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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 27, 1919.

New Jersey Supreme Court

PASSAIC COUNTY.

10

FRANK J. MAYES,

Plaintiff-Respondent,

vs.

SPLITDORF ELECTRICAL COMPANY, *et al.*,

Defendant-Appellant.

Action at Law.

*Notice of
Appeal.*

To William M. Rysdyk, attorney for plaintiff-respondent.

20

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

CLARENCE B. TIPPETT,
Attorney for Appellant.

Service of the within copy admitted this 26th day of December, 1919.

WILLIAM M. RYSDYK,
Attorney for Plaintiff-Respondent.

30

40

Grounds of Appeal.

GROUND OF APPEAL.

Filed January 23, 1920.

New Jersey Court of Errors and Appeals

10

FRANK J. MAYES,

Plaintiff-Respondent,

vs.

SPLITDORF ELECTRICAL COMPANY,

Defendant-Appellant.

Action at Law.

*Grounds of
Appeal.*

20 The appellant states the following grounds of appeal in this cause:

1. That the Court refused to grant defendant's motion for a non-suit.

2. That as a matter of law plaintiff was guilty of contributory negligence and there was no breach of duty on the part of this appellant.

30 3. That as a matter of law defendant was not in possession or control of the particular premises where the alleged accident occurred, so as to charge it with liability for the happening thereof.

4. That the Court refused to grant defendant's motion for direction of a verdict.

CLARENCE B. TIPPETT,
Attorney for Defendant-Appellant.

Service of copy within admitted this 24th day of January, 1920.

WM. M. RYSDYK,
Attorney for Plaintiff-Respondent.

40

Complaint.

JUDGMENT RECORD.

New Jersey Supreme Court

FRANK J. MAYES,

vs.

SPLITDORF ELECTRICAL COMPANY.

*Judgment
Record.*

10

Action at Law.

On Postea.

*William M.
Rysdyk,
Attorney.*

Splitdorf Electrical Company, the defendant in this cause, was summoned to answer unto Frank J. Mayes, the plaintiff therein, in an action at law upon the following complaint:

20

(Summons issued November 9, 1918.)

Plaintiff, residing in the City of Brooklyn, in the County of Kings and State of New York, says that:

1. Defendants are corporations of the State of New Jersey, and on November 15th, 1916, and for some time prior thereto, were the owners, proprietors or operators of a certain manufacturing plant or factory situate in the City of Newark, New Jersey, which was used by them in the manufacture of electrical instruments, appliances and other products unknown to the plaintiff.

30

2. A short time prior to the happening of the accident hereinafter referred to, the defendant companies had entered into contract with A. D. Howlett & Co., Inc., of New York City for the performance of certain painting work in the defendant's plant or factory at Newark, aforesaid, and on the date hereinafter mentioned, plaintiff was in the employ of said A. D. Howlett & Co., Inc., as a painter, engaged in doing some painting work on the interior of the boiler room of defendant's said factory, under the contract made as aforesaid between the defendants and his said employer.

40

3. On the rear wall of said boiler room, at the time hereinafter mentioned, there was a rack attached thereto, which was

Complaint.

used by persons working in said boiler room to hang up their hats and coats; at a point between the boilers and said rack, and nearest the rack, there was also an exhaust pit which was filled with hot water reaching an extremely high temperature; by reason of the premises, plaintiff charges that the place aforesaid was
 10 extremely dangerous and subjected the plaintiff, as well as any other person who might be lawfully upon said premises, to great hazard, risk and danger of life and bodily injury by reason of stepping or falling into said pit, all of which the defendants were fully aware, by reason whereof said defendants ought to have properly guarded said exhaust pit so as to render it safe and secure to the plaintiff or any other person who might have law-
 20 ful occasion to pass in the vicinity thereof, thus preventing them from being precipitated therein.

4. On November 15th, 1916, the plaintiff, under orders from
 20 his said employer, was about to commence some painting work in defendant's said boiler room, in pursuance of the contract entered into as aforesaid between the said defendants and the plaintiff's employer, and while in the act of so doing, and because of the negligence of the defendants in failing to have lights burning either in said boiler room or in the vicinity of said exhaust pit, and because of the further negligence of the defend-
 30 ants, by their servants or employees, in failing to inform plaintiff of the existence and location of said pit, and because of the further negligence of the defendants in disregarding their duty to properly safeguard and cover said exhaust pit, so as to render the plaintiff safe and secure from injury by reason of the exist-
 40 ence thereof, plaintiff's right leg was precipitated into said pit which was then filled with hot water of an extremely high temperature.

5. By reason of said accident, plaintiff's right leg was severely burned and scalded, causing him to suffer great pain, loss of sleep and a general nervous depressed condition; he became sick, sore, lame and disordered from thence hitherto, during all which time he underwent great pain and suffering; his injuries
 40 are permanent in character, causing a loss in the use of said injured leg; he was hindered and prevented from carrying on his lawful business and affairs and will continue so to do for a long period in the future; he necessarily laid out and expended large sums of money for medicines and medical attendance in endeav-

Answer.

oring to be cured of his said injuries, and will be obliged so to do for some time in the future.

Plaintiff demands \$10,000 damages.

WILLIAM M. RYSDYK,
Attorney of Plaintiff.

(Filed Nov. 16, 1918.)

10

ANSWER.

Defendant, Splitdorf Electrical Company, a corporation of the State of New Jersey, having on office at 98 Warren street, Newark, N. J., answering separately, says that:

First: This defendant admits the allegations of paragraph "1" of the complaint with reference to it.

20

Second: This defendant denies each and every allegation contained in paragraph "2" of the complaint.

Third: Upon information and belief, this defendant denies each and every allegation contained in paragraphs "3" and "4" of the complaint.

Fourth: This defendant denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "5" of the complaint.

FOR A SEPARATE AND DISTINCT DEFENSE TO THE CAUSE OF
ACTION SET FORTH IN SAID COMPLAINT, DEFENDANT ALLEGES,
UPON INFORMATION AND BELIEF—

30

Fifth: That whatever damages and injuries were sustained by the plaintiff at the time and place mentioned in the complaint were caused and contributed to by his own negligence, or by the negligence of third persons over whom this defendant exercised no control, without any fault or negligence on the part of this defendant contributing to the happening thereof.

CLARENCE B. TIPPETT,
Attorney for Defendant,
Splitdorf Electrical Company.

40

(Filed Dec. 18, 1918.)

Reply.

Defendant, Splitdorf Electrical Company of New York, a corporation of the State of New Jersey, having an office at 98 Warren St., Newark, N. J., answering separately, says that:

10 First: Answering paragraph "1" of the complaint, this defendant admits it is a corporation of the State of New Jersey, but denies each and every other allegation contained therein with reference to this defendant.

Second: This defendant denies each and every allegation contained in paragraph "2" of the complaint.

Third: Upon information and belief, this defendant denies each and every allegation contained in paragraphs "3" and "4" of said complaint, and defendant disclaims any interest in the property or premises described in said paragraph.

20 Fourth: This defendant denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph "5" of said complaint.

CLARENCE B. TIPPETT,

*Attorney for Defendant,
Splitdorf Electrical Company of New York.*

(Filed Dec. 18, 1918.)

REPLY.

30

The plaintiff denies each and every allegation of the separate and distinct defense set forth in the separate answer of Splitdorf Electrical Company to the plaintiff's complaint.

WILLIAM M. RYSDYK,

Attorney of Plaintiff.

(Filed Dec. 18, 1918.)

40

Postea.

POSTEA.

The case was tried before Judge George S. Silzer, with a jury in the Passaic Circuit on November 26, 1919.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for three thousand seven hundred and fifty (\$3,750.00) dollars. 10

| | |
|---|---|
| <p>\$3,750.00 Damages 63.35 Costs</p> <hr/> <p>\$3,813.35</p> | <p>Whereupon it is adjudged that the plaintiff recover of the defendant the sum of three thousand seven hundred and fifty dollars damages and his costs, which have been taxed at the sum of sixty-three dollars and thirty-five cents, making in the whole the sum of three thousand eight hundred and thirteen dollars and thirty-five cents.</p> |
|---|---|

Judgment entered December 12, 1919. 20

WM S. GUMMERE,
C. J.

I, ENOCH L. JOHNSON, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

(SEAL) In testimony whereof I have set my hand and the seal of said Court at Trenton, this thirty-first day of January, A. D. nineteen hundred and twenty. 30

ENOCH L. JOHNSON,
Clerk.

Dr. John B. Zabriskie, direct.

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

FRANK J. MAYES,

10

Plaintiff,

vs.

SPLITDORF ELECTRICAL Co., *et al.*,

Defendants.

Before HON. GEORGE S. SILZER, *J.*, and a jury.

PATERSON, N. J., November 25, 1919.

Appearances :

20

William M. Rysdyk, Esq., for the plaintiff.

Clarence B. Tippet, Esq., for the defendant.

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

Mr. Rysdyk opens for the plaintiff.

Mr. Tippet opens for the defendants.

DR. JOHN B. ZABRISKIE, sworn as a witness on behalf of the plaintiff, testifies as follows :

30

Direct examination by Mr. Rysdyk.

Q You are a practicing physician of the State of New York?

A Yes, sir.

Q Where is your office? A Number 505 Ocean avenue, Brooklyn.

Q How long have you been practicing medicine? A Twenty-five years.

Q Are you acquainted with Frank J. Mayes, the plaintiff in this case? A Yes, sir.

40

Q How long have you known him? A At least ten years.

Q Do you remember treating Mr. Mayes some time in November, 1916? A Yes, I do.

Q Do you remember the day of the month you first saw him?

A I think it was November fifteenth.

Dr. John B. Zabriskie, direct.

Q What time of the day was it? A It was in the evening.

Q Where? A At his house.

Q Where did you find him when you reached his house? A He was in bed.

Q Did you examine him that evening? A He was suffering acutely and it was late in the evening—

10

Q Did you examine him? A Not that night, no.

Q Just tell the Court and jury the condition you found him in on the occasion of your first visit? A He was suffering a good deal of this pain, this accident, he told me he had had it dressed in the morning by a physician in Newark and was suffering so much pain I decided to let it alone and examine the injury in the morning.

Q Did he state whether he was suffering pain? A He told me he did and he showed me, and I saw his leg was bandaged.

20

Q Which leg? A The right leg.

Q He was in bed? A Yes, sir.

Q What was his general condition? A He was simply suffering pain from this leg, this extreme pain.

Q Did you prescribe for him? A I gave him a sedative that night.

Q When did you next see him? A The next morning.

Q What did you find his condition then to be? A I took the bandage off and found his leg was pretty badly burned from the knee down to the ankle.

Q From the knee? A From the knee to the ankle.

30

Q Just describe, if you please, those injuries? A Simply that it was the result, as one could see, of burn; the leg was blistered and inflamed and there were some irritated spots beyond that from the burn.

Q What did you do in the way of treatment for him? A First, I continued the treatment that had been used the day before in the application of the oils for the burn, and what blisters there was I opened up and drained them out, and then after that it was simply a treatment of dressing his wounds, anti-septic treatment until it healed up.

40

Q Was the leg bandaged, did you order the leg bandaged? A I bandaged it myself.

Q How long did you continue this treatment? A I think I treated him about two months, I think, until January.

Dr. John B. Zabriskie, direct.

Q About how many times did you see him during those two months? A I think about thirty-five times altogether.

Q How much did you charge a visit? A Three dollars.

Q How long was he confined to his bed, do you remember?

A He was not confined to his bed very long, not more than a week.

10 Q Was he able to walk about? A Oh, no.

Q How long was it before he had the use of that leg? A I think not till January, two months about.

Q Was it bandaged all the time? A Yes, sir.

Q Could he sit up? A Yes, he could sit up with the right limb lifted on a chair.

Q During all that time did you continue this bandage? A Yes, sir.

Q Did he complain of pain? A Yes, sir, of considerable pain.

Q How long during that interval? A Well, most of the time after his dressings they were very painful, for two or three hours, sometimes the greater part of the day.

Q Did you notice anything particularly about his condition immediately after the injuries were dressed? A He complained of more pain then for quite a little while after the dressings.

Q After the two months did you see him again? A Yes, he occasionally came to my office.

Q How many times did he come to your office? A I should say about half a dozen times.

30 Q What did you charge for your office calls? A Two dollars.

The Court here ordered a recess until two o'clock this day.

AFTER RECESS.

The trial was resumed pursuant to adjournment.

DR. JOHN B. ZABRISKIE resumes the stand.

40 *Direct examination (continued) by Mr. Rysdyk.*

Q Will you describe more particularly the character of the injuries to the lower right limb? A After I opened those blisters, as a result of the burn, then there was more or less ulcera-

Dr. John B. Zabriskie, direct.

tion there, and that is one reason why it took so long to heal from the deep ulcerations especially at the upper part of the leg, in the fleshy part.

Q About how many of those ulcerations were there, do you remember? A As I remember, practically the whole leg was covered with them.

Q What effect, if any, did that condition have in reducing the size of the limb? A I don't think there is any difference in the size. 10

Q Is there any difference now between the right and left limb in size? A No, not on my last examination. There is a very marked scar there on his leg.

Q When did you see the leg last? A I examined it yesterday.

Q Will you state to the Court and jury how you found it yesterday? A Simply that his leg has a number of scars, showing the old injury. He complains of pain over his ankle, on account of the positions of the scars. 20

Q Is that where some of those ulcerations were? A Yes, sir, they were there, too, the whole of the leg was more or less ulcerations.

Q You mentioned some ulcerations— A Yes, well, a large number of those are in the fleshy part of the leg and they were deeper.

Q He complained to you of pain yesterday, where? A Just about at the ankle joint.

Q In your judgment will that pain continue? A It is possible for it to continue, yes, sir. 30

Q Will you state the likely duration of it? A No. That is impossible to say, how long.

Q Did you examine the limb yesterday by manipulation? A Yes, sir. I felt of it.

Q Digital manipulation? A Yes, sir.

Q In that examination did he complain of pain? A No, he did not.

Q Did that examination disclose any other condition of the limb than you have already described? A No, it did not. 40

Q The scars, where are they located? A Well, over the limb, just where the burns were.

Q Will you state as to whether they are permanent in character? A I think they are.

Dr. John B. Zabriskie, cross.

Cross examination by Mr. Tippet.

Q These scars of which you have just now spoken, were those simply superficial scars? A Well, a scar is superficial.

Q In fact, the injuries that he did sustain, the visible injuries, are purely superficial? A No, they were not, they were quite
10 deep.

Q How deep would you say? A Probably, in the fleshy part of the leg a half an inch, I had to cauterize them to heal them, to heal them over.

Q Are those wounds all healed over? A They are healed over, yes, sir.

Q You spoke of right after he came to see you, on the evening of November fifteenth, that you did not make an examination of him at that time? A No, I did not.

20 Q You waited until the next morning? A Yes, sir.

Q You found the leg bandaged when he came to you, did you? A Yes, sir.

Q Or, did you see him at his home? A I saw him at his house in bed.

Q Under what circumstances did you go there? A He sent for me.

Q You were his family doctor, I suppose? A Yes, sir.

Q And, naturally, he called you in? A Yes, sir.

Q And the next morning you examined his leg and found that he had burns from the knee down? A Yes, sir.

30 Q And, I understand, you gave him, antiseptic treatment? A Yes, sir.

Q And continued with your bandages? A With dressings, yes, sir.

Q You spoke of approximately thirty-five visits? A Yes, sir.

Q During a period of two months after November fifteenth? A Yes, sir.

Q Did you keep an exact record? A I have a record, yes, sir.

40 Q Suppose you examine your records and find out how many times you called? A Yes, I did.

Q Was that an average of once every other day? A No, not on the average of that, I think the first week or two it was nearly every day, then after that the rest of it was every day or two possibly.

Dr. John B. Zabriskie, cross.

Q In order to simply look at his dressings? A Yes, and re-dress it and treat it, too.

Q I suppose you charged him directly for the services that you rendered? A Yes, sir.

Q And I assume that he paid you? A Not yet.

Q He has not? A He has not paid me.

Q When was the last time you treated him at the conclusion of the thirty-five times mentioned? A I don't remember that, because—it must have been in February or March. I saw him a number of times in my office. It must have been in February or March. 10

Q You say that you treated him for approximately two months? A At his house, yes.

Q A period of about thirty-five visits? A Yes, sir.

Q When do you say was the last time of those thirty-five times that you saw him? A I think it was the fifteenth of January. 20

Q Approximately or exactly? A Approximately about that.

Q When was it that the wounds in his leg had healed? A They must have been practically healed by the fifteenth of January, the two months.

Q You took the bandages off that time, did you? A He had to have them rebandaged as a matter of support to the leg.

Q Protective measures, you mean? A Yes, protective and also to support the leg, the leg was pretty tender from the flesh scars there. 30

Q Was he in bed for any particular period of time? A No, he was not in bed very long, he would have to sit up with his limb elevated. It was more comfortable for him to be up in a chair.

Q When was it that he was up and around? Around the house? A I think he was in bed the first week. I am not sure.

Q And, after the first week? A He sat up in a chair.

Q When was he walking around? A To my knowledge he did not walk until after the fifteenth of January. Just how soon after that I don't remember. 40

Q Do I understand then, that each time you called upon him you found him at his house? A Yes, for all of those two months.

Q And that he did not go out of doors? A Not to by knowledge, no, sir.

Dr. John B. Zabriskie, cross.

Q Of course, you could not see? A Of course, I could not, but if he did he disobeyed my direction.

Q Then, after the fifteenth of January, 1917, you saw him, you say approximately, a half dozen times? A May be that many, yes, sir, at my office.

10 Q Stretching over no special period of time but at intervals?

A Well, it must have been within those months, February and March.

Q So that during February and March you saw him— A About six times in my office.

Q When you last saw him have you any definite recollection as to the condition of his leg? A Well, I saw him yesterday.

Q At the end of that time I refer to? A At the end of that time simply those scars had all healed over, there were scars there.

20 Q How would he get to your office? A He came part of the way in a car.

Q How far is your office from his house? A His house is about a mile from my office.

Q So that, at a matter of necessity, he would use a car? A Yes, sir.

Q And each time he called at your office he walked in? A He walked in, yes, sir.

Q You spoke of the ulcerations and the opening of the blisters. That, of course, I take it was during the time from November fifteenth up to January fifteenth? A Yes, sir.

30 Q You spoke of the whole leg, do I understand the ulcerations were on his whole leg? A Well, more or less. It was, of course, naturally the whole leg, but there were very few spots on the leg that were not ulcerated; some healed up quicker than others.

Q The burn, I understand, was from the knee down was it not? A From the knee down.

Q And the main ulcerations were higher up? A Than the knee?

Q Yes. A I did not say there were any ulcerations above the knee.

40 Q I assume the part above the knee is a part of the leg? A No. From the knee down.

Q So that what you mean to say is that the blisters and the injuries you had to treat were from the knee down? A From the knee to the ankle.

Frank J. Mayes, direct.

Q And not his whole leg? A Not of the whole leg, no.

Q You saw him yesterday you say? A Yes, sir.

Q And you thoroughly examined him? A I made an examination of his leg, yes.

Q Where was the examination made? A That was right here yesterday.

Q You just looked at his leg? A I looked at his leg, I had not seen it for two years. 10

Q You found no difference at all in the size of the two legs by comparison? A No, I did not.

Q And the man walked naturally? A Yes, sir.

Q And normally? A Yes.

Q And all that you did see, I understand, was the scars? A Yes, sir.

Q Which are thoroughly healed up? A Absolutely.

Q He has, from your observation and your manipulation of it, the use of his limb? A Yes, from my observation and manipulation, yes. 20

Q He did not complain of pains when you manipulated his leg? A No, sir.

FRANK J. MAYES, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Rysdyk.

Q Where do you live? A At number 947 Franklin avenue, Brooklyn. 30

Q Are you married? A Yes, sir.

Q How old are you? A Forty-seven years old.

Q Do you live with your wife and family? A Yes, sir.

Q What is your business? A Painting.

Q In November, 1916, were you engaged in the occupation of painter? A Yes, sir.

Q For whom were you working at that time? A A. D. Howlett & Co., number 570 Fifth avenue, New York.

Q What was their business? A Painting and decorating.

Q Did you do any work upon the building belonging to the defendant, the Splitdorf Electric Company of Newark? A I did the fire room. 40

Q When did you start to work there? A I went to work there November thirteenth.

Frank J. Mayes, direct.

Q Where was that plant? A That was, it seems to me, like, in about the center of the yard in the plant.

Q On what street? A High street I had to go to, then I had to come around the side entrance, I don't know what street it was on.

10 Q Was that a new plant? A The boiler room was a new plant, yes, sir.

Q I refer to the buildings? A The one building was a new plant, the High street end was new.

Q When you went there on the thirteenth of November did you do any work? A I done a little bit with one part that had been left out to get the boilers in.

Q Was that a new building or an old building? A That was a new building, the boiler room.

20 Q Did you notice what kind of business was being carried on there? A Well, big boilers was going, there was two big furnaces going.

Q What was that building used for? A It was used for the steam to supply the heat for the factory.

Q That is, heating that building or the other buildings adjoining it? A All of the buildings adjoining it.

Q This company is engaged in the manufacture of electrical appliances, I believe? A Yes.

30 Q On the thirteenth you say you did some work, what part of the new building did you work in on that day? A In the back of one of the boilers.

Q In what room? A In the boiler room.

Q Just tell us what kind of work you did there on that occasion? A I just painted one piece of wall, the new wall there, and the superintendent from Howlett's was to come there to show me what was to be done.

Q Do you remember the superintendent's name? A Yes, sir, Neale.

40 Q He was to meet you there on that day and tell you what was to be done? A He was to come there and show me what was to be done, and he did not get there and I just done that one piece of wall, and I waited there. I telephoned to the office and they told me to wait.

Q Who told you to do that one piece of wall? A When I went away they told me there was one piece of wall, to do that, and wait till he got there; Neale told me that.

Frank J. Mayes, direct.

Q Then it was Mr. Neale who told you to do that one piece of wall? A Yes, sir.

Q Did you do it? A Yes, sir.

Q When did you go there again? A November fifteenth.

Q What time did you get there? A About ten o'clock in the morning.

10

Q How did you get in the building on the first occasion you went there on the thirteenth? A I had a letter first and I went to a guard, and from there the guard took me to the office, I believe it was the employment bureau.

Q You had a letter from whom? A From the Howlett firm.

Q To whom? A To the Splitdorf people.

Q What did you do with that note? A I first handed it to the guard and he took me to this employment office.

Q What employment office? A The employment office of the Splitdorf, they were employing people there anyway and I waited there for a time.

20

Q When you handed your note to the Splitdorf guard, whoever it was, what did you receive then? Any other instructions? A They told me I would have to wait, they would have to telephone for some certain party in the building. I waited in that office for fully an hour before they got this party.

Q What then happened? A Then he took me around in the back and took me around and handed me over to another guard and the guard took me to show me where the stuff was kept.

Q Who took you out? A The party they telephoned for in another building.

30

Q A party from the Splitdorf's place? A A party from the Splitdorf's place, yes, sir.

Q And he took you where? A He took me around the back near the boiler room to the new end of the factory and he handed me to a guard there and told the guard to show me where the stuff was.

Q The entrance is that the new factory or the old factory? A The new factory, in the center of the place.

Q What happened then after you met that guard? A Then that guard showed me where the paint had been packed away.

40

Q Who showed you? A This guard showed me where the stuff was and showed me where the boiler room was what was to be done.

Frank J. Mayes, direct.

Q What did he show you? A He just came up to me and showed me and said "That is the boiler room there. Go right in there."

Q Did you go in there? A Yes, sir.

10 Q What did you do after you got in there? A I looked around to see where this wall was, and I found once piece of new wall, as they told me, in the rear of the boiler, so I painted that piece of wall and the superintendent had not showed up by that time and I telephoned to the office and they told me to wait there for the superintendent to come.

Q This was on the thirteenth? A Yes, sir, on the day I got there first.

Q Then when the man did not come? A I waited till half-past four and went home.

20 Q And you came back on the fifteenth? A I came back on the fifteenth.

Q How did you get in on the fifteenth? On the fifteenth the guard passed me right through.

Q The same guard? A The same guard, yes, sir.

Q What time did you get there that day? A About ten o'clock in the morning.

Q Just tell us what you saw and did? A I went through the boiler room and went down the stairs and in the back of the boiler room was there they hung their clothes, they showed me where to hang my clothes up—

30 Q Who told you to hang your clothes up there? A The fireman.

Q Do you know what his name is? A Peter. I don't know his last name.

Q Is he in court? A Yes, he is in court.

Q (A man in the audience is asked to stand up.) Is that the man? A Yes, that is the man.

Q Peter Chaseries? A Yes, sir.

Q Do you know who Peter Chaseries was, what his business was there? A Fireman.

40 Q For whom? A For the Splitdorf people.

Q Where was he? A When I went in he was working on the fires.

Q In the room where you were to paint? A Well, I was to paint around all those rooms; I had an order then to paint an-

Frank J. Mayes, direct.

other dado around the whole fire room. He was in the boiler room then and told me to go right in in the back there.

Q What did you do? A I went around to hang up my coat and went in the hole just as I was going in, went into this exhaust.

Q You say there were some boilers in there? A Yes, sir. 10

Q How many boilers were in there? A I don't know how many boilers there were in there, there was all the machinery in there.

Q Did you have to walk by them? A I walked through the passageway right down the passageway and on the top where this rack was, and just as I turned to hang up my coat where this hole was left in the corner where this boiler was on the floor and I could not see it.

Q Did you hang your coat on the rack before you went in the hole? A I just got my coat up when I went in the hole. 20

Q Where was the hole? A The hole was right in the back of this boiler.

Q Had you ever been in that part of the building before that? A I had been in that part of the building before the day I was there before.

Q I mean where this hole was? A I could not get up there, there was a ladder there when I was there Monday and I could see the men working there.

Q Do you know who was working there? A Yes; Mr. Hubin was working there. 30

Q What happened to you? You say you went in the hole? Just tell us what you remember? A I went down with my right leg in this hole till I sat on the floor, and then I hollered, and the coal passer, I believe it was, he ran around and pulled me out, and, of course, then, the rest of them ran around, they heard me holler and they got off my clothes and got some oil and then they had a doctor in the building and he came to my aid and he dressed it and took me to the Emergency Hospital.

Q Where? A In Newark.

Q After you had received first aid there? A Yes, sir. 40

Q And had your wound dressed by the application of oil, by, you say, the doctor in the building? A Yes. The doctor that they have in the building.

Q Then you were taken to the Emergency Hospital in Newark? A Yes, sir.

Frank J. Mayes, direct.

Q From there where were you taken? A From there I was taken back to the Splitdorf factory and they had telephoned to the Splitdorf factory and told them to take me home, because the doctor at the hospital said it was best to take me home and not to leave me there, but they had to go back to the factory to get gas because they had not enough gas to take me home.

10 Q On the thirteenth when you went there, did you see whether or not this plant in the new building, that is to say, the boilers were in operation? A Oh, yes.

Q Did you see Mr. Shafron there that day? A Yes, sir.

Q The first day? A Yes, sir.

Q What did he appear to be doing? A I was talking to him when he was firing this fire at different times there when I was waiting.

Q On the fifteenth when you got there were the boilers and the plant in operation? A Yes, sir.

20 Q Did you see Mr. Shafron there that day? A Yes, sir, I spoke to him when I went in.

Q What was he doing then? A He was working around the fires then.

Q What was the condition of the room in which you were, as you passed down through this passageway? A Well, the room was—you mean in the light?

Q Was it light or dark? A There was no electric lights on when I entered and back in this place it was the same as going in a dark cellar.

30 Q You say there were no electric lights on? A No, sir, there were no electric lights on.

Q Did you notice whether the electric lights were on when you were there the first day? A Yes, sir, the place was lit up well when I was there the first day.

Q On the day of the accident when you first went in the building was there any lights? A There was no lights when I went in the building.

Q Could you see where you were walking? A You could see where you were walking, but in the back part you could not see any of the floor.

40 Q Were there any windows along that part back there? A No, sir, there were no windows in the back.

Q Were there any windows in the room there? A The windows is on the side, but they are up like two stories high then

Frank J. Mayes, direct.

you get to the window and, of course, those boilers throws a shadow.

Q Had anybody told you about this condition of the hole that you fell in? A Nothing about it, no, sir; nobody told me nothing, I did not know the hole was there.

Q Did you know it was there? A No, sir. 10

Q How large was that? A Well, I should judge it was about two feet, two feet six square.

Q Do you know what it was used for? A I believe it was from the exhaust that drips over from the steam pipes, I believe.

Q As you were hanging up your hat had the light been restored? A No, not till after I was hurt, then, after I was hurt they got the light on.

Q Who else did you see around the room working, right after you were pulled out, or just before the accident? A I seen 20 workmen there, but did not notice who they were, only Mr. Chaseries when I went in, but of course, after the accident, then I seen these other men because they were working in different parts of the room.

Q Did you notice any covering over this hole, over this pit? A All I seen was one little piece of board laid across one corner.

Q When did you see that? A That I saw there after they got the lights on.

Q After the lights were turned on? A Yes, after I was out 30 of it and while they sat me down and took off my pants and things I saw this little piece of board there, just over one corner of the pit.

Q How wide was that? A Maybe four or five inches, wide, something like that, I don't know exactly.

Q How long was it? A It just covered the hole, it went across catacornered.

Q The exhaust pit, itself, you say, was about— A I judge 40 about two feet, two feet six square, I don't know, the first time I seen it was then.

Q I show you a paper representing the plan of the interior of the building and ask you to examine that— A My brother drew that up.

Q Were you present when he drew it? A Yes, sir.

Frank J. Mayes, direct.

Q I will ask you if that represents materially and generally the lay of the room in which you went to work? A Yes, sir, as near as we can remember.

10 *Mr. Tippett.* I have no objection to this being used for the purpose of refreshing his possible recollection of what he thinks to be the condition that existed in there, but as to its relationship and accuracy of the technical locations, and the locations of the boilers and the dimensions, etc., I object to all that. Simply for the purpose of refreshing his recollection I have no objection to it.

Q I will ask you to look at this diagram and indicate if that is the stairway there in which you entered the building that morning? A Yes, sir, that is the stairway where I came down.

20 Q And then after you had entered the room you indicate with your finger, what direction did you take to go to the hat rack? A Right around this way. (Indicating.) The hat rack stood here.

Q There are three spaces here marked "Boiler or other machinery"; will you tell us what they represent? A I don't know what they were, because I did not see enough of them going in there to know; the thing happened so sudden when I went along that I never realized.

30 Q Was there some machinery or boilers located along that side of the wall? A Yes, at the back of the boiler building, because in the back here is where I was when they took my pants off, right in the back here they had some works across here.

Q This passageway leads down to the hat rack and runs right down into the area leading alongside of the exhaust pit? A Yes, the exhaust pit is right around the back here from this boiler, and this boiler throws a shadow so that you cannot see a thing on the floor without a light.

Mr. Rysdyk. We offer the thing as being accurate.

40 *Mr. Tippett.* I have no objection to it, but as to being accurate, as identifying the position of these boilers to which he has referred and the question of the other positions, I do not concede its accuracy.

Mr. Rysdyk. I will not offer it as being a correct diagram.

Mr. Tippett. As to the general idea roughly, as to the locations in there roughly, I am agreeable.

Frank J. Mayes, direct.

Mr. Rysdyk. Only to fix the general locations.

Q After you were pulled out of this exhaust pit, were you suffering pain? A Yes, sir, awfully.

Q And did you continue to suffer pain until you arrived home? A Yes, sir; the pains was awful until they got me home.

Q What time did you reach home? A I was home around two o'clock, I judge.

Q What happened to you then? A I got home and then I went in and telephoned; the doctor helped me in, and telephoned to the office and told them what happened.

Q To what office? A To the office where I was employed, Howlett on Fifth avenue, and then after that he helped me upstairs, that is, he put me onto the stairs and asked me if I could manage with the baluster, and as it happened the baluster was on the lefthand side so I could manage to get upstairs.

Q You were then put to bed? A I went right to bed as soon as I got upstairs.

Q Did you have a doctor? A I had a doctor that evening.

Q Doctor Zabriskie? A Yes, sir.

Q When did he see you first? A He seen me November fifteenth in the evening.

Q Where were you when he first saw you? A In bed.

Q Did he examine you? A He did not examine my leg. Because the doctor in the Emergency Hospital had told me to take that bandage off, but he thought with the treatment he would give it would be better to leave it till morning.

Q The bandage I understand was put on at the Emergency Hospital? A At the Emergency Hospital, yes, sir.

Q And were you still suffering that night? A Oh, yes, sir.

Q And how long did you continue to suffer pains? A I suffered pains till—the pain was severe till about the last part of January before it commenced to get much easier.

Q When did you first have a chance to see your leg? A I seen my leg the next morning.

Q What was the condition of it? A Well, when they took the bandage off it was all full of big bubbles all over.

Q Ulcers? A Big blisters all over.

Q Did Dr. Zabriskie dress it that day? A Yes, sir, he banded it and then gave the usual dressing.

Frank J. Mayes, direct.

Q How often did he see you? A Well, for the first he would see me almost every day, and then after that he stopped every second day and later on, well, like that, every second day, to see how it was getting along.

Q Do you know how many visits he made all together? A About thirty-five visits to the house.

10 Q How long were you in the house? A I was in the house till some time in January; I got out and around the first week or so when I came out just to get a little fresh air for a half an hour and took a little air in the sun.

Q During that period could you stay in bed or were you sitting up? A No. I could not lie in bed.

Q Why? A The pains were so severe lying down.

Q What did you have to do? A I sat on a chair with my leg drawn up this way (indicating) and on top of pillows on other chairs so that no blood got in the leg.

23 Q How long did you continue in that position? A That was till about the first week in January before I could put the leg down to let any blood in it.

Q And the pain, how was that? A The pain was terrible after the treatment, for two or three hours, it was something awful; the chills would set in with it and they would have to get me on the bed as quick as possible.

Q What was your general condition during that time, outside of your pain in the leg? A I was feeling pretty bad because I could not get any sleep on account of the pain.

30 Q Did you sleep at all? A Very little. Most of the sleep I had was under the dope the doctor gave me to make me sleep.

Q The doctor was given you treatment for that? A Yes, continually, all the time.

Q Who took care of you? A My wife.

Q Did you have any children? A Yes, sir.

Q Did anybody else help to take care of you? A Well, the daughter did first, and then the daughter could not stand the suffering so much so she went out and could not stand to see the way I was suffering.

40 Q Was this pain that you describe continuous? A Well, sometimes it would get a little easier, but after the dressing it would be sharper three to four or five hours after the dressing.

Q You noticed it more particularly, you were more sensitive then? A More after the dressing, yes; why the pains would be

Frank J. Mayes, direct.

so bad that the chair would almost go over with me and they would have to get a couch bed and put me on the couch, because the chills would set in with it.

Q How long was it before you could put the weight of your leg on the ground, on the floor? A I think it was about, right after the first week, going in the second week.

Q How did you get around at all in the house before that? A I did not get around, I had to just sit on the chair all the time and could not move. 10

Q Who helped you in and out of bed? A The way I had to arrange that, I had a couch bed and this couch bed I had to hold up there and have them shove the couch right in front of the chair so that I could slip my leg onto it. That is the only way I could manage it.

Q Could you help yourself at all in locomotion, could you get around at all around the room? A No. I could not get around the room. I could not let any blood in the leg, I could not stand it. 20

Q When did you first start to work? A I don't know. It might have been the latter part of the second week, or the middle of the second week. I just worked about a week or ten days.

Q Of January? A Of January.

Q How long did you continue working? A Around that week or ten days.

Q What happened then? A There was a job right across from my house and there was some work in a warm room that I could manage to do to fill in doors and like of that and when that was done the work required to go up a ladder and I could not do it so I had to lay off. 30

Q Why couldn't you do it? A Because I could not go up a ladder; I could not trust my leg; the leg was still in bandages and the sores still onto it.

Q Did you have to stop? A I had to stop, yes, sir.

Q How long was it then before you returned to work? A I did not start again until around March, around the first part of March.

Q During all that time did you leg have bandages? A My leg had bandages clean up to then and after, some part of it. Clean up to April. 40

Q Did you start to work in March again, and were you able to continue then without stopping? A I could continue but I

Frank J. Mayes, direct.

had to be very careful not to lean up against the ladder or anything.

Q What about the pain? A The pain was pretty bad at times, but it gradually worked away.

10 Q When was the last you had any pain? A It looks like I have pain there during every second day, sometimes they are away a week at a time.

Q And the pain is in what part? A It gets me through here (indicating).

Q From the ankle to five inches above the ankle, you indicate? A Yes, sir, from the ankle up about five inches.

Q Was there any of those ulcers which you had there larger than the others? A Yes, sir, some of them looked to be almost all open, especially around here, around the ankle part.

Q Did they leave any scars? A Yes, sir.

20 Q Will you remove your trouser leg and show the jury, if you please, the condition of your limb? A (The witness does so.)

Q What were you earning at that time in your work? A Five dollars a day was the day's pay.

Q You mean the day's pay? A Yes, sir.

Q What were you averaging a week? A I used to average between thirty-five and forty-five dollars a week.

30 Q That included overtime? A That included overtime, the regular day was five dollars a day.

Q Was that the standard scale of wages at that time? A That was the standard scale at that time, yes, sir.

Q When did that increase, if at all, afterwards, during the time you were ill? A No. Not during the time I was ill. Not till after.

Q Did you lay out any money for medicines or drugs? A Yes, sir.

Q How much, all together, approximately? A Approximately between twenty-five and thirty dollars at least.

40 Q What did that include? A That included medicines and some gauze for bandaging and medicines that I have to take for the condition.

Q And did you expend any other moneys? A That is all I spent on that.

Frank J. Mayes, cross.

Cross examination by Mr. Tippet

Q How long have you been a painter? A About twenty-eight years.

Q When was the very first that you had worked at the job in Newark? A November thirteenth.

Q Who sent you over there? A Mr. Neale, the superintendent for A. D. Howlett & Co. 10

Q When did he give you the instructions? A He gave me the instructions at the office, number 507 Fifth avenue.

Q The office of A. D. Howlett & Co.? A Yes, sir.

Q What was the occasion under which he wanted you to go over there? A He said there was some work for me to do there and he told me to go over that there was one piece of wall, to do that piece of wall and to wait until he got there and then he would show me what was to be done besides that.

Q Do you know Mr. J. Smith of A. D. Howlett & Co.? A 20 Yes, sir.

Q Where is he located? A At number 507 Fifth avenue.

Q Who was he? A He was then the estimator for Mr. Howlett.

Q So you say you started over there on November thirteenth? A First, yes, sir.

Q Were there any other men from A. D. Howlett & Co., painting at that time there? A Not at that time.

Q Do you know whether they were there at that time? A 30 There was nobody there but me from them.

Q Do you know whether anybody had been there before that time? A Yes, there was someone there before that time.

Q How long had they been painting there? A I could not say how long. I don't know how much was done there. That was the first time I was ever in the place, the first time I ever seen it.

Q Did you not see painting being done there by A. D. Howlett & Co.? A I understood there was, because the paint was left over there.

Q You had that understanding that there had been men of 40 A. D. Howlett & Co. painting over there before you went over? A Yes, sir.

Q Do I understand that you went over then to paint side walls or finish up? A To do some work in the boiler room, that is the only thing I was told to do.

Frank J. Mayes, cross.

Q And you say you went over there and arrived at what entrance, was this? A I don't know the names of the streets there, there is an entrance where you have got to go in on the side street. I tried to get in the main factory and could not do it.

10 Q You stated in your testimony that you had a note from Howlett & Co.? A Yes, sir; I had a note, just saying Splitdorf factory, High street, Newark, New Jersey. He told me to go to the High street building and I went to High street and could not see the entrance to go in for employees and walked around until I found the entrance and a lot of people going in and asked a guard if that was the entrance to the Splitdorf, I don't know what the name of the concern was.

Q You say you had a note directing you to go over to the building of the Splitdorf company? A Yes, sir.

20 Q Were you told by anybody what to do there? A Yes; Mr. Neale, he said he would be over there during the day and to go over and he would be there.

Q About what time did you arrive at the entrance you speak of? A Well, the first day, perhaps about eight o'clock.

Q And you showed your note to the guard? A Yes, sir.

Q That was during the time of the war, wasn't it? A No, sir.

Q Do you mean to say that in 1916 the war was not on? A It was not on in this country, no.

30 Q But they did have guards there at the entrance? A They had guards there, or watchmen, I don't know what they called them, but you could not get in.

Q You gave it to the watchman there? A I gave it to the man there, may be he was the watchman, nobody could go in at that time.

Q He had his station right there at the entrance to that roadway, was it, a roadway? A It was a roadway where they drove in.

Q You went up that roadway a little bit? A Yes, sir.

Q And you handed the note to the guard? A Yes, sir.

40 Q What did that note say? A It just says "Admit bearer." I did not read the note.

Q You don't know what the note said. A The note was simply—

Q To identify you? A To identify me, that I was from the Howlett people.

Frank J. Mayes, cross.

Q That you had come over from Howlett & Co. to do some painting? A Yes, sir.

Q Did you ask them the circumstances under which you were to do the painting there? A I asked them, they said they did not know until Mr. Neale came over and they would talk it over with Mr. Neale.

10

Q I am referring to the Howlett Co.? A The Howlett people told me there was a piece to do in the wall and they would be able to show me what to do.

Q So you came up to the guard? A Yes, sir.

Q And you gave him your note? A Yes, sir.

Q What was it you said or did next? A Then after I went into the employment office.

Q Did you wait there any length of time? A I waited there a long time.

20

Q You waited right there for Mr. Neale to come? A No, I waited for one from the Splitdorf's.

Q When you got there, at the office, the guard, do I understand you, went there for Mr. Neale? A Not for Mr. Neale there, no, sir.

Q Then what did you do? A I went into this place with this note, they said "All right, sit down for a little while" until they telephoned some gentleman belonging to the Splitdorf people, which I don't know the name, and it was kind of hard for them to get him, and they kept telephoning on different floors to try to locate him and it was fully an hour I was there.

30

Q You were there to meet Mr. Neale, were you not? A Mr. Neale said he would be there in the morning but he was not to meet me there then, he was to meet me later.

Q What were you supposed to do? A I was supposed to paint this new piece of wall until he got there.

Q So I presume you asked the guard where the place was where you were supposed to do your work? A I asked where the boiler room was and he showed me where the boiler room was, the second guard.

40

Q You say you went downstairs; did you go into the boiler room? Did you do any painting in the boiler room? A I done one piece of wall back of the first boiler.

Q Are you referring to the boiler room or the pump room now? A The boiler room.

Frank J. Mayes, cross.

Q What is there in this particular boiler room you are referring to? A There was one piece of wall I understood had been left out in order to get those boilers in and when the boiler was in that piece of wall was put in and I was to paint that.

10 Q I show you on this diagram which has been marked Exhibit P. 1. You came down these stairs you say? A Yes, sir.

Q Where was it with relation to this that you were supposed to do some painting? A I was supposed to paint a dado all around that room.

Q What do you mean by a dado? A The dark green part along on the bottom.

Q Up any height? A Well, they were to tell me the height when I got there.

Q You mean Mr. Neale was? A I don't know that Mr. Neale was.

20 Q Who was to tell you? A Somebody there, I don't know who.

Q Mr. Neale was the man who sent you over there to do the work? A Yes, sir.

Q And it was from him you were to receive your orders as to what to paint? A He was giving me my orders but they would tell me the height they wanted.

Q When you are speaking of "they," you refer to who? A The Splitdorf people were to tell me the height they wanted.

30 Q Do I understand you to say that you were told the Splitdorf people would tell you what height to paint? A Not till after Mr. Neale got there. Mr. Neale was coming there first then they were going to talk it over.

Q You were to receive your orders from Mr. Neale, weren't you? A I suppose I would, yes.

Q He sent you over there to do some painting along the side wall and he told you when he got over there he would tell you what to do; isn't that right? A Yes, sir.

Q So you were to paint some of the side wall there until Mr. Neale arrived there? A Yes, sir.

40 Q Then you say you went in and the first bit of painting you did was where? A I think it was around here (indicating on diagram). There was one little piece left out there.

Q What do you mean, "left out"? A A piece of concrete wall, which was not built there in order to get the boilers in through the opening.

Frank J. Mayes, cross.

Q The boiler room on being constructed had all been painted previous to that except this one piece of wall which was being constructed? A Yes, sir, it was all constructed.

Q As far as you saw? A Yes, sir.

Q You spoke of a piece of wall that was not in? A Not when I was there.

Q That evidently had been put in recently? A I don't know how long ago. 101

Q You never concerned yourself with it? A I did not know anything about that.

Q Your job, then, as you describe it, was to paint that new piece which went in? A One new piece of wall which was in the back of one of those boilers; I don't know just exactly which one it was now.

Q With that diagram before you can you locate the spot approximately, over in that corner as you pointed? A I imagine it was right on that side, right in here somewhere (indicating on diagram) where that new section of wall was. 201

Q Were you to do anything along this side? A I was to work all around the whole room; the whole boiler room was to be painted green on the bottom.

Q How far did you get that day? A I only just done this piece of wall and waited for Mr. Neale to come about the other.

Q Mr. Neale did not arrive? A Mr. Neale did not arrive.

Q What time did you leave about that day? A Half-past four. 301

The Court. What was this building they were building there at that time?

The Witness. It was a boiler room, to furnish heat, I believe, for the buildings.

The Court. Mr. Rysdyk, as I understand the defendant's position, it is this, that the Splitdorf concern made a contract with the American Concrete Steel Company to erect a boiler house, and the American Concrete Steel Co. was given possession of the land and started to build; the American Concrete had sub-contracts with other people to do particular parts of that work, and the defendant's position is, as I gather it, that while the building was still in the possession of the contractor, namely, the American Concrete Co., the plaintiff was invited on by the 401

Frank J. Mayes, cross.

10 sub-contractor and was injured, and the defendant's contention is that in that situation it is not responsible because it had no possession of the property and had no control over it whatever. I was under the impression when you first stated what it was that it was a part of their factory in which the plaintiff was doing something, but this, I understand, was an independent building by itself, and the defendant's contention is that this was in the control of this contractor and under the direction of the contractor and if he failed to finish it then the defendant could not take possession and until the time the defendant had possession it is not responsible.

20 *Mr. Rysdyk.* My answer to that is this, in the first place this plaintiff was not concerned with any contract whatever the contract may be which existed between the Splitdorf Company and its contractor—

The Court. He was not concerned about the contract, but he was concerned as to whether the defendant was in possession.

30 *Mr. Rysdyk.* That it one point I make; secondly, that the Splitdorf Company was in occupation, occupied this boiler house and boiler room; they were operating it; they were operating these pumps; these pumps had been used we will show for several weeks before this accident. In other words, they exercised control.

The Court. You mean the possession had been turned over to them, at least part of the possession?

Mr. Rysdyk. This plant, whatever it was that was being constructed there, had practically been completed for all purposes for the operation of their factory.

The Court. And that they had taken possession?

40 *Mr. Rysdyk.* They were occupying it and using it, and also the man who was running these pumps, their foreman and chief engineer had control of it; it was all under their control and dominion during this time.

The Court. What does the defendant say to that?

Mr. Tippet. My answer to that is this, with respect to this place where this alleged accident happened, in the pump room, and if I may refer your Honor to the dia-

Frank J. Mayes, cross.

gram, which is off there, the large pumps or furnaces here were installed, of course, at once, in order that the heating might be supplied through the main factory building where the other employees were working.

The Court. Your answer, as I gather, is that this particular piece of property had not yet been turned over? 10

Mr. Tippett. This particular part where this accident happened had not been turned over to the Splitdorf Company. Under the contract which the Splitdorf Company had with the American Concrete Steel Company, until the final payment under the contract was made the Splitdorf Company exercised no control over that building.

The Court. Mr. Rysdyk says that you took possession of a part of it at least and ran the pumps; in other words, do you think that you took possession of a part of it, or do you say you did not take possession of any of it? 20

Mr. Tippett. We say that with the permission of the contractor we got up some heating apparatus for the purpose of supplying heat generally from the furnaces throughout the building, but in this particular place where the accident happened, that was in the course of construction under our contract with the American Concrete Steel Company and that particular part had not been turned over because the contract had not been finished and the contractor had not completed his work.

The Court. And I suppose the plaintiff takes the position that the jury may infer that the defendant took possession of the whole of it, including this? 30

Mr. Rysdyk. Yes, sir; the defendant as owner occupied this room, its men operating this fire, operating these new pumps installed in this particular part of the building, and we will show further that men in their employ knew of this danger and knew of this trap, and we will show further that there was a covering for this trap that never was upon it, although it was on the premises and had never been used and that it was neglect of the Splitdorf Company in not completing the covering and protection of that trap. 40

Mr. Tippett. We are prepared to show by evidence that such was not the actual situation.

Frank J. Mayes, cross.

10 *The Court.* That is a question of fact. I am getting at the legal proposition, just what you were contending. As I gather, if the defendant made this contract, at the time of the happening of this accident, the matter had been taken out of the hands of the contractor and was in the possession of the defendant, and the defendant denies that, so far as this particular place was concerned, contending that this was still in the hands of the contractor.

20 *Mr. Tippett.* Yes, sir; it absolutely was under our contractor, and especially because the Howlett Company had a man working over there under their contract with the American Concrete Steel Company, of which we had no control, the American Concrete Steel doing the work through Howlett & Co., and not under our direction at all, and the fact that there was a temporary pipe running down there which was the occasion evidently why this man slipped in there.

By Mr. Tippett.

Q That was on the 13th of November? A Yes, sir.

Q Did Mr. Neale show up that day? A No, he did not.

Q At 4:30 you quit? A Yes, sir.

Q What did you do then? A I went home, and the next day I went to work on Fifth avenue on a part of a job where I had previously been.

30 Q While you were over at the Splitdorf plant doing your work there did you see any other painting employees of your company? A No, sir.

Q You were the only one who on the 13th was over there, as far as you knew? A Yes, I was the only one there.

Q On the 14th, did you inquire at any time, after the 13th, did you inquire of Mr. Neale why he did not appear? A After I went up to my old job at Seventy-second street and Fifth avenue, Mr. Neale came up there on the morning of the 15th.

Q Then what were you instructed to do? A He told me to go back there Wednesday morning.

40 Q So you went back there Wednesday morning? A I did not go at the first, I went over to the workroom first to get some material and that is the reason I got there at 10 o'clock.

Q You said that because they knew you you walked right in and went on down? A Yes, they passed me through then because they had seen me there Monday.

Frank J. Mayes, cross.

Q What was the first thing you did when you entered the room there? A The first thing I done when I entered the room I went right back to that passageway to hang up my coat and hat.

Q Please describe that rack, if you can, that you speak of? A Well, there was a rack standing in the back of the room.

Q Describe what the rack was. Was it a coat rack like you see in the court room over there? A No, it was one made just temporary to hang clothes on.

Q Nothing but a beam with some nails in, wasn't it, as a matter of fact? A Yes, for everybody that works in the place to hang their clothes up on.

Q Nailed up against the wall? A Standing up on two up-rights, I believe, it was not nailed on the wall, because the wall was a concrete wall.

Q You say you walked right in that morning? A Yes, sir.

Q What did you do? What time did you get in? A About 10 o'clock.

Q Did you walk in the same way you walked in the other day? A No, the other day I did not go that way at all.

Q Was this the first time you had been in this room? A No, I had been in that room before; the other day I was in there, but I went along another passageway between the boilers.

Q So you had been in this room before? A I had been in this room before, on the 13th.

Q What led you to know there was a rack there? A Mr. Chaseries told me.

Q I refer to the second time you went in. Did you hang your clothes up the first time you went in? A Yes, sir.

Q So the second time you went in you walked right in yourself? A I walked right in, said, "Good morning," and walked back to the rack where I was told to hang my clothes.

Q What else did you do? A That is all I had time to do, because when I went to hang up my clothes I went into this hole.

Q Do you remember anything about the pair of overalls you had on at the time? A I had no overalls on at the time.

Q You say it was dark in there? A It was dark in the back, yes, sir.

Q Was it light enough to see the hat-rack, or did you feel your way? A You could see the hat-rack, but you could not see the floor.

Frank J. Mayes, cross.

Q Did you look at the floor? A You could not see anything, the pump closed it up.

Q Did you look to see that day? A I walked right in. Yes, certainly I looked at the floor. You could not see anything on the floor; the floor was perfectly black at that part of it.

10 Q Did you look? A Sure I looked.

Q You say you could not see anything? A No. I could not see anything.

Q Were there any pipes right over that hole? A There was a pipe, I think, running right down at the corner, right off the corner pump.

Q Was there a temporary pipe running from the hole up to the ceiling? A I believe there was.

Q Right from the hole right straight up to the ceiling? A Right from one corner of the hole.

20 Q You saw that, did you? A I saw the pipe there, yes, sir.

Q Do I understand, when you were in there before, you saw a board on this hole? A No, sir, I did not see a board on the hole; I did not see the hole the first time I was in there.

Q Did you look? A They had a ladder there when I was there the first time.

Q Where? A Right over that.

Q When you saw the ladder there what did you think? A The men was working on the ladder, they were working up there on some pipes.

30 Q There were some men working up there on the pipes? A Yes, sir.

Q What were they doing? A I don't know. They were working on some pipes, doing some repairs there, something; I don't know what they were doing. They were up on the ladder working on the pipes.

Q How many men did you see there? A I saw two men up the ladder—one up above, one down below.

Q On the 13th, now? A On the 13th, yes, sir.

Q They were working on the pipes? A Yes, sir.

40 Q That was right near where this hat-rack is? A Yes, sir.

Q Just right over where this hole was? A This ladder was astraddle of the hole.

Q And you saw the men working on the pipes? A Yes, sir.

Q So next when you came in there on the 15th you immediately started to hang your coat and hat up? A Yes, sir.

Frank J. Mayes, cross.

Q On this board with the nails? A Yes, sir.

Q You did not see the ladder there, did you? A There was no ladder there.

Q Although it had been there two days before that the last time you were there? A Yes, sir.

Q You did not look to see what these men might have been fixing? A I did not see what they were fixing; they were working on top of the ladder one day, one up and one on the floor. 10

Q You could not tell whether they were connecting up the pipe to run right down into that pit? A I could not say what they were doing there.

Q So that when you came in on the 15th you just simply went in, you did not look to see if there was any hole in the floor or anything else? A I could not see it if I did look.

Q You did not look, did you? A I looked as I went along, certainly.

Q Did you look or did you not look? A I looked, but I could not see anything. 20

Q Did you look or did you not? A I looked as I went along, as I walked through the room, looking, I looked at the floor.

Q What did you see? A I could not see anything in the back part there, it was all dark.

Q Were there men working in there at the time? A They were working around at the other side, back of the boilers.

Q What do you mean, back of the boilers? A There is a passageway back of the boilers there. 30

Q Wasn't there a skylight in this room? A Not as I know of. I don't know anything about any skylights.

Q Was there any light at all visible? A There was no lights of any kind, only just through the side where the boiler is there is some windows up on the side, along the side, but not in the back.

Q Show me where you mean where the light came out? A Well, there is windows across here, and there is windows here (indicating on the diagram). And I don't know how far the windows went down this side, but there is nothing back here. 40

Q There are no windows back here? A There are no windows back here at all.

Q And you did not observe any skylight in the room at all? A No, sir, it is perfectly black here from the shadow from that pump.

Frank J. Mayes, cross.

Q Did you see any men working there at all? A Not there, working on the other side I did.

Q You say on the 15th you came in the same way, you went up here, right along that passageway, is that right? A Yes, sir.

10 Q And then you walked right up to where this rack was? A Yes, sir.

Q And with that rack is a couple of uprights? A Yes, sir.

Q A couple of beams running straight up? A A board across and nails onto it.

Q As though I held my hands up and had a board across there, that would be the nature of a hat-rack you refer to? A Yes, sir.

Q And I understand was resting up against the— A Right by the rear wall.

20 Q Was it on that side or that wall? A The back wall.

Q Is that your right, would you say it was right in that position (indicating), was it to the left of that or to the right? A Right there. (Indicating.)

Q Indicating from the corner a spot in that wall? A Yes, sir.

Q What is the distance between the hat-rack and the pit? A I don't know exactly, but I think the space between the boiler and the walls I judge to be about four feet and that pit sets out that much. (Indicating.)

30 Q If that is your view, then you conclude that there is only a space of two feet between the far edge of the pit and the wall? A I could not say exactly, I did not measure it. You know, when you fall in a hole like that, and after that happens, you don't want to bother with measuring.

Q You don't recall exactly the space? A I had never seen the space there before that because when I hung up my coat I could get at the rack more than enough, than I could that day.

Q You did not look on the 13th? A I had no business to look there.

40 Q If you did look could you have seen it? A I told you two men were working there, one standing on the floor and one up on the ladder.

Q The point was you did not look to see what the condition was? A I had no business to look at those men.

Frank J. Mayes, cross.

Q You did not look to see what the condition was on the floor? A No, I did not see nothing.

Q Your answer is not responsive to my question. A I told you that day I had no business to look, the men were standing there in front of it; there could have been a hole there and I would not have seen it; one man was up on the ladder and the other man was standing right in front of the hole, and you could not see the hole unless you went back to see it.

10

Q The men were doing some work there? A The men were doing some work there.

Q Then when you went in there on the 15th you paid no attention to what might have been done there? A I could not see if I did; there was no way of seeing, the thing was dark.

Q How did you reach the hat-rack? A You could see the hat-rack because that stood up high and showed that, but from the shadow from the boiler you could see nothing on the floor.

20

Q The hat-rack stood up high? A Yes, sir.

Q The hat-rack is around the corner from the entrance to the doorway, is it not? A The hat-rack was across the back wall. You could see the hat-rack, but you could not see the floor because the shadow from that pump threw a shadow on the floor, and the floor was perfectly dark, because the light strikes from the back.

Q I yet do not understand with clearness your answer when you said that whereas you could see the hat-rack up here, and you referred to the light thrown that would allow you to see that? A The lights from those openings, the windows. You know, you have been in the boiler room; you know the boiler room is two stories below and one story above, is it not?

30

Q I know approximately. A And the lights come from the back of this boiler and that is pretty well above.

Q From above where? A From the top of these windows that runs along the side, of this little square factory windows, with steel frames.

Q You now are speaking of the windows in that room? A Up at the top, but nothing in this back wall.

40

Q On this back wall you say there are no windows? A No.

Q Where are those windows? A They start from the side and go around the front.

Q Which side do you refer to? A Here. (Indicating.)

Frank J. Mayes, cross.

Q Where, with relation to the side, are those windows? Are they way down low? A No, sir, they are way up high.

Q Do you want me to understand there are no windows here?

A Yes, sir, there is windows there.

10 *Mr. Rysdyk.* Where? Indicate the position on the diagram.

The Witness. There are windows from, beginning at from the ground at the outside about five or six feet up, you will strike the window sash.

Q How big were those windows? A Little small lights.

Q Where else are there windows? A No more.

Q Is this a coal chute? A The coal comes in through a chute from the outside, I believe.

20 Q Where did you say you got the lights? A We got light from this side and it threw a shadow across here.

Q The windows are also along this side? A I don't know positively whether there is or not, but I know it did not throw any light back here.

Q Where did you get the light that was thrown over on that part? A I suppose there is a couple of windows along that side which threw a shadow, I don't know; there must have been some windows in that room, too; the day I was in there before it was all lit by electric lights.

30 Q You don't know as a matter of fact whether there are or not in this particular room windows that extend around the walls? A I don't know what windows are in that room; I know there is nothing on the back wall.

Q Will you find out where that light came in which enabled you, as you said, to see the top of that hat-rack, but still you could not see any further than the top of it? A You could only see just a shadow there of the pump.

40 Q Please describe your actions just immediately after you hung your hat and coat up, just previous to the happening of this accident? A Previous to the accident or after the accident?

Q Just previous to the happening of this accident, after you hung up your hat and coat. A I just got my hat up when I was down in the hole.

Frank J. Mayes, cross.

Q Right after this accident you say you saw the board? A That is, when they got the lights on, after they had me sitting down and had my clothes off.

Q You saw a little board? A Yes, sir.

Q With relation to the hole where was that little board? A From the time I went into it—

Q When you observed it right after you saw the lights go on? A It was lying right across catacornered across here. (Indicating.)

Q Indicating that just after the accident the little board was lying across one corner of the hole? A Yes, sir.

Q That board was how big? A I don't know, I think about four or five inches wide.

Q How long? A It went across the hole; I don't know how much of a hole it was, or how much longer the board was than just simply to go across the hole; it might have been bigger.

Q How much was it over the hole when you first saw it, when you came out of the pit? Was it just across one corner, over half of it, or three-quarters of it? A Just across one corner when I came out of the pit.

Q You don't know whether that board was on there before you slipped in or not? A I could not tell that; it could not have walked there itself, it must have been over one corner of it.

Q So that at the time you slipped in the board must have been over one corner of the pit? A Yes, sir.

Q Do you remember everything in detail that happened just as you were hanging your hat and coat up? Did you try to step back? A No, sir.

Q What did you do? A Well, I hung my coat and hat up; when I hung my coat up, it was built so that you could put your hat on top; there was a place there to lay your hat on, on top, and I went up this way with my coat, this way, and naturally I raised up just a little, and when I came down I had no foundation and naturally I sat on the floor.

Q Do I understand you were almost on the hole? Almost on the edge of the hole? A Yes. I must have been on the edge of the hole when I went in.

Q Do you recollect having touched the board or anything when you went down? A No, sir.

Q That was two years or more ago? A It is three years ago.

Frank J. Mayes, cross.

Q It might have been possible to touch that board when you came down? A I never touched the board; I never knew there was a board or anything there until I fell in the pit.

Q You might not have known? A No. I did not know there was a board there until we seen the light afterwards. I know I did not touch no board.

10 Q You don't recall having touched any board, do you? A No, sir.

Q Might it not have been possible that you did touch that board and not know it? A No. If I touched that board I would have known it, because the board was thick enough for me to know if I touched it.

Q How thick was the board? A I suppose it was between five-eighths and seven-eighths thick; I don't know exactly what the thickness was.

20 Q You don't know that? You did not pay any particular attention to the thickness of it; you only know there was a board over the edge of it? A A small board over one edge.

Q You testified that on the 13th when you came in there you hung your hat up and you did not look to see any exhaust pit down around underneath the ladder because the men were working there? A Yes, sir.

Q But, nevertheless, you did know, then, that the men were working there, and yet on the 15th when you came in there, and do I understand that as you came in that morning and went up to the hat-rack the lights went out right then and there? A
30 The lights was out when I came in.

Q They were out when you came in? A They were out when I came in.

Q You walked right in there, dark as it was, and hung your hat up, and started to take your coat off, and yet you knew that the men were working in there on the 13th doing something, did you not? A I saw them working up top, not on the floor.

Q You saw the ladder there, didn't you? A Yes, sir.

Q Indicating that something was being done there? A Yes,
sir.

40 Q There might have been a pit a mile deep and yet you not have known the pit was there, is that not so? A Yes, sir.

Q And yet, while you realized on the 13th, when you were there last, that these men were working in there, still you came in on the 15th and in this dark where you could not see a thing

Frank J. Mayes, cross.

and you walked into this long alleyway and continued to walk up there and hung your hat up where that hat-rack was and yet you never paid any attention to see if there was anything wrong about the floor there, even though you knew the men had been working there two days before? A You could not see anything on the floor. The floor was perfectly dark, black; you could not see anything. 10

Q So that you never looked and you only say if you had looked you could not see? A It don't make any difference if I looked, I could not see anything. I always look on the floor when I am walking.

Q You are a painter; you don't always have to paint from parlor floors? A No, sir.

Q Your work is arduous at times? A Yes, sir.

Q You often work in dangerous places? A Not very often.

Q You have worked in some dangerous places? A In years past, but not of late years. 20

Q But you know when a man is sent, as a rule, to do some work, it is not always where it is entirely safe? Is that not so? A No.

Q Sometimes and most generally when painting is done, repair work of some sort has been done, is that not so? A Yes, sir.

Q So that it is up to you to use reasonable care, is it not? A I always do.

Q What you might understand to be reasonable care? A I always do; I always look and be very careful. 30

Q You went into this dark room and had never been in there before, and you could know what to expect, couldn't you? A No, sir.

Q In this particular instance, when you had been in there on the 13th, on the premises of the Splitdorf Company, aside from anything else, you saw some repair work going on something being done there with a ladder up at or near that corner where this rack was, and yet it was light there? A Yes, sir.

Q And you came in on the 15th, two days afterwards, and you found that room dark, and yet you walk along in there without thinking, without looking, or without waiting, irrespective of whatever may be there, whether dangerous or safe, is that not so? A Then after that I would hang my clothes there and 40

Frank J. Mayes, cross.

walk right back to the same place. They told me to hang my clothes there and I went back to that place to hang it on, and you could see to work on the wall, but you could not see the floor.

Q You did that as a matter of fact? A Yes, and I never expected to find a hole in the floor.

10 Q You did not look to see if there was one? A You could not see it if you did look, because I told you there was no light there. If you did look you could not see anything, it was impossible.

Q So that there might have been a very dangerous condition in there and yet you not know it? A Yes, and anybody else would in their place would have have done the same thing.

Q Would you have any reason to believe that there was anything going on at all in there, having seen the men working in there two days before, and you were not there the day previous to this, mind you, would you think there was something going on in there? A I would never think of looking on the floor for a hole, and nobody else.

Q Where would you think the hole would be, in the ceiling or the side wall? A If there is a hole in the floor it is always protected or there is some way to notify you.

Q You did not ask anyone that morning if there was a hole in there?

Mr. Rysdyk. Objected to as immaterial and irrelevant.

30

Objection overruled.

A I did not ask if there was a hole in there.

Q You being an employee of A. D. Howlett & Co., had you ever had any injuries before? A No, sir.

Q While working for your employer? A No, sir, not for him nor anybody else.

Q Did you make a report of this accident to your employer? A I did.

40

Q Did you have a conversation with your employer respecting it?

Mr. Rysdyk. Objected to.

Mr. Tippet. I am not asking what the conversation was. I just want to know if he did have.

The Court. I will allow the question.

Frank J. Mayes, cross.

Q Did you ever have a conversation with your employer about this accident? A I just simply told him over the wire of the accident; that was the day of the accident.

Q Did you ever receive any money of any sort in settlement of any injuries sustained here? A No, sir.

Q Did you ever make any claim upon your employer for compensation? 10

Mr. Rysdyk. Objected to as immaterial and irrelevant. The cases hold that the injured party is not bound to put his claim under compensation.

The Court. He is trying to prove now that he did not do it.

The Court. Did you make a claim for compensation? Have you received anything from your employer?

The Witness. No, sir, I never received a penny. 20

Q So you made no claim and have not received any money from your employer? A I never received one penny in any way, shape or form.

Q And no one promised you any money? A Nobody promised me any money.

The Court. How is it that you did not make any claim?

The Witness. The Insurance Company; it appears there are two companies here and one was trying to advise me not to do this and not to do that, and it wound up that I did not do anything, one trying to fight the other on it, and they made a whole lot of trouble— 30

Mr. Tippet. I object to any reference to that in the case. That is unfounded and I am only asking if there was compensation in order to determine if he ever received any or preferred a claim for compensation.

The Court. That will be stricken out and the jury will disregard that entirely.

Q As to when you started to work after this accident, what was the first day when you started to work and when? A Well, I don't know the exact date, as I said before. 40

Q During what month was it? A It was in January.

Q In January, 1917? A 1917, yes, sir.

Q When you started to work? A Yes, sir.

Patrick J. Hubin, direct.

Re-direct examination by Mr. Rysdyk.

Q I understand when you went down through the passageway on the 15th of November, the day that you were injured, you could see the pumps and boilers and walls? A Yes, you could see that all right.

10

PATRICK J. HUBIN, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Rysdyk.

Q Where do you reside? A At Clifton, New Jersey.

Q What is your business? A Steamfitter.

Q In November, 1916, where were you employed? A A. G. Connell & Co.

20

Q Were you doing any work on the buildings of the Splitdorf Electric Company? A Yes, sir.

Q Do you know Mr. Mayes? A I do now; I seen the gentleman the day he got hurt; that was the only time I ever seen him.

Q Do you remember the accident which happened on November 15th, 1916? A Yes, sir, I do.

Q Do you remember Mr. Mayes being injured that day? A I do, yes, sir.

30

Q Just tell the Court and jury, please, what you were doing in the Splitdorf building? A Well, I was connecting up all the steampipes there; I was getting the plant in perfect operation.

Q What do you mean by "the plant?" A The boiler house and the pump room.

Q Was the boiler house a new building? A Yes, sir.

Q And had the boilers been newly put in? A They had been moved, I suppose, into this new building, from the old plant and they were fitted in there.

Q Who attended to doing that? The Splitdorf people.

40

Q Who did the work of removing the boilers into the new plant? A That I could not say.

Q Who did the work of installing the boilers? A That I could not say.

Q You were employed by the W. G. Connell Company? A Yes, sir.

Patrick J. Hubin, direct.

Q What were you doing there that day? A Working around the various pumps, finishing up.

Q What time did you start to work there that morning? A At eight o'clock.

Q How was that room lighted? A It had electric lights, and I believe, if I am not mistaken, there was one skylight over it; of course, I have not seen the building since this thing came up and I have not seen a soul from there, and I don't know how it is; I did not know the thing was coming up until the other day I got called on it. 10

Q I show you a diagram which has been marked Exhibit P. 1 and ask you to look at it and tell us if that is generally a representation of the interior of the plant and the floor on which those boilers and pumps were located. I don't mean as to accuracy or correctness, but generally of the plant. A That is pretty near it, I should judge. 20

Q Indicate where you were working? A I was working at various places around there. I had charge of the men there; had several men working around there; around in here there is some pumps and there is a receiver in here.

Q As you enter the building? A On this side there is a partition right over here.

Q Next to the passageway leading in the back to the hat-rack? A Yes, and over this passageway there is an overhead tank, return tank, hanging on the ceiling, right in this room here.

Q In this passageway? A Yes, sir. 30

Q Where were you working? A I could not just say, I was over in here some place.

Q Did you see the man come in and go over to hang up his hat and coat? A No, I cannot say I did. The first thing I knew was the holler. The first thing I knew I heard the holler there.

Q Had you seen the man before you heard the holler? A No, sir, I did not. The lights went out previous to that, and the first thing I knew I heard the holler.

Q You say the lights went out; when was that? A Just a few minutes before that to some man hollering. Just a few minutes before Mr. Mayes' hollering. 40

Q How do you know it was Mr. Mayes hollering? A Because I seen two or three fellows running and I went over there, another gent and myself got over there and my helper—

Patrick J. Hubin, direct.

Q Over where? A Over where the corner was, over in the corner where the hollering was.

Q What did you see when you got there? A I seen Mr. Mayes and the fireman at the pit.

Q Peter Chaseries? A Yes, sir, that is the gentleman.

10 Q Who was he? A He was the fireman with the Splitdorf people.

The Court. Was that hat-rack there when you went there?

The Witness. No. I believe this tall gentleman over there put it up.

The Court. Who was he?

The Witness. Mr. Heiser.

Q What was he doing there? A He was a pipe coverer.

20 Q Who was he employed by? A The New York Asbestos.

Q Do you know how he came to put it up? A To hang clothes on. We all hung our clothes on it. I saw it was a convenient place and out of everybody's way.

Q Do you know whether the Splitdorf employees hung their clothes on there? A That I could not see; I don't think they did.

Q Mr. Chasseries, Peter, you say, was the fireman? A Yes, sir.

Q He had charge of the boilers? A Yes, sir.

30 Q How long had those pumps been in operation? A I should judge three or four weeks; I had some steam on, going up through the building, and from then we worked it through the pipes.

Q What were the boilers being used for? A For heating the main building; the new building I installed a new pipe direct, a four or five-story manufacturing building, a big building.

Q Where is that new building? A The front of the new building is on High street.

40 Q And the boilers, were they used for heating that building and that room also? A Yes, sir.

The Court thereupon adjourned until Wednesday, November 26th, at 10 o'clock A. M.

Patrick J. Hubin, direct.

SECOND DAY.

Wednesday, Nov. 26, 1919.

PATRICK J. HUBIN, recalled.

Direct examination by Mr. Rysdyk.

Q Where were you when you saw Mr. Mayes and Pete Chaseries? A Why, I heard them call and I was down there in the boiler room, around the heater. 10

Q What were you doing there? A Was working around there; can't just exactly say what I was doing; giving instructions to some of my men.

Q Was they in the end of the room where the accident happened? A No, it was in the opposite end of the room.

Q When you heard the call you went in the direction of where the noise came from, and what did you see there? A I saw the fireman, Pete Chaseries; I believe that was his name. 20

Q Who else? A Mr. Mayes was there; somebody else there, I can't remember just who it was.

Q Where did you see Mr. Mayes? A Partly out of the hole. I gave him a hand to get him out and helped pull his trousers off, and I got a can of linseed oil and poured it over his leg.

Q Which leg? A I forget now.

Q What was his condition? A Why, it was all red, very red; looked like it was just bare burn; he appeared to be suffering pain. He said it hurt a great deal. 30

Q What became of him after you gave him first aid? A A gentleman came down there; I think he was a first aid doctor, and then I went back to work; I can't say what became of him after that.

Q Do you remember seeing Mr. Mayes in there a few days before the accident? A I believe I saw him there a few days before that.

Q About how long before? A One or two days before that.

Q Did you see him do anything there that day? A Well, that I can't say, whether he done anything, but I was working on a ladder right by the pump pit; there was a lid right on this pump pit and there was somebody connected with the Splitdorf Company—their head electrician—used to come down and put these lights out once in a while. 40

Patrick J. Hubin, direct.

Q Do you know why he did that? A I suppose he got general instructions—

Mr. Tippet. I object to that and move that be stricken out.

The Court. Yes.

10

Q Did he tell you why? A No, sir.

Q Did you see him that day? A I saw him that day, yes, sir.

Q Did you ever see him working on the ladder which you have observed as being over this exhaust pit? A Yes, I did once or twice.

20

Q Now, on the day you say you were working there when Mr. Mayes came in, what were you doing? A If I am not mistaken, I was hooking up an overhead trap from the discharge of the ten or twelve-foot main that heated the five-story building.

Q You say you saw the ladder? A I was working on the ladder.

Q Anybody there with you? A My helper.

Q How did that ladder stand in regard to the pit? A Directly over the pit on a slant, right up against the wall.

Q Did you have any conversation with Mayes that day? A No, sir.

Q How long had you been working there before the day of the accident? A From the first time I started the building entirely?

30

Q Yes. A I started around there early in the spring on the main building.

Q And how long had the boilers been in operation? A I judge three or four weeks; I am not positive about that. I know they had been in operation for some time.

Q Do you know who had charge of the operating of the boilers? A Chief engineer.

Q Do you know his name? A No, sir, I do not.

40

Q What was Peter Chaserie's duty? A He was fireman and water tender, from all accounts; I think that was what he was. I know he tended the fires there and had help.

Q Who was he employed by? A Splitdorf.

Q Now, will you just describe the condition of this exhaust pit on the day of the accident? A As near as I can remember, the exhaust pit was about two feet, six inches and there was

Patrick J. Hubin, direct.

a pretty big pump right alongside of the exhaust pit. Now when these lights went out, the exhaust pit was in the dark. You could not see much of it, that is, from the shadow of this pump. Of course, a person walking in there would not see it.

The Court. What was the use of the exhaust pit?

Witness. I was making connections for them. 10

The Court. Was it being operated?

Witness. Yes.

The Court. In what way?

Witness. The returns from the heating system and the pumps; when the heating system was being operated and also the overflow, the overflow went to this pump pit.

The Court. It's part of the operation of the pump and heating plant?

Witness. Yes, sir. 20

Q Was there a pipe running down from the overhead into the exhaust pit? A Yes, sir.

Q What part of the opening did that pipe occupy? A It ran along the wall and then across the floor into about the centre of it.

Q Of the pit? A Yes, sir.

Q It did not go into the centre of the pit? A No, sir.

Q Now, was there any covering there over that pit? A There was a little piece of board. 30

Q How large was the board? A Four or five inches—six inches, I don't think over five.

Q How was that piece of board used? A Just set across catcornered from the pit; I don't know what it was used for. I seen it there.

Q What was the position of the pit in respect to the large pump? Was it behind it, directly in the centre, or near the edge? A I think it was right down near the corner of the pit.

Q I show you P. 1 and ask you to look at that and tell us whether that is a general diagram of the general condition of that room, showing the pumps? A No, the heater sets right over here; this pump extends along this way (indicating); there is a tank over here and a guard around this pump; you walk along this way. I think there was either five or six steam mains coming down overhead. This tank set right down here in this 40

Patrick J. Hubin, direct.

corner, the return tank from the overhead system throughout the other mill.

Q I thought you said this pump was right at the edge of the corner of the pit? A The pit was right in line with the pump, if I am not mistaken.

10 Q Now, was there any other light in this room except the electric light, the artificial light? A If my memory don't fail me, I think there was a skylight in the centre of that room.

Q Do you remember Mr. Mayes coming into the room that morning, the day of the accident, when he first came in? A No, I didn't see him.

Q Don't remember whether or not—when you heard the noise, some one crying out, you went and assisted Mr. Mayes out of the pit, was the electric light on or off? A It was off.

20 Q Was it off before you heard the shout? A I believe it was, yes.

Q Did you notice the light off before that morning? A No, it had been going on and off several times.

Q Had there been any trouble with the power plant there at any day just before the accident? A Well, it was going in and out all the time. They were making changes continually there.

Q Who was operating the power plant? A Splitdorf.

Q In connection with their business? A Yes, sir.

30 Q Was the Splitdorf Electric Company carrying on this business while you were working there? A Yes.

Q And on the day of the accident? A Yes, sir.

Q Your work had not all been completed, you say? A Why, all but touching up.

Q What was the work you installed? A We installed all the high and low pressure heating in the plant. The first contract was a big contract for the main building, and I was working for W. S. Connell Company, and when that contract was completed, then they gave the Splitdorf Company, from the way

40 I got it from—

Mr. Tippet. I object.

Q Not what you heard; just your own positive knowledge.
A That's my own positive knowledge. My boss gave me instructions—

Patrick J. Hubin, direct.

Mr. Tippett. I object to what instructions your boss gave to you.

Q I will frame my question different. Was the contract for the main work done by the Connell Company completed on the day of the accident? A Yes.

Q Then what were you doing there? A I was doing some extra work around the boiler room. 10

Q And from whom were you getting orders for that? A From W. S. Connell Company.

Q Anybody else? A Their Mr. Brown.

Q Who was Mr. Brown? A I believe he was maintenance manager for the Splitdorf people.

Q Did Mr. Brown give you instructions throughout the day?

Mr. Tippett. I object. His answer to your previous question was his orders came from Mr. Brown. 20

The Court. It is certainly admissible, showing that somebody connected with the Splitdorf exercised some authority here.

Q (Question repeated.) A Yes; at several times he instructed me what to do, and if there were any changes to be made he also notified me of the changes to make.

Q Was he about the premises every day? A He was right there in the building; whenever I needed him I could go and find him.

Q And did you make any changes in the work without first consulting Mr. Brown? A No, sir. 30

Q You say this was extra work you were doing? A Yes, sir.

Q And that the main contract had been completed? A Yes, sir.

Q Now this pipe that was there, extended down through the exhaust pit, was that a permanent pipe or a temporary pipe, if you remember? A You got me there.

Q You don't remember that. Well, will you just tell the jury, please, the work that you were doing there on the 15th, this extra work? A Well, now, I can't say just exactly what I was doing that day; it was regular pipefitting and steamfitting. 40

Q Did you have anything to do with covering pipes? A No, sir; I was under instructions to do what there was to be done.

Patrick J. Hubin, cross.

there, that's all. I had to look after the men's time and then I turned it in to Mr. Brown and Mr. Brown sort of kept track of it and O. K.'d it.

Q You turned it in to Mr. Brown? A Yes, he O. K.'d my time.

10 Q Do you remember the hat and coat-rack?

The Court. You spoke of that yesterday.

Q Do you know the party that—

The Court. Yes, I asked that yesterday of this witness.

Mr. Rysdyk. I believe you did, Judge.

Cross examination by Mr. Tippet.

Q Mr. Hubin, how long had you been working in this pump room previous to November 15th? A Well, that I can't exactly say. I ain't working for the same firm now—if I could locate the old books—I don't think I could; if I could I could easily decide that.

Q Could you say you had been working there for some time before that? A Yes, sir.

Q How long would you estimate you were working there after this accident? A When was that, November 15th, was it?

Q November 15th, 1916. A Well, I was up around there until December, some time.

Q Some time in December? A I think it was because I went from there up to Allwood, New Jersey, on another job.

Q Who did you say was made superintendent there? A My superior in the Connell Company was George S. Brown.

Q And you took your orders from Mr. Brown? A And also from Mr. Brown in the Splitdorf; there were two Mr. Browns.

Q How many men did you have working in there about this time? A I cannot say whether I had either two or three gangs; and a gang constitutes two men—a fitter and a helper.

Q You say you were working in another part of the building previously, on the main contract, as you term it? A Yes.

Q The main building? A Yes.

Q What work was done there? A Putting in the whole steam heating plant.

Q And this steam heating plant embraced how many buildings? A The one main building.

Patrick J. Hubin, cross.

Q And this particular boiler room is part of the main building, is it not? A No.

Q Is it not connected with the main building? A Sir?

Q Has it any connection with the main building? A Only through steampipes.

Q When was it that the steampipes were connected up by you? A Just as soon as the cold weather came on. 10

Q When was that, roughly? A Well, I can't say.

Q So it was essential then that heat be gotten in the main building? A Yes.

Q And it was essential that furnaces be started in order that heat could be sent through the main building and connections were made as soon as you could get the pipes so the connections could be made, is that so? A Well, the connections were all made just as soon as they could get the boilers; I had the work all ready. 20

Q So you just connected them up? A Yes.

Q That was about the last thing that would be done in the completion of a building? A Yes.

Q The structural parts of the building had been erected, and then, of course, you came over for the purpose of connecting the pipes so that they could have heat throughout the rest of the building, and then there were some items, such as covering pipes that were done the last thing, is that so? A Yes, sir.

Q And this temporary pipe that you speak of— A I didn't speak of any temporary pipe. 30

Q Didn't you say the pipe that ran from the ceiling into the pit? A Yes, I installed a pipe.

Q Did you install a permanent pipe around the side? A Yes, sir.

Q Do you remember when you installed that? A Well—

Q That was after this accident happened, was it not? A No.

Q I understood you to say that on November 15th, 1916, there was a pipe running from the ceiling down along the side and along into the pit. What time of the day of November 15th, 1916, was such pipe installed? A What time of the day? 40

Q Yes. A All day.

Q Did you understand that the pipe was not a temporary pipe running from the edge of the pit up to the ceiling? A I don't remember.

Q You don't remember? A No.

Patrick J. Hubin, cross.

Q Well, isn't it a fact that two days before there was a step-ladder over that pit? A Yes.

Q And were you working on it? A I was working on the ladder.

10 Q And what was being installed up there? A I was installing a trap to take the return; a return trap from the twelve-inch main that ran over to the new building.

Q Do you recall at that time having seen the pit that has been spoken of here? A Oh, yes.

Q That pit was not used at the time? A Yes, sir.

Q Now, do you recall having seen any temporary pipe at that time? A No, I do not.

Q You don't recall? A No.

Q But you do say there was a permanent pipe up there? A To the best of my knowledge there was.

20 Q Describe it, please. A A three-quarter-inch pipe, if I am not mistaken.

Q Now, is your memory positive of this; this is three years ago this thing happened? A Yes, three years exactly.

Q And there have been witnesses testify as to certain conditions; now you claim you were working there, still working there for some time in December? A I cannot say how long in December; I can't say whether I was working in December or not.

Q Irrespective of that, you were working there in November, 1916? A Not around that part of the building.

30 Q But in respect to this particular pipe, can you positively say there was not a temporary pipe that ran from the ceiling above or a pipe connected above done into the edge of the pit? A To the best of my knowledge there was not. It ran along the floor and up the side wall.

Q Well, did you have anything to do with the installation of that pipe; no or yes? A Yes.

Q Do you know when you installed that pipe? A I can't say when I did. It was before that time.

40 Q What makes you think it was before that time? A Because the thing was in operation.

Q How do you account for the fact that other people who saw that pipe there in November, 1916, say they saw it there and you say that it was not there? A I say, to the best of my knowledge, it was not there.

Q Well, you may not have observed it then, that's right?

Patrick J. Hubin, cross.

The Court. I understand he is only giving his recollection.

A Well, you can let me down on that, because I will not tell a lie for the best man living, and I will not say it was there when I am sure it was not there.

Q I understand you are not sure it was not there? A To 10
the best of my knowledge it was not there.

Q You did speak of a permanent pipe? A Yes, sir.

Q And you say you installed it? A Yes, sir.

Q There ought to be some way in which you could determine whether, in your mind, this pipe was installed two or three days before, or some particular time? A This pipe around the wall was installed before that.

Q Well, now, about the pit there; did that have a board over that? A Just a small piece of board. 20

Q Was there a cover? A There was a cover around there some place. And they were waiting for the pipes to get in to put the cover on.

Q Well, if the pipes were in— A They had waited so long, they were still waiting.

Q Who do you mean "they"? A Splitdorf people.

Q Why they? A Because they were putting the covers on.

Q Didn't you do that work? A Not putting covers on.

Q What are your duties? A My duties, as stated before, was to supervise the work. 30

Q And Mr. Brown was your foreman? A And Mr. Brown of the Splitdorf.

Q How often did you see either Mr. Brown come in there? A Sometimes he came over there when I wanted him, once in two weeks; sometimes he came over there when I did not want him.

Q When did you see him last? A That I can't say.

Q And yet you say the reason why the cover was not in there was they were waiting for pipes to be put in? A No, they were not waiting for pipes; the pipes was in; but it was up to them to put the cover on. 40

Q That's your conclusion? A That's not my conclusion; they put the rest on.

Q What rest? A There was a big long drainage running in back of the boilers.

Patrick J. Hubin, cross.

Q Did you have anything to do with that work? A Putting pipes in, yes.

Q When did you do it? A Just as the job went along that was all finished.

Q How long before this? A That I can't say.

10 Q And yet you say the board you saw— A There was a board across that, a small piece of board, yes.

Q You were working a day or so before there above that? A Yes.

Q And you say you had a step-ladder? A Yes.

Q And when did you finish the work you were doing? A I was only recovering them, it was not working properly.

Q Anybody helping you do that? A A young man by the name of Tommy Hayes.

20 Q One of your own workers? A Yes.

Q Do you know how long he was working around this pit? A All the time I was there.

Q Do you remember when you finished that bit of work? A On some time Monday; the ladder was there part of the day Monday.

Q Do you remember what you did, if anything, on Tuesday? A No.

Q Do you remember what you did, if anything, on previous work you were on there? A No.

30 Q Do you remember what you did on Wednesday? A No.

Q Or Thursday? A No.

Q So your memory is absolutely positive of what you did on Monday, but you can't remember what you did a few days since? A My memory is this: Worked around the power plant there, putting in guard rails. That has been some time ago, and I have been on a number of jobs since then and I would have a hard time memorizing all this here stuff.

40 Q Mr. Hubin, as a matter of your customary work, when you connect up pipes and finish connections, if such pipes go into pits or anything else, isn't it part of your duties to see that the job is done? A Not unless it is in our contract. If they take the general contract, they will.

Q So you claim that is not in your contract? A We had nothing to do with that whatsoever.

Q You didn't have anything to do with that? A No, sir.

Frank C. Hysler, direct.

FRANK C. HYSLER, sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Rysdyk.

Q Where do you live? A 72 Forty-first street, Corona, Long Island.

Q What is your business? A Asbestos worker. 10

Q Where were you working November 15th, 1916? A Splitdorf Electric Company in Newark.

Q What were you doing there? A Covering something on the boiler, some breaching.

Q Do you know Mr. Mayes? A I do.

Q Did you see him there that day? A I did.

Q How long had you been working there before that day? A Six or seven weeks. 20

Q Who were you employed by? A New York Asbestos Company.

Q When do you recall first seeing Mr. Mayes in the Splitdorf plant? A I believe it was Monday when he first came on the job.

Q Did he afterwards have an accident there? A He did, two days after.

Q Two days after? A Yes.

Q On the first occasion, where did you first see him? A I was up at the head of the stairs in the boiler room when Mr. Mayes came. 30

Q And is this the way you get in the boiler room? A Yes.

Q And what were you in the act of doing there? A Lowering down casing planks; this same breaching work.

Q Will you just give us a general description of what was in that boiler room?

The Court. Do you not think we have that?

Mr. Rysdyk. I withdraw that.

Q What did you see Mr. Mayes do? A Came in the building and he went in the boiler room and hung up his clothes. 40

Q Did you see him afterwards? A I worked in one end of this hallway in back of the boilers, and he was working that particular day at the other end. I was behind one boiler and he was behind the other.

Frank C. Hysler, direct.

Q Do you know how long he stayed there that day? A I went home about quarter after four and he was still there.

Q Now, you say the next time you saw him was the 15th of November? A Yes.

Q What time of the day did you first notice him there? A
10 About half-past nine, quarter to ten.

Q What were you working on? A At the same breaching.

Q Did you see Mr. Mayes come in the building? A I saw Mr. Mayes at the head of the stairs in the doorway.

Q When you went to work there how did you get in the building? A Why, I came up from the depot and walked up Market street—

Q I mean in the building, who let you in? A The man at the gate, at the driveway.

Q Who was he? A Watchman or some one there at the
20 time clock; he stops you and wants to know what you want.

Q Who was he employed by? A Splitdorf Electric Company.

Q And was he at the gate every morning? A You had to pass him to get in.

Q What did you notice Mr. Mayes do when he first came in on the day of the accident? A The first, as I said before, I saw him at the head of the stairs coming in the building; you have to come down about four or five steps; after that I could
30 no longer see him.

Q Now, did anything happen to him after he came in? A Well, about three or four minutes after I heard somebody holler, "Oh!" And then I heard the foreman holler, "Come here. come here!"

Q What did you do? A I got down; I had two step-ladders with a board and plank across; I got down off this and went in the pump room and there I saw them have Mr. Mayes on a box or chair, I don't recall which.

Q Now, what happened to him, will you describe? A They
40 had his trousers off and was just pulling his underdrawers down when I saw his leg was all red, and I figured the man must have been burned, and from the little bit I overheard, I could not stand the looks of it and I turned in the boiler room. And I saw the coal passer and he says he just pulled him out of the pump pit, he got in the boiling water.

Frank C. Hysler, direct.

Q By whom was the coal passer employed? A Splitdorf Electric Company.

Q And then Mr. Mayes was taken away after receiving treatment? A Yes, Mr. Brown of the Splitdorf and Mr. Hubin was there and several of the men and the doctor or first aid man gave him first aid down in the boiler room.

Q Who was Mr. Brown? A He was consulting engineer or maintaining engineer of the Splitdorf people. 10

Q What was he doing about the place? A He gave us all orders.

Q He gave you orders? A Yes.

Q What kind of orders? A Why, I had to go to him to find out which pipes were to be covered.

Q Now, during the time you were there, was the plant in operation? A Yes, sir.

Q By whom? A By the Splitdorf Company. 20

Q When you say Mr. Mayes came down the stairs into the room and when you heard the shout what were you doing? A I was covering something, breaching it is called.

Q Did you continue your work? A Not after he was hurt.

Q I mean just before you heard the shout, were you working then? A Yes.

Q Now, will you tell us whether the room was lighted or not? A Right about ten minutes before Mr. Mayes came in I was working on the bottom of this breach and the lights went out and I went to the other side and the lights of the boiler room to see if the lights of the boiler room would let me work and there was no electric lights. 30

Q Do you know whether or not the room was lighted after you heard the shout? A Lights were out.

Q The lights were out? A Yes.

Q And had the lights been on between the time you had stopped work just before he came in and the time of the accident? A No, sir.

Q Had the lights been out some time? A Positively ten or fifteen minutes.

Q How were these lights operated, Mr. Hysler? A As far as I know, from a switchboard in the engine room. 40

Q Do you know that? A I do.

Q And where is the switchboard in that engine room? A In that engine room.

Frank C. Hysler, direct.

Q In that engine room? A In that engine room.

Q Will you just describe, please, the passage where the exhaust pipe is located? A Yes, you go downstairs into the boiler room and you turn to your left into the door where the pump room is. You walk about two feet and turn to the right, and there's the passage which comes this way, and right on the
10 wall is the fire pump, and on the left-hand right by the fire pump is the situation of this pit.

Q Right around the corner of the pump? A Right at the end of the pump. On the side of it.

Q What was, on that day, the condition of the light in location of the pit? A Well, hardly any light there at all when the lights went out.

Q Could you see with no electric lights? A You could distinguish what was overhead and side of it.

Q Now, is there any natural light in that room? A There
20 is a skylight; I don't exactly know whether it is in the center of the room or toward one end; very near the centre, in the roof of this room.

Q And was a person able to walk about the passageways and observe the condition without the electric lights? A No, sir.

Q How wide was this pit? A Oh, about two foot; two foot, six inches.

Q And how deep? A That I don't know.

Q Was there any cover over it? A Not to my knowledge.

Q Did you ever see any covering there belonging to it? A
30 No, sir, not up to the time of the accident.

Q Did you ever see a piece of board used as a covering? A There was a board for it this day, I believe.

Q What kind of a board? A Board probably four or five feet long, five or six inches wide.

Q Where was that? A Laying over this hole.

Q What part of the hole? A Why, it lay slanting, cate-
cornered.

Q And how far was the hole from where the hat-rack was
40 located? A The hat-rack was right at the side wall; I should judge about two feet, I suppose, between the location of the hat-rack and the hole.

Q And what was the width of the passage where this large pump and the space where the hat-rack was? A About four or five or six feet.

Frank C. Hysler, direct.

Q And do you know who put up that hat-rack? A I did.

Q And what was it used for? A Well, for whatever workmen were on the job, to hang their clothes on.

Q Well, did anybody help you put it up? A My helper.

Q Anybody else? A Not to my knowledge.

Q Now, was that hat-rack afterwards taken away? A After? 10

Q Yes, after the accident? A No, it was there up until the time I left the job.

Q When did you leave the job? A The first day of January, 1917.

Q The first day of January, 1917? A Yes, sir.

Q Did you ever see the chief engineer of the Splitdorf Company around this rack? A Yes.

Q How often did he make tours of the place? A Four or five times a day or more. 20

Q And how often did you see Mr. Brown of the Splitdorf Company there? A Oh, Mr. Brown would come when they sent somebody after him, and often he would come in of his own free will and see how we were getting on.

Q And I believe you testified you took orders from him? A Yes, sir.

Q Now, were you working on the main contract for this asbestos work or not? A I was working on extra work; I had nothing to do with the main building whatsoever; all I done was the boiler room and work in the old places; nothing in the new building whatsoever. 30

No cross examination.

FRANK C. HYSLER, recalled.

Further direct examination by Mr. Rysdyk.

Q Mr. Hysler, you say you put the hat-rack there? A Yes.

Q Did you receive any orders from any one about it? A It is customary—

Q No, did you get any orders? A No. 40

Q Anybody tell you where to put it? A I asked Mr. Peter, the foreman, I don't know his last name, where I could find a place to put my tools and clothes, and he told me that end of the pump room I would interfere with his work, so I used the other end.

Frances Mayes, direct.

FRANCES MAYES, sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Rysdyk.

Q Mrs. Mayes, you are the wife of the plaintiff? A Yes.

10 Q Do you remember the day of the accident that your husband received injuries while employed at the Splitdorf Company? A Yes, the 16th.

Q Did you see him that evening? A Yes.

Q Where? A Well, he came in, a man had brought him home in an automobile.

Q What time? A I think three or four o'clock; I don't remember.

20 Q What was his condition when you first saw him? A He was hollering with pain and all like that, and then I tried to get off his pants and put him to bed.

Q Did you put him to bed? A Yes.

Q What did you do? A I telephoned the doctor.

Q And did the doctor come? A Yes.

Q Doctor Zabriskie? A Yes.

Q And he attended him? A Yes.

Q Now just describe, will you please, his condition that night after you got him to bed? A Well, he was hollering with pain and he did not sleep all night.

Q And did you see his leg? A Not that night, I didn't.

30 Q Was his leg bandaged when he returned home? A It was bandaged until the next day.

Q What was the condition of it? A It was all red and then it blistered all up like in big blisters.

Q And did you notice anything peculiar, anything else with his leg outside of being red? A Yes, afterwards, the doctor was to fix it every day, and then it came like corruption from his leg and blisters; some was very deep.

Q How long did he stay in bed? A Well, I don't know how long he stayed in bed. He was up and down and I used to find him on the chair.

40 Q How long did he have to lie in bed? A With his foot bolstered.

Q Could he help himself getting about the room? A No.

Q How did he get from the bed to the chair? A Well, I had to get the bed right here and the chair here (indicating),

Frances Mayes, direct.

and then we used to get a cot bed shoved out for him like, and then I would put him on the cot bed and then he would lay this way on the cot bed here, and then when he got on the cot bed I took his foot and put him in bed.

Q How long did the doctor continue coming to see him? A Quite a while; I could not exactly say how long; I know it was quite a while. 10

Q You heard the doctor testify here yesterday? A Yes, but I did not take much notice.

Q Yesterday the doctor testified he saw him thirty-five times. A Yes.

Q Do you think he saw him as many times as that? A Oh, yes; he did.

Q Did the doctor bandage his leg all this time? A Oh, the doctor bandaged his leg and told me to get water, and he could not put his leg on the floor. 20

Q How long was it before he could bear his leg on the floor? A It was quite a time before he could do that.

Q Can you give us the time? A I could not tell you the time; I know it was quite a time.

Q Do you know when he went to work? A Yes; March, I think it was.

Q Did he do any work at all between November and March? A I think January he went out and tried to work, but could not stand the pain of his leg. 30

Q And then he did not start to work until March? A Yes.

Q What was his condition, Mrs. Mayes, during the time he was home, as the result of the injury? A Oh, well, he was always hollering with it, his leg hurt, and if the doctor would treat it, why, he would suffer, and I would have to hold the chair; the doctor would come at four o'clock, and he would be that way until eight o'clock or nine o'clock.

Q After the doctor was there he was worse? A Yes.

Q In what respect? A He would say the pain was so bad and he was suffering. 40

Q Did he sleep? A Well, some nights he would not sleep at all, and some nights a little bit, because he could not have the covers on; it would hurt him, the pressing of them.

Peter J. Chakeris, direct.

Q And did he complain of pain all that time? A Yes; he complained of pain.

No cross examination.

PLAINTIFF RESTS.

10

(At this point a deposition of a witness was read.)

Testimony of Peter J. Chakeris, taken November 25, 1919, by James J. Murner, Paterson, New Jersey, *in re* Frank Mayes *vs.* Splitdorf Electrical Company.

PETER J. CHAKERIS, after being duly sworn, testified as follows:

Direct examination by William N. Rysdyk.

20

Q Where do you live? A 180 Bank street, Newark.

Q Do you know the plaintiff in this case, Mr. Mayes? A Yes, sir.

Q How long have you known him? A Three years.

Q Where are you employed? A At Port Newark, in the shipyard; just for today, you know; not tomorrow.

Q Were you employed by the Splitdorf Electrical Company at Newark, New Jersey, in November, 1916? A Yes, sir.

Q How long had you been working there? A About three months.

30

Q What doing? A Firing the boilers; getting up steam. I was a fireman.

Q What kind of a fireman? A Well, stationary fireman.

Q You had charge of that branch of the work, did you not? A I had charge of the boilers.

Q You were the head fireman, is that so? A Yes, sir. Of course, there was the head man, John Ferrot.

Q Who was he employed by? A Splitdorf.

Q And you were employed by Splitdorf Electrical Company? A Yes, sir.

40

Q Who was John Ferrot? What was he? A He was the chief engineer.

Q And he was in November, 1916? A Yes, sir.

Q Who did you take your orders from? A John Ferrot.

Q Where were these boilers that you say you were firing? A Down in the cellar like.

Peter J. Chakeris, direct.

Q You mean below the ground? A Yes, sir.

Q How long had they been there? A About two months before the day of the accident.

Q Do you remember when Mr. Mayes was hurt? A Yes, sir.

Q And you say that these boilers had been in this room below on the lower floor for about two months? A Yes, sir. 10

Q Had they been in use? A Yes, sir. We used them to get steam up.

Q Who do you mean by we? A The company used the boilers.

Q What company? A Splitdorf.

Q What for? A Keep steam up for the buildings, for the heaters for that building.

Q Did the company have a power-house? A No, we get power from the Public Service. 20

Q I mean your lighting power. A Yes, from the Public Service.

Q You purchased the current from the Public Service, and what did you do with it? How were the buildings lighted? A By four generators, breakers; you know what I mean.

Q You mean by switchboards? A Yes, sir.

Q Where were they? A Behind the boilers.

Q In the same building? A Exactly; not exactly the same for the boiler-room, in the building behind. 30

Q They were in the Splitdorf building? A Yes, sir.

Q That is where the light was sent from? A Yes, sir.

Q And the lights in the room in which the boilers and pumps were are lighted from those breakers in the adjoining building?

A Yes, sir.

Q Do you remember seeing Mr. Mayes there on November 15?

A Yes, sir.

Q Had you seen him before that? A Yes, the day before.

Q How long? A The day before.

Q What was he doing there? A He was a painter. 40

Q Where was he painting? What part? A Well, behind, on top of the boilers, covering some holes for the stack, and on the wall.

Q Which wall? A The wall in back of the boilers.

Q Which street did that wall face on? A Warren street.

Peter J. Chakeris, direct.

Q How long did he work there? A He was working the first day, eight hours; nine or ten hours; I don't know; I can't exactly remember.

Q Do you remember seeing him? A Yes, sir.

Q You next saw him a day or two afterwards? A Yes, sir.

10 Q What time did you see him first on November 15th, 1916?

A Ten o'clock.

Q Where? A He came down the stairs.

Q I show you a diagram marked P. 1, and ask you to look at it. Does that show the location and situation of the room in which the boilers and pumps were located? A Exactly.

Q Just indicate where you first saw Mr. Mayes. A (Pointing to diagram.) I saw him come down the stairway. I was firing the boiler at the bottom of the stairs and he came down and said good morning.

20

Q What did you say? A I said, good morning.

Q Did he say anything else? A Yes; he said, "is there any place to hang my coat?"

Q Anything else? A He came down the stairs and walked through the door (indicating on diagram), and passed the three pumps, and, he says, where is the hanger, and he walked on through here (indicating), where there is a skylight, on this side, and the light flashed down to here (indicating), and here there is a big pump. You can see the hole half way up, and he walked and you could see the hanger, and never thinking of the hole, and he fell in the hole.

30

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

Q How do you know he fell? A He hollered.

Q Who hollered? A My helper.

Q What was your helper's name? A I think his name is Farma.

Q Where is he? A I don't know; I think he has gone to Italy.

Q How long has he been in Italy? A I don't know.

40

Q When you heard him holler, you went around, did you? A Yes, sir. We brought him around here.

Q Who did? A Well, Pat and the other fellow.

Q Who is Pat? A He is the pipe fitter, Patrick Hubin. We pulled out his pants and dried him up, and I put them behind the boiler to dry, and at the same time the doctor came down

Peter J. Chakeris, direct.

and put some things on him and wrapped him up, and Mr. Brown came down.

Q Who is Mr. Brown? What was Mr. Brown's business? A He was boss for the maintenance department of the Splitdorf Company. He take him up and take the man up and wrap his foot up; take him in automobile and take him away.

Q That is the last you saw Mr. Mayes? A Yes. When he went away he say good bye, and I say good bye; I hope you be good.

Q Before the day of the accident, was there an opening in the floor near the large pump? This hole was open (indicating on diagram)? A Yes, sir.

Q Where was that opening? A Not here between the large pump—a little bit further around the corner.

Q You could not see it when you come around? A No, sir.

Q You say the hole or pit was in back of the large pump? A Yes, sir. About the center of the rear side of the large pump.

Q And in the passageway, between the pump and where the hat-rack was? A Yes, sir.

Q How large was the hole? A About three feet square; maybe seven feet deep, or maybe three or four feet deep.

Q About how wide? A About three feet wide.

Q What was that used for? A For the returns to come down; the returns of water of the boilers; you know, when the heater overflows the water comes down to the exhaust, and there it goes into pipe, out into the ground.

Q That hole has always been there? A Yes, sir.

Q How long before that day? A A couple of weeks.

Q Was the pump working? A Yes, sir.

Q On the fifteenth? A Yes, sir.

Q How long had that been working? A About a month.

Q And they were using heat in the adjoining buildings and the boiler-room? A Yes, sir.

Q Was there any cover over the hole? A No, sir. We have a board; just a little narrow board.

Q You mean just like the top of this panel in front of you? A Yes, sir.

Q How wide was it? A About three or four inches wide.

Q Where was that kept? A Kept right in the middle.

Q Was there any other cover or boards used over that pit? A No, sir.

Peter J. Chakeris, direct.

Q Did you not have any others? A No.

Q Was there any made? A No, sir.

Q Did you ever see any cover for that pit? A Yes, sir. We have a big plate behind the boiler.

10 Q What was that plate for? A For this hole. Still it was too large for the hole.

Q How long had that been there before the day of the accident? A I don't know

Q More than a day? A Yes, sir; maybe a week.

Q And never had been put on? A No, sir.

Q When Mr. Mayes came in that morning, did you notice anything about the lights? A They were out.

Q How long had they been out? A A couple of minutes.

20 Q Did the lights go out before or after you spoke to him? A About the same time.

Q When? It was when he asked me where the hanger was that the lights went out and it was very dark where he was and you could not see. He walked through and I did not tell him to look for the hole and he fell down.

Q Was it light enough to see the hole? A No, sir.

Q How long was the light out? A About three minutes.

Q When were they turned on, before or after he was pulled out of the hole? They were out when you heard the shout? A Yes, sir.

30 Q The lights were off? A Yes, sir.

Q When was the lights turned on? A After he got out of the hole.

Q Did you notice whether the lights had been out before that day or not? A Once in a while they go out.

Q Was it often or now and then? A Sometimes every two or three minutes, sometimes five minutes.

Q Once a day? A Three or four times a day.

Q What was the matter with them? A I don't know; something the matter with the switchboard.

40 Q You do know the lights were out from time to time and sometimes for a minute and two or three minutes? A Yes, sir.

Q Did you ever talk to anybody about that pit? A The exhaust pit? Before that I told the chief to put a cover on and he told me he would put a cover on, and he put it on after the man was hurt.

Peter J. Chakeris, cross.

Q How often was he in the room? A Well, he was the manager; he came in sometimes every ten minutes or every hour.

Q How long before the day of the accident was it that you and he were talking about the pit? A A week, maybe a week and a half, I told him about it.

Q What did you say to him.

10

At this point Mr. Tippet objected to this line of questioning as to any conversation he had with anyone in which this witness was engaged as to what he said to them or they said to him. I object to his testimony as to any conversation he had with an official or employee of this company.

A He says we are going to fix it pretty soon; that is all he say.

Q Did he tell you how? A He says we are going to fix it. I don't know how he would fix it.

20

Q Was there anything done towards fixing it from the time you spoke to him about it and the day of the accident? A No, sir, not at all.

That is all.

Cross examination by Mr. Tippet.

Q Peter, you were employed as a fireman? A Yes, sir.

Q Your job was to fire the furnaces? A Yes, sir. Keep steam up.

Q Keep the steam up from the furnaces to the main part of the new building? A Yes, sir.

30

Q The contractors were working in there making a new boiler room? A Yes, sir.

Q And they had been working there for some time? A Yes, sir.

Q And at the time of the accident the contractors were still working in there? A To tell you the truth, they were finished with the concrete work. There was some men, pipe coverers, that was all.

Q That was in November, 1916? A The accident, yes, sir.

40

Q The accident happened November 15, 1916.

Q In order that heat could be run through the main building, it was necessary to start the furnaces? A Yes, sir; the steam goes through the heaters.

Peter J. Chakeris, cross.

Q Your job was to keep the heaters going? A Yes, sir; look after the water and anything like that in case of fire I can start the pumps right there and keep water up.

Q The plumbing work was being finished in there, wasn't it? A Yes, sir.

10 Q It wasn't entirely finished at this time, I mean November 15, 1916? They were still working? A Some little jobs, yes, sir.

Q Well, some of the work was being finished? A Yes, sir.

Q Did they have a pipe running from above right down into this little pit? A Yes, sir.

Q Was that a permanent pipe? Or was it a temporary pipe? A Temporary pipe. It run from the ceiling to the center of the pit.

Q That is the reason why they could not put the cover on, isn't it? A Yes, sir.

20 Q They could not put the cover on because the pipe ran into the center of the pit? A Yes, sir.

Q The contractors after they had finished put the pipe on the side? A Yes, sir. The man who was on before me could tell you; he knows better than me.

Q If there was a cover it wasn't on there this particular day, the day of the accident? A No, sir.

Q The regular cover that did go on? A No, sir, just a very narrow board.

30 Q Well, a wide board? A No, if I had a wide board the man would not fall.

Q You had a board across? A Just a very narrow board. It was just a little board.

Mr. Tippett objected to anything which the witness might volunteer not responsive to his questions.

Q What time did you come to work? A Six o'clock until six at night—twelve hours.

40 Q What time did the pipefitters come in? A I don't know, about eight o'clock, I guess. Eight or nine o'clock. I can't remember.

Q What time was it on the 15th of November that this man came in, about ten o'clock? A Yes, sir.

Q Mr. Mayes said good morning to you and then he walked in toward where your hat-rack was? A Yes, sir.

Peter J. Chakeris, cross.

Q The lights had just gone out when Mr. Mayes spoke to you? A Yes, sir. They were out about a minute before he spoke to me.

Q Then he walked in along the passageway? A Yes, sir.

Q The next thing you heard was someone yell? A Yes, sir.

Q Who was it that yelled? Was it Mr. Mayes you heard yell or someone else? A My helper and Mr. Mayes were shouting and my helper pick him up and bring him around in the light. 10

Q When you found Mr. Mayes was he standing up? A No, sir.

Q Did you help him out of the pit? A No, sir. There was three men holding him up.

Q Here near the entrance? A Yes, sir.

Q They had already gotten him out of the pit? A Yes, sir.

Q They carried him down like that (indicating with his arms)? A Yes, sir. Then I pulled his pants off, then we get the light. 20

Q He was walking at this time? A No. They were holding him up; three men.

Q You are able to sign your name? A Yes, sir.

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

Q I ask the stenographer to mark that P. 2, for identification and for evidence as being his statement signed in the presence of a witness under date of December 17, 1918.

Q Do you remember when you signed your name? A Yes, sir. They called me in the office. 30

Q This paper was signed by you? A Yes, sir.

Q Mr. Caneer asked you to come up to the office? A Yes, sir.

Mr. Rysdyk objected to the admission of the statement as being immaterial, irrelevant and incompetent.

Q Do you recall having had that paper read to you? A Yes, sir. But I don't remember what was put down there.

Mr. Tippet. Well, I will read it to you. 40

Mr. Tippet reading:

"I, Peter Zackross, residing at 118 Bank street, Newark, New Jersey, state that on November 15, 1916, I was employed by the Splitdorf Electrical Company at their

Peter J. Chakeris, cross.

101 plant in Newark, New Jersey, as a fireman firing boilers. I remember a man named Frank Mayes being injured in November 15, 1916. The circumstances as I recall them are that I was working in the boiler room, next to the pump room, about eight o'clock in the morning, firing boilers. My helper, an Italian, named Farma, came into the boiler room and told me that a painter had fallen into the hot water pit used for overflow return from the heating system. The helper and I ran into the pump room and found Mayes standing and walking around near the pit."

(Chakeris interposing.) No, he was not walking around. He could not speak. He was not walking; they were holding him up and we tried the best we could to take him around to the boilers.

202 (Tippett continuing reading):

"I helped take off his overalls."

(Chakeris interposing.) Yes, I said pants, but I meant overalls; we call them pants.

Tippett continuing:

303 "The first aid man from the plant came down and we put linseed oil on his right leg. His skin on his right leg appeared red. The first aid man and Mr. John Brown, the plant engineer, took him away. He was able to walk all right."

(Chakeris interposing.) Yes, sir, they take him up easy, though, and you know he felt better getting outside; it was getting cold around his legs.

Mr. Tippett. He walked up the ladder?

A They hold him up by the arms.

Q So as to relieve his leg? A Yes, sir.

Mr. Tippett. Do you recall this:

40 "I remember putting my hand in the water at that time to see how hot it was and the water was hot, but not boiling in any way."

Witness. Well, no, I want to tell the truth; now, you know I put my finger in and it was hot; it was over two hundred degrees.

Peter J. Chakeris, cross.

Q How do you figure the water was two hundred degrees? A We have a thermometer by the heater you can see when you go down.

Q Isn't it a fact that when the water is too hot it does not go through the heaters? A The water never goes out unless we pump it up.

Q That pit is the pit known as the exhaust pit that contains the water from the overflow of the heaters when they overflow?

A We open an injector and it is pumped into a sewer.

Mr. Tippet continuing reading:

"I had seen this painter Mayes painting in this pump room for about two days before this accident, and as I remember he had been painting the green borders along the lower part of the wall. Some painters had painted the side walls white before this."

Chakeris. It was one day.

Tippet. Well, he came in Monday or Tuesday.

Tippet continuing reading:

"For some time before this accident happened the pipefitters who were employed by Connell steamfitting contractors had been working in this room and were working there at the time of this accident, connecting and covering the pipes in this room; they were covering all the pipes. There were about three pipe fitters there at that time working. They had boards of tressels and were working on the overhead pipes. The pit which Mayes stepped into is about two foot square and located in the rear of the room.

At that time there was a temporary pipe which ran from the ceiling down into the center of the pit, and at the time there was no cover on the pit, as the pipe ran down from top of ceiling to the center of pit and the contractors had not supplied any cover for the pit."

Chakeris (interposing). I don't know who didn't supply it. I can't tell that I wasn't the boss.

Tippet continuing reading:

"Before the accident the workmen in the room had put a board across the pit, but someone had removed it."

Chakeris. Yes, a nice little narrow board. After we put large boards, after the accident.

Peter J. Chakeris, cross.

Tippett continuing reading:

“Right after the accident happened the contractors removed the temporary pipe leading to the pit, and ran a pipe down the side of the wall along the floor and into the pit. I remember they did this the same day and also placed on the pit an iron cover which is still in use.

10

In the corner near the pit the workmen had placed a board with nails on it, which they used to hang their clothes on. After this accident the contractor's workmen took this board down and put it in the boiler room next to the pump room.

Chakeris (interposing). We take them out of there and put them in the boiler room.

Tippett. Who do you mean by we?

20

A Me and the pipefitters.

Q You did not take the board down yourself? The hat-rack, did you? A When the accident happened one pipefitter and me we take the board down and put it in the back of the boiler so we would not fall down ourselves.

Tippett continuing reading:

“After this accident the pipefitters were still working in this room for over a month. I recollect the painters were in there for about a week finishing the room.

30

There were no Splitdorf men working in the pump room except my helper, Forma, who was cleaning the air compressor which was connected up with the boiler, but was not in use.

On the morning of this accident I came to work at my usual time, six o'clock in the morning. The steamfitters came in around seven o'clock A. M. and the painter Mayes about eight o'clock. He had just come in and started to change his clothes to begin to work when he stepped evidently backwards into the pit.

40

The ceiling lights in the room were installed, but were not lighted, as there was a skylight in the center of the roof although anyone could see the pit if they looked and there was enough light for that.”

Chakeris. Oh, no, that is wrong, I didn't say that.

Peter J. Chakeris, cross.

Tippett continuing reading:

“The following week after this accident happened a man, stating he was a brother of Mayes, who had a lawyer with him, asked me if I could meet him and I did meet him at the corner of Broad and Market Street, Newark, N. J. They had a paper which they wanted me to sign and I refused to sign it. I haven’t seen Frank Mayes since the accident, nor his brother since I met him at Broad and Market Street. 10

I am now employed at the Submarine Boat Corporation, Port Newark, N. J., as first class machinist.

This statement has been read to me in the presence of T. H. Kinnear of the Splitdorf Electrical Company and it is exactly as I have stated to him as to all the facts and—as my understanding and recollection is of the facts and circumstances. 20

I certify that everything herein stated is true and I have signed my name to it, on the 17th day of December, 1918.

(Signed) Peter Zachiroes.

In presence of:

T. H. Kinnear, Witness.”

Tippett. The facts in that statement are substantially what you have testified to? 30

Chakeris. I would not say that he could see the hole.

Tippett. You did say it, but you are changing your statement now.

Chakeris. No. I don’t know what he put down. Maybe I talk too fast and he misunderstand. The lights were out and no one could see the hole.

Q Why was it you left the Splitdorf Company? A I forget just why.

Q What for? A I get better job, more money. I give week notice to Mr. Ferrot. I leave just as good like any man go in and out without any trouble. I worked there two years. Any man finds more money he go ahead. I worked for twenty-five dollars and I went down and made sixty dollars a week; that is the reason I leave. 40

Peter J. Chakeris, cross.

Tippett. I think that is all.

10 *Rysdyk.* In your statement which Mr. Tippett has read from you you say the ceiling lights in the room were installed but were not lit as there was a sky light in the center of the room, although anyone could see the pit if they looked and there was enough light for that, is that what you said?

A No, sir. I can't remember very well. But if you put the lights out you can't see the hole. No man can see the hole.

Q The light that came in from the skylight was not sufficient to show where the hole was? A No, sir.

Q You put up the hat-rack? A We put it up for the pipefitters.

Q Who, did you? A Yes. I hang my clothes there. I hang my overcoat there.

20 Q Did you help build the hat-rack? A We put it there, yes; me and my helper built it.

Q What did you and he do about it? A We put across four boards and put nails through to keep clothes on.

Q Afterwards that was taken down? A We take him down after accident.

Q Who? A I and two pipefitters move them in the back.

Q How long was it? A Seven or eight nails in it. Across you know (indicating). Little narrow board about two inches.

30 Q Who put the board over the pit? A Well, I don't know who put it on, still it was on and exactly I don't know who put it on.

Q Was it taken off now and then? A Yes.

Q Was it taken off or was it necessary to take it off during the day and put it back on again? A No, sir; always kept it there.

Q Did you ever have anything to do with putting it on the hole? A No, sir.

Q Never? A When I see it off I put it on.

Q How often? A Well, someone might knock it off.

40 Q Did you put it on at any time? A Yes, sir.

Mr. Tippett.

Q You spoke of your putting the board on? A Yes, sir.

Q You didn't have anything to do with putting it on first, did you? A I move it many times.

Motion for Non-suit.

Q You did not put the board on there the first time yourself?

A No, sir.

Q You said you and the other workmen in there put up this hat-rack? A Yes, sir.

Q For the convenience of yourself as well as anyone else? A The reason why we put that there the pipefitters worked in the other room and we wanted to keep the clothes clean and after the accident we took the rack back again. 10

Q The pipefitters were a party to putting that board in there? A Yes, sir.

Q They were the men working in there? A Yes, sir.

Q It was so they could have a place to hang their clothes on? A Yes, sir. So did we.

Q Don't you have a rack, a place outside for your things? A No, sir. 20

Q Didn't you ever have one? A After the accident we did but not before that.

Q Didn't you have lockers? A Not then; the building was being made and they did not bring them down yet.

Q The men were working in there? A Yes, sir.

Q The room wasn't finished? A No, sir.

Q After a month or so this work was finished? A Yes, sir.

Q The workmen finished? A Yes, sir. The pipefitters worked ten weeks; not the painter; he worked for a week or so.

Q You mean finishing the painting this man didn't do? A Yes, sir. 30

Tippett. That is all.

Rysdyk. One question.

Q When was it first decided to move the hat-rack away? A After the man was hurt.

Q Who attended to that? A We do that.

Q Who? A I did.

Q You did it, did you? A Me and pipefitter and helper; we all go and do it. 40

That is all.

Mr. Tippett. If your Honor please, I desire to make a motion at this time on the question of non-suit for various reasons:

Motion for Non-suit.

In the first place, I wish to call attention to the allegation of complaint in which there are contractual relations alleged in which the Splitdorf Electric Company are contended and claimed to have been participants, that they entered into a contract with A .D. Howlett & Co., and they have not proved the allegation contained therein.

10

The Court. That seems to be so.

Mr. Tippett. Then continuing, in the second allegation—

The Court. No use reading all this.

Mr. Rysdyk. I ask leave at this time to amend allegation whereby it is alleged that there was a contract between the A. D. Howlett Co. and the Splitdorf Company, and amend my complaint by joining them together.

20

Mr. Tippett. I object to the amendment at this time because it is too late; such amendment should be made before putting in your case. That would set forth a different cause of action, which is not set forth in your complaint.

The Court. I understand now you want to allege now that the Splitdorf Company has no control of the premises?

Mr. Rysdyk. Yes.

The Court. I allow the amendment.

30

Mr. Tippett. May I have an exception?

The Court. Yes.

Mr. Tippett. The plaintiff has failed to prove that the defendants, Splitdorf Electric Company or Splitdorf Electric Sales Company were there or either of them.

The Court. The Sales Company has not been mentioned at all.

Mr. Rysdyk. The Splitdorf Electrical Sales Company of New York, a non-suit suit will be granted as to that company.

40

Mr. Tippett. Now as to the Splitdorf Electric Company, I contend that the plaintiff has failed to show any duty in which the Splitdorf Company has failed. I contend that the plaintiff has failed to show that the Splitdorf Company has failed in any duty; that this man was

Paul J. Landemare, direct.

in the employ of the sub-contractor; that while they were the owner of the premises, the work of this factory building had not been completed. I am not disputed in any way that this building was in course of construction and that it was being completed under their contract.

The Court. As to that, the jury might infer from this stage of the case that the defendant company was exercising some control there because they had a foreman who was giving orders. 10

Mr. Tippet. I appreciate the fact there were some elements which would indicate some control insofar as these elements go. In some parts of the premises they had apparent control.

The Court. I think it is a jury question.

Mr. Tippet. If your Honor feels it is a jury question with respect to that point, of course, it is essential for me to proceed, and put in my defense. 20

The Court. Yes, I do; I will overrule your motion and allow you an exception.

PAUL J. LANDEMARE, sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Tippet.

Q Mr. Landemare, you are connected with the Splitdorf Electric Company? A Yes. 30

Q And in what capacity? A Treasurer.

Q You are treasurer of the Splitdorf Electric Company? A Yes.

Q You have been with the Splitdorf Electric Company how long? A Since 1912.

Q Now, during 1916 or thereabouts, what work, if anything, was being done in or about the premises of the Splitdorf Electric Company? A A new factory building and boiler house was being erected. Six-story building. 40

Q And who was doing that work? A American Concrete and Steel Company.

Q In what manner was that work being done by them? A Under contract.

Paul J. Landemare, direct.

Q I show you a paper and ask you if that purports to be the contract between your company and the American Concrete Steel Company? A That is the Splitdorf's copy of the original contract between the Splitdorf and the American Concrete Steel Company.

10: *Mr. Rysdyk.* I object to that as immaterial, irrelevant and incompetent and for the reason that any contract that may have been made for the performance of any part of the work in these premises between the American Concrete Steel Company and the Splitdorf Company cannot be binding upon this plaintiff.

The Court. Of course, not. But your contention is that they were in control of these premises?

20: *Mr. Tippet.* Yes. This is for the purpose of showing that control was given somebody else.

(Exception allowed.)

Q Mr. Landemare, the first of this agreement which you have spoken of is the contract between your company and the American Concrete Steel Company for the erection and completion of a factory and manufacturing building, is that not correct? A Yes.

30: Q I show you a further instrument and ask you what that is? A This is the original contract between the Splitdorf Electric Company and the American Concrete Steel Company to install and put in the building to be erected all plumbing and electrical work in connection with the new building.

Q I will read this contract in brief.

Mr. Rysdyk. I object.

The Court. Objection sustained.

Mr. Tippet. As to the second contract?

Mr. Rysdyk. I make the same objection to that.

The Court. Same ruling.

40: *Mr. Tippet.* The first contract is as to the erection and completion of a factory building, dated March 1st, 1916. Now the second contract referred to is a contract between the Splitdorf Electric Company and the American Concrete Steel Company dated May 20th, 1916, and in article one provides as follows:—

Paul J. Landemare, direct.

The Court. Your point is, Mr. Tippet, that these contracts were given to this contractor to erect the building and that put them in possession and that there is a clause in this contract that they failed to live up to.

Mr. Tippet. That's correct.

The Court. Anything else you want to point out? 10

Mr. Tippet. Yes, in the first part of the contract there it provides that the mason and plumber perform all work for the erection and completion of a boiler house as shown on the drawings. That in article two it is expressly provided in this contract for the erection and completion of the boiler house and that the contractor will also install in the building to be erected by it all of the plumbing and electrical work in accordance with complete plans and specifications to be furnished by contractor. There is further provided in this contract as in the other contract that in the event of failure of the contractor to perform— 20

The Court. I just called attention to that.

Mr. Tippet. And that final payment shall be made within thirty days after completion of the work covered under this contract and all payments made by it when certificates for same are issued; and it is further agreed if any certificate shall be given all payments made under this contract, except the final payment, shall be evidence of the performance of this contract, either wholly or in part; so that under this contract, under these two contracts we contend that the Splitdorf Electric Company had a general contractor doing the work and in charge of the work, and until such contract is consummated in accordance with these terms, that the Splitdorf Electric Company had no control over such premises. 30

The Court. Mr. Rysdyk's point is that even if that was so, yet they did take possession before it was completed or it had been completed. 40

Q Now, Mr. Landemare, I show you a piece of paper and ask you what that is? A This is the original receipt showing final payment by the Splitdorf Electric Company on the power house.

Paul J. Landemare, direct.

Q And will you tell us the date of that? A December 19, 1916.

Q I show you another paper and ask you what that is? A That's a receipt given the Splitdorf Electric Company for final payment for the main or manufacturing building dated May 21st, 1917.

10 *Mr. Tippet.* I offer these in evidence, your Honor.

Mr. Rysdyk. I make the same objection.

The Court. I think they are evidential.

Q Mr. Landemare, at the time the new building was being erected and completed by the contractor, your company was still doing business over there, was it not? A Yes.

Q Did you have other buildings in which you were engaged? A A number of other buildings. The new building was in addition.

20 Q And as soon as the new building was completed, your company moved in gradually? Do you understand? A Yes; with the contractor's permission.

Q So that the contractors furnished the work as expeditiously as they could? A Yes, I believe they rushed the erection as much as they could.

Q And as far as you know, your company exercised no interest or supervision over the work being done there by the contractor? A Certainly, not myself, personally, and I don't know anybody else of the company did.

30 Q Mr. Landemare, I show you a further pamphlet and ask you what that is? A These are specifications for the building prepared by Monks and Jacobson, architects.

Q What do these specifications cover? A Plumbing.

Q I show you another pamphlet and I ask you what that is? A That's the specification prepared by Monks and Jacobson covering the manufacturing building of the plant.

Q And it is under such specification that the contractors did the work, is that your understanding? A Yes, the American Concrete Steel Company, did the work.

The following were offered and received in evidence and marked as follows:

Contract, D. 1.

Specifications, D. 2.

William A. Haley, direct.

Certification for manufacturing building, D. 3.

Certification for boiler house, D. 4.

The Court. The question is whether you took possession. You might put in the contract but it might be binding upon you to the extent that you took it away from the contractor.

10

Plumbing specification, D. 5.

Manufacturing building specifications, D. 6.

The Court. You gave a contract to the contractor who is supposed to be in possession unless something turns up that you took it.

WILLIAM A. HALEY, being sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Tippett.

20

Q You are connected with the American Concrete Steel Company? A Yes.

Q In what capacity? A Manager.

Q How long have you been employed by them? A Since 1913.

Q Your company had a contract to erect a factory building with a boiler house for the Splitdorf Electric Company? A Yes.

Q You are familiar with the terms and conditions of this contract? A Well, I could not say in detail, in general I am.

30

Q You are familiar at that time your company had this contract to erect and complete the building and boiler house? Or were at that time? A Yes, sir.

Q Now under the contract, did the American Concrete Steel Company—what is the contract or relationship as to work to be done by the American Concrete Steel Company? A Why, to completely erect the building and—

Mr. Rysdyk. To erect the building?

A —erect the buildings under the directions of the architect and to his satisfaction.

40

The Court. Do you remember when this injury took place?

Witness. Yes, from hearing testimony.

William A. Haley, direct.

The Court. Did you have possession and control of the building at that time?

Witness. Yes, sir.

Q At that time had your work been turned over and the building been turned over to the Splitdorf Electric Company? A
10 Well, I am told the Splitdorf people may have asked us for the privilege to use some parts of the completed floors but it had not formally been turned over to them. It was still in our possession.

The Court. You mean technically.

Witness. I mean actually. There were parts of the building actually in our possession; I can't tell which part was actually in our possession because it has different sections and they may refer to one section which may be
20 called the boiler room.

The Court. Let us pay particular attention to the place of the accident. What was the situation with reference to the boiler room?

Witness. The boiler room was still in our possession because of the fact that our contractors were still working there.

The Court. And were these sub-contractors under your control and direction?

Witness. Yes.
30

The Court. And while they were working there the building was under your control?

Witness. Yes.

Q And do I understand that shows the date when the premises were taken from under your control? A Yes, when it was accepted by the architect.

Q What date was that? A December 19, 1916.

Q And as far as the boiler house was concerned your company was released on that date and you had control of it until
40 that date? A Yes.

Q And the Splitdorf Electric Company did not have control of it? A No.

The Court. So I understand if anybody is liable for this man's injury, you are?

Witness. Yes.

William A. Haley, cross.

A And as to the main building, of course, you are not particularly concerned at this time—that is the small final payment showing completion of the main building.

Q Under what date? A May 21, 1917.

Q But as far as owner of premises, your concern or company assumed then full charge of operations and work until the contracts were entirely completed? A Yes, sir.

10

Cross examination by Mr. Rysdyk.

Q Mr. Haley, I understand you to say that your company maintained control of the work under the contract on November 15th, 1916? A Yes, covering that period.

Q But not all? A Yes, all of the building.

Q Absolute control? A Well, I don't know how that would be termed, absolute control of the building, we allowed some privileges.

20

Q Now, who asked you for certain privileges? A What do you mean by certain privileges?

Q You say you had control of the building except for certain privileges? A Well, what the owner referred to was to install something or to put some of his machinery in there he was probably purchasing for the new building and we granted him the favor.

Q And the owner proceeded to do that? A Yes, sir.

Q And the owner installed machinery in the boiler room, too, didn't he? A Yes.

Q And the owner began operations before November, 1916, didn't he? A Yes, I believe they did.

30

Q And the boilers were being operated by the owners' own employees on November 15, 1916? A Yes, sir.

Q There was a chief engineer there in charge of the boiler room on that date? A Yes.

Q (*By the Court.*) Employed by the defendant, employed by the Splittdorf Electric Company? A I believe so.

Q He was not employed by the American Concrete Steel Company? A No, we did not have any engineer there.

Q And there was a fireman there in charge of the fires and boilers? A I believe so.

40

Q And they were operating the boilers and furnaces on the day of the accident? A I believe so.

Motion for Direction of Verdict.

Q And that fireman was employed and paid by the Splitdorf Electric Company, was he not? A I could not say that. He was not employed by us.

Q And you were not operating the boilers? A No, sir.

Q Then you must have given the owners permission to do some work in there, did you not? A Yes, sir.

10 Q Was this sump pit where this man was hurt, was that also turned over to them? A No, sir; for it was not completed.

Q Was it being used by them in this operation that you allowed them to undertake? A I don't believe so; no, sir.

Q Was it necessary in order for the exhaust steam? A Well, it was necessary for the operation of the heating plant.

Q Was it necessary in order to operate this pump and steam plant to have this sump hole? A Yes.

Q Then the Splitdorf people were operating that, as I understand it, under the permission you have given them to operate? A No, sir.

20 Q Then if you were not, the Splitdorf Company— A Or our sub-contractor.

Q Do you know, that is what I am driving at; do you know? A No.

Q Mr. Haley, that exhaust pit was used in connection with the operation of the boiler, was it not? A I believe so.

Q That was an essential element to the operation of the boilers? A Yes, sir.

30 *Re-direct examination by Mr. Tippett.*

Q Did you understand Mr. Haley, as to whether or not the work was completed as to that sump pit? A I could not answer that.

Q You are not— A I am no practical man.

Q You are not familiar on that point? A No, sir.

DEFENDANT RESTS.

40 *Mr. Tippett.* I desire at this time to make a motion for direction of verdict on the ground that under the changed conditions that exists and in the amending of the complaint that the defendant Splitdorf Electric Company owed no duty to this plaintiff in or about these premises at this particular time that the accident happened; that the man was a mere employee of a sub-

Charge to Jury.

contractor or contractor and that the contract had not yet been completed; also that if a contract did exist, it was between his own employer and the American Concrete Steel Company and that therefore discharges this defendant from any duty. (Argument on motion, in which case of *Cuff v. Newark & New York Ry Co.*, 35 New Jersey Law, page 17, is recited, and on which the Court said that this was an entirely different principle.)

10

The Court. I think that it is a question for the jury. I will deny the motion and allow you an exception.

(Counsel then proceed to sum up to the jury.)

The Court then charged the Jury as follows:

The Court. Gentlemen of the Jury, the plaintiff, while working on the premises of the defendant, stepped into pit in the floor of the boiler room and received injuries, and he now asks for compensation from the defendant, in the nature of a verdict for damages.

20

The claim is based upon the allegation of negligence, that the defendant was negligent.

Now, in order to find out whether anyone was negligent, you must first ascertain what duty they had to perform, because negligence is the failure to perform some duty.

So, the first question is, what duty did they have to perform?

30

To decide that, certain circumstances must be determined, to see whether the defendant was in control or possession of the premises and had any duty to perform.

So the first question is whether the defendant had any control of these premises at this particular time.

Now, the plaintiff contends that it had. The plaintiff's contention is that the Splitdorf Company was building a boiler room, and the plaintiff admits that the work was given to the American Steel Concrete Company and that the American Steel Concrete Company had some sub-contractors to do the work. These facts do not seem to be in dispute. But there is where the parties part in their contentions. The plaintiff contends, first, that this work was completed and that the Splitdorf people had taken possession of the premises; that there was some little extra work being done there, but that the Splitdorf Company was in possession of this particular part of the premises,

40

Charge to Jury.

and that the Splitdorf people, having had the premises turned over to them, that there was a duty on their part to do something.

10 The Splitdorf people, on the other hand, contend that that is not true. They say that this contract was made with the American Concrete Steel Company and that the contract was not finished until some time afterward, that they were not in possession until final payment was made, and that, though certain privileges were given to the Splitdorf people, the American Concrete Steel Company maintained control and responsibility.

20 So you see, the first question you will have to determine when you retire to your jury room is, whether the defendant company exercised any control or possession of these particular premises when this accident occurred. If you are not satisfied that they were in control, but that the premises were controlled by the Steel Company people, then that ends the case and there can be no recovery; because, if the Splitdorf Company was not in control, they had no duty to perform.

30 Now, on the other hand, if you find that the Splitdorf Company was in control and possession of this particular part of the premises, then the next question that arises is, what was their duty in the situation that existed there? The plaintiff was on the premises for the purpose of doing some work which the Splitdorf Company wanted done upon the premises, although being done by a sub-contractor. Now, the law upon that subject is this: the owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or the use of the premises dangerous. The gist of the liability in such cases consists in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the place was adapted and proposed or allowed to be used.

40

Charge to Jury.

So you see, the contention of the plaintiff is that the Splitdorf people were in possession, and that, although they did not ask him to come there, that there was an implied invitation on their part to come there because they wanted this work done and the contractors had to have their men there and that the premises were intended by the defendant company to be used by the men who came there to do the work.

10

In a situation of that kind, where a person is invited on the premises, the duty is to exercise ordinary care to make the premises reasonably safe.

So, gentlemen, if the Splitdorf people were not in control, then your verdict is no cause of action.

If you do find they had control of this particular place, then the next question is, did they perform their duty, the duty of exercising ordinary care, so that the place might be reasonably safe?

20

The plaintiff contends that the defendant did not do that. That it was carelessness, negligence, to have left a place of this kind in the floor, open without any protection or covering or notice to the plaintiff, and, especially so, at a time when the lights were out; that it was carelessness and negligence on the part of the defendant not to notify the men working around there. The defendant claims that is not so.

Now, if you find the defendant company was not negligent in that particular, then that is the end of the case and your verdict will be no cause of action. On the other hand, if you find that it was negligent, and did not exercise care, then you come to the third question in the case, and that is, to the conduct of the plaintiff himself.

30

The plaintiff himself also had a duty to perform. When a man goes upon premises he must also exercise care for his own safety. The defendant in this case claims that the plaintiff failed to exercise the care he should, that this place was one in which the plaintiff had worked before, that he had been through there during the daylight, that he saw or must have seen this hole in the floor, and must have known that it was there, and, notwithstanding that, he walked into it.

40

That, even if it was dark there, the man should have exercised care in the way he moved about the place; that if he could not see where he was going, he should have stopped until seeing was possible. And this the defendant contends was carelessness

Charge to Jury.

on the part of the man himself, that he was negligent and that his negligence contributed to this injury.

10 The plaintiff, on the other hand, contends that this is not so, that, while this condition existed, he took the care he ought to take, that he moved about and looked as well as he could, but did not see this hole.

So you see, that is the next question, gentlemen, the question of the conduct of the plaintiff; whether you think he failed to exercise care and was guilty of contributory negligence, negligence which contributed to or caused this accident. If he did, then, of course, he cannot recover, because no man can benefit by his own negligence contributed to that of some one else; or, by his own negligence alone and recover compensation from someone else.

20 Now on the other hand, if you find the defendant was careless and that the plaintiff was not, then the plaintiff will be entitled to recover, and you then come to the question of damages. The elements of damage in a case of this kind are pain and suffering, the bodily injuries sustained, the effect those injuries have had upon his health, and whether they are temporary or permanent. You must consider all the testimony before you. You may also consider the sums that have been necessarily expended for medicines to cure himself of these injuries, by way of doctors' bills and so forth. You may also consider the loss of wages. All of these are elements which
30 are to be taken into consideration when you come to the question of damages, and, after you take them all into consideration, you fix such amount as will, in your opinion, compensate the plaintiff for the loss sustained.

So take the case and see whether the Splitdorf Company was in possession of these premises. If you find they were, then what duty had they to perform? And if they did perform their duty, then your verdict is no cause of action. If you find they did not perform their duty and were careless, then examine the plaintiff's conduct. If you find he was careless also, then
40 your verdict will be no cause of action, and if you find he was not careless and that the defendant was, then you compensate the plaintiff in such sum as you find he is entitled to.

(The Jury then retire.)

Exhibit D. 1.

Exhibit D. 1.

Date, Nov. 26. John P. Dengler, Passaic County Courts.
American Concrete Steel Co. Received Jun 14, 1916. Newark,
N. J.

THIS AGREEMENT, made the twentieth day of May, in the year 10
one thousand nine hundred and SIXTEEN, by and between AMERICAN
CONCRETE-STEEL COMPANY, a New Jersey corporation, party
of the first part (hereinafter designated the Contractor), and
SPLITDORF ELECTRICAL COMPANY, a New Jersey corporation, party
of the second part (hereinafter designated the Owner),

WITNESSETH that the Contractor, in consideration of the agree-
ments herein made by the Owner, agrees with the said Owner as
follows:

Article I. The Contractor shall and will provide all the ma- 20
terials and perform all the work for the erection and completion
of a boiler house, as shown on the drawings and described in the
specifications prepared by Monks & Johnson, of Boston, Massa-
chusetts, Architect, which drawings and specifications are identi-
fied by the signatures of the parties hereto, and become hereby
a part of this contract.

Article II. In addition to the work to be done and material to 30
be furnished as hereinbefore provided, the Contractor will also
install in the building to be erected by it all plumbing and
electrical work in accordance with complete plans and specifica-
tions to be furnished the Contractor, for which the Owner will
pay the Contractor such amounts as the Contractor may, with
the consent of the Owner, pay or agree to pay for said installa-
tion, plus an additional sum equal to three per cent. (3%) of said
amounts, said sums to be paid the Contractor only upon the
certificates of the Architect in the same manner as is hereinafter
provided for the payment of the other sums to be paid the Con-
tractor.

Article III. It is understood and agreed by and between the 40
parties hereto that the work included in this contract is to be done
under the direction of the said Architect, and that his decision
as to the true construction and meaning of the drawings and
specifications shall be final. It is also understood and agreed by
and between the parties hereto that such additional drawings
and explanations as may be necessary to detail and illustrate

Exhibit D. 1.

the work to be done are to be furnished by said Architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

10 It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property, and that all charges for the use of the same, and for the services of said Architect, are to be paid by the said Owner.

20 Article IV. No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XIII of this contract.

30 Article V. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

40 Article VI. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor and materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to

Exhibit D. 4.

terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor it shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such expense shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

Article VII. The Contractor shall complete the several portions and the whole of the work comprehended in this agreement on or before August 1, 1916.

Article VIII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, or by the act, neglect or default of the Architect, or of any other contractor employed by the Owner upon the work, or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

Article IX. The Owner agrees to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that it will reimburse the Contractor for such loss; and

Exhibit D. 1.

the Contractor agrees that if it shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then it shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Article XIII of this contract.

Article X. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be TEN THOUSAND EIGHT HUNDRED SIXTY-THREE DOLLARS (\$10,863.00), subject to additions and deductions as hereinbefore provided. If as part of the work the Architect shall find any excavation in rock to be necessary, the Owner will pay the Contractor for such excavation work an additional amount equal to \$1.50 per cubic yard of rock excavated. If the Architect shall order any alteration to be made in the work, consisting of additional foundation work, the Owner will pay for all such additional, an additional amount based on the following unit prices:

For additional excavation in loam, clay, etc., for foundations, \$1.75 per cubic yard to an additional depth of ten feet excavated. For additional sheet piling in loam, clay, etc., 20¢ per square foot.

For additional excavation in shale for foundations, \$3.00 per cubic yard to an additional depth of ten feet excavated. For additional sheet piling in shale 20¢ per square foot.

For additional concrete in foundations \$6:00 per cubic yard.

For additional forms 7¢ per square foot, in foundations.

For additional steel in foundations 4¢ per pound.

And it is further agreed that all sums provided to be paid in this article shall be paid by the Owner to the Contractor in current funds and only upon certificates of the Architect as follows: On the last day of each month the Contractor will submit to the Architect an estimate of the value of the labor and materials furnished during that month. Upon receipt of the Architect's certificate that in his judgment the work called for under said estimate has been satisfactorily executed and materials therein mentioned furnished, and that the Contractor is entitled to the money, the Owner will pay the Contractor eighty-five per cent. (85%) of said estimate not later than the tenth day of the month for which the said estimate is made.

Exhibit D. 1.

The final payment shall be made within thirty (30) days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

10

ARTICLE XI. IT IS FURTHER MUTUALLY AGREED BETWEEN THE PARTIES HERETO THAT NO CERTIFICATE GIVEN OR PAYMENT MADE UNDER THIS CONTRACT, EXCEPT THE FINAL CERTIFICATE OR FINAL PAYMENT, SHALL BE CONCLUSIVE EVIDENCE OF THE PERFORMANCE OF THIS CONTRACT, EITHER WHOLLY OR IN PART, AND THAT NO PAYMENT SHALL BE CONSTRUED TO BE AN ACCEPTANCE OF DEFECTIVE WORK OR IMPROPER MATERIALS.

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Article XII. The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

30

Article XIII. In case the Owner and Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Articles IV or IX of this contract, or should either of them dissent from the decision of the Architect referred to in Article VIII of this contract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

40

Exhibit D. 1.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above
101 written.

SPLITDORF ELECTRICAL CO.,

C. W. Curtiss,
Genl. Mgr.

AMERICAN CONCRETE-STEEL CO.,

By J. Lewis Hay, Prest.

In presence of

203 R. STREBLE.

Attest,

J. Lewis Hay, Jr., Sec't'y.

[SEAL.]

Exhibit D. 4.

303 Date, Nov. 26. John P. Dengler, Passaic County Courts.

American Concrete-Steel Co. Received Dec. 28, 1916. Newark, N. J.

OWNER:

This certificate should be mailed with your check to the Contractor, who will sign this certificate and return it to you as a receipt for the amount of this payment.

CONTRACTOR:

40

This certificate should be dated and signed by you in the place reserved for same in the lower left-hand corner of the other side of this sheet. It should then be sent to the owner, and is his receipt for this payment to you.

Exhibit D. 4.

No. 144-G-3

Office of Monks & Johnson.

\$4,276.94

Dec. 19, 1916.

It is our opinion that American Concrete Steel Company is entitled to a final payment being the sum of Forty-two Hundred Seventy-six and 94/100 dollars, in conformity with its contract of 5/20/16 with Splitdorf Electrical Company for the Power House at Newark, N. J. 10

MONKS & JOHNSON,
Eng'rs & Arch'ts.

PLEASE NOTE DIRECTIONS ON THE
OTHER SIDE OF THIS SHEET

| | | |
|------------------------|-------------|-------|
| Am't of contract..... | \$10,863.00 | 20 |
| Am't added..... | \$ 707.04 | |
| Am't deducted..... | \$ 68.10 | |
| Total | \$11,501.94 | |
| Previously paid..... | \$ 7,225.00 | |
| Am't of this cert..... | \$ 4,276.94 | |
| Balance unpaid..... | \$ none | |
| | 19 | |

Received payment as per this cert.

AMERICAN CONCRETE-STEEL CO. 30

J. B. Wright, Treas.

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MAR. 1, 1920

New Jersey Court of Errors and Appeals

FRANK J. MAYES,
Plaintiff-Respondent,

vs.

SPLITDORF ELECTRICAL COMPANY,
Defendant-Appellant.

Action at
Law on Ap-
peal from
the Supreme
Court.

BRIEF OF PLAINTIFF-RESPONDENT.

Preliminary Statement.

On November 15, 1916, the defendant-appellant was building a boiler room adjoining its factory in the City of Newark, under a contract with the American Steel Concrete Company. The plaintiff-respondent was employed by A. D. Howlett & Co., a sub-contractor, engaged to do the painting work. The contention of the respondent is that on the above date the appellant was in possession and control of that particular part of the building where he was to do some work, such possession and control having been turned over to the appellant (owner) by the general contractor. That the appellant as such owner and occupier, having induced the plaintiff-respondent to come upon the premises, by invitation, express or implied, was under a duty to exercise ordinary care to render the premises reasonably safe for the purposes of his employment, and to abstain from making the entry upon or use of the same dangerous while the respondent was doing

the work in which the appellant owner and occupier had a beneficial interest. That although the plaintiff-respondent exercised the care required by him for his own safety while on the premises, the said owner and occupier carelessly and negligently left an unguarded exhaust pit or hole in the boiler room into which this employee fell and sustained severe injuries on account of which he recovered a judgment in the court below.

I.

Plaintiff was not guilty of contributory negligence and the Trial Court properly refused to grant a non-suit.

Plaintiff started to work November 13, 1916, to paint a particular piece of wall in the boiler room. He looked around when he got there to see where the wall was he had to paint which was in the rear of the room, and walked through a passageway in the boiler room. The electric lights were burning. There were windows on the sides. He could plainly see about him as he went to the back of the room where there was a hat rack on which he was told by the fireman (Chakeris), employed by the Splitdorf Electrical Company, he could hang his clothes. He noticed that day a ladder near the location of the hat rack which the uncontradicted testimony of the witnesses show stood directly over the pit, and on which ladder there were two men working (the witness Hubbin was one of them), and he couldn't see the pit. On the day of the accident, two days later, the plaintiff went down the stairs into the boiler room and through the room to the back where the hat rack was, intending to hang up his

clothes as on the previous day before starting to work when he fell into the pit. On the first day the witness Chakeris showed the plaintiff where to hang up his clothes. On the first day the witness looked about him as he went down through the boiler room to where the hat rack was located as appears by the following testimony:

“Q. How did you get in the building on the first occasion when you went there on the thirteenth? A. I had a letter first and I went to a guard, and from there the guard took me to the office, I believe it was the employment bureau.

Q. You had a letter from whom? A. From the Howlett firm.

Q. To whom? A. To the Splitdorf people.

Q. What then happened? A. Then he took me around in the back and took me around and handed me over to another guard and the guard took me to show me where the stuff was kept.

Q. Who took you out? A. The party they telephoned for in another building.

Q. A party from the Splitdorf's place? A. A party from the Splitdorf's place, yes, sir.

Q. And he took you where? A. He took me around the back near the boiler room to the new end of the factory and he handed me to a guard there and told the guard to show me where the stuff was.

Q. Who showed you? A. This guard showed me where the stuff was and showed me where the boiler room was and what was to be done. (P. 17.)

Q. What did he show you? A. He just came up to me and showed me and said “That is the boiler room there. Go right in there.”

Q. Did you go in there? A. Yes, sir.

Q. What did you do after you got in there? A. I looked around to see where this wall was, and I found one piece of new wall, as

they told me, in the rear of the boiler, so I painted that piece of wall.

Q. How did you get in on the fifteenth?

A. On the fifteenth the guard passed me right through.

Q. The same guard? A. The same guard, yes, sir.

Q. What time did you get there that day?

A. About ten o'clock in the morning.

Q. Just tell us what you saw and did? A. I went through the boiler room and went down the stairs and in the back of the boiler room was where they hung their clothes, they showed me where to hang my clothes up.

Q. Who told you to hang your clothes up there? A. The fireman. (P. 18.)

Q. (Referring to the date of the accident.) What did you do? A. I went around to hang up my coat and went in the hole just as I was going in, went into this exhaust.

Q. You say there were some boilers in there? A. Yes, sir.

Q. Did you have to walk by them? A. I walked through the passageway right down the passageway and on the top where this rack was, and just as I turned to hang up my coat where this hole was left in the corner where this boiler was on the floor and I could not see it.

Q. Did you hang your coat on the rack before you went in the hole? A. I just got my coat up when I went in the hole.

Q. Where was the hole? A. The hole was right in the back of this boiler.

Q. Had you ever been in that part of the building before that? A. I had been in that part of the building before the day I was there before.

Q. I mean where this hole was? A. I could not get up there, there was a ladder there when I was there Monday and I could see the men working there. (P. 19.)

Q. Did you notice whether the electric lights were on when you were there the first

day? A. Yes, sir, the place was lit up well when I was there the first day.

Q. On the day of the accident when you first went in, the building was there any lights? A. There was no lights when I went in the building.

Q. Could you see where you were walking?

A. You could see where you were walking, but in the back part you could not see any of the floor. (P. 20.)

At page 35 (cross-examination):

Q. What was the first thing you did when you entered the room there? A. The first thing I done when I entered the room I went right back to that passageway to hang up my coat and hat.

Q. What led you to know there was a hat rack there? A. Mr. Chakeris told me. (Split-dorf's employee.)

Q. You say it was dark in there? A. It was dark in the back, yes, sir.

Q. Was it light enough to see the hat rack, or did you feel your way? A. You could see the hat rack, but you could not see the floor.

Q. Did you look at the floor? A. You could not see anything, the pump closed it up.

Q. Did you look to see that day? A. I walked right in. Yes, certainly, I looked at the floor. You could not see anything on the floor; the floor was perfectly black at that part of it.

Q. Did you look? A. Sure I looked.

Q. You say you could not see anything? A. No. I could not see anything.

Q. Do I understand, when you were in there before, you saw a board on this hole? A. No, sir, I did not see a board on the hole; I did not see the hole the first time I was in there.

Q. Did you look? A. They had a ladder there when I was there the first time.

Q. Where? A. Right over that.

Q. When you saw the ladder there what did you think? A. The men were working on the

ladder, they were working up there on some pipes.

Q. How many men did you see there? A. I saw two men up the ladder—one up above, one down below.

Q. On the thirteenth, now? A. On the thirteenth, yes, sir.

Q. That was right near where this hat-rack is? A. Yes, sir.

Q. Just right over where this hole was? A. This ladder was astraddle of the hole.

Q. So next when you came in there on the 15th you immediately started to hang your coat and hat up? A. Yes, sir. (PP. 35, 36.)

Q. So that when you came in on the 15th you just simply went in, you did not look to see if there was any hole in the floor or anything else? A. I could not see it if I did look.

Q. You did not look, did you? A. I looked as I went along, certainly.

Q. Did you look or did you not? A. I looked as I went along, as I walked through the room, looking, I looked at the floor.

Q. What did you see? A. I could not see anything in the back part there, it was all dark.

Q. You say on the 15th you came in the same way, you went up here, right along that passageway, is that right? A. Yes, sir.

Q. And then you walked right up to where this rack was? A. Yes, sir. (Pp. 37, 38.)

Q. You did not look to see what the condition was on the floor? A. No, I did not see nothing.

Q. Your answer is not responsive to my question. A. I told you that day I had no business to look, the men were standing there in front of it; there could have been a hole there and I would not have seen it; one man was up on the ladder and the other man was standing right in front of the hole, and you could not see the hole unless you went back to see it.

Q. Then when you went in there on the 15th you paid no attention to what might

have been done there? A. I could not see if I did; there was no way of seeing, the thing was dark.

Q. How did you reach the hat rack? A. You could see the hat rack because that stood up high and showed that, but from the shadow from the boiler you could see nothing on the floor. (P. 39.)

Q. Would you have any reason to believe that there was anything going on at all in there, having seen the men working in there two days before, and you were not there the day previous to this, mind you, would you think there was something going on in there? A. I would never think of looking on the floor for a hole, and nobody else.

Q. Where would you think the hole would be, in the ceiling or the side wall? A. If there is a hole in the floor it is always protected or there is some way to notify you."

The testimony of the witnesses, Patrick J. Hubbin and Frank C. Heiser, corroborate plaintiff in regard to the unprotected and hidden danger of this pit, and that on the first day the plaintiff worked there, there was a ladder standing over it and Hubbin and a helper were working on this ladder which obstructed the view of the open pit, and they also testify regarding the light in this room and the defective manner in which the electric lights had been working on the day of the accident going out from time to time, which system of lighting was operated by the Splitdorf Electrical Company.

Neither the testimony of the plaintiff nor his witnesses is contradicted by the defendant and no explanation of the situation as found there on the day of the accident is offered, nor is there any attempt made by the defendant to show that this pit was not a hidden danger, but on the other hand an obvious one and self apparent to the

plaintiff. The defendant only attempted to prove that it owed no duty to the plaintiff as it was not in possession and occupation of the premises.

It is argued that the plaintiff-respondent was not guilty of contributory negligence in going through the passageway as he did on the day of the accident. He had passed through the same part of the building two days before and saw no hole or pit where the hat rack was located and on which he had hung up his clothes on the first occasion. That the ladder was standing directly over the pit on the first day and it was impossible to see the hole. Mayes had a right to assume that the passageway and floor were reasonably safe for passage and repassage and to do the work which he went there to do. The open and unprotected hole raised a *prima facie* presumption of lack of ordinary care on the part of the owner and occupier of the premises. Whether plaintiff ought to have seen and avoided the hole, or proceeded along this passageway where he could see all around and about him, except the floor in the back by the hat rack, where he had walked and been two days before and saw no hole when the electric lights were on, was a matter for the jury's determination and the trial judge very properly submitted the question to the jury.

Are not the substantial facts uncontroverted?

It was for the jury to visualize the situation from the evidence whether the defendant exercised reasonable care in protecting the plaintiff against injury and whether the plaintiff had reasonable grounds from all the surroundings for believing that the place was safe and free from hidden dangers.

Where fair-minded men may honestly differ as to the conclusions to be drawn from facts, whether

controverted or uncontroverted, the question of issue should go to the jury.

Pennsylvania Railroad Company vs. Matthews, 36 N. J. L. 531.

Delaware, etc., Railroad Company vs. Shelton, 55 N. J. L. 342.

Traction Company vs. Scott, 58 N. J. L. 682.

A trial judge is only justified in granting a nonsuit or directing a verdict upon a court question arising from the admitted or uncontroverted facts in the case, and the weight of conflicting testimony must always be submitted to a jury for their consideration and determination.

Dickinson vs. Erie Railroad Company, 85 N. J. L. 586.

Fulton vs. Grieb Rubber Company, 72 N. J. L. 35.

Clark vs. Public Service Electric Company, 86 N. J. L. 144.

When the existence of negligence depends upon the conclusion to be reached from a variety of circumstances, considered in relation to and their reaction upon each other, the jury, and not the court, is normally the tribunal to draw such conclusion.

Sutton vs. Bell, 79 N. J. L. 507.

In the case at bar the invitation extended to the plaintiff implied an understanding on the part of the owner to exercise care for the plaintiff while upon the premises, commensurate with the situation and the circumstances surrounding the *locus in quo*, over which the plaintiff had no power or control and in fact the danger not being obvious,

he had no knowledge of its existence, and we argue that in this particular case the solution of that issue of fact was properly committed by the trial court to the jury. Chakeris the fireman employed by the Splitdorf Company testified that he had talked with the Chief Engineer in the employ of this Company about this pit before the day of the accident. That this officer told the fireman that he would put the cover on and in fact he testified it was put on after the accident (p. 70). It cannot therefore be said that the Splitdorf Company did not know of this dangerous condition, and which the evidence discloses had not been made known to the plaintiff. This pit was used for the return of water from the boilers, and was an essential function in their operation by the owner, and had been used in connection with the pumps and boilers for about a month as testified to by the witness Chakeris as follows:

“Q. How large was that hole? A. About three feet square; maybe seven feet deep, or maybe three or four feet deep.

Q. About how wide? A. About three feet wide.

Q. What was that used for? A. For the returns to come down; the returns of water of the boilers; you know, when the heater overflows the water comes down to the exhaust, and there it goes into pipe, out into the ground.

Q. That hole has always been there? A. Yes, sir.

Q. How long before that day? A. A couple of weeks.

Q. Was the pump working? A. Yes, sir.

Q. On the fifteenth? A. Yes, sir.

Q. How long had that been working? A. About a month. (P. 69.)

The evidence in the case shows that the work in this boiler room was practically completed, and

there was not any material change of the situation from day to day. The main contracts had been completed and the work being done at the time was extra work according to the witnesses, Hubbin and Heiser, and patching here and there about the pipes and other parts of the machinery. When the plaintiff walked down through the passageway that morning as he testified he could see all around him and where he was walking, and as he approached the end wall behind the pump he saw the hat rack on the wall in the same place where it had been two days before, and walked toward it to hang up his clothes without any reason to assume that the pit was open, and in fact he did not know there was any pit there. The testimony is that no one had told him about the condition of the hole or that there was one in the place. He did not know the little piece of board which has been used as a pretended cover for the hole was there until after the accident and the lights had been turned on.

II.

Defendant-appellant was in possession and control of the premises where the accident occurred and chargeable with liability.

The plaintiff-respondent contends that the testimony that the Splitdorf Electrical Company was in possession and occupied the premises where the accident happened, and that it exercised control of the same stands uncontradicted. It is admitted that there was a contract between the Splitdorf Electrical Company and the American Steel

Concrete Company, the general contractor, and that the general contractor entered into an arrangement with various sub-contractors for the performance of certain parts of the work to be done in this building, and that under the terms of the general contract the building was not to be turned over to the owner until completed when final payment was to be made, and that the general contractor during that period would be responsible to the owner for any damages. This contract, however, was not binding upon the plaintiff-respondent, and in fact it does not appear that he had any knowledge of these conditions. It is clear from the evidence in the case, the particular parts of which will be briefly referred to, and in fact by the testimony of the defendant's witnesses, that the owner did enter into possession of this particular part of the premises at least a month or more before the date of the accident, with the consent and acquiescence of the contractor, and continued to occupy the same and use and operate the boilers and pumps in connection with its general business on account of which usage the exhaust pit was an essential element. I think it unnecessary to make only general reference to the testimony of the plaintiff and his witnesses in respect to the premises being used and occupied by the owner and under its control on the day of the accident, but I wish to direct attention to the testimony of the defendant's witnesses. Mr. Landemare, the Treasurer of the Splitdorf Electrical Company, testified as follows:

"Q. (Direct examination.) At the time the new building was being erected and completed by the contractor, your Company was still doing business over there, was it not? A. Yes.

Q. Did you have other buildings in which you were engaged? A. A number of other buildings, the new building was in addition.

Q. And as soon as the new building was completed your Company moved in gradually? Do you understand? A. Yes; with the contractor's permission." (P. 84.)

William A. Haley, Manager of the American Concrete Steel Company, in his direct examination testified as follows:

"Q. (Referring to the date of the accident.) At that time had your work been turned over and the building been turned over to the Splitdorf Electrical Company? A. Well, I am told the Splitdorf people may have asked us for the privilege to use some parts of the completed floors, but it had not formally been turned over to them. It was still in our possession.

Q. (Cross-examination.) Mr. Haley, I understand you to say that your Company maintained control of the work under the contract on November 15th, 1916? A. Yes, covering that period.

Q. But not all? A. Yes, all of the building.

Q. Absolute control? A. Well, I don't know how that would be termed, absolute control of the building, we allow some privileges.

Q. Now, who asked you for certain privileges? A. What do you mean by certain privileges?

Q. You say you had control of the building except for certain privileges? A. Well, what the owner referred to was to install something or to put some of his machinery in there he was probably purchasing for the new building and we granted him the favor.

Q. And the owner proceeded to do that? A. Yes, sir.

Q. And the owner installed machinery in the boiler room, too, didn't he? A. Yes.

Q. And the owner began operations before November, 1916, didn't he? A. Yes, I believe they did.

Q. And the boilers were being operated by the owner's own employees on November 15th, 1916? A. Yes, sir.

Q. There was a Chief Engineer there in charge of the boiler room on that date? A. Yes.

Q. (By the Court.) Employed by the defendant, employed by the Splitdorf Electric Company? A. I believe so.

Q. He was not employed by the American Concrete Steel Company? A. No, we did not have any Engineer there.

Q. And there was a fireman there in charge of the fires and boilers? A. I believe so.

Q. And they were operating the boilers and furnaces on the day of the accident? A. I believe so.

Q. And that fireman was employed and paid by the Splitdorf Electric Company, was he not? A. I could not say that. He was not employed by us.

Q. And you were not operating the boilers? A. No, sir.

Q. Then you must have given the owners permission to do some work there, did you not? A. Yes, sir.

Q. Was this pit where this man was hurt, was that also turned over to them? A. No, sir; for it was not completed.

Q. Was it being used by them in this operation that you allowed them to undertake? A. I don't believe so, no, sir.

Q. Was it necessary in order for the exhaust steam? A. Well, it was necessary for the operation of the heating plant.

Q. Was it necessary in order to operate this pump and steam plant to have this sump hole? A. Yes.

Q. Mr. Haley, that exhaust pit was used in connection with the operation of the boiler, was it not? A. I believe so.

Q. That was an essential element to the operation of the boilers? A. Yes, sir.

Q. (Re-direct examination.) Did you understand, Mr. Haley, as to whether or not the

work was completed as to that sump pit? A. I could not answer that.

Q. You are not— A. I am no practical man." (Pp. 85, 86, 87, 88.)

The plaintiff and his witnesses, Messrs. Hubbin and Heiser, testified that the Splitdorf Electrical Company was actually in possession of the premises. That the boilers and furnaces were going and the business of the Company was generally being carried on. That the Chief Engineer and fireman were there attending to their duties and the operation of the machinery. Chakeris, the fireman, employed by the Splitdorf Electrical Company, testified that the plant had been in operation about a month before the date of the accident, and that he was taking his orders from the Chief Engineer of the Company. He said that Mr. Brown, the head of the maintenance department of the Splitdorf Company, was about the place giving orders and in fact was there when the accident happened and assisted in rendering first aid to the plaintiff (p. 69). Chakeris says that there was some little jobs being done there by the sub-contractors.

Can there be any question that the Splitdorf Electrical Company were exercising control over these premises because of the fact of their employees operating the boilers and pumps and having a maintenance manager there in charge of the place?

Mr. Hubbin, the witness for the plaintiff, testified that the main contract had been finished and that the work then being done there was extra work. That he was taking orders only from Mr. Brown, the maintenance manager of the owner, who was in and about the premises from time to time. Mr. Brown gave instructions if there were any changes to be made in the work and told this

witness the changes he required made. That he made no changes in any of the work without first consulting Mr. Brown. (P. 53.)

The entire testimony of Mr. Hubbin tends to show that not only the work being done there, but the plant itself was under the control and supervision of the Splitdorf Company.

Mr. Heiser corroborates the plaintiff and Mr. Hubbin regarding the operation and possession of the premises by the Splitdorf Company. He further testified that Mr. Brown, the maintenance manager of that Company, was in and about the place from time to time, and exercised certain control over the business and on the day of the accident he was there. That he gave the men who were engaged in finishing the plant orders what to do. Mr. Heiser was engaged in covering the pipes in the room and had to go to Mr. Brown to find out what pipes were to be covered. (P. 61.) That the Splitdorf Company was carrying on its business while the work of the sub-contractors was going on. Heiser says he saw the Chief Engineer of the Splitdorf Company around this hat rack, and that he made tours of the place four or five times a day or more. (P. 63.)

I desire to comment on the fact that neither Mr. Brown nor the Chief Engineer of the Splitdorf Company or any of the employees of that Company who were engaged in work there at that time, except the witness Chakeris, who testified in behalf of the plaintiff, were produced at the trial of this case. In fact no evidence was offered on the part of the defendant to show what the conditions were about the premises on the day of the accident, and I contend that the testimony of the plaintiff and his witnesses stand uncontradicted in respect to the situation of the premises and the operation of the business on the day in question.

We therefore contend and insist that the plaintiff being on the premises engaged in doing work which the Splitdorf Company wanted done were in duty bound to exercise reasonable care to make these premises safe for him to work, and as owner or occupier of the premises they had by invitation, express or implied, induced the plaintiff to enter upon the premises, and owed a duty to exercise ordinary care to render the same reasonably safe for that purpose, or at least to abstain from any act to make his entry or presence upon the premises, or the use of the premises dangerous. Mr. Mayes did not act merely on his own accord, but he went there induced by the acts and conduct of the occupier or owner to believe that the premises were intended to be used in the manner in which he used them. The contractors had to have their men on the premises and there was an implied invitation on the part of the owner to go there because they wanted the work done.

An owner or occupier of lands who by invitation, express or implied, induces persons to come upon the premises, is under duty to exercise ordinary care to render the premises reasonably safe for such purposes.

Nolan vs. Bridgeton, etc., 74 N. J. L. 559.

An owner or occupier of premises, who by invitation, express or implied, induces a person to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation, and this includes the duty to use ordinary care to have the railing of a balcony on the premises in a reasonably safe condition for the purpose for which it was used and intended to be used.

Sefler vs. Vanderbeek & Son, 88 N. J. L. 636.

An employee entering upon premises to perform work there, although not employed directly by the owner, or in the employment of another in joint occupancy of the premises, is there by implied invitation.

Dettmering vs. English, 64 N. J. L. 16.

Where a manufacturer is in possession of and testing his own machinery he owes to everyone who may be in danger from it the duty of proper care; and if he exposes anyone to danger from his carelessness, whether the carelessness be in handling or constructing, he must answer for the consequences.

Necker vs. Harvey, 49 Mich. 517.

The case of *Phillips vs. Library Co.*, 55 N. J. L., p. 307, is one of the leading cases in this State in regard to the duty owed by the owner and occupier of lands, who by invitation, express or implied, induces persons to come upon the premises, and holds that duty to be to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous.

The principle of law involved in the case at bar is also expressed in the case of *Sebeck vs. Plattdeutsche Volkfest Verein*, 64 N. J. L. 621.

To render the owner of premises liable for injuries caused by their defective or dangerous condition, it is not necessary for the plaintiff to show actual negligence on the part of the owner himself. It is enough to show that he permitted others to place the premises in such a condition as to cause an injury. Thus the owner is liable, although the premises were in the possession of a

licensee or a contractor. One who is not the owner or in control is not liable, unless he has invited this other person to use the property.

29 Cyc, p. 476.

See also 29 Cyc, pp. 453 and 456.

An employee of one who holds a contract to perform work in the premises for the owner and occupier, who enters the premises to perform the work, is there by implied invitation.

Sommer vs. Public Service Corporation,
79 N. J. L. 349.

Plaintiff was employed by a contractor to assist in digging a cellar. The shed was supported by poles which were changed as to location as the excavation proceeded. Within ten minutes after defendant's employees had located one of the poles, and had endeavored to adjust it properly to its position, the roof of the structure fell and injured plaintiff. *Held*, that the question of the negligence of the defendant in constructing the shed and in properly maintaining it, as well as the negligence of the plaintiff's employers in respect to it, were questions of fact for the jury.

DeVincenzo vs. Sommer, 87 N. J. L., p.
645.

The facts in the case at bar devolve with considerable essentiality with that of *Sheridan vs. Foley*, 58 N. J. L. 230, where a brick fell from a scaffold where the contractor was building a wall and struck the workman of the plumber working upon the same building in the cellar. In his opinion the Chief Justice there stated: "The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty

to, so handle them as not to endanger others who were engaged in other work upon the same premises." The premises in question were occupied by the Splitdorf Company and in charge of its employees, and it was therefore their duty in the operation of the boilers and pumps and the use of the premises incidental thereto, not to endanger the plaintiff.

The law in respect to the employee of one who holds a contract to perform work on premises for the owner and occupier thereof, who enters the premises to perform the work, is further exemplified in the following cases:

Albanese v. Central Railroad Co., 70 N. J. L., p. 241.

Hoadley v. International Paper Co., 72 Vt. 79.

John Spry Lumber Co. v. Duggen, 182 Ill. 218.

Sack v. St. Louis Car Co., 112 Mo. App. 476.

The principle involved regarding the duty of the owner to exercise ordinary care to render the premises reasonably safe for the purposes of the employment of a person, invited thereon by him, is so well established by the cases above referred to that it does not seem necessary to make any further references. We contend that the case of *Cuff Adm's. vs. Newark and New York R. R. Co.*, 35 N. J. L. 35, which appellant-respondent cites, and which was referred to in the application for a non-suit, is not applicable. In that case it was sought to hold that the injured person was a servant of the Company, although in fact he was employed by a sub-contractor and the accident occurred as a result of an act committed without the

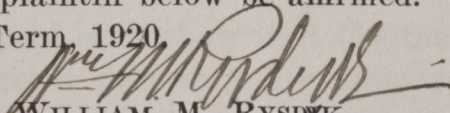
authority of the Company or the consent of the Company to use its premises for the work which resulted in the injury.

It is also contended that the case of *Philpho vs. Merchants' L. & T. Co.*, 168 Ill. App. 511, likewise does not apply, for in that case the danger was an obvious one, while in the case at bar it was a hidden danger which the plaintiff could not reasonably have anticipated to exist.

In passing upon motions to non-suit, and for the direction of a verdict, it has been held in this court that the trial court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.

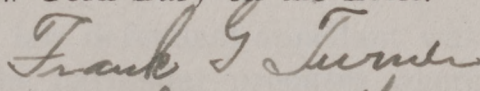
For these reasons it is respectfully submitted that the trial court properly refused to grant defendant's motions for a non-suit and for the direction of a verdict, and from all the testimony in the case the plaintiff was not guilty of contributory negligence, but, on the other hand, the appellant-defendant was in possession and control of the particular premises where the accident occurred and was responsible for the happening thereof, and it is further submitted that the judgment in favor of the plaintiff below be affirmed.

Submitted March Term, 1920.


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of counsel

New Jersey Court of Errors and Appeals

FRANK J. MAYES,

Plaintiff-Respondent,

vs.

SPLITDORF ELECTRICAL COMPANY,

Defendant-Appellant.

Action at Law.

On Appeal

from the

Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of the Case.

This is an appeal from the Supreme Court, Passaic County, wherein judgment was entered in favor of the plaintiff. The plaintiff herein instituted suit against the Splitdorf Electrical Company, defendant-appellant, and The Splitdorf Electrical Company of New York, to recover damages for injury sustained by him as the result of alleged negligence on the part of defendants. At the conclusion of the plaintiff's case, the Court granted the motion of the defendant's counsel for non-suit, as against the defendant, Splitdorf Electrical Company of New York, but denied counsel's motion for non-suit as against this defendant-appellant. The Trial Court also refused to grant the motion for direction of a verdict, made by the defendant-appellant at the trial of the issue. It was after the submission of the facts to the jury that judgment was entered for plaintiff-respondent.

The purpose of the appeal is to show that (1) the Trial Court erred in its refusal to grant defendant-appellant's motion for a non-suit.

(2) As a matter of law plaintiff was guilty of contributory negligence and there was no breach of duty on the part of this appellant.

(3) As a matter of law defendant-appellant was not in possession or control of the particular premises where the alleged accident occurred, so as to charge it with liability for the happening thereof.

(4) The Trial Court erred in its refusal to grant defendant-appellant's motion for direction of a verdict.

BRIEF OF THE ARGUMENT.

As a matter of law plaintiff was guilty of contributory negligence, and a non-suit should have been granted.

The status and relationship of the parties hereto were briefly, that Splitdorf Electrical Company, a New Jersey Corporation, was conducting a factory in the City of Newark, N. J.; that early in the spring of 1916 the Company decided to have erected a new factory building, and new boiler and pump room, and to that end negotiations were made, a definite contract duly executed and the work thereupon undertaken by and with the American Concrete Steel Company, Newark, N. J., as general contractor for the erection and completion of such a factory building, containing a boiler house and pump room under the terms and conditions set forth under such contract or contracts testified to by Mr. Landemere and Mr. Haley, witnesses of defendant, in accordance with the plans and specifications duly prepared by the architect; that under such contract all the work thereon and thereunder was to be under the control, jurisdiction and supervision of the general contractor and architect; that acting under such contract the general contractors sub-let to various sub-contractors different elements of the work, all under the direct control and supervision of the general contractor. Among the sub-contractors was A. D. Howlett & Company, of Boston, Mass., a painting contractor, which concern had the contracts for painting in the building and parts to be erected under contracts, as such, from the general contractor. This plaintiff-respondent was an employee of this painting sub-contractor, A. D. Howlett & Company, and he, under orders from his own employer, came to the plant of the defendant-appellant in course of erection and construction, to do certain painting work at the time the alleged injury was sustained. This plaintiff took his orders from his own superior (case, pp. 16, 18, 27, 30), took no orders from the Splitdorf Electrical Company, and was not an employee of the Splitdorf Electrical Company. The occasion of his being upon the premises at the time was in furtherance of orders from his superior to do some unfinished painting work in the boiler house and pump room, under contract of his employer with the general contractor.

It appeared that as soon as the main part of the factory building was erected during the summer of 1916, the owner moved parts of their manufacturing staff into it, with the con-

sent and permission of the general contractor, so as to continue as expeditiously and uninterruptedly as possible their manufacturing work.

At and about the time this accident occurred, November 15, 1916, the boiler house and pump room, were each unfinished, were each in course of erection and completion. These were almost the last parts of the construction work to be done. At the time there were pipe-fitters working in the pump room (case, pp. 53, 57) covering pipings, installing pipings and doing other steam fitting work. The painting was also unfinished.

Owing to approach of cold weather and necessity to have heat through the parts of the building in which operations were going on, and men were working, and to dry out the rooms, the general contractor allowed the heating apparatus to be connected up, and supervised and installed such heating, installation under the general contract. In connection therewith, and as an essential incident the fire pump was connected up for emergency use, a temporary pipe was run into the exhaust pit in a pump room as an incident in the chain of necessity in this heating system.

In order to keep the heat flowing, the furnaces in the boiler room, adjacent to the pump room were being fired by an employee of the owner, and the boilers keep going.

It is submitted that no employee of the owner was engaged in the pump room; no operations were being conducted in there by the owner.

It was further contended by the appellant that by the contract between it and the general contractor, the owner was to be absolved and relieved and held harmless from any claims arising from anyone for injuries sustained by them during the course of the erection and completion work under this contract, and that at the time of the occurrence of this accident the general contractor had not completed its contract; that such contract as to this boiler house and pump room was not completed until December 19, 1916, (case, p. 86) when final payment was made and final receipt signed, and until such was done, the liability of the general contractor subsisted and legal and actual possession of the owner did not arise; (case, p. 86) further, that such work thereunder was being done is disclosed by the evidence and from the testimony of the manager of the general contractor where he said his company had a contract to erect a factory building with a boiler house for this defendant; to completely erect the buildings under the directions of the architect; that parts of the

building were actually in possession of the general contractor (case, p. 86); that the boiler room was still in the contractor's possession because of the fact that their contractors were still working there; the sub-contractors were under contractor's control and direction; and while they were working there the building was under their control; on December 19, 1916, the general contractor turned over the boiler house to the owner, and until that date the general contractor had control, and the Splitdorf Electrical Company did not have control (case, p. 86).

Attention is directed to the Court's question of the witness (case, p. 86):

The Court. So I understand if anybody is liable for this man's injury, you are?

Witness. Yes."

This direct testimony alone, from the manager of the general contractor, shows they, if anybody, were in charge, legal possession and liable, if anyone, rather than this defendant.

Appellant asserts that the Trial Court must consider the conditions under which the work was being undertaken, relations of parties to the controversy, and the elements which enter therein having bearing upon the questions involved.

Appellant urges that the Trial Court erred in refusing its motion for non-suit, without giving due cognizance to such relations existing.

We maintain that there were two-fold reasons why the motion for non-suit should have been granted.

One, that it was negligence—legal contributory negligence on the part of plaintiff, considering attending conditions, the nature of his own work, the conditions under which it was to be performed, the ever-present hazards in a building in course of erection, when he went into the pump room at the particular time and under the particular circumstances, wherein he testified (case, p. 20. L. 29) that "it was the same as going in a dark cellar." Consideration of his testimony as to his actions on the day or two previous and the occasion requiring him to be there; the fact that he knew the first day he came there, and saw men were working at and near where he claimed he hung up his hat, and he did not know what they were doing; didn't look; couldn't see as he claimed (case, pp. 36, 37). He did see a stepladder near where he hung up his hat and some men were working on some pipes, doing some repairs, something; and he saw two men up the ladder,

one up above, one down below (case, pp. 36, 37). His answer as to his observation and general attitude indicated *no interest* on his part. Still, pipe-fitters and others were in there, working; he will admit that; and that this stepladder was astraddle of the hole (case, pp. 36, 38, 39).

On the day in question what does he say? Reference to his testimony (case, pp. 36, 37) shows he arrived in the boiler house, and that the lights were out in the other room, and he walked through the dark room making no inquiry if it was safe. In absolute disregard of whatever may be in the next room, whatever dangerous condition might exist, without asking if it was alright to go in there, the room being in darkness as he asserted (case, pp. 42, 43, 44), he enters, goes along a narrow passageway to *where he had been* the day before, and prepares to disrobe; and then claims he stepped backwards into an uncovered exhaust pit. He asserts he did not look around there because it was too dark to see anything (case, p. 44). There might well have been an excavation in there deep and wide enough for six men to fall into, and yet for all that he enters and goes along to the corner where he proposed to hang up his clothes. We contend the risk assumed by this man was obvious and by his own physical act, by his own volition, he voluntarily assumed the consequences which followed. It cannot be justly said that the dangers confronting him, if any, were unknown, because he knew the day before men were engaged at work in there; as to just what he didn't seek to learn; he knew or as a painter should have known, that there is ever danger where construction work is being undertaken, and *his own* work has dangers attending. His obvious failure to look reacts against him in any event.

In the case of *Burns v. Delaware and Atlantic Telegraph Co.*, 41 Vroom 745, 752, Mr. Justice Pitney, in delivering the opinion of the Court, says:

“It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him or, at least to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation.”

Again it was asserted in the case of *Rogers v. Roe and Conover*, 45 Vroom, 615, 617, where Chief Justice Gummere, in his opinion delivered for the Court, said:

“It is not the obviousness of the physical condition or situation which charges the servant with the assumption

of the risks that arise from it, but the obviousness of the danger which the physical condition or situation produces.”

Of course, this injured man was not an employee of the owner, yet applicability of the above can be utilized as a principle. We respectfully maintain this man walked into a place of danger just as though he had closed his eyes and walked into a machine shop with machines in operation. The same chances exist, voluntarily assumed; the same open danger.

We wish to call the Court's attention to the case of *Piepho v. Merchants Loan & Trust Co.*, 168 Ill. App. 511 (1912), 10 Neg. & Comp. Cases Ann. 664-5, wherein the facts were that defendant company was having its building remodelled, and contracted with plaintiff's employer for sheet metal work to be done upon the building. On the fifth floor there was a dark passageway, and near a column was a hole uncovered and unguarded, four feet square. Defendant had a superintendent to supervise the work of all the contractors. On the morning of the accident plaintiff was at work on a skylight when the superintendent came up and told him to do some work on the fifth floor. They went down the stairs through the passageway and passed within two feet of this hole. The superintendent gave no directions as to how he wanted the work done and at no time pointed out the holes in the floor of which there were several. When they separated, plaintiff retraced his steps, went past the hole and up to the sixth floor. Returning to the fifth floor he stepped into the hole, fell and was injured. Plaintiff testified that his eyesight was "kind of blurred" when he came out of the passageway into the room, but he kept on walking and did not look at the hole. He argued at the time he was obeying orders of defendant's superintendent, and thereby became a servant of the defendant. The defendant contending plaintiff was in the service of an independent contractor who was liable for the damages if anyone was liable. In reversing judgment for plaintiff the Court held that at the time plaintiff was injured, he was a servant of the firm of contractors engaged to do the sheet metal work on the building, because he had not become subject to the direction and control of defendant's superintendent; that the defendant was relieved of the usual obligation to furnish his servant a reasonably safe place to work, *where the conditions, under which he was working, were changing from day to day as in this instance*; that the plaintiff could not recover from the defendant on the theory that he was a licensee,

because the danger of falling through the hole was not a hidden danger but was open and obvious; and that the plaintiff himself was guilty of contributory negligence as shown by the evidence that he walked without looking where he was stepping.

Appellant submits the facts and principles enunciated above are applicable here as a guidance to the legal conclusion proper in the case at bar, and in our particular case the conditions were changing from day to day as the work progressed.

The happening was the proximate and direct result of voluntary actions, in entering a dark room, in disregard of self-evident and ever-open dangers, not knowing what was the conditions in the room at the time, which, we maintain of itself was sufficient to place a reasonably prudent and careful man on his guard, so as to require a reasonable degree of care on his part. We contend he *did not* exercise that degree of care essential, and from plaintiff's evidence alone, it shows contributory negligence, conclusively as a fact, or at least by necessary exclusive inference, sufficient to warrant a non-suit.

Time with him was not so much of the essence that it required him to enter immediately when he did, with lights out; that alone should create greater observation, watchfulness and care on his part. Even if the facts had been that the light *was on* at the time, a reasonable degree of observation and care would legally be required of him. He failed to show he gave *any* attention to the environments, at the time or even the day before (case, pp. 42, 43).

An implied invitation to come upon premises creates obligation to use reasonable care. *Furey v. N. Y. C.*, 67 N. J. L. 270; *Smith v. Jackson*, 70 N. J. L. 183; this applies both ways.

What will be deemed reasonable care in any case will depend upon the peculiar circumstances of that particular case. *Central R. R. v. Moore*, 24 N. J. L. (4 Zab.) 824.

As to the effect of contributory negligence, citations are superfluous.

Where a person goes into a strange place in the dark without using ordinary care to discover danger, he is guilty of contributory negligence.

29 Cyc. 514, and cases cited there, Note 95.

One who puts himself in such a position that he is unable to see danger which may be present is guilty of contributory negligence.

In fact and as a matter of law defendant did not have possession or control of the particular premises, and the Court should have directed a verdict for the defendant.

Appellant maintains that plaintiff failed to show a *prima facie* case of negligence against this defendant and in fact failed to show affirmatively any legal negligence chargeable to defendant. This plaintiff in his complaint (case, pp. 3, 4) under paragraphs 2, 3 and 4 thereof particularly predicated a contractual relationship as existing between plaintiff's employer and this appellant, and based his contentions upon such assumption. After plaintiff rested, appellant asserted plaintiff had failed to prove the relationship alleged, or facts sufficient to support the allegations. Over objection, the Trial Court granted plaintiff's request to change his complaint to conform to a different averment. We maintained insufficient evidence, on the part of plaintiff's own case, was shown to charge legally this appellant with such a degree of possession or control over the work then being done, as to render it liable for said accident. The acts of independent contractors intervened in this case. No relation of master and servant existed, and the man was an employee of a sub-contractor, exercising an independent employment.

Appellant submits that under the principles enunciated in the case of *Cuff v. Newark, Etc., R. Co.*, 35 N. J. L. 17, it should be held exempted from liability. The Court said, page 28:

"The principle upon which the superior who has contracted with another, exercising an independent employment for the doing of the work, is exempt from liability for the negligence of the latter in the execution of it, applies as between the contractor and the subcontractor. *Rapson v. Cubitt*, 9 M. & W. 710; *Knight v. Fox*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867."

The general rule as to non-liability of contractee should apply here. 26 Cyc. 1552, 1552, 1555; *Alexander v. Sherman's Sons Co.*, 86 Conn. 293, 85 Atl. 514.

In *Redstake v. Swayze*, 52 N. J. L. 129, 131, Garrison, J., says:

"It is undoubtedly a rule of law, that where one employs a contractor exercising an independent employment to do a work not in itself a nuisance, the contractor alone is liable for an injury, resulting from the negligence of himself or of servants hired by him, providing the employer is not in default in selecting as a contractor an unskillful or improper person. *Cuff v. Newark and New York R. R. Company*, Co. 6 Vroom 17."

Appellant respectfully asserts the relationship of the parties governed at the time. *Schutte v. United El. Co.*, 68 N. J. L. 435; *Jansen v. Jersey City*, 61 N. J. L. 243.

In 26 Cyc. 1546, 1547, an independent contractor is defined to be "one who, carrying on an independent business contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. * * * The test of the relationship is the right to control." The same rules apply as between sub-contractor under original contractor.

The owner where he designs a safe and proper building and employs a competent builder as contractor for its construction, is not liable to the workmen of the contractor or his sub-contractor from the defective condition of the building occasioned by the negligence of the contractor. *Murphy v. Altman*, 28 N. Y. App. Div. 472; 51 N. Y. Supp. 106; *Burke v. Ireland*, 26 N. Y. App. Div. 487; 50 N. Y. Supp. 369. And in such a case the owner is not liable to an employee of one contractor for an injury caused by the negligence of another independent contractor. *Murphy v. Altman, supra*. The same principles are expressed in a recent case of *Mann v. Max*, 107 Atl. 417, decided by our Court of Errors and Appeals June 20, 1919, supporting in point and principle appellant's contentions.

One who employs a contractor to erect a building, or to do any mechanical work, does not become a guarantor to all the employees of the contractor for his skill and care in performing the work. In such a case the contractor is a principal of the persons whom he employs. *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *Butler v. Lewman*, 115 Ga. 752, 42 S. E. 98; *Nelson v. Young*, N. Y. App. Div. 457.

The owner of real estate does not ordinarily owe to a person employed on his premises in the service of an independent or sub-contractor the duty to furnish a safe place for work; and for omission to do so he is not liable in damages. *Reilly v. Chicago, etc., R. Co.*, 122 Iowa 525, 98 N. W. 464; *Callan v. Pugh*, 54 N. Y. App. Div. 545.

The contractor, however, is liable for injuries to a servant of a sub-contractor when resulting from defects in that part of the work done by the contractor. *Curley v. Harris*, 11 Allen (Mass.) 112.

In an action for personal injury the plaintiff in order to recover damages must do more than show possible responsibility of defendant for the injury. In the absence of direct evidence, he must show existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of defendant, and exclude the idea that it was due to a cause with which the defendant was unconnected.

Suburban El. Co. v. Nugent, 58 N. J. L. 658;

Bond v. Smith, 113 N. Y. 378;

Houston v. Traphagen, 18 Vr. 23;

Daug v. North German Lloyd, 73 N. J. L. 770.

Where, in the case of the plaintiff, is evidence showing sufficient notice or knowledge on the part of defendant of the acts of negligence alleged in its complaint? To warrant finding this defendant negligent, plaintiff must show defendant had knowledge of such alleged dangerous condition and thereafter failed to use reasonable means to guard against accident. Where under the circumstances was this owner notified of any dangerous condition? Where had it failed in any duty? Conditions in there were changing from day to day as contractor's work progressed.

Plaintiff-respondent attempts to charge the owner with control and jurisdiction of the pump room because of the fact that the general contractor had connected up the pipes for heating, and the owner was receiving and using, as such, heat for the main part of the building. It is submitted, if the pump room were finished, completed, the contention would be merited, but to charge defendant under such conditions with legal possession, seems untenable.

As a matter of law, the testimony of witnesses of plaintiff, did not show any **privaty** of interest on the part of Splitdorf Electrical Company with the men engaged in the room at the time. The fireman was in the *other* room.

In what respect was defendant negligent? Where remiss in any duty owing to this plaintiff? Where did the defendant fail to do anything legally chargeable to it?

The defendant did not make the exhaust pit; that was in course of construction by the general contractor and work under it still being done; the piping was merely temporary; the employees of sub-contractors were at work at the time; and for some time thereafter (case, p.p. 54, 63).

This plaintiff knew that the men were working in there, and he had a duty devolving upon him, commensurate with his occupation and the attending circumstances to observe a degree of care in carrying on his duties. He was not working on a parlor floor, but in a place where construction work was being carried on and always elements of danger exist. Circumstances should govern actions. The occasion of his being there was because work was unfinished. If he were to paint the side of a building in course of erection, a degree of care would be required of him as an incident in his work in keeping with conditions; the same applies here.

Reference throughout the testimony was made to the uncovered exhaust pit (case, pp.51,62). The contractors working in there had put a small board over it temporarily for their mutual convenience, why? Because it was unfinished; because it was only connected up with a temporary pipe, running down from the ceiling; because until the final piping was installed the metal top could not be put upon it by the contractors.

No testimony was presented that the board covering was not over it when the man finished work the day previous, or in fact that they had removed it; no testimony of plaintiff-respondent shows the owner had anything to do with the board covering before, on the day in question, or had removed it; or further that the owner knew it was off, or had been taken off and not replaced it.

No testimony of plaintiff showed that the owner had notice of such alleged defective condition, or by a reasonable inspection should have known it, and hence failed to do its legal duty. If any conclusions are permissible, the men working on the job had removed it, if it were off, for the purpose of their work.

From the above, where can the Trial Court say this owner was negligent?

The plaintiff, by testimony of witness Hubin (case, p.53) attempts to imply that a Mr. Brown exercised some supervision over the work done in there. Mr. Brown was general superintendent of the plant, and customarily went through the whole plant to see how the work generally was progressing. Such was an incident in his work. To seek to charge the defendant because of that fact with control and jurisdiction over that room, the work being done therein, and responsibility for the condition of the exhaust pit, in course of construction, is going far afield.

Where, under the circumstances, was there evidence of a duty upon the owner to inspect this exhaust pit, and a failure to guard against a contingency such as occurred?

What, but mere conclusions, unsupported by any legal binding basis, were the statements of the witnesses of plaintiff on the subject of the lights going out. (Case, pp. 57, 61.)

The building was in course of construction, wiring and other elements being a part, and it is natural at times for lights to flash out and on at intervals. Is that enough to charge the owner with negligence?

Appellant respectfully asserts that at the particular time this light referred to (case, pp. 20, 42) went out, the plaintiff failed to show that the owner, or anyone for him, *put out this light*. Testimony did show (case, p. 52) that occasionally the lights would flash out but this building was under construction and completion.

Assuming for the sake of argument that this appellant did have some control or jurisdiction over the premises. Is it a necessity upon the owner to follow the employees of the contractor and the sub-contractor around all the time, to pick up, replace, remove and guard every possible element in their work which might cause *some* danger to some one, be it a co-employee of the contractor or sub-contractor? To do so would *at once* cause disturbance and interference with the proper duties of the men. At most all that would be required, legally, would be a reasonable inspection of the work on part of the owner. Could it be said that the owner had failed in a reasonable inspection if the board were on the pit the day before, at a time when work was being done, and yet without any evidence shown that the owner had knowledge at the time in question that the pit was uncovered? No evidence shows it knew the board was off. We argue that there is nothing in the conditions existing with work changing each day to lead the owner, under our assumption, to reasonably expect the board would be off, so as to charge it with a degree of negligence or want of ordinary care. In *Sesler v. Rolf Coal & Coke Co.*, 415 S. E. 261, 51 W. Va. 318, it was held that if an independent contractor, going on premises of another to perform work under a contract with the owner, is injured from defects known or which by fair care ought to have been known to owner, and unknown or which by fair care cannot be known to the contractor, the owner is liable; *but under the reverse of these circumstances, he is not liable.*

There are no questions of doubt involved, and we assert that the plaintiff-respondent failed to show, as a matter of law, this appellant was guilty of negligence, and that irrespective of the question of contributory negligence on the part of plaintiff, a direction of a verdict should have been granted by the Trial Court at the end of the case.

It is submitted that, upon the actual facts found by the Court, no negligence as to this appellant was exhibited as a matter of law, and the Trial Court should have so ruled. Further, as a matter of law the plaintiff by his acts was wanting in such a degree of care under the attending circumstances and conditions as to defeat his recovery; that his own acts contributed proximately to cause the happening of the accident.

Appellant respectfully asserts this suit was initially instituted against the wrong defendant; that responsibility, if any, beyond the plaintiff-respondent, for the happening was upon others than the owner, over whom this appellant had no control, as a matter of law.

In consequence the rule applies: That damages cannot be recovered in an action for personal injuries, where the independent act of a third person intervenes between the negligence of defendant complained of and the injury sustained, and but for which the injury would not have occurred. *Cuff v. Newark, etc.. R. Co.*, 35 N. J. L. (*supra*). Such a condition makes a test of the remoteness of the damage which forbids recovery. *Ashley v. Harrison*, 1 Esp. 48.

It is maintained that the evidence showed that the general contractor had not completed the work contracted, and the owner had not accepted the work. The principal, therefore applies, that until the owner does accept the result of the work done by an independent contractor, he is not liable for injuries thereafter arising from defects in the work; and when so accepted, it must be shown he knew of the defects or could have known of them by careful examination of the work, and provided also the defects which caused the accident affected the sufficiency of the structure or article for the purpose for which it was intended. (16 Am. & Eng. Encyc. of Law, 2nd Edit., pp. 206, 207, and cases cited there.)

In the case at bar the relation of the parties to this controversy, the nature of the work to be done or undertaken, the actual conditions existing support no other conclusion than that this defendant was not responsible for the injury sustained. The

actions, conduct and relation of the plaintiff, and his own testimony give rise to his own negligence. In the case of *Piepho v. Merchant's Loan & Trust Co.*, *supra*, the facts are analogous or as near as can be found, and the Appellate Court grasped the proper legal aspect. We contend that the questions of law are identical.

Take the testimony of the witnesses; the best resume is the full record. It is undisputed that the plaintiff was an employee of a sub-contractor; that he took no orders from this defendant; his orders came from his own employer. A building was in course of erection, installation and completion. Work was changing from day to day. The sub-contractor's men were at work in the boiler room, before, on Nov. 15, 1916, and thereafter; the work was uncompleted. The general contractor made the sump pit, and had not finished its work. The boiler room was not completed and turned over to the owner until December 19, 1916. A contract existed to do that work, and the manager of the general contractor in answer to the Court's question showed his company were liable, if anyone was. They had actual control—legal control.

Further, it is submitted that plaintiff failed to show a legal liability upon the owner or a duty devolving upon it with respect to the sump pit, so as to charge it with a failure to exercise any reasonable degree of care as to it. We contend the owner certainly had no duty, under existing circumstances, to interfere with the construction work being engaged upon at the time, even if it did have knowledge of the condition of the pit, which we respectfully assert it did not. This defendant was wanting in no legal duty, and the Trial Court should have so found as a matter of law.

For these reasons it is respectfully submitted that the Trial Court erred in submitting the case to the jury, and that the judgment entered should be reversed.

Submitted March Term, 1920.

CLARENCE B. TIPPETT,
Attorney of Defendant-Respondent.

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