	4.3278
31	14.618	24.363	60	8.9399	14.8998	89	2.4947	4.1578
32	14.507	24.178	61	8.7121	14.5201	90	2.3388	3.8980
33	14.388	23.980	62	8.4872	14.1453	91	2.3210	3.8683
34	14.260	23.767	63	8.2580	13.7633	92	2.4120	4.0200
35	14.127	23.545	64	8.0157	13.3595	93	2.5174	4.1957
36	13.987	23.312	65	7.7650	12.9417	94	2.5685	4.2808
37	13.842	23.070	66	7.5027	12.5045	95	2.5960	4.3267
38	13.694	22.824	67	7.2274	12.0457	96	2.5553	4.2588
39	13.541	22.568	68	6.9413	11.5688	97	2.4283	4.0472
40	13.390	22.317	69	6.6434	11.0723	98	2.2783	3.7972
41	13.244	22.074	70	6.3359	10.5598	99	2.0447	3.4078
42	13.100	21.833	71	6.0150	10.0250	100	1.6240	2.7067
43	12.957	21.595	72	5.7105	9.5175	101	1.1924	1.9873

Exhibit D. 7.

Exhibit D. 7.

STATEMENT OF JOHN S. KINSEY

I am 54 yrs, old and reside at 303 Main St., Hacketstown, N. J. I am a Painter Contractor on the 21st day of August 1923, I went to Oxford and put in a bid for painting and finishing a school house on the same day I spoke to Mr. Wayne Nester at the new school Building in Hacketstown regarding the painting and finishing, he told me to look the building over and meet a representative of Butz and Clader the next day (Aug. 22).

On August 22nd, 1923, about 9 A. M. I went to the school building and went through the building. I saw Wayne Nester from a distance and as he seemed to be busy I did not speak to him but went into the building as I was walking from a room into the Hall on second floor I was writing on a pad some measurements I had made and did not notice an opening in the floor and fell through the first floor, I do not remember anything after I fell.

I was taken to Dr. Oseman, who rendered first aid and then took me to Dover Hospital, the extent of my injuries is as follows:—

7 Fractured Ribs, on Right side, Right Collar Bone Broken, Back and Body bruised.

I have read the above statement same being correct and true.

Signed JOHN S. KINSEY

WIT. B. A. HORDMAN
HACKETSTOWN, N. J.
Sept. 20th, 1923.

OPINION OF SUPREME COURT.

Filed January 29, 1926.

NEW JERSEY SUPREME COURT.

No. 93. October Term, 1925.

JOHN S. KINSEY, *Plaintiff-Respondent,* *vs.* SOLOMON BUTZ, *et als.,* *Defendants-Appellants.*	*On Appeal.*

Submitted October Term, 1925: Decided January 28, 1926.

Before Justices Parker, Minturn and Black.

For the appellants, Mr. Wm. P. Braun.

For the plaintiffs, Messrs. Wm. C. Gebhardt & Son.

PER CURIAM.

The plaintiff had a verdict of $5,000 in an accident case. He fell through an unguarded opening of hole in the hallway of the second floor of the unfinished addition to the Hackettstown High School. The defendants are contractors of Allentown, Pa. A man by the name of Wayne Nester was their superintendent of the construction work at Hackettstown. The plaintiff on the 22nd of August, 1923, was injured. The day before, the plaintiff met Mr. Nester, they had a conversation in which Mr. Nester requested the plaintiff Kinsey to go into the building and look over the painting work to be done on the interior of the unfinished building and to make up an estimate as to what he would do the

painting work for. He was then to meet Mr. Butz, one of the defendants, the following morning to submit the estimate to him. It was while doing this that the plaintiff was injured. The defendants file forty-four grounds of appeal, which are argued under twenty-nine heads in the brief: The first and most important point made in the case, is as to the authority of Mr. Nester, as superintendent of the construction work to bind the defendants by an invitation to visit the unfinished building, for the purpose of making an estimate of the painting work, as being within the scope of his employment either expressed or implied. This question was left clearly and sharply by the Trial Judge to the jury to determine as a fact from the evidence in the case; and as we think rightly, in view of the testimony of Alvin H. Butz, one of the defendants, at page 194 of the record. He testified as follows: "Q And you did say to 'Mr. Nester that he should get a bid? A That he should Solicit bids: yes, sir.' We told him that he should get a "Painting bid on this work." Q That is before the accident? A Before the accident. Q And Mr. Nester was the "superintendent?" A That is right. Q He hired the men there? A That is right. Q Discharged the men and paid the men with the money that you supplied him with? A Yes, sir. Q And you authorized him to get bids on this work before the accident? A Before the accident." True at page 262, he testified, that he authorized Mr. Nester to get the bids after the accident to the plaintiff. "A Yes, sir, but I have refreshed my memory since, and it is after."

We find no error in the rulings of the Trial Court alleged as error in the grounds of appeal.

The Trial Judge submitted to the jury all the controverted questions of fact, such as contributory negligence and the like in a clear and accurate charge for the jury to settle and determine all controverted questions.

Finding no error in the record, the judgment of the Warren County Circuit Court is affirmed.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

JOHN S. KINSEY, *Plaintiff-Respondent,* *vs.* SOLOMON BUTZ and ALVIN BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants-Appellants.*	*Action at Law.* *On Appeal from the Judgment of the Warren County Circuit Court.* *Rule for Judgment.*

This cause having been duly argued at the October, 1925, term of this court, by William C. Gebhardt & Son, counsel for the plaintiff-respondent, and William P. Braun, counsel for the defendant-appellant, and the Court having considered the same and finding no error in the record or proceeding in the Warren County Circuit Court:

IT IS THEREUPON ORDERED and ADJUDGED that the judgment of the Warren County Circuit Court in this cause be affirmed with costs, and that the record be remitted to the court below, to be proceeded with this Judgment and the practice of said court.

Entered February 2, 1926.

On motion of

WILLIAM C. GEBHARDT & SON,
Attorneys of Plaintiff-Respondent.

A true copy.

EDWARD KELLEHER,
Clerk.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

JOHN S. KINSEY, *Plaintiff,* vs. SOLOMON BUTZ and ALVIN BUTZ, partners trading as BUTZ & CLADER COMPANY, *Defendants.*	*Action at Law.* / *Notice of Appeal and Grounds of Appeal.*

To William C. Gebhardt & Son, Attorneys of Plaintiff.

TAKE NOTICE that the defendants do hereby appeal to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the whole and every part of the judgment of the New Jersey Supreme Court which affirmed the judgment entered in the Warren County Circuit Court on June 24, 1925.

FURTHER TAKE NOTICE that the following are the grounds of appeal that will be urged on this appeal:

(1) Because the New Jersey Supreme Court erred in affirming the judgment aforesaid of the Warren County Circuit Court.

(2) Because the New Jersey Supreme Court erred in not reversing the judgment aforesaid of the Warren County Circuit Court.

Respectfully yours,

WILLIAM P. BRAUN,
Attorney of Defendants.

Notice and Grounds of Appeal.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

CLAIRE DEIGNAN, being duly sworn according to law, upon her oath deposes and says, that on Saturday, the 13th day of February, 1926, she served a copy of the within notice of appeal and grounds of appeal on William C. Gebhardt & Son, attorneys of plaintiff, at their office No. 239 Washington street, Jersey City, by leaving said copy with the clerk in charge of said office.

CLAIRE DEIGNAN.

Subscribed and sworn to before me
(SEAL) this 13th day of February, 1926.

ALICE M. BOYLE,
Notary Public of New Jersey.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOHN S. KINSEY, *Plaintiff-Respondent,* *vs.* SOLOMON BUTZ and ALVIN BUTZ, partners trading as Butz & Clader Company, *Defendants-Appellants.*	*On Appeal from Supreme Court.*

BRIEF FOR APPELLANTS.

This appeal is from a judgment entered in the Supreme Court February 2, 1926, affirming the judgment of the Warren Circuit Court in favor of the plaintiff and against the defendants for $5,000 damages and costs.

The action in the Circuit Court was brought to recover damages sustained by the plaintiff, who fell through a hole while walking through an addition, in the course of construction, to the Hackettstown High School.

The new addition to the high school was only partly erected and the hole through which plaintiff fell was to accommodate a flight of stairs leading from the basement to the first floor above the ground.

Plaintiff was going through the building unaccompanied by anyone familiar with the work or building, for the purpose of getting information on which he could submit an estimate to the defendants for the cost of decorating and painting the addition to the high school.

The defendants were the general contractors, who held the contract for and who were building the addition.

The day before the accident the plaintiff, who was in business in Hackettstown, asked the defendants' superintendent on the work if he might submit an estimate for the painting and decorating. He was told that he might do so. Plaintiff was not invited to make such an estimate, but when he requested the privilege of estimating was told that he might do so.

Accordingly the morning following this request on the plaintiff's part he started about nine A. M. through the building to measure it up.

Plaintiff testified that he saw Mr. Nestor, defendants' superintendent, in the distance as he entered the building, but Nestor said that he did not see the plaintiff until after the plaintiff was injured.

The day before Mr. Nestor had told the plaintiff the bid would have to be in accordance with the plans and specifications, and he told him that they were in the contractors' office at the building site (record, p. 260). The plans and specifications were complete and the plaintiff could have obtained all the information he required from them (p. 260).

The plaintiff, however, instead of making up his bid from the plans and specifications, elected to go through the unfinished building and measure it up.

Plaintiff testified that the outside of the building seemed to be about complete, excepting the sash, and they were lathing and plastering on the inside. None of the trim was in the building (p. 29). None of the stairs had been built in the addition to the high school and plaintiff entered the addition through the old building.

Plaintiff measured up one of the schoolrooms and then went out into the hall, on the floor above the basement. He says:

> "Then I went out into the hall and there was a stairs on the end and the stringers in the rear were of iron and the upper part is slate and that was painted two or three coats, I forget which, and I got that and I started along the hall toward this north end, and there is another entrance and I done the same thing there. Then I looked over my shoulder. Then I stepped close to the window and wrote this down and then I started ahead and then I took a step or so and I happened to think that I had not counted the doors on the side of the hall and I looked over my shoulder and counted the doors and then I looked ahead and the floor all appeared alike to me and I started and then next thing I knew I was falling" (p. 38, lines 20 to 40).

Again plaintiff testified:

> "Q What was the condition with respect to light in the vicinity of this hole and in the vicinity of the floor at the time this happened? A Well, the building was gloomy; the hall there was gloomy. I cannot just describe it, but it was like a gloom of daylight; that was the natural condition of the hall, and in this corner there was a shadow; it seemed to be darker where this hole was than in the other part of the hall yet. I do not mean to say as dark as night, but quite dark, and it was caused by the shadow from this scaffold. This end room had a scaffold running from the edge of this hole right back to the end of it, and it was a lather's scaffold; there were bundles of lath laid on it and pieces of lath sticking over the edge of it, but there was nobody working there" (p. 41, lines 15 to 35).

There was no railing around the hole and the electric lights had not yet been connected up

(p. 42). There were no workmen working in or around the hole on the floor that the plaintiff was on (p. 46, line 36).

Plaintiff had not been in the building before this occasion (p. 65, line 25). Plaintiff knew that the stairs were not completed. The iron work was up, but it had no steps on it. Plaintiff knew that there was a pile of work still to be done in the building, construction as well as finishing. Plaintiff said that he went to the end of the hall "to see what was on the other end" (p. 70). Plaintiff said that the hall was all open.

> "Q Couldn't you see from one end to the other? A Oh, yes, I could.
>
> Q Couldn't you see what it was like? A Not enough to suit me" (p. 71, lines 20 to 30).
>
> "Q Wasn't the hall straight? A Well, yes, it was in a sense, but it forms a complete square all the way around through the building" (p. 71).

Again the plaintiff testified:

> "Q How wide was that hall? A About nine feet.
>
> Q And this was the full width of the hall? A Yes, sir.
>
> Q How high was the window from the floor? A That I don't know. I didn't see that. I could just see the top of the window.
>
> Q Did this give light up to the edge of the hole? A Yes, sir.
>
> Q You are sure about that? A Yes, sir, I am sure of it.
>
> Q So you could see it? A Yes, sir; I saw it.
>
> Q Did you see the hole? A No, sir" (p. 74).
>
> "Q Why didn't you see the hole? A Because I did not see it. That is all I can tell you.

Q Could you see what you were walking on? A I looked ahead and I saw nothing. It looked all right to me'' (bottom p. 75).

''Q What do you mean, it looked all right? Could you see the floor? A Yes, I couldn't see it.

Q You didn't see any floor there, did you? A I don't know. There was a floor where I was walking. The only thing I can see was this shadow darkened this hole across there'' (p. 76, lines 1 to 10).

Again the plaintiff said:

''Q But you did not see the hole? A I did not see the hole.

Q Was it so dark you could not see what you were walking on? A No.

Q You could see what you were walking on? A I do not understand just how it was. I looked ahead and I didn't see no hole. I saw nothing; and then next thing I was falling and that is all I know'' (p. 76, lines 20 to 30).

Plaintiff's witness Mitcham, a member of the Board of Education, testified that the building was not turned over to the Board of Education until many months after the happening of the accident (p. 177).

Other witnesses testified that there were windows along the hall along which plaintiff was walking; that it was a dark or cloudy day, and the witness Miller testified: ''There wasn't any too much light in the hall'' (p. 126). The witness Clawson said that the day was ''kind of dark.'' He also said that the workmen had to go from floor to floor in the new addition by means of ladders (p. 121).

The witness Miller testified that the day of the accident was a cloudy day, but that one could see from one end of the hall to the other, although from one end of the hall one could not

see the hole that was at the far end of the hall. He said there was a room directly underneath the hole in which men were working under daylight (p. 130, lines 30 to 33). Men were working all through the building without lights (bottom p. 130).

The windows that were along the hall were on the east side of the hall (p. 126).

Since the accident happened about 9 A. M., the Court will take judicial notice of the fact that since the sun arose in the east, what light there was came best through those east windows into the hall.

There were windows on the north and south ends of the hall as well (bottom p. 72).

The only respect in which the plaintiff alleged the defendants were guilty of negligence was in not having a railing around the hole that was left for the stairway.

There was testimony that there had been a railing around this hole at one time, but it was taken down by the lathers for their own purposes about a week before the accident (p. 122, line 38).

The Errors Alleged.

At the close of the plaintiff's case defendants moved for a non-suit on the grounds (1) that there was no evidence of any invitation by the defendants, or any authorized agent of the defendants, and that plaintiff was not entitled to recover under the authority of *Saunders* v. *Smith Realty Co.*, 84 N. J. L. 276; (2) on the ground that since the plaintiff knew of the unfinished condition of the building and by the use of due care could have seen the hole, he assumed the

risk under the authority of the same case; (3) on the ground that the plaintiff was guilty of contributory negligence. The motion was denied and an exception allowed (p. 179).

In defense the defendants proved that some of their employees were actually making concrete steps directly beneath the hole through which the plaintiff fell. That no one knew the plaintiff was in the building and that the hole in the floor in the hall through which the plaintiff fell was quite evident; and that it was darker in the basement below where the men were working on the concrete steps than it was in the hallway above (p. 190). Mr. Hill, who was making the concrete steps in the basement below, testified that he got some of the light by which he worked through this hole (p. 190, line 30). The plaintiff in falling struck Mr. Hill while he was at work making the steps.

Mr. Nestor, defendants' superintendent, testified that he told plaintiff he wanted a figure made from the plans and specifications, which were in the contractors' office outside of the building (p. 260). He said he never asked the plaintiff to go through the building (p. 266). Nestor told the plaintiff where the plans and specifications were (p. 265, line 30). Nestor said that the hole was left for the purpose of doing some fabricating of steel there, and he could not run the concrete floor through on account of that fabrication (p. 267, line 20).

At the close of the whole case defendants moved for the direction of a verdict on the ground (1) that the defendants did not invite the plaintiff to go through the building; (2) that plaintiff knew or should have known of the unfinished condition of the building and the ex-

istence of the hole, and therefore assumed the risk; (3) because plaintiff was guilty of contributory negligence; and (4) because there was no evidence of actionable negligence on the part of the defendants.

The whole of this motion does not seem to have been taken by the stenographer, but the Court in denying the motion said:

> "I think, that on the motion to direct a verdict, that on the present state of the evidence the question of invitation and negligence of the defendants, and contributory negligence of the plaintiff are all fact questions and must go to the jury."

Exceptions allowed (p. 292, lines 20 to 35).

It is alleged that the Court erred in refusing to charge certain requests submitted by the defendants, which will be mentioned hereafter.

POINT I.

There was no actionable negligence on the part of the defendants.

According to the plaintiff's own admission he had never been through this unfinished building before the occasion on which he went to measure up for the purpose of submitting a bid for the painting and decorating, on which occasion he fell.

Admittedly the plaintiff went to defendants' superintendent and asked the privilege of making a bid for the painting and decorating, and this privilege was accorded him.

This privilege, moreover, was accompanied with the statement made to the plaintiff that said bid would have to be made according to the plans and specifications, access to which was

given the plaintiff and he was told they were in the contractors' shanty.

Therefore, if the plaintiff went through the building he did so as a matter of convenience to himself to have the personal satisfaction of actually seeing what kind of construction the defendants had put into the building so far as it had been erected.

Furthermore, since the plaintiff admittedly knew the building was in the course of construction, and since he saw that the stairs had not been built into the building, which was in the course of construction, he knew that he must be unusually watchful to see that he did not suffer injury because of the unfinished condition of the stairs. Anyone going through an unfinished building, and particularly an experienced workman, knows that when the stairs are not completed he must be watchful that he does not fall down through the space where the stairs will be built. Anyone going through such a building knows that he must be watchful to see that he does not fall over building materials that are used in the course of construction, and which necessarily are left lying about. Anyone also knows that he must not get in the way of building operations and be injured thereby. An entirely different sort of care is required of one going through an unfinished building than is required of one going through a completed structure. Likewise an entirely different standard of care is required of a builder in an unfinished structure towards persons who may be going through than is required while he is repairing an existing building which is in use.

In this case the only negligence charged is first, that there was a hole in one of the hall-

ways into which a flight of stairs was to be built, and second, that there was no railing around this hole.

Defendants' testimony is that the hole had to be there in the course of construction and also that a railing had been around the hole up to about a week previous, and that the railing had been taken down by the lathers, who had to have the space free for the purposes of their work.

We submit that it is not negligence in the course of a building operation for the contractors to have an open hole in the place where the stairs are to be built.

Any other rule would make it almost impossible to construct a new building.

Defendants' attorney on his motion for a nonsuit cited to the Court the decisions in this Court in *Saunders* v. *Smith Realty Co.*, 84 N. J. L. 276, and *Rooney* v. *Siletti*, 96 N. J. L. 312.

In the Saunders case this Court held that a person being *sui juris*, who undertakes to use a dangerous way with full knowledge of its unsafe condition, assumes the risk of injuries which may result to him from such use.

In *Fitzpatrick* v. *Glass Mfg. Co.*, 61 N. J. L. 378, the Supreme Court held that the owner of lands is under no obligation to keep them in a safe condition for the use of a person who comes upon them not by the invitation of the owner, but merely by his permission.

This Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Reich*, 61 N. J. L. 635 (at page 643), held:

> "The general rule with regard to the duty which a land owner owes to persons coming upon his premises is that where the entry is made by his invitation, either ex-

> press or implied, he is required to use reasonable care to have his premises in a safe condition; but that where the entry is made merely by his permission * * * the land owner is under no obligation to keep his premises in a non-hazardous state; his only duty to a licensee or a trespasser is to abstain from acts wilfully injurious."

See also *Fleckenstein* v. *Great Atlantic & Pacific Tea Co.*, 91 N. J. L. 145.

In *Bonfield* v. *Blackmore*, 90 N. J. L. 252, this Court held, as urged on the motion to non-suit and direct, that a mere passive acquiescence by the owner of a building or his representative upon a certain use of his property imposes no obligation upon him to keep it in a safe condition for the benefit of the user.

We therefore submit that it was error for the Court below to deny defendants' motion for the direction of a verdict for the defendants on this ground.

POINT II.

The plaintiff was guilty of contributory negligence.

Plaintiff admits that "the building was gloomy; the hall there was gloomy. I cannot just describe it, but it was like a gloom of daylight; that was the natural condition of the hall, and in this corner there was a shadow; it seemed to be darker where this hole was than in the other part of the hall yet. I do not mean to say it was as dark as night, but quite dark, and it was caused by the shadow from this scaffold" (p. 41).

The plaintiff knew he was going through a building that was in the course of construction.

He also knew that there were no stairs in the unfinished portion of the building where he was and that therefore he would have to be watchful not to fall into any of the holes where the stairs were to be built.

We submit this case falls directly in line with the decision in *Saunders* v. *Smith Realty Co.*, 84 N. J. L. 276. In that case an employee of one of the tenants of the building while walking through the cellar to dispose of some of the tenant's refuse stumbled over an obstruction and fell. Chief Justice Gummere, writing the opinion for this Court, said:

> "Accepting as proved the fact that the passageway from the front to the rear cellar was dangerous to one passing through it in the dark, the danger was as obvious to the plaintiff as to the defendant. He was *sui juris,* and when he undertook to use the passageway with full knowledge of the danger he ran in doing so, he assumed the risk of such injury as might result to him from such use, and cannot now charge it upon the defendant. Vorrath *v.* Burke, 34 Vroom 189.
>
> In addition, it may be said that his conduct in attempting to pass along this dangerous way in total darkness was culpably negligent. The evidence discloses no necessity for his doing so. If he was unable to turn on the lights himself, he could either have had this done for him by the janitor or someone else, or, in the event of his being unable to do this, could have left the emptying of his rubbish until a more seasonable time, when he should find the passageway properly lighted."

Moreover, in this case the plaintiff, in a statement made shortly after the accident, said:

> "On August 22nd, 1923, about 9 A. M. I went to the school building and went through the building. I saw Wayne Nestor from a

distance and as he seemed to be busy I did not speak to him but went into the building; as I was walking from a room into the hall on second floor I was writing on a pad some measurements I had made and did not notice an opening in the floor and fell through the first floor. I do not remember anything after I fell" (p. 314).

Although plaintiff attempted to impeach this statement by saying that he did not read it before he signed it, he testified to substantially the same thing in his direct examination when he said:

"Then I went out into the hall and there was a stairs on the end and the stringers in the rear were of iron and the upper part is slate and that was painted two or three coats, I forget which, and I got that and I started along the hall toward this north end, and there is another entrance and I done the same thing there. Then I looked over my shoulder. Then I stepped close to the window and wrote this down and then I started ahead and then I took a step or so and I happened to think that I had not counted the doors on the side of the hall and I looked over my shoulder and counted the doors and then I looked ahead and the floor all appeared alike to me and I started and then next thing I knew I was falling" (p. 38).

In *Rooney* v. *Siletti*, 96 N. J. L. 312, Chief Justice Gummere, speaking for the Supreme Court, said:

"But, assuming the negligence of the landlord, still no right of recovery against her was established, for Mrs. Rooney, having full knowledge of the danger which she would incur in attempting to go down these stairs, assumed the risk of an accident which might result from their use. This is the doctrine declared by this court in the case of Vorrath *v.* Burke, 63 N. J. L. 188, where the circumstances were quite similar to those in

> the case now before us. There the plaintiff attempted to go down a cellar stairway, the top of which was covered by a door. This door had attached to it a counter-balancing weight so as to make its raising and lowering easy, but the weight had become detached from the door. The plaintiff was fully aware of these facts, but, nevertheless, attempted to go down the stairs, holding the door up while she did so. Her strength was not equal to the burden she put upon it; the door fell and she was injured. It was considered that, as she was fully aware of the condition of the door—that is, that the weight was detached from it—and, notwithstanding, attempted to go down the stairs, she deliberately assumed what risk there was in descending, and that consequently there could be no recovery against the landlord."

In the instant case not only did plaintiff know that he was going through a building which was in the course of construction, in which there were no stairways, but he himself says that "in this corner there was a shadow; it seemed to be darker where this hole was than in the other part of the hall yet" (p. 41, line 23).

On page 76 plaintiff was asked on cross examination:

> "Q You didn't see any floor there, did you? A I don't know. There was a floor where I was walking. The only thing I can see was this shadow darkened this hole across there."

Evidently the hole being dark, he thought it was a shadow and walked into it.

We submit that this conduct in an unfinished building constituted contributory negligence.

If the hall was so dark that the plaintiff could not be sure whether he was stepping into a

shadow or into a hole, we submit that either he should have kept out of the building, or he should have asked someone familiar with it to have gone through with him. His election to go through alone we submit constituted an assumption by him of the risks naturally to be found in a building in course of construction, within the meaning of the cases herein cited.

It was error for the Court not to non-suit or direct a verdict in favor of the defendants because of plaintiff's contributory negligence.

POINT III.

The Trial Court erred in refusing to charge the jury defendants' sixth, seventh and sixteenth requests.

Defendants' sixth request was:

> "If the plaintiff on entering the building knew of its unfinished condition and the consequent dangers arising therefrom, or by the use of ordinary care could see and understand them, he assumed the risks which arose therefrom and is not entitled to recover from the defendants" (p. 310).

Defendants' seventh request was:

> "The plaintiff had no right to assume that an unfinished building, still in the course of construction, was perfectly safe in every respect, and if, on entering such a building, he proceeds blindly through a section where it is impossible for him to make observations for his own safety, he is guilty of contributory negligence and cannot recover damages for any injury resulting from his continuing under such conditions" (p. 310).

Defendants' sixteenth request was:

> "If the plaintiff, by making reasonable observations could have seen the hole in the floor, but failed to see it, you may

assume that he did not make proper observations and was, therefore, guilty of contributory negligence, and cannot recover'' (p. 312).

The Court refused to charge each of these requests and exceptions were taken by the defendants (p. 306).

The Court charged the jury regarding contributory negligence and assumption of risk on page 298, concluding his remarks with the statement:

> ''The plaintiff, however, does not bear the burden of proving that he was not guilty of contributory negligence. It is for the defendants to show that he was guilty of such negligence.''

Plaintiff, however, requested the Court to charge and the Court did charge plaintiff's fourth request, as follows:

> ''You are to remember that in order for the defendants to take advantage of the defense of contributory negligence, you must be satisfied by a preponderance of the evidence that the plaintiff was guilty of contributory negligence. If the strength of the evidence on this point of contributory negligence does not measure up to this test, the defendant cannot avail itself of this defense, and such defense would not be a bar to the plaintiff's recovery of damages'' (p. 308).

We submit that since the Court in the main portion of its charge (p. 298) did not say that the defendants were required to prove contributory negligence by a preponderance of the evidence, nevertheless, after having charged plaintiff's fourth request to charge as above stated, namely, that *before the defendants could take advantage of this defense* the jury must be satisfied by a preponderance of the evidence that

the plaintiff was guilty of contributory negligence, the Court should have made the matter clear to the jury as requested in the defendants' sixth, seventh and eighth requests. No exception having been taken to charging the plaintiff's fourth request, the defendants still were entitled to have the jury instructed specifically as the defendants requested.

In fact the language of the sixth request is almost identical with the opinion of this Court in *Saunders* v. *Smith Realty Co.*, 84 N. J. L., at page 288.

We therefore respectfully submit that the judgment of the Supreme Court should be reversed.

WILLIAM P. BRAUN,
Attorney of Defendants-Appellants.
McDERMOTT, ENRIGHT & CARPENTER,
JAMES D. CARPENTER, JR.,
Of Counsel.

New Jersey Court of Errors and Appeals

JOHN S. KINSEY,
Plaintiff-Respondent,
vs.
SOLOMON BUTZ and ALVIN H. BUTZ, partners trading as BUTZ & CLADER COMPANY,
Defendants-Appellants.

Action at Law.
On Appeal
From the
Supreme Court.

Brief of Plaintiff-Respondent

STATEMENT OF FACTS.

This appeal brings up for review the judgment of the Supreme Court affirming the judgment obtained by the plaintiff in the sum of $5,000 in the Warren County Circuit Court for very serious personal injuries sustained by him as a result of the negligence of the defendants.

The defendants are a firm of contractors and were engaged in building a large addition to the High School at Hackettstown in Warren County, under a contract with the Board of Education of that municipality. The plaintiff was a painter by trade and employed several men in his business and did contract work.

The defendants resided in Allentown, Pa. One of them, Alvin H. Butz, came down to Hackettstown for a part of a day once a week and this was the ex tent of the time that either of the defendants spent at

this job. Their superintendent of construction who was entirely in charge of the work, was Wayne Nestor. He was responsible to no one except the defendants.

At the time that the accident occurred the work was well along toward completion. The floors were entirely closed in, the plasterers were at work, and the defendants were desirous of making some arrangements for the painting of the interior of the building.

On the day before the accident in which the plaintiff was injured, he met Mr. Nestor, superintendent of the building, on the street and they had a conversation in which Mr. Nestor requested Kinsey, the plaintiff, to go into the building and look over the painting to be done on the interior and to make up an estimate as to what he would do the work for, and then meet Mr. Butz the following morning to submit the estimate to him.

Kinsey agreed to do this and the following morning went to the building, passing Nestor on the way in, and went on up to the second floor for the purpose of ascertaining the amount of painting to be done.

He was on the second floor and was walking along the hallway. It was a rainy and cloudy day which made the end of the hallway somewhat gloomy. For some reason a hole about eight feet square had been left open in the floor at the end of this hall. There was no railing around it or any other warning of the presence of the hole and no planks across it to protect it. As a consequence of the foregoing facts, the plaintiff walked into the hole unaware that it was there and fell to the floor below, sustaining extremely serious injuries, including a broken collar bone, the fracture of nine ribs, and also a fracture of the transverse process of two of the lumbar vertebrae. It also appeared that there had previously

been a railing around this hole to prevent such accidents as this but it had been taken down a few days before the accident and not replaced. It was shown furthermore, that there was a well established custom in the building trade in that vicinity to protect such a hole as this by putting loose planks over it and that such planks were not over this hole.

POINT NO. 1.

THE REFUSAL OF THE TRIAL COURT TO GRANT A NON-SUIT ON THE GROUND THAT THERE WAS NO INVITATION BY AN AUTHORIZED AGENT OF THE DEFENDANTS WAS PROPER.

The first point discussed by counsel for the defendants in his brief is that the trial court should have granted a non-suit or directed a verdict because no negligence on the part of the defendants had been shown.

All but one of the cases cited by counsel in support of this contention are those in which the court held that there was no evidence of an invitation, and where, therefore, the plaintiff was a mere licensee. It would, therefore, seem as if counsel intended to rely also on the ground that the plaintiff in this case was not an invitee, and therefore it becomes necessary at the outset for us to discuss the question of whether an invitation was extended to the plaintiff. We contend that there was ample evidence of such an invitation.

It is well settled that even if a non-suit would properly have been granted, if the lack of evidence, upon which the motion for a non-suit was based, was afterwards supplied by the other side, the court will not reverse the judgment upon this ground. Mershon vs. Hobensack 23 N. J. L. p. 580; Bostwick vs. Willett,

72 N. J. L. p. 21; Carey vs. Hamburg-American Packet Co. 72 N. J. L. p. 56.

If there is any evidence in the whole case therefore, of an invitation given by an authorized servant or agent of the defendants, this would be sufficient to uphold the verdict. **It is contended that there was not only some proof, but the strongest kind of proof, of such fact.**

Kinsey's story as to the invitation was as follows p. 33 l. 22 to p. 34 l. 9:

> Q. Now, then, will you proceed and state the conversation and all that took place?
>
> A. I walked up to him and I said, "Is this Mr. Nestor, the superintendent in charge of this building?" And he said, "I am." Then I says, "Who does your painting and finishing in this building, or do you bring men down from Allentown?" He says, "We have nobody." "Well," I says, "if you want any local bids I would be pleased to give you a bid on it, and for reference I refer you to Osborne & Company—" They were doing the steam fitting and heating in this building—"or the Hackettstown National Bank, either one." He says, "That is all right. Now," he says, **"Mr. Kinsey I tell you what I wish you would do—go in the building, look it over or measure up, or whichever way you figure, and see what you can do it for, and meet my boss tomorrow morning and tell him." I said, "I do all the estimating and everything by the square yard and I cannot do it today, because I have another little job to finish, but I will be here tomorrow morning." He says, "All right."**

There can be no question but that in this conversation there was an actual out and out invitation to Kinsey from Nestor. Moreover two witnesses testified

that Nestor said after the accident that he had invited Kinsey to come to the schoolhouse and make an estimate on the painting job, (p. 287 l. 30 to p. 288 l. 4; p. 289 l. 34 to p. 290 l. 24.)

Elias Pysher, an employee of the defendants on this job testified that Nestor hired him, paid him, directed the work, and was in charge of the work (page 103 ll. 29-35). He also said that he saw one of the defendants give Nestor the money with which to pay the workmen (p. 105 ll. 11-35). He stated further that no one else higher up than Nestor directed the men (p. 106 ll. 15-16).

Carter M. Labar, a member of the Board of Education of Hackettstown and also of the building committee of the Board, testified that Nestor was the superintendent on this job for Butz & Clader and that Nestor directed the men in their work and that he had charge of the work (p. 113 l. 21 to p. 114 l. 32). Other witnesses who testified along similar lines were George Thorp, George Clawson, George Harper, Louis A. Hart and Ross Miller.

Nestor testified that he was the superintendent on the job. He said that the elder Butz never appeared on this job and that Alvin H. Butz, the younger of the two, came down for one to two hours once or twice a week. We quote from his testimony at p. 270 ll. 17-31.

Q. And the work went right on just as if he never came at all, didn't it?

A. That was what I was there for.

Q. You had entire charge of the work?

A. Yes, sir.

Q. You hired the men?

A. I hired the laborers and the carpenters; that is about all I hired; and sometimes a cement finisher.

Q. You paid them with Mr. Butz's money?

A. He always brought the money in envelopes and I paid off the men as they were named on the envelopes.

Q. And you discharged the men when you saw fit?

A. Yes, sir.

He said further that he talked to Mr. Butz on the telephone the day before the accident, which was the day that Kinsey saw Nestor and received the invitation from him (p. 266 ll. 3-14). The result of the conversation is evident from the following testimony of Nestor at p. 271, ll. 8-15.

Q. Didn't you in this very case get instructions from Mr. Butz to get a bid or at least to receive a bid from Mr. Kinsey?

A. **I told him over the long distance telephone that Kinsey has been there and would like to estimate on the work and he told me it would be all right.**

Q. **He told you it would be all right?**

A. **Yes, sir.**

And finally, Butz himself testified clearly and explicitly and without equivocation that he had given Nestor the authority to solicit Kinsey's bid. We quote from his testimony at p. 193 l. 23 to p. 194 l. 35.

Q. Now, will you just give us all the particulars of the sub-letting of this painting contract, and everything about it; what was done and who did it and everything?

A. Well, when the time came for receiving painting bids on this work we called in the painter who usually did our work, and we found—

Q. Wait. I asked you to give the details. Now, you say "We." Did you or your partner call them in?

A. No; I did, myself. I say "we" as the firm, because I acted for the firm.

Q. You individually did it?

A. That is right. I called in the painter who generally does our class of work, and got a bid from him on this painting. In the meantime, however, there was some priming work to be done on this building and I asked him to give us a bid for the work as the work had to be started immediately, and we got a bid from him, **and it was while we were considering this bid that we were told by Mr. Nestor that he was getting a bid from Mr. Kinsey, at Hackettstown;** and I told Mr. Nestor that in getting this bid the bid should be in accordance with the plans and specifications, as that would be the only way we would accept it; and we never did get a bid from Mr. Kinsey on the work and that was the last I had heard of that situation until this accident occurred.

Q. **Then all this was done, that you have related now, before the accident?**

A. **Before the accident; that is right.**

Q. **And you did say to Mr. Nestor that he should get a bid?**

A. **That he should solicit bids; yes, sir. We told him that he should get a painting bid on this work.**

Q. **That is before the accident?**

A. **Before the accident.**

Q. **And Mr. Nestor was the superintendent?**

A. **That is right.**

Q. **He hired the men there?**

A. **That is right.**

Q. **Discharged the men and paid the men with the money that you supplied him with?**

A. **Yes, sir.**

Q. **And you authorized him to get bids on this work before the accident?**

A. **Before the accident.**

We respectfully submit that there was abundant evidence to go to the jury on the question of the invitation by Nestor and his authority to extend it.

A recent case which is strikingly similar to the case at bar is that of Sefler vs. Vanderbeek & Sons, 88 N. J. L. p. 636. In this case the defendant had a lumber yard and the plaintiff's intestate went to the lumber yard for the purpose of buying a stick of lumber. The defendant's servants directed him to the superintendent who, after showing him some lumber on the first floor which was not suitable, said to the customer "Come upstairs and I will show you more lumber." Then he conducted the decedent upstairs and while he was up there the decedent placed his hand upon a railing which, because it was not properly secured, gave way and the decedent fell and was killed. We quote from the opinion of the Court of Errors and Appeals at p. 638 as follows:

> "Now of course, an owner or occupier of premises who, by invitation, expressed or implied, induces a person to come upon the premises is under a duty to exercise ordinary care to render the premises safe for the purposes embraced in the invitation (Phillips v. Library Company, 55 N. J. L. 307; Nolan v. Bridgeton and Millville Traction Co., 74 Id. 559) and this includes the duty to use ordinary care to have the guard rail of a balcony on the premises in a reasonably safe condition for the purpose for which it was used and intended to be used.
>
> "In the case at bar, **the decedent was on the defendant's premises on business, in which both the decedent and defendant had an interest, and**

he was there by the express invitation of the defendant's servants, who referred him to defendant's superintendent in a matter relating to the defendant's business. He was following the superintendent to the place where he was told to go. He was thereby exposed to an unusual danger, of which the defendant knew, or ought to have known, and was killed by reason of the guard rail being so insecurely placed as to fall when he put his hand upon it, and yet so arranged as to give no warning to anyone using it as it was designed to be used. The guard rail, so insecurely placed, was, under the circumstances, in the nature of a trap or concealed source of mischief. **It was clearly, therefore, open to the jury to find that the defendant was negligent in the performance of its duty to the decedent, and the motion for a direction of a verdict was properly denied.** Nolan v. Bridgeton and Millville Traction Co., supra; Smith v. Jackson, 70 N. J. L. 183; Spicer v. Boice, 66 Id. 434; Phillips v. Library Company, supra; White v. France, L. R., 2 C. P. D. 308; Bolch v. Smith, 10 W. R. 387; 7 H. & N. 736."

Another case that is on all fours with the case at bar is that of Fort vs. Reid Ice Cream Co. 98 N. J. L. p. 559. We quote from the opinion of the court at p. 561.

"Now, with respect to the plaintiff's invitation, the facts as the jury might find them were that plaintiff's father was an electrical contractor who had been employed by the defendant to install and put in order certain electrical apparatus in the manufacturing department at the rear of the platform, and that, certain materials being needed for that work, the plaintiff's father sent the plaintiff with a delivery car and the appli-

ances in question loaded thereon to deliver them at the job. Plaintiff went down to the plant, and, as it would seem, quite naturally placed his automobile at the platform, and, not having been there before, started to find out where the supplies were to be delivered, and, seeing through the passageway the lights burning at the rear, and assuming—correctly, as it happened—that that was where the materials were needed, started through the passageway unaware of the fact that the elevator was not in position, and that there was a yawning shaft concealed by the semi-darkness of the place, and fell down into the basement.

"We have no hesitation in saying that under the circumstances the jury were clearly entitled to say that he was invited there, and were entitled to infer negligence of the defendant from the fact that the elevator was not in place, and that no provision was made to guard against any one falling into the shaft when it was out of place. It does appear that there were collapsing gates at the entrance of the shaft, and that they were out of order, and not in use."

In the recent case of Painter vs. Hudson Trust Co. 2, Misc. Rep. p. 1137, the plaintiff was a foreman employed by the New York Telephone Company and the plaintiff had notified the company that they desired to have a unit of a new building connected with telephone service. While this work was being done the plaintiff was injured. The Supreme Court distinctly held that the plaintiff under these circumstances was not a licensee but an invitee. **The court said that the duty of the defendant in the premises was that imposed on "a person who invites another on his premises to perform some act for his benefit."**

This presented a situation precisely analogous to the case at bar.

Another case directly in point is that of Gibeson vs. Skidmore 99 N. J. L., p. 131; see also Nolan vs. Bridgeton, etc. Trac. Co. 74 N. J. L. p. 559, and Mayes vs. Splitdorf Electric Co. 94 N. J. L. p. 460.

It is respectfully submitted, therefore, that the trial court was entirely correct in denying both the motion for non-suit and the motion for the direction of the verdict on the ground that there was no evidence of an invitation.

POINT No. 2.

THE QUESTION OF THE DEFENDANTS' NEGLIGENCE WAS PROPERLY LEFT TO THE JURY.

We now pass to the consideration of the question as to whether there was any evidence of negligence on the part of the defendants, their servants or agents, to go to the jury. We have already pointed out that there was strong evidence of an invitation on the part of the defendants' authorized agent to the plaintiff. This being so, it is manifest that if there was any evidence of a failure on the part of the defendants to exercise reasonable care so far as the plaintiff was concerned, that then the question of the defendants' negligence was properly submitted to the jury. Tha there was the strongest kind of such evidence, we submit is clear beyond a doubt.

It is true that the building was under process of construction, but it appeared that the floors were all closed in with the exception of this hole (p. 117 ll. 24-28; p. 102 ll. 3-9) and as a matter of fact the concrete had already been laid in the floor in this hallway with the exception of this hole (p. 102 ll. 14-18).

It was a cloudy day and that end of the hall was

not pitch dark, but was rather gloomy and a lather's scaffold at the end of the hall threw a shadow across the hole, all of which resulted in making the plaintiff entirely oblivious of the presence of the hole, and which made the floor appear to the plaintiff to be all alike and to be entirely completed. This particular phase of the matter is discussed more in detail under Point No. 3.

Moreover there had been a railing around this hole before, up until about a week before the accident, and it had then been taken down and not replaced, and the proof was that during that week Nestor, who was the superintendent of the defendants, and who had entire charge of the building and the work of the construction of it, had been right alongside the hole after the railing had been taken down.

Elias Pysher testified to these facts as follows at page 100 l. 10 to p. 100 l. 19.

"Q. Did you see it on the day that this accident happened? A. I did.

Q. Was there any railing up around it or not? A. That day?

Q. That day. A. I do not think there was that day.

Q. Had there been any railing put around it at any time before that? A. There had.

Q. Who put that railing up before? A. I did."

Again at page 100, l. 31 to p. 101 l. 40.

"Q. Who ordered you to put the railing up?

A. Nestor.

Q. Did he say to you for what purpose it was put up?

A. No, sir.

Q. What kind of a railing was it?

A. It was a furring lath.

By the Court.

Q. A what?

A. A furring lath.

By Mr. W. Reading Gebhardt.

Q. What sort of a stick of wood is that?

A. Well, it is about an inch thick and it is about two and a half inches wide.

Q. How high was that railing from the floor up?

A. I imagine it must have been around thirty inches.

Q. Where was it with reference to the hole?

A. It was around the hole.

Q. Now you have stated that you do not think there was a railing there at the time the accident happened. Do you know anything about the railing being taken down?

A. The railing was taken down.

Q. Before or after the accident?

A. Before.

Q. About how long before?

A. I imagine about a week or so.

Q. About a week before the accident?

A. About a week.

Q. I wish you would please state whether or not at any time between that week, between the time that the railing was taken down and the time the accident happened, whether or not you saw Mr. Nestor anywhere around this hole?

A. I had.

Q. During that week?

A. During that week.

Q. How near was he to the hole?

A. Well, he was right to it.

Q. Right alongside of it?

A. As near as he could get.

Q. Which way did you see him look?

A. He was looking at that entrance, at the stairs.

Q. Was he at any time looking in the direction of this hole or not?

A. Well, now, I think he was."

The fact that the superintendent of the building had considered the hole so dangerous that he had ordered a railing put up around it some time previous to the accident, is the strongest kind of evidence of the duty of the defendants to keep a railing there.

The evidence was, therefore, that there was this hole at the end of the hallway in a place where the light was deceptive, making it difficult to observe it; that although there had been a railing up around it, there was none at the time of the accident; and that there were no warning signs up around the hole to notify the plaintiff of any danger (page 42 ll. 5-7); and the plaintiff did not know that the hole was there; that there were no lights in the hall (page 42 ll. 9-10.)

In the face of these facts it seems to us that the question of whether there was enough evidence of the defendants' negligence to go to the jury is not seriously open to debate. In this case there was not only some such evidence, but an abundance of evidence to this effect.

Counsel for the defendants states in his brief that the only evidence of negligence in the case was the fact that the hole was there and that there was no railing around it. **But he has entirely overlooked one of the most important grounds of negligence that was proved by the plaintiff in the trial, and which was not contradicted by the defendants.**

This was proof to the effect that it was the custom in the building trades in that vicinity when there was a hole in the floor of a building under construction like this, and under such circumstances as these, to put planks across the hole for the purpose of preventing

just such accidents as this occurring, and there were no such planks over this hole. This was the uncontradicted proof in the case.

Kinsey, the plaintiff, testified as follows with respect to this at page 46 ll. 21-38:

"Q. Now, Mr. Kinsey, what was the custom, if any, with respect to the protection of any dangerous place in or around a building such as this in process of construction in the vicinity of Hackettstown at the time this accident happened?

A. Well, they generally cover them over with plank.

Q. Cover what over with plank?

A. Cover the hole over with plank; and then if they have any occasion to work around the hole they pull the plank back and when they get through they put them back again.

Q. You say they put plank over the hole—the hole in what?

A. A hole in the floor.

Q. At the time that this accident happened were there any men working or otherwise located in and around this hole?

A. Nobody around there at all."

George Thorp also testified to the same effect concerning this custom (p. 116 l. 34 to p. 117 l. 8).

Elias Pysher stated that there were no planks over this hole (p. 102 ll. 23-33).

That the failure on the part of the defendants to comply with such a custom is negligence, has been well settled by our courts.

The case of McCormick vs. Anistaki, 66 N. J. L. p. 211, is one which bears a close similarity to the case at bar. There was a hoistway in the floor of the hallway of the building in question, extending from the door sill of the street doors to the bottom riser of the stairs. A street door opened

in over this hatchway. The evidence was that it was the practice of the defendant while using the hatchway as a hoistway to have these street doors locked and fastened and to have some of its employees stationed inside to warn people going down stairs.

On the morning of the accident the plaintiff stepped up to the door of the street entrance and found the door was simply closed, touched the knob and gave the door a push; the door opened and he fell through the open hatchway down into the cellar.

The Court of Errors and Appeals held that the failure to observe this custom was a negligent act for which the defendant was liable and reversed the judgment of non-suit.

It is evident that in this case the plaintiff did not make an observation before he stepped through the door, but relied on the custom of having the door locked if the hatchway was open. **It is important to note that one of the grounds for the non-suit was contributory negligence, and that the court held likewise that this was a jury question and that the non-suit was erroneous.**

A similar case is that of Harmer vs. Reed Apartment Company, 68 N. J. L. p. 332. This case will be referred to at length under Point No. 3, so we will not deal with it further here except to remark in passing that it was a case where the Court of Errors and Appeals held that the failure to observe such a custom constituted negligence.

Another case on the matter of custom is that of Cowell vs. Pa. R. R. 3 Adv. Rep. 973.

A case which is on all fours with the case at bar, except that the case at bar is much stronger, is that of Mayes vs. Splitdorf Electrical Company, 94 N. J. L. 461. The defendant in this case contracted with a general contractor for the erection of a new boiler house on its premises, and that company subcontracted

the painting work to a subcontractor who employed the plaintiff. **The job was not yet complete at the time the accident occurred.**

The facts of the case are well set forth in the opinion at page 463, as follows:

> "On entering the premises on the day of the accident the plaintiff did precisely as he had been directed to do the first day. He went along the same passageway to the clothes rack where he had been told to hang his clothes. The evidence tends to show that on the first occasion he did not see the pit (which was hard by the clothes rack) because it was covered with a ladder. **It tends to show that he did not see it on the occasion of the accident because of the defective light, which, while enabling him to see the clothes rack, prevented him from seeing the pit in the floor which was in the shadow of the boiler.** He fell into the pit, which was then uncovered and unguarded, just as he was in the act of hanging up his clothes."

A motion for a non-suit and a motion for a direction of a verdict on the ground of negligence were made and denied and the Court of Errors and Appeals held that there was sufficient evidence to go to the jury on the question of the defendant's negligence, and affirmed the judgment.

The court also considered the question of contributory negligence and held that this was likewise a jury question. We quote again from the opinion of the court on this point at page 463.

> "Now, where, as here, the existence of contributory negligence upon the part of the plaintiff depends upon the conclusion to be reached from a variety of circumstances considered in their relation to and their reaction upon each other, the jury and not the court is normally the tribunal

to draw such conclusion. Sutton vs. Bell, 79 N. J. L. 507."

This decision is of especially great importance in its application to the case at bar because of the fact that this was also a case where the building was in process of construction and where the plaintiff fell into an unguarded hole, the two cases being almost exactly parallel.

Another important case in this connection is that of Lechman vs. Hooper, 52 N. J. L. p. 253. It appeared in this case that the defendant had the contract for doing the mason work on a building that was being erected, and that the plaintiff's master had the contract for the iron work. While the plaintiff was engaged in his work there, a certain wall that had been erected by the defendant fell and injured the plaintiff. The plaintiff had received no warning personally, of the dangerous condition of the wall.

Chief Justice Beasley, speaking for the Court held that it was the duty of the defendant to see that the plaintiff received notice or warning of the defective condition of the wall and that the failure to see that he actually received such warning, was negligence for which the defendant was liable. We quote from the opinion of the court at page 257:

"This is, then, the legal posture of affairs: The erector of the nuisance must give warning of its existence; he can perform this duty either personally, or by one of his own servants, or, as is often the course adopted, through the medium of the foreman of a body of men who are entitled to be warned. Practically either of such methods is safe, as, in the main, every person having a right to notice of the danger receives it; but in case of a miscarriage by reason of the neglect of the foreman, who is to abide the consequences?

Assuredly it is he whose duty the negligent foreman failed to fulfill."

We desire to point out that this was also a case where a building was being constructed and that the negligence complained of was the failure to warn, just as in the case at bar no warning was given to the plaintiff.

Three other cases that are directly in point are Sefler vs. Vanderbeek & Sons, 88 N. J. L. 636; Fort vs. Reid Ice Cream Company, 98 N. J. L. 559; and Painter vs. Hudson Trust Company, 2 Misc. Rep. 1137. These cases have been referred to at length under Point No. 1 and so will not be discussed further here.

The following cases referred to under Point No. 3 are also very important: Nolan vs. Bridgeton and Millville Traction Company, 74 N. J. L. 559; Kappertz vs. The Jerseyman, 98 N. J. L. 836.

The case of Saunders vs. Smith Realty Company, 84 N. J. L. 276, has no application to this situation, for in that case there was no evidence of authority conferred by the defendant upon the agent to extend the invitation.

In the case of Rooney vs. Siletti, 96 N. J. L. 312, cited by the defendant, the court held that the question of the negligence of the defendant was properly submitted to the jury.

All the other cases cited by counsel in his brief are cases dealing with the duty of the defendant to a mere licensee and consequently are not in point.

Moreover, there was in none of these cases the strong element that we have in the case at bar, namely, that there was a custom to protect this hole by putting planks over it, which the defendants failed to do, and upon which custom the plaintiff had a right to rely. This fact, alone places the case at bar in an entirely

different class of cases from any of those cited by the defendants.

It is, therefore, respectfully submitted that the trial court was correct in submitting the question of the negligence of the defendants to the jury.

POINT No. 3.

THERE WAS NO ERROR IN THE COURT'S REFUSAL TO GRANT A NON-SUIT ON THE GROUND OF CONTRIBUTORY NEGLIGENCE.

It is contended that under all of the circumstances in this case the question of contributory negligence was necessarily a jury question. The plaintiff testified that it had rained early that morning and was still cloudy (p. 34 ll. 28-30). Several witnesses testified that the floors were all closed in, in the building, with the exception of this hole (p. 117 ll. 24-8; p. 102 ll. 3-9).

Moreover the concrete had already been laid in this very hallway.

In addition to the fact that it was a very cloudy day, there was the further element that near this end of the hall there was a lather's scaffold which cast a shadow apparently directly over the hole and because of this, the floor appeared all the same and to be safe and solid although, in fact, this dangerous hole was there.

The plaintiff well describes the conditions in his testimony, (p. 41 ll. 16-40).

> Q. What was the condition with respect to light in the vicinity of this hole and in the vicinity of the floor at the time this happened?
>
> A. Well, the building was gloomy; the hall there was gloomy. I cannot just describe it,

but it was like a gloom of daylight; that was the natural condition of the hall, and in this corner there was a shadow; it seemed to be darker where this hole was than in the other part of the hall yet. I do not mean to say as dark as night, but quite dark, and it was caused by the shadow from this scaffold. This end room had a scaffold running from the edge of this hole right back to the end of it, and it was a lather's scaffold; there were bundles of lath laid on it and pieces of lath sticking over the edge of it, but there was nobody working there. A mason's or lather's scaffold is generally about the width of your hand above your head—

Mr. William C. Gebhardt: No, not that.

The Witness: Well, the room was about twelve feet high and the scaffold was about half way up and that threw a shadow across this hole.

Elias W. Pysher agreed that it was a gloomy, cloudy day (p. 102 ll. 18-22).

Louis A. Hart testified as follows with reference to the hole, p. 126 ll. 11-19.

Q. **Did you have any trouble in seeing it?** [the hole.]

A. **Well, on a dark day or a cloudy day it was hard to see.**

Q. **It was hard to see?**

A. **Yes, sir, because there was a lot of scaffolding there in the other room that cut off the light and there wasn't any too much light in the hall.**

Q. **There was not too much light in the hall?**

A. **No, sir.**

Ross H. Miller testified that it was a cloudy day, (p. 130 ll. 16-17); that the scaffolding at the end of the hall where the hole was, was between the hall and

the window, which, of course, accounted for the shadow over the hole (p. 131 ll. 29-32). He also said that it was not very dark, (p. 130 l. 3), thus indicating clearly that it was not pitch dark but rather a gloomy and uncertain light. He also said that there were no electric lights strung in the building as yet (p. 130 ll. 29-32). He gave an excellent description of the nature of this scaffold as follows, p. 132 ll. 17-22:

Q. How large a scaffold was this in the teachers' room?

A. **I think the scaffold was large enough to lath the whole room from it practically; it was five or six feet from the floor and boarded up tight.**

Q. How high was it?

A. The scaffold?

Q. Yes.

A. Oh, probably five or six feet up from the floor.

The resultant effect of all of these conditions was such that the floor appeared to the plaintiff to be all the same and entirely completed and all of the indications were that it was perfectly safe to proceed. As he expressed it, "I looked ahead and the floor all appeared alike to me and I started and the next thing I knew I was falling." (p. 38 ll. 33-37.) On page 75 ll. 38-40, he said that he looked ahead and saw nothing and that it looked all right to him. He also testified on p. 74 ll. 33-6 as follows:

Q. How did you know where the hole was?

A. I didn't know. I didn't see the hole at all. I saw this scaffold and that cast a shadow right down where this hole was.

And then there is another potent reason why the question of contributory negligence was necessarily for the jury, namely, **because it appeared by the un-**

contradicted testimony that there was a custom in the building trade in that vicinity to protect such a hole as this by putting planks over it. The plaintiff had a right to assume that this custom would be observed, and therefore, the degree of care required of him would be much less than if there was no such custom.

We have already referred to the testimony on this matter of the custom under Point No. 2.

The case of Saunders vs. Smith Realty Company, 84 N. J. L. 276, relied on by the defendant under this point is entirely different from the case at bar.

In the Saunders case it was so dark that the plaintiff could see nothing, whereas in the case at bar, it was merely gloomy and the shadow of the scaffold covered the hole. Moreover, in the Saunders case there were electric lights available, but there were none in the case at bar.

Furthermore, Saunders was very familiar with the cellar and with the danger that lurked there, but Kinsey knew nothing of this hole which was in the nature of a concealed death trap. Finally, in the case at bar, it was not totally dark, but the shadow of the scaffold made the floor appear all alike and in good condition and the plaintiff was deceived thereby.

The case of Rooney vs. Siletti, 96 N. J. L. p. 312, and likewise the case of Vorrath vs. Burke, 34 Vr. p. 189, are not at all analogous to the case at bar, because in both of these cases the proof was that the plaintiff knew of the dangerous condition beforehand and elected to take a chance on it, whereas Kinsey was entirely ignorant of the presence of this hole.

As we have already pointed out under Point No. 2, the case of Mayes vs. Splitdorf Electrical Company, 94 N. J. L. p. 461, was almost identical with the case at bar, particularly as to the situation surrounding the hole, for in the Mayes case the plaintiff failed to see the hole in which he fell because of the poor light, and

because of the fact that the hole was in the shadow of a boiler; consequently, the Court of Errors and Appeals held that the question of contributory negligence was properly left to the jury.

Another similar case in which the Court of Errors and Appeals held that the question of contributory negligence was for the jury, is that of Nolan vs. Bridgeton and Millville Traction Co. 74 N. J. L. p. 559. The facts in this case were that the plaintiff's wagon ran into a hole. We quote from the opinion of the court with respect to the question of contributory negligence at p. 562.

> "It is the contention of the defendant company that Nolan was negligent in failing to observe and to avoid the hole in the driveway. In connection with this it is to be observed that **there was evidence that the hole and the ground thereabouts was partly covered with leaves, which tended to obscure the hole. Whether Nolan ought to have seen and avoided the hole under those conditions was a matter of doubtful inference for the jury's determination.**
>
> "The rule which controlled the action of the trial judge on the motions to nonsuit and to direct a verdict was this: That where fair-minded men might honestly differ as to the conclusions to be drawn from facts whether controverted or uncontroverted, the question at issue should go to the jury. Pennsylvania Railroad Co. v. Matthews, 7 Vroom 531; Delaware, Lackawanna and Western Railroad Co. v. Shelton, 26 Id. 342; Newark Passenger Railway Co. v. Block, Id. 605; Traction Company v. Scott, 29 Id. 682."

The case of Fort vs. Reid Ice Cream Co. 98 N. J. L. p. 559, bears a great similarity to the case at bar. In that case the plaintiff, while walking through a hall-

way, fell through an open elevator shaft in the hall. **Here also the hole was concealed by the defective light.** The Court of Errors and Appeals dealt with the question of contributory negligence as follows at p. 561.

> **"The question of contributory negligence of the plaintiff was clearly for the jury. In the absence of any knowledge or reason to know that there was an open hole at that point, he was not required, as a matter of law, to keep his eyes on the floor. This disposes of the main features of the case."**

Another recent case is that of Kappertz vs. The Jerseyman, 98 N. J. L. p. 836. The plaintiff, who was a repairer of machinery, had been called upon by the defendant to make some adjustments to a printing press. A trap door which was near the press, had been open and Kappertz closed it and went on with his work. Later he stepped backward **without looking** and fell through the hole, the trap door having been opened without his knowing it. The Court of Errors and Appeals held that the question of contributory negligence was for the jury. We quote from the opinion at p. 838.

> "To justify the nonsuit it must be said that Kappertz as a matter of law was guilty of negligence in stepping backward on a place which a few minutes before he had made safe by closing the trapdoor and which had in the meantime been made unsafe by a servant of the defendant opening the door without the knowledge of Kappertz. The act of the defendant's servant was a violation of the defendant's duty to abstain from any act which would make the use of the premises dangerous. Kappertz had in law the right to assume that as he was engaged in his work with his back to the trapdoor that the place in which he was working, which he had

made safe, would not be made unsafe by the act of the defendant's servant in opening the trap-door. **For Kappertz to have acted as he did in stepping backward without looking was not, in our opinion, conclusive evidence that he was not at the time exercising reasonable care for his safety. As to whether he was acting with reasonable care or not was a question upon which the minds of fair-minded men might differ, and as was said by Mr. Justice Trenchard in the case of Nolan v. Bridgeton & Millville Traction Co., 74 N. J. Law, 559, 65 Atl. 992:**

'Where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury.' "

In the case of Harmer vs. Reed Apartment Co. 68 N. J. L. p. 332, the plaintiff was a painter employed by a contractor who was building an apartment house. The building had reached a point which permitted the installation of the elevator and this was being operated by the defendant. The painter was at work in the shaft and while so engaged in his duties, someone started the elevator without giving any warning, with the result that the counter weight of the elevator descended and struck the plaintiff. **The evidence was that there was a custom to give a warning before the elevator was moved, which was not done in this case.**

The Court of Errors and Appeals held in that case that:

"Under this testimony it was negligence in the defendant to move the elevator without giving the customary signal and the jury was justified in so finding."

The Court also held that the plaintiff was entitled to rely upon receiving the customary signal and that

such reliance upon his part was not contributory negligence. This presents a situation precisely identical with the case at bar, where the custom was to cover such a hole as this with planks; consequently, in the case at bar also, the plaintiff had a right to rely upon this custom and therefore, was not guilty of contributory negligence.

The following cases referred to under Point No. 2 are important on the question of contributory negligence: McCormick vs. Anistaki, 66 N. J. L. p. 211; and also the case of Sefler vs. Vanderbeek & Sons, 88 N. J. L. p. 636, referred to under Point No. 1.

See also Cooper vs. Reinhardt, 91 N. J. L. p. 402; Higgins vs. Goerke Krich Company, 91 N. J. L. p. 464.

It is respectfully submitted, therefore, that the trial Court properly left the question of contributory negligence to the jury.

POINT No. 4.

THE REFUSAL TO CHARGE DEFENDANTS' REQUEST No. 6 WAS NOT ERRONEOUS.

The defendants' request No. 6 was as follows (p. 310 ll. 16-23).

> "If the plaintiff on entering the building knew of its unfinished condition and the consequent dangers arising therefrom, or by the use of ordinary care could see and understand them, he assumed the risks which arose therefrom and is not entitled to recover from the defendants."

The Court was entirely correct in refusing to charge this request because it in effect charged the jury that mere knowledge by the plaintiff that the building was in a unfinished condition would be a sufficient basis for the jury to find that he assumed the risk of this

accident. Such is not the law and it would not have been proper for the Judge to so instruct the jury because, as we have already pointed out, the question for the jury to decide was whether under all the circumstances the plaintiff exercised ordinary care.

The matter of assumption of risk as referred to in cases of this character is nothing more or less than the doctrine of contributory negligence and it has never been held in this state that when a person goes into an unfinished building, he is guilty of contributory negligence as a matter of law from that fact alone.

Moreover, this request left entirely out of consideration the matter of the custom of protecting with planks such a hole as this under these circumstances, and on this account the Request was likely to mislead the jury and therefore was properly refused.

We submit that the court was entirely justified in declining to charge this request.

POINT No. 5.

THE COURT PROPERLY REFUSED TO CHARGE DEFENDANTS' REQUEST No. 7.

The request was as follows (p. 310 ll. 24-34):

> "The plaintiff had no right to assume that an unfinished building, still in the course of construction was perfectly safe in every respect, and if, on entering such a building, he proceeds blindly through a section where it is impossible for him to make observations for his own safety, he is guilty of contributory negligence and cannot recover damages for any injury resulting from his continuing under such conditions."

The request was clearly faulty in that it contained facts that did not appear in the case at all. There

was not a scintilla of evidence in the case to the effect that the plaintiff "proceeded blindly" through the hall. On the contrary he said that he looked ahead and the floor looked all right. Nor was there any proof that it was "impossible for him to make observations for his own safety," for he saw the floor and saw the scaffold at the end of the hall but the hole itself was obscured and hidden by the gloomy light and by the shadow of the scaffold.

It is well settled that the trial judge cannot properly charge a request to charge that contains facts of which there is no proof in the case. Humphrey vs. Boro of Woodstown, 48 N. J. L. p. 588. Moreover, this request left entirely out of consideration the custom to protect a hole by planks, upon which the plaintiff was entitled to rely.

Furthermore, the request should have stated that if such conduct contributed to the injury, then it would be contributory negligence, which it did not do, but arbitrarily said that if he conducted himself as described, he could not recover. It was for the jury to say whether he did, in fact, exercise reasonable care under all the circumstances and not for the court to lay down any such hard and fast limitations upon the jury's judgment.

We, therefore, respectfully submit that the Court properly refused to charge this request.

POINT No. 6.

THE COURT COMMITTED NO ERROR IN REFUSING TO CHARGE DEFENDANTS' REQUEST No. 16.

This request was as follows (p. 312 ll. 16-21):

"If the plaintiff, by making reasonable observations could have seen the hole in the floor,

but failed to see it, you may assume that he did not make proper observations and was, therefore, guilty of contributory negligence, and cannot recover."

This request was properly refused because it did not contain an accurate statement of the law and was likely to mislead the jury. The question was not whether the plaintiff made reasonable observations; it was whether he exercised such care as an ordinarily prudent man would have used under all the circumstances, and, if not, whether his negligence contributed proximately to the accident.

Moreover, this request left entirely out of consideration the matter of the custom to protect such a hole by planks, upon which the plaintiff had a right to rely, and was therefore not in the proper form.

Moreover the court charged the jury in great detail and with great clarity on the question of contributory negligence and, therefore, the refusal of such a request pertaining to a subject already adequately covered, could not possibly be prejudicial error (Smith vs. Erwin, 51 N. J. L. p. 507).

In the case of Enstice vs. Cortright, 61 N. J. L. p. 653, it was held "that a judgment will not be reversed for an erroneous instruction if appellant was not prejudiced thereby."

We respectfully submit that the trial court was entirely correct in refusing to charge this request.

CONCLUSION.

For the reasons above set forth, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

William C. Gebhardt & Son,

ATTORNEYS OF PLAINTIFF-RESPONDENT.

W. Reading Gebhardt,
Of Counsel.