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## TESTIMONY.

### *For Plaintiff.*

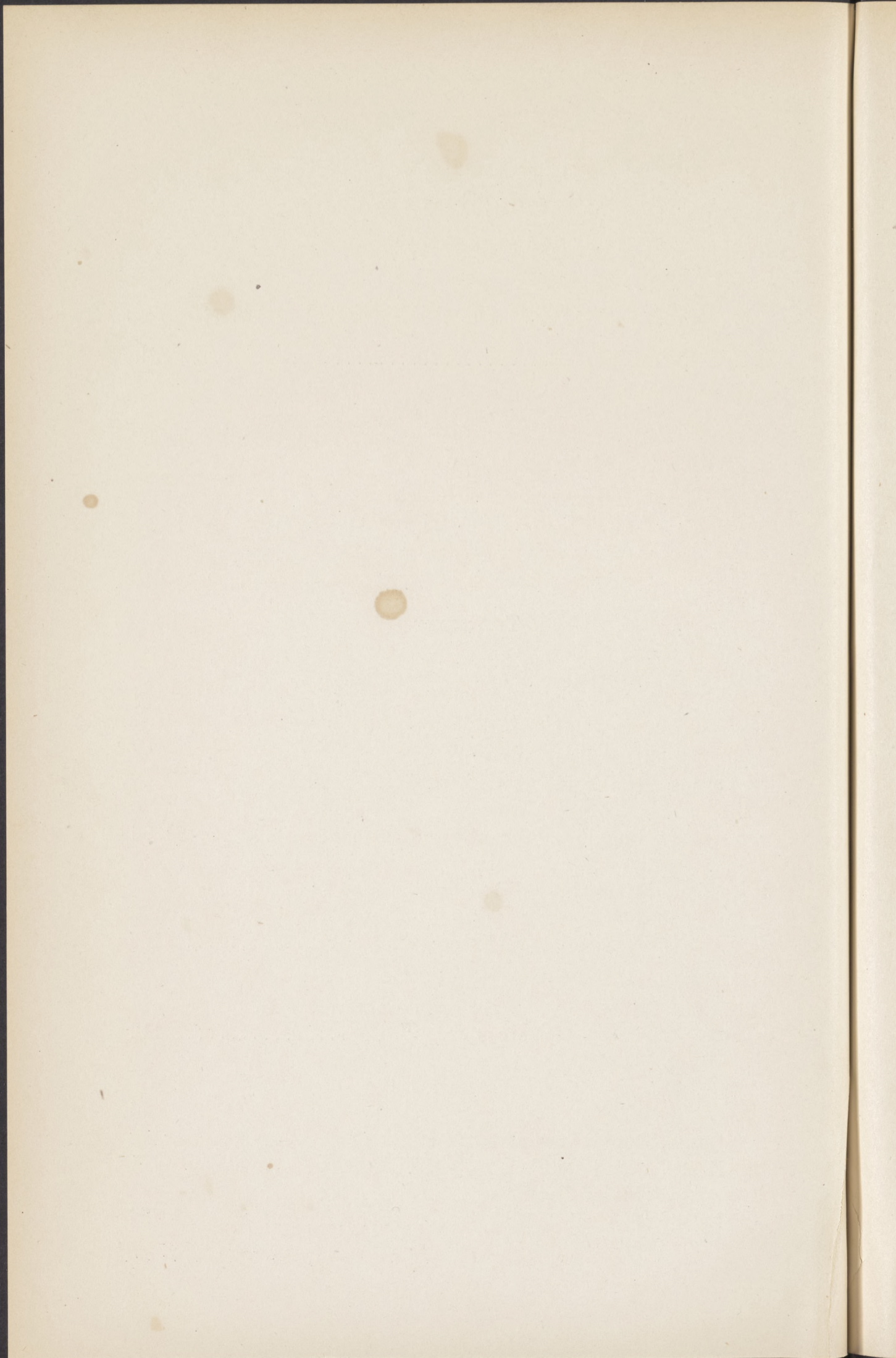
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### *For Defendant.*

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed March 16, 1920.

**New Jersey Supreme Court**

10

CHARLES H. LEONARD,

*Plaintiff,*

*vs.*

STANDARD AERO CORPORATION OF NEW YORK,  
*Defendant.*

*Action at Law.*

*Notice of Appeal.*

*To McDermott & Enright, Attorneys for Plaintiff,  
75 Montgomery Street, Jersey City, N. J.:*

20

Sirs:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the judgment entered in this cause in favor of Charles H. Leonard and against the Standard Aero Corporation of New York on February 13, 1920, for the sum of \$9,000.00 damages and costs of suit.

Yours, etc.,

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Appellant.*

30

40

*Grounds of Appeal.*

## GROUNDS OF APPEAL.

Filed April 23, 1920.

### 10 New Jersey Court of Errors and Appeals

CHARLES H. LEONARD,

*Plaintiff-Respondent,*

*vs.*

STANDARD AERO CORPORATION OF NEW YORK,

*Defendant-Appellant.*

*Action at Law.*

*Grounds of  
Appeal.*

20 The appellant states the following grounds of appeal:

1. Because the Court refused to strike out as a conclusion the answer of witness Leonard: "Q In what condition of repair was the building at the time of the first lease? A Well, I guess it was in pretty good condition" (Case, p. 23).

2. Because the Court permitted the following leading question: "Q Was anything said about taking down the brick boiler house?" (Case, p. ~~32~~) 28

30 3. Because the Court permitted witness Leonard to testify as an expert after special cross examination (Case, p. 35) and answer the questions: "Q I will ask you whether there has been an advance or recision in price of that sort of material between say the first of January, 1918, and the time when you made this inquiry? A Constantly advancing, everything. Q Can you tell us about the percentage of advance, if you know?" (Case, p. 37.) "Q The pending question is whether you are able to say about what the enhancement in market value of machinery has been since the first day of January, 1918, and the  
40 time when you got these quotations." (Case, p. 39.)

4. Because the Court permitted witness Leonard to testify as an expert and answer the question: "Q Do you know whether there is any increase or decrease in it" (market for general supplies)? "A Increase. Q Now he wants to know how much in general supplies since December 31, 1917." (Case, p. 40.)

*Grounds of Appeal.*

5. Because the Court sustained the objection to the following question asked witness Leonard: "Q What rental did you get for the premises from them? Mr. Enright. I object to that as immaterial." (Case, p. 41.)

6. Because the Court sustained the objection to the following question to witness Leonard: "Q What rental are you getting for the premises at the present time? Mr. Enright. I object as immaterial." (Case, pp. 60-62.) 10

7. Because the Court admitted the answer of witness Leonard to the following question: "Q Did you subsequent to 1908 make repairs to this Corliss engine and these boilers. Mr. Heine. Objected to on the ground that the witness has already testified he had made no repairs other than the rough repairs between the end of the Crown Machine Company tenancy in 1908 or 9 and the beginning or just before the Standard went in." That was gone over in detail as to every item of the bill specified. (Case, p. 65.) 20

8. Because the Court permitted witness Bradford to be asked the following leading question: "Q And that building did not involve any disturbance of the boiler house? Mr. Heine. I object to that question as leading." (Case, pp. 70-71.)

9. Because the Court permitted the following question to be asked witness Bradford: "Q I will ask you this: Was it the result—did you go to Mr. Leonard this second time as the result of any direction received from the president of the company?" (Case, p. ~~86~~) 73 30

10. Because the Court permitted witness Bradford to be asked the following leading question: "Q Before you told Mr. Leonard that it was already done, was there anything said about a sum of money to be paid?" (Case, p. 75.)

11. Because the Court sustained the objection to the following question asked witness Bradford: "Q What did this extension cost?" (Case, pp. 78-79.) 40

12. Because the Court permitted the testimony of witness Leonard (Case, p. 86) as to the thickness of the walls to be incorporated in a hypothetical question asked witness Poggi and overruled the objection to the hypothetical question asked witness Poggi. (Case, pp. 84-86.)

*Grounds of Appeal.*

13. Because the Court denied defendant's motion to strike out the answer of witness Poggi to the hypothetical question after the witness had testified that his answer was based upon matters extraneous to the question. (Case, pp. 87-88.)

10 14. Because the Court permitted witness Dunphy to answer the following question: "Q Now I will ask you if you are able to give an opinion as to the value of the machinery which you saw scrapped out there in the yard, set up and installed in this Plainfield factory in 1917, assuming it then to be second-hand machinery but in usable condition." (Case, pp. 94-95.)

15. Because the Court permitted witness Dunphy to answer the following question: "Q I want you to take all of the machinery upon which you were able to form an opinion of value—erected in the boiler house or factory during the year 1917."  
20 (Case, p. 96.)

16. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question (Case, p. 96.)

17. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, pp. 96-97.)

30 18. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 97.)

19. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 98.)

40 20. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 98.)

21. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical ques-

*Grounds of Appeal.*

tion on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 99.)

22. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, pp. 99-100.)

10

23. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 100.)

24. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 101.)

20

25. Because the Court refused to grant defendant's motion to strike out the testimony of witness Dunphy as a speculation. (Case, p. 102.)

26. Because the Court refused to grant defendant's motion to strike out the testimony of witness Dunphy as a speculation. (Case, p. 107.)

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant-Appellant.*

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*Summons.*

**SUMMONS.**

Issued July 17, 1919.

THE STATE OF NEW JERSEY TO STANDARD AIRCRAFT CORPORATION  
AND STANDARD AERO CORPORATION OF NEW YORK:

10

You are summoned to answer the annexed  
complaint of Charles H. Leonard in an action at  
(L. s.) law in the New Jersey Supreme Court. And take  
notice that unless you file your answer to said  
complaint with the Clerk of the said Supreme  
Court at Trenton, within twenty days after the service upon  
you of this writ and the annexed complaint, the plaintiff may  
proceed in the suit, and judgment may be entered against you.

20

Witness, WILLIAM S. GUMMERE, Chief Justice of our said New  
Jersey Supreme Court, at Trenton, this 17th day of July, nine-  
teen hundred and nineteen.

McDERMOTT & ENRIGHT,  
*Attorneys.*

ENOCH L. JOHNSON,  
*Clerk.*

30

40

*Complaint.*

### COMPLAINT.

Charles H. Leonard, residing in the City of Elizabeth, Union County, New Jersey, complaining against Standard Aircraft Corporation, a corporation of the State of New York, and Standard Aero Corporation of New York, a corporation of the State of New York, says:

10

1. Under date of December 29, 1916, plaintiff leased to defendant Standard Aero Corporation of New York certain factory premises, buildings and plant situate at the northwest corner of Berkman street and North avenue in the City of Plainfield, Union County, New Jersey, known as numbers 631 to 635 North avenue, in said City of Plainfield, for the term of one year, commencing January 1, 1917, and ending December 31, 1917, by written instrument of lease, under which said lessee, among other things, covenanted and agreed to preserve the leased premises and surrender them at the termination of said lease in as good condition as the proper use thereof would permit, damages by the elements excepted.

20

2. Prior to the termination of the term of said lease, to wit, on October 16, 1917, plaintiff entered into a further indenture of lease with said Standard Aero Corporation of New York, under which plaintiff did lease and defendant, Standard Aero Corporation did hire and take the aforesaid premises and appurtenances for the further term of one year and four months from the first day of January, 1918, to the 30th day of April, 1919, and said lessee did, among other things, covenant and agree in and by said indenture, that at the expiration of said term it would yield up and surrender said premises with the appurtenances to the plaintiff, his heirs and assigns, in the same good order and condition as the same then were, reasonable wear and tear thereof and accidents happening by fire or by other casualties excepted.

30

3. Defendant Standard Aero Corporation of New York entered into the possession of said premises and appurtenances under the aforesaid leases and enjoyed the same until some time in the year 1918, when, on information and belief, defendant Standard Aircraft Corporation did take over the assets and

40

*Complaint.*

business of Standard Aero Corporation of New York, and assume the liability thereof, including all liability under the aforesaid leases.

10 4. Defendants, one or both of them, entered upon, occupied and enjoyed said premises under the aforesaid leases until the end of the term covered thereby, namely, until April 30, 1919.

20 5. Defendant, Standard Aero Corporation of New York, notwithstanding the terms and covenants of its aforesaid leases, did not preserve said leased premises during the term of the lease first aforesaid, in as good condition as the proper use thereof would admit, damages by the elements excepted, and did not at the expiration of the term arising under the said secondly above set forth lease, yield up and surrender the demised premises, with the appurtenances, unto the plaintiff, in the same good order and condition as the same were at the time of the making of said lease, reasonable wear and tear thereof and accidents happening by fire or other casualties excepted, but, on the contrary, did permit said premises and appurtenances to be damaged and the buildings erected thereon and the plant installed therein and the appurtenances thereto, to be removed, injured and destroyed, and did commit and permit to be committed waste upon said premises.

30 6. That defendant Standard Aircraft Corporation after entering upon the possession of the demised premises and appurtenances under the lease aforesaid, did fail to preserve said premises in as good condition as the proper use thereof would admit, damages by the elements excepted, as required by the lease first aforesaid, and did fail to yield up and surrender the possession of said premises, with the appurtenances, unto the plaintiff at the expiration of the term created by the lease second above referred to, in the same good order and condition as the same were at the time of the making of said lease (reasonable wear and tear thereof and accidents happening by fire or other casualties excepted) but, on the contrary, did cause the buildings  
40 erected upon said premises and the plant and machinery installed therein and the appurtenances thereto, to be removed, damaged and destroyed and did commit or permit to be committed waste upon the demised premises and appurtenances.

*Complaint.*

Plaintiff has sustained damages by reason of the acts and defaults of the defendants, as aforesaid, to the amount of \$18,200 for which amount plaintiff demands judgment against the defendants, with interest from May 1, 1919.

McDERMOTT & ENRIGHT,  
*Attorneys of Plaintiff.*

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**BILL OF PARTICULARS OF PLAINTIFF'S DEMAND.**

Plaintiff has sustained damages by reason of the damage, destruction or removal of machinery and buildings upon the demised premises as follows:

170' Heavy Main Shafting,		20
17 20' Adj. Hangers,		
8 Compression Shaft Couplings,		
2 Split Collars,		
1 48x20' Wood Split Pulley,		
1 50x20 Iron,		
All above erected .....	\$ 600.00	
1 Whiting Foundry Cupola,		
1 Wilbraham & Baker Positive		
Blast Foundry Blower .....	650.00	
1 50-H.P. Full Front Horizontal Boiler,		30
1 100-H.P. " " " "		
With all fixtures and set.....	5,000.00	
1 18x72 Frick Corliss Engine, 227 H.P.—Set.....	2,500.00	
1 Duplex Boiler Steam Pump.....	150.00	
1 Travelling (Shop) Crane .....	500.00	
1 750-Light Dynamo .....	500.00	
1 Gorton Boiler and Fixtures—Set and connected...	700.00	
1 Brick Engine Room and Boiler Room—Demolished	7,500.00	
Broken Flagging .....	100.00	
	<hr/>	40
	\$18,200.00	

*Answer of Standard Aero Corporation of New York.*

TO THE WITHIN NAMED DEFENDANTS:

10 In case the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of such service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

McDERMOTT & ENRIGHT,  
*Attorneys of Plaintiff.*

20 **ANSWER OF STANDARD AERO CORPORATION  
OF NEW YORK.**

Filed July 25, 1919.

Defendant, Standard Aero Corporation of New York, a corporation organized and existing under the laws of the State of New York, with an office in the Woolworth Building, City, County and State of New York, answering the complaint of the plaintiff, says:

30 1. Defendant denies the allegations of paragraph "1" of the complaint, except that it admits that it entered into a lease with plaintiff on December 29, 1916, a copy of which is hereto annexed.

2. Defendant denies the allegations of paragraph "2" of the complaint, except that it admits that it entered into a lease with plaintiff on October 16, 1917, copy of which is hereto annexed.

40 3. Defendant denies the allegations of paragraph "3" of the complaint, except that defendant entered into possession of said premises under the leases hereinbefore referred to and set forth, copies of which are annexed hereto, and that defendant remained in possession of said premises under said leases with full control of said premises by defendant during the entire term of each of said leases.

4. Defendant denies the allegations of paragraph "4" of the complaint, except that it admits that it, defendant, Standard

*Answer of Standard Aero Corporation of New York.*

Aero Corporation of New York, entered upon, occupied and enjoyed said premises under the aforesaid leases until the end of the term of each.

5. Defendant denies the allegations of paragraph "5" of the complaint.

6. Defendant denies the allegations of paragraph "6" of the complaint.

## FOR A FIRST SEPARATE AND DISTINCT DEFENSE.

Defendant alleged that heretofore and during its occupancy and possession of the demised premises under the lease of December 29, 1916, defendant, Standard Aero Corporation of New York, and plaintiff did for a valuable consideration agree that defendant, Standard Aero Corporation of New York, should be released and held harmless by reason of its acts in taking down the boiler house on said premises and in removing boilers and other property then on the premises and the property of plaintiff, being the same acts complained of and concerning the same property as alleged of in the complaint; and defendant further alleges that it was agreed with plaintiff that defendant should take down and remove the boiler house on the premises, the property of plaintiff, which was in a dilapidated and unusable condition, and that defendant should remove the boilers therefrom, which were of no value except as junk; and that defendant should do the other things and acts in connection with said property on the demised premises, being the acts alleged in the complaint, and that in consideration thereof defendant would erect on said premises new and larger buildings in place of those taken down, and would install a new and adequate heating plant, and would put in a solid concrete floor in main building, and would improve the space in certain buildings by installing various fixtures and other structures, all of which said improvements and additions were to become and be the property of plaintiff at the expiration of said lease; that the above agreement was fully executed by the parties. Said improvements and structures erected by the defendant in accordance with said agreement have been accepted by plaintiff, who is now in the enjoyment and use thereof.

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30

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*Answer of Standard Aero Corporation of New York.*

FOR A SEPARATE AND DISTINCT DEFENSE.

Defendant re-alleges, as if here set forth at length, the allegations contained in its first defense herein; and further alleges that at the time of making of the last lease, to wit: October 16, 1917, plaintiff and defendant incorporated in said lease a confirmation of said agreement between the parties, and that at 10 said time of making said lease and at the time that defendant went into possession thereunder, January 1, 1918, defendant made no complaint, charge or claim of any kind against defendant by reason of its use of the premises during the prior lease expiring on December 31, 1917; but on the contrary ratified and approved the acts done by defendant in making the additions, alterations and improvements upon said premises and did lease said premises in their then existing and improved condition to defendant, and that plaintiff is estopped from making 20 any claim for damage by reason of the acts of defendant, as aforesaid, being the same acts set forth and alleged in the complaint.

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendants.*

30

40

*Answer of Standard Aircraft Corporation.*

**ANSWER OF THE DEFENDANT, STANDARD AIRCRAFT CORPORATION.**

Filed July 25, 1919.

Answer of Standard Aircraft Corporation, a corporation of New York, with an office at Bayway, Elizabeth, County of Union and State of New Jersey, answering the complaint of the plaintiff, says: 10

1. It has no knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 1 of the complaint.

2. It has no knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 2 of the complaint.

3. It denies the allegations of paragraph 3 of the complaint, except that it has no knowledge, or information, sufficient to form a belief as to the allegation that Standard Aero Corporation of New York entered into possession of the demised premises under certain leases and enjoyed the same until some time in the year 1918. 20

4. It denies the allegations of paragraph 4 of the complaint, except that it has no knowledge or information sufficient to form a belief that defendant, Standard Aero Corporation of New York, entered upon, occupied and enjoyed the demised premises under certain leases until April 30, 1919. 30

5. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of the complaint.

6. It denies the allegations of paragraph 6 of the complaint.

Wherefor Standard Aircraft Corporation demands judgment against the plaintiff, dismissing the complaint with costs.

HEINE, BOSTWICK & BRADNER,  
*Attorneys for Defendant,*  
*Standard Aircraft Corporation.*

*Defendant's Motion re Pleadings.*

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January Term, 1920.

10 CHARLES H. LEONARD

*vs.*

STANDARD AIRCRAFT CORPORATION, *et al.*

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the ninth day of February, A. D. 20 1920, at 12:15 P. M.

Appearances:

Messrs. McDermott & Enright, John M. Enright, Esq. (present), attorneys for the plaintiff.

Messrs. Heine, Bostwick & Bradner, M. Casewell Heine, Esq. (present), attorneys for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

30 Adjourned until 2:30 P. M.

AFTERNOON SESSION, 2:30 P. M.

*The Court.* By consent of counsel the case is proceeded with before eleven jurors.

40 *Mr. Heine.* I would like to make a motion, before this case is opened to the jury, to compel the plaintiff to make an election. Your Honor will observe from the complaint, paragraph one alleges that December twenty-ninth a lease was entered into between the plaintiff and the Standard Aero Corporation. Your Honor will note there are two defendants, the Standard Aero Corporation of New York, and the Standard Aircraft Corporation. I presume during the trial we will have to emphasize the words Aero and Aircraft, as distinguishing. The second paragraph alleges the making of a further lease on October 16th,

*Defendant's Motion re Pleadings.*

1917, between the same parties, the plaintiff and the Standard Aero, which lease was to run for a year and some four months, expiring on April 30th, 1919. It goes on paragraph three to allege that the Aero Corporation entered into possession under the leases and remained in possession until some time in the year 1918, when, on information and belief, the Aircraft did take over the assets and business of the Standard Aero and did assume liability, including this lease. Then the fourth paragraph that the defendants, one or both of them, entered upon, enjoyed and occupied the premises, one or both, the allegation being in the alternative. Then in the fifth paragraph it alleges that the Standard Aero notwithstanding the promises, etcetera, did not at the expiration of the term arising under the second lease, thereby clearly implying from the pleadings not only the entry, but the continued occupation of the Aero until the termination of the lease. So that all acts of waste, as charged in the subsequent paragraph, or the later part of that paragraph, failure to live up to the covenant of returning it in as good condition, and so forth, would leave out the Aircraft. Then in the sixth paragraph it says the Aircraft, after entering, without specifying, and this allegation being directly contrary, charges them with being in possession at the expiration and with committing waste up to the expiration. I do not think that the defendants ought to be called upon to meet the pleading in this particular form. The defendant should elect—

*The Court.* They say either or both of you, depending whether the Aircraft assumed the Aero lease or not.

*Mr. Heine.* Regardless of the assumption, if the Aero were in possession the Aircraft could not be in possession.

*The Court.* And vice-versa.

*Mr. Heine.* And vice-versa. It seems to me counsel ought to come out and state which of these corporations they intend by their proof—this is not pleaded in the alternative. It is not pleaded they hold the Aero if they can prove the case against them, and in the alternative for acts done by the Aircraft. But it is pleaded here, two inconsistent—

*The Court.* Mr. Heine, it seems to assume that there was some arrangement between the two companies whereby one or the other or both remained in possession.

*Defendant's Motion re Pleadings.*

10 *Mr. Heine.* No, there is no assumption. There is the fifth allegation that the Aero went into possession and remained in the possession until the expiration of the term and committed waste. There is also an allegation that the Aircraft, at some time unspecified, entered into possession and committed waste. That is impossible to stand in the same complaint. And the allegation that one company assumed liabilities of the other is im-

*The Court.* What do you claim, Mr. Enright?

*Mr. Enright.* In the first place I would like to say that no notice whatever has been given of this motion, so it is not—

20 *The Court.* Was there any answer reserving the right to strike out?

*Mr. Enright.* No, sir; I think not.

30 *Mr. Heine.* We didn't have to. That is always reserved at the trial any motion relative to the character or method or mode of proof, and no notice has to be given of a motion to make an election. If I had moved to strike out—at least failure to constitute facts to constitute a cause of action, that would have to be reserved in the answer. But any other motion which is not properly made before trial under sections A and B, or brought before a referee, can be made at the opening of a trial, and a motion to elect is properly made at this time.

*Mr. Enright.* So far as this is a motion addressed to the pleadings it must be considered by your Honor as a motion coming entirely without notice. I do not think we should be put to an election until after the proofs are in, the case having gone to this stage. The case is one of leases made to the Aero Corporation, and under some sort of arrangement that is better known to the defendants than anybody else, these two corporations, with two different names, but the same set of officers—

40 *Mr. Heine.* No, that is not correct.

*Mr. Enright.* Mr. Mingle vice-president or president of both companies.

*Mr. Heine.* One president.

*Mr. Enright.* The general manager of one company was the vice-president of the other. When these acts are done by these

*Defendant's Motion re Pleadings.*

two ideal bodies, operating through the same individuals, it seems to me that as a matter of election—it seems to me it must go to the jury anyway to determine on all the facts when they are in, in which capacity an individual was acting when he did a particular thing.

*The Court.* I do not think I will separate them at this time, 10  
Mr. Heine. When the companies are so interlocked I think the plaintiff ought to have a right to get all the facts before the jury.

*Mr. Heine.* I do not wish your Honor to rule finally; I just wish to be heard this one sentence: That presents a situation where a plaintiff may come into court and make allegation which is diametrically opposed in the pleadings, and without putting it in the alternative, or without anything bringing it under the practice act, lets a matter go on a general fishing expedition to see what he can find at the end of his case, and if he finds enough 20  
to substantiate one or the other, then he is in court.

*The Court.* It may be a case where we ought to permit him to fish a little.

*Mr. Heine.* A man could file an insurance policy and amend it into a complaint after awhile, but he had to get his pleading in form before he could go to his proof.

*The Court.* This is simply putting it in the alternative. It may not be according to Hartshorne, but that is what it does.

*Mr. Heine.* He makes an allegation that two people are on 30  
the same spot at the same time. That cannot be.

*The Court.* And he also says you are separately. I certainly would not make him choose now, and then find after the proofs were all in that the one—if he made the wrong guess, and you had all the information, that the one party would be out. That would not be justice, would it?

*Mr. Heine.* No, but that is—

*The Court.* That is what I am here for.

*Mr. Heine.* That is what he should plead. He should plead 40  
on information and belief. The situation of interlocking the companies or anything of that kind. But he simply makes allegation that the two companies were in possession at the same time, and that they committed acts of waste respectively, and then he says either or both of them. I think he should be called upon,

*Defendant's Motion re Pleadings.*

before we are called upon to meet the proof, to select which, because how are your Honor's rulings on evidence to be affected by an alternative question which will be continuously presented, is this admissible as to the Aircraft, is this admissible as to the Aero?

10 *The Court.* We will have to try to solve that.

*Mr. Heine.* With that continuously alternative question coming up before the jury, it is going to put in their hands a case that is very, very much insolved.

*The Court.* I will deny the motion.

*Mr. Heine.* Prays exception.

*The Court.* Yes.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,

*Judge.*

20

*Mr. Heine.* I would then move that the case, so far as it involves the Standard Aero Corporation, and the alternative case, under your Honor's ruling, that involves the Aircraft Corporation, be severed, and that they be tried separately; in addition to the reason I have just stated, that the rulings will be exceedingly complicated by reason of the alternative which is always before the Court in regard to these two corporations; that the case as to the Aero Corporation and the acts of waste during the time they may be proven under these pleadings to be in possession, be disposed of, and that the Court's rulings be made with a single eye to the issue there presented, and that then after that has been disposed of, the case so far as they may be able to adduce proof to involve responsibility or liability upon the Aircraft Corporation, then that be brought before the jury and tried under a set of rulings which will be applied singly to the issues involved there.

30

*The Court.* If we get to a point where there is any embarrassment, or there is apt to be any injustice to one or the other, I will separate them.

40

*Mr. Heine.* Yes, sir. If your Honor will allow me an exception to the motion to sever?

*The Court.* Exception allowed.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,

*Judge.*

*Opening.*

Mr. Enright opens the case for the plaintiff.

Mr. Heine opens the case for the defendant.

*The Court.* Is it your contention because the tenant put additional improvements on that he could take away the engine and the boiler room?

*Mr. Heine.* No, sir. Not at all. Our point is that there was an agreement made which is evidenced by the proof we will make in this list, that the putting up of this new building, which would have been prevented by the lean-to boiler house on the back, was agreed upon and authorized by the landlord; we had perfect authority from the landlord to take down the ramshackle old boiler house.

10

*The Court.* Under the lease or subsequent to it?

*Mr. Heine.* Under the lease, and it was ratified in the new lease where it was specifically provided that this new construction should belong to him. And the old lean-to had been taken down during the period of the first lease.

20

*The Court.* What about the contents?

*Mr. Heine.* The contents, as I have stated, we will prove were junk and that they were removed as part of—practically before they were in this boiler house.

*The Court.* Had no value?

*Mr. Heine.* Had no value. And that the machinery and et-cetera complained of by the plaintiff, other than in this boiler house, is there today in the premises in as good condition as it ever was. Particularly this traveling crane. I don't know whether the crane is up now. They have a new tenant. But it was left by us in just as good shape to be put up.

30

*Mr. Enright.* I think Mr. Heine misunderstood your question when he said they had authority under the lease to remove the building.

*Mr. Heine.* And that that was ratified in the second lease, the agreement between Mr. Leonard and the company, to take down these ramshackle buildings and put up the new structure, which would require the removal of the old, was recognized in the second lease, the phraseology which I quoted.

40

*Mr. Enright.* I would like to interrupt counsel. It is a written instrument and there is no such thing in it.

*The Court.* What part are you referring to?

*Charles H. Leonard, direct.*

*Mr. Heine.* I refer to the lease of October 16th, 1917, in which the language I got out was "Buildings and heating plant erected on the ground shall be the property of Charles H. Leonard."

*The Court.* When this said building and heating plant erected on the ground should be the property of Mr. Leonard, that recognized the existing situation that those had been taken away?

*Mr. Heine.* That the others had been taken away. And that these new buildings were recognized in this lease as the buildings which had taken the place of the old boiler house that had been taken down.

*The Court.* I see what you mean.

Mr. Heine continues opening the case for the plaintiff.

*The Court.* I suppose there is no dispute about the two leases, is there?

*Mr. Heine.* No, sir; I think not.

*The Court.* They might as well be offered in evidence.

*Mr. Enright.* I offer in evidence indenture of lease made by Charles H. Leonard, landlord, to Standard Aero Corporation of New York, dated December 29th, 1916, leasing property Berkman street and North avenue, Plainfield, for one year commencing the first of January, 1917, and ending the thirty-first day of December, 1917.

*Mr. Heine.* No objections.

(Lease entered in evidence and marked Exhibit P. 1.)

*Mr. Enright.* Also lease made between the same parties dated October 16th, year blank—

*The Court.* Evidently 1917.

*Mr. Enright.* Evidently 1917, leasing the same premises for the term of one year and four months from the first of January, 1918.

(Lease entered in evidence and marked Exhibit P. 2.)

CHARLES H. LEONARD, the plaintiff, being duly sworn according to law, on his oath, saith:

*Direct examination by Mr. Enright.*

Q Mr. Leonard you are the plaintiff in this action? A Yes, sir.

*Charles H. Leonard, direct.*

Q You live in Elizabeth? A Yes, sir.

Q How long have you lived there? A Thirty years.

Q And what is your business? A Machinery and mill supplies, factory supplies.

Q What is the name of your firm? A Leonard & McCoy.

Q How long have you been in that line of business? A Oh, about forty years. 10

Q You are the owner of this factory at North avenue and Berkman street, Plainfield? A Yes, sir.

Q And you leased it to the Standard Aero Corporation? A Yes, sir.

Q Under this lease that has been marked Exhibit P. 1. A Yes.

Q Will you just describe for us what the factory consisted of, the factory plot consisted of at the time you made the lease?

A Well, the factory plot is two hundred and fifty feet front on North avenue, extending back about two hundred feet on Berkman street at that point. And then additional ground at the other corner is four hundred and fifty-eight feet. The two hundred and fifty foot front, there was a brick building and machine shop and a boiler and engine room on the side, and sheds and so forth in the yard. 20

Q I show you a blue print and ask you whether that is a blue print correctly showing the location of the different buildings on this plot? A Yes, sir.

*Mr. Heine.* At that time? 30

Q At the time of this first lease I have called your attention to? A Yes, sir.

Q Was this blue print made before the time of that lease? A Yes, sir. Before.

Q And correctly shows the location of the buildings at the time of the lease? A Yes, sir. There should be some small iron racks and things in there.

Q What? A Iron racks and coal bins and so forth.

*Mr. Enright.* I offer the blue print in evidence. 40

*Mr. Heine.* No objection.

*The Court.* It will be admitted.

(Blue print admitted in evidence and marked Exhibit P. 3.)

*Charles H. Leonard, direct.*

Q Now, Mr. Leonard, this rectangular place marked along Berkman street, that is the main building, isn't it? A That is the machine shop.

Q This is a brick building? A Yes, sir.

10 Q How many stories high? A Well, it is two and one-half stories in front, this small building, and then that is one story (indicating). Regular machine shop construction. There is an overhang here.

Q To the rear of that rectangular place, butting up against it is a square enclosure. What is that? A That is the side boiler room and engine room.

Q Was that there at the time of the lease to the Standard Aero Company? A Yes, sir.

20 Q Will you tell us the dimensions of that? A Well, that is fifty-one by thirty-seven, as I recall.

Q You know. It is your property? A Yes, sir.

Q Is that approximately the dimensions as you recall it? A Yes, sir.

Q Will you tell us how high that building was to the best of your recollection? A About fourteen or fifteen feet.

Q What sort of floor did it have in it? A Brick.

Q Were there windows or openings in it? A I believe there was two doors and three windows.

30 Q Will you say whether or not it was constructed of the same materials as the main building? A It was.

Q State whether or not it was in the same comparative state of preservation as the main building.

*Mr. Heine.* I object to that question as calling for a conclusion by the witness. We have not had any evidence as to the state of preservation of the main building. He is asking for comparison with the main building. We do not even know what the main building was constructed of yet.

40 *The Court.* I think that is right, Mr. Enright.

Q The main building was constructed of brick, I think you said, didn't you? A Yes, sir.

Q About how old was it? A I don't know. It must have been thirty years old, I should think.

*Charles H. Leonard, direct.*

*By Mr. Heine.*

Q At what time? A From now.

Q From the present? A Yes.

*By Mr. Enright.*

Q In what condition of repair was the building at the time of the first lease? A Well— 10

Q By that I mean lease Exhibit P. 1? A Well, I guess it was in pretty good condition. The International Motor Company hired it for a time.

*Mr. Heine.* I move to strike out what the International Motor Company did.

*The Court.* Yes, that will be stricken out.

A I should think fair. 20

*Mr. Heine.* I would like to examine Mr. Leonard on qualifications as to buildings. Or, unless he is more specific, that is a conclusion. I object as a conclusion by an unqualified witness.

*The Court.* I will let it stand.

*Mr. Heine.* Prays exception.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,  
*Judge.* 30

Q Will you state what the condition of this extension was at the time of the Aero lease? A Same condition as the main building.

Q Were there any openings between this extension and the main building? A Yes. A door.

Q And what was contained in this extension? A Why, there were two boilers, one of one hundred horsepower and one of fifty horsepower.

*Mr. Heine.* I do not hear you. 40

A There was a one hundred horse power horizontal boiler, and one fifty horse power, and an eighteen by forty-two Frick Corliss engine steam pump and a pipe connecting them. It was a steam plant complete.

*Charles H. Leonard, direct.*

Q How long had this fifty horsepower boiler been in there?  
A Oh, since the building was built, I guess. That is the first boiler was put in there.

*Mr. Heine.* When? At the time of Exhibit P.1? I object unless the time is fixed.

10 *The Court.* He says about twenty years ago.

*Mr. Heine.* At the time of the lease.

*The Court.* Now it is thirty years ago.

*Mr. Heine.* But the question—

*The Court.* The boiler was put in when the building was put up, so it must be thirty years old.

A The one hundred horsepower was put in about two years subsequently.

20 *By Mr. Enright.*

Q Was the one hundred horsepower boiler put in by you? A I sold it to the party that owned the property.

Q Was there a Gorton boiler in there? A I put that in after these gentlemen had leased the place.

*By Mr. Heine.*

Q Which boiler? A Gorton low pressure heating boiler. Largest size.

30 Q You have not mentioned that before? A No.

*By Mr. Enright.*

Q Whereabouts on the property was the Gorton boiler? A Why, there was a place near the wash house. These people put their extension right in the—

*Mr. Heine.* I object to the witness volunteering testimony as to the extensions at this time.

A Well, it was put into the building that they erected.

40 Q Can you point out on the property whereabouts the Gorton boiler was put in? A Just about there (indicating).

*Mr. Heine.* To the left adjoining the old boiler house.

Q Is there anything else you can recall, any other machinery located in that boiler house? A A No. The Gorton boiler was

*Charles H. Leonard, direct.*

not put in the boiler house at all. It was put out here. They built here (indicating).

*Mr. Heine.* I move to strike out "they built around there." Let us have the record right.

*The Court.* Yes. That part will be stricken out.

10

Q Was this Gorton boiler your property? A Yes, sir.

Q What machinery was there inside of the main shop? A Well, there was shafting and pulleys, and a traveling crane.

Q Anything else that you recall? A No, not inside that shop.

Q What about the condition of these boilers and the engine and the pulleys and cranes that you have described at the time of the leasing to the Aero Company?

*Mr. Heine.* First lease or second?

*Mr. Enright.* The lease Exhibit P. 1.

20

A I had examined thoroughly and received word—

*Mr. Heine.* I object to what word he received.

Q Did you look them over yourself? A No, I did not.

Q Before they went into possession did you have them examined? A I did so.

Q By whom? A By J. N. Leary.

Q Do you know anything about his qualifications for that sort of thing? A Well, he has been in that line all his life, I guess, and he installed the engines originally.

30

Q What other structures were there on the plot besides the two you have described at the time of this lease P. 1? A Well, there was a skeleton of a foundry in the back.

Q Will you point that out on the blueprint? A Just about there, I guess (indicating).

Q And that skeleton of a foundry you have spoken of is not indicated at all on the blue print? A No. It was taken out.

Q What other structures were there on the plot? A Why, there was iron racks and coal bins such as necessary in a machine shop manufacturing plant.

40

*Mr. Heine.* I move to strike out as a conclusion "such as is necessary in a machine shop manufacturing plant."

*The Court.* Yes. That will be stricken out.

*Charles H. Leonard, direct.*

Q Was there any building on the square marked "pattern shop" on the blue print? A Yes, the pattern shop was there.

Q What sort of a building was that? A Wooden building.

Q To the rear of the plot on the other side of the railroad?

A That is the siding. There is sheds.

10 Q There is a rectangle marked "modern pattern storage paint shop and miscellaneous sheds." A Yes.

Q Was there something up there at the time of this first lease? A Yes. Those wooden buildings; yes, sir.

Q Were they covered buildings? A Yes.

Q Open front or closed in the front? A No. Closed.

Q Was this pattern shop? A That was closed all around.

Q Was that a wooden building? A Yes.

Q That is detached from the main brick building? A Yes.

20 Q This foundry you have spoken of was that frame or otherwise? A That was frame. Corrugated iron.

Q Was that enclosed? A It was enclosed but the iron had fallen off in places.

Q That was in rather bad shape? A Yes.

Q Now, you have spoken of putting in a Gorton boiler at the request of the Aero Company?

*Mr. Heine.* I object. The question is leading in that form. There is no testimony as to any request. He said he put a Gorton boiler in and he owned it.

30 Q At whose request did you put in the Gorton boiler? A Why, I thought that the people would use the small boiler for heating.

*Mr. Heine.* I object to that.

Q What individual asked you to put in the small boiler? A Mr. Bradford, the general manager and vice-president.

Q Of what? A Of the Standard Aero.

40 Q So as to get this straightened out, I will ask you whether the Aero Company wasn't in possession for a short time prior to this lease, P. 1, under another lease? A They were, yes.

Q Was this Gorton boiler put in there in the period when they were in possession under the first lease, just prior to P. 1? A Well, it is the first fall. The very first fall after the date of this lease. No.

*Charles H. Leonard, direct.*

*The Court.* Is there any dispute this Gorton boiler was in there?

*Mr. Heine.* No. None whatever.

*The Court.* Then let us not waste any time upon that.

*Mr. Enright.* It was put in in a period shortly antedating Exhibit P.1 when they were in under another tenancy not material to this case. 10

Q Now, Mr. Leonard, after the making of this lease, Exhibit P.1, and after the United States got in the war, do you recall any interview with anybody connected with the Aero Company in which the matter of making authorizations was discussed? A Yes.

Q I show you what purports to be an office copy of a letter from your establishment and ask you whether that enables you to fix the date? What is the date of that letter? A This is August 9, 1917. 20

Q Is it? A April 9, 1917.

Q Did you have an interview with Mr. Bradford on the date of that letter? A Yes, sir.

Q You have said he was connected with the Aero Company? A Yes, sir.

Q What did he say to you at that time and what did you say to him? A He came to see me. He wanted to make changes out there and put up buildings and take down the iron rack and the coal bins and wash house and such things that were outside. 30

Q What buildings did he tell you that he wanted to take down at that time? Indicate them on the map? A Well, this pattern shop and the racks that were out here.

Q Talk louder. A The pattern shop and coal bins and the wash house out here. He wanted to take them down.

Q Did he tell you what he wanted to do? A Extend the building.

Q Did he show you where he wanted to put up the extension? A No. 40

Q Was anything said about taking down—

*Mr. Heine.* I object to the leading. Let the conversation come from the witness.

*The Court.* Let him finish the question.

*Charles H. Léonard, direct.*

Q (Continued.) Was anything said about taking down the brick boiler house?

*Mr. Heine.* I object.

A Nothing.

10 *The Court.* I will allow the question.

*Mr. Heine.* The conversation was asked for and counsel asks practically the conversation in his questions.

*The Court.* I will allow it to stand.

*Mr. Heine.* Prays exception.

Exception allowed. Sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

20 Q At the conclusion of that interview was a letter dictated and signed by you addressed to the Standard Aero Corporation?

A Yes.

Q There was? A Yes, sir; that letter.

Q Who dictated the letter? A Mr. Bradford.

Q This copy I have in my hand is your office copy of that?

A Yes, sir. I signed it.

Q You keeping this yellow paper and Mr. Bradford taking the other? A Yes, sir.

*Mr. Enright.* I offer the letter in evidence.

30 *By Mr. Heine.*

Q Did you hear Mr. Bradford dictate it? A Yes.

Q In your office? A Yes.

(Letter entered in evidence and marked Exhibit P. 4.)

*Mr. Enright.* This is letter April 9, 1917.

“Standard Aero Corporation,

Attention Mr. C. B. Bradford.

40 Gentlemen: Confirming conversation with your Mr. Bradford will say that I am quite agreeable for your company to erect any buildings which you deem necessary for your business upon the property which you now lease from me. It is understood, of course, that said buildings shall not extend over the grounds you now occupy under the terms of the lease existing, and that upon the expira-

*Charles H. Leonard, direct.*

tion of the lease buildings that you so erect shall be considered my property. You are privileged to take down any of the outside sheds or structures which you deem necessary.”

A That is right.

Q In that interview at that time when that letter was written was anything said about removing any of the machinery? A No. Absolutely no. Positive. 10

Q How soon after that did you first hear that this boiler house had been taken down and machinery removed? A Some time subsequently Mr. Bradford came to me.

Q About how long after, to the best of your recollection? A Oh, I can't tell. I could tell if I had my papers. I can't tell. It was some time subsequent, however, he came to me and wanted permission to remove the machinery. Nothing was said about taking down that building. 20

Q What did you tell him? A Why, I told him, I said, Bradford, says I, you folks have got an option on that place, now I tell you what I will do, I don't want to interfere with your business, because the world needs airplanes, or words to that effect, I will do anything I can to help you out, pay me \$5,000 and that will give me a chance to re-install in case you don't purchase the property, to re-install the machinery. And if you do purchase the property the \$5,000 can go on account of the purchase price, the option price. And with that Mr.—oh, and then I said, understand, if that machinery comes out of there it has got to be housed and greased and painted and taken care of. And Mr. Bradford— 30

Q What was the \$5,000 for? A So that I might re-install it after they got through with the property.

Q Re-install the same machinery? A The same machinery; yes, sir. And if they purchased the property the \$5,000 went on account of the purchase price.

Q All right. What did Mr. Bradford say? A Mr. Bradford laughed and he said, why, he says, Mr. Leonard, he says, the machinery has been out of there and the building torn down weeks ago. I said, well, you have got a gall. 40

Q When he first came to you he didn't say anything about the machinery having been taken down or the building removed? A Not a word.

*Charles H. Leonard, direct.*

Q Simply wanted your permission? A Yes, sir.

Q What did he say about the \$5,000? A Didn't say anything at all.

Q No, but when you told him you wanted \$5,000 what did he say about that? A He laughed.

10 Q Did you and Mr. Bradford come to any conclusion at that time respecting your giving your consent to this removal? A No. The thing was done.

Q Did you ever consent to the removal of that machinery? A No.

Q Did you ever consent to the tearing down of that brick boiler house? A No.

Q What did you do, if anything, about pressing your contention that \$5,000 should be paid? A Well, I wrote the Standard Aero people a letter.

20 Q When was that? A I think it was in February. You have got the copy there.

Q Of 1919 do you mean? A Yes, sir. The letter in which I enumerate the articles.

*Mr. Heine.* Do you want that original?

Q Do you know what was actually done with these two boilers, for instance? A Why, I own the adjoining property and the whole business was thrown out in the lots in the mud there, scrap. Part of it. Another boiler was taken down here to Elizabethport, the Gorton boiler.

30 Q Did you ever consent to that? A No. Certainly not.

Q What was done with the Corliss engine? A Oh, it is in pieces—some of it is in pieces out in the lot. It is lying there yet. It is up there now.

Q Was anything done so far as you were able to observe to protect it? A No. Absolutely no.

Q What was done with the traveling crane? A I don't know. The carriage is there. I found the carriage there but the rest of the stuff I don't know where it is. The tracks.

40 Q How about the shafting in the original buildings? A Why, yes. That was thrown out in the lots. I don't know whether it is all there or not. And some pulleys and stuff. Hangars. Wood pulleys thrown out there and all in pieces.

Q When did you go to the property yourself to see what had happened to the machinery? A I think about February.

*Charles H. Leonard, direct.*

Q Of what year? A 1919. It was after these gentlemen notified me, I think, that there was going to be a kick.

Q And then you went out to see what shape things were in?  
A I think so. I had a meeting there with Mr. Taylor, is it? Before that I called on Mr. Mingle and he asked me to write a letter.

10

Q Who is Mr. Mingle? A Why, he was the president of the company, I think. I had an interview with him and he asked me to write a letter or statement and I wrote the letter, and that is the last.

Q Was that time, which you think was about February, 1919, the first time that you went to the property and saw physically what happened to this machinery? A Yes.

Q In what condition did you find the boilers? A Well, the fifty horse boiler is imbedded in the mud, in very bad condition. And the other boiler is on skids, I think the tubes of that are all played out, from being exposed.

20

*Mr. Heine.* I object to the conclusion of the witness.

*The Court.* Why?

*Mr. Heine.* Their being exposed. Because of the playing out of the tubes, they might have been burned.

*The Court.* He is giving his opinion. He has been in this business for years.

A The tubes were all right before it was taken out.

*Mr. Heine.* He says because of the tubes' condition which I think is a conclusion of this witness.

30

*The Court.* Of course. Isn't he entitled to give a conclusion.

*Mr. Heine.* I don't know.

*The Court.* I understand he has been in this business for years.

*Mr. Heine.* Junk business?

*The Court.* Not junk.

40

*By the Court.*

Q Haven't you seen, Mr. Leonard? A Yes, sir.

*Mr. Enright.* I am asking him now to describe the physical condition as he saw it in February, 1919.

*Charles H. Leonard, direct.*

*By Mr. Enright.*

Q You have told us about the boilers. Were they capable of being used? A I would not care to use them.

*Mr. Heine.* I object to that.

10 *The Court.* Yes, that will be stricken out. Answer the question, Mr. Leonard.

A I should say so far as the small boiler was concerned, no. The larger boiler might be.

Q Would anything have to be done to it in your judgment to make it useful? A Well, I should think it would have to be re-tubed.

20 Q In what condition did you observe the Corliss engine? A Well, that that I saw there was in very bad shape. The cylinder head had been taken off and was not there and the water and wet had got in there and the cylinder was pitted, rusted out and pitted.

Q What is the effect on an engine of having the cylinder pitted with rust?

*Mr. Heine.* I object to that.

A Well, you would probably have to re-bore the cylinder.

30 *Mr. Heine.* I object on the ground the witness is not qualified as a machinery expert. He may be.

*The Court.* He ought not to be in business 18 years if he does not know what would happen to a cylinder when it gets rusted.

*Mr. Heine.* I mean the mechanical problem; it may be a mechanical problem.

*The Court.* There is nothing so very technical about that, is there? I think almost anybody would know—

40 *Mr. Heine.* If the inside of the cylinder is pitted I think the jury can draw the inference. But what is the mechanical effect, I think, is a different proposition.

*The Court.* I will allow the question.

(Question repeated by stenographer.)

*Mr. Heine.* I will not waste time about it.

*Charles H. Leonard, direct.*

A You would probably have to get a new piston for it to compensate for the boring. New rings.

*By the Court.*

Q In other words, you would have to make it tight again?

A Why, sure. It would be quite a job, too.

10

*By Mr. Enright.*

Q Was there anything, as you saw the situation, to indicate that anything had been done at all to protect this machinery from the weather? A Absolutely none.

Q Just indicate on the blue print there whereabouts you found this machinery? A This only shows the 250 feet front. There is 458 feet additional, the whole block. And they are away out here (indicating). Those people rented this property, but I allowed them to use the whole block for their lumber and coal and everything else.

20

Q I think you said there was a dynamo, didn't you? A Yes, there was a dynamo and that was pitched out in the lot. Mather dynamo, 750 light.

Q I don't think I asked you what condition that was in at the time of the lease? A First-class wreck. Never saw anything like it.

Q In what condition did you find it in February of 1919?

A I found it in the lot away back.

Q In what operating condition was it? A Why, you could not run it at all. Everything was practically off of it. Wires and everything else, all busted. It is there yet.

30

Q At the time of the lease was there any foundry equipment? A Why, there was a cupola there and a Willbraham-Baker blower.

Q What did you observe as to the cupola and the blower when you were out in February, 1919? A Thrown out in the lot in front of the foundry and the furnace had been removed and built over and they were thrown out in the lot in the mud.

Q What was their condition as to whether they were usable or not when you saw them? A Rusted out. No, I don't think they were usable.

40

Q You have spoken of a steam pump. What happened to that? A Well, that is out in the lot, too, all rusted up. It is a wonder some one ain't carried it away before this.

*Charles H. Leonard, direct.*

Q Is it in a condition so that it could be repaired, do you think? A Well, yes, buy all new parts for it.

Q What have you to say as to the expense of such repairs?

A Well, fix the steam pump, would cost probably more than half of the cost of the whole nowadays.

10 Q What did you observe as to the traveling crane? A Why, the I-beams were there and the carriage, and that was all. So far as the track was concerned I could not locate that anywhere.

Q How about the shafting and pulleys, did you see them around? A Well, I saw some pieces of shafting there, not all, and the hangars, some of them with the caps off. I don't know where the caps were. The pulleys, there was one big wood pulley there was all in pieces from the weather. A wood pulley has to be kept out of the damp, even in the shop.

20 Q Were such of the shafting and pulleys as you saw there in usable condition? A Well, such as are there they might be fixed up, yes.

Q What part of them have disappeared? A Why, the caps caps of the hangars and some of the hangars were broken. There was no collars there. Couldn't see any collars or couplings.

Q Have you been in the business of buying and selling second-hand machinery of this description within such recent times as would enable you to express an opinion as to the value of these things? A Not very recently. I have got out of that line.

30 Q Got out of the second hand line? A Yes.

Q Can you tell us what it would have cost to replace new, and then I will have you tell what condition of depreciation you observed it in, what it would have cost to replace new December 31st, or about that time, 1917, the traveling crane? A Well, new, at Plainfield, traveling crane, I got a price from a specialist in that line right near there thirteen hundred and fifty dollars.

Q Are you able to tell us anything about the cost of replacing the pulleys and the shafting as of that time?

40 *Mr. Heine.* I object. I move to strike out the last answer on the ground the witness says he got the price from some one else. The question was directed to his own knowledge of the cost of replacement at that date at Plainfield. His answer is that he got a price at that time from somebody. I think that is irrelevant.

*Charles H. Leonard, direct.*

*The Court.* Unless he went in the open market and ascertained—

*Mr. Heine.* Unless he can testify that it is at market prices.

A That is right. I am buying those things and selling them and I went right to headquarters about it. 10

*Mr. Heine.* I object to the answer as it stands.

*The Court.* Let us ascertain his knowledge.

*By the Court.*

Q Are you still actively engaged in selling new machinery?

A Yes, sir.

Q And you know the market price? A I think so; yes, sir.

*The Court.* I will allow it.

*Mr. Heine.* This is asked as of December 31st, 1917? 20

*The Court.* Yes. He says he is still in the business, and been in quite long, I understand.

A Why, sure.

*Mr. Heine.* The witness answer as of his own knowledge, but I object to the answer to a price given by someone else to him.

A I got the price from a man who does nothing else but put that stuff up. He is right there alongside of the factory. And that is the Colburn Crane Company. That is their specialty. It would cost less money to get it from them than to get it from a jobber. 30

*By the Court.*

Q That is right in the open market, is it? A Yes, sir. And he knows that stuff. He has examined it.

Q Is that a very reasonable price for that kind of work at that time? A Yes, at that time.

*Mr. Heine.* I have not any opportunity to go into whether the crane company sell in the open market, or whether they are a specialty and fix their own price. 40

*The Court.* You will have when you come to cross examine. He says that is a fair and reasonable price in the open market.

*Charles H. Leonard, direct.*

*Mr. Heine.* Of his own knowledge, is that it?

*The Court.* That is what he says.

*Mr. Enright.* As I understand it the open market for a specialty consists in getting the information from a specialist.

10 A That is new. I place my claim on the stuff that was there at \$500, no matter what the new costs.

*By Mr. Enright.*

Q I think I asked you whether you were able to give us as of the same time the fair replacement cost of these pulleys and shaftings that went in the crane building at the time of the lease?

A I figured the thing out, and then I sent to the Dodge Company for an estimate, I buy lots of stuff from them, and the price I got was \$1,000 erected.

20

*Mr. Heine.* I object to that unless that is of that date, December, 1917.

*Mr. Enright.* I limited it to that date.

*Mr. Heine.* Is the answer addressed to December 31st, 1917? Is that the time this price was given from the Dodge Company?

A No. The \$1,000 was the price at the present time. That is about a year ago when I got these prices.

30

*Mr. Heine.* I object to that on the ground that the witness is testifying—

*The Court.* Why did you say December 31st, 1917?

*Mr. Enright.* That is at the time the first lease ended.

*The Court.* Then there was a continuation of the lease, wasn't there, and they continued in possession—

*Mr. Enright.* Yes, sir. It was thought, however, that since these acts occurred during the period of the first lease, that probably the damage claim should be fixed as of the dates of termination of that lease. If I am wrong about it, I will be glad to put in the figures, because I have them, as to the date of termination of the second lease.

40

*The Court.* All right. We will take them as of that date.

*Charles H. Leonard, direct.*

*Mr. Heine.* Then I renew the objection to the letter from Dodge Brothers as of the present time.

*The Court.* Yes. It ought to be of the other date.

A I don't claim that value. I claim \$600.

*Mr. Heine.* Not what you claim. 10

*The Court.* That will be stricken out.

*Mr. Heine.* Not what you claim. What is the value in 1917. May I ask at this time, while we have this point before the Court:

*By Mr. Heine.*

Q Was the letter, or the estimate from the specialty concern in Plainfield secured in December, 1917, or later? A Why, I got that price from Colburn Crane since this thing has started. Since you folks have left there. 20

Q Since February 10th, since action was started? A Yes.

*Mr. Heine.* Then I move to strike that out, under that same ruling.

*The Court.* Yes. That will be stricken out.

*Mr. Enright.* May I ask another question:

*By Mr. Enright.*

Q I will ask you whether there has been an advance or recession in price of that sort of material between say the first of January, 1918, and the time when you made this inquiry? A Constantly advancing. Everything. 30

Q Can you tell us about the percentage of advance, if you know?

*Mr. Heine.* I object to this witness being allowed to create an entirely independent market of his own here, without any preliminary cross examination as to the number of his transactions, or the matters in which he has dealt, on these particular kinds of materials, which go over a broad field of various kinds of machinery. 40

*The Court.* You may test him if you like. You are questioning his experience and ability and you may test him, if you like.

*Charles H. Leonard, cross.*

*Mr. Heine.* Between the fluctuation in the market on machinery between December 31st, 1917, and the present time.

*The Court.* You may test him.

10 *Special cross examination by Mr. Heine.*

Q Mr. Leonard, you do business over in New York, don't you?

A Yes.

Q Your sales are in the majority of cases made from your office at 161 Washington street, New York? A Yes, sir.

Q And in the New York Trade? A Yes, sir.

Q You do very little Jersey business? A Oh, we have some customers down here.

20 Q Yes, a few. Between the first of January, 1918, and the present time have you had any sales in your business of Corliss engines? A No.

Q When was the last sale of a Corliss engine in your business? A Oh, I don't know. Maybe ten years ago.

*Mr. Enright.* I did not ask him anything about Corliss engines.

*Mr. Heine.* That is part of the machinery involved.

*The Court.* He has not asked him about that. He has not qualified him as to it.

30 *Mr. Enright.* I simply asked him as to the pulleys and the hangars and traveling crane.

*Mr. Heine.* And the shafting. And then you asked him a question generally as to the machinery market, whether the machinery market had advanced or not in the last year. If the machinery market does not include a Corliss engine it is a very poor machinery market. That is also one of the items complained about. I took that to keep within the pleadings.

40 Q Have you sold any traveling cranes? A No.

Q Between the first of 1918, January 1st, 1918, and the present time? A No.

Q Have you been very active in business lately, the last three or four years? A Well, I am there every day.

*Charles H. Leonard, direct.*

Q You could not be any more active than that. Have your sales involved any boilers since January 1st, 1917, of as high horsepower as one hundred? A No.

Q Or fifty horsepower? A No. I have drawn out of it.

Q Have you been making any bids during that time involving the price of boilers or not? A No.

10

*Mr. Heine.* I submit the witness is not qualified to testify to the fluctuations of the machinery market between December 31st, 1917, and the present time.

*The Court.* You have not asked him anything about the fluctuations of the machinery market. The man has had twenty years' experience and he does not have to sell any, and he may know all about the fluctuations of the market.

*Mr. Heine.* The usual qualifications, as I understand it— 20

*The Court.* I will allow the question. No use arguing and wasting time about it. Proceed.

*Mr. Heine.* Prays exception.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

*Direct examination (continued) by Mr. Enright.*

Q The pending question is whether you are able to say about what the enhancement in market value of machinery has been since the first of January, 1918, and the time when you got these quotations? 30

*By the Court.*

Q Are you able to do it, that is what he wants to know? A Well, I should judge—

Q No. Are you able to tell it? Do you know? A Well, know more from buying in the—

Q Do you know? A No, I don't know it. 40

Q Don't you keep familiar in your business with how prices are moving? A I can, yes. I know what tubing is worth.

Q That is what Mr. Enright is trying to find out. You are in the business of machinery aren't you? A Yes.

*Charles H. Leonard, direct.*

Q Mr. Enright wants to know whether you keep in touch with that business or not. Do you? A I do in general supplies but not in engines and boilers.

Q In general supplies do you keep in touch with the market?  
A Yes.

10 Q Do you know whether there is any increase or decrease in it? A Increase.

Q Now, he wants to know how much in general supplies since December 31st, 1917?

*Mr. Heine.* I object to that as irrelevant on the ground the items complained of in the complaint are not involved in the classification of general supplies.

*The Court.* Then it will not apply to the case.

20 *Mr. Heine.* I object to it on the ground it is irrelevant.

*The Court.* I will allow the question.

\* *Mr. Heine.* Prays exception.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

A I should judge it is one hundred per cent. in everything.

*The Court.* Now you may ask him as to particular instances.

30

*By Mr. Enright.*

Q I think you have said you hadn't any occasion to test the market on these traveling cranes? A Yes, sir.

Q And pulleys and hangars.

*The Court.* Give us those items that come within general supplies that he would know about. That is the question.

40

*Mr. Enright.* I do not think any of these things come within general supplies.

*The Court.* Then he does not know anything about it.

*Mr. Enright.* I am simply limiting the question of value to those things I thought he did know. The hangars and pulleys and so forth. That is all.

*Charles H. Leonard, cross.*

*Cross examination by Mr. Heine.*

Q When did you acquire this property in Plainfield, Mr. Leonard? A Oh, I guess it must be thirty years ago.

Q And before the Standard Aero Company took possession under this lease Exhibit P. 1, or any preceding lease, who was your last tenant? A Before the Standard took hold of it? International Motor Company. 10

Q And when did they vacate? A Just previous to these gentlemen taking it.

Q Well, how long previous? A Well, I can't remember. A very short time, I guess.

Q Well, you were the one interested, weren't you? A Oh, I suppose a couple of months.

Q Two months? A Maybe. Maybe a month. I will have to look back. 20

Q And how long had the International Motor Company been in the premises? A I think they were there about nine months.

Q What did they use the premises for? A To store their chasses in.

Q Storage? A Yes. They could not ship them on account of the lack of vessels to the other side.

Q Do you know whether or not the International Motor Company during the nine months they were there used either the one hundred horsepower or the fifty horsepower boiler? A No. They never used anything there. 30

Q They didn't use any of the machinery, engines, traveling crane or anything? A No.

Q Just as a shell for storage? A That is all.

Q Did they renew the glass in the frames, or anything like that, or the windows, or did you put new glass in? A No. I put that in.

Q You had put that in when they went into possession, the usual breakage of glass? A Sure.

Q Was there anything else you had to do to the premises before they used it for storage, such as to the roof? A No, I did nothing for them at all. 40

Q What rental did you get for the premises from them?

*Mr. Enright.* I object to that as immaterial.

*The Court.* How is that material?

*Charles H. Leonard, cross.*

10 *Mr. Heine.* Some evidence of the value placed on the premises by reason of their condition. A rental is indicative of whether or not the premises are in good or poor repair. The statement that he did nothing for them would indicate that attitude on his part would be made by a less lease than if he had done something for them.

*The Court.* Question overruled.

*Mr. Heine.* Prays exception.

Exception allowed—sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

20 Q Before the International Motor Company was in there how long was the property idle? A Why, I think it was about four years; there was no demand for factory buildings in that time at all.

Q Who was the tenant then that was the last one before the International Motors? A Previous to that the Crown Machine Company. They were there I guess for three years or more.

Q Did they use the plant, the boilers, and the engine, and so on? A Yes, sir.

Q And about what date or time did they leave the premises? A Well, let us say four years previous to 1917, about 1909, I should think, something in that neighborhood.

30 Q You said they were there about three years? A I think so; yes, sir.

Q Did you make any repairs to the buildings during the tenancy of the Crown people? A Yes.

*Mr. Enright.* I object to that as immaterial. It seems to me we have gone far enough afield.

*Mr. Heine.* I think I am entitled to show the condition of those buildings at any time down to the last repair.

*Mr. Enright.* There is no testimony in this case as to the condition of any building except the boiler house.

40 *The Court.* That seems to be so, Mr. Heine. That is the only thing they are complaining of.

*Mr. Heine.* They go into the branch of the traveling crane, the shafting and pulleys and all that, inside of the main building, and if anything had to be done in connection with that building, the roof, and so on, in con-

*Charles H. Leonard, cross.*

nection with the protecting of the shafting, and so on, it would give evidence what the situation was, I submit. Any evidence of the general nature of charges as to the machinery—

*The Court.* The charge is not general. The charge is specific. They say you took certain things out. 10

*Mr. Heine.* They say we took certain things out, and he asserts the shafting was in good condition at a certain time. At least, they haven't testified about that, but it was found to be in poor condition in February, 1919. But I think we are entitled to show that it was in similar condition as any period I can adduce proof to meet. In other words, if Mr. Leonard testifies that boiler had the flues burned out—

A No, I didn't say burned. 20

*Mr. Heine.* I mean had them rusted out from exposure, we are entitled on cross examination to bring out, if possible, the condition of that boiler was the same—

*The Court.* Yes, but your question now is about the building. If you talk about the boiler I will admit it.

*Mr. Heine.* Mr. Enright has asked about the structure of the building.

*The Court.* If he asks irrelevant questions it does not make it proper. There is a very distinct issue here. 30

*Mr. Heine.* There is also the situation which relates to the issue of damage that these things were bound to be in a certain condition of dis-repair in February, 1919, when Mr. Leonard made a personal inspection. I think we are entitled to any proof we can get to show that they were in poor condition of repair years before that.

*The Court.* Certainly. If you will address yourself right to that. You asked the condition of the building. Does not make any difference whether the chimney was falling down or not. The question is what they are claiming damages for. 40

*Mr. Heine.* He says the shafting and the traveling crane were all rusted—

*The Court.* I overrule that question.

*Charles H. Leonard, cross.*

Q Mr. Leonard, did you ever make any repairs to the shafting and pulleys before the Crown people were in there? A No.

Q Did you make any repairs to the shafting and pulleys after the Crown people went out? A No.

10 Q Did you make any repairs to any of the compression shaft couplings or split collars or wood pulleys in the building at the time the Crown people went out? A No.

Q Was the Whitney Foundry cupola and the Wilbraham-Baker positive blast foundry blower in the premises at the time the Crown people went out? A Yes, sir.

Q Did you make any repairs to that after they went out? A No, sir.

Q Was the fifty horsepower full front horizontal boiler on the premises when the Crown people went out? A Yes, sir.

20 Q Did you make any repairs to that after they went out? A I had them cleaned out.

Q How soon after the Crown people went out did that happen? A Well, just before these people went in there. I had them thoroughly examined to see that they were all right. I supposed they were going to use them.

Q Had them cleaned out in 1916? A Yes, sir; or whatever date that was.

30 Q Do I understand you to say you had the fifty horsepower boiler cleaned out just before the Aero people went in? A Yes, sir. To see if it was in condition.

Q Nothing else was done to it between the time the Crown people went out— A Well, it was examined and passed upon.

Q When was that examination? A Well, previous to—just about 1916, previous to these people going in.

Q In other words, you had it examined and then you had what was necessary to be done to it done? A Whatever was necessary to be done. There was some handhold plates wanted, which I sent out there.

40 Q Was the one hundred horsepower horizontal full front boiler in the premises when the Crown people went out? A Yes, sir.

Q Did you make any repairs on that boiler after that time? A Treated it just the same as the fifty horse.

Q Then it was inspected and cleaned in 1916 just before the Aero Company went in? A Yes, sir.

*Charles H. Leonard, cross.*

Q Did that apply to the fixtures such as feed pipes, flues, and so on? A Yes, sir.

Q Included the entire paraphernalia of the boiler? A Yes, sir. It was pronounced all right.

Q Who did that pronouncing? A J. W. Leary.

Q Where does he reside? A Philadelphia.

Q Was the eighteen by forty-two Frick-Corliss two hundred and twenty-seven horsepower engine there when the Crown people went out? A Yes, sir.

Q Did you make any repairs to that after they went out? A None were necessary.

*By the Court.*

Q Did you make them? A No.

*Mr. Heine.* I move to strike that out.

*The Court.* Strike it out.

*By Mr. Heine.*

Q Was the Duplex boiler steam pump on the premises when the Crown people went out? A Connected with the boiler; yes, sir.

Q Connected with which one? A For both. It fed both of them.

Q Was anything done to that? A No, sir.

Q After the Crown people went out? A No, sir.

Q Was the traveling crane there when the Crown people went out? A Yes, sir.

Q Did you make any repairs to that crane or to the various parts of the crane, or the track upon which it runs, after they went out? A None were necessary.

*Mr. Heine.* I move to strike that out.

A No.

*The Court.* That will be stricken out.

Q Was the dynamo which you have referred to in the premises when the Crown people moved out? A Yes, sir.

Q Have you made any repairs to that since that time? A No.

Q The Gorton boiler and the fixtures which were connected with that, was that there when the Crown people moved out?

*Charles H. Leonard, cross.*

A Why, no. I bought that boiler and installed it for these people.

Q In about what year? A Why, since they were in the place there.

Q Under the first lease, during the first year they were there?

10 A I think so.

Q Can you recall the time of the year, summer or fall or spring? A No. It was in the early fall.

Q Of which year, 1916? A It must have been the first year they were there because they never ran the big boilers to heat the place, and they heated with that boiler, the Gorton boiler.

20 Q When the Crown people moved out what was the condition of what we call the boiler house, being the part of the premises which you have indicated on the map as adjoining the rear of the main building and which is marked "Blacksmith Shop, Engine Room and Boiler Room," on Exhibit P. 3? A Why, it was in serviceable condition.

Q What was the condition of the walls of that lean-to, or boiler house, when the Crown people moved out? A I never saw anything wrong about them.

Q Well, what was their condition? Were the brick walls well pointed all right? A Yes. Certainly. Brick walls. Twelve-inch walls, I think.

Q Were they well pointed? A I guess so.

30 Q Well, do you know? A Well, I didn't examine particularly to see whether they were well pointed or not.

Q Would you swear there wasn't a lot of brick out and the cement wasn't— A I never saw a brick out in the place.

Q When were you there at the time the Crown people went out? A Just about the time that they did go out, or afterward.

Q Did you make an examination of the premises? A Yes, I walked through it.

40 Q Did you go out and look at the back of the sides of the boiler house to see if the brick walls were all right? A Yes, I did walk around.

Q Did you look at the roof of the boiler house? A I looked at the roof of the main building particularly and put a new roof on.

Q I am not asking you that. Did you look at the roof of the boiler house? A No, I did not.

*Charles H. Leonard, cross.*

Q Didn't look at the roof? A No.

Q Looked at all of the three walls? A Yes.

Q But not the roof? A Yes.

Q Is that your signature (handing paper to witness)? A Yes, sir.

*Mr. Heine.* I ask to have that marked for identification. 10  
(Paper marked D. 1 for identification.)

*Mr. Enright.* What is that?

*Mr. Heine.* It is a letter. I will come to it later.

Q Is this your signature (handing paper to witness)? A Yes, that is my signature.

Q These are both from your office, these two sheets part of the same letter? A Yes.

*Mr. Heine.* I ask to have those two sheets marked for identification. 20

(Two sheets of letter marked D. 2 for identification.)

Q Is that your signature (handing paper to witness)? A Yes, sir.

*Mr. Heine.* I ask to have this marked for identification.

(Letter marked D. 3 for identification.)

Q I show you a paper and ask you if that if your signature? A That is my signature. 30

*Mr. Heine.* I ask to have this marked for identification.  
(Letter marked D. 4 for identification.)

Q Is that your signature (handing paper to witness)? A Yes, sir.

(Letter marked D. 5 for identification.)

Q Is that your signature? A Yes, sir.

(Letter marked D. 6 for identification.)

Q Is that your signature (handing paper to witness)? A Yes, sir. 40

(Letter consisting of two sheets marked D. 7 for identification.)

*Charles H. Leonard, cross.*

Q Now, Mr. Leonard, was the shafting and hangars and compression shaft couplings, the split collars, split pulleys and iron pulleys as enumerated in your complaint, was that installed by you, or was it in the building when you purchased it? A It was in the building when I purchased it.

10 Q Do you know when that was installed in the building? A I suppose about thirty years ago.

Q When the building was put up? A Yes, sir.

Q I ask you the same question in regard to the Whiting Foundry cupola and the blast foundry blower? A That is right. Same thing.

Q In there when the building was put up? A Yes, sir. Or subsequent.

20 Q Well, do you know whether they were new when they were put into the building as it was first erected, or when it was first erected? A Well, I know the shaftings and pulleys were, but as to the other I don't know, because they didn't procure them from me.

Q That is the cupola and the blower? A Yes.

Q About the fifty horsepower boiler was that new when the building was erected? A Yes, sir.

Q Was it sold by you to the owner? A Yes, sir.

Q New? A Yes, sir.

Q Was the one hundred horsepower boiler sold to the owner by you? A Yes.

30 Q When the building was put up? A New.

Q New? A Yes, sir.

Q Does that apply to the fixtures and steam pump? A Yes.

Q That were connected with the boilers? A Yes.

Q They were sold by you to the owner when the building was put up? A New.

Q New? A Yes, sir.

Q Is the same thing true regarding the Corliss engine? A No.

40 Q Was that bought second-hand? A That had been used in an Edison plant.

Q Did you sell it to them? A I purchased it and put it in there for the Aluminum Parts Company.

Q And you bought it from whom? A Well, I can't recall who. It was at the Edison plant over at Grand and Eldridge street.

*Charles H. Leonard, cross.*

Q Do you know how long that engine had been used there?

A It was used a very short time because the Public Utilities took charge of things and these little plants were knocked out. It was a fine lot.

Q Was this dynamo new at the time? Did you sell that to them? A No. That was for Chase, the original man.

Q When did that dynamo—when was that dynamo installed?

A That was not new either.

Q It was second-hand? A That was not new.

Q But it was put in when the building was first put up? A No, subsequent. Probably a year or more afterwards.

Q It was paper wound, wasn't it? A It was wire wound.

Q Well, the instrument between the wiring was paper? A I don't know.

Q Was the old-fashioned paper winding, what they called paper wound? A I don't know as to that.

Q Didn't you ever see or examine the dynamo so as to see whether it was rubber or paper wound? A No, I did not.

Q You would not be surprised to know that it was paper wound, would you? A No.

Q You would not dispute that fact? A No, I don't know.

Q The Gorton boiler was that purchased by you and put in in 1916 new or second-hand? A Second-hand. It was furnished by myself. It wasn't sold to these people.

Q Do you know where that had been in use, and how long, before it was put in? A Why, it was in use for two months, I understood, by the man I bought it from.

Q Isn't it a fact, Mr. Leonard, when the Crown people moved out the roof of that boiler house was all sagging in and broken in so that the rain came in on the boilers and engines and so on? A Well, I don't know. I didn't examine it. I put a new roof on the entire building, though.

Q On the main building? A On the main building.

*By the Court.*

Q He is speaking now about the roof of the boiler room?

A I don't know as to that. I never examined it.

*By Mr. Heine.*

Q Did you ever put a new roof on the boiler house? A Why, there was a man out there in charge that used to be with

*Charles H. Leonard, cross.*

the Crown Machine Company, and he put the roof on, with other mechanics that he got, and whatever he called for I sent out to him. Whether he applied some of the materials to the boiler house I don't know. But I never examined that boiler house, the boiler roof. The roof.

10 Q At the time the Crown Machine people moved out wasn't the roof of the boiler house full of holes and broken in so that the water came in on the boilers and machinery? A No, I don't think so, because—

Q Well, do you know that? A I don't know, I never examined it.

Q Do you remember the iron stack? A Yes, I do.

Q When did that fall down? A Well, some time before these people took the place.

Q Did you ever put it up again? A No.

20 Q What did you do with it? A Let it stay there.

Q Did you ever sell any of it? A No. I believe Mr. Bradford did, and I never got the money for it.

Q What was the height of the stack, how much of it was there? A Why, I should judge there was forty feet.

Q Did you make any visit or examination of these various items of machinery in that plant and of the boiler house yourself in 1916 before the Aero people came in? A I went there just previous to having Mr. Leary go there to inspect and rectify whatever was wrong, and pass upon the boilers.

30 Q And was that the only occasion between the going out of the International Motor Company and the renting to the Aero Company that you inspected the premises personally? A Well, I may have been around there several times. I don't recall, though.

Q Not to make any inspection such as you made at this time when you got Leary? A No.

Q You just were casually there before that? A Oh, I went out there to see the keeper. I had a keeper there. And he superintended the placing of a new roof on the main building.

40 Q But you saw him and you didn't go around to inspect shafting or the pulleys or the condition of the boilers or anything of that kind? A Well, the pulleys and everything of that kind inside was all right. There was nothing to interfere there.

Q I am not asking you about that. I am asking you if you went around and made the inspection except at this time you

*Charles H. Leonard, cross.*

called in Leary? A Everything was standing there just as it had been left by the Crown people.

Q And finding everything standing as it had been left by the Crown people you called in Leary to make an inspection for you? A To see if the boilers were fit for these people to run because I didn't know but what they were going to use steam power. 10

Q That was in 1916? A Yes.

Q How many times were you at that plant between the leaving of the Crown people in 1909 and the coming in of the Aero Company? A Well, I don't know. I should say three or four times.

Q And during any of those times except when you called in Leary did you make any inspection of the machinery in the plant? A Well, I saw it there. I saw the hangars and shafting. 20

Q You could see the hangars but did you make an inspection of it? A The engines and boilers.

Q Did you get down and open the boiler doors and look in the tubes and see how the— A No, I did not.

Q You didn't make an inspection then? You just simply saw them there? A I looked at them.

Q You can't tell what condition the tubes were in, whether they needed expanding, or anything else, unless you go and open the doors, can you? A No, not very well.

Q On those other occasions did you get down and open up the doors of the boilers and look in? A No, I never did that in my life. 30

Q You never made any claim or objection to the course of the Aero people until after the expiration, or about the time of the expiration of the last lease, did you? A I did not. Do you want to know the reason?

Q No. The changes, such as the taking down of the boilers and the erection of these other buildings all occurred before the end of December, 1917, did they not? A Well, I think so. I don't know. 40

Q Was there any act in connection with these items set forth in your complaint, which is the removal of the shafting and cupola and the boilers and so on which occurred later than December 31, 1917? A Well, it occurred at the time they demolished the boiler room and engine room.

*Charles H. Leonard, cross.*

Q And that was done during the summer of 1917, was it not? A Well, I don't know. It was done.

*By the Court.*

10 Q Mr. Heine wants to know whether there was anything done after the expiration of the first lease, or was it all during the term of the first lease? A They started in putting up their sheds there before that.

*By Mr. Heine.*

Q Before the first lease? A Yes.

Q All right. Did they get all through and take the boilers down and put up this new building and set your boilers out on skids, or whatever they did with them, before the end of December, 1917? A I can tell if you will allow me to refer to this thing.

20 Q Yes, you can refer to it. A Well, it was previous to the visit of Mr. Bradford to me in which he wanted permission to tear down the—or, not to tear down; he didn't mention that. He removed the machinery.

*The Court.* Previous to that letter you spoke of.

Q That letter was dictated by Mr. Bradford in your office? A Yes.

*The Court.* What is the date of that?

30 *Mr. Heine.* April, 1917.

A It was long subsequent to that.

*Mr. Enright.* He does not mean that.

*Mr. Heine.* He ought to know what he does mean.

*The Court.* It was after April, 1917.

Q The boiler house was taken down before that time? A No. Subsequent. After.

Q Well, within what period after that? A Well, I should say within a year.

40 Q Can't you fix it any more definitely than that? A No, I cannot.

Q You testified that you had a conversation with Mr. Bradford at which he laughed and said the thing was done? A Yes. Two weeks before. He said, why—

*Charles H. Leonard, cross.*

Q Done two weeks before? A The building is down and the machinery is out.

Q Did that conversation occur before the end of the summer of 1917? A Well, I can't tell you that.

Q Well, you testified that you had this conversation at which he laughed shortly after this letter was written. You said subsequently to, as I recall your testimony; you used the word "subsequently"? A Yes. 10

Q Well, how long after? A Well, we will say about a year, maybe.

Q That would be in April, 1918? A Yes.

Q Can't you be any more definite than that? A No, I can't.

Q Have you anything with which you can refresh your memory as to when that house was taken down and how long after this letter, Plaintiff's Exhibit 4, was written, you had this conversation? A Well, if you can get the date when they took that Gorton boiler out of there and brought it down to Elizabeth, why, that will fix about the time, because where the boiler stood is where the altering was; just about the site where the boiler and engine room was. So they did the whole thing. 20

Q Were you at the Plainfield plant during 1917? A I was there in 1917 or 1918; I only visited the place while those people were there.

Q You said that they went in in 1916, as I recall? A Yes.

Q And the lease was signed giving them the possession from the 1st of January, 1917. Now, you had this letter that you wrote, or Mr. Bradford wrote? A Yes. 30

*Mr. Enright. 1st of January, 1918.*

Q In April, 1917? A Yes.

Q Did you visit the plant alone or with anybody during the rest of that year? A I was alone.

Q Did you go there during the rest of that year 1917? A Well, I went out there to see him one day upon the renewal of the lease, if they wanted it to remain. He had opened it up with me. 40

Q Was that in 1917? A Well, no; I guess it was—well, I can't tell you now.

Q See if we can fix it this way: You went out, you said, twice, once in February, 1919, after you were notified—after

*Charles H. Leonard, cross.*

you were notified they would give up the property? A Yes; I met Mr. Taylor there.

Q That is once. Now, before that, before February, 1919, and back as far as the 1st of January, 1917, when were you out there? A Just previous to the making of the last lease was the last time that I was there.

10 Q The last lease is dated October 29th?

*Mr. Enright.* No; October 16th.

Q October 16th, 1917. Was it just prior to that time? A Yes; just prior to that time.

Q So the other visit that you made to Plainfield, other than February, 1919, was then just prior to October 16th, 1917? A Yes.

20 Q And that is the visit then at which you discussed the making of the new lease and at which this boiler situation was known to you and you saw it? A No, I didn't. The boiler house and the engine room was there that first visit.

Q Just prior to— A I never discussed any lease matter with Mr. Bradford but once, and that was the last lease at the factory there. He came to me in New York.

Q You say that you discussed—the only other time that you were there was just prior to the 16th of October, 1917; is that right? A Yes.

30 Q Now, at that time you saw that the boiler house was not there, didn't you? A I did not.

Q Well, what was the reason, then, for inserting in the new lease which you were making, that the heating plant and the buildings which were erected on the grounds should be your property on the expiration of the new lease? A Because they were installing a heating plant of their own.

Q That heating plant was right, as you put it; right beside this old house there, wasn't it? A Oh, no; that was my boiler that was there, but they put a heating plant in back here (indicating).

40 Q On the far corner? A Yes; away back here; mine was in here; the large size Gorton boiler. They took that down to Elizabeth.

Q The buildings you provided should become your property in this lease were known to you and known about, in order to put them in here at that time, weren't they? A Yes.

*Charles H. Leonard, cross.*

Q And that was when you had this conversation in October, 1917, wasn't it? A I didn't know that.

Q You have just testified it was? A You mean the conversation about the—

Q Didn't you see the building about which you were careful to provide in the lease that it should become your property when you were out there discussing the new lease? A I saw the part extensions they made there, but not the entire thing. 10

Q Didn't you see that the building covered the place where the boiler house had been? A No.

Q Do you mean to tell this jury that you went out to your property and saw a building the rear of the space behind your building and didn't see that it covered the place where the boiler house was? A I did not, and Mr. Bradford's visit was subsequent to that, when he came to ask for permission to take out that machinery. 20

Q All right. A And there was nothing said whatever about the demolition of the building until afterwards.

Q The time we are talking about is the time that you have testified that you went and talked about the new lease which was prior to October the 16th, 1917. At that time you provided in the lease, didn't you, that building should become your property at the expiration of the lease, didn't you? Answer me yes or no. A They had started—

Q Answer me yes or no. A They had started right in. 30

Q Answer that yes or no.

(Question repeated by stenographer.)

A The buildings they had there that they started in building, but not the great big place.

Q What building was there when you had that conversation providing that they should become your property; what buildings did you see to which that provision in the lease referred? A Why, I think the building that covered where the wash house stood, a building called the wash house. 40

Q Where is that? A In here (indicating).

Q We haven't had that before, have we? Have we had that wash house before? A Yes.

Q Where is this wash house? A In here somewhere (indicating).

*Charles H. Leonard, cross.*

Q What kind of a place was it? How big a place? A Why, it was probably 10 by 20, something like that.

Q And how close to the boiler house was the wash house?

A I think it was right near to it; close to it.

10 Q And the building that was erected by the Aero Company, how close did it come to the boiler house, when you saw it prior to October, 1917? A If I remember right, it was right here (indicating).

Q Right up beside it? A Yes; right here.

Q Will you tell this jury that you saw the boiler house standing on the premises there when you talked about the new lease?

A I won't tell them because I don't think I noticed the boiler house.

Q How can you tell me how close it was to it? A I am speaking of the building they erected here.

20 Q If you saw the building which they erected there within a few feet of the boiler house, couldn't you see the boiler house?

A They made a big hole in here in the wall.

Q How close was this heading of concrete to the boiler house?

A What, the building?

Q No; what you were talking about? A Why, they cut the wall away.

Adjourned until tomorrow, February 10th, 1920, at 9:30

A. M.

30

40

*Charles H. Leonard, cross.*

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. George S. Silzer, Circuit Court Judge, and a jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the tenth day of February, 1920, at 9:50 A. M.

Appearances:

10

Messrs. McDermott & Enright, John M. Enright, Esq. (present), attorneys for the plaintiff.

Messrs. Heine, Bostwick & Bradner, M. Casewell Heine, Esq. (present), attorneys for the defendant.

CHARLES H. LEONARD (resumed).

*Cross examination* (continued) by Mr. Heine.

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

20

Q That is the letter of February 10th? A Yes, sir.

*Mr. Heine.* I offer that for identification.

(Letter consisting of two sheets marked D. 8 for identification.)

Q Mr. Leonard, did you ever meet Mr. Mingle, the president of the Standard Aero before this date that you have testified in 1917? A I met him at his office on the second visit I made out there.

Q When was that? That was in October just before the signing of the second lease as you testified yesterday? A I believe so; yes, sir.

30

Q At the meeting in regard to the second lease just before October 16th, 1917, what was the conversation you had with Mr. Mingle?

*Mr. Enright.* Objected to as not cross examination.

*The Court.* This is the plaintiff. I think the rule is different. I will allow the question.

A Well, I can't remember just exactly what was said. There was general talk. Mr. Bradford took me into Mr. Mingle's office at the plant.

40

Q What was the general talk about with Mr. Mingle? A Oh, about the place and what I wanted to sell it for.

*Charles H. Leonard, cross.*

Q About the new lease? A Very little.

Q And about the new lease? A I don't recall if anything was said about the new lease.

Q That is what you went out there about, wasn't it? A No, I went out there about the last lease.

10 Q I mean the second lease? A The last lease?

Q Yes, you went out there to talk about the terms of the last lease, renewal? A No, I didn't see him at all about the last lease.

Q You saw him on this occasion of your visit? A I made three visits there. It was the second visit when I saw him, I think.

Q When was that? A 1917.

20 Q What time of the year? A August, somewhere around in there.

Q This is another visit from the two that you testified yesterday? A I made three visits in all.

Q You want to correct your testimony of yesterday that there were only two visits? A If I said that yesterday I would like to correct it.

Q And make it three? A Yes.

Q The other one being the one in which you saw Mr. Mingle in August, 1917? A I think so.

30 Q I am not talking about Mr. Mingle's visit now. The visit just before the signing of the last lease in October, 1917, did you go into the boiler house? A No, I did not.

Q You didn't go in? A No, sir.

Q Were you on the ground where the boiler house was at that time, at that visit? A No. I was in the main shop with Mr. Bradford.

Q But you saw the new buildings of the Standard on the property, did you not? A Looking through the great doorway, yes, and coming up towards the plant.

40 Q And you were able to see the portions of that new building which was adjacent to the line of your factory? A I saw the buildings there, yes.

Q They were easy to be seen, weren't they? They were quite large? A Sure.

Q About twice the size of your old building? A Well, no, not twice the size. They were not as high.

*Charles H. Leonard, cross.*

Q What would you say was the difference in floor space? A Wood construction. Well, there is a great deal more floor space.

Q About how much more floor space than the old building?

A I have never calculated. I don't know.

Q Fifty per cent. more? A Probably so, yes.

Q And were they pretty good construction? A I guess they were the cheapest could be put up. 10

Q About what you had to do in 1917, wasn't it?

*Mr. Enright.* I object to that comment.

*The Court.* Yes.

A I don't know. They were nothing but boards, scantlings and rubberoid.

Q You haven't taken them down, have you? A No.

Q Did you notice in October, or just before October the 16th, 1917, whether these new buildings covered the place where the boiler house had been? A No, I did not. I supposed that it did, though. 20

Q So that you knew then at the time of this conversation just before October 16th, 1917, that the boiler house had been taken down? A The first that I knew of it was when—

Q Just answer me yes or no. A I did not know it.

Q Did you repair the roof of the main building, your old building between the time that the Crown people left the premises in 1908 or '09 and the time that the Standard went in, in 1916? 30

*Mr. Enright.* Objected to as immaterial and irrelevant. We have been all through it.

*The Court.* Yes, I think so.

*Mr. Heine.* I didn't understand we went through the roof proposition.

*The Court.* I thought you took up every detail of it and asked him whether he had made any repairs.

*Mr. Heine.* Your Honor excluded the testimony as to the condition of the main building. 40

*The Court.* Yes. I thought you took up the other and asked him whether after the Crown people went out, whether they repaired and I thought you took up every detail.

*Charles H. Leonard, cross.*

*Mr. Heine.* As to all of the interior; but in going over the testimony last night I think I neglected to take up the question of the roof.

*The Court.* I will allow the question.

A I put an entire new roof on it.

10 Q At what time? A Right after the Crown people left I went through the whole business.

Q That was in nineteen what, nineteen hundred and eight or nine? A Yes.

Q What was the nature of that roof? A Rubberoid.

Q What was the condition of that roof in 1916 when you were on the premises, before Leary made his examination? A Why, I think it was all right. The International people had the place and they never made any complaint.

20 Q Did you see the roof when you were on the premises? A I did not.

Q You didn't see the roof? A I didn't notice the roof.

Q Did you make any examination so that you could— A No, I did not examine the roof.

Q So that you don't know what its condition was just prior to the Standard going in? A No, there was no complaint. There was no necessity.

Q You don't bother until the complaints come in? A I kept the place in good order. There was a keeper there and family.

30 Q No complaint being made, you didn't make any inspection? A That is right.

Q What rental are you getting for the premises at the present time?

*Mr. Enright.* I object as immaterial.

*The Court.* How is that material?

40 *Mr. Heine.* I think the charge in the pleadings is the commission of waste and the depreciation of the premises, and I think that we are entitled to show whether or not a larger or less amount is now being received for the premises, in the condition of disrepair in which it is alleged we put them, than was received for the premises under the lease with the—

*The Court.* That depends on many conditions, doesn't it?

*Charles H. Leonard, cross.*

*Mr. Heine.* I think that is an element of damage, just as a price is not conclusive, or very strong evidence of value, nevertheless, it is a scintilla or some evidence of value which is allowed to be considered by the jury. And taking the very charge here that we have removed a lean-to, containing these boilers, where the power plant was, and that that has materially affected the premises, and our contention opposing that, that the removal of this lean-to, which was in a broken down condition, and so on, made no change in the value of the premises, I think it becomes relevant, at least to some extent, to show whether or not a greater rental is being received for the premises now, in the condition in which we have left them, than was received before our occupancy.

10

*The Court.* Suppose he got one thousand dollars a year rent before, and you tore down ten thousand dollars' worth of buildings, and then afterward, due to other conditions arising in real estate, he still got one thousand dollars rent, do you think you would not have to pay for the buildings?

20

*Mr. Heine.* I think that we would, but I think if the charge made in that particular instance—

*The Court.* How would it throw any light on it then? How would the fact of rental throw any light on it?

*Mr. Heine.* If buildings can be removed, and the issue is whether or not they are of any value, assuming your Honor says they removed ten thousand dollars' worth of buildings, but assuming they were removed, and the issue is between the plaintiff and defendant whether those buildings ever were removed, are worth ten thousand dollars, were nothing, then the fact that the same rental can be obtained before or after the removal is some evidence to the jury that the contention of the plaintiff that these buildings—

30

*The Court.* It depends upon so many circumstances. One man may rent it without a power plant. Another man may have to get out of his other place of business and he wants some other place to go in. Rents may have been increased abnormally and there may have been a scarcity of factories. All sorts of conditions.

40

*Charles H. Leonard, cross.*

*Mr. Heine.* It is far from conclusive, I concede, but it seems to me it is relevant and material.

*The Court.* I will overrule it at this time. After the other evidence is in, if you want to renew it, I will permit you to bring it up again.

10 *Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

Q Mr. Leonard, did you or did you not make a statement to Mr. Smith, of Plainfield, to the effect that you would never have brought this suit had the Standard people not torn down the partitions in the building? A I never said that.

20 Q Did you ever make a remark to Mr. Mill or Mr. Taylor to the effect that you felt that after the Standard had given up their lease that they had influenced a prospective tenant of yours to go to New Brunswick, instead of coming to Plainfield, and that you had a very bitter taste in your mouth on account of it? A Well, that remark—

Q Just yes or no. Did you or did you not? A Ask that over again.

(Question repeated by stenographer.)

30 *Mr. Enright.* I think the question should direct the witness to sometime and place and to some persons.

*Mr. Heine.* I have asked him one of two persons.

*Mr. Enright.* Which one?

*Mr. Heine.* I will fix the time on or about May 1st, 1919.

A At my visit when I got notice from them—

*The Court.* Did you say that? That is the question, Mr. Leonard.

40 A Well, that was said by Mr. Taylor.

*By the Court.*

Q Not by you? A No. I wrote them a letter to that effect afterwards, recalling that statement.

*Charles H. Leonard, cross.*

*By Mr. Heine.*

Q I would just like the answer yes or no, whether you made such a statement to Mr. Taylor or Mr. Mill. A Mr. Taylor made the statement; the treasurer. I said that Mr. Mingle—

Q Please answer the question, did you or did you not make such a statement? A I wrote a letter to that effect, referring to that. 10

Q To that effect? Containing that statement? A You have the letter there; yes.

Q You wrote a letter to that effect about May, 1919? A Well, it was after that visit there.

Q Did you, about August the 10th, 1908, make a statement that—

*Mr. Enright.* To whom?

Q (Continuing.) —to Mr. M. Casewell Heine, myself, that involved the condition of the premises at the time of the giving up of the lease by the Crown Machine Company? A Well, you were my attorney in that matter; yes. 20

Q You made that statement? A I made that statement, of course.

Q I show you this paper, D. 1 for identification, and ask you to read it and see if that will refresh your recollection? A I wrote that letter. I made all those repairs, too, after I got through with that.

*Mr. Enright.* Please answer the question, so that we don't have any volunteered statements. 30

A I wrote that letter.

Q And was it correct that in 1908—

*Mr. Enright.* I object to that line of testimony. It relates to a time anterior to anything involved in this suit, 1908, and is apparently the extraordinary purpose of Mr. Heine to cross examine a former client respecting a communication between attorney and client, which, on every principal of law and professional ethics, is objectionable. 40

*Mr. Heine.* I have not offered anything in evidence.

*The Court.* No, but you are referring to it.

*Mr. Heine.* I have not asked the question yet. Shall I now ask the question?

*Charles H. Leonard, cross.*

*The Court.* Yes. Don't answer until the objection is made.

*Mr. Enright.* He has produced a letter and now is apparently going to read—

*The Court.* I cannot tell what he is going to do.

10 *Mr. Enright.* I agree to that. The present effort is so extraordinary, and I can't anticipate what may follow it.

*The Court.* I can't rule anything until I get it before me.

20 *Mr. Enright.* If it is the purpose of counsel, as the beginning of the question indicates, to read from this letter, and then, after he has got the whole effect—I do not know what is in the letter, but apparently this attorney is taking from his own files a communication between his former client and himself and is framing a question from that letter. And that is what I object to, his even framing the question.

*Mr. Heine.* You cannot object to framing the truth, no matter where it comes from.

*The Court.* Oh, yes. If a man deals confidentially with his own attorney.

*Mr. Heine.* I am not offering any confidential communication in evidence.

*The Court.* Ask your question.

30 Q Is it a fact, Mr. Leonard, that on the 8th or 10th of August, 1908, the Corliss engine on the premises required extensive repairs?

*Mr. Enright.* Objected to as immaterial and irrelevant.

*The Court.* I think it is relevant, Mr. Enright, in this sense that you are asking for the value of that engine.

*Mr. Enright.* Yes.

40 *The Court.* They have a right to show what condition it was in from time to time, how old it was, how long it was used, and what condition it was in. I will allow it.

A There were some repairs made to it by the keeper there.

*Mr. Heine.* I move to strike that out as not responsive.

*The Court.* Yes. Strike that out.

A Yes.

*Charles H. Leonard, re-direct.*

*By the Court.*

Q Were extensive repairs necessary to it in 1908? A I don't think extensive repairs; no.

*By Mr. Heine.*

Q At about the same time, Mr. Leonard, was the condition of the fifty horse power and the one hundred horse power boiler such that they required at that time extensive repairs? A I think not. 10

*Mr. Heine.* That is all.

*Re-direct examination by Mr. Enright.*

Q Did you subsequently to 1908 make repairs to this Corliss engine and these boilers?

*Mr. Heine.* Objected to on the ground the witness has already testified he made no repairs other than the rough repairs between the end of the Crown Machine Company tenancy in 1908 or '09 and the beginning or just before the Standard went in. That was gone over in detail as to every item of the bill specified. 20

*The Court.* His own counsel has a right to examine him on re-direct examination on that. I will allow it.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.* 30

A The keeper I had there was repairing around all the time.

*Mr. Heine.* I object to that unless the witness was there to see it.

*The Court.* Strike that out. Listen to the question, Mr. Leonard.

(Question repeated by stenographer.)

A No. 40

*Mr. Enright.* That is all.

*C. Vernon Bradford, direct.*

C. VERNON BRADFORD, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Enright.*

10 Q Where do you reside, Mr. Bradford, at the present time? A Philadelphia.

Q And what is your occupation? A Shipbuilding business.

Q With what concern are you now identified? A The Merchant Shipbuilding Corporation.

Q What is your position there? A Manager of the production division.

Q Were you formerly connected with the Standard Aero Corporation? A Yes, sir.

20 Q When did you become connected with it? A The latter part of 1916.

Q How long did you remain connected with it? A Until the first part of 1918.

Q What was your position? A At what time?

Q Well, during that interval. A Well, the latter part—I was in charge of the factories in Plainfield, and previous to the formation—

*Mr. Heine.* I think I object to the witness qualifying as to his corporate authority by his own testimony.

*The Court.* Objection will be overruled.

30 *Mr. Heine.* Prays exception.

*The Court.* You may answer.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A In charge of the factories, and the end of 1917 I was made the general manager, and right after that, during that same year, was made the first vice-president of the Standard Aircraft Corporation.

40 Q And how long did you continue vice-president of the Standard Aircraft Corporation? A Three or four months.

Q Up to what time? Up to the first part of 1918.

Q Were you identified with the Aero Corporation at the time when the first lease was made from Mr. Leonard, or did you come in after that? A No; I was not identified with it during

*C. Vernon Bradford, direct.*

the first lease. The first lease was made before I became connected with the company.

Q When you became connected with the company did you have your office, by the way, at the Plainfield plant at first? A Yes.

Q There every day, were you? A Yes.

Q What machinery equipment was there in the Plainfield plant belonging to Mr. Leonard when you went there? A The equipment details as specified in the evidence which I have heard, Corliss engine and boilers, and so forth. 10

*Mr. Heine.* I object to testimony of that kind from the witness.

*The Court.* I will let it stand as it is. Corliss engine, boilers, and so forth. The reference to the former testimony will be stricken out.

*Mr. Heine.* Corliss engine and boilers, does it stop there? 20

*The Court.* Whatever he said.

*Mr. Heine.* I mean the "etcetera," is that included?

*The Court.* Yes, for what it means; Mr. Bradford did not want to detail it.

*By the Court.*

Q What was there besides? A There was a feed pump, traveling crane, shafting, pulleys, hangars, collars, stops, shaft stops and a motor; I think that covers it. 30

*By Mr. Enright.*

Q Was this equipment used by the Aero Corporation? A Only such equipment as shafting; that is, part of the shafting and pulleys and hangars stops; that covers it.

Q The power plant was not used? A No.

Q Why not? A We didn't need a power plant.

Q Why not? A Because we were using electric power. The equipment that we had that we required to use would not warrant going to the expense to run a steam power plant; it only required a few horse power of electric force to drive such things as small drills. 40

Q Did you generate your own electricity, or buy it? A No, sir; we bought it from Plainfield, from the Public Service, I believe.

*C. Vernon Bradford, direct.*

Q So that this power plant that you found there was not used, because it was not adapted to your style of manufacture?

*Mr. Heine.* I object to that as calling for a conclusion.

*The Court.* He said they did not need it.

10 Q Did you make any particular observation so as to be able to say anything about the condition of this equipment of Mr. Leonard's?

*Mr. Heine.* At what time? I object unless the time is fixed.

Q Well, when you came there? A More or less, yes; I didn't go into it very deeply. It was around the later part of 1916. In looking into the possibility as to if the plant should develop and increase would we be able to use that equipment. I looked into  
20 the boilers, inside of the boilers—not inside the boiler itself, but inside of the fire pit, because nobody could see inside of the boilers unless taking out a tube. I looked into the engine; I did not take out the piston or drive, nor did I have the connections taken apart, but it seemed—well, that is not your question; I looked at it from that point of view only.

Q Well, from the observation which you made, are you able to state anything about the condition of this equipment so far as being useful or not? A It is very hard to make a decision, or to decide whether a boiler can be used, or in what condition it  
30 is, until you get inside. I saw that all the tubes were there in place, and with the exception of fire brick or fire wall in the boiler, which had to be repaired, which is a condition that is always pertaining on boilers, the boiler seemed as if it could be used, from external appearance. The Corliss engine was painted, oiled, greased, so that I could not see inside to the bearings; and I should have had to have made a further examination of it, to have taken off the flywheel to examine the bearings to see whether the machine should be run or not.

Q Let me ask you this: Did you observe anything at that  
40 time to indicate that this equipment was not capable of use? A With the necessary repairs—by repairs I mean the necessary adjustments to be made to any machinery or equipment that has been laying idle for some time—I should say that—well, I would not like to say whether it could be used or not, because I didn't make that experiment or test.

*C. Vernon Bradford, direct.*

Q I ask you whether you observed anything to indicate that it could not be used? A I simply say I—no, I did not.

Q What was the general condition of the boiler house? A It was not in a very good condition. The roof was—

Q What was its condition compared with that of the rest of the factory?

10

*Mr. Heine.* I object to that. Your Honor has ruled the rest of the factory out for me, and I think Mr. Enright will have to stay out.

*The Court.* Yes; it goes both ways.

*Mr. Enright.* My thought is these people have demolished this boiler house, and if we can establish a standard of comparison at some particular time. Here it was a part of their building, and it seems to me, I want to lay the foundation to show that it is about the same condition as the main building, so that we can lay the basis for the hypothetical—

20

*The Court.* If he can tell what condition the building was he can also tell what this power house was.

*Mr. Enright.* Perhaps I don't make it quite clear. I wish to lay the foundation for an expert valuation of this power house, based upon its dimensions, its materials.

*The Court.* Mr. Bradford knows what the condition was.

*Mr. Enright.* He perhaps is not necessarily an expert on value of buildings.

30

*The Court.* He does not have to tell what some other building looked like; he can tell us what the roof was in this case.

Q Well, just tell us what the condition of this boiler house was? A The floors were good; the walls were solid; they were made of brick; the windows were not in good repair, and the roof leaked.

Q What part of the roof leaked? Well, did it all leak, or was it a local condition? A No; just in spots. I think, as a matter of fact—

40

Q Well, did it leak over the boiler, or did it leak over a coal bin? A It does not make any difference as far as the boiler is concerned.

*C. Vernon Bradford, direct.*

Q Maybe you think it does not, but where did it leak? A Near the connection to the main building.

Q Was there any machinery exposed under that leaky part of the roof? A I would not answer that.

Q You don't recall?

10 *By the Court.*

Q Did the machinery give any indication that it had been rained on? A No; the machinery was well protected by grease.

*By Mr. Enright.*

Q Was the machinery rusty? A I could not see. It was protected by grease; coated over with heavy grease. It may have been rusty, or may not.

20 Q Do you recall going into Mr. Leonard's office in April of 1917 and having a talk with him about—and asking for permission to take down certain sheds? A Yes.

Q For the purpose of refreshing your recollection, I will ask you to look at that letter dated April 9th, 1917, addressed to Standard Aero, New York, for your attention. I wish to fix the date? A Yes.

Q Now, at that time of that interview, which of the sheds in the yard were talked about? A Do you wish me to point them out?

30 Q Yes; on the blueprint, please? A (Witness indicates.)

Q You are now pointing to the so-called pattern shop? A Yes.

Q And the new building that you were talking about was to occupy what part of the land? A (Witness indicates.)

Q You are now indicating an area along North avenue? A Yes.

Q Directly to the rear of the part of the main building called office; is that right? A This is the front; therefore, that is the rear on this side. Directly to the side of the main office building.

40 Q Along North avenue? A Along North avenue; yes, sir.

Q And that building did not involve any disturbance of the boiler house?

*Mr. Heine.* I object to that question as leading.

*The Court.* I will allow the question.

*C. Vernon Bradford, direct.*

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A No, it did not; not at that time.

Q You dictated the letter which was then signed by Mr. Leonard? A I did. 10

Q Now, after that, did the plant of the Aero company have its extension changed so as to involve a different sort of building? A Oh, yes.

Q More extensive or otherwise? A More extensive.

Q Just tell us where the changed plan involved a location?

A It came down here (indicating), so, like this.

*The Court.* Indicating what? 20

A Indicating the first extension was along North avenue; the distance I would not care to say; extending to the rear or to the north and taking in this small extension of property here (indicating).

Q You are pointing now to the extreme right of the blueprint? A Extreme right of the blueprint.

Q As you point to the extreme right, how far was it to go up to the machine shop? A It adjoins the machine shop.

Q And covers over the part where the boiler house was? A Yes, sir. 30

Q And in carrying out that construction, what was done to the boiler house? A They were torn down.

Q What was done to the machinery in the boiler house? A The main pieces of machinery—

*Mr. Heine.* I would like to have a time fixed.

*The Court.* Yes.

*By the Court.*

Q When was this, Mr. Bradford? A About May or June of 1917. 40

*By Mr. Enright.*

Q What was done to the machinery in the boiler house? A The main parts of the machinery put into a field on the property belonging to Mr. Leonard. The small parts were put into the

*C. Vernon Bradford, direct.*

so-called pit which previously contained—which did contain at that time the boiler which Mr. Leonard installed in the plant originally.

*By Mr. Heine.*

10 Q That is the Gorton boiler? A The Gorton boiler, yes; put in the same pit.

*By Mr. Enright.*

Q What was done with the Gorton boiler which was in this pit? A It was left there at that time.

Q Do you know what was done with it subsequently? A Yes.

Q What?

*By Mr. Heine.*

20 Q Of your own knowledge? A Sir?

*By Mr. Heine.*

Q What time? A The latter part of 1917.

*By Mr. Enright.*

Q You said the small parts were put in this pit? A Yes, sir.

Q Then what was done with the pit? A It was boarded over.

30 Q What was done with the traveling crane? A All that machinery was placed out in the open.

Q In the open on the leased property? A Yes.

Q Or on adjoining property? A Well, that is all the property of Mr. Leonard; the whole of that property, you know, it goes away back.

Q It was not all covered by this lease, was it? A The third lease, I think, did cover the entire property of Mr. Leonard. The second lease did not; it simply just took in only part.

40 Q Was anything done to protect any of this machinery that was put out there in the lot? A No.

Q Was Mr. Leonard told anything about the tearing down of this building and the removal of the boilers and machinery while the work was going on? A No.

Q Did there come a time when you had a further interview with Mr. Leonard and told him anything about this? A Yes.

*C. Vernon Bradford, direct.*

Q When was that? A Referring to this letter here of April 9th, in which it states that certain buildings—

Q Never mind what it states. Refer to that for a date, please, if you want to.

*By the Court.*

Q By using that letter can you refresh your recollection? A Yes, sir. 10

*The Court.* You may do so.

*Mr. Heine.* I don't want the letter read in the record, that is all I was objecting to.

*Mr. Enright.* The letter was in evidence and has been read to the jury.

(Question repeated by stenographer.)

A After April the 9th. 20

*Mr. Heine.* How long after?

Q Can you tell us about how long after? A It was several days after the buildings had been demolished, which I have already stated was about May or June.

Q And what led up—what caused you to have that interview with Mr. Leonard?

*Mr. Heine.* I object to the causes of an interview. The interview is in evidence. The actuating cause, I think, is irrelevant and immaterial. 30

*The Court.* Yes. I will overrule that. I will ask you this: Was it the result—did you go to Mr. Leonard this second time as the result of any direction received from the president of the company?

*Mr. Heine.* I object to that.

A Yes, sir.

*Mr. Heine.* Don't answer. I object to that on the ground that it is not relevant or material as to why or under what instructions he went. 40

*The Court.* If the general manager goes at the request of the president of the company?

*Mr. Heine.* I think the fact of the instruction from the president of the company, or, in other words, the agent's

*C. Vernon Bradford, direct.*

authority, cannot be proven out of the mouth of this agent. I think if instructions were received the president of the company should be called and asked it.

*The Court.* I will allow the question.

*Mr. Heine.* Prays exception.

10 Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

(Question and answer repeated by stenographer.)

Q Who was the president at that time? A Mr. Harry Bowers Mingle.

Q Had you prior to this direction reported what you were doing in the way of removing this building, and so forth, to Mr. Mingle, the president? A The buildings were going to be torn  
20 down—

*Mr. Heine.* I object.

*By the Court.*

Q The question is did you report it before that to Mr. Mingle?  
A That we were going to tear that down?

Q Yes.

*By Mr. Enright.*

Q Or had torn it down already, whatever you did report to  
30 him? A Yes.

Q What did Mr. Mingle say to you?

*Mr. Heine.* I object to that unless the time is fixed when this was reported.

Q Can you fix the time? A Yes, sir. About May or June.

Q Of 1917? A 1917.

Q What did Mr. Mingle say to you? A Again I must come  
back to this letter—

40 *The Court.* Tell us.

A It states here buildings—we got permission to tear down certain—

Q Do you have to refer to that in order to tell us what Mr. Mingle said to you, that is all I ask you? A Yes, I must do it.

*C. Vernon Bradford, direct.*

*By the Court.*

Q Having referred to it, what did Mr. Mingle say to you? A Mr. Mingle said this letter was not sufficient to warrant us in tearing down that boiler, and I had better go to Mr. Leonard again to get his permission to do so.

*By Mr. Enright.*

10

Q You say in tearing down this boiler? A I mean the building.

*By the Court.*

Q And then you went to him after it had already been torn down? A Yes.

*By Mr. Enright.*

Q What took place then? When? Where?

20

Q When you went to Mr. Leonard in pursuance of what Mr. Mingle told you? A I went to Mr. Leonard and asked him permission to tear the boiler house down. And he said no. And I talked along certain lines to try and get him to my way of thinking, to try to get him to give me permission.

Q Was anything said in the first part of the conversation about the removal of the machinery, or was it confined to tearing down the boiler house? A It was tearing down the boiler house and moving the machinery.

Q Yes. A And Mr. Leonard said he would not allow it. I then told Mr. Leonard that he better had allow it because it was already done.

30

Q Before you told Mr. Leonard that it was already done, was there anything said about a sum of money to be paid?

*Mr. Heine.* I object to the witness being led.

*The Court.* I will allow the question.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

40

*Judge.*

A Yes, sir.

Q By whom? A Mr. Leonard.

Q What was it? A Five thousand dollars.

*C. Vernon Bradford, direct.*

Q What did he say he wanted that for? A For the purpose of rebuilding the power house if same became necessary. Shall I clarify that?

*The Court.* Yes. Whatever was said.

10 A The company had an option on that—

*Mr. Heine.* I don't want it clarified. I want the conversation. I object to the clarification.

*The Court.* Yes. Ask another question.

Q Well, after you told Mr. Leonard he better had? A Yes.

Q That it had already been destroyed, what did he say? A I refuse to answer.

Q He expressed his opinion about it? A Quite forcibly.

20 Q Was anything done at any time after this machinery was removed to preserve it or protect it against the elements? A The large parts that were placed in the lot, no. The small parts that were placed in the pit, they were automatically protected.

Q By being put in this hole in the ground and boarded over? A Yes.

Q And that is all the protection they got? A That is all.

Q And by the small parts you mean the portable parts of the Corliss engine that were apt to be stolen, is that it? A Yes. Relief valves and trips.

30 Q They were rather delicate parts of the engine, weren't they? A They are.

Q Do you remember whether there was a cupola in the yard? A Yes, there was.

Q Foundry blower? A Yes.

Q What was done with those? A Left in the yard.

Q Where were they originally located with reference to the new building? A Back here (indicating).

40 Q The new building covered the area where they formerly were, didn't it? Now, my question was whether—what I meant to ask you whether they were removed from their original possession the cupola and blower? A Yes, they were.

Q And where were they put? A Back here in the field (indicating).

Q Anything done to preserve them? A No.

*C. Vernon Bradford, direct.*

Q Was any part of the rear wall of the main building, the machine shop building, broken through to make openings into this new building? A Yes.

*Mr. Heine.* I object to that, not in the complaint as to damage to walls of part of the main building.

*The Court.* Not in the bill of particulars? 10

*Mr. Heine.* No.

*Mr. Enright.* No, sir; that is not, but I am developing what was done in the way when they put up this new wooden shed, that they also broke through the wall, although we are not—it is omitted from the bill of particulars. Not considered worth while making an amendment, but I think we are entitled to show what was done there generally.

*The Court.* If you are not claiming anything for it what difference does it make? 20

*Mr. Enright.* Perhaps that is so.

Q Do you recall a time along in the fall of 1917 before this last lease was negotiated when Mr. Leonard came out there to the factory? A Yes.

Q Were you with him during his visit out there? A Yes.

Q All the time? A Yes.

Q Was Mr. Mingle there at that time, do you know? A Mr. Leonard and myself saw Mr. Mingle. 30

Q On that occasion? A On that occasion.

Q What part of the factory did you and Mr. Leonard go over at that time, if any? A We went into what we termed the main building. That is the original building, about halfway down that building. Then we came back and went upstairs in Mr. Mingle's office, and there was Mr. Mingle, Mr. Leonard and myself in the office. After that right from there Mr. Leonard came downstairs and left the premises.

Q You were not out in this extension part at all then? A No.

Q About how long did that visit last? A Twenty minutes. 40

Q And when Mr. Leonard left you he left the premises? A Yes.

Q There has been so much talk about this extension I will just ask you what sort of construction it was. The extension that was put up by the Aero Corporation. A It was sort of skeleton con-

*C. Vernon Bradford, cross.*

struction. The technical terms I cannot use. But it was tongued and grooved, one-ply structure with either twenty or twenty-four—twenty, I think it was—twenty-foot spans from center to center; roof; windows.

Q Well, for instance, what sort of roof did it have? A This rubberoid roof.

10 Q Was it a permanent building? A No, sir. Permanent in this way; I will qualify that.

*By Mr. Heine.*

Q It is still there? A Yes.

*By Mr. Enright.*

Q Do you know? A I have not seen it. When you said there I ask you the question as to where it was.

20 Q The operations of the Standard Company, had there ever been after this new extension was put up, did they continue to be light manufacturing? A After the extension was put up did they continue to manufacture?

Q Was it light manufacturing or heavy manufacturing? A Oh, light.

Q Was any different arrangements made for power after the extension was put up? A No.

Q Continued to buy electric current from the Public Service? A Yes.

30 Q And such machinery as you had was electric driven? A Yes.

Q No need for a power house at any time up to the time you left the plant, isn't that right? A Right.

*Mr. Enright. Cross examine.*

*Cross examination by Mr. Heine.*

Q What did this extension cost?

*Mr. Enright. I object to that.*

40 *Mr. Heine. My reason for asking that on cross examination was that counsel has just brought out as to a detailed explanation of what this new construction was, the tongue and groove work, and the span and general construction of the building, with rubberoid roof, and so forth, and I thought I was entitled on cross examination, after that had*

*C. Vernon Bradford, cross.*

been brought out in detail, in order that, as counsel expressed it, the jury might know what this new construction was, the cost of it.

*The Court.* The question will be overruled.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

10

GEORGE S. SILZER,

*Judge.*

Q This cupola and blower, Mr. Bradford, that were out there on the place indicated on the right-hand side of the blue print, which you moved out into the lot, you say you did nothing to preserve them? A No.

Q What was their condition when you moved them? A Their condition was poor.

Q There was nothing that could be done very much to preserve them, was there? A Not as a cupola; no.

20

Q It was unusable? A As a cupola; yes.

Q As a cupola? A Yes.

Q Was the same true of the blower? A No. The blower could have been repaired and used as a blower.

Q Why did you then, as the Standard representative there, move it out in the lot in that way? Is that your idea of good business management? A Because we didn't need it.

Q Answer the question. Was that your idea of—

*Mr. Enright.* I submit the witness did answer that question. He gave a rational explanation; he said he didn't want it.

30

Q Was that your idea of proper business management? A War times we didn't have time to wait.

*Mr. Heine.* I would like the answer. I move to strike that answer out.

*The Court.* I will not strike the answer out.

*Mr. Heine.* Not responsive.

*The Court.* I think it is responsive in a way. I suppose what Mr. Bradford means to say is that on account of wartime exigencies it had to be done.

40

*By the Court.*

Q That is what you mean, isn't it? A Yes, sir.

*C. Vernon Bradford, cross.*

*Mr. Heine.* Prays exception to the Court's ruling in refusing to strike out the answer as not responsive.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

10 Q Now, Mr. Bradford, this hole in which the small parts Mr. Enright says the delicate parts of the engine were put was in the floor of the house where the Gorton boiler was? A Yes.

Q What was the construction of that floor? A Concrete.

Q Was this hole in the concrete? A It was a hole dug out of the concrete, re-inforced sides and top.

Q What was the bottom? A Concrete.

Q Was that dry? A Yes, sir.

20 Q And when these parts were put in there how were they put in there? With any waste or other material, or just put in there as steel parts, one on top of the other? A They were just put in.

Q And then boarded over? A Yes.

Q And after they had been boarded over was the place in which they were there dry? A I didn't see to it, but I should assume not because we used to put water on the floor above it. I never saw in it. Therefore, I can't prove it.

Q You don't know whether it was dry or wet, through observation? A After the boarding top was on; no.

30 Q The parts of the boilers that were put in the field and crane, how were they put out there, on skids, or in what manner were they placed in the lot? A I think there were one or two pieces possibly on skids, and the others were just simply placed in the lot. I couldn't answer in any more detail than that.

Q And they were in a condition in which you could not positively state that they could be used, that is, as to boilers? A No.

40 Q Mr. Bradford, did you make any report in writing to Mr. Mingle regarding the disposition made by you of this property, the boilers, the engines, and so forth? A What do you mean by disposition?

Q Well, taking them and putting them out in the lot. A You mean taking them down and putting them in the lot?

Q Yes. A No written report; no.

Q Did you make a verbal report to him? A Certainly.

Q More than one? A We had discussed it many times.

*C. Vernon Bradford, cross.*

Q When was the first mention—at what time was the first mention of this made to Mr. Mingle by you? A Previous to my visit to Mr. Leonard, asking permission.

Q And that visit to Mr. Leonard you fix at— A May or June.

Q May or June, 1917? A '17.

Q And it was previous to that that you discussed it with Mr. Mingle? A Yes. 10

Q Was the building, the boiler house, torn down before or after that discussion with Mr. Mingle? A After.

Q Was it torn down before or after your visit to Mr. Leonard, about April 9th, 1917? A It was torn down before my visit to Mr. Leonard.

*Mr. Enright.* He is calling your attention now to the first visit of April 9th.

A The boilers were torn down after this letter of April 9th. 20

Q And your conversation with Mr. Leonard asking permission to tear them down was a few days after this letter? A No; May or June.

Q You had no conversation with Mr. Leonard then between the time of the letter of April 9th, 1917, and May or June? A I don't know. I don't remember.

Q I am just asking you to fix that date. A No; excuse me, sir. I may have seen Mr. Leonard between the time of April 9th and this date of May or June. I may have seen him several times, but I did not see him in connection with tearing down the boilers. 30

Q Then the interview with Mr. Leonard with regard to tearing down of the boiler house occurred after the writing of this letter of April 9th, 1917? A Yes.

Q But the letter of April 9th, 1817, was dictated by you after a conversation regarding the tearing down of buildings on the premises? A Yes.

Q And when you discussed with Mr. Leonard about that in 1917, the removal of buildings on the premises, did you or did you not include in that discussion the boiler house? A I did not. 40

Q Did you specify any buildings in that discussion, or was it simply a general discussion of the out buildings, and so on, of the property? A It referred particularly to the buildings under

*C. Vernon Bradford, cross.*

discussion of "pattern shop," and any other said buildings—I had in mind these things back here. The conversation really referred to this one building, and with the possibility of this (indicating), and that is why it specified in the letter any sheds that should be torn down.

10 Q Was anything said about the heating apparatus? A No.

Q That had been installed at that time, had it not? A No.

Q When was it installed? A The latter part of 1917.

Q Before or after the demolition of the boiler house? A After.

Q When was the newest construction at its greatest extent completed? A About end of June.

Q May or June? A About June, 1917.

Q Can you fix it more definitely whether the early or latter part? A Latter part of June, I said. About that.

20 Q You were given leave of absence from the company on what date, about what date? A Do you mean the last final? What do you mean by leave of absence?

Q Did you or did you not receive a leave of absence from the company just before your giving up active work? A Yes.

Q And about what time was that leave of absence given you? A January, 1918.

Q And you were never called back, were you? A No.

30 Q You were asked whether the boilers and engines were in such shape that they could not be used, and your answer was that you could not say. Can you say that they were in such shape that they could be used? A No.

Q In other words, you were in a position of really not being able, from the examination you made of the two boilers and the engine to know whether or not they were usable? A Exactly.

Q The amount of repairs that would be required to put them in usable shape were an unknown quantity to you until further examination? A Yes.

40 Q What was your business before you came with the Standard? A Is that relevant to this inquiry? How far do you want to go back?

Q Immediately before, what was your immediate position before you came with the Standard? A With the Stamford Rolling Mills.

Q Where was that? A Stamford, Connecticut.

Q What was your position there? A Manager.

*C. Vernon Bradford, cross.*

Q And what was your employment before that?

*Mr. Enright.* I submit there must come a time when we have got to stop long-winded performance.

*The Court.* We will go back another step.

*Mr. Heine.* He has expressed opinions as to machinery and so on which have been taken here as evidence. 10

*The Court.* He may answer.

A United States Metal Products Company, at College Point.

Q What was the nature of their business and what was your duty there? A I was manager. They made metal doors, trim, sash and so forth. We equipped the Woolworth Building and various other places.

*Mr. Enright.* This witness, as I recall it, has not been asked to give any expert opinion about anything. 20

*The Court.* He stated the condition of the engine and boilers.

*Mr. Enright.* He has stated he made some examination, not in a sufficient detail to tell whether or not it was usable. No expert element involved.

Q You have been familiar with construction work for a number of years and with boilers in particular, have you not? A I am not an expert in any way, but I have been mixed up in factories and erection of factories and supervision of factories for a good many years. 30

Q For a good many years? A Yes.

Q You said the roof leaked in spots. How many of those spots would you say there were in the roof of that boiler house when you first saw it? A I didn't count them.

Q Enough. Were the pits in which the boilers were in that house under water or full of water at the time you first saw them? A Please designate which boilers you mean?

Q The one hundred horse power and fifty horse power that were in the boiler house? A Yes.

Q Were the pits they were in full of water at any time that you saw them? A They were ground level boilers. 40

Q They were not sunk? A No.

Q The fly-wheel of the engine was sunk? A Naturally.

Q Was there water in that pit? A I could not answer that question.

*C. Godfrey Poggi, direct.*

*Mr. Heine.* That is all.

*Mr. Enright.* That is all.

C. GODFREY POGGI, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

10 *Direct examination by Mr. Enright.*

Q Mr. Poggi, whereabouts do you live? A Elizabeth.

Q And what is your profession? A Architect.

Q How long have you been engaged in that? A Twenty-three years.

Q All that time in and around Elizabeth? A Yes, sir.

Q Have you in the practice of your profession had occasion to become familiar with cost of brick buildings? A I keep in touch with it.

20 Q And brick buildings have been built under your supervision as architect? A They have.

Q Upon your plans? A They have.

Q In the course of your professional work do you familiarize yourself with the cost of buildings? A I do.

Q Did you have occasion to pass upon the bids of contractors submitted for buildings of various sorts? A Yes.

Q And supervise the construction? A Yes.

30 Q Did you examine the machine shop building corner of Berkman street and North avenue at Plainfield some time last fall?  
A October 16th.

Q 1919? A 1919.

Q And at that time were you able to locate from any marks upon the rear wall of the building where apparently another structure had been? A Yes.

Q Did you observe the main building to ascertain the quality of material and the apparent change and general condition of preservation of the main building?

40 *Mr. Heine.* I object to that on the ground that the rulings so far have excluded the condition of the main building.

*The Court.* This is for the purpose of qualifying, as I understand it, to testify as to what the damage was by the removal of the other building?

*C. Godfrey Poggi, direct.*

*Mr. Heine.* Damage to the main building, or the character of the material of which the other building was constructed?

*The Court.* Character.

Q I will ask you to assume for the purpose of valuation a brick extension to the main building of the dimensions shown upon this blue print, namely, fifty-one feet in width and thirty-seven feet in depth, one story, about fourteen feet high, built of brick of the same material and quality of construction as the main building, of the same age and substantially the same degree of preservation. Have you that question in mind as to your assumption? And assuming such a building can you give us an approximate valuation of that building during the year 1917, having in mind values as they existed at that time? 10

*Mr. Heine.* I object on the ground that the question is a hypothetical question and is objectionable on the ground that it contains facts that are not in evidence. 20

*The Court.* What facts?

*Mr. Heine.* The facts of the size of the—not the size but the quality of the brick, the thickness of the walls, at least; it leaves out a question of the thickness of the brick wall, which is vital, and there is no evidence, so far, that is an essential part of the construction of the building, as to the thickness of the walls of which the building is to be made. And also that the same age—it states the question of the same age of the building which is not in accordance with the evidence, which specifically gives the definite figures. 30

*The Court.* You may recall Mr. Leonard and supply that.

*Mr. Heine.* If it is known. I do not want to take unnecessary time, but if it is known what the thickness of the wall is.

*The Court.* I understood these buildings were all part of one, as I recall Mr. Leonard's testimony, the whole thing was all put up at once. 40

*Mr. Heine.* That is thirty years; if it can be supplied. The question is amended to that extent. Name the thickness of the walls.

*C. Godfrey Poggi, direct.*

*The Court.* Mr. Enright does that by saying the same condition of the other building.

*Mr. Heine.* That does not meet the condition of the thickness of the walls.

10 *The Court.* Do you know the thickness of the walls, Mr. Enright? You may add that.

*By the Court.*

Q Was the thickness of the walls shown by the lines on this other building? A No; I didn't notice that, your Honor; I don't believe they were.

Witness withdrawn.

CHARLES LEONARD, recalled.

20 *Direct examination* by Mr. Enright.

Q Mr. Leonard, do you recall how thick the walls of this boiler house were? A I think they were twelve-inch walls; they were partitioned walls between the blacksmith shop and the boiler room and engine room.

Q Was those partition walls of brick? A Brick; yes, sir.

Q How thick were they? A I presume the same; I don't know.

30 C. GODFREY POGGI, resumed.

*Direct examination* (continued) by Mr. Enright.

Q Now, Mr. Poggi, I will add to the question I asked you the further fact—

*Mr. Heine.* I object to the testimony of Mr. Leonard on the ground that it is not anything the witness has of his own knowledge, but a guess practically.

*Mr. Enright.* Do you want to cross examine him on it?

40 *The Court.* I will allow it to stand.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

*C. Godfrey Poggi, cross.*

Q Now, Mr. Poggi, assume the further fact that the walls were twelve-inch walls and that the boiler house was divided by three partitions.

(Question repeated by stenographer.)

*The Court.* You may answer it, Mr. Poggi.

10

A Do I understand that that has relation to the condition of the main building; that is to say, assuming also that the extension was the same condition that the main building was?

*The Court.* Built at the same time and was in the same condition as the main building, same general condition.

A My impression is that that building—

*By Mr. Enright.*

Q Your opinion I want? A Yes, my opinion is that that is worth about three thousand dollars; that extension.

20

Q Do you mean a reproduction value, or a value in the depreciated condition? A In the depreciated state. A reproduction value would be greater than that at that time.

*Mr. Enright.* Cross examine.

*Cross examination by Mr. Heine.*

Q In giving your answer, you are, of course, using and including your general experience in the handling of buildings and in drawing plans and specifications and giving estimates and so on? A Yes.

30

Q Your ordinary experience in your own affairs? A Yes.

Q And that experience entered into the answer which you gave to this question? A Yes.

*Mr. Heine.* I move to strike out the answer on the ground that the witness has not confined himself strictly to the hypothesis placed before him in the question, but based it in part on his own experience.

40

*The Court.* His own experience as an architect?

*Mr. Heine.* Yes.

*The Court.* That is simply for the purpose of qualifying him to express an opinion. Motion will be denied.

*C. Godfrey Poggi, cross.*

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

10 Q Would it make any difference in your answer as to the value if the building had been originally built of second-hand materials, say, thirty years ago, as to its value in 1917, end of 1917? A I don't think so, if the second-hand materials were of a good quality serving the same purpose as new materials would.

Q Well, is it your experience as an architect that second-hand materials of good quality bring the same price in the performance of work as new materials? A All depends upon the type of building.

20 Q Well, in this factory type building? A In this factory type I think second-hand materials are better than new materials.

*By the Court.*

Q The fact they were there thirty years, Mr. Poggi, would that have anything to do with it? A I don't think so.

Q It would show that they were not so very bad, wouldn't it? A The fact they were there thirty years, if second-hand material was up thirty years, it showed it was standing up as long as the new material, new main building.

30 Q As what? A As the new material in the main building, assuming that the material in the main building was new.

*By Mr. Heine.*

Q Nobody has asked you to assume that. I would now like the answer to the question. Is it your custom and your experience that you are able to charge as much for construction into which good second-hand materials enter as for construction into which new materials enter? A No. Under ordinary conditions, no; you could not charge as much.

40 Q Assuming ordinary conditions to have existed in the erection of this struction originally, and its gradual weathering and condition at the end of 1917, would it make any difference, in your answer of value, that the building was originally constructed of second-hand materials, in the absence of any evidence as

*Joseph M. Dunphy, direct.*

to the character of the second-hand materials? A I think so far as that particular building is concerned that it should not make much difference whether those materials were second-hand or not.

Q Well, how much would it make? A In view of the fact that it had apparently lasted the thirty years. 10

Q How much would it make? A Very slight. Only by reputation of having had second-hand materials in the building.

*Mr. Heine.* All right. That is all.

JOSEPH M. DUNPHY, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

*Direct examination* by Mr. Enright.

Q Where do you live, Mr. Dunphy? A Brooklyn.

Q What is your business? A Machinery salesman, buyer, and inspector. 20

Q Anything to do with selling? A Yes, sir.

Q How long have you been in that business? A Twenty years.

Q Is it any part of your business to handle second-hand machinery? A Yes, sir.

Q How much of your business is in the second-hand trade? A Ninety per cent.

Q And are you familiar with the market value in 1917 of second-hand boilers and engines and machinery of the character that has been described here? A Yes, sir. 30

Q How long have you been in the second-hand machinery business? A I have been in the second-hand machinery business for a livelihood of about ten years. But I have handled machinery, of course, which became second-hand quite likely for about twenty years.

Q You handle both new and second-hand? A Yes, sir.

Q Did you go to this factory of Mr. Leonard's at Plainfield? A Yes, sir.

Q Last fall and make any observations respecting machinery that you then saw there? A Yes, sir. 40

Q When did you go there? A Some time in the fore part of October, I think.

Q What did you see there, what machinery did you inspect? A I saw a Corliss engine.

*Joseph M. Dunphy, cross.*

Q Whereabouts was that? A It was out in the lot there beside the factory.

Q Was it on skids or not? A No, sir; it was not.

10 Q What else did you see? A I saw two horizontal return tubular boilers, feed water pump and a blower, and the span of an overhead crane, that is, the carriage part, and pulleys, wooden pulleys, some shafting, hangars, cupola and generator. I think that is all.

Q Did you make a careful inspection of what you saw there?

A Yes, sir.

Q Was any of that stuff useful at the time you saw it there?

*Mr. Heine.* I object until I have the opportunity to examine the witness as to his qualifications.

*The Court.* You may ask him.

20 *Special cross examination by Mr. Heine.*

Q How many boilers did you sell, either that horizontal return type or other types between the first of 1917 and the first of 1919? A How many horizontal return tubular boilers?

Q Yes. A That would be an almost impossible question for me to answer. I could not tell you the number I sold.

Q Well, can't you approximate it? A Between what dates was that? A First of January, '17, and first of January, '19. One or two? A I should say six.

Q Six of what type? A Horizontal return tubular.

30 Q What make? A I remember one in particular is a Dillon boiler, a Massachusetts type.

Q Where did you sell that? A Sold it in Watertown, New York.

Q Did you make any sales in New Jersey? A Yes.

Q Where? A You say the first of the year 1919?

Q First of the year 1917 to the first of January, 1919? A I don't think I sold a horizontal boiler in New Jersey in that time.

Q At all? A No.

40 Q Did you make a sale during the year 1917 of any engine of the Corliss type? A I didn't make the sale directly; no, sir.

Q Did you make indirect sale? A I was in the office that made the sale.

Q You were physically there when they made it? A Yes, sir.

*Joseph M. Dunphy, direct.*

Q Did you have anything to do with it? A Yes, sir.

Q Where was that sale? A The sale was consummated between Adams street, Brooklyn, and 39 Cortlandt street, New York, and Baltimore, Maryland.

Q Any sale in New Jersey? A No.

Q Have you sold any shafting during the year 1917? A Yes, 10  
sir.

Q In New Jersey? A Not in Jersey.

Q What was the market price in 1916 of return tubular boilers per horse power?

*Mr. Enright.* Is this cross examination as to his qualifications?

*The Court.* No.

A In 1916? Well, there being several different types of horizontal return tubular boilers, if you would ask me any particular question. 20

Q Did you know the market price of B-W boilers, 1916? A Yes, sir.

*Mr. Enright.* I submit I am entitled to go ahead and develop his estimate of costs. This is not cross examination.

*The Court.* Yes.

A They are not, however, horizontal return tubular. 30

*The Court.* I think the witness is qualified. You may examine him, Mr. Enright.

*Direct examination (continued) by Mr. Enright.*

Q Was this machinery at the time you observed it out there on the lot in October, I think you said it was, of 1919, in a usable condition? A No, sir.

Q Was any of it in a salable condition as machinery? A Well, yes.

Q What part? A There was a little pump there you could sell. 40

*By Mr. Heine.*

Q A pump? A Yes; a little Duplex pump.

*Joseph M. Dunphy, direct.*

*By Mr. Enright.*

Q Anything else? A Not to be sold as machinery then unless extensive repairs would be put on them. Sell them, but not in condition to be used.

10 Q Was the pump salable without repairs? A Yes; I think it was.

Q Why wasn't the rest of it salable as machinery without extensive repairs? A Most of it was not complete, and in bad repair.

Q Well, can't you tell us what you mean by bad repair? A Well, it was exposed to the weather and rusty and broken and bent.

20 Q Well, now, are you familiar with the market prices of machinery of the character that you saw out in the lot? A Yes, sir.

Q During 1917? A Yes, sir.

*Mr. Heine. Where?*

Q My friend seems to think there is some charm about machinery values in New Jersey. During your experience as a machinery salesman, have you made sales of machinery in New Jersey? A Yes, sir.

*By the Court.*

30 Q Is there any variation of price within fifty miles of New York? A Yes, sir; there is.

Q How much? A Well, the laws for using the boiler in the State of New Jersey are quite strict, and you have got to have an awful good type of boiler to sell in the State of New Jersey, which, of course, necessitates the price being larger. That law, I understand, is in effect for about the last three or four years, and it affects boilers coming into the State. But I understand that it does not affect boilers that have been used in the State here for some time.

40 Q Is that the only thing on which there is a variation? A That is the only thing that I know of.

Q In other words, those that are in here you can deal with, but you can't bring any new ones in? A That is what they appeared to have founded their law on, evidently.

*Joseph M. Dunphy, direct.*

*By Mr. Enright.*

Q In other words, there is a more limited market for boilers in New Jersey than there is outside of New Jersey, because you have—

*The Court.* Poor boilers.

10

A Well, it is pretty near impossible to get a poor boiler in here at all unless you smuggle it.

Q So the market for poor boilers in New Jersey would be lower than the market for poor boilers in New York? A Yes, I would say so.

Q I will ask you in giving your valuations to give the valuations on this material in the highest market so as to give the benefit of any price to the defendant. Now, Mr. Dunphy, having in mind the particular machinery which you saw there out in the field, can you give a value—can you give the market value of that machinery as of market conditions in 1917, assuming a condition, assuming that it was in usable condition, but second hand, but assuming a condition before it had been exposed to the weather and bent and broken, in the condition that you saw it, and parts missing?

20

*Mr. Heine.* I object to that on the ground the question includes the form—

*The Court.* I do not see how Mr. Dunphy could answer that. Do you mean what was its value in the boiler room set up and in usable condition in that place?

30

*Mr. Enright.* I will strike out that question and see if I can make it a little clearer.

*The Court.* You want to get the difference between what it was worth at the time when it was set up there in usable condition and what it was worth when he found it in the yard, is that the idea?

*Mr. Enright.* I don't want to get the difference.

*By the Court.*

40

Q Was it worth anything in the yard, and if so, how much?

A Well, it was worth, except the pump—there was nothing except the large boiler that was worth anything except for junk. The large boiler could be repaired.

*Joseph M. Dunphy, direct.*

*By Mr. Enright.*

Q For junk what was it worth, approximately? A Well, of course, it would be based on weight, and the price of junk fluctuated so much around war times.

10 Q This stuff that you found in the yard, what was it worth approximately, in your judgment, the whole thing? A Boiler plate for junk—

*The Court.* He says the boiler could be used. He could not use that for junk.

*Mr. Enright.* That is what year, 1917?

*Mr. Heine.* Excluding the big boiler now.

*The Court.* Count the large boiler in at the value you thing it was worth at that time.

*Mr. Heine.* I think it ought to be separate.

20 *The Court.* He can give us the whole thing together.

A You want a total sum?

*By the Court.*

Q Yes. That which was junk being estimated as junk, and the boiler that could be used estimated for what that was worth?

A Well, I would have to figure that out from point of weight and price per pound.

*By Mr. Enright.*

30 Q You have not figured that out? A No, I have not. It would be a guess to say in round numbers what all that machinery was worth in one lump sum. I have not figured that up.

Q Now, I am going to ask you whether in the course of your business you sell this heavy machinery sometimes to be erected so that the seller stands the cost of erection? A Yes; we do.

Q So that you have knowledge both of the market value of the machinery and the cost of erection? A Yes, sir.

40 Q Is that a customary way for machinery dealers to sell heavy machinery of this character? A Well, it is a custom of some concerns and others not a custom. With our concern it is a custom for installation sometimes.

Q Now, I will ask you if you are able to give an opinion as to the value of the machinery which you saw scrapped out there in the yard, set up and installed in this Plainfield factory in

*Joseph M. Dunphy, direct.*

1917, assuming it then to be second-hand machinery, but in usable condition?

*Mr. Heine.* Objected to unless this witness shows a direct knowledge of construction costs at that time. Construction costs similar to the construction which would be required for this machinery. 10

*The Court.* I will allow the question.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

A Yes; I can give an opinion.

Q Have you calculated the detail on which that opinion is based? A Yes, sir. 20

Q Now, will you just give it?

*Mr. Heine.* Same objection.

*The Court.* Yes. I will allow the question.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

*The Court.* You may state it, Mr. Dunphy. 30

Q You have the items there, haven't you? A Yes, sir.

Q You made those up carefully? A Yes, sir.

*Mr. Heine.* I object to the witness consulting this memorandum unless foundation is laid for it, or bring the testimony out in some way to get it on the record.

*The Court.* It is a calculation he has made for the purpose of testifying.

A It is the original notes I made when I was at the plant with the cost of construction added. 40

*Mr. Heine.* If they are offered in evidence.

*The Court.* He is using them to refresh his memory, as I understand it.

*Joseph M. Dunphy, direct.*

*By the Court.*

Q Aren't you? A Yes, sir.

*Mr. Heine.* He certainly has not been shown not to have any independent recollection.

10 *By the Court.*

Q Can you give us the figures without this? A I think I can.

*The Court.* Then do not bother with your book.

A What particular one are you referring to now?

*By Mr. Enright.*

Q I want you to take all of the machinery upon which you were able to form an opinion of value.

20 *Mr. Heine.* I object to that answer unless—

Q (Continued.) —erected in the boiler house or factory during the year 1917?

*Mr. Heine.* I object to an omnibus answer covering an unknown, unenumerated lot of machinery lying out in a lot, without a proper description of it, and the method of installation which it is proposed to use.

*The Court.* I will allow the question.

*Mr. Heine.* Prays exception.

30 Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A Do I understand that you want a lump sum—

Q No. I want the details and then when you get through adding up the details give us the lump sum. A To install that Corliss engine from where it stands, in a plant, say moving it one hundred and fifty feet and installing it with complete base it would cost between twelve and fourteen hundred dollars.

40

*Mr. Heine.* I move to strike that out on the ground that the answer disclosed that it is based upon evidence which is not contained in the question and which is not in evidence.

*The Court.* Motion will be denied.

*Joseph M. Dunphy, direct.*

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER.

*Judge.*

*Mr. Heine.* Might I, with your Honor's permission, add the proposition that it does not cover—it is given as an estimate of the present time and not 1917. 10

A That was based on about what it would cost at that time.

*Mr. Heine.* All right. Don't add that then.

Q That was the installation cost? A Yes, sir.

Q What was the second-hand value of the engine itself? A Assuming that engine—

*Mr. Heine.* Same objection. 20

*The Court.* Yes.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A (Continued.) —to be complete and in good running order, good second-hand condition, I should say that engine—market value in 1917, you say?

Q Yes. A Worth seventeen or eighteen hundred dollars. 30

*Mr. Heine.* I move to strike that out on the ground the witness has interjected in his answer a matter which is not in the testimony and not contained in the hypothetical question.

*By the Court.*

Q Instead of using the term "good second-hand condition," you said the engine as you saw it was in the factory and usable, then what would you say as to the value? A Well, that is substantially what I mean, your Honor. 40

Q Same figures? A Yes, sir. We use the term in condition as first-class second-hand condition. We use the term—that is in the machinery trade. That means the engine is in usable condition.

*Joseph M. Dunphy, direct.*

*By Mr. Enright.*

Q What is the next item? A Well, of course, the boiler that furnished steam for that engine would probably be the next item. That horizontal return tubular boiler.

10 Q How many horse power was that? A It was about one hundred horse power.

Q That is the big one, yes. What was the second-hand value of that, in usable condition, 1917?

*Mr. Heine.* Same objection.

*The Court.* I will allow it.

A Fourteen or fifteen hundred dollars. Boilers in 1917 in usable condition, it is a very hard matter to place the market value on them because—

20 *Mr. Heine.* I object to the witness volunteering testimony.

*The Court.* Yes. You have given the figure, Mr. Dunphy.

Q Do you know what would be the cost of installation as of the same time?

*Mr. Heine.* Same objection.

*The Court.* Yes.

*Mr. Heine.* Prays exception.

30 Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A I think it would cost one thousand dollars, sir.

Q Take the smaller boiler, how many horse power was that?

A About fifty horse power.

Q What was the value of that in usable condition in 1917?

*Mr. Heine.* Same objection.

40 *The Court.* Yes.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

*Joseph M. Dunphy, direct.*

A Eight hundred dollars.

Q That would be a fair cost of installation?

*Mr. Heine.* Same objection.

*The Court.* Same ruling.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

10

GEORGE S. SILZER,

*Judge.*

A Between five and six hundred dollars.

*By Mr. Heine.*

Q What do you mean, five hundred and fifty dollars? A Say, five hundred and fifty dollars; yes, sir. Between five and six.

20

*By Mr. Enright.*

Q Did you see the remains of a cupola out there? A Yes, sir.

Q Was there sufficient of that left so that you could form an idea of what that was before it was taken out? A Yes, I measured it up. I got the size of it.

Q Just tell us what you mean by a cupola. A Well, it is placed on top of a foundry or any other building where a draught is to be taken away from it, to take the forced draught and the air away from the building. It is generally made of galvanized iron or heavy sheeting, or some other black iron pipe asphalted.

30

Q What would have been, in your judgment, the fair value of the cupola you saw, in usable condition, erected in 1917?

*Mr. Heine.* Same objection.

A Three hundred and fifty dollars.

Q Did you see the remains of a blower out there in the field?

A Yes, sir.

Q What, in your judgment, would have been the fair value of that blower which you saw, assuming it to have been in second-hand usable condition installed in 1917? A Four hundred dollars.

40

Q You have spoken of the little pump? A Yes.

Q What, in your judgment, would have been the fair value of the pump which you saw in usable second-hand condition in-

*Joseph M. Dunphy, direct.*

stalled on these premises in 1917? A One hundred and fifty dollars.

Q Did you see a dynamo out there? A Yes, sir.

Q What, in your judgment, would have been the fair value of the dynamo which you saw, if installed in this factory and  
10 in usable condition in 1917?

*Mr. Heine.* Same objection.

*The Court.* Same ruling.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A That particular dynamo I could give my opinion on it, but  
20 I would have to know more of the details. It was in such condition that I could not even tell the size of it. To recall it, a direct current generator, and if it was in working condition in 1917, I should think it was worth six or seven hundred dollars.

*Mr. Heine.* I object on the ground that the witness' own testimony indicates that he has not the knowledge of science which is one of the elements necessary in fixing price of dynamos.

*The Court.* I will let it stand.

30 *Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

A My opinion was that it was about a seventy-five K-W machine. It was a wooden frame and I could not get all the details off the name plate, and the armature was exposed and I could not get much to it. But one about that size, my opinion was it was about a seventy-five K-W machine.

40 *Mr. Heine.* I move to strike out the entire answer as volunteered.

*The Court.* I will let it stand.

Q Did you see any remnants of a traveling crane out there?

A Yes, sir.

*Joseph M. Dunphy, direct.*

Q What was the part you saw? A I saw just the carriage span and the wheels on the end of the span.

Q Was there enough of that appliance left so that you could form a judgment of what a complete crane of that character, second-hand, in usable condition, would have been worth in 1917?

A Well, there was nothing of that crane left so that I could tell what that crane was. There was no power there, or any propellor. I could not judge what kind of power was on that crane. Whether it was self-propelled or whether they pulled it with a chain or what they did. Or whether it was a chain block or electric power. Just the gears. 10

*Mr. Heine.* I object to volunteering of testimony when the witness said he could not tell.

Q You saw a part and recognized it as a part of a traveling crane of a certain size? A Yes, sir. 20

Q But what you would need to know more particularly before valuing it is the power appliance, is that right? A Yes, sir.

Q Now, I will ask you to assume a traveling crane of the size indicated by the part which you saw, and assume that the power arrangement was the cheapest power appliance that could be applied to a crane of that size, I ask you to give us a valuation, if you can, on such an appliance installed but in usable second-hand condition in 1917?

*Mr. Heine.* Objected to on the ground as previously stated. And also on the ground that the question includes elements of testimony assumed which are not in the testimony and which are improper and irrelevant to the issue here. Cheapest proposition. 30

*The Court.* Answer the question.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.* 40

A Well, we would have to assume that the crane would be some certain capacity then. The only thing that I could go by, assuming it was just an overhead crane, you could assume the same thing altogether as a piece of iron.

*Joseph M. Dunphy, direct.*

*Mr. Heine.* I object to the witness rambling.

*The Court.* Better have something definite.

*Mr. Heine.* Assumptions of his—

*The Court.* I have passed on the question. Give him the size.

10 *Mr. Enright.* My difficulty is that—

*The Court.* Mr. Leonard knows the size of it, doesn't he?

*Mr. Enright.* I don't know whether he does or not.

*Mr. Enright.* Do you know, Mr. Leonard, the size of the crane?

*Mr. Leonard.* Twenty ton.

*The Court.* What was the motive power?

*Mr. Leonard.* Hand. Pulled it along.

20

*By the Court.*

Q Does that give you facts enough, Mr. Dunphy? A It had just a chain block for the hoist?

*Mr. Leonard.* That is all. Fifteen ton hoist, and that is gone.

*By Mr. Enright.*

Q Assume that the crane was twenty ton capacity, hand power, fifteen ton hoist?

30

*Mr. Heine.* Same objection.

A Two thousand dollars.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,

*Judge.*

Q You didn't see the Gorton boiler, did you? A I did not.

40 Q Have you had occasion to deal with Gorton boilers? A I don't think I ever sold a Gorton boiler; bought one.

Q Do you know what they are? A I know what they are.

Q Do you know what they are worth second-hand?

*Mr. Heine.* I object.

*Joseph M. Dunphy, cross.*

A Yes. Approximately I know the value of them. If I knew the size. Of course, there are several different sizes. It is a heating boiler. I know the value of that the same as I do of boilers.

*Mr. Heine.* I object to the witness continually volunteering testimony. 10

*The Court.* What is the objection to it? The question is whether he knows.

*Mr. Heine.* He goes on and on and on. I do not want to object all the time.

Q Have you added up those figures which you have given us to make a total? A No, I have not.

*The Court.* You can give us the total, Mr. Enright.

*Mr. Enright.* I have it right here. 20

*The Court.* Anything further with this witness?

Cross examine.

*Cross examination by Mr. Heine.*

Q What repairs would be required on the one hundred horse power boiler there to put it in shape? A I think it will have to be all re-tubed, and I think probably some of the stays will have to be put in.

Q Can those tubes be taken out and re-rolled? A I don't think those tubes could be re-rolled in that boiler now. You could not tell anything about it until you get them out, but I would not think they could be re-rolled. 30

Q In other words, your opinion from the examination of those tubes is that they could not be expanded there at all, and if you took them out and re-rolled them you might get something and might not? A You would have to re-roll them in there anyhow. You could not take them out.

Q If you consider them to be in that condition the reason is rust, is that it, they are rusted? A Yes.

Q Over how long a period do you think it would take the tubes in a boiler of that type to get rusted to that extent? A Well, it would depend on conditions. Do you mean out in the lot? 40

Q Yes, out in the lot there, how long would it take? A Six or eight months or a year would rust them in such condition that

*Joseph M. Dunphy, cross.*

the scales would drop off on the inside when you begin to clean them or do anything with them.

Q What would be the cost of repairing that boiler at the present time, say? A Now, at the present time?

Q Yes. A Well, I think it would cost between six and seven hundred dollars to repair that boiler now.

10 Q And then, what could you sell it for at the present time?

A Sell it for about nine hundred dollars, if it was thoroughly repaired. If the shell was weak it might be a total loss, but we will assume that the shell would be all right.

Q Your inspection indicated that you were assuming that in your inspection? A That the shell of the boiler was all right.

Q Of course, if the shell was weak? A I say, if it was.

Q But in your inspection you did not assume that shell was weak, did you? A No, I didn't give it a hammer test.

20 Q You didn't give it a hammer test? A No, sir.

Q When you testified that the boiler was inspected by you, that inspection consisted of simply opening the doors in front and looking in the tubes and looking it over generally, without taking a hammer and giving it any kind of a test for the shell? A Yes. I didn't give it a hammer test.

Q Isn't it customary in looking over a boiler first thing to do to find out whether the skin is tender, or the shell is tender? A If you are going to inspect it to use it, no. We generally put a hydrostatic test on it.

30 Q This boiler would not stand a hydrostatic test, would it? A Don't know until you put it on there. Might stand one.

Q Those tubes might be a whole lot better than you think right there? A Well, the tubes might be scaled on the inside; that is, on the water side of the tubes, so that if you didn't move the boiler at all or jar it, that it would stand a hydrostatic test. Of course, it would stand a hydrostatic test. Of course, it would stand a hydrostatic test, but it would depend on the pressure you would put on it.

40 Q What do you think that would stand? A Well, I could not tell what that would stand. I would not consider it would stand very much without leaking some.

Q Before putting a hydrostatic test on wouldn't you, as a practical man, thump that boiler good and proper with a hammer to see what it would do? A No, I would not.

Q What could you sell this pump for up there? A Now?

*Joseph M. Dunphy, cross.*

Q Yes. A Well, right where it is I suppose probably fifteen or twenty dollars. Right where it is.

Q Could you repair it? A Yes; it could be repaired.

Q How much could you get more than the cost of repairing for it? A Why, I don't think you could get for it what it would cost to repair it, now, in its present condition, where it is. It would cost more than that to repair it. 10

Q Is this dynamo you say you inspected there—did you make an exact inspection or detailed inspection of that? A Just in a general way.

Q Is not it a very old type? A Yes; it is.

Q Obsolete now? A Well, it would never be re-installed again. Of course, there are generators as old.

Q Paper wound, isn't it? A I don't know whether it is paper wound or not. 20

Q Didn't you inspect enough to find out the way it was wound? A No, I didn't. I didn't go into the inspection far enough to find out what the material was used in the winding.

Q How many years ago is it since they stopped winding dynamos with paper? A They wind some of them yet with it.

Q Not very many. A dynamo of this type, how long ago since they stopped that? A I don't know when they stopped building that particular type of machine.

Q It is a long time ago, however, isn't it? A I should say that it was because that is a wooden frame machine, and they are all built of cast iron or cast steel now. 30

Q It is a pretty old citizen, that dynamo? A I don't know whether it is a citizen at all or not, but it is rather old.

Q Now, you say that a lot of things were broken and bent. These boilers are there so that they could be taken off the property and used, aren't they? A Well, I don't think the little boiler could be ever used again. I think the shell is too weak in the little boiler to be used.

Q Did you give that a hammer test? A No.

Q This cupola that you speak of, that is pretty well gone, isn't it? A Yes; they chopped it right off with an axe or clipper or something like that, when they took it off there. They just cut it right in to and bent it. 40

Q The blower is in the same condition? A No; I didn't notice that the blower was broken.

*Joseph M. Dunphy, re-direct.*

Q What could you sell that for now? A Why, I don't think you could sell it at all unless you sold it very cheap—as a junk price.

Q Do you know what the junk price is? A I don't know just exactly within, say, a half a cent a pound what they are paying for junk right now.

10 Q Give us within half a cent a pound what they are paying for stuff. A Oh, now, I should say, one and three-quarters or two cents.

Adjourned until 1:30 P. M.

Afternoon session, 1:30 P. M.

20 JOSEPH M. DUNPHY (resumed).

*Re-direct examination* by Mr. Enright.

Q You were asked this morning whether you could give us an opinion as to the present value of what you saw out there, that is, at the time you saw it in October, and you said you could with a little figuring. Can you give us that now?

*The Court.* I think he gave most of it to Mr. Heine, didn't he?

*Mr. Enright.* I don't think he gave the present value.

30 *The Court.* Yes. Wasn't it, Mr. Heine? You asked him about all of this, didn't you?

*Mr. Heine.* I asked him about the present value of the little pump. I only asked him about three of the items.

*The Court.* Which three were they?

*Mr. Heine.* The large boiler and the little pump and the cupola.

*The Court.* Do you want to cover something else?

40 *Mr. Enright.* I wanted to get the value as of the time he saw it out there in the lot, in the condition it was then in, of everything he saw there.

A Well, I would place a value on that as I saw it there last fall from junk price only.

*The Court.* Except to the boilers.

*Joseph M. Dunphy, re-direct.*

A I would include the boilers in that, and also the pump, as a junk price with the idea the large boiler might turn out to be all right, and, of course, I know the pump would be, but as a machinery offer for that machinery out there I would not bid on it to buy it as machinery.

*By the Court.*

10

Q What is the fair market price as you saw it there? A I would say between two hundred and fifty and three hundred dollars, as it stands right there.

*By Mr. Enright.*

Q That is the junk? A Yes.

*Mr. Heine.* I move to strike that out on the ground the witness has previously testified he didn't know the weight and could not give the value without the weight.

20

*The Court.* I understand he has made a calculation since.

*Mr. Heine.* I think we ought to have the benefit of the total weight on the record.

Q You didn't weigh any of this stuff, did you? A No, sir.

Q And what you are now giving us is based on some assumption of weight? A Yes. And what I think that the junkies, we call them, would offer you for it. We very often clean out plants where we sell stuff after we take the machinery out, and I can come pretty close to what these fellows will offer for it in a lump sum, whatever it is.

30

*Mr. Heine.* I renew my motion to strike out on the ground the witness' testimony is a pure speculation.

*The Court.* No, I do not think it is. He says he can tell from his experience about what he would get for it as it lies there.

Q You give us the highest price which in your estimate as a man who occasionally carries through those transactions a junky would give for it?

40

*Mr. Heine.* Same objection.

A Three hundred dollars.

*Joseph M. Dunphy, re-direct.*

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

10 Q So as to give the benefit of anything that is entitled to benefit here, suppose the larger boiler, the one hundred horse power boiler is possibly worth something more than junk, won't you—

*The Court.* He has told us about that; it would cost a certain amount to repair and there would be a margin of about three hundred dollars after it was repaired.

*Mr. Heine.* Yes.

20 Q You said you hadn't seen this Gorton boiler. You know the type, do you? A Yes, sir.

Q And about what they are worth? A Yes, sir.

Q I will ask you to assume what I will establish by asking Mr. Leonard a question later on, that this Gorton boiler installed for heating purposes in this plant in 1917 was a second-hand boiler in good, usable condition, designed to serve a radiating surface of about six thousand feet. Can you tell us about what the value of that would be installed in 1917?

30 *Mr. Heine.* Same objection that was entered before to this expert's answer.

*The Court.* It will be admitted.

*Mr. Heine.* Prays exception.

Exception allowed; sealed accordingly.

GEORGE S. SILZER,  
*Judge.*

40 A The size of the boiler has been given to me by Mr. Leonard as five feet in diameter and about six feet high, and if it was designed to take care of six thousand feet radiation I should think, if the boiler was in good shape, it was worth seven hundred dollars.

Q Does that include cost of installation? A Just right up.

*Mr. Enright.* That is all.

*Motion for Non-Suit.*

CHARLES H. LEONARD, recalled.

*Direct examination* by Mr. Enright.

Q Mr. Leonard, what was the size of this Gorton boiler? A Why, it is about five foot in diameter and six and one-half foot high, I believe. It took care of 6,000 feet of radiation; largest size they make. 10

*Mr. Enright.* That is all.

*Mr. Heine.* That is all.

*Mr. Enright.* Plaintiff's case. For the sake of the record I have totaled up the minimum prices given by Mr. Dunphy, where he said between twelve and fourteen hundred dollars; for instance, I have taken twelve hundred dollars, and the total of those is ten thousand eight hundred dollars. That does not include the building. 20

#### MOTION FOR NON-SUIT.

*Mr. Heine.* Before going to defense I would move that in connection with the motions—following up the motions made at the opening of the trial—

*The Court.* Where is the evidence against the Standard Aircraft?

*Mr. Heine.* Nothing against the Standard Aircraft in the record.

*Mr. Enright.* I don't think there is. 30

*Mr. Heine.* I move for a non-suit as to the Standard Aircraft.

*The Court.* That will be granted.

40

*Alexander Milne, direct.*

DEFENDANT'S CASE.

ALEXANDER MILNE, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct examination by Mr. Heine.*

10 Q Where do you reside, Mr. Milne? A Plainfield, New Jersey.

Q You built, did you not, the new buildings on the property of the Standard Aero Company, or Mr. Leonard's, occupied by the Standard Aero Company? A I did.

Q When was the new construction, or the new building constructed behind the old buildings of Mr. Leonard's completed? A The buildings were started on or about April 13th and finished on or about May 23rd of 1917. By that I mean the build-  
20 ings, but not all of the equipment.

Q Outside structures? A Outside structure.

Q I show you a photograph and ask you whether or not you can state what that is, indicating the left-hand page of a book? A I am now pointing and running my finger along a photograph which shows the southerly side of the new addition to the Standard Aero plant on Berkman street.

Q Which I am marking with pencil the letter "A"? A That photograph does not show all of the buildings, all of that side.

Q I ask you whether this building which I have marked "A" on this photograph, whether the other side of that building—the north side—was adjacent and next to the old brick building? A  
30 The southerly wall of the old brick building formed the northerly wall of the new building.

Q Marked "A" in this photograph? A Marked "A."

Q Is that same building depicted on the lower photograph here? A The easterly front which adjoins the southerly side—generally adjoins—is shown on the second photograph.

Q I will mark that "B."

40 *Mr. Enright.* I object that this line of testimony which appears to be to the erection of this new building is immaterial and irrelevant. I make suggestion merely because we have got to get through today and it is opening up a line—I do not press the matter—

*The Court.* Is that the new building which took the place of the boiler house?

*Alexander Milne, direct.*

*Mr. Heine.* This is directed to my testimony of Mr. Leonard's that he was unable to see the boiler house at a certain time just prior to the making of the lease and I am putting in evidence the buildings which covered the house where the boiler house was and which he must have seen, because he also testified that he saw the new buildings. 10

*Mr. Enright.* I do not press the objection if your Honor thinks—

*The Court.* For that purpose I will admit it.

*Mr. Heine.* For that purpose alone, your Honor, and not for any other.

*Mr. Heine.* I will offer these two photographs for the defendant, photographs marked "A" and "B."

(Photograph entered in evidence and marked Exhibit D. 9.) 20

(Photograph entered in evidence and marked Exhibit D. 10.)

Q I show you two photographs on a page and direct your attention to the lower one of the two and ask you what is shown on that? A That is the photograph of the interior of the new building, showing particularly that part which came **directly over** and enclosed the space formerly occupied by the old boiler house. It is indicated very plainly by the roof slope, which shows on the southerly wall of the old building. I am now pointing to that slope. 30

Q I will mark that slope with an "X"; this is the interior, is it, of the building which has been indicated in the previous two photographs, 9 and 10? A It is.

*Mr. Heine.* I offer that.

(Photograph entered in evidence and marked Exhibit D. 11.)

Q Did you see the premises at the time in 1916 when the Standard—just about the beginning of their lease, or their occupation—the Standard Aero Corporation? A I did. 40

Q Did you see the boiler house or the lean-to which was on the southerly side of the building? A I did.

Q Did you observe the condition of the roof? A I did.

*Alexander Milne, cross.*

Q What was it? A The roof was conspicuous by its absence. There was practically no roof; the stack had fallen down at some previous period, and in doing so had gone through a part of the roof; the former roof covering, which was of a rubberoid nature, had become torn in a great many places.

10 Q Were there holes in the roof? A Oh, yes; all over.

Q Were there more than one? A Several.

Q What was the size of these holes? A One of them was where the chimney had gone through was possibly, in squaring it up would be four foot by six foot.

Q What was the location of these holes in relation to the boilers and Corliss engine in the building? A The holes came particularly over where the Corliss engine formerly set.

*Mr. Heine.* That is all.

20 *Cross examination by Mr. Enright.*

Q How many holes were there in the roof? A I would say half a dozen.

Q This was the only big hole, wasn't it? A Yes; if I may say, the whole roof was rotten where it came up against the old building, the material of which it was constructed—

Q The only big hole was this hole where you say the chimney had fallen? A The stack, yes.

Q The stack? A Yes.

30 Q And you said there were five or six other holes, didn't you?  
A May I explain here what I mean?

Q You said there were five or six other holes? A In the roof structure itself; the roof covering was full of holes.

Q In the roof structure there were five or six other holes? A Yes.

Q How large were they? A Oh, maybe a foot, some of them. Just where a plank would be splintered out, where a plank had rotted away.

40 Q And that is what you mean when you said there was no roof on the building? A No; what I mean when I said there was no roof, the roof covering has ceased to be a roof covering.

Q But there was something that to an ordinary layman looked like a roof, wasn't there? A No.

Q It wasn't open to the sky? A Yes; see right through it.

Q In these four or five places? A Yes, and more.

*Discussion.*

Q And that is what you mean by saying there was no roof?  
A I mean by that that there was no roof that would shed water.

Q Any roof that fails to completely shed water you regard as being no roof at all? A No roof worth having; that is what we have roofs for.

Q Any roof that leaks is not a roof? A No, sir; it is a sieve. 10

*Mr. Heine.* I offer this letter, marked D. 8 for identification.

*Mr. Enright.* No objection.

(Letter heretofore marked D. 8 for identification entered in evidence and marked Exhibit D. 8.)

*Mr. Heine.* Defendant rests.

Mr. Heine sums up the case for the defendant.

*The Court.* Do you think there is any dispute here as to the liability? 20

*Mr. Heine.* Yes, sir.

*The Court.* In what particular?

*Mr. Heine.* Mr. Leonard either agreed or waived any claim for the removal of this boiler house, or for what was done with the particular machinery.

*The Court.* Where is there any evidence of that? Mr. Bradford testified that he represented your company at the time; that he went there and took it down without authority and went there and tried to get authority, and the language was so lurid that he would not repeat it here. 30

*Mr. Heine.* The testimony was that after that conversation, which took place in June, that there was a conversation between Mr. Mingle and Mr. Leonard, which resulted in the drawing up of a lease, and that the written provisions of the lease, the act of the parties, which is in evidence, shows conclusively that Mr. Leonard agreed to my idea of the motives of human action, waived any claim when he entered into that new lease arrangement, not having made any claim for damage at that time— 40

*The Court.* Let me see that second lease.

*Mr. Heine.* Yes, sir. The phraseology I have in mind—

*The Court.* Buildings and heating plant erected on the grounds shall be the property of Charles H. Leonard," is that it?.

*Discussion.*

*Mr. Heine.* Yes, sir. The phraseology there; and coupled with that the letter—

*The Court.* That, in connection with the letter—

*Mr. Heine.* The letter of April 9th, and the letter which I have just offered in evidence, which indicates that the building  
10 was taken down some two months or two weeks, as this letter shows, makes a claim here for damages in 1919, apparently the first claim of any kind. And the indication is from his letter here, where he says, two weeks before this interview, evidently indicating this interview here, the building was taken down, so that there is something of which the jury might find that the letter here had to do with the taking down of the building, which immediately followed.

*The Court.* Didn't Mr. Bradford say quite the contrary.

*Mr. Heine.* Mr. Bradford said he pointed out certain other  
20 buildings, but that phraseology of the letter is broad.

*The Court.* The letter deals with two things. First, what they may erect; it says: "I am agreeable to your company to erect any buildings which it may deem necessary. It is understood it shall not extend on other ground." That gives the rights to erect any buildings. Now, the next clause is referring to tearing down buildings: "You are privileged to take down any of the outside sheds or structures which you deem necessary." That, taken in connection with the lease, "buildings and  
30 heating plant erected on the ground shall be the property of Mr. Leonard," namely, those which were erected in accordance with the consent which he gave, namely, outside buildings.

*Mr. Heine.* We further have the testimony in regard to those outside buildings. Mr. Leonard says shortly before the 16th of October, when this second lease was under negotiation, that he went and saw Mr. Mingle. Mr. Bradford corroborates that and says that he took him up to Mr. Mingle's office. And he was at the plant. I asked him if he saw the boiler house then there; he said no, he could not tell whether he did or not. He said he  
40 saw the new building, the new construction which came up to where he pointed an old wash house was. And I asked him how close the old wash house was to the boiler house, and he said it was very close.

*The Court.* Suppose he had seen it there and made a new lease in which he said any new buildings you put there must be-

*Charge to Jury.*

long to me, does that waive the claim he had for things you had already torn down?

*Mr. Heine.* I think that it is a proper jury question, if a man has a property and it is materially, as he claims, and substantially damaged, and he goes there and sees, as they are entitled to find from his testimony, and sees that the property has been damaged and that he then enters into and negotiates a new lease providing for the passing of the title to him of the new buildings erected, that there is a perfectly good warrant that he has foregone and waived and acquiesced in any acts of damage, which have transpired prior to that time; and all the acts of damage testified to occurred prior to the negotiations there in October, 1917, when this new lease was made. If a man has a real grievance—

*The Court.* It might be given that construction, but I doubt it very much. You may argue it.

Mr. Heine continues summing up the case for the defendant.

Mr. Enright sums up the case for the plaintiff.

**CHARGE.**

Charge to the jury, by Hon. George S. Silzer, Circuit Court Judge, as follows:

Gentlemen of the Jury:

In this case the plaintiff leased his premises to the defendant company and under the terms of that lease there were certain obligations to be performed by the tenant. It appears that during the term the boiler house was removed, together with the contents and machinery that were a part of that boiler house. The plaintiff claims that they were removed without his authority and he now asks that you award him damages to compensate him for the loss. It appears that this boiler house was removed originally without any consent from the plaintiff, but that after the removal had taken place the superintendent of the building went to the plaintiff and tried to secure his consent. The plaintiff says that he never gave consent to the removal of it, and never acquiesced in its removal in any way, nor authorized it. The defendant, on the other hand, contends that by reason of

*Charge to Jury.*

10 the execution of the second lease the plaintiff consented and authorized the removal, or at least that he waived any right that he had to damages by reason of that. You will remember that the letter Mr. Bradford wrote was written as a result, as I recall Mr. Bradford's testimony, of an interview in which the removal of this boiler house was not discussed at all, nor contemplated; that the letter dealt with something entirely different, and if you will read the letter you will see that it very carefully put and deals first with the erection of buildings, and gives the tenant the right to erect such buildings as they need on these premises, and then when it takes up the subject of tearing down the buildings says, as I recall the language—you have the letter before you—that they may take down outside buildings; that together with Mr. Bradford's testimony that at this particular time the boiler house, which apparently was not an outside building, but attached to the main building, was not apparently contemplated at all. Do you believe that that letter, or any conversation between Mr. Leonard and Mr. Bradford gave authority to this tenant to tear down this boiler house? It appears further, from Mr. Bradford's testimony, that it was pulled down without Mr. Leonard's consent; that the president of the company asked him to see Mr. Leonard and ask him to consent to it and Mr. Leonard refused, and refused to waive his claim. That is the situation up to the time of the making of the second lease. The defendant claims when the second lease was made that there is a clause in that lease which says that the buildings erected upon the premises shall become the property of the landlord. Do you believe that the making of a lease which says that the buildings you put on there belong to me, is any waiver on the part of the land owner for compensation for buildings that have been torn down, the machinery has been thrown out and permitted to be destroyed? If you believe that then your verdict would be no cause of action in this case.

40 On the other hand, do you think it simply means that the man who owned the property said, "Yes, the buildings you put on there, if I make a new lease with you the building you put on there belong to me, you cannot take those off, but I do not waive any rights I had for damages you have done me already?" So, you see, that is a question of fact for you to determine. If you find that Mr. Leonard consented to this, or waived it in any way, gave up his rights, or did not intend to be paid for it, and

*Charge to Jury.*

showed that by such actions as convince you that is so, then, of course, he cannot come in now and ask for it. In that case your verdict would be no cause of action.

On the other hand, if you find this was done without his consent, and that he did not waive his rights, and he did not ratify the action which took place, then he would be entitled to recover for the damage that has been done. 10

The measure of damages in a case of this kind is the depreciated value of his property. How much less was his property worth by reason of this destruction than it would have been if it had not been destroyed? That does not mean that you can say to yourselves, well, they erected a whole lot of new buildings there and that might have increased the value of his property. Those new buildings have nothing to do in your consideration of the question of damages. You cannot offset the new buildings against the tearing down of this. The new buildings have absolutely nothing to do with it, on the question of damages. The question of damages is this: How much less was this property worth by reason of tearing down this particular piece of property and the things that were attached to it. You have heard the testimony here on that subject. The figures I presume you have in mind, from the testimony, and statements of counsel. Examine those figures carefully and determine, if you come to that part of the case, what depreciation there was to Mr. Leonard's property by reason of this action on the part of the tenant, and when you find that sum that will be the sum you return as your verdict in favor of the plaintiff, if you find the defendants liable. 20 30

So, to recapitulate, if you find the defendant is not liable, that Mr. Leonard waived his claims, or authorized this to be done, then your verdict is no cause of action. If, on the other hand, you find that he did not, then you assess damages to him which will represent the depreciated value of the property by reason of the destruction. You may retire.

*Mr. Enright.* I would like to note an exception to that part of the charge in which it was left to the jury to find that the second lease might be taken as evidence of a waiver by the plaintiff of his cause of action, or whatever was said under that head. 40

*Judgment of Non-Suit.*

*The Court.* I will allow that.

Exception allowed—sealed accordingly.

GEORGE S. SILZER

*Judge.*

10 *Mr. Enright.* I would like to note an exception to that part of the charge leaving to the jury to find the measure of damages the amount which the property was worth after the damage—or, rather, the difference between the value of the property after the damage and before the damage.

*The Court.* Don't you think that is the measure of damages of depreciation?

*Mr. Enright.* I was reading that case you called my attention to.

20 *The Court.* That is undoubtedly the measure of damages.

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STANDARD AIRCRAFT CORPORATION, Impld,  
&c.,

*Defendant,*

*Action at Law.*

*ads.*

*On Postea.*

CHARLES H. LEONARD,

*Plaintiff.*

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It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff, with costs to be taxed *nisi*.

Entered February 11, 1920.

On motion of

HEINE, BOSTWICK & BRADNER,

*Attys.*

40

*Exhibit P. 1.*

**EXHIBIT P. 1.**

THIS AGREEMENT, made this 29th day of December, 1916, between Chas. H. Leonard of Elizabeth, N. J., party of the first part, Landlord, and Standard Aero Corporation of N. Y., party of the second part, Tenant,

WITNESSETH, that the said Landlord has agreed to let, and hereby does let, and the said tenant has agreed to take, and hereby does take, ALL that certain property situated on the northwest corner of Berkman street, and North Ave. being designated & known as No. 631-655 North Avenue in the City of Plainfield in the County of Union and State of New Jersey, for the term of one (1) year commencing the first day of January 1917, and ending the thirty-first (31) day of December 1917, at twelve o'clock in the forenoon of that day, at the yearly rent of Three Thousand (\$3,000.00) dollars, payable in twelve equal monthly payments of Two Hundred Fifty (\$250) each in advance, on the first day of each and every month. In consideration of the execution of these premises, it is hereby understood and agreed by and between the parties hereto, that in the event of the party of the first part having an offer, being able to sell and dispose of the property herewith above mentioned that party of the second part shall have the first option of purchasing the property hereto above mentioned.

THIS AGREEMENT is upon the following conditions, all and every of which the tenant agree to perform and keep. That it will pay the rent at the times aforesaid. That it will not let, sell, underlet or assign the premises, or any part thereof, and that it will not use them, nor permit any part thereof to be used, for any business or purpose extra hazardous, without the written consent of the Landlord. That it will permit the Landlord or his agent to enter the said premises at reasonable hours in the day time, to examine or to make such repairs and alterations therein as shall be necessary for the preservation thereof; and to exhibit them after the first day of October, 1917, to persons, and to put notices "To Let" or "For Sale" on the walls thereof. If the premises, or any part thereof, shall become vacant, or deserted, during the said term, the tenant authorizes the Landlord or his agent to re-enter, without being liable to any prosecution thereof, and to re-let them, and receive and apply the rent first to the payment of the expense of re-entering, and then to the payment

*Exhibit P. 1.*

of the rent due by these presents. To preserve the said premises, and surrender them at the time aforesaid, in as good condition as the proper use thereof will admit, damages by the elements excepted. And it is agreed that this instrument, on the breach of any of its conditions, shall, and, at the option of the  
 10 Landlord, may be rescinded; and that he may recover immediate possession of the premises, "for holding over after the expiration of the term," without any other than this notice of the intention of the Landlord to re-enter.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

Landlord,  
 CHAS. H. LEONARD, (L. S.)

20 Tenant,  
 STANDARD AERO CORP. OF N. Y. (L. S.)

By H. B. Mingle, President.

Executed and delivered  
 in the presence of  
 LESLIE R. STEWART.

30 Endorsement: Landlord and Tenant's Agreement. Standard Aero Corp. of N. Y. to Chas. H. Leonard. Date, December 29th, 1916. House No. 631-655 North Avenue, from Jan. 1st, 1917, to Dec. 31st, 1917.

*Exhibit P. 2.*

**EXHIBIT P. 2.**

THIS AGREEMENT WITNESSETH: That Charles H. Leonard of Elizabeth, County of Union, and State of New Jersey, hereby let unto Standard Aero Corporation of New York, County of Union and State of New Jersey, all that certain House and Lot known as No. 655, Situate on the side of North Ave. & Berckman at Plainfield, New Jersey, with the appurtenances, for the term of one year and four months, from the first day of January A. D., Nineteen Hundred eighteen, at the rent of Five Thousand Dollars per year, to be paid as follows, to wit: in monthly installments.

10

After May 1st, 1919, the Standard Aero Corporation shall have the option to continue to occupy the property for the duration of the war under the same conditions governing this lease. The Standard Aero Corporation shall further have the privilege of cancelling this lease any time after May 1st, 1919, on 60 days notice in writing. Anytime after May 1st, 1919, that cessation of war shall take place Charles H. Leonard may cancel this lease on 60 days notice in writing. Buildings and heating plant erected on the grounds shall be the property of Charles H. Leonard.

20

and the said Standard Aero Corporation hereby for heirs, executors and administrators, covenant and promise to pay to the said Charles H. Leonard, heirs and assigns, the rent in the proportion and at the time aforesaid; and that , the said Standard Aero Corporation, executors, and administrators, shall and will not at any time during the said term, let or demise, or in any manner dispose of the hereby demised premises, or any part thereof, for all or any of the term hereby granted, to any person or persons whatever, nor occupy or use the same in any other manner than as a factory without the consent and approbation, in writing of the said Charles H. Leonard, heirs and assigns, first had for the purpose; and at the expiration of said term yield up and surrender the possession of said premises, with the appurtenances unto the said Chas. H. Leonard, heirs and assigns in the same good order and condition as the same now are (reasonable wear and tear thereof, and accidents happening by fire or other casualties, excepted).

30

40

AND IT IS FURTHER AGREED, That if the said party of the second part, shall fail or neglect to perform any of the above mentioned covenants and agreements, then the tenancy shall, at the option

*Exhibit P. 2.*

of the said party of the first part, immediately cease and determine.

AND IT IS ALSO UNDERSTOOD AND AGREED, That the principal or his agent has the privilege of placing cards "For Sale" or "To Let" on the property during the 60 days preceding expiration of the lease.

10 In consideration of these promises and the payment of \$1.00 by the party of 2nd part to party of 1st part, receipt of which is hereby acknowledged, the Standard Aero Corporation shall have the option of purchasing the above property at \$57,500. within six months from date of this lease; and shall have the further option to purchase at \$65,000. after six months from date of this lease and during the period of its occupancy of the property.

20 IN WITNESS WHEREOF, The said parties have hereunto set their hands and seals this sixteenth day of October A. D., Nineteen Hundred and Seventeen.

CHAS. H. LEONARD.

(L. S.)

STANDARD AERO CORPORATION OF NEW YORK.

(L. S.)

By H. B. Mingle, President.

Sealed and Delivered  
in the presence of

30

40

*Postea.***POSTEA.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

CHARLES H. LEONARD,

*Plaintiff,**vs.*STANDARD AIRCRAFT CORPORATION and STAND-  
ARD AERO CORPORATION OF NEW YORK,*Defendants.*

10

*Action at Law.**Postea.*

The above-entitled action was tried before Hon. George S. Silzer, Circuit Court Judge, to whom said action was regularly referred for trial by the Supreme Court, with a jury, at the Union County Circuit Court on February 9th and 10th, 1920.

20

Said Circuit Court Judge directed a non-suit in favor of the defendant, Standard Aircraft Corporation, and submitted the issue against the defendant, Standard Aero Corporation, to the jury.

The jury returned a general verdict in favor of the plaintiff and against the defendant, Standard Aero Corporation, and assessed the damages at the sum of \$9,000.

GEO. S. SILZER,

30

*Judge.*

Whereupon it is adjudged that the complaint of the plaintiff be dismissed as to the defendant, Standard Aircraft Corporation, and that the plaintiff recover judgment against the defendant, Standard Aero Corporation of New York, the sum of nine thousand dollars damages and his costs, which are taxed at the sum of forty-nine dollars and sixteen cents, making in the whole the sum of nine thousand and forty-nine dollars and sixteen cents (\$9,049.16).

40

Judgment entered February 13, 1920.

ENOCH L. JOHNSON,

*Clerk New Jersey Supreme Court.*

*Plaintiff's Cross Appeal.*

**PLAINTIFF'S CROSS APPEAL.**

NEW JERSEY SUPREME COURT.

10	CHARLES H. LEONARD,  <div style="text-align: center;"><i>vs.</i></div> STANDARD AIRCRAFT CORPORATION, Impld., &c.,	} <i>Plaintiff,</i>  <i>Defendant.</i>	} <i>Action at Law.</i>  <i>Notice of Appeal.</i>
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*To Heine, Bostwick & Bradner, Attorneys for Defendant,  
 790 Broad Street, Newark, N. J.:*

Sirs:

20 TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals from the judgment of non-suit entered in this cause in favor of Standard Aircraft Corporation and against Charles H. Leonard, on February 11, 1920.

Yours, etc.,

McDERMOTT & ENRIGHT,  
*Attorneys for Appellant.*

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## New Jersey Court of Errors and Appeals

CHARLES H. LEONARD,

*Plaintiff-Respondent,*

*vs.*

STANDARD AERO CORPORATION OF NEW YORK,

*Defendant-Appellant.*

*Action at Law.*

*On Appeal from  
Supreme Court.*

### BRIEF FOR RESPONDENT.

Plaintiff, a landlord, recovered judgment below against defendant, his tenant, for damages to a leased factory and contained machinery plant, inflicted by the tenant holding under a lease containing a covenant to preserve the premises and surrender them at the end of the term in as good condition as the proper use thereof will admit, damages by the elements excepted.

The only matters brought up by the appeal are certain rulings of the Court, admitting, excluding and refusing to strike out oral testimony.

In order to properly understand the bearing of these questions of evidence, the following brief statement of fact is made:

Suit was originally brought against two corporate defendants of similar name and closely related business and management, viz: Standard Aero Corporation and Standard Aircraft Corporation.

The Aero Corporation originally entered into the demised premises under a lease antedating the lease of December 29, 1916. Exhibit P. 1 (p. 26, l. 40).

No question whatever arises under this lease and the same was not offered in evidence. Mention of it is now made solely for the purpose of explaining some references in the testimony to the first lease.

On December 29, 1916, plaintiff made a second lease to the Aero Corporation for the term January 1, 1917, to December 31, 1917 (Exhibit P. 1).

The destruction complained of occurred during the term of this lease.

Thereafter the same parties made a third lease for the term January 1, 1918, to May 1, 1919 (Exhibit P. 2).

Shortly after making the third lease and the infliction of the damages complained of, the Aircraft Corporation became active and the complaint was drawn against both corporations on the theory that the Aircraft Corporation became responsible for the obligations of the Aero Corporation.

The proof failed in this respect and a non-suit was entered in favor of the Aircraft Corporation.

The theory of the defense at the trial was, first, that the landlord consented to the destruction complained of before the destruction took place, and, second, that the landlord at the time of negotiating the third lease waived any claim for damages in consideration of certain supposed improvements to the property. Both of these questions were submitted to the jury and found against the defendant.

The demised premises consisted of a considerable area of ground, upon the front part of which was erected a brick factory building which was equipped as a machine shop. Attached to this building in the rear as an integral part thereof was a one-story brick extension designed and equipped as a power house. The power house equipment consisted of two boilers, a Corliss engine, feed pump and dynamo.

The main building contained an equipment of traveling crane, shafting, hangers, etc.

The land also contained several detached wooden buildings and sheds (p. 26) and a foundry cupola and a foundry blower. A considerable part of the premises was not built upon.

The Aero Corporation carried on the manufacture of aircraft in the premises in a comparatively small way, without alteration of the building or equipment, prior to the entry of the United States into the war.

Thereafter defendant planned a comparatively small addition to the main building covering the area occupied by certain of the outside detached structures, for which permission was given, April 9, 1917 (p. 28).

Before this contemplated extension was completed, however, defendant expanded its plan so as to include a very much larger temporary structure covering practically all of the demised premises adjoining the rear of the main factory building and including the power house.

The manufacturing operation as carried on and contemplated by the Aero Corporation did not require the use of heavy power machinery and the plant was designed for operation by electric power purchased from the Public Service Corporation. This made the power house and existing equipment of no use to the Aero Corporation (p. 67) and the latter thereupon completely demolished the brick power house extension and removed all of the power house equipment, and also the machine shop equipment from the premises.

The machinery was thrown out on a vacant lot without protection, and when the premises were surrendered to the landlord upon termination of the last lease on May 1, 1919, the equipment had practically lost all value as such and was practically reduced to junk (p. 107, l. 10).

The only evidence produced by defendant was that of a witness who described the physical character of the frame extension erected by the tenant covering the location of the demolished power house (pp. 110, 111). This witness was a building contractor by occupation, and the power house in question was torn down and the new building erected under his supervision (p. 110). He was examined respecting the condition of the roof of the power house, but did not criticise the condition of the building in other respects, nor was he asked to give any opinion upon the value thereof, although obviously qualified for that purpose.

In fact, defendant did not at the trial in any way attempt to dispute the *amount* of damage sustained, resting its whole case on its contention respecting legal liability.

On closing the case, defendant's counsel stated to Court and jury, in substance, that the defendant would not produce any witnesses upon the question of value, inasmuch as its witnesses (then in Court) substantially agreed in their estimates with the testimony of the plaintiff's witnesses.

This latter matter does not appear in the printed case, but counsel have stipulated that the case be deemed as supplemented in that respect (see stipulation). The verdict is considerably less than the amount testified to by plaintiff's witnesses. It is, therefore, difficult to see how any harmful error can now be assigned on any ruling admitting or rejecting questions bearing on the question of damages.

This applies to grounds of appeal numbered 1, 3, 4, 5, 6, 7, 12, 13, 14-26, inclusive.

We will now proceed to answer appellant's brief, using the same "Point" numbering adopted by appellant's counsel.

### POINT I.

**Appellant's ground of appeal Number 1 is without merit.**

Appellant's objection under this head was entered to a question after the answer was received without objection.

Plaintiff was asked the preliminary question without objection:

"Q In what condition of repair was the building at the time of the first lease?"

Witness answered without objection:

"A Well, I guess it was in pretty good condition. The International Motor Company hired it for a time.

*Mr. Heine.* I move to strike out what the International Motor Company did.

*The Court.* Yes; that will be stricken out."

The witness then answered:

"A I should think fair.

*Mr. Heine.* I would like to examine Mr. Leonard on qualifications as to buildings. Or, unless he is more specific, that is a conclusion. I object as a conclusion by an unqualified witness.

*The Court.* I will let it stand" (p. 23).

Counsel having allowed this testimony to go in without timely objection, it was certainly within the discretion of the Trial Court whether or not to strike it out.

*State v. Hummer*, 73 N. J. Law 714, E. and A.

Furthermore, it is submitted that the question and answer were entirely proper.

The condition of repair was called for. This was merely a matter of observation and not expert opinion.

In any event, it is not apparent that appellant was in any way harmed after previously allowing an answer to stand without objection to the same question.

"A Well, I guess it was in pretty good condition."

The statement in appellant's brief that the Court did not permit an examination of Mr. Leonard as to his qualifications (brief, p. 7) is not supported by the record.

## POINT II.

Appellant's grounds of appeal Numbers 2, 8 and 10 are without merit.

The sole contention raised by these grounds of appeal is that the questions were leading in form.

This Court held in *Trenton Passenger R. R. Co. v. Cooper*, 60 N. J. Law 219, 223, E. and A., that it was discretionary with the Trial Court whether to allow leading questions, and that error could not be assigned on the rulings.

*Vanderbilt v. Central R. R.*, 42 Vr., p. 67, cited by appellant, was decided on rule to show cause why a new trial should not be granted. The opinion indicates that the chief contention raised was that the plaintiff was surprised by the introduction of evidence of a serious injury not anticipated by the defendant and which plaintiff himself failed to recall when first examined and which he brought into the case for the first time after a leading question. Apparently, additional testimony was taken under the rule to show cause, and the opinion concludes:

“The defendant seems to have been surprised by the testimony at the trial as to the rupture and justice requires a new trial.”

## POINT III.

Appellant's grounds of appeal Numbers 5 and 6 are without merit.

Ground No. 5 brings up the overruling of an inquiry into the amount of rent received for the demised premises from a prior tenant, the International Motor Company. This was overruled on the ground that it was immaterial. The prior testimony had developed that the International Motor Company had leased the premises for a short time as a storage place for automobiles delayed by scarcity of shipping and not for factory purposes (p. 41). This lease was terminated shortly prior to the time when the defendant went into possession under its first lease, which ran for about a year prior to the making of the lease Exhibit P. 1 involved in this suit. Plaintiff's judgment was recovered entirely upon the latter lease.

Appellant's ground No. 6 complains of a like exclusion of a question respecting the rent received by plaintiff under a lease made by him with third parties sometime following the expira-

tion of defendant's third lease. The latter (Exhibit P. 2) expired May 1, 1919.

Even conceding that rent paid may be an element in determining the value of property, it does not of itself determine such value, but at most is one of the factors to be taken into consideration by an expert in estimating value.

No evidence was offered by either side as to the total value of the demised premises at any time.

The amount of rent, even if paid under a lease negotiated at the very time of the injury complained of, could not become material except in connection with proof of the value of the property, concerning which no proof was offered.

The 1915 lease was made before the country had recovered from the depression caused by the war, and rent was doubtless fixed with reference to the proposed use, "Just a shell (shed) for storage" (p. 41, l. 35).

The 1919 lease was made during a period of the greatest general industrial activity the country has ever known.

Again, the rent was fixed with reference to the whole premises, including land and buildings, while the damage complained of involved a comparatively small part of the whole.

The interval between the lease to the International Motor Company and this fourth lease was, therefore, over four years, 1915-1919, during which time occurred the tremendous fluctuation of values of all sorts due to war conditions.

The Court held, in substance, that the inquiry was immaterial because of the great variation in conditions, and finally ruled (p. 62):

"I will overrule it at this time. After the other evidence is in, if you want to renew it, I will permit you to bring it up again."

The offer was never renewed.

It has been held that the admission of extraneous matter bearing remotely upon the issue is within the discretion of the Trial Court and rulings thereon are not reversible on writ of error.

*Schenck v. Griffin*, 38 N. J. Law 462, 471.

Appellant's argument does not indicate how the questions are even remotely material.

Appellant's brief does not suggest any theory upon which the questions are relevant except the question of damages.

At the conclusion of the trial, however, appellant's counsel admitted that the evidence of his own witnesses practically agreed with the testimony of plaintiff's witnesses as to the amount of damages. The verdict was considerably less than the amount so testified to.

#### POINT IV.

**Appellant's ground of appeal Number 9 is without merit.**

This objection was raised to the testimony of the former general manager of defendant's plant, who narrated the circumstances which lead up to the destruction of plaintiff's property complained of.

The status of Mr. Bradford as general manager and the status of Mr. H. B. Mingle as president of the defendant company had already been established. Bradford testified to an interview which he had with plaintiff after the destruction complained of and before Leonard was aware of the fact, in which interview Mr. Bradford first endeavored to get Leonard's consent to the removal of the power-house, without informing him that it had already been accomplished.

The question objected to was asked by the Court, viz:

“Was it (the interview with Leonard) the result—did you go to Mr. Leonard this second time as the result of any direction received from the president of the company?”

The sole ground urged for the objection was that the authority of the agent could not be proved by himself.

Mr. Bradford's status as general manager had already been proven, however, as had that of Mr. Mingle, the president, and the transaction inquired about simply established a sequence in events between the interview between Leonard and Bradford and the interview between Bradford and Mr. Mingle, the president.

As to the substantial merit of this objection, it is significant that Mr. Mingle, the president, was in court throughout the trial and did not take the stand to deny his transaction with Mr. Bradford.

**POINT V.**

**Appellant's ground of appeal Number 11 is without merit.**

Under the third lease (Ex. P. 2) it was provided that "buildings and heating plant erected on the grounds shall be the property of Charles H. Leonard."

Defendant contended at the trial that this provision was equivalent to an agreement by Leonard to accept the buildings and heating plant in release of his claim for property damage.

Defendant's counsel in cross examination had continually referred to the magnitude of the new buildings erected and plaintiff's counsel, in examining Mr. Bradford, the former manager of defendant company, asked him to describe the physical character of the extension, giving approximate dimensions, materials, method of construction, &c.

On cross examination defendant's counsel asked witness to give the cost of the extension in money. It was properly and clearly within the discretion of the Trial Judge to overrule such inquiry.

At best, it was cross examination upon an immaterial matter.

**POINT VI.**

**Appellant's grounds of appeal Numbers 12 and 13 are without merit.**

Ground No. 12 raises an objection to testimony of Mr. Leonard after the question was asked and answered and is not even in the form of a motion to strike out. Clearly it came too late.

Furthermore, the objection has no substance inasmuch as the hypothetical question predicated on the testimony simply asked the expert witness Poggi to assume a building with outside walls twelve inches thick (respecting which Mr. Leonard testified positively) and to assume three partition walls of undefined thickness (respecting which partition walls the witness Leonard did not have knowledge).

Ground No. 13 raises the curious contention that an expert witness may not, in giving his opinion, have recourse to his own experience in the profession in which he has qualified as an expert, but must confine his answer solely to the factors specified in the hypothetical question and dismiss from his mind all general knowledge and experience acquired by him in the course of his general occupation.

Furthermore, as to both of these grounds, it is again observed that the opinion goes solely to the question of damages with respect to which defendant admitted at the trial that its proofs were in agreement with those of the plaintiff.

#### POINT VII.

**Appellant's grounds of appeal Numbers 14 to 26 are without merit.**

Grounds Nos. 14 and 15 raise objections to the testimony of an expert dealer in machinery as to the value of the machinery in question as of the period of termination of plaintiff's lease (Exhibit P. 1), set up and installed in plaintiff's factory in the same manner that such machinery was installed at the time the lease was entered into.

It was previously developed in the case that defendant, acting through its general manager, had demolished the power house and had ripped out all of the machinery in question and thrown it out on a vacant lot without care, under such conditions that it was reduced to junk.

The dealer in question inspected the remnants of this machinery and was asked to give his opinion of the value of that machinery when in good, usable second-hand condition (as the testimony proved it was), set up and installed in plaintiff's factory on the date of termination of the lease.

These two grounds go to the expert qualification of the witness and the sufficiency of the preliminary questions.

We think this was within the discretion of the Trial Judge and in any event that the questions were sufficient.

Appellant's grounds Nos. 16 to 26 all relate to the refusal of the Court to strike out testimony of the same witness.

*State v. Hummer*, 73 N. J. Law 714, is again cited as authority for the proposition that a motion to strike out testimony which has come in without objection is discretionary with the Trial Court and is not a ground for reversal upon writ of error.

Furthermore, an examination of these questions and answers in detail fails to disclose any objectionable character.

And with respect to all of them, we again observe that they are addressed wholly to the question of damages with respect to which defendant cannot claim that it was prejudiced in view of

its admission that its own witnesses agree with plaintiff as to the quantum of damage.

The appeal should be dismissed and judgment affirmed.

McDERMOTT & ENRIGHT,  
*Attorneys of Plaintiff-Respondent.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES H. LEONARD, )

Plaintiff-Respondent, )

vs. )

STIPULATION.

STANDARD AERO CORPORATION )  
OF NEW YORK, )

Defendant-Appellant. )

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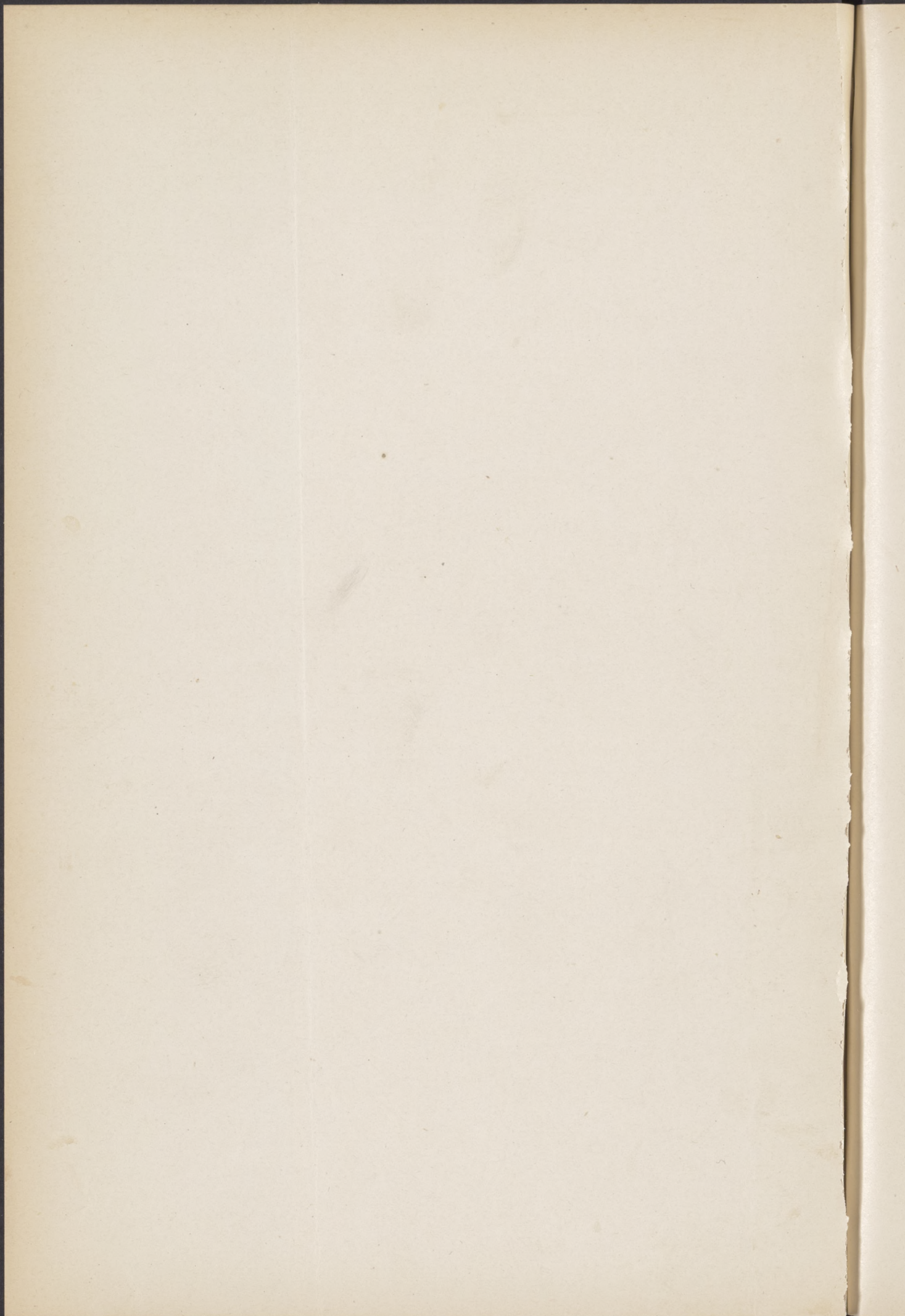
Defendant admits that at the close of defendant's case in the trial of the above entitled cause at the Circuit defendant's counse, Mr. M. Casewell Heine, stated to the Court, in open Court, in substance that the defendant would not produce any further evidence in relation to damages for the reason that it was not prepared with witnesses available to substantially controvert the testimony on this head given on behalf of the plaintiff.

It is hereby stipulated and agreed by and between the counsel for the parties hereto that the State of the Case herein be supplemented by the addition of the foregoing, but that this Stipulation shall not be deemed to admit the sufficiency or correctness of the plaintiff's proof of damage nor waive its exceptions to the admission of testimony in regard thereto.

Dated June 22, 1920.

Heine, Bostwick & Bradner  
Attorneys for Defendant-Appellant.

McDermott & Enright  
Attorneys for Plaintiff-Respondent.



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# New Jersey Court of Errors and Appeals

CHARLES H. LEONARD,

*Plaintiff-Respondent,*

*vs.*

STANDARD AERO CORPORATION OF NEW YORK,

*Defendant-Appellant.*

*Action at Law.*

*On Appeal from  
Supreme Court.*

## BRIEF OF APPELLANT.

### Abstract of the Case.

This action was instituted by the plaintiff in the New Jersey Court to recover damages from the defendant in an action on the case for waste.

The plaintiff, by a lease dated December 29, 1916, let to defendant certain factory premises in the City of Plainfield for the term of one year, commencing January 1, 1917, and ending December 31, 1917, in which among others appeared the covenants to preserve the leased premises and surrender them at the termination of said lease in as good condition as the proper use thereof would permit, damages by the elements excepted. (State of Case, p. 7, l. 20.)

Plaintiff maintained that defendant did not yield up and surrender the demised premises as so provided, but on the contrary did permit said premises and appurtenances to be damaged and the buildings erected thereon and the plant installed therein and the appurtenances thereto to be removed, injured and destroyed, and did commit and permit to be committed waste upon said premises. (Case, p. 8, ll. 20-30.) Plaintiff claimed damages for \$18,200, and after a trial at the Circuit in Union County before the Hon. George S. Silzer, Circuit Judge, and a jury judgment was rendered in favor of the plaintiff and against the defendant in the sum of \$9,000. (Case, p. 123.)

The Trial Court correctly charged the jury that the measure of damages in a case of this kind "is the depreciated value of his property. How much less was the property worth by reason of this destruction than it would have been if it had not been destroyed? \* \* \* What depreciation was there to Mr. Leon-

ard's property by reason of this action on the part of the tenant?" (Case, p. 117, ll. 10-30.)

In the course of the trial certain objections were taken and exceptions allowed to the rulings of the Court on the admission and exclusion of testimony, and upon these exceptions this appeal is based.

### Grounds of Appeal.

The appellant states the following grounds of appeal:

1. Because the Court refused to strike out as a conclusion the answer of witness Leonard: "Q In what condition of repair was the building at the time of the first lease? A Well, I guess it was in pretty good condition." (Case, p. 23.)

2. Because the Court permitted the following leading question: "Q Was anything said about taking down the brick boiler house?" (Case, p. 28.)

3. Because the Court permitted witness Leonard to testify as an expert after special cross examination (Case, p. 35) and answer the questions: "Q I will ask you whether there has been an advance or rescission in price of that sort of material between say the first of January, 1918, and the time when you made this inquiry? A Constantly advancing, everything. Q Can you tell us about the percentage of advance, if you know?" (Case, p. 37.) "Q The pending question is whether you are able to say about what the enhancement in market value of machinery has been since the first day of January, 1918, and the time when you got these quotations." (Case, p. 39.)

4. Because the Court permitted witness Leonard to testify as an expert and answer the question: "Q Do you know whether there is any increase or decrease in it" (market for general supplies)? "A Increase. Q Now, he wants to know how much in general supplies since December 31, 1917." (Case, p. 40.)

5. Because the Court sustained the objection to the following question asked witness Leonard: "Q What rental did you get for the premises from them? Mr. Enright. I object to that as immaterial." (Case, p. 41.)

6. Because the Court sustained the objection to the following question to witness Leonard: "Q What rental are you getting for the premises at the present time? Mr. Enright. I object as immaterial." (Case, pp. 60-62.)

7. Because the Court admitted the answer of witness Leonard to the following question: "Q Did you subsequent to 1908 make repairs to this Corliss engine and these boilers. Mr. Heine. Objected to on the ground that the witness has already testified he had made no repairs other than the rough repairs between the end of the Crown Machine Company tenancy in 1908 or '09 and the beginning or just before the Standard went in." That was gone over in detail as to every item of the bill specified." (Case, p. 65.)

8. Because the Court permitted witness Bradford to be asked the following leading question: "Q And that building did not involve any disturbance of the boiler house? Mr. Heine. I object to that question as leading." (Case, pp. 70-71.)

9. Because the Court permitted the following question to be asked witness Bradford: "Q I will ask you this: Was it the result—did you go to Mr. Leonard this second time as the result of any direction received from the president of the company?" (Case, p. 73.)

10. Because the Court permitted witness Bradford to be asked the following leading question: "Q Before you told Mr. Leonard that it was already done, was there anything said about a sum of money to be paid?" (Case, p. 75.)

11. Because the Court sustained the objection to the following question asked witness Bradford: "Q What did this extension cost?" (Case, pp. 78-79.)

12. Because the Court permitted the testimony of witness Leonard (Case, p. 86) as to the thickness of the wall to be incorporated in a hypothetical question asked witness Poggi and overruled the objection to the hypothetical question asked witness Poggi. (Case, pp. 84-86.)

13. Because the Court denied defendant's motion to strike out the answer of witness Poggi to the hypothetical question after the witness had testified that his answer was based upon matters extraneous to the question. (Case, pp. 87-88.)

14. Because the Court permitted witness Dunphy to answer the following question: "Q Now I will ask you if you are able to give an opinion as to the value of the machinery which you saw scrapped out there in the yard, set up and installed in this Plainfield factory in 1917, assuming it then to be second-hand machinery but in usable condition." (Case, pp. 94-95.)

15. Because the Court permitted witness Dunphy to answer the following question: "Q I want you to take all of the ma-

chinery upon which you were able to form an opinion of value—erected in the boiler house or factory during the year 1917.” (Case, p. 96.)

16. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 96.)

17. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, pp. 96-97.)

18. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 97.)

19. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 98.)

20. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 98.)

21. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 99.)

22. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, pp. 99-100.)

23. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 100.)

24. Because the Court refused to grant defendant's motion to strike out the answer of witness Dunphy to hypothetical question on the ground that the witness' answer was based on matter extraneous to the question. (Case, p. 101.)

25. Because the Court refused to grant defendant's motion to strike out the testimony of witness Dunphy as a speculation. (Case, p. 102.)

26. Because the Court refused to grant defendant's motion to strike out the testimony of witness Dunphy as a speculation. (Case, p. 107.)

### The Brief of the Argument.

The defendant went into possession under the lease of December 29, 1916, and was in possession from January 1, 1917, to December 31, 1917, and during this period committed the waste which was the basis of the plaintiff's action, and according to the statement by plaintiff's counsel, on page 36, line 38 of the state of the case, plaintiff contended that "the damage claimed should be fixed as of the date of termination of that lease" (lease of Dec. 29, 1916). The proof of damage therefore on behalf of the plaintiff was adduced as of the date December 31, 1917. The proof of plaintiff on the question of damage was directed to show the difference between the value of the particular premises and property on December 31, 1917, and the condition in which they would have been had the defendant not committed the acts of waste charged and their value in the condition in which they were found after the commission by the defendant of the acts of waste charged.

There was also some evidence offered by the plaintiff on the subject of damage directed to the cost on December 31, 1917, of restoring the property from the condition in which it was after the acts of waste charged had been committed to the condition in which it would have been had these acts not been committed. Testimony on damages therefore was received under both of the rules sanctioned in the case of *Manda v. City of Orange*, 48 Vr. p. 285.

The testimony whether offered under either branch, namely, the cost of restoration or the amount of depreciation, was received by the Court and the charge of the Court was sufficiently broad to cover both, and to present the question properly to the jury. The appellant complains of specific rulings of the Court to which objections were taken and exceptions allowed, and these will be dealt with so far as possible under separate groups involving the same principle.

FIRST: The ground of appeal No. 1 in which the appellant contends that the Court permitted the witness (not an expert) to improperly testify to a conclusion, *i. e.*, an opinion.

SECOND: Grounds of appeal Nos. 2, 8 and 10, where appellant contends that the Court improperly admitted leading questions.

THIRD: Grounds of appeal Nos. 5 and 6, where appellant contends that the Court erroneously excluded evidence of the rental received from said premises prior and subsequent to the lease.

FOURTH: Ground of appeal No. 9, where the appellant contends that the Court erroneously admitted a question calling for a conclusion and improperly leading.

FIFTH: Ground of appeal No. 11, where appellant contends that the Court excluded proper cross examination on matter introduced in the case by plaintiff.

SIXTH: Grounds of appeal Nos. 12 and 13, where appellant contends that the Court improperly admitted opinion evidence.

SEVENTH: Grounds of appeal 14 to 26, inclusive, where appellant contends that the Court improperly admitted opinion evidence.

### POINT I.

#### GROUND OF APPEAL No. 1:

**The Court erroneously admitted the answer of witness Leonard as to the condition of repair of the leased building at the time of the first lease. (Case, p. 23, ll. 10-30.)**

Plaintiff Leonard testified (case, p. 21, l. 3) that he was in the "machinery and mill supplies, factory supplies" business. It nowhere appears that he was a contractor, architect, or in any way experienced in the construction of buildings, or was a judge of the materials of which buildings and particularly this demised brick building was constructed.

The Court properly excluded his testimony as to the comparative state of preservation of the main building and the side boiler room and engine room (case, p. 22, ll. 30-40) and the witness states (at p. 22, l. 43) in answer to the question: "About how old was it? A I don't know; it must have been thirty years old, I should think." Plaintiff's counsel then asked him: "In what condition of repair was the building at the time of the first lease?" (P. 1, Dec. 29, 1916; case, p. 119.) And the wit-

ness answered: "Well, I guess it was in pretty good condition \* \* \* I should think fair." Defendant's counsel then objected to the answer as a conclusion, unless he were allowed to examine Mr. Leonard upon his qualifications as an expert in regard to buildings. The Court did not permit an examination of Mr. Leonard as to his qualifications and allowed the question to stand and an exception to be sealed.

While it is true that the testimony of a witness qualified by such cautious expressions as "I would judge," "I think," etc., do not necessarily imply that he is giving an opinion when they involve some matter of common observation, such as whether a person seemed to the witness to be drunk, or whether a man's elbow seemed to project out of the window of a car; nevertheless if the qualified statement or the impression of the witness is merely another name for his opinion it is not competent unless as opinion evidence. (Abbott's Proof of Fact, 3rd Ed., pp. 239-240.) Clearly in the present instance the question called for opinion evidence in its technical sense.

The condition of repair of this building at the time of the first lease was a vital point in the case. It was the foundation or starting point of plaintiff's proof of damage, to be compared with the condition of repair at the end of the lease, after the commission of the alleged acts of waste by the defendant. It was not merely a question of whether the building looked new or old, whether it was painted or unpainted, whether it was brick or wood—all matters of common observation—but it was a technical inquiry as to what was the condition of repair of this brick building at a certain time. The defendant was entitled to have qualified and competent testimony on this point introduced against it, or none at all. To ask a man in the machinery business the condition of repair of this brick building we submit was to ask a question which he was not competent to answer as a matter of ordinary observation as a basis for value testimony, and which, even if he had been an expert concerning the subject matter, which he was not, had no proper basis of facts laid for it.

The rule laid down in Jones Commentaries on Evidence, Vol. 2, Sec. 336, p. 889, is: "Opinions of witnesses derived from observation are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained." The rule need but be stated to show that the evidence was improperly admitted by the Court, for not only was its weight involved—being that of the interested plaintiff himself—but any builder or contractor or material man or wrecker

could have given more reliable testimony as to the condition of repair of this building than the plaintiff, who was in the machinery business. As Jones, in *Commentaries on Evidence*, Vol. 9, Sec. 816, p. 96, says: "Questions may not be asked calling for the conclusion of the witness from facts in place of the facts themselves."

Clearly the question here objected to called for the conclusion of Leonard in place of the facts regarding the condition of repair in which the building was. A question concerning the identity, the weight, dimensions, etc., of the building, or its form, size, age, would have been properly admitted, but the form of the question has asked for a conclusion by the plaintiff with no experience in regard to the special subject matter of the inquiry which enabled him to testify upon a vital issue in the case. (See also *Thompson on Trials*, Sec. 377.)

It is respectfully submitted that this evidence was erroneously admitted, and involving a vital point in the plaintiff's proof of damage substantially prejudiced the defendant.

## POINT II.

GROUNDS OF APPEAL NOS. 2, 8 AND 10:

**The Court erroneously permitted leading questions to be asked.**  
(Case pp. 28, 70-71 and 75.)

Witness Leonard (in case, p. 27, l. 32) was asked regarding the interview with defendant's general manager (in l. 26): "What did he say to you at that time and what did you say to him." This was eminently a proper question, as was the question (at l. 31): "What buildings did he tell you that he wanted to take down at that time?" The witness then enumerated certain buildings, and thereupon plaintiff's counsel instead of asking him if there were any other buildings than those which he had mentioned, or some similar question, asked: "Was anything said about taking down the brick boiler house?" (Case, p. 28, l. 1.) Objection by defendant's counsel as leading (case, p. 27, l. 41; p. 28, ll. 10-11) was overruled and exception allowed. *Thompson on Trials*, Sec. 358, lays down the rule: "All questions put to a witness which assume the existence of facts material to the issue which have not been proved are said to fall within the definition of leading questions," and Jones in *Commentaries on Evidence*, Vol. 5, Sec. 816, p. 92, says: "It is very clear that a question is leading which suggests to the witness the answer which he is

to make, or which puts into his mouth the words which he is to echo back," and at page 96: "It should be borne in mind the form of the question is not paramount in the test whether it is leading." It is the suggestiveness of the substance and he cites authority in foot note 65 for the test: "The cases support the proposition that if the question suggests the desired answer it is leading, otherwise not." The ban is placed, according to Mr. Jones, on the impropriety of questions which disclose the spirit of suggestiveness concealed in the letter of them.

It is difficult to conceive of a question which violates these rules any more than the question above referred to. Not only does it assume that something was said about taking down the boiler house which was not proved, but it does not involve any main fact (concerning the boiler house) already testified to, and it certainly suggests to the witness the answer desired by referring to the subject matter of the boiler house. Further, it does this without showing that the memory of the witness has been exhausted. The one possible exception under which the witness' attention might properly have been called to the subject matter of the boiler house would be if his memory on the subject of the buildings spoken of in the conversation had been exhausted. Jones Commentaries on Evidence, Sec. 818, p. 100. Plaintiff's counsel, however, after the witness had enumerated (on p. 27, ll. 30-40) the buildings mentioned in the conversation, did not ask him whether there were any other buildings, or whether he was able to remember any other buildings, and took no steps to show that the witness' memory was exhausted, but wantonly violated the rule against leading questions by putting into the mouth of the witness in the question the subject matter which he desired.

Furthermore, this question of the conversation regarding the boiler house involved a vital point in the proof of damage against the defendant. Whether or not the boiler house was mentioned in this conversation was an important point, perhaps *the* important point, in the case, and the plaintiff's counsel certainly suggested the answer which he desired, namely, that the boiler house was mentioned in this conversation, in contravention of the rules above referred to.

In the case of *Vanderbille v. Central Railroad*, 42 Vr. p. 67, in a personal injury case where the witness was testifying to his injuries the witness enumerated a number of them and his counsel then had the decency to ask him "what else" before

putting the objectionable leading question: "Did you receive a rupture?" (p. 68). As Mr. Justice Swayze said in that case: "Although this question was immediately objected to and another question asked, the harm was then done and nothing could be gained by striking out the testimony however much the defendant was prejudiced by this method of examination." The action of counsel in the Vanderbilt case was held to require a reversal.

GROUND OF APPEAL No. 8: (Case, pp. 70-71.)

Plaintiff's witness Bradford was testifying regarding an interview with the plaintiff at his office in April, 1917, in which he asked permission to take down certain sheds (case, p. 70, l. 20). The witness' recollection was then refreshed by reference to a letter to fix the date. He was then asked: "At that time of that interview which of the sheds of the yard were talked about?" (case, p. 70, l. 25), and he proceeded to point them out on the blueprint. He was then asked what part of the land the new building about which he was talking to the plaintiff was to occupy, which he indicated, and he stated that he was indicating "directly to the side of the main office building." (Case, p. 70, l. 39.) He was then asked the question objected to as leading: "And that building did not involve any disturbance of the boiler house?" Applying the principles referred to above concerning the propriety of leading questions, it is submitted that this question is violative of them, particularly by reason of its suggestiveness, as Jones in his Commentaries on Evidence says in Sec. 116 above referred to, page 91, quoting Bentham: "A question is a leading one when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer," and his illustrations of objectionable questions—"Are you not in the service of such and such a person? Have you not lived so many years with him?" The examiner while he pretends ignorance and is asking for information is in reality giving instead of receiving it." The question in the case at bar: "And that building did not involve any disturbance of the boiler house?" is clearly objectionable under this rule.

GROUND OF APPEAL No. 10 (Case, p. 75):

Plaintiff's witness Bradford was being examined on direct regarding the conversation with the plaintiff and was asked:

"Was anything said in the first part of the conversation about the removal of the machinery, or was it confined to tearing down the boiler house? A It was tearing down the boiler house and removing the machinery." (Case, p. 75, ll. 20-30.) The witness then added, continuing his version of the conversation: "And Mr. Leonard said he would not allow it. I then told Mr. Leonard that he better had allow it because it was already done." Thereupon plaintiff's counsel asked the objectionable question: "Before you told Mr. Leonard that it was already done was there anything said about a sum of money to be paid?" Not only did plaintiff's counsel fail to exhaust the recollection of the witness, thereby failing to bring himself within the exception to the rule against leading questions, but in this suggestive question he violated every rule which has been referred to above, and because of the particular subject matter of the suggestion regarding the sum of money to be paid by the defendant to the plaintiff he insinuated improperly into the case a further improper element prejudicial to the defendant in a vital part of its case.

It is submitted that the admission of the above leading questions was substantially to the prejudice of defendant, and that the Court's errors in this respect require a reversal.

### POINT III.

GROUND OF APPEAL NOS. 5 AND 6 (Case, pp. 41 and 60-62):

At case, p. 41, plaintiff was asked on cross examination what rental for the premises he received from the last tenant before the defendant, and on pages 60-62 he was asked what rental for the premises he was now receiving from the tenant that succeeded the defendant. The colloquy between defendant's counsel and the Court (on p. 42 and on pp. 61 and 62 of the state of the case) indicates the object of this evidence sought to be adduced from the plaintiff was addressed to the issue of damages, the plaintiff's contention being that the defendant had committed waste upon the premises, which was denied by the defendant. The question of the value of the premises at the time of the plaintiff's going into possession thereof and their value at the time it gave up possession was relevant as tending to show whether or not the plaintiff's contention as to the amount of destruction wrought by the defendant was or was not probably true.

Any scintilla of evidence therefore which would show the value of the premises at one time or the other would be deemed to be relevant. It is submitted that the amount of rental received by the plaintiff before and after the occupation by the defendant was some evidence of value and therefore should have been admitted.

The rule of damage as stated by the Court in its charge: "How much less was the property worth by reason of this destruction than it would have been if it had not been destroyed." (Case, p. 117, l. 12.) "What depreciation was there to Mr. Leonard's property by reason of this action on the part of the tenant." (Case, p. 117, l. 28) is undoubtedly correct. *Sedgwick on Damages*, 9th Ed., Sec. 932, lays down the rule:

"The general principle upon which compensation for injuries to real property is given is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by defendant may be of a permanent nature; in such a case the measure of damages is the diminution in the market value of the property."

*Freeman v. Sayre; Manda v. Orange.*

The defendant's proposition was that the rental value at the times referred to in the questions, objection to which was sustained by the Court, was relevant evidence on the question of fact whether or not the premises had suffered the amount of depreciation claimed by the plaintiff.

In *Manda v. Orange*, 48 Vr. p. 285, the Court says, on page 286:

"Whether or not the diminution in value is in every case to be regarded as the measure of damages is a question which we need not now decide. It has been held to be the proper measure in *McGuire v. Grant*, 1. Dutcher, 356. Subsequently had the approval of this Court in *Freeman v. Sayre*, 19 Vr. 37 (at page 42) but even in jurisdictions where this rule prevails, as in New York, it is held that evidence of the cost of restoring land to its former condition is also admissible and this for the very obvious reason that if the land could be restored for less, the land owner ought to restore it and not attempt to hold the tortfeasor for the full diminution in value."

In *Freeman v. Sayre*, *supra*, at page 42:

"The instruction should have been that compensation must be awarded for the diminution in value of the property, viewed in its actual relations to the adjoining

property and alley, which had been produced by defendant's wrongful acts."

Under the above rule of damage anything which would tend to show the value of the premises before and after the acts complained of would be relevant. In *Hadley v. the Freeholders of Passaic*, 44 Vr. 197, the Court held at page 198, in *Laing v. United N. J. Railroad & Canal Co.*, 25 Vr. 576, it is declared that on an inquiry as to the value of lands evidence of sales of other land in the neighborhood is competent where there is a substantial similarity between the properties.

In the case of *Wolfe v. Meyer*, 46 Vr., at page 185, the subsequent sale price of rent on a breach of an agreement to convey was held to be relative. Jones Commentaries on Evidence, dealing with the question of proof of the value of lands, Section 168, lays down the rule that: "Whenever the question of value is involved \* \* \* there are so many different matters which may enter into consideration, that the exclusion of that which is not relevant becomes a difficult task. To make the comparison it is necessary to tabulate those circumstances connected with the land itself, its locality, its improvement; its capacity for production, either of vegetable or mineral matter, its cost to the owner, *its rental value*, its natural and artificial advantages." This author holds that the weight of authority is that a proper subject of inquiry is what is the value of the property for the most advantageous uses to which it may be applied. (*In re Furman St.*, 17 Wendel (N. Y.) 649.) The rule that particular sales of smaller tracts is admissible, supported by this author and by the New Jersey cases, *Hadley v. County*, 73 N. J. L. 197; *Wylie v. West Jersey Co.*, 44 N. J. L. 247, the same author holds "that a witness may in forming his opinion as to the value of property consider the uses and capabilities and productive capacity of the property," as well as the prices at which like property in the neighborhood has been sold. He may also base his opinion of value upon his knowledge or observation of the growth and development of towns and cities, a general knowledge of trade and business, rental value, the interest which the land would pay upon investment, etc. The price paid by the owner for lands has also been held relevant. *Wolfe v. Meyer*, *supra*; Jones 6—135, p. 659: "If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy it should go to the jury."

Jones Commentaries on Evidence, Sec. 173, p. 893:

“The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.”

Clearly, if the devastation wrought by the defendant was anything like that claimed by the plaintiff it is hardly conceivable (and it was certainly a question for the jury) that the premises would have been rentable at all. Whereas if the jury had been allowed to receive the evidence of the subsequent rental value paid by the tenant succeeding the defendant in possession they might have been justified in considering the amount of this rental an absolute refutation of the claims of defendant that his property had been damaged to the extent which he said it was.

#### POINT IV.

GROUND OF APPEAL No. 9:

The Court erroneously allowed a question to be answered by plaintiff's witness Bradford as to the cause of his action (case, p. 73, ll. 25-35).

The recollection of the witness had been refreshed by reference to a letter to recall a date (case, p. 73, ll. 10-20) and he stated that an interview which he had with the plaintiff “was several days after the buildings had been demolished” (case, p. 73, l. 23). He was then asked: “Q And what led up—what caused you to have that interview with Mr. Leonard?” (Case, p. 73, l. 26.) This was objected to by defendant's counsel and the Court sustained the objection and then immediately proceeded to ask the following question: “Was it the result—did you go to Mr. Leonard this second time as the result of any direction received from the President of the Company?” (Case, p. 73, ll. 30-35.) It is submitted that this question was equally objectionable to that asked by plaintiff's counsel. Instead of the witness being asked whether he had any conversation with any officer of the company in regard to the subject matter of what that conversation was and then allowing the jury to perform its proper function of inferring that from the direct tenor of the conversation between the witness and the corporate officer

or from the sequence in time that the visit of Leonard was the result of instructions received by the witness from an officer of the defendant, the question erroneously contained the unauthorized and at the time unproved conclusion which the witness was allowed to substantiate by his answer that the instruction was given by an officer of the defendant and that that instruction was such (although it does not appear anywhere in the evidence) that it caused the witness to seek and have the conversation with the plaintiff. The question allowed the witness to testify as to the irrelevant motive or actuating cause in seeking an interview with the plaintiff when the only admissible facts were the interview itself and in conversation between an officer of defendant and the witness prior thereto. The question was leading and suggestive and contained a conclusion of fact unwarranted by the testimony at that time.

The overruling of the objection of defendant's counsel was error.

#### POINT V.

GROUND OF APPEAL No. 11 (Case, pp. 78-79):

**It is conceded that under the rule of damage in an action on the case in the nature of waste that the improvements of the premises by the construction of buildings or otherwise by the person who committed the waste is immaterial.**

Nevertheless regard must be had for the rule that testimony which would be clearly irrelevant or incompetent, if offered by one party in the first instant may become very pertinent in rebuttal or explanation of evidence originally offered by the adversary.

In the first place the question in the case at bar was asked on cross examination which of itself entitles the cross-examiner to greater latitude. Further, it has been held that it is not reversible error to permit cross examination on a relevant matter which has been called by the opening party. *Crosby v. Wells*, 44 Vr. 790. The Court there says at page 106, in regard to testimony claimed to be properly offered in rebuttal: "Whether the testimony of the witnesses \* \* \* in rebuttal should have been given as a part of the defendant's principal case is of no present consequence, inasmuch as it would appear that the door was open for its admission in contradiction of the plaintiff-in-

error by evidence given by the plaintiff himself in rebuttal of the defendant's case."

The general principles relating to the rebuttal or explanation of irrelevant testimony are dealt with by Jones Commentaries on Evidence, Vol. 1, Sec. 172, and we refer particularly to the citation from the opinion of Marshall, *C. J.*, on page 890:

"Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the Judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this Court does not mean to indicate any opinion."

In the case at bar (on case, p. 77, l. 42) plaintiff's counsel says: "There has been so much talk about this extension I will just ask you what sort of construction it was. The extension that was put up by the Aero Corporation." The witness then goes on (on p. 78) to describe it as tongued and grooved, with dimensions, roof, windows, etc., together with the kind of manufacturing was done in it and to which it was presumably adapted.

Bearing in mind one of the issues in the case to be defendant's contention that by an acceptance of this newly constructed building mentioned in the second lease (Ex. P. 2; case, p. 121, ll. 22-23), as in full satisfaction on the part of the plaintiff for any old buildings that had been removed (case, p. 20, ll. 1-20, and case, p. 19, ll. 38-42, and case, p. 113, ll. 35-45 and pp. 114-115), it can be readily seen that this evidence offered by the plaintiff as to the character of the new building constructed on the premises would have two possible objects: (1) to show that it was of such a flimsy construction that it could not be regarded in any way as acceptable to Leonard in place of the buildings that were taken down, as was contended by defendant; (2) to show the utter disregard by the defendant of plaintiff's rights in tearing down what plaintiff alleged to be substantial buildings, to be replaced by transient or flimsy ones.

As addressed to either object it concededly might be relevant and the plaintiff thus having opened the door the defendant was at least entitled on cross examination to inquire from this witness the cost of the new construction in order to show by some evidence, namely, the cost, that the improvement was not a flimsy one, but a substantial one. This the Court prevented the defendant from doing and on cross examination when defend-

ant's counsel asked: "What did this extension cost?" the Court overruled the question. (Case, p. 78, l. 40; p. 79, ll. 1-10.)

Further, and assuming that this evidence originally introduced, without objection by plaintiff concerning the character of the construction of the building to be relevant, the impression created on the jury in regard to the flimsy character of the improvement seems to come within the scope of Judge Marshall's language above referred to, as calculated to make such an impression on the jury that the otherwise inadmissible testimony as to its cost should have been permitted to be introduced.

It is further submitted that this testimony should have been allowed on cross examination to show the bias of this witness. The witness was formerly general manager of the defendant and had been given a permanent vacation (case, p. 82, l. 27) and in addition to the usual latitude of cross examination defendant's counsel was entitled to additional latitude by reason of the hostility of the witness, and even upon an immaterial issue where the witness had testified that this new construction was flimsy and made light of it the defendant was entitled to show what its cost was in order to contradict the witness and affect his weight and credibility. Jones Commentaries on Evidence, Sec. 826, where the author says that it is permissible on cross examination to ask questions otherwise wholly irrelevant to the issue to test the interest and motives of the witness, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, his powers of discernment and description. Clearly under such a rule if he had described the construction referred to as flimsy the cross examiner was entitled to test his observation of the construction and his description of it in the light of its actual cost.

Under the further rule referred to by the same author (in Section 822, p. 121), the witness may be asked questions "naturally tending to show the improbability of statements made in the examination in chief. (P. 121.) The improbability of the construction referred to being of such a flimsy character as the witness said would have its probability or improbability directly put in issue by allowing the question of its cost. We submit that the exclusion of this was reversible error.

## POINT VI.

GROUNDS OF APPEAL, NOS. 12 AND 13 (Case, pp. 84-86 and 87 and 88):

On page 86, ll. 20-30, plaintiff Leonard was asked: "Do you recall how thick the walls of this boiler house were? A I think they were 12" walls; they were partition walls between the blacksmith shop and the boiler room and engine room. Q Was those partition walls of brick? A Brick; yes, sir. Q How thick were they? A I presume the same; I don't know." This testimony was objected to on the ground that it was practically a guess, and not a matter of knowledge on the part of the witness. This objection the Court overruled. It is submitted that the plain language of the plaintiff above set forth is indicative not of caution or of merely qualifying words of belief, but discloses an absolute lack of knowledge, or at best a mere guess, requiring the exclusion of the testimony.

The testimony is in the nature of an impression, which is merely an opinion of the witness, without any basis of independent recollection or fact.

This brings us to the question of the hypothetical question asked of the expert architect, witness Poggi, which was originally stated (case, p. 85, ll. 10-20) and was amended by including in it the improperly admitted testimony of Leonard regarding the thickness of the wall. (Case, p. 87, l. 1.) In the first place the hypothetical question in its amended form contained the improperly admitted evidence from Leonard, and it is elementary in regard to such questions that if one fact supposed to be true and included in the question is untrue or unsupported by the evidence the opinion is inadmissible. The question, therefore, including the improper testimony contained a fact not supported by the evidence and should not have been permitted to be asked and answered. Jones Commentaries on Evidence, Sec. 392, p. 796.

The expert witness, Poggi, was asked on cross examination whether he based his answer upon "your general experience in the handling of buildings, your hand and drawing plans and specifications and giving estimates, and so on," and upon "your ordinary experience in your own affairs," and he answered "yes"; and further answered affirmatively the question: "And that experience entered into the answer which you gave to this question?" Defendant's counsel then moved to strike out the expert's answer on the ground that the witness had not con-

fined himself in his answer strictly to the hypothesis placed before him in the question, and this motion the Court denied.

It has been held in this Court, (*Shoemaker v. Elmer*, 41 Vr. 710, at p. 712):

“Expert evidence should be carefully guarded. It is sufficiently dangerous when carefully circumscribed; it becomes altogether too unreliable when the basis of it is indefinite.”

The question upon which the opinion is expressed should be so clear that the jury will not be left in any doubt about what the actual facts are upon which the witness is expressing an opinion. A question should not be so framed as to permit the witness to roam through the evidence for himself and gather the facts as he may consider them to be proved and then state his conclusion concerning them.

By the admission of the expert himself (case, p. 87, ll. 29-35) in answering the question put to him, containing as it did the improperly admitted evidence of Leonard, he assumed even greater latitude than that of roaming through the evidence and included the unknown elements of his general experience in handling buildings in general and in drawing plans and giving estimates and his experience in the conduct of his own affairs. Just what elements or facts culled from his own experience he also included in connection with the facts given him by the plaintiff's counsel in the question does not appear. Instead of confining himself exclusively to the facts in the hypothetical question he admits that he included other facts unknown to the Court and jury out of his own personal experience and the conduct of his business affairs. Clearly such a latitude is entirely improper.

Jones in Commentaries on Evidence, Sec. 375, p. 918, says:

“It has now been sufficiently established that in asking a question of an expert witness it is necessary to base such question upon a hypothesis of fact, either expressed in the question, or founded in the evidence already before the jury, well recognized and easily grasped; and that an expert can not be called upon to give an opinion upon facts in his mind and undisclosed, or upon matters in part within his observation and in part derived from others, but such facts must be stated to him hypothetically and his conclusion therefrom obtained.”

In the case at bar, in addition to the facts stated in the hypothetical question the witness admits that he based his opinion upon facts in his mind and undisclosed, namely, facts connected

with his general experience in the handling of buildings and drawing plans and giving estimates, and in his ordinary experience in his own affairs, and he admits that these elements entered into the answer which he gave to the question. Clearly this contravenes the rules of evidence above referred to. The motion to strike out the answer should have been granted and the Court's refusal was error.

### POINT VII.

#### GROUND OF APPEAL NOS. 14-26, INCLUSIVE:

The exceptions to the ruling of the Court included in the above grounds of appeal arise out of the testimony of plaintiff's witness, Dunphy, which will be found on case pp. 89 to 103, and on p. 107. The testimony of the witness who was produced as an expert is of such a character that an examination of the ruling of the Court in connection with it must necessarily be prefaced by a brief analysis of the testimony itself.

#### Analysis of Dunphy's Testimony.

The witness was a machinery salesman, buyer and inspector for twenty years, and had handled second-hand machinery, and 90 per cent. of his business was in the second-hand trade, which he had pursued for a livelihood for ten years. He testified that he was familiar with market values as of 1917 of second-hand boilers, engines and machinery of the character involved in this case (p. 89). He inspected the demised factory premises and machinery in the fall, October, 1919, and saw on the premises the property enumerated on page 90, ll. 1 to 12, of all of which he made a careful inspection at that time (case, p. 90, l. 12). He says that this machinery in October, 1919, was not in a usable condition. (Case, p. 91, l. 35.) Some of it was salable, to wit: The Duplex pump, without any repair (case, p. 92, l. 9) and the rest of it requiring extensive repairs to be salable (case, p. 92, ll. 1-20).

He then testified that he was familiar with the market prices of such machinery as he saw in 1917 (case, p. 92, l. 20) and that he had made sales of machinery in New Jersey (case, p. 92, l. 25). He admits, however, there is a variation of price within fifty miles of New York (case, p. 92, l. 30), and that the New Jersey laws regarding boilers are more strict than those of neighboring States (case, p. 92, ll. 30-40) and that there is

therefore a more limited market for boilers in New Jersey than outside (case, p. 93, l. 10).

In reply to the Court's question (case, p. 93, l. 40) the witness said that with the exception of the big boiler, which could be repaired, the property he saw there was only good for junk.

Plaintiff's counsel then asked him what it would be worth for junk (case, p. 94, l. 1) to which witness replied that he would have to figure the weight of it before he could tell (case, p. 94, ll. 10-30) and he proceeds to make the significant statement: "(Case, p. 94, l. 30.) It would be a guess to say in round numbers what all that machinery was worth in one lump sum. I have not figured it out." He was then asked, in view of the custom of the business to sell machinery to be erected, the seller to stand the cost of erection, to give "an opinion as to the value of the machinery which you saw scrapped out there in the yard, set up and installed in this Plainfield factory in 1917, assuming it then to be second-hand machinery, but in usable condition." Objection was then made by defendant's counsel on the ground that the witness had not been shown to have direct knowledge of construction costs at that time—construction costs similar to the construction which would be required for this machinery, and this the Court overruled.

There then followed some argument concerning the calculations which the witness had made, and again the question was asked: "(Case, p. 96, l. 18.) Q I want you to take all of the machinery upon which you were able to form an opinion of value erected in the boiler house or factory during the year 1917." To this objection was again made as requiring an omnibus answer, covering an unknown and unenumerated lot of machinery lying out in the lot, without a proper description of it or of the method of installation proposed to be used. This objection was overruled. The witness was then asked: "Q I want the details, and then when you get through adding up the details, the lump sum. A To install that Corliss engine from where it stands in a plant, say moving it 150 feet and installing it with complete base it would cost between twelve and fourteen hundred dollars. Defendant's counsel moved to strike this out on the ground that the answer was based on evidence not contained in the question and not in evidence. This motion the Court denied. Practically the same questions were asked and the same objections made in regard to each of the other articles of machinery enumerated, with the same rulings by the Court.

After recess, when this witness resumed the stand he was permitted to give a junk value (case, p. 107) for all of the property which he saw in the lot, and the defendant's counsel moved to strike out the answer on the ground that the witness had previously testified that he could not give such a price because he did not know the weight, to which the Court replied: "I understand he has made a calculation since," but when the witness was asked: "You did not see any of this stuff, did you?" he answered, "No, sir," and further: "Q And what you are now giving us is based on some assumption of weight? A Yes, and what I think that the 'junkies,' we call them, would offer you for it." On a renewal of the motion to strike out by defendant's counsel, on the ground that the witness' answer was a pure speculation, the Court denied the motion.

In the first place it must be noticed that this witness made no sale of any horizontal boiler in New Jersey during the period under consideration (case, p. 90, l. 38), and he was only "in the office" of the concern that made the sale of a Corliss engine (case, p. 90, l. 41) and he sold no shafting in New Jersey during that period (case, p. 91, l. 11), and this taken in connection with the admission that there is a variation in price within fifty miles of New York in machinery values (case, p. 92, l. 30), and the arbitrary way in which the Court cut short the attempt of defendant's counsel to inquire into the witness' knowledge of market values (case, p. 91, l. 31) we submit disqualifies his testimony so far as it relates to the values of the particular kinds of machinery above mentioned and included in the damage claimed by the plaintiff.

Further, on the question of the value of the machinery scrapped in the yard, assuming it to have been set up and installed in the Plainfield factory in 1917, which was put to the witness (case, p. 94, l. 40) after he admitted that any estimate would be a guess (case, p. 94, l. 30) and the reiteration of this question in a different form (case, p. 96, l. 32) was improper, because nowhere in the evidence does the way in which this machinery was set up and constructed and installed at the beginning of defendant's lease appear, and with this element absent how is it possible for this witness to be asked, as he was, what would be the cost of installing this machinery as it was installed in 1917. The witness had no basis in fact as to the kind of installation in 1917, and consequently when he made a statement as to the cost of installing it as it was in 1917 his answer is

entirely in the air without this essential fact as part of its foundation. There is no evidence in the case as to the kind and manner of the original installation, and yet the witness without this information was asked to give his opinion in regard to the cost of restoring it to the condition as it was installed in 1917. Further, to make matter worse, this witness is not shown to have any knowledge of the cost of any kind of installation of machinery in 1917, and consequently the objections of defendant's counsel to his testimony were valid and should have been sustained. Under the controlling rules regarding opinion evidence questions lacking the elements above referred to were pure guesses and inadmissible. This was the basis of the objection of defendant's counsel and his motion to strike out (case, pp. 96 and 97).

The Court's rulings were violative of the principle laid down in *Lindenthal v. Hatch*, in 32 Vr. p. 29, where Justice Depue condemned general questions of very much the same kind as were asked of the witness Dunphy, and in which that learned jurist summed up his criticism of general questions of this kind put to so-called experts, as follows: "We think the question put to the witness was so indefinite as to admit of no answer except as mere guesswork" (page 31).

Further, although witness before recess had stated that he could not make any estimate of the value of the machinery as junk without finding out its weight, and he had not figured the weight (case, p. 94, l. 30), nevertheless after presumably lunching with counsel or the plaintiff he returned to the stand after recess and gave an opinion of the junk value, still without knowing the weight of it and based purely upon a cursory examination which he had previously testified was insufficient to enable him to fix a value (case, p. 107, ll. 28-40). The other objections to similar testimony regarding other portions of the machinery were based upon the same grounds, and it is submitted were equally improper and require a reversal.

It should be borne in mind that one of the two chief points in this case was the question of damages, and that the whole testimony of witness Dunphy was directed to this issue and an examination of it discloses that his opinions were based upon pure guesses, or that the questions calling for opinions lacked essential elements upon which they had to be based, which were either not propounded to him or were not to be found anywhere in the evidence.

The result of the Court's entire rulings on the testimony of this witness taken as a whole show substantial error and the admission of improper testimony upon a vital issue in the case and a real prejudice suffered thereby by the defendant.

**POINT VIII.**

It is submitted that the erroneous rulings of the Court require a reversal of the judgment.

Respectfully submitted,

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*Attorneys for Defendant-Appellant.*

M. CASEWELL HEINE,  
*Of Counsel.*

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POINT VIII

It is submitted that the erroneous rulings of the Court result in reversal of the judgments.

Respectfully submitted,

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*Attorneys for Respondent-Appellant*  
W. CASARETO SPINA

BY \_\_\_\_\_