INDEX

TESTIMONY

Summons

THE STATE OF NEW JERSEY to

VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC. (Body Corporate).

YOU ARE SUMMONED to answer the annexed complaint of GEORGE SHAW in an action at law in the NEW JERSEY SUPREME COURT. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this Thirtieth day of June, Nineteen Hundred and Twenty-seven.

EDWARD J. KELLEHER,
Clerk.

COOK AND STOUT,
Attorneys.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate), *Defendants.*	ACTION AT LAW. COMPLAINT.

Plaintiff, George Shaw, a resident of the City of Asbury Park, in the County of Monmouth and State of New Jersey, complains:

FIRST COUNT

1. On February 8, 1927, plaintiff was a foreman, employed by Dwight P. Robinson & Company, Inc., who were, at that time, the general contractors of and engaged in the erection of a large office building known as the

Electric Building, situate on the northwest corner of Bangs Avenue and Emory Street, in the City of Asbury Park, Monmouth County, New Jersey.

2. The defendants, Vermont Marble Company (Body Corporate); George Peterson, Inc.; John H. Meyers, (the first name being fictitious), and Isaac F. Ribicki, (the first name being fictitious), partners trading as Meyers & Ribicki, and Carley & Company, Inc. (Body Corporate) were independent contractors, and by their agents, servants and employees, then and there actively engaged in furnishing labor and materials for and toward the construction and completion of various portions of the works in said building under independent contracts or undertakings.

3. At the time and place aforesaid, this plaintiff was actively engaged in his duties as foreman, directing the work and overseeing the work being then and there performed by his employer, Dwight P. Robinson & Company, Inc., on the ground floor of said building; his duties being separate and independent of and from the various works being performed by the defendants, by their agents, servants and employees, plaintiff not being a fellow servant, employee, vice principal, or in any manner connected with the agents, servants and employees of the defendants or any or either of them, and not in any manner participating in, or being connected with the separate and distinct works being carried on and performed by the defendants at the time and place aforesaid, by and through their respective agents, servants and employees.

4. It then and there became and was the duty of the defendants and each of them, to use due and proper care

in the employment and selection of their servants, and not to employ such as were unskillful, careless, reckless and negligent in the performance of their respective duties in that behalf, in the handling of appliances, materials, elevator shaft, hoisting device; likewise in the handling, lifting and transporting of materials from floor to floor and place to place and in said building; likewise in the erection and construction of its elevator well hole and hoisting apparatus so used as aforesad; likewise to use due and proper care in the construction, operation and maintenance of said elevator shaft and elevator well hole; likewise to see that no timbers or other material projected over and into said shaft or well hole; likewise to use care that no materials be placed on the elevator platform in such manner that while operating the same and hoisting materials thereon, said platform or said materials thereon did not engage in any obstruction or projecting thing while said elevator device was being used between the various floors of said building; likewise to use care not to bring into contact said elevator or materials thereon with any projecting plank, beam or other construction or obstruction so as to dislodge materials then and there being hoisted and transported thereon and causing the same to be cast from said platform down said shaft and to fall upon this plaintiff where he was working, and injuring him; likewise to see that no part of said platform or elevator should strike any plank, beam or projection extending over and into said shaft or otherwise dislodging it and causing tile and other material to be ripped and torn from the walls and columns in said building and thereby causing such tile or other material to fall or to be cast down said elevator shaft to the floors below and particularly to the floor where plaintiff was lawfully at work and thus injuring him.

5. Defendants and each of them disregarded and violated their respective duties to plaintiff and were negilent in this: Did not use due and proper care in the selection of its said agents, servants and employees; but on the contrary selected and employed in said work persons who were unskillful, careless, reckless and negilent in the performance of their respective duties; reckless, careless and negligent in the handling of material and appliances used in the works in which they were then and there engaged; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negilent in transporting materials from floor to floor in said building; reckless, careless and negligent in the erection, maintenance, construction and operation of said elevator and hoist; reckless, careless and negligent in failing to see that no planks, beams or other projections extended over and into the elevator shaft or well hole in such a manner as to strike or engage the platform of said elevator or the material then and there being carried thereon, and so in this, or some other manner to dislodge such materials placed thereon, and causing tile and other material to be ripped and torn from the walls and columns in said building and therby caused such tile or other material to fall or to be cast into and down said shaft or well hole, thereby, or in some such or other manner, caused such tile and other heavy materials to strike this plaintiff and seriously and permanently injuring him.

6. As a direct proximate and consequential cause of such carelessness, recklessness and negligence on the part of the defendants, their agents, servants and employees in this behalf, did, on the day and year aforesaid, and at the place aforesaid, while plaintiff was engaged in his duties as aforesaid, by said agents, servants and employees

then and there operating said elevator or hoisting apparatus and paraphernalia trnsporting mterials from floor to floor in said building, carelessly, recklessly and negligently run, operate and manage said elevator engine and apparatus, equipment, paraphernalia and materials in such manner that the platform or said elevator or hoist, or the materials thereon, in some such manner engaged and struck a beam or plank placed, erected and maintained, and permitted to be placed, erected and maintained by the defendants over, into and upon the elevator hole or shaft on the sixth floor of said building in such manner as to cause the same, or the material on said elevator, to collide violently with a projecting plank or beam, ripping loose a large quantity of tile or other material from the walls of said building and causing the same to be cast and to fall with great force and violence to the ground floor of said building, down, upon and against the head and body of this plaintiff, thereby seriously and permanently injuring him.

7. In consequence and by reason of such carelessness, recklessness, fault and negligence of the defendants, their agents, servants and employees as aforesaid, this plaintiff sustained, suffered and received serious injuries of a permanent character; several vertbræ of his spine were fractured; the shock and injury therefrom and other injuries then and there received, cause diabetes to develop in the body, blood and system of the plaintiff; he was rendered sick, sore and disabled, and so continues and will permanently, either wholly or in part, so remain; he was confined to a hospital and to his home, in bed; he suffered, still suffers and will permanently suffer great physical and mental pain, and suffered serious nervous, mental and physical shock and injuries to his nerves and nervous sys-

tem; ever since the happening of said occurrence he has been and will permanently be incapacitated and disabled from attending to his usual duties and occupation, and from earning any money; he has been and will permanently be compelled to expend large sums of money for medicines and surgical treatment, and medicines and medical and surgical appliances in endeavoring to be cured of his said injuries; that he was cut, bruised and wounded in and about his body and head; that he has been and will in the future be obliged to spend large sums of money for appliances, apparatus and devices to support his spine, neck and head, and to wear the same during the balance of his natural life, and be put to the expense of renewing such appliances, apparatus and devices from time to time during his life; that he has lost large gains and profits which he otherwise could and would have enjoyed; all to his damage in the sum of $100,000.00.

Plaintiff demands judgment against the defendants in damages for the sum of $100,000.00 besides the costs of this action.

SECOND COUNT

1. On February 8, 1927 plaintiff was a foreman, employed by Dwight P. Robinson & Company, Inc., who were, at that time, the general contractors of and engaged in the erection of a large office building known as the Electric Building, situate on the northwest corner of Bangs Avenue and Emory Street, in the City of Asbury Park, Monmouth County, New Jersey.

2. The defendant Vermont Marble Company (Body Corporate) was an independent contractor, and by its agents, servants and employees, was then and there ac-

tively engaged in furnishing labor and materials for and toward the construction and completion of various portions of the works in said building under an independent contract or undertaking.

3. At the time and place aforesaid, this plaintiff was actively engaged in his duties as foreman, directing the work and overseeing the work being done and performed then and there by his employer, Dwight P. Robinson & Company, Inc., on the ground floor of said building; his duties being separate and independent of and from the various works being performed by the said defendant, by its agents, servants and employees, plaintiff not being a fellow servant, employee, vice-principal, or in any manner connected with the agents, servants and employees of the defendant Vermont Marble Company, and not in any manner participating in, or being connected with the separate and distince work being carried on and performed by the defendant Vermont Marble Company at the time and place aforesaid, by and through its respective agents, servants and employees.

4. It then and there became and was the duty of the defendant Vermont Marble Company (Body Corporate), to use due and proper care in the employment and selection of its servants, and not to employ such as were unskillful, careless, reckless and negligent in the performance of its duty in that behalf, in the handling of appliances, materials, elevator shaft, hoisting device; likewise in the handling, lifting and transporting of materials from floor to floor and place to place in said building; likewise in the erection and construction of its elevator well hole and hoisting apparatus so used as aforesaid; likewise to use due and proper care in the construction, opera-

tion and maintenance of said elevator, elevator shaft and elevator well hole; likewise to see that no timbers or other material projected over and into said shaft or well hole; likewise to use care that no materials be placed on the elevator platform in such manner that while operating the same and hoisting materials thereon, said platform or said materials thereon did not engage in any obstruction or projecting thing while said elevator device was being used between the various floors of said building; likewise to use care not to bring into contact said elevator or materials thereon with any projecting plank, beam or other construction or obstruction so as to dislodge materials then and there being hoisted and transported thereon and causing the same to be cast from said platform down said shaft and to fall upon this plaintiff where he was working, and injuring him; likewise to see that no part of said platform or elevator should strike any plank, beam or projection extending over and into said shaft or otherwise dislodging it and causing tile and other material to be ripped and torn from the walls and columns of said building and thereby causing such tile or other material to fall or be cast down said elevator shaft to the floors below, and particularly to the floor where plaintiff was lawfully at work, and thus injuring him.

5. Defendant Vermont Marble Company (Body Corporate) disregarded and violated its duty to plaintiff and was negligent in this: It did not use due and proper care in the selection of its said agents, servants and employees; but on the contrary selected and employed in said work persons who were unskillful, careless, reckless and negligent in the performance of their respective duties reckless, careless and negligent in the handling of material and appliances used in the works in which they were then

and there engaged; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negligent in transporting materials from floor to floor in said building; reckless, careless and negligent in the erection, maintenance, construction and operation of said elevator and hoist; reckless, careless and negligent in failing to see that no planks, beams or other projections extended over and into the elevator shaft or well hole in such manner as to strike or engage the platform of said elevator or the materials then and there being carried thereon, and so in this, or some other manner to dislodge such materials placed thereon, and causing tile and other material to be ripped and torn from the walls and columns in said building and thereby caused such tile and other material to fall or be cast into and down said shaft or well hole, thereby, or in some such or other manner caused such tile and other and heavy materials to strike this plaintiff and seriously and permanently injuring him.

6. As a direct proximate and consequential cause of such carelessness, recklessness and negligence on the part of the defendant, Vermont Marble Company (Body Corporate), its agents, servants and employees in this behalf, did, on the day and year aforesaid, and at the place aforesaid, while plaintiff was engaged in his duties aforesaid, by said agents, servants and employees then and there operating said elevator or hoisting apparatus and paraphernalia transporting materials from floor to floor in said building, carelessly, recklessly and negligently run, operate and manage said elevator engine and apparatus, equipment, paraphernalia and materials in such manner that the platform of said elevator hoist, or the materials thereon, in some such manner engaged and struck a beam

or plank placed, erected and maintained, and permitted to be placed, erected and maintained by said defendent over, into and upon the elevator hole or shaft on the sixth floor of said building in such manner as to cause the same, or the materials on said elevator, to collide violently with a projecting plank or beam, ripping loose a large quantity of tile or other material from the walls of said building and causing the same to be cast and to fall with great force and violence to the ground floor of said building, down, upon and against the head and body of this plaintiff, thereby seriously and permanently injuring him.

7. In consequence and by reason of such carelessness, recklessness, fault and negligence of the defendant Vermont Marble Company (Body Coporate), its agents, servants and employees as aforesaid, this plaintiff sustained, and suffered serious injuries of a permanent character; several vertebræ of his spine were fractured; the shock and injury therefrom and other injuries then and there received, caused diabetes to develop in the body, blood and system of the plaintiff; he was rendered sick, sore and disabled, and so continues and will premanently, either wholly or in part, so remain; he was confined to a hospital and to his home, in bed; he suffered, still suffers pain and suffered serious, mental and physical shock and injuries to his nerves and nervous system; ever since the happening of the said occurrence he has been and will permanently be incapacitated and disabled from attending to his usual duties and occupation, and from earning any money; he has been and will permanently be compelled to expend large sums of money for medicines and surgical treatment, and medical and surgical appliances in endeavoring to be cured of his said injuries; that he was

cut, bruised and wounded in and about his body and head; that he has been and will in the future be obliged to spend large sums of money for appliances, apparatus and devices to support spine, neck and head, and to wear the same during the balance of his natural life, and be put to the expense of renewing such appliances, apparatus and devices from time to time during his life; that he has lost large gains and profits which he otherwise could and would have enjoyed; all to his damage in the sum of $100,000.00.

Plaintiff demands judgment against the defendant Vermont Marble Company (Body Corporate) in damages for the sum of $100,000.00, besides costs of this action.

THIRD COUNT

1. On February 8, 1927, plaintiff was a foreman, employed by Dwight P. Robinson & Company, Inc., who were, at that time, the general contractors of and engaged in the erection of a large office building known as the Electric Building, situate on the northwest corner of Bangs Avenue and Emory Street, in the City of Asbury Park, Monmouth County, New Jersey.

2. The defendant George Peterson, Inc., (Body Corporate) was an independent contractor, and by its agents, servants and employees, was then and there actively engaged in furnishing labor and materials for and toward the construction and completion of various portions of the works in said building under an independent contract or undertaking.

3. At the time and place aforesaid, this plaintiff was actively engaged in his duties as foreman, directing the work and overseeing the work then and there being done

and performed by his employer, Dwight P. Robinson & Company, Inc., on the ground floor of said building; his duties being separate and independent of and from the various works being performed by the said defendant, George Peterson, Inc., by its agents, servants and employees, plaintiff not being a fellow servant, employee, vice-principal, or in any manner connected with the agents, servants and employees of the defendant George Peterson, Inc., and not in any manner participating in, or being connected with the separate and distinct work being carried on and performed by the defendant George Peterson, Inc., at the time and place aforesaid, by and through its respective agents, servants and employees.

4. It then and there became and was the duty of the defendant George Peterson, Inc., to use due and proper care in the employment and selection of its servants, and not to employ such as were unskillful, careless, reckless and negligent in the performance of its duty in that behalf, in the handling of appliances, materials, elevator shaft, hoisting device; likewise in the handling, lifting and transporting of materials from floor to floor and place to place in said building; likewise in the erection and construction of its elevator well hole and hoisting apparatus so used as aforesaid; likewise to use due and proper care in the construction, operation and maintenance of said elevator, elevator shaft and elevator well hole; likewise to see that no timbers or other materials projected over and into said shaft or well hole; likewise to use care that no materials be placed on the elevator platform in such manner that while operating the same and the hoisting of the materials thereon, said platform or said platform or said materials thereon, did not engage in any obstuction or projecting thing while said elevator device was being

used between the various floors of said building; likewise to use care not to bring into contact said elevator or materials thereon with any projecting plank, beam or other construction or obstruction so as to dislodge materials then and there being hoisted and transported thereon and causing the same to be cast from said platform down said shaft and to fall upon this plaintiff where he was working, and injuring him; likewise to see that no part of said platform or elevator should strike any plank, beam or projection extending over and into said shaft or otherwise dislodging it and causing tile and other material to be ripped and torn from the walls and columns of said building and thereby causing such tile or other material to fall or be cast down said elevator shaft to the floors below, and particularly to the floor where plaintiff was lawfully at work, and thus injuring him.

5. Defendant George Peterson, Inc. (Body Corporate) disregarded and violated its duty to plaintiff and was negligent in this: Did not use due and proper care in the selection of its said agents, servants and employees; but on the contrary selected and employed in said work, persons who were unskillful, careless, reckless and negligent in the performance of their respective duties; reckless, careless and negligent in the handling of material and appliances used in the works in which they were then and there engaged; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negligent in transporting materials from floor to floor in said building; reckless, careless and negligent in the erection, maintenance, construction and operation of said elevator and hoist; reckless, careless and negligent in failing to see that no planks, beams or other projections extended over and into the elevator shaft

or well hole in such a manner as to strike or engage the platform of said elevator or the materials then and there being carried thereon, and so in this, or some other manner to dislodge such materials placed thereon, and causing tile and other material to be ripped and torn from the walls and columns in said building and thereby caused such tile and other material to fall or be cast into and down said shaft or well hole, thereby, or in some such or other manner caused such tile and other heavy materials to strike this plaintiff and seriously and permanently injuring him.

6. As a direct proximate and consequential cause of such carelessness, recklessness and negligence on the part of the defendant, George Peterson, Inc., its agents, servants, and employees in this behalf, did, on the day and year aforesaid, and at the place aforesaid, while plaintiff was engaged in his duties as aforesaid, by said agents, servants and employees then and there operating said elevator or hoisting apparatus and paraphernalia transporting materials from floor to floor in said building, carelessly, recklessly and negligently run, operate and manage said elevator engine and apparatus, equipment, paraphernalia and materials in such manner that the platform of said elevator hoist, or the materials thereon, in some such manner engaged and struck a beam or plank placed, erected and maintained, and permitted to be placed, erected and maintained by said defendant over, into and upon the elevator hole or shaft on the sixth floor of said building in such manner as to cause the same, or the material on said elevator, to collide violently with a projecting plank or beam, ripping loose a large quantity of tile or other material from the walls of said building and causing the same to be cast and to fall with great

force and violence to the ground floor of said building, down, upon and against the head and body of this plaintiff, thereby seriously and permanently injuring him.

7. In consequence and by reason of such carelessness, recklessness, fault and negligence of the defendant, George Peterson, Inc., its agents, servants and employees as aforesaid, this plaintiff sustained and suffered serious injuries of a permanent character; several vertebrae of his spine were fractured; the shock and injury therefrom and other injuries then and there received, caused diabetes to develop in the body, blood and system of the plaintiff; he was rendered sick, sore and disabled, and so continues, and will permanently, either wholly or in part, so continue; he was confined to a hospital and to his home, in bed; he suffered, still suffers and will permanently suffer great physical and mental pain, and suffered serious nervous, mental and physical shock and injuries to his nerves and nervous system; ever since the happening of the said occurrence he has been and will permanently be incapacitated and disabled from attending to his usual duties and occupation, and from earning any money; he has been and will permanently be compelled to expend large sums of money for medicines and surgical treatment, and medical and surgical appliances in endeavoring to be cured of his said injuries; that he was cut, bruised and wounded in and about his body and head; that he has been and will in the future be obliged to spend large sums of money for appliances, apparatus and devices to support his spine, neck and head, and to wear the same during the balance of his natural life, and be put to the expense of renewing such appliances, apparatus and devices from time to time during his life; that he has

lost large gains and profits which he otherwise could and would have enjoyed; all to his damage in the sum of $100,000.00.

Plaintiff demands judgment against the defendant, George Peterson, Inc., in damages for the sum of $100,000.00, besides cost of this action.

FOURTH COUNT.

1. On February 8, 1927, plaintiff was a foreman, employed by Dwight P. Robinson & Company, Inc., who were, at that time, the general contractors of and engaged in the erection of a large office building known as the Electric Building, situate on the northwest corner of Bangs Avenue and Emory Street, in the City of Asbury Park, Monmouth County, New Jersey.

2. The defendants, John H. Meyers (the first name being fictitious) and Isaac F. Ribicki (the fiirst name being fictitious), partners trading as Meyers & Ribicki, were independent contractors, and by their agents, servants and employees, were then and there actively engaged in furnishing labor and materials for and toward the construction and completion of various portions of the works in said building under an independent contract or undertaking.

3. At the time and place aforesaid, this plaintiff was actively engaged in his duties as foreman, directing the work and overseeing the work then and there being done and performed by his employer, Dwight P. Robinson & Company, Inc., on the ground floor of said building; his duties being separate and independent of and from the various works being performed by the said defendants, by

their agents, servants and employees, plaintiff not being a fellow servant employee, vice-principal, or in any manner connected with the agents, servants and employees of these defendants, and not in any manner participating in, or being connected with the separate and distinct work being carried on and performed by these defendants at the time and place aforesaid, by and through their respective agents, servants and employees.

4. It then and there became the duty of these defendants to use due and proper care in the employment and selection of their servants, and not to employ such as were unskillful, careless, reckless and negligent in the performance of their duty in that behalf, in the handling of appliances, materials, elevator shaft, hoisting device; likewise in the handling, lifting and transporting materials from floor to floor and place to place in said building; likewise in the erection and construction of the elevator well hole and hoisting and apparatus so used as aforesaid; likewise to use due and proper care in the construction, operation and maintenance of said elevator, elevator shaft and elevator well hole; likewise to see that no timbers or other material projected over and into said shaft or well hole; likewise to use care that no materials be placed on the elevator platform in such manner that while operating the same and the hoisting of the materials thereon, said platform or said materials thereon did not engage in any obstruction or projecting thing while said elevator device was being used between the various floors of said building; likewise to use care not to bring into contact said elevator or materials theron with any projecting plank, beam or other construction or obstruction so as to dislodge materials then and there being hoisted and transported thereon and causing the same to be cast

from said platform down said shaft and to fall upon this plaintiff where he was working, and injuring him; likewise to see that no part of said platform or elevator should strike any plank, beam or projection extending over and into said shaft or otherwise dislodging it and causing tile and other material to be ripped and torn from the walls and columns of said building and thereby causing such tile or other material to fall or be cast down said elevator shaft to the floors below, and particularly to the floor where plaintiff was lawfully at work, and thus injuring him.

5. These defendants disregarded and violated their duty to plaintiff and were negligent in this: Did not use due and proper care in the selection of their said agents, servants and employees; but on the contrary selected and employed in said work, persons who were unskillful, careless, reckless and negligent in the performance of their respective duties; reckless, careless and negligent in the handling of material and appliances used in the works in which they were then and there engaged; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negligent in transporting materials from floor to floor in said building; reckless, careless and negligent in the erection, maintenance, construction and operation of said elevator and hoist; reckless, careless and negligent in failing to see that no planks, beams or other projections extended over into the elevator shaft or well hole in such a manner as to strike or engage the platform of said elevator or the materials then and there being carried thereon, and so in this or some other manner to dislodge such materials placed thereon, and causing tile and other material to be ripped and torn from the walls and columns

in said building and thereby caused such tile and other material to fall or be cast into and down said shaft or well hole, thereby, or in such or some other manner caused such tile and other heavy materials to strike this plaintiff and seriously and permanently injuring him.

6. As a direct proximate and consequential cause of such carelessness, recklessness and negligence on the part of the defendants, their agents, servants and employees in this behalf, did, on the day and year aforesaid, and at the place aforesaid, while plaintiff was engaged in his duties as aforesaid, by said agents, servants and employees then and there operating said elevator or hoisting apparatus and paraphernalia transporting materials from floor to floor in said building, carelessly, recklessly and negligently run, operate and manage said elevator engine and apparatus, equipment, paraphernalia and materials in such manner that the platform of said elevator hoist, or the materials thereon, in some such manner engaged and struck a beam or plank placed, erected and maintained, and permitted to be placed, erected and maintained by said defendants over, into and upon the elevator hole or shaft on the sixth floor of said building in such manner as to cause the same, or the material on said elevator, to collide violently with a propecting plank or beam, ripping loose a large quantity of tile or other material from the walls of said building and causing the same to be cast and to fall with great force and violence to the ground floor of said building, down, upon and against the head and body of this plaintiff, thereby seriously and permanently injuring him.

7. In consequence and by reason of such carelessness, recklessness, fault and negligence of the defendants afore-

said, their agents, servants and employees as aforesaid, this plaintiff sustained and suffered serious injuries of a permanent character; several vertebra of his spine were fractured; the shock and injury therefrom and other injuries then and there received, caused diabetes to develop in the body, blood and system of the plaintiff; he was rendered sick, sore and disabled, and so continues, and will permanently, either wholly or in part, so continue; he was confined to a hospital and to his home, in bed; he suffered, still suffers and will permanently suffer great physical and mental pain, and suffered serious nervous, mental and physical shock and injuries to his nervous system; ever since the happening of the said occurrence he has been and will permanently be incapacitated and disabled from attending to his usual duties and occupation, and from earning any money; he has been and will permanently be compelled to expend large sums of money for medicines and surgical treatment, and medical and surgical appliances in endeavoring to be cured of his said injuries; that he was cut, bruised and wounded in and about his body and head; that he has been and will in the future be obliged to spend large sums of money for appliances, apparatus and devices to support his spine, neck and head, and to wear the same during the balance of his natural life, and be put to the expense of renewing such appliances, apparatus and devices from time to time during his life; that he has lost large gains and profits which he otherwise could and would have enjoyed; all to his damage in the sum of $100,000.00.

Plaintiff demands judgment against these defendants in damages for the sum of $100,000.00 besides costs of this action.

FIFTH COUNT

1. On February 7, 1927, plaintiff was a foreman, employed by Dwight P. Robinson & Company, Inc., who were, at that time, the general contractors of and engaged in the erection of a large office building known as the Electric Building, situate on the northwest corner of Bangs Avenue and Emory Street, in the City of Asbury Park, Monmouth County, New Jersey.

2. The defendant, Carley & Company, Inc., (Body Corporate) was an independent contractor, and by its agents, servants and employees, was then and there actively engaged in furnishing labor and materials for and toward the construction and completion of various portions of the work in said building under an independent contract or undertaking.

3. At the time and place aforesaid, this plaintiff was actively engaged in his duties as foreman, directing the work and overseeing the work then and there being done and performed by his employer, Dwight P. Robinson & Company, Inc., on the ground floor of said building; his duties being separate and independent of and from the various works being performed by the said defendant, Carley & Company, Inc., by its agents, servants and employees, plaintiff not being a fellow servant, employee, vice-principal, or in any manner connected with the agents, servants and employees of the defendant, Carley & Company, Inc., and not in any manner participating in, or being connected with the separate and distinct work being carried on and performed by the defendant, Carley & Company, Inc., at the time and place aforesaid, by and through its respective agents, servants and employees.

4. It then and there became and was the duty of the defendant Carley & Company, Inc. to use due and proper care in the employment and selection of its servants, and not to employ such as were unskillful, careless, reckless and negligent in the performance of its duty in that behalf, in the handling of appliances, materials, elevator shaft, hoisting device: likewise in the handling lifting and transporting of materials from floor to floor and place to place n said building; likewise in the erection and construction of its elevator well hole and hoisting apparatus so used as aforesad; likewise to use due and proper care in the construction, operation and maintenance of said elevator, elevator shaft and elevator well hole; likewise to see that no timbers or other material projected over and into said shaft or well hole; likewise to use care that no materials be placed on the elevator platform in such manner that while operating the same and the hoisting of the materials thereon, said platform or said materials thereon did not engage in any obstruction or projecting thing while said elevator device was being used between the various floors of said building; likewise to use care not to bring into contact said elevator or materials thereon with any projecting plank, beam or other construction or obstruction so as to dislodge materials then and there being hoisted and transported thereon and causing the same to be cast from said platform down said shaft and to fall upon this plaintiff where he was working, and injuring him; likewise to see that no part of said platform or elevator should strike any plank, beam or projection extending over and into said shaft or otherwise dislodging it and causing tile and other material to be ripped and torn form the walls and columns of said building and thereby causing such tile or other material to fall or be cast down said

elevator shaft to the floors below, and particularly to the floor where plaintiff was lawfully at work, and thus injuring him.

5. Defendant Carley & Company, Inc., (Body Corporate) disregarded and violated its duty to plaintiff and was negligent in this: did not use due and proper care in the selection of its said agents, servants and employees; but on the contrary selected and employed in said work, persons who were unskillful, careless, reckless and negligent in the performance of their respective duties; reckless, careless and negligent in the handling of material and applicances used in the works in which they were then and there engaged; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negligent in the handling and operation of said elevator hoist; reckless, careless and negligent in transporting materials from floor to floor in said building; reckless, careless and negligent in the erection, maintenance, construction and operation of said elevator and hoist; reckless, careless and negligent in failing to see that no planks, beams or other projections extended over and into the elevator shaft or well hole in such a manner as to strike or engage the platform of said elevator or the materials then and there being carried thereon, and so in this, or some other manner to dislodge such materials placed thereon, and causing tile and other material to be ripped and torn from the walls and columns in building and thereby caused such tile and other material to fall or be cast into and down said shaft or well hole, thereby, or in some such or other manner caused such tile and other heavy materials to strike this plaintiff and seriously and permanently injuring him.

6. As a direct proximate and consequential cause of such carelessness, recklessness and negligence on the part of the defendant Carley & Company, Inc., its agents, servants and employees in this behalf, did, on the day and year aforesaid, and at the place aforesaid, while plaintiff was engaged in his duties as aforesaid, by said agents, servants and employees then and there operating said elevator or hoisting apparatus and paraphernalia transporting materials from floor to floor in said building, carelessly, recklessly and negligently run, operate and manage said elevator engine and apparatus, equipment, paraphernalia and materials in such manner that the platform of said elevator hoist, or the materials thereon, in some such manner engaged and struck a beam or plank placed, erected and maintained and permitted to be placed, erected and maintained by said defendant, over, into and upon the elevator hole or shaft on the sixth floor of said building in such manner as to cause the same, or the material on said elevator, to collide violently with a projecting plank or beam, ripping loose a large quantity of tile or other material from the walls of said building and causing the same to be cast and to fall with great force and violence to the ground floor of said building, down, upon and against the head and body of this plaintiff, thereby seriously and permanently injuring him.

7. In consequence and by reason of such carelessness, recklessness, fault and negligence of the defendant Carley & Company, Inc., its agents, servants and employees as aforesaid, this plaintiff sustained and suffered serious injuries of a permanent character; several vertebræ of his spine were fractured; the shock and injury therefrom and other injuries then and there received, caused diabetes to develop in the body, blood and system of the

plaintiff; he was rendered sick, sore and disabled, and so continues, and will permanently, either wholly or in part, so continue; he was confined to a hospital and to his home, in bed; he suffered, still suffers and will permanently suffer great physical and mental pain, and suffered serious nervous, mental and physical shock and injuries to his nerves and nervous system; ever since the happening of the said occurrence he has been and will permanently be incapacitated and disabled from attending to his usual duties and occupation, and from earning any money; he has been and will permanently be compelled to expend large sums of money for medicines and surgical treatment, and medical and surgical appliances in endeavoring to be cured of his said injuries; that he was cut, bruised and wounded in and about his body and head; that he has been and will in the future be obliged to spend large sums of money for appliances, apparatus and devices to support his spine, neck and head, and to wear the same during the balance of his natural life, and be put to the expense of renewing such appliances, apparatus and devices from time to time during his life; that he has lost large gains and profits which he otherwise could and would have enjoyed; all to his damage in the sum of $100,000.00.

Plaintiff demands judgment against the defendant Carley & Company, Inc., in damages for the sum of $100,000.00, be sides costs of this action .

COOK AND STOUT,
Attorneys for Plaintiff.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW,
Plaintiff,
vs.
VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate),
Defendants.

ACTION AT LAW.

ANSWER.

The defendant, Vermont Marble Company, a body corporate of the state of Vermont, having its principal office in the Town of Proctor and State of Vermont, answering the complaint says:

FIRST COUNT.

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1.

2. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2, except that it admits that it was one of the contractors engaged in the erection of the Electric Building, in the City of Asbury Park, during the month of February, 1927.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3, except as is admitted by the following statement: Plaintiff was not in the employ of this defendant.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

SECOND COUNT

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1.

2. Paragraph 2 is admitted.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3, except as is admitted by the following statement: Plaintiff was not in the employ of this defendant.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied.

THIRD COUNT.

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1.

2. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2, except that it understands that the defendant, George Peterson, Inc., was during February, 1927, engaged in furnishing labor and materials towards the construction of the said Electric Building.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3.

4. This defendant has no knowledge or information suffiicient to form a belief as to the allegations contained in Paragraph 4.

5. This defendant has no knowledge or information suffiicient to form a belief as to the allegations contained in Paragraph 5.

6. This defendant has no knowledge or information suffiicient to form a belief as to the allegations contained in Paragraph 6.

7. This defendant has no knowledge or information suffiicient to form a belief as to the allegations contained in Pargraph 7.

FOURTH COUNT

1. This defendant has no knowledge or information suffiicient to form a belief as to the allegations contained in Paragraph 1.

2. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2, except that it understands that the defendants John H. Meyers (the first name being fictitious) and Isaac F. Ribicki (the first name being fictitious), partners, trading as Meyers and Ribicki, were during February, 1927, engaged in furnishing labor and materials towards the construction of the said Electric Building.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3.

4. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4.

5. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 5.

6. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 6.

7. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 7.

FIFTH COUNT

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1.

2 .This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 2, except that it understands that the defendant, Carley & Company, Inc. (Body Corporate) was during February, 1927, engaged in furnishing labor and materials towards the construction of the said Electric Building.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3.

4. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4.

5. This defendant has no knowledge or information sufficient to form a belief as to the alegations contained in Paragraph 5.

6. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 6.

7. This defendant has no knowledge or information sufficient to form a belief to the allegations contained in Paragraph 7.

FIRST DEFENSE

This defendant was not guilty of the negligence charged in the complaint.

SECOND DEFENSE

Plaintiff was at the said time and place guilty of contributory negligence.

DURAND, IVINS & CARTON,
Attorneys of Defendant,
VERMONT MARBLE WORKS.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate), *Defendants.*	ACTION AT LAW. ANSWER OF DEFENDANT, GEORGE PETERSON, INC.

The defendant George Peterson, Inc. of the City of Harrison, County of Hudson and State of New Jersesy, answering the complaint of the plaintiff, for itself says:

ANSWER TO FIRST COUNT

1. As to Paragraph 1, defendant has not sufficient information to form a belief, but leaves plaintiff to his proof.

2. Defendant denies Paragraphs 2, 3, 4, 5, 6, and 7 and that they are liable to the plaintiff in any sum whatsoever.

ANSWER TO SECOND COUNT

1. As the Second Count applies only to the defendant Vermont Marble Company (Body Corporate) this defendant has not sufficient information to form an opinion and belief and leaves plaintiff to his proof.

ANSWER TO THIRD COUNT

1. As to Paragraph 1 defendant has not sufficient information to form a belief but leaves plaintiff to his proof.

2. Defendant denies Paragraphs 2, 3, 4, 5, 6, and 7 and that they are liable to the plaintiff in any sum whatsoever.

ANSWER TO FOURTH COUNT

1. As the Fourth Count applies only to the defendant John H. Meyers (the first name being fictitious) and Isaac F. Ribicki (the first name being fictitious) partners, trading as Meyers & Ribicki, this defendant has not sufficient information to form an opinion and belief and leaves plaintiff to his proof.

ANSWER TO FIFTH COUNT

1. As the Fifth Count applies only to the defendant Carley & Company, Inc. (Body Corporate) this defendant has not sufficient information to form an opinion and belief and leaves plaintiff to his proof.

FIRST SEPARATE DEFENSE

This defendant was not guilty of any negligence.

SECOND SEPARATE DEFENSE

The agents, servants and employees of this defendant were not guilty of any negligence.

THIRD SEPARATE DEFENSE

Plaintiff was guilty of contributory negligence.

FOURTH SEPARATE DEFENSE

This defendant had fully completed and and all work they had to do on, in or about said building, prior to the happening of the accident as alleged, and on the date of the happening of the said alleged accident, they had no agents, servants or employees or anyone whatsoever on the premises, or doing anything in connection therewith, and had no machines, implement, appliances, tools or machinery of any nature belonging to them or in which they had any interest on said premises.

FIFTH SEPARATE DEFENSE

Any work this defendant may have done or may have been doing on said premises, was under special contract and had nothing to do with the happening of the accident, as alleged in the complaint which resulted in said injury and said alleged injury was received without any negligence on the part of this defendant or its agents, servants and employees.

SIXTH SEPARATE DEFENSE

This defendant was not the General Contractor for the construction and erection of building mentioned in complaint and any work it may have done or may have been doing on said premises, was under special contract and had nothing to do whatsoever, or no relation to or interest in the work which was being done by someone else on said premises, through and by which the alleged accident was supposed to have happened and injury received.

ACKERSON & VAN BUSKIRK,
Attorneys of Defendant,
GEORGE PETERSON, INC.

NEW JERSEY SUPREME COURT

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate), *Defendants.*	ACTION AT LAW. ANSWER OF DEFENDANTS, MEYER & RIBICKI.

J. Henry Meyer and I. Frank Rybicki residing in the Borough of Rutherford, in the County of Bergen and State of New Jersey, partners trading as Meyer & Rybicki, two of the defendants in the above entitled action, say that:

FIRST COUNT

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the First Count of the complaint.

2. They admit the allegations of paragraph 2 of the said first count.

3. They admit that the plaintiff was not in their employ at the time as alleged in paragraph 3 of the said first count; they have no knowledge or information sufficient to form a belief as to the remaining allegations of the said paragraph 3.

4. They deny the allegations of paragraph 4 of the said first count.

5. They deny the allegations of paragraph 5 of the said first count.

6. They deny the allegations of paragraph 6 of the said first count.

7. They deny the allegations of paragraph 7 of the said first count.

FOURTH COUNT

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the fourth count of the complaint.

2. They admit the allegations of paragraph 2 of the said fourth count.

3. They admit that the plaintiff wsa not in their employ at the time as alleged in paragraph 3 of the said fourth count; they have no knowledge or information sufficient to form a belief as to the remaining allegations of the said paragraph 3.

4. They deny the allegations of paragraph 4 of the said fourth count.

5. They deny the allegations of paragraph 5 of the said fourth count.

6. They deny the allegations of paragraph 6 of the said fourth count.

7. They deny the allegation of paragraph 7 of said fourth count.

DEFENSES TO FIRST AND FOURTH COUNTS

1. The injuries and damages, if any, sustained by the plaintiff at the time and place mentioned in his complaint were not due to any negligence on the part of the defendants, Meyer & Rybicki, ther servants, agents or employees.

2. The injuries and damages, if any, sustained by the said plaintiff, at the time and place mentioned in his complaint, were caused or contributed to by his own negligence in that he did not use such care and caution for his own safety as a reasonably prudent person would have used under like circumstances.

WILLIAM K. FLANAGAN,
Attorney for Defendants, J. Henry Meyer and I. Frank Rybicki, partners trading as Meyer & Rybicki.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

GEORGE SHAW, *Plaintiff,* VS. VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate), *Defendants.*	ACTION AT LAW. REPLY TO ANSWER OF VERMONT MARBLE COMPANY (BODY CORPORATE)

Plaintiff denies the truth of the Answer of the defendant, Vermont Marble Company (Body Corporate), save such part thereof as admits the truth of the allegations contained in plaintiff's complaint.

COOK & STOUT,
Attorneys for Plaintiff.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY (Body Corporate), *et als., Defendants.*	ACTION AT LAW. REPLY TO ANSWER OF DEFENDANT, GEORGE PETERSON, INC.

REPLY TO ANSWER TO FIRST COUNT

Plaintiff denies the allegations contained in this count save so much thereof as admits the allegations in plaintiff's complain.

REPLY TO ANSWER TO SECOND COUNT

Plaintiff denies the allegations contained in this count save so much thereof as admits the allegations in plaintiff's complaint.

REPLY TO ANSWER TO THIRD COUNT

Plaintiff denies the allegations contained in this count save so much thereof as admits the allegations in plaintiff's complaint.

REPLY TO ANSWER TO FOURTH COUNT

Plaintiff denies the allegations contained in this count save so much thereof as admits the allegations in plaintiff's complaint.

REPLY TO ANSWER TO FIFTH COUNT

Plaintiff denies the allegations contained in this count save so much thereof as admits the allegations in plaintiff's complaint.

REPLY TO DEFENSES

Plaintiff denies the truth of the allegations contained in the first, second, third, fourth, fifth and sixth separate defenses, save so far as they admit the allegations contained in plaintiff's complaint.

GENERAL REPLY

Plaintiff denies the truth of the allegations contained in the defendant's answer.

COOK & STOUT,
Attorneys for Plaintiff.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious) and ISAAC F. RIBICKI (the first name being fictitious), partners, trading as MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate), *Defendants.*	ACTION AT LAW. REPLY TO ANSWER OF MEYER & RIBICKI.

The plaintiff replies as follows to the Answer of the defendants, J. Henry Meyer and I. Frank Rykicki:

REPLY TO ANSWER TO FIRST COUNT

Plaintiff denies the truth of the allegations contained in the defendants' answer, save such part thereof as admits the allegation in plaintiff's complaint.

REPLY TO ANSWER TO SECOND COUNT

Plaintiff denies the truth of the allegations contained in the defendants' answer, save such part thereof as admits the allegation in plaintiff's complaint.

REPLY TO DEFENSES TO FIRST AND FOURTH COUNTS

Plaintiff denies the truth of the allegations contained in the defenses to the First and Fourth Counts.

COOK & STOUT,
Attorneys for Plaintiff.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW,
Plaintiff,
v.
VERMONT MARBLE COMPANY,
et al.,
Defendants.

ACTION AT LAW.

Freehold, N. J., January 3, 1929.

(During the drawing of the jury:)

THE COURT—The court rules that joint defendants are not entitled to more than six challenges.

MR. CARTON—Does your Honor rule that joint defendants are entitled to only six challenges and that each defendant is not entitled to six?

THE COURT—Yes, joint defendants are entitled to six challenges only. If you can show me any authority to the contrary I will allow eighteen.

(Objection noted for defendant Vermont Marble Company as ground of appeal.)

(Objection noted for defendant Peterson Company as ground of appeal.)

(Mr. Cook opens for the plaintiff and Mr. Flanagan, Mr. Carton and Mr. Ackerson open for the respective defendants.)

MR. CARTON—If the court please, it should be noted on the record, in connection with your Honor's ruling, that the joint defendants have but six challenges. At the time your Honor announced the ruling we assumed that each defendant should have six. That is there had been all the challenges: the Vermont Marble Company had had two, Peterson had had one and Meyer and Rybicki had had three.

THE COURT—I ought to say to counsel as a matter of fairness to myself, I am not aware of any authority which authorizes six challenges each in the case of joint defendants. It is likewise true in criminal cases. Now if counsel has any authority which allows six challenges severally where defendants are jointly sued, of course I will stop this case right here. I do not want to be left in the position of having something sprung on me at the last moment. If you gentlemen know of any authority give it to me.

MR. CARTON—Of course your Honor will understand there is no attempt to have anything sprung. Your Honor asked us to produce such authority. I thought it was so elementary I supposed there was plenty of authority. I am somewhat surprised to know there is not. For years in this court where there were joint defendants, each defendant has taken six challenges, whether right or not.

THE COURT—No, I will stop the case right now and allow you to look it up. For example, in looking at

the Digest here I find all the cases relating to criminal cases. I see no reason why it should be any different. The fact is that my practice right along has been in cases of joint defendants to allow six challenges.

MR. FLANAGAN—In criminal cases it has always been that; plenty of authority for that and that was the practice when your Honor came up to Essex as a visiting judge and when I was prosecutor.

THE COURT—Now I will declare a recess. You might as well be right right at the start. For example, the citations here are all in criminal cases. (Reads citations.)

I am not aware in my experience of any case where the court has allowed more than six.

MR. CARTON—If the court please, I had no thought about this matter coming up.

THE COURT—We will stop right now and find out. I don't want this case tried and then find out that we are wrong about challenges.

(An intermission was taken.)

MR. COOK—There are a number of witnesses working around through different parts of the state and out of the state, and I would like the privilege of calling them out of order.

THE COURT—All right.

HUGH GRADY, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Grady, where do you live? A. Laurelton.

Q. Laurelton, New Jersey? A. Yes.

Q. What is your business or occupation? A. I am a hoisting engineer.

Q. How long have you been employed as such? How long have you been working in that capacity? A. The last twenty years.

Q. On February 8, 1927, were you employed as a hoisting engineer? A. Yes.

Q. And where were you? A. Electric building.

Q. Asbury Park? A. Yes, sir.

Q. Where was the hoisting engine that you had charge of? A. On the ground floor.

Q. That is down in the cellar? A. No, that is on the level of the street.

Q. The level of the street? A. Yes, sir.

Q. And what engine or apparatus was it? A. Why, it was a motor.

Q. Run by electricity? A. Run by electricity. I think it was a forty horse motor.

Q. And did it run both the elevators that were there? A. No, sir.

Q. Just the one? A. Just the one.

Q. And that was the one nearest to what street? A. Bang Avenue. Does Bangs Avenue run into Main.

Q. Bangs Avenue run into Main Street. A. It was the Bangs Avenue side.

Q. So this was the most southerly of the elevators in the building; is that right? A. Yes, sir.

Q. The most southerly? A. Yes, sir.

Q. I show you a diagram and ask you if that is a typical representation of the floors of the electric building as of February 8, 1927, the layout. A. No, sir.

Q. Do you recognize it? A. I recognize this, yes.

Q. As the floor plans, I mean. A. First floor plan, isn't that?

Q. Yes, first floor plan. What differences were there at that time between now as shown by that diagram.? A. Well, the elevators that we speak of lay about here. (Indicating.)

Q. Referring to the bottom of the diagram? A. Well, in the center of the building.

Q. You understand that is just a floor plan? A. I understand that.

Q. It doesn't show where that elevator was located? A. Yes, shows the passenger elevators here.

Q. I know, but I don't mean passenger elevators, I mean to say is it, outside of the fact of those elevators there, which are permanent, is that floor plan correct? A. Yes, it looks to be right.

Q. Those what you referred to there as the elevators were not in at that time? A. No.

Q. They have been placed there, you say, permanently since? A. Yes.

Q. Outside of that that plan is a typical representation of the floors of that building, each one of them? A. Yes, that looks to be what it is, as near as I can remember.

Q. As of that date? A. Yes.

Q. Now can you mark on that paper about where these elevators were, with this pencil here? A. Say

No. 1 and No. 2. I think that is about where it is. (Marks on diagram.)

Q. Now you have marked there on this diagram No. 1 and No. 2 elevators. No. 1 is nearest to Bangs Avenue. Is that the one that you were operating that day. A. Yes, sir.

Q. You remember this accident, don't you, the fact that it occurred that day? A. I do. I was doing the hoisting.

Q. That Mr. Shaw was injured? A. The day he got hurt, yes.

Q. Who was engaged in hauling material on that elevator at the time that the accident happened? A Vermont Marble Company.

Q. And were you employed by them? A. Yes, sir.

Q. Did they pay you? A. Yes, sir.

Q. Where was the marble going, to what floor, at that time? A. It was the eighth or ninth floor, I can't say sure. It was either the eighth or ninth floor, I believe.

Q. Going to the eighth or ninth floor? A. Yes.

Q. Did you see them during the day that you were working for the Vermont Marble Company then hoisting up the marble cases on the platform? A. Yes.

Q. Were you inside when they were putting them on the platform? A. Well, I could see they was putting it on, yes.

Q. Did you get your signal from— A. The man at the bottom of the elevator.

Q. The man at the bottom of the elevator? Who was that man working for? A. Vermont Marble Company.

Q. Before this accident had any other cases gone up there? A. Yes, sir.

Q. Do you know how many? A. No, I don't know how many. They run from noon to 4:30, I believe.

Q. Until 4:30? A. Yes.

Q. And during all that time were you engaged in the work of hoisting for the Vermont Marble Company? A. Yes, sir.

Q. What time did this accident happen, about? A. Happened in the afternoon sometime, but I don't know just what time it was.

Q. And could you tell by any instrument or observation where this accident happened, where it started, what floor it was on? A. No, sir.

Q. You have no means of knowing that? A. I didn't notice that, what floor it happened on.

Q. What attracted your attention? A. Falling tile.

Q. Falling tile? A. Yes, sir

Q. Well, can you tell us just about that, Mr. Grady, how— A. Yes, I can. You see in operating one of these elevators you get a signal to go ahead, and in the operation you are watching the cable come in. That cable is marked from floor to floor.

Q. It is marked on the cable? A. It is marked on the cable. That cable comes in pretty fast, I think 20 feet a minute. Yes, 250 feet a minute that motor will bring in. Now that cable—when that hoist was going up this tile fell, fell down on the shaft.

By THE COURT:

Q. Did you see it fall? A. Heard the noise is all. I didn't see no tile. I seen the broken tile at the bottom of the shaft.

Q. Something fell? A. Something fell and drawed my attention.

Q. You were looking in the bottom of the shaft afterwards? A. I was looking at this cable coming in and I heard this noise, and naturally thinking something was happening, I stopped.

By MR. COOK:

Q. You say the cable was marked; did that indicate the different floors where the platforms would stop? A. Yes, sir.

Q. And did you observe just about what mark was on this cable at the time you heard this noise? A. No, sir.

Q. Does anybody go up on the platform with the goods? A. No, sir.

Q. How is it stopped when it reaches its desired destination? A Well, I stop it at the mark on the floor, whatever floor I am supposed to deliver it to.

Q. You marked it? A. Understand the cables are marked right through the whole operation, but you run to them marks.

Q. To which A. And I was running to the eighth floor.

Q. You were running to the eighth floor? A. Eighth or ninth floor, as I said, I don't just remember, it was around there somewhere, when this thing happened, and when it happened I stopped.

Q. Well, by your markings there it hadn't reached its destination? A. No.

Q. Did you notice between the time that the elevator started up and when you heard the noise where or about where this elevator was? A. No, sir.

Q. Did you know whether it had reached beyond the sixth floor? A. Well, I couldn't say.

Q. You couldn't say? I don't know.

Q. Were you excited about it when you heard the noise? A. When I heard the noise I stopped, see? I figured something went wrong or somebody dropped a tile or something and stopped; and as soon as I stopped I got bells to go ahead and I went ahead.

Q. As soon as you stopped? A. I went ahead to the floor I was supposed to go to .

Q Went right on up? A. Went right on up.

Q. And did that go on up to the floor you were supposed to? A Yes, sir.

Q. And of course went beyond the sixth floor? A. Yes, sir.

Q And that was the eighth or ninth floor, you say? A. Yes, sir.

Q. Did you see Shaw struck with this tile? A. No, sir.

Q Did you see him fall? A. No, sir.

Q Didn't know anything about that till when? A. Till somebody told me.

Q. And did you go out and see him there? A No, sir.

Q. You stayed right in your engine house? A. Yes, sir.

Q Was that enclosed? A. No, sir.

Q. Were you inside so you could see Mr. Shaw? A. No, sir.

Q. You were not in position to see him? A. No, sir.

Q. Then you were wholly unaware that he had been injured until somebody afterwards told you about it? A. Yes, sir.

Q. Now this elevator had been used at various times by a Peterson & Company, had it not? A. Yes, sir.

Q. By Myer & Rybicki? A. Yes.

Q. By Carlow & Company? A. Yes, sir.

Q. They were performing different work in this building? A. Yes, sir.

Q. How long were these cases of marble, would you say, Mr. Grady? A. Well, I couldn't say.

Q. Were they boxed? A. They were boxed, they were crated up, yes.

Q. What type of marble were they? Give us a general description, and what were they used for, if you know.
10 A. I think they were marble for the side walls there.

Q. The side walls? A. The side walls.

Q. And about how high was the box on the elevator? A. I could only give you a rough estimate on that.

Q. That is what I want. A. I should judge about five feet.

Q. About how long? A. About four by five or maybe some four by six or four and a half by five, I should judge they would run about four by five.

20 Q. Four feet high and six feet long, do you mean? A. No, four feet wide and five feet long.

Q. Four feet wide and five feet long? A. That is only a rough estimate. I never measured those boxes, you understand.

By THE COURT:

Q. That is all you are giving, your impression, that is all. A. Yes, sir.

30 By MR. COOK:

Q. Were these boxes heavy, I mean by reason of the contents in them? A. Well, according to the elevator the motor handled the load all right; probably about a thousand pounds.

Q. About a thousand pounds? A. Yes.

Q. And you had been hauling similar cases on this elevator from one o'clock until the time of the accident? A. Yes.

Q. And were they about the same size, all of them? A. Well, they varied, you know, a little; about the same thing, you know; six inches, maybe might have been six inches difference, I don't know.

Q. You didn't pay any particular attention to them? A. No, I didn't pay any partcular attention to them.

Q. Nothing happened in the nature of an accident prior to that on that day? A. No.

Q. And the others went up all right? A. Yes.

Q. What was about, in your best judgment, the dimension of the elevator platform? A. Well, I would say five feet, maybe six feet square; no, about five and a half feet square. I think the people that built the elevator told me that. I don't know.

Q. I am just getting your best judgment, Mr. Grady. Your own best judgment is about five and a half feet square? A. Yes.

Q. Who did you get your directions from to start the elevator and to stop, or to start the elevator? A. Why, Mr. Arnott.

By THE COURT:

Q. Who is Mr. Arnott? A. He is here.

Q. I know, but what relation did he have to the work? A. He was representing the butcher or boss of the gang.

By MR. COOK:

Q. Of what gang? A. The gang that was lifting the marble.

Q. And what gang was lifting the marble? A. The Vermont Marble Company men, the gang of laborers.

Q. He was employed by the Vermont Marble Company too? A. Yes.

Q. And he was foreman of the men putting these cases on, the foreman? A. Well, he acted like one. I don't know whether he was or not. He might have been acting on his own hook.

Q. He acted the leader? A. Yes.

By THE COURT:

Q. He gave directions? A. Yes.

By MR. COOK:

Q. And when did he give you a signal? A. He told me where the marble was going and it was all right going ahead.

Q. And of course you, knowing that your cable was marked, when it reached that point, the designation you stopped the engine? A. At the floor he told me, yes.

Q. And it landed right there? A. Yes, sir.

Q. You were paid by the Vermont Marble Company that day? A. Yes, sir.

Q. And employed by them at that time? A. Yes, sir.

Q. How much did they pay you? A. $20.

Q. For how much, how long? A. For that afternoon.

Q. $20 for that afternoon? A. Yes, sir.

Q. Was that a special job? A. Yes, sir.

Q. They wanted the marble up there, I suppose, did they not? A. They wanted the marble up there and

that is what it cost them. They wanted me to put it up there.

Q. So you made your bargain with them and they paid you? A. Yes, sir.

Q. That was your wages? That was your wages or compensation; is that right?

MR. CARTON—I object to the characterization of it.

THE COURT—It will speak for itself, really.

Q. You were not regularly employed by the Vermont Marble Company? A. No, sir.

Q. Only had hired to the different operators? A. To the different subcontractors as they would come along.

Q. From time to time? A. Yes, sir.

CROSS EXAMINATION

By MR. CARTON:

Q. Mr. Grady, you say you are a hoisting engineer? A. Yes, sir.

Q. And have been for how long? A. The last twenty years.

Q. How long had you been engaged in work on the electric building before February 8, 1927? A. About eight weeks.

Q. Doing hoisting work during all that time? A. Yes.

Q. For whom? A. For George Peterson, Rybicki and Meyers.

Q. Well, whom were you employed by? Were you employed by any one specially at that time or prior to

the time on this job? A. On the start of the job I got about eight weeks from Peterson. He was the one that started that elevator.

Q. What do you mean now; you say you got about eight weeks with Peterson. A. Well, I worked eight weeks for Peterson.

Q. And was that all you worked for him, eight weeks? A. No, he hired me, maybe it would be for only one week. It lasted eight weeks.

Q. Hired you for what? A. To run the elevator.

Q. Carting material for Mr. Peterson? A. Yes, sir.

Q. And did you do work any one other than Peterson before this time? A. Before the time of the accident?

Q. Yes. A. Yes.

Q. For whom did you work? A. Rybicki and Meyer and Carlow.

Q. And did you contract with them for the use of the elevator when they employed you? A. I didn't contract with anybody.

Q. Well, did you make an agreement with them? A. He hired me.

Q. Who are you talking about now, Peterson? A. Any of them.

Q. What do you mean, hired you? What was the hiring contract or what happened to the contract? A. Well, if they wanted me to run the elevator they told me to start to run it.

Q. Well, you made a separate charge, did you, for each job, didn't you, so much an hour? A. No.

Q. Never charge by the hour? A. Yes, I do.

Q. What was the hourly charge? A. $5 an hour. That was for small loading; that is, if they didn't want to hire me for a week.

By THE COURT:

Q. $5 an hour working how many hours a day? A. Maybe two, maybe four. You didn't know what you were going to get out of it.

By MR. CARTON:

Q. Whatever number of hours they wished to use you? A. That is the idea.

Q. Had you done some work for the Vermont Marble Company before the day of the accident? A. Well, I can't say. I don't remember if I ever done work before. I don't remember the date.

Q. Do you recall now whether this job that you were doing on the 8th of February, 1927, was the first time you had ever contracted to do any work for the Vermont Marble people? A. I thing it was.

Q. You think it was? And with whom did you make your arrangements for the doing of this work? A. The foreman marble setter.

Q. The foreman of the Vermont Marble Company? A. Yes.

Q. Do you know what his name was? A. No, sir.

Q. Have you seen him here today? A. Yes, sir.

Q. Mr. Johnson, was it? A. I don't know what his name is.

Q. Mr. Galloway? A. I don't know.

Q. When did you make the agreement with this representative for doing this work on the day in question, Febuary 8th, or prior? A. You see I was working for about four of them there and I can't tell you—

Q. Well, you entered into an agreement for any one who wanted your services, didn't you, with this ele-

vator? A. Sure, if they wanted me they would send for me.

Q. You owned or controlled the elevator, didn't you? A. I ran the elevator.

Q. And you were there to render your services to any one who wanted to hire it for working on that job? A. Yes, sir.

Q. You remember what your actual agreement was with the representative of the Vermont Marble Company on this day? A. No, I don't know of any agreement.

Q. Well, you say that it was a special job and he paid you $20. A. $20.

Q. That was the result, wasn't it? A. Yes, $5 an hour. It lasted four hours.

Q. Well then, that is what I say it was; the agreement was $5 an hour; is that right? A. That is right.

Q. They employed your hoister for their use at the rate of $5 an hour that afternoon; is that right? A. That is right.

Q. And they paid you? A. Sure they did.

Q. You stated at the outset, as I understood, that you were in the employ of the Vermont Marble Company. You don't mean to say that you are in the employ of the Vermont Marble Company in any other way than what you have described, do you? A. Well, if I was not employed by the Vermont Marble Company I would like to know who I was employed by.

Q. Well, you hadn't been in their employ prior to that time, had you? A. No, I don't believe I was.

Q. When you say you were in their employ you mean that you entered into this agreement with the foreman to do this hoisting for them. A. Yes, sir.

Q. That is what you mean by that? A. Yes, sir.

Q. Do you remember how many loads had been taken up in the building on this day in question prior to this time of the accident happening? A. No, sir.

Q. Now I understand you to say that their crated marble was being taken up; is that right? A. Well, there were cases supposed to be marble in it. I don't know what was in it.

Q. And they were loaded on the elevator? A. Yes, sir.

Q. And when the elevator was loaded what happened then? Did you take care of the operation of it? A. Yes, sir.

Q. And is that electrically operated and controlled? A. Yes, sir.

Q. And you would send this elevator up to whatever floor had been requested? A. Yes, sir.

Q. What was the name of the man who had charge of the elevator on the ground floor? A. Arnott.

Q. Did Arnott have anything to do with the operation of the elevator that day? A. No, sir; outside of loading it.

Q. Yes, but I mean the actual operation or control. A. No.

Q. He had nothing to do with it? A. No.

Q. It was your elevator and you were carting up the loads? A. Yes, sir.

Q. Had you prior to that day, the day in question, February 8th, carted up other loads through this shaftway? A. Yes, sir.

Q. And do you know of the construction of the shaftway generally? You knew of its construction?

MR. ACKERSON—Objected to on behalf of the defendant George Peterson, as to the question being

asked. Probably the objection is premature, but as I understand the answer of my codefendant, the Vermont Marble Company, that he has denied any and all allegation of any negligence as to the construction or operation of this particular elevator and shaft, and furthermore, that it is not proper cross-examination because the plaintiff, for whatever allegation he may have included in his complaint, has not seen fit and has not examined as to any such allegations.

THE COURT—I will not rule on that question now until it becomes pertinent. You may ask the question and I will ascertain the trend of the examination.

Q. The question was, Mr. Grady, if you prior to this day, February 8, 1927, knew generally of the construction of the pit, the shaftway. A. Well, no, I didn't. The elevator ran through it and ran free and that was all as far as I went with it.

Q. Well, how long had the elevator been running through it and running free, as you say? A. From the time it was built.

Q. And how many months or weeks was that prior to February 8, 1927? A. It was about eight weeks.

Q. And you had been operating through this shaftway more or less during the whole of that time? A. Yes.

Q. That is a fact, isn't it? A. Yes.

Q. This so-called elevator, I suppose, is nothing more or less than a hod hoist. A. Yes.

Q. That is what it is? A. Yes.

Q. Constructed how? Without sides, without top, I suppose, just a platform? A. Runs on a guide rail and braced from the guide rail up through the building.

By THE COURT:

Q. Just a platform, I suppose? A. Yes, sir.

Q. No car attachment? A. Just a flat platform with a guide switch running on the side to guide it up the building.

By MR. CARTON:

Q. Do you remember to which of the floors prior loads had been taken that afternoon? A. Well, the loads were distributed right through the building, on each floor.

Q. Various floors? A. Yes, sir.

Q. And do you know how many loads they were to take up, whether this was the last load or not? A. No, it was not the last load.

Q. It was not the last load? A. No.

Q. Were other loads taken up after that? A. Yes, sir.

Q. In the same way? A. Yes, sir.

Q. By you operating the hoist if loaded? A. Yes, sir.

Q. For how long, about? A. Well, we ran them right through that day to around quitting time, half past four. I couldn't tell you just how many. Sometimes they go—

Q. Do you recall, Grady, about what time the accident happened that afternoon? A. Well, I think it was in the middle of the afternoon.

Q. And it is your recollection that after the accident you continued to haul your loads up? A. Everything ran all right before and after.

Q. Without any difficulty with subsequent loads? A. No.

Q. Nor had you had any difficulty with previous loads? A. No, sir.

Q. I thing I understood you to say that you observed a piece of the tile going down. A. Yes, or I noticed the pieces in the bottom of the shaft.

THE COURT—He didn't say he saw the tile going down; he heard a noise, then afterwards, immediately afterwards, he saw broken tile at the bottom of the shaft. That was his statement as I understand it.

THE WITNESS—Yes, sir.

Q. That is a fact, is it? A. Yes, sir.

By THE COURT:

Q. Do you know where the plaintiff was working at that time? A. No, sir.

MR. CARTON—That is all.

FURTHER CROSS-EXAMINATION

By MR. FLANAGAN:

Q. Your equipment was just a hod hoist? A. International hod hoisting—

MR. ACKERSON—I object to that, if your Honor please.

THE COURT—I will allow it. Objection overruled.

(Objection noted for defendant Peterson, as ground of appeal.)

Q. Whose equipment was the hod hoist? A. International Hod Hoisting Company, I believe that is the name.

Q. Is that perhaps the International Machine Company? A. Yes, or the International Machine Company.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. Had you done all the hoisting work on this elevator or with this elevator? A. Yes, sir; up to that time.

Q. Up to the date of the happening of the accident? A. Yes, sir.

Q. And you were operating it at that time? A. Yes, sir.

Q. On February 8, 1927, were you employed at all by George Peterson, Inc.? A. No, sir.

Q. Had you previously to February 8, 1927, done some work for them? A. For who, Peterson?

Q. Peterson, George Peterson, Inc. A. Well, I have—

Q. Had you previously to February 8, 1927, worked for George Peterson? A. I finished work with Peterson in January.

Q. In January, 1927? A. Yes.

Q. And you didn't work for George Peterson, Inc., after that time? A. George Peterson, Inc., after that time, no, sir. It was around the end of January when I got finished with Peterson.

Q. You don't recall the exact date in January, 1927? A. No, I know it was the latter part of January.

Q. It was the latter part of January? A. Yes, I don't know what date.

Q. 1927? A. Yes, that is the last hoisting I done for him on that building.

Q. And that is the last time that you worked for him? A. Yes.

Q. Who did you work for after you finished with George Peterson, Inc.? Who was the next company? A. I worked for Rybicki & Meyer.

Q. They were the next company that you worked for? A. Yes.

Q. And what was your work with them? What did that consist of? A. It was the same racket, hoisting—

Q. Hod hoist? A. Yes, hod hoist.

Q. This same hod hoist? A. This same hod hoist, yes.

Q. Who did you work for after that? A. Well, I worked for the Vermont Company, but just who I couldn't tell you. I worked for Kelsey (?) and the Terrazzo man.

Q. Of the Vermont Marble Company? A. Of the Vermont Marble Company.

FURTHER CROSS-EXAMINATION

By MR. FLANAGAN:

Q. And sometime prior to February 8, 1927, you had finished with Meyer & Rybicki? A. Yes.

Q. And on the day in question you were working for the Vermont Marble Company? A. Yes.

REDIRECT EXAMINATION

By MR. COOK:

Q. Mr. Grady, could you tell about immediately preceding the fall of that tile that you refer to, that you heard, whether or not your elevator had hit any thing or struck anything or had been interferred with? A. I couldn't feel anything. You usually can, see?—feel through the cable on to the drum; you get used to that work, you can feel if you hit the bottom or something, but I didn't feel anything.

Q. You were not looking for it? A. No, of course I wasn't looking for it.

Q. Did you stop right away after this tile fell? A. When the tile hit the bottom of the shaft I stopped.

Q. What made you do that? A. Well, to protect myself, most of anything. I didn't know what was going or what had happened.

Q. Could you hear any noise or anything indicating— A. Only when the tile hit the bottom of the floor.

Q. How much tile came down, did you notice? A. Well, I didn't see any whole tile coming down.

Q. Just pieces? A. Judging from the pieces on the floor there must have been two or three tile laying there.

By THE COURT:

Q. Give us the size of the pieces as you saw them. A. I saw them tile that day that laid there in—

Q. How large were the pieces? A. Oh, they were big as your hand, some of them.

By MR. COOK:

Q. Did you see any dirt coming down? A. Mortar mixed with it.

Q. And what thickness would you say they were?

A. Well, a tile is about three-quarters of an inch thick, very brittle, breaks all to pieces if it hits anything. If you drop one it would all break right up.

By MR. COOK:

Q. Is this the type of tile that came down, that was being used? (Tile shown witness.)

MR. CARTON—I object to the type of the tile. If that is the tile that came down I have no objection.

THE COURT—Well, he would have the right to show him a piece of tile, if that be the tile, and say whether it resembled that which he saw that was being used.

MR. COOK—The witness has said that the piece he saw was about the size of his hand. There is granite in this building and iron girders and everything; simply showing a piece of the construction of the building. It seems to me that is relevant.

Q. I am asking you if this is the type of tile that was being used in the building. A. Yes.

By THE COURT:

Q. Was that the type that you saw broken at the bottom of the elevator shaft? A. Yes, sir.

Q. Of course you are now being shown what apparently is a whole piece. A. It is half.

Q. It is half a tile? A. Yes.

Q. That which you say was broken pieces about the size of your hand was the same general material? A. Yes.

Q. Without regard to the size? A. Yes.

THE COURT—I will allow that.

MR. ACKERSON—Your Honor will note my objection?

THE COURT—Yes.

(Objection noted for defendant, George Peterson, Inc.)

MR. COOK—I would like to have this marked.

THE COURT—I will not allow that to be marked because you have practically a complete half tile, that is, so far as the half is concerned, and of course it is understood that this is not the condition in which it lay on the floor of the elevator shaft when Mr. Grady saw it.

MR. COOK—No, but I am asking him if it was a piece of the general character.

THE COURT—I will only allow that to go in with the instructions to the jury that they will understand that that is not the thing that dropped; that it was of the material, broken pieces about three-quarters of an

inch in width or thickness and about the size of the hand.

MR. COOK—That is my purpose.

THE COURT—With that understanding I will allow it to be marked.

MR. CARTON—In evidence, if your Honor please?

THE COURT—Well, you will have to identify where that came from.

MR. COOK—I will.

THE COURT—I will not mark it yet.

MR. COOK—I would like to have this diagram to be marked.

THE COURT—I will allow that to be marked now for identification merely. You may do that.

MR. CARTON—If your Honor please, this plan that Mr. Cook has produced and from which he interrogates this witness I take it shows the building in a finished form. If it is Mr. Cook's purpose to have this witness indicate on this plan where these hoists were we have no objection.

MR. COOK—That is all. He has indicated it by 1 and 2. 1 is the elevator in question.

(Plan marked Exhibit P 1.)

DR. WILLIAM J. HERRMANN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Doctor, what is your profession? A. I am a physician, specializing in X-ray work.

Q. And how long have you been such? A. Ten years.

Q. You are at Asbury Park? A. In Asbury Park nine years.

Q. And you have had that experience in the taking of radiographs or X-rays, so called? A. Yes.

By THE COURT:

Q. You specialize in radiographs, don't you, Doctor? A. That is right.

Q. You are what they call a roentgenologist? A. Yes.

THE COURT—Are his qualifications admitted?

MR. CARTON—Yes, if your Honor please.

THE COURT—I may say for the benefit of other counsel I think the doctor has qualified about a dozen times before me.

By MR. COOK:

Q. Now, Doctor, what instruments do you use in making radiographs or X-ray pictures? A. Do you want a description of the X-ray machine?

THE COURT—Oh, no. Go ahead.

MR. COOK—I want to prove the trustworthy and reliable working.

By THE COURT:

Q. Are these instruments used in taking radiographs and photoplates to your knowledge trustworthy and reliable for the purpose used?

MR. CARTON—I think that is objectionable.

THE COURT—In a sense it is a conclusion.

MR. CARTON—I don't suppose the expert knows that. They may buy the best in trade or use at the time, but I don't think this witness is qualified to say.

MR. COOK—He can tell by his experience.

MR. CARTON—No, I don't think he can.

MR. COOK—There are three cases in this state that I have picked out. You show the trustworthiness and reliability of the instruments used.

THE COURT—Go ahead. Let him tell what he did in reference to taking photographs.

By THE COURT:

Q. You used the standard type machine? A. Yes, it is the best we can obtain, made by one of the three or four major houses.

Q. You know that to be so? A. Yes, I know that to be so.

By MR. COOK:

Q. Has it proved trustworthy and reliable? A. Always has in the past.

Q. Do you remember the plaintiff, George Shaw, taking an X-ray of the bones of the body or neck? A. Yes, sir.

Q. On February 8, 1927? A. That is right.

Q. Was he brought to your office? A. He was.

Q. And did you take such X-ray? A. I did.

Q. What part of the body did you X-ray? A. Well, the neck particularly, the lower part, to take in the vertebra, the bones of the spine, in the neck region.

Q. Have you the photographs with you, Doctor? A. No, I haven't the original. It was sent to his doctor.

Q. And who is that, do you know? A. I don't know. I turned them over to his physician at the time of the injury.

By THE COURT:

Q. Well, all you did was to take them, Doctor? A. Took them and wrote a report on what we saw there.

Q. You didn't treat the man at all? A. No, sir.

Q. You were merely an X-ray man? A. Yes, sir.

By MR. COOK:

Q. Who was the physician at that time, Doctor? A. Dr. Holters of Asbury Park.

MR. COOK—My error; I told the doctor he need not come till 1:30. Mr. Carton, I don't want to hold the doctor here. Dr. Holters will not be here till one o'clock.

THE WITNESS—I beg your pardon. I think the X-rays are here.

MR. COOK—These are not the ones.

10

THE COURT—The doctor states that he is in a position to testify as to what he found, but of course he has not the X-ray here to illustrate his testimony, that is the only difficulty.

MR. COOK—We have a subsequent X-ray that was taken after the cast was put on his neck.

20 THE COURT—After the cast was removed?

MR. COOK—No, while the cast was on. The original one I haven't and Dr. Holters says he hasn't.

THE COURT—This is a mere copy?

MR. COOK—No, this is the original, but the ones we are talking about were taken before his admission to the hospital. This was taken in the Long Branch

30 hospital after the cast was put on his neck.

By MR. COOK:

Q. And you took that? A. Yes.

Q. Can you tell us the date when you took the first

X-rays? A. If I am allowed to refer to records, February 9, 1927.

Q. And can you tell when you took the second one? A. The second one was taken February 12th.

Q. At the Long Branch hospital? A. Yes.

Q. By you? A. Yes, sir.

Q. And have you that plate? A. I have that one with me.

By THE COURT:

Q. What does that disclose, Doctor? A. This was —shall I describe it to the jury as well as I can?

Q. Yes, describe it. A. This was merely a side view of the man's neck, after he has had a large heavy plaster cast, the thickness of which you can see, nearly an inch thick, applied to his neck and his shoulders, consequently through this plaster cast the lower bones of the neck, where the body is much thicker anyway, don't show up very well. If we had the proper light here, which this is not, I could show you a fracture through the spinous process, that is, the portion of one of the neck bones that extends backwards, of the seventh cervical vertebra, the one we commonly call the check rein, to which the big ligament from the back of the head is attached; and the sixth vertebra above there has a small piece from the extreme tip fractured.

By THE COURT:

Q. Fractured? A. Yes, or broken, the same thing.

By MR. COOK:

Q. Which cervical vertebræ was fractured? Just turn to that? A. The seventh and the sixth cervical.

Q. The seventh and the sixth cervical? A. Yes.

Q. Is that the bone that extends to the spine? A. Well, we are talking about the posterior. One of the neck bones is really roughly illustrated with a cross. It has lateral processes that extend out, it has a circular body in front, and then it has this long process which extends backward and to which muscles are attached. This fracture oocurred through the bony end of the posterior process that came out, and this seventh one is the most prominent one that sticks out here to the back. You can all feel it in the base of your neck.

By THE COURT:

Q. Sixth and seventh vertebra? A. Yes, sir.

Q. If you had a proper light could the jury see where that fracture was? A. I think I could point it out.

Q. Do you think you could do it at the window there?

(Witness goes to window.)

A. I am afraid, your Honor, that it is so faint here that I will not be able to demonstrate it.

Q. You had better not undertake it. A. I know it is there.

Q. But you can see it, you know it is there? A. I can't see it this morning.

Q. But you know it is there? A. Yes.

By MR. COOK:

Q. Doctor, I show you a photograph, apparently an X-ray photograph, and ask you if you identify that. A. Yes, I will identify it.

Q. And was that photograph taken by you under your direction? A. Yes, sir.

Q. And bears your filing marks? A. Yes.

Q. And by that you identify tt? A. Yes.

Q. And is that the filing mark represented in the case of George Shaw? A. It is.

Q. Does it indicate when it was taken? A. I can also identify it by this arrow, which I remember distinctly placing on it.

Q. Do you remember just when it was taken? A. When this was taken?

Q. Yes. A. No, I don't remember exact. This is a positive made from the negative, superimposing it on the film and allowing the light to come through.

Q. Either the 9th— A. Made subsequent to the 9th.

Q. But it was from a plate taken on the 9th? A. Yes.

Q. Will that assist you in showing this jury? A. Yes, this shows very plainly.

Q. Will you show the jury? A. Now this not viewed by indirect light but by direct light. I think the best is to pass it around.

(Exhibits photograph to jury.)

This is a side view of the neck, showing the bone, counting from the top, first, second, third, fourth fifth, sixth, seventh. I told you before the seventh is the longest process of any of the neckbones sticking from back the back. Here you see a break in it. The posterior piece is pulled a little bit downward, it is not in line with the rest of it. Now then you see a small piece is broken off right from

the tip. The arrow here points directly to the break in the lower of the two bones.

Q. There is such a gland called the pituitary gland, is there? A. Yes.

Q. Can you tell us by that photograph where that is approximately located in relation to the injury? A. I don't believe that goes up far enough on the scale to—(examines photograph). No, we see only the extreme base of the skull here, and that gland would be up here somewheres, probably seven or eight inches or more above.

Q. Is it related in any way to seat of the fracture? A. No.

Q. It is disassociated? A. Yes.

By THE COURT:

Q. What is the pituitary gland, Doctor? A. It is one of the so-called ductless glands of the body. It lies in a small bony depression in the bottom of the skull, right in the center. The crossing of the optic nerves occurs right in that location. And this gland has to do with growth and development very largely. In some cases of interference with this gland—

MR. FLANAGAN—Well, if your Honor please, I don't know the pertinency of this.

THE COURT—I am going to find out. I will tell you later. Any objection to it?

MR. FLANAGAN—I have, sir, at this time.

THE COURT—Objection overruled. You may take an exception.

(Objection noted for defendants Meyer and Rybicki as ground of appeal.)

Q. Finish your story. A. In some cases of interference with this gland we may have some giantism.

Q. Well, it does generally affect the normal growth? A. Yes, but there are other points I was going on to give you; for instance, that tumor of the gland might cause blindness. In other cases of interference with this gland we have glycosuria and sugar—

MR. CARTON—Objected to.

THE COURT—I don't know why you object to it.

MR. CARTON—I object because it is entirely incompetent and immaterial. He says this pituitary gland is seven or eight inches away and has no relation to the seat of the fracture.

THE COURT—He says sometime it interferes with the—what did you say, sugar?

A. Sometimes having glycosuria, sugar appearing in the urine, when it is interferred with.

Q. Does it relate to Bright's disease in any way? A. No.

MR. CARTON—If your Honor please, I now ask that this testimony be stricken out as being incompetent, irrellevant and immaterial.

THE COURT—Yes, I will strike the testimony excepting as the doctor has said that the pituitary is a

gland, indicating where it is located, and all the rest of it will be stricken. I will allow the rest of it to stand.

By MR. COOK:

Q. Doctor, by looking at that X-ray and with your knowledge of causes of injury and trauma, I ask you whether or not a blow such as received by Shaw, as has been described here in the testimony, would or could affect this gland to which you have referred.

MR. FLANAGAN—I object to that. He has not been qualified except merely as a roentgenologist.

THE COURT—Of course he hasn't. He is merely produced as an X-ray man.

Q. Doctor, you are a practicing physician? A. I am fully licensed.

Q. Have you practiced as a physician? A. Yes.

Q. For how many years? A. Well, about two years before I specialized.

Q. About ten or eleven years ago? A. Yes.

Q. And since that time you haven't practiced? A. Not general medicine, no.

Q. You have been confined to this X-ray? A. Yes.

MR. COOK—I think that is all.

THE COURT—Any questions, gentlemen?

CROSS EXAMINATION

By MR. CARTON:

Q. I understood you, Doctor, that you took the first X-ray on the 9th; that is before the patient went to the hospital? A. Yes.

Q. And that was not the one that you examined or produced, was it? A. I have an exact copy of it.

Q. A photographic copy? A. Yes, a positive.

Q. Then you took another approximately after the cast has been applied on the 12th? A. Yes, sir.

Q. Have you taken any since? A. Not to my knowledge.

REDIRECT EXAMINATION

By MR. COOK:

Q. Just one question, Doctor. You say that one of those photographs that you have referred to was taken on the 9th and one was taken after the plaintiff was in a plaster cast? A. That is right.

Q. I show you a picture and ask you if that represents the condition of the plaintiff at the time you took the X-ray. A. I don't know whether that is the exact cast but it is exactly similar.

Q. Did he appear to you in that way when you took this X-ray which you have identified? A. Yes.

THE COURT—Show it to Mr. Carton. He may not object to it.

MR. CARTON—I don't know what this is, if your Honor please.

THE COURT—Well, I can tell you but I won't.

MR. CARTON—I do object to it, your Honor, for the reason that I can't see that it has any relevancy. The witness himself, the patient himself, the plaintiff

himself, can describe his condition. The doctor is here to tell of the X-rays he took.

THE COURT—He has already testified that he took an X-ray while the man was wearing a plaster cast. Now he is asked whether that is the sort of a plaster cast he was wearing that day.

MR. CARTON—That has not been disputed.

THE COURT—Then there is no reason why that photograph should not be admitted.

MR. CARTON—I ask an exception to the marking.

By THE COURT:

Q. That is a picture of Shaw, is it? A. Yes, sir.

By MR. COOK:

Q. Is that a picture of Shaw? A. Yes.
Q. That is the way he appeared at the time you took that X-ray? A. Yes.

(Objection noted for defendant Vermont Marble Company as ground of appeal.)

THE COURT—I understand there is not objection to the X-ray here and the positive photograph?

MR. CARTON—No.

THE COURT—Mark them both.

(X-ray and photograph marked Exhibit P 3 and P 4.)

RECESS TILL 1:35 P. M.

Trial of the cause resumed at 1:35 P. M.

HUGH GRADY, Resumed.

FURTHER CROSS-EXAMINATION

By MR. CARTON:

Q. Mr. Grady, as I recall, in response to my questions you stated that this hoister belonged to you, and then later on, in answer to questions by some other counsel you stated it belonged to some company, did you? A. I didn't state it belonged to me, did I?

Q. Well, so I understood you; then you state afterwards it belonged to some international machine company. A. Yes.

Q. International Hoisting Company; is that right? A. They were the owners of the machine.

Q. What is that? A. They owned the machine.

Q. Well, what right did you have to the controlling of this machine if they owned it? A. I was only an operator on that machine.

Q. Representing the International Company? A. No, representing myself, that is all.

By THE COURT:

Q. Well, how did you get possession of the machine, that is what he is asking; did you lease it from them?

A. I am hired, hired by the man that wants to use the machine.

Q. You are hired? A. Yes.

Q. Who paid for the machine? A. Oh, I don't know who pays for the machine.

Q. Were you? A. No.

Q. You were merely paid for operating it? A. Yes.

Q. $5 a day? A. $5 an hour.

By MR. CARTON:

Q. How did you assume to take charge of operating this machine of the International Hoisting Company? A. Well, I had been the operator on the machine.

Q. For whom? A. For Peterson and for contractors that used the machine.

By THE COURT:

Q. Well, how does the International Machine Company figure in its use? Who pays them? A. The contractor rents the machine from the International and they hire an engineer.

THE COURT—That is it.

By MR. CARTON:

Q. Who hired it from the International? A. The contractor, whoever it may be.

Q. What contractor? A. Why, all the contractors that was on that job there, the subcontractors.

Q. Do you mean to say that these subcontractors for

whom you did work at times contracted with the International Hoisting Machine Company for the use of this machine? A. I don't know anything about what they did with the International Machine Company. They hired me to operate the machine.

Q. Well, because, I suppose, you had some charge of the machine; is that right? A. I had been operating it.

Q. How did you come to have any charge of it? A. Well, that is my business, an engineer.

Q. I know, but what were you doing? What were you doing with the International Hoisting Machine's property? A. With their property?

Q. What were you doing with it? A. That is the regulation with which they work.

Q. Did they know you were operating it? A. They knew I was operating it.

Q. Under what regulation were you such? A. I have a license.

By THE COURT:

Q. Who sent you down to Asbury Park? A. Nobody sent me down.

Q. Oh, yes; somebody must have sent you down. A. I went out and got the job myself.

Q. To whom did you apply for the job? A. Peterson was the first man who hired me.

Q. All right; you had to have an elevator? A. I didn't have to have no elevator; he already had it.

Q. Peterson already had it down? A. Yes, they hired the elevator and installed it and I operated it.

By MR. CARTON:

Q. Who hired the elevator and installed it? A. Peterson did first.

MR. ACKERSON—I object to the installation of it.

THE COURT—We will get this situation. As a matter of fact you don't know anything about it, do you? A. No.

Q. How it came to be down there?

THE COURT—He says he doesn't know.

MR. ACKERSON—I move that portion of the testimony be stricken out.

THE COURT—As to whose?

MR. ACKERSON—As to Peterson and the installation.

MR. CARTON—If he knows.

MR. ACKERSON—He doesn't know. He says he went down there and the elevator was there.

By THE COURT:

Q. Do you know whether Peterson hired it? A. No, I don't know. Peterson hired me.

THE COURT—Strike it out.

By MR. CARTON:

Q. Who employed you in the first instance in this electric building job in Asbury Park? A. Robinson.

Q. Dwight Robinson? A. Dwight Robinson.

Q. To run the elevator? A. No, to run the mixer.

Q. Who employed you first to run the elevator? A. Peterson.

Q. Was the elevator—had it been set up and was it in use when you were first employed? A. Yes, sir; it was set up.

Q. And then did you do operating work for various contractors on behalf of Mr. Peterson or on behalf of yourself? A. Why, no, I worked for Mr. Peterson, and Peterson had the machine, he used the machine most of the time himself. At times when a contractor would want something done they would ask me if I would hoist the stuff for them and I would ask them how much they were going to pay me, and I would get whatever I could out of them.

Q. Then you made this $5 an hour arrangement. A. Yes.

Q. Now did that money come to you or to Peterson? A. $5 an hour for operating went to me.

Q. Did you pay Peterson anything for the use of his elevator? A. No, sir.

Q. On no occasion? A. No, sir.

Q. Did you have any agreement or understanding with Mr. Peterson by which you were entitled to use his elevator? A. No.

Q. Just did it? A. Just did it, yes.

Q. Did Mr. Peterson know that you were doing it? A. I suppose he did.

Q. Well, did he? Do you know whether he did or not? A. Well, I don't know. He never stopped me when he seen me using it.

Q. Did you tell Peterson that you were using his elevator on your own account for other people?

MR. ACKERSON—I object to the characterization of Mr. Carton. It was not Mr. Peterson's elevator.

THE COURT—I will let the witness answer, because I think it would make the question competent.

A. What was it?

By THE COURT:

Q. You were about to say, "I asked"—what? A. I asked Mr. Peterson could I raise some stuff in the noon hour. On that occasion he knew—half hour, noon hour.

By MR. CARTON:

Q. That is, you asked him if you could raise some stuff for another, I suppose? A. For another contractor. He said it was all right.

Q. Did you thereafter ask him if you could use it for other persons? A. No, sir.

Q. You did use it for other persons? A. Yes, sir.

Q. Did Mr. Peterson know you used it for other persons? A. He did from that time and I went on. He wasn't on the job all the time.

Q. Did I understand you to say in your direct examination that there came a time when Mr. Peterson finished

his work on this job? A. When he finished using me on the elevator.

Q. And when was that? A. That was the last of January.

Q. And did he leave the job then, Peterson? A. No, he had work to do there.

Q. Had other work there? A. I think he had men in the building after that.

Q. When was the elevator finally taken out? A. I don't know.

Q. Do you know whether it was taken out or not? A. Do I know whether it was?

Q. Yes. A. Yes, it was taken out.

Q. Do you know by whom it was taken out? A. No, I don't.

By THE COURT:

Q. When did you stop work there? A. Oh, you have got me. I think it was around the 1st of March. I was working for Robinson after that.

Q. When did you stop work in the building? A. Around the first of March or in March.

By MR. CARTON:

Q. The fact is, is it not, Mr. Grady, that this elevator that we are talking about was the same elevator that you had been using in the Fitkin building before this time, isn't it?

MR. ACKERSON—I object. I don't think that that is material.

THE COURT—I don't see how it is material.

A. I don't remember anyway.

THE COURT—He says he doesn't remember.

MR. CARTON—It is material, if the court please. The reason I think it is material, my next question is:

Q. If it was not used in the Fitkin Building whose elevator was that in the Fitkin Building? A. Well, I was on the Fitkin job, too.

THE COURT—It may have a bearing on that subject. It is more or less of a probe.

(Objection noted for George Peterson, Inc., as ground of appeal.)

Q. Were you in the employ of Peterson when he was working on the Fitkin Building? A. Yes.

MR. ACKERSON—I object to this, if your Honor please.

THE COURT—Well, if it doesn't become pertinent I will strike it. I will allow this line until I tell you to stop.

MR. ACKERSON—I wish my objection to extend to the whole examination.

THE COURT—Objection overruled.

(Objection noted for George Peterson, Inc., as ground of appeal.)

Q. Did you operate this same elevator in the Fitkin Building? A. I am not sure whether it was the same one. I operated one like it.

Q. Did you operate the elevator for Peterson in the Fitkin Building? A. Yes, sir.

Q. The Fitkin Building was constructed prior to the Electric Building, was it not? A. Was constructed what?

Q. Before the Fitkin Building? A. Oh, before the Fitkin Building, yes.

Q. Were you present when the elevator in the electric building was set up or installed? A. Yes, sir.

Q. Do you know where it came from? A. Came from the—

MR. ACKERSON—I object, if your Honor please, that that is immaterial, as to where the elevator came from; taking up the time in the examination.

MR. CARTON—I think this is important, that the court and jury may understand. I don't understand yet what these people had to do with the American Hoisting Company's elevator, and I am trying to find out why they had it, and I am pursuing it for that purpose.

MR. ACKERSON—We have the proof here for that purpose.

MR. CARTON—Well, you may use him at the proper time.

Q. (Question repeated.) Do you know where it came from?

THE COURT—He may answer.

A. International Machine Company.

Q. You mean by that that they were the owners of it? A. They were the owners of it.

Q. Do you know from what place or location it came to the electric building when it was set up? A. No, sir.

Q. Do not? A. No, sir.

Q. You are here today as a witness for Peterson, aren't you? A. I am here to state the case. I don't know whose witness I am.

Q. I mean you haven't been brought here by the plaintiff, who has produced you on the stand; you have been brought here by Peterson, haven't you? A. Brought here by—I have got two subpoenas.

Q. Who did you get the subpoenas from? A. Mr. Cook and Mr. Ackerson, I think.

Q. Well, you were here yesterday on behalf of Peterson, weren't you? A. Yes, on behalf of Peterson, that is right. Mr. Cook, the counsel, is—

Q. Where do you live now, Grady? A. In Laurelton.

REDIRECT EXAMINATION

By MR. COOK:

Q. So the jury will understand, what type of work did Peterson & Company do in the building? A. Well, they put in these concrete arches, which are of cinder and cement mixed. It is a loose concrete. It is a loose concrete on top—

THE COURT—Well, that will suffice. They put in concrete arches.

Q. What type of work did Meyer & Rybicki do in the building. A. They put on concrete, which is the finished concrete, goes on top of this concrete which is already in.

Q. You have stated that the Vermont Marble Company performed the marble work in the building? A. Yes.

Q. And that Carlow & Company, the defendant who is not here, did the plastering; is that right? A. That is it.

CROSS EXAMINATION

By MR. ACKERSON:

Q. Do you know who did the work of the installation of the tile in the shaft, the exhibit of which was shown to you, on this particular job? Who did that job of work? A. Why, Robinson. Robinson did all the brick and tile.

Q. Did George Peterson, Inc., do any of that tile work at all? A. No, they didn't do any tile work that I know of.

Q. Now as to George Peterson, Inc., you spoke of asking permission at one noon hour to use the elevator for one of the other contractors. Now it was true at the time that you were employed by Peterson & Company, wasn't it? A. Yes, it was long before this.

Q. And it was prior to February 8, 1927? A. Oh, yes.

Q. In fact, it was in the month of January, 1927, was it not? A. Yes, sir; that was while Peterson was in his operation in the early part of the job.

Q. Now you finished working for Peterson the last time when? A. The latter part of January.

Q. 1927? A. With the elevator.

Q. 1927? A. Yes, sir.

Q. That was the last time you operated that elevator for Peterson, wasn't it? A. Yes, sir.

Q. And Peterson after that date didn't operate or control that elevaator at all, did they? A. Not to my knowledge.

Q. All the operation of the elevator was done by you, wasn't it? A. Yes, sir.

Q. And after January, the last of January, 1927, Peterson had nothing further to do with the elevator? A. That is when I finished up with Peterson, the latter part of January.

Q. Is that right? Peterson had nothing at all to do with the elevator after that time, did they? A. No, sir.

Q. Who was the representative of Dwight Robinson Company, who had charge of this tile work in the shaft if you know. A. Mr. Shaw, I think. He was the boss bricklayer and boss over that line of work in the building.

Q. The plaintiff in this suit? A. Yes, sir.

JOSEPH FRANCIOSA, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Where do you live? A. 360 East 113th Street.

Q. Were you employed in the electric building on February 8, 1927? A. Yes, sir.

Q. In what position? A. Deputy foreman, labor foreman.

Q. Labor foreman? A. Yes, sir.

Q. Do you remember this accident that happened this day? A. Yes, sir.

Q. Were you in the building at the time? A. Yes, sir.

Q. Now will you please describe to the jury what you observed in relation to this accident, giving us about the time it occurred and what you know about it generally? Just tell the jury. A. Well, it was in the afternoon sometime, I don't remember the time; it was in the afternoon anyway. But I was on the sixth floor; the men were doing some cleaning up around the building on the sixth floor and I was in charge of the men there, and the elevator was coming up, so all of a sudden I hears a crash; this crash here, a plank was laying on the side and the hoist—there was a case on the hoist; the case either was sticking out too far or something, this plank was caught under this case, and as it caught this plank going up it rips all the blocks off the column.

Q. You mean the tile? A. All the tile off the column, and the tile come tumbling down. Then all of a sudden the elevator stops. It stops there for about a minute or so, then it went ahead up again.

Q. Will you describe the tile as you saw it lift off the column by reason of this contact with the elevator or whatever it was at the elevator and that board you referred to? I have a piece of tile here. Is it anything similar to that? A. Yes, that is a tile just like that, something like that.

Q. Was that there the tile— A. On the column?

Q. Yes. A. Well, it was a full tile on the column.

Q. Is that a full tile? A. No, sir; that is only half a tile.

Q. About half a tile? A. Yes, sir.

Q. And generally of that material and makeup? A. Yes, that material and that makeup.

Q. Now will you step here to this map? That has been marked 1 and 2 on the map. That is the Bangs Avenue side. Do you recognize that as a typical floor plan of the building as it was upon that day? That forward one has been described as being the nearest to Bangs Avenue, the one Mr. Grady spoke about. Now we will say that is the sixth floor and that is the elevator. What was there over here that caused this elevator with that box of marble on it to catch that?

MR. CARTON—I object, if your Honor please. The question has been asked and answered almost. It is leading.

THE COURT—Yes.

MR. COOK—Well, I want him to describe.

THE COURT—Of course I know what you want him to do, but you have got to do it properly, you know. You are testifying, Mr. Cook.

Q. What was there to engage that, that elevator? A. The plank across that floor.

Q. How far did it extend out into the elevator shaft? How far did it extend out into the elevator shaft, if you know? A. Extend out?

Q. Yes, the plank that was there along the floor of the sixth floor. A. Well, it wasn't supposed to stand out that way in the elevator shaft.

BY THE COURT:

Q. Where was the plank? A. Standing right on the floor.

Q. Which floor? A. On the sixth floor.

Q. On the floor itself? A. Yes, sir.

Q. Not on the elevator? A. No, sir.

Q. And what did it do? Was it held on the floor or did it lap over on the elevator shaft? A. No, sir; just on the floor; didn't lap over on the elevator shaft.

Q. Just on this floor? A. Yes.

Q. All right. Then what happened to the plank? A. As the elevator was coming up the plank went out and caught on the box or something; caught on the box and it went up. As it was going up, it is right on the edge, and the column is right on the side here, and it started to rip off the block off the column.

Q. Was there anybody on the elevator at that time? A. No, sir.

By MR. COOK:

Q. Was there a column right close by the elevator well hole? A. Yes, sir.

Q. Did you see what was on the elevator? A. Yes, sir.

Q. What was on the elevator? A. There was a case on the elevator, a box.

Q. Do you know what was in that box? A. Marble. They said it was, anyway. I don't know.

THE COURT—Well, now, don't say. Did you see it? A. I didn't see it.

Q. You didn't see it? A. No.

Q. How large a box was it? A. About five feet anyway.

Q. Was it high or low standing up on the elevator? A. About five feet high and five feet wide, just about—

Q. Did you see how this contact was made, the elevator and this plank you are referring to? A. No, sir; when I heard—as the elevator was coming up I heard the crash and as I heard this crash I seen the plank lifting up, see? It was caught like, I figured it was caught on the edge of the box there. The plank was lifting up and as it was lifting up it was just scraping all the blocks right off the columns.

Q. Did you see the tile go down? A. Yes, sir; I saw the tile going down.

Q. And did the elevator continue on? A. No, sir; he stopped there for a minute or two.

Q. Well, he was above the sixth floor when he stopped? A. Yes, sir.

By THE COURT:

Q. Let me understand. Did the box drop? A. No, sir.

Q. The box didn't drop? A. No, sir.

Q. Where was the tile that dropped? A. The tile, yes.

Q. The tile was on the column? A. Oh, yes; it just pulled that off, yes, sir.

Q. And went down? A. Yes, sir. Here is the elevator, like, and there is the column right here. That column was all tile, an iron column there, and then there is blocks laid all around it with cement.

Q. And this board, you say, just ripped up there?

A. It just ripped up the blocks and they went right down.

Q. Went down in the shaft? A. Yes, sir.

Q. The box on the elevator didn't drop? A. No, sir; the box stood on the elevator.

By MR. COOK:

Q. Did you notice just prior to that, just before that time, similar boxes going up in that elevator? A. Yes, sir; there were boxes going up pretty near all the afternoon, there were.

Q. Of the same general type? A. Yes, sir.

Q. Did you notice any condition of the elevator shaft immediately afterwards outside of what you have described? A. Afterwards?

Q. Yes. A. Well, yes, afterwards I went down, because I went downstairs to see if there was anybody hurt, and I found out that Mr. Shaw was hurt and they had taken him away already, but I went down to see, and then I started to walk up, and as I started to walk up I noticed on every floor—on one floor yes and one floor no—but every floor or two—that that same plank laying there was moved back halfway or moved out or in a little on every floor.

Q. Had that happened there about these other planks before that afternoon? A. They were all right that afternoon.

Q. What happened at that time? How did you come to observe the other planks? A. Well, I went to see just what caused it anyway.

Q. You mean to say that on every other floor, as you have described it, from the ground up, where the elevator came up, there was evidence of contact with

something? A. Yes, that something was touching the plank as that was coming up.

Q. Was that condition there before that day, that afternoon, where the ripping was? Was it there before this accident happened? A. No.

Q. How do you know that it was not there before this accident happened? A. Well, I made it my business to see that there was nothing in the way from the—
10 I would use my eyes.

Q. Did you inspect it that day before the accident? A. In the morning.

Q. Did you look at the well line and see if there was anything wrong? A. Certainly; every day I looked at that.

Q. And you say there was no such condition there until this afternoon? A. Yes, until that afternoon.

Q. And you describe it how? What did it appear
20 like? A. Them planks?

Q. First down below on the sixth floor? A. Down below, yes.

Q. Yes. A. Showed that they were ripped off on each floor like.

Q. These planks? A. Yes.

Q. Did you notice anything about where the box stood on the platform, whether it was wholly within the platform or whether it was not? A. The box was a long way—

30 Q. Or did you see it, yes? A. It wasn't over straight, it was this way. (Indicating.)

Q. Catercornered like? A. Catercornered; it couldn't fit this way and it couldn't fit this other way, so it had a catercorner like.

Q. Was it within the platform or did any part of it extend out? A. I surmise that it stood out a little there.

Q. No, do you know whether it stood out the edge of the platform or not? A. I don't know?

Q. But it was catercornered like this? A. Catercornered, yes.

Q. And not straight across? A. No, sir.

Q. You saw that? A. Yes, sir; I saw that in the catercorner.

Q. Was it quite a large crate? A. Yes, sir.

Q. After the elevator stopped did you go up to see the condition of the box or anything? A. Up where?

Q. Anywhere on those floors? A. I was on the sixth floor.

Q. Did you notice anything about that box, whether or not they were within the platform, wholly within the platform, or whether they were extending out? A. No, sir; I didn't notice.

Q. Didn't notice that? A. No, sir.

Q. Did I understand you to say you did hear the ripping of this tile? A. Yes, I heard the ripping.

Q. When that platform was there at the sixth floor? A. Yes, sir.

Q. And it occurred as you say? A. Yes, sir.

CROSS-EXAMINATION

By MR. CARTON:

Q. Mr. Franciosa, will you tell us again your address? A. 360 East 113th Street.

Q. And you say you were a labor foreman? A. Yes, sir.

Q. For whom? A. Dwight P. Robinson.

Q. How long had you been employed on that job up to February 7, 1927? A. On that job? I don't remember. I was on that job about four months, something like that.

Q. A labor foreman? A. Yes, sir.

Q. And as such what were your duties? A. My duties, to take charge of the men or see that they did their work, to tell them what to do and so forth.

Q. You had the plans or detail and outlined to the men what work they should do? A. No, sir; I was told through my superior and I used to tell the men what to do.

Q. You got your instructions from your superior? A. Yes, sir.

Q. And then you in turn would communicate to the men what they should do? A. Yes, sir.

Q. Who is your superior? A. My superior was a fellow named Johnny Gray.

Q. What was he, the general foreman of the job? A. He was the labor foreman.

Q. He was the labor foreman? A. Yes, sir.

Q. And you were under him? A. Yes, sir.

Q. What did I understand you were doing the day of the accident? A. We were cleaning up on the sixth floor.

Q. You were cleaning up on the sixth floor? A. Cleaning up, yes, sir.

Q. What were you doing? A. I was watching the men cleaning up.

Q. You were not cleaning up yourself? A. No, sir; I was just standing there.

Q. What men were there cleaning up that day? A. I don't know. There were about five men up there cleaning up.

Q. And what were they cleaning? A. Cleaning the floor, piling up, getting everything and piling them in one corner.

Q. What was the condition of the floor at the time? Had the permanent floor been laid? A. What do you mean the permanent floor, the finished concrete floor?

Q. Yes. A. No, sir.

Q. What was its condition? How far had it progressed, that floor, at that time? A. I don't remember.

Q. What? A. I don't remember.

Q. What were you cleaning it up for? A. Cleaning up the floor, all the wood and everything lying on the floor, picking it up to pile it all in one corner.

Q. And that is all you were cleaning? A. Yes, sir.

Q. Do you know who had left wood on this floor that had to be cleaned up? A. Who had left wood?

Q. Yes. A. Anybody that was working there or moved something around.

Q. Were these bricklayers who were cleaning the floor up? A. Bricklayers?

Q. Yes. A. No, sir; they were laborers.

Q. And you were cleaning up the debris, trash and boards on this floor? A. Yes, everything on the floor.

Q. How long had you been engaged there before the accident doing this particular work? A. You mean on the job?

Q. Yes, on this floor that day. A. Oh, on this floor?

Q. Yes. A. I went up there because we was working floor by floor, you see, with my men. I started in in

the morning downstairs, I think we was on the third floor, we started, and in the afternoon when the accident happened we was around the sixth floor.

Q. And when you were in charge of that gang there in the afternoon on the lower floors did you notice this elevator that had been passing up and down with this marble? A. In the afternoon?

Q. Yes. A. Yes, sir.

Q. Your attention wasnt' particularly attracted by that incident, I don't suppose? A. No, sir.

Q. Quite a usual thing for this elevator to be in operation, was it not? A. What is that?

Q. It was quite a usual thing to see this elevator in operation? A. Yes, you see that every minute. You would always see them.

Q. How many times did you see it go up and down during the morning? A. I don't know how many times I seen it.

Q. Was it operated in the morning? A. In the morning?

Q. Yes.

THE COURT—If you know.

A. I don't know if it was or not in the morning.

THE COURT—Does it yet appear, Mr. Cook, who placed that box on the elevator?

MR. COOK—Oh, yes; Mr. Grady.

THE COURT—Did Grady say he put it there?

MR. COOK—No, he said it was done by the marble company defendant.

MR. CARTON—The elevator was loaded by the representative of the Vermont Marble Company. That is a fact, your Honor. I dont think it has come out yet.

THE COURT—That is a fact?

MR. CARTON—Oh, yes.

THE COURT—I was under the impression that Grady did say who did it.

MR. CARTON—Arnott.

THE COURT—Arnott, yes, that is it.

MR. ACKERSON—All he took is directions in raising the hoist.

Q. Well, then, Mr. Franciosa, do you remember whether your attention had been attracted to that elevator at all that afternoon before this accident or not? A. No, sir; I didn't pay no attention to it only every once in a while—you couldn't help seeing it. It was wide open.

Q. Do you know as a matter of fact that the elevator was in operation that afternoon before the accident? A. That afternoon?

Q. Yes. A. Well, I have seen it coming up a few times.

Q. You did? A. Certainly.

Q. Carting up this marble? A. Yes, carting up something, I don't know what.

Q. Now you stated on you direct examination that you heard a crash and you though there was something

sticking out. What do you mean by that? A. I think there was something sticking out?

Q. You said you were up there and heard this crash. A. Yes, I heard the crash.

Q. And you though there was something sticking out; what did you mean by that? A. Oh, well, I thought maybe it was a stick or something that crashed up against the elevator or something, I didn't know. I heard the crash and then I seen the plank lifting up after that crash and ripping the blocks off and I knew there was something sticking out then.

Q. Well, something sticking out of where? A. I seen the plank raising with the hoist. As that hoist was going up the plank was going up with it and ripping the blocks off.

Q. Well, now, did you know what caused the hoist to hit the planks? A. No, sir.

Q. Then when you say that there is something sticking out you figured that there was something sticking out? A. Yes, sir.

Q. You didn't see anything sticking out? A. No, sir; I didn't see anything sticking out.

Q. How far away from the shaft were you when this accident did happen? A. How far away? Oh, about five or ten feet away.

Q. Did you have you back to it or were you looking at it? A. What say?

Q. Did you have your back to the elevator shaft? A. I was all around. I don't know.

Q. When the accident happened were you looking at it, have your back to it or sideways or what? A. I don't remember.

Q. You don't remember? A. No, sir; I just heard the crash and that shot my eyes right away towards the elevator, because I knowed that was where it come from.

Q. And then you saw what? A. The hoist going up, and as the hoist was going up the plank was going up with it and ripping the blocks off the columns.

Q. Now just tell what was the construction of this plank to which you have referred, being on the sixth floor. What do you mean by a plank? A. Well, you see on every floor there is a plank, like, right in front of the hoist, there is a plank there so as they take the wheelbarrows off, you see, to roll your wheelbarrow on.

Q. You mean a plank extending from the solid floor out to the hoist? A. Yes, sir.

Q. Which they used wheelbarrows on? A. Yes, sir.

Q. Well, who erected that plank connecting up the hoist, do you know? A. I don't know, no.

Q. You did observe the use that had been made of it, did you not? A. The plank?

Q. Yes. A. Yes.

Q. What use had been made of it? A. It is used to roll your wheelbarrow off.

Q. Do you know who erected the plank there? A. No.

Q. How near, to what point in nearness to the elevator, did this plank extend? Did it go right up flush with the elevator shaft? A. Well, supposed to be right up flush, right to the end of the elevator shaft.

Q. The end of the shaft? A. Yes.

Q. Now there were similar planks placed on the other floors, weren't there? A. Yes, sir.

Q. So there was nothing unusual about this planking on the sixth floor? A. No.

Q. Had you seen other contractors or subcontractors prior to this day use this plank in connection with the elevator shaft? A. I haven't seen anybody.

Q. You haven't seen anybody? A. No, sir.

Q. How do you know they use it for wheelbarrows? A. That is what we have been using it right along. I have been using it for that.

Q. You mean you hadn't seen others use it but you did use it yourself? A. Yes.

Q. Representing the Dwight Robinson people? A. Representing the Dwight Robinson people, yes, sir.

Q. Now Mr. Cook asked you what happened after the accident. You say that you went downstairs, I think, and you observed as you went down or as you went up that this elevator, something had been knocking all the floors all the way up; that is so? A. Yes, sir.

Q. When did you make that examination? A. As I was going up.

Q. As you were going up? A. Yes, sir.

Q. How did you go, up and down a stairway or elevator or what? A. Stairway.

Q. And where is the stairway? Does the stairway go down around the elevator shaft? A. No, sir; the stairway is on the side.

Q. How far away from the elevator shaft? A. About fifteen or twenty feet, something like that.

Q. About fifteen or twenty feet? A. Yes, sir.

Q. Is that north of the elevator shaft? You see here it has been indicated that this is where the elevator shaft was; this is the big elevator and the smaller elevator. You say the stairway by which you ascended was some twenty feet from that. Which way, north or south? Toward Bangs Avenue or toward the north? A. The stairs was on the back of the elevator, I think.

Q. You mean west of the elevator? A. Yes.

Q. Now you havent entirely forgotten the construction of the building, have you? A. I don't remember.

Q. Well, you did remember it was some twenty feet away from this point? A. Something like that, yes.

Q. And what sort of stairs was that, just temporary wooden stairs? A. No, a regular stairway was there.

Q. A permanent stairway? A. Yes, sir.

Q. You were using then the permanent stairway? A. Yes, sir.

Q. That was more than twenty feet from this elevator which is indicated here, wasn't it? A. I don't know, it may be more than twenty feet.

Q. What was there, if anything, between you and the elevator shaft as you were ascending those stairs, some twenty feet or more away? What was there to obstruct your view of the elevator shaft, if anything? A. I don't know what you mean.

Q. Well, to what point had the building progressed in its construction at that time, such as partitions and so forth, such as partitions, obstructions, rooms or what not? A. The partitions was already up.

Q. The partitions were already up? A. Yes, sir.

Q. And you mean to say that going up this stairway some twenty feet away that you observed where this elevator had hit all the way up to the other floor; is that so? A. Yes, sir.

Q. That is so, is it? A. Yes, sir.

Q. How did you see it? A. How did I see it?

A. Yes. A. I went up to look at it.

Q. From where? A. I walked down, and then I walked, as I was coming up, and I went and looked at every floor, if there was anything lying in the shaftway.

Q. Oh, as you started to go from the ground floor you walked along all those six flights? A. Yes, sir.

Q. You walked out to the elevator shaft each time? A. Yes, sir.

Q. That is a fact, is it? A. Yes, sir.

Q. What did you see when you got there? A. What did I see?

Q. Yes. A. I seen on one floor maybe, one not maybe.

Q. No, what did you see? A. On one floor the plank was a little lifted and the other it was not.

Q. Take up number one. Which was the floor on which the plank was a little bit lifted? A. I don't remember.

Q. You saw it? A. Yes, it is three years ago. I don't remember what happened then.

Q. You remember everything else quite vividly. A. I don't remember on what floor I seen it.

Q. Tell us any floor where you saw besides the sixth floor where the plank had been interfered with.

THE COURT—Immediately after the accident, he means.

A. Well, on the fifth floor I—

Q. On the fifth floor? You didn't notice anything until you got to the fifth floor about the elevator having interfered, did you? A. I don't remember exactly.

Q. Well, do you remember the fifth floor? A. I am pretty sure the fifth floor.

Q. What did you see there? A. The plank was a little bit lifted there, perhaps shoved back a little bit.

Q. What do you mean, pushed away from the elevator? A. Yes.

Q. What were the dimensions of this plank that extended from the floor out to the elevator over which the

wheelbarrows went, you say? What were the dimensions of that plank? A. What do you mean by dimensions?

Q. Was it big, two by four? A. The plank?

Q. Yes. A. Oh.

Q. The dimensions. A. Two inches by—I think it was two by twelve, something like that.

Q. Two by twelve? A. Something like that, or two by six, something like that.

Q. Extended away from the elevator how far? How long was the plank? Did it extend the whole floor? A. No, the planks are cut as wide as the hole is, the shaft is.

THE COURT—It was parallel, not cut out. It was parallel with the side of the shaft. In other words, his statement appears to be that the plank was cut the width of the shaft.

THE WITNESS—The width of the shaft, that is so.

THE COURT—And then it was laid there as a sort of step or foundation for the wheelbarrows and so on, and his statement is that that plank was lifted up.

MR. CARTON—Yes, I understood that, your Honor.

THE COURT—And it moved the tile that was surrounding this iron column and dashed down. You were giving me the impression that you thought the plank was lengthways of the floor.

MR. CARTON—I didn't intend to give any impression, your Honor. I want to find out what the fact is.

THE COURT—I want to know, too. He says the fact—

MR. CARTON—Whether they were parallel with this elevator or running lengthwise with it.

THE COURT—No, it was just parallel with the elevator shaft.

Q. Where was it, on the point of the elevator, the west side or the middle side? A. On the street side.

Q. On the middle of the street side? A. I don't know what street it is.

Q. On the east side? A. Yes.

Q. Step over here a minute, will you, please? (Referring to plan.) These planks run this way and not this way? A. This way. (Indicating.)

Q. In front? A. Yes.

Q. And how much space did they occupy from the point of the elevator shaft out towards the floor? How wide were they? A. They were about twelve inches wide, the planks, something like that.

Q. Was there more than one plank used in this operation or were there two or three? A. One.

Q. Just one? A. One plank.

Q. And did that extend the length of both elevator openings? A. No, sir; one for each.

Q. Take your seat.

(Witness resumes the chair.)

Q. Now then, these planks that you have described at that time had been covered and imbedded in the permanent floor, the tiling, had they not? A. What is that?

Q. The tiling had been placed on top of these planks or that plank at that time, had it not? A. The tiling had been placed on top of them planks?

Q. Yes.

THE COURT—Floor tiling.

Q. The floor was still over those planks. A. The floor was still over those planks?

Q. Yes; that is so, is it not? A. No, sir.

Q. Was there anything on the planks? A. No, sir; nothing at all on the planks.

Q. You are quite sure about that, are you? A. I haven't seen it. I don't know, I haven't seen it, I don't know.

By THE COURT:

Q. We are talking about the moment of this accident, that is what we are talking about. A. Oh, at the moment of the accident?

Q. Yes.

MR. CARTON—That is what we are talking about.

Q. Had the planks that you are talking about been covered by the permanent tiling? A. No, sir.

By MR. CARTON:

Q. Where did the tiling come from that flew up from the sixth floor when the elevator hit it? A. Off the iron column.

Q. And they were tiles something— (Referring to specimen tile.) A. Similar to that.

Q. To the sample here? A. Yes, sir.

Q. And you say that at the time this day in question, on that sixth floor nor on any other floor had this planking been covered over with permanent tiling or any tiling; they didn't do that? A. I don't know.

Q. You don't know? A. I don't remember. I don't remember.

Q. Well then, you were going to describe for us what you saw on the fifth floor, where something had hit this planking and had knocked it out some way. How did that appear, to be knocked out or knocked up or knocked aside or what not? A. Well, I don't know if something had hit it or not, but, see, this plank is supposed to be level. That plank on the fifth floor was not level; it was away off from the elevator. Something hit it or something pushed it. I don't know what pushed it back; I know it was away off from the elevator.

Q. Do you know whether it had been lifted up or pushed back? A. I don't know.

Q. And you don't know what the condition was on the day before in regard to that plank, do you? A. I know in the morning that I had left it straight because I had cleaned that floor in the morning; not even in the morning, a couple of hours before that.

Q. Now outside of the fifth floor what other floor did you notice there had been nicking or something? A. I don't remember any other floor.

Q. Well, you told Mr. Cook that you saw all those various floors as you ascended the stairs. A. I don't remember on what floor.

Q. You don't remember on what floor? A. No, sir.

Q. How long do you say this elevator had been used as a hod hoist or truck hoist in this shaft before this day in question? A. Before this day?

Q. Yes; had it been used for some days, weeks or months or how long? A. Ever since I was on the job it was used.

Q. For several months? A. Yes, sir.

Q. And did you ever know of any occasion where, in carrying up any materials, whether anything on the elevator had ever struck the side of these planks or any of the shafting or not? A. No, sir.

Q. Never noticed that? A. Never noticed that.

Q. Isn't it a matter of fact that there were continued abrasions all the way up to the top of the building? Isn't it a fact that those planks, all of them, showed great wear, having been used in the rough part of the construction of a building? They were rough planks, were they not? A. Yes, they were rought planks.

Q. And had marks and abrasions on them? A. Yes, from being used.

Q. Do you think that those abrasions were put on as this elevator ascended up this day, just at that time only or do you think they might have been there before? A. Them planks?

Q. Yes. A. Certainly they were there before.

Q. No, you don't get the question. Do you think those abrasions or those markings on those planks were put there at the time this elevator went up or that they might have been there before? A. I don't know. Explain to me better. Maybe I can answer.

THE COURT—He doesn't understand your question.

A. I don't understand what you mean.

THE COURT—If you don't understand the lawyers you tell them so.

Q. No, I want you to understand us. I understood you to say in your direct examination to Mr. Cook that in ascending the stairway, in observing this hoist, you saw each of the floors, that you figured something had hit it on the way up. Now just what you saw indicating that something had hit it; what did it look like?

By THE COURT:

Q. Something new or having been there for several days? A. No, you see I had cleaned them five floors in the morning and I had cleaned that fifth floor in the morning, I noticed every one of my planks along by the hoist, and as I say, I went down to see if anybody got hutr, and as I got down I found Mr. Shaw was hurt and they had taken him to the hospital, so I walked up to see if everything was clear around the hoist, and as I was walking up I was looking on every floor. One floor was all right, and another floor that plank was shoved a little back, and another floor it was away from the hoist back, and another floor it was—

Q. Now stop right there. Had you seen that condition before that day? A. Before that day?

Q. Yes, of something having the plank shoved back.
A. No, sir.

Q. That is what he is asking you. A. No, sir; I haven't seen that condition before.

By MR. CARTON:

Q. Going back a moment, Franciosa, these planks that had been inserted paralleling the opening of the elevator they extended back eastward to what, the floor? A. To the floor.

Q. And were they level with the floor? A. Lay flat on the floor.

Q. Oh, I mean did you have to step up to get on these planks or were they level right with the floor? Did they serve as continuous with the floor, on a level line? A. Well, the hoist would stop right level with that. The hoist is marked to stop right level with them planks.

Q. In other words, when you were rolling skids down the hall to go to the elevator, when you came to these planks for the elevator, when you came along, would it lift or drop? A. Well, that is up to the bellman to give signals to the engineer.

Q. Oh, I haven't asked you about that at all. I don't know whether you understand me or not. A. You mean if there was a lift or a drop?

Q. Yes. Suppose this was the elevator floor and here is the hall floor out here and here is the place in here where we had planks. Is this on a level surface? A. Yes, sir.

Q. Then we are all right on that then. Did these planks one, two or three, whatever they may have been, in running parallel along here, did they just fit in this opening flush and fully, or was there a vacancy or a gap in between? A. There is a little vacancy in between.

Q. How much? A. A couple inches.

Q. Do you want us to understand now that in addition to what you saw on the fifth floor you saw these planks moved on several other floors also? A. No, sir.

Q. You are just referring to the fifth floor? A. Yes, sir; to the fifth and I am not sure of one of the other floors below or not.

Q. And what you observed on this fifth floor was not that the plank had been raised but it appeared to have been pushed back A. Pushed back.

Q. And had it been pushed back the inch represented by the opening? Had it been pushed back about an inch? A. Oh, more than an inch.

Q. More than an inch? A. Yes, sir.

Q. Was it pushed out of its place? A. It was pushed back about a couple inches.

Q. I thought there was only an inch space there between the floor and the outer portion of the plank. Was there more than an inch space there? A. There was more than that, a couple inches.

Q. About a couple inches? A. Yes.

Q. And then what you observed was that it had been pushed back about two inches? A. Yes, sir.

Q. Now that is the fifth floor, and you are quite sure that at that time there had been no floor tiling put on those planks? A. Yes, sir.

Q. Did you say you saw some tile pushed up on the fifth floor? A. On the fifth floor?

Q. Yes. A. No, sir.

Q. When were you sought out to be a witness in this case? A. When was I sought out?

Q. Yes.

By THE COURT:

Q. When did you know that you were going to be a witness? A. I didn't get no—until last night.

By MR. CARTON:

Q. Well, when before last night were you interviewed by any one about what you knew about this case? A. I wasn't interviewed by anybody, but just Mr. Shaw when I was on the job, asked me if I seen the accident. I told him what I seen and he took my name and address.

Q. And you didn't confer with Mr. Shaw or anybody else representing him again until last night? A. No, sir. I didn't even see anybody last night. When I went home I found a summons there.

Q. What job were you working on when Mr. Shaw spoke to you about this accident, about being a witness? A. It was on the same job.

Q. Oh, right at the same time? A. Yes.

Q. How long after the accident? A. I think it was when he come out of the hospital he asked me for my name and address, that is all.

Q. Was Shaw on the electric building job at that time? A. He wasn't working.

Q. Wasn't working; he just came up to the job and saw you? A. Yes, sir.

Q. And that is the only time you have rehearsed or communicated to anybody what you knew about that accident from that time until the time you got on the stand here this morning? A. Yes, sir.

Q. Haven't talked with anybody else about it? A. Just this morning they asked me what I knew about it,

Mr. Shaw's lawyer asked me what I knew about it and I told him.

Q. And you told him, that was all; you told Miss Castle about the matter, didn't you? A. Who?

Q. Miss Castle, the young lady. She interviewed you about this case, didn't she? A. No young lady interviewed me.

Q. No young lady talked to you about the matter? A. No, sir.

10

FURTHER CROSS-EXAMINATION

By MR. FLANAGAN:

Q. What was the purpose of the boards that lined the elevator shaft on each floor? A. These boards, that is when you roll the wheelbarrow off, and not make it hit, break the cement, so you can roll it off. Otherwise you wouldn't be able to roll it off the hoist.

20

Q. What was underneath the board on each floor? A. Concrete floor.

Q. The rough concrete? A. The rough concrete, yes, sir.

Q. What would be the difficulty with wheeling a wheelbarrow off the hoist onto the rough concrete floor? A. Well, if you push the whole wheelbarrow off the hoist maybe fifty or sixty times a day that concrete floor is going to break if you ain't got something under it.

Q. If you haven't something under it? A. Yes, if

30

you haven't got a board under it.

THE COURT—Something under the wheelbarrow.

Q. So that these were mere temporary affairs, the boards. A. Yes, sir.

Q. And were they taken up afterward? A. No, sir; they were always there; they were there all the time.

Q. Yes, I mean as the work progressed were these boards taken up then? A. They were always there as long as I knew. They were always there.

Q. Were you there when that job was finished? A. I was there pretty near the end, yes, sir.

Q. Were you there when the finished floor was laid? A. I was there when the finished floor was laid, yes, sir.

Q. Were they removed? A. Yes, sir.

Q. At the time the finished floor was put on? A. Yes, sir; they were removed and that shaft hole was filled in.

Q. So that these boards were merely temporary aids?

THE COURT—During construction?

Q. During the construction of the job? A. Yes, sir.

Q. And they were just fitted in loose on each side? A. Yes, sir.

THE COURT—Anything more?

By MR. CARTON:

Q. You say the shaft holes were afterwards filled up? Who filled them up? A. Who filled them up? Peterson, I think.

Q. After the time of the accident? A. Yes, sir.

By MR. ACKERSON:

Q. That was after the elevator was removed? A. Yes, after the elevator was removed.

ARTHUR BLAND, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Bland, what is your business? A. Time keeper now.

Q. What say? A. Time keeper for—

Q. Did you work in the Electric Building in 1927? A. Yes, sir.

Q. Do you remember February 8, 1927, when this accident happened? A. Yes, sir.

Q. Now will you tell the jury where you were and what you noticed in regard to that elevator? Just describe it to them. A. I was on the sixth floor, working on the sixth floor, and there was a plank there and the hoist that had been running that marble up to the floors above the sixth; and then some marble come up and hit the plank. That was after a while.

Q. Just direct your attention to the jury so they can hear what you are saying. Raise your voice a little bit. Now you say the platform came up or the elevator came up? A. The elevator came up, yes.

Q. And hit the plank? A. The marble on the elevator hit the plank.

Q. Oh, the marble on the elevator? A. Yes.

Q. Hit the plank? What plank? A. The plank used as a roll for barrels.

Q. On the side of the elevator shaft? A. No, the floor comes to the elevator.

Q. Level with the elevator? A. Yes, sir.

Q. As described by the last witness, you mean? A. Yes, sir.

Q. Now how was that plank laid on the floor, that is what I want to understand, on the sixth floor there?

THE COURT—As described by the last witness.

MR. CARTON—I think we understand.

MR. COOK—All right; we won't go over it again. Now just tell the jury there, you say that the elevator platform came up with the marble, as you say, and engaged this plank; what happened after that?

A. The marble came out and struck the board, throwing the partition from the column down through the shaft of the hoist.

By THE COURT:

Q. You saw that, did you? A. Yes, sir.

Q. You were there on the floor and saw it? A. Right.

Q. Did that plank project over into the shaft? A. It came level so that the marble—it was over far enough so that the marble hit it.

By MR. COOK:

Q. How was the marble on the elevator shaft? A. About like catercornered, I should say.

Q. But what was it in, if anything? A. In a crate.

Q. It was in a crate? A. Yes, sir.

Q. You say it was catercornered across the elevator? A. Yes, sir.

By THE COURT:

Q. And did it project beyond the floor of the elevator, the crate? A. Yes, sir; it did.

Q. You saw that? A. Yes, sir.

By MR. COOK:

Q. How much over did you say that it went over?

THE COURT—The floor of the elevator?

MR. COOK—The edge of the floor of the elevator?

A. I should say two or three inches.

By THE COURT:

Q. Two or three inches?

A. From what I recollect.

By MR. COOK:

Q. And you mean to say that you saw the box engage the edge of this plank? A. I did.

Q. Rip it? A. Yes, sir.

Q. And the tile go down the shaft? A. Yes, sir.

Q. Did the elevator stop or go on? A. It paused for a brief instant and then went on, and then I looked down the shaft and saw the tile going down all the way to the bottom.

Q. How large a tile did it rip off this column? A. Took out several pieces of tile.

Q. Well, what circumference or how big a place did it rip? A. I should judge probably two feet square, three feet.

Q. Two feet square? A. Yes.

Q. How about the columns? Do you know where this tile came from in relation to the columns?

THE COURT—You are not clear, Mr. Cook.

BY THE COURT:

Q. In other words, there was an iron column, you understand, that was there, Mr. Witness? A. Right.

Q. And then that iron column was covered with tile? A. Yes, sir.

Q. Similar to the tile on the floor? A. Right.

Q. Did that tile go clear to the ceiling of that floor, to the top of the floor? A. I believe it did. I can't say for sure.

Q. Well, there was the rough tiling surrounding the iron column? A. Yes, sir.

Q. Then you saw the corner of the box containing the marble strike the board? A. Right.

Q. And the board lifted part of the tiling off the column? A. Yes, sir.

Q. And dropped; is that right? A. Yes, sir.

CROSS EXAMINATION

By MR. CARTON:

Q. Where do you live, Mr. Bland? A. Asbury Park.

Q. Is that your home? A. Yes, sir.

Q. Were you employed on this Electric Building job at the time of the accident? A. I was.

Q. For whom were you working? A. Dwight C. Robinson.

Q. In what capacity? A. Carpenter's helper.

Q. Where were you at the time of the accident? A. On the sixth floor.

Q. Were you in Mr. Franciosa's gang? A. I was not.

Q. What were you doing? A. Helping the carpenter.

Q. What was the carpenter doing at that time? A. I don't just remember what he was doing but I believe he was laying grounds.

By THE COURT:

Q. What were you doing? A. I was helping him.

Q. What? A. Well, I was supplying him with material if he wanted it.

Q. That is what Mr. Carton wants to know, if you were lifting sticks and handing them to him. A. I kept him supplied with material.

By MR. CARTON:

Q. I would like to know just what you were doing at that time, that morning or that afternoon; I would like to know just what you were doing by way of assistance to the carpenter at that time.

THE COURT—At that particular moment.

A. I was giving him nails.

Q. What was he doing with nails? A. Using them on the grounds.

Q. What do we understand are grounds? A. The

grounds is a one-inch strip which they use for to nail the trim to.

Q. And how many carpenters were working on that particular work at that time? A. At that time?

Q. Yes. A. There were probably twelve carpenters on there, twelve or fifteen.

Q. And were you helping all of them? A. Yes, sir.

Q. Supplying them with nails? A. Yes, sir.

Q. Can you tell us the names of the carpenters? A. I can tell you a few, probably.

Q. Tell us their names. A. I don't know their last names.

Q. Well, what did you know them by?

By THE COURT:

Q. Give their first names. A. I know Bill Hulse and his brother.

By MR. CARTON:

Q. Are they here or not? A. They are not.

Q. And who else? A. And a gentleman back there that I know. I don't know his name right now—Joe, that is his name.

MR. CARTON—Will Joe stand up?

(A man stands.)

A. I guess his name is another name.

By THE COURT:

Q. Go back and indicate him, will you? Where is he sitting?

(A man stands.)

A. Right there in the back. Yes, that is the man and his partner.

Q. He was there; what was he, a carpenter? A. Yes, sir.

Q. Is that Joe? A. I think I called him Joe.

THE COURT—What is the name?

A. (By the man who was standing.) Howard Crowley.

THE WITNESS—Yes, that is it, Howard Crowley. His partner, I believe, is named Joe.

By MR. CARTON:

Q. And there were some dozen in all there? A. Yes, sir.

Q. How far was it where these men were working, how far was it away from the elevator shaft? A. About nine feet.

Q. About nine feet? A. Yes, sir.

Q. And did I understand you to say they were working on the floor? A. On the grounds.

Q. On the grounds? A. Yes, sir.

Q. And that is what they attach the molding to? A. Yes, sir.

By THE COURT:

Q. The base moulding? .A The base moulding.

By MR. CARTON:

Q. What is that in front of the elevator there some nine feet away? Was that a hallway or room? A. Partition for a room.

Q. Partition for a room? A. Right.

Q. Was that east or west of the elevator? A. It was south. The elevator hoist is there and east is out there, and north is back here. (Indicating.)

Q. You were south then? Was the place where your men were working the same place where Mr. Franciosa's gang were working? A. It probably was, if he says he was on the sixth floor.

Q. You saw Mr. Franciosa's gang there that morning, didn't you, that afternoon? A. His gang was there. He was probably there, too.

Q. You don't remember seeing him there? A. I couldn't say.

Q. What first attracted your attention to the accident. A. Previous to that this carpenter said—

Q. No, what first attracted your attention to the accident? A. To the accident, at that time or before?

Q. I understand there was only one accident; when this man was hurt.

By THE COURT:

Q. No, at the moment of the accident what attracted your attention? How did you know an accident happened? A. Why, I saw it happen.

Q. How did you come to look? A. Well, this freight had been hitting it before.

Q. Were you standing looking at the elevator. A. Yes, sir.

Q. You were facing the shaft? A. Yes, sir.

By MR. CARTON:

Q. The crate had been hitting it before? A. Yes, sir.

Q. No question about that, is there? A. No, sir.

Q. How long before was it that you had observed that the crate had been hitting? A. Twenty minutes.

Q. You mean on some former trip? A. Yes, sir.

Q. You mean to say that you observed that prior to this trip that the crates they were bringing up and down to the hoist had been hitting? A. I wouldn't say it was a crate at that time. It was marble that was hitting.

Q. Something that had been placed on the elevator? A. Yes, sir.

Q. Where did you see that hit? A. At the sixth floor.

By THE COURT:

Q. Did anything happen when it hit before? A. No, sir.

By MR. CARTON:

Q. Did you make any comment about it? A. The man whom I was working with—

Q. Did you make any comment about it?

MR. COOK—He is telling you.

A. I can only explain it by saying—

Q. Answer the question; did you make any comment about it? A. I did.

Q. To one of your associates. A. To a carpenter I was helping.

Q. Did you call your foreman's attention to it? A. I did not.

Q. Did you call Mr. Franciosa's attention to it? A. I did not.

Q. Did you call Mr. Shaw's attention to it? A. I did not.

Q. You did not? A. No, sir.

Q. Did you apprehend that there was something wrong? A. No.

Q. What? A. The only thing that was wrong was that the marble kept hitting it, that was all.

Q. Well, did you think it was wrong or what it should not be? A. I say that it was careless.

Q. And you commented on it? A. I did.

Q. Then getting to the time of the accident, what was the first thing then again that attracted your attention to the happening of the accident? A. I was standing there when the hoist came up and the plank going over to the hoist was raised by the marble and then it made a noise.

Q. How do you know it was raised by the marble? A. Because I was looking in that direction.

Q. And you saw the marble extending out over the platform of the elevator, did you? A. I did.

Q. How far? A. Probably three inches.

Q. Did you notice that it was extending out three inches before it struck or afterwards? A. It had been that way before because it had hit before.

Q. What say? A. It had glanced off several times before.

Q. No, I am talking about this particular time now when it struck that the accident happened. A. I don't understand your question.

MR. CARTON—Repeat the question.

((Question repeated as follows:) Q. Did you notice that it was extending out three inches before it struck or afterward?

Q. Did you notice that the marble—you say you noticed the marble sticking out some three inches. Had you noticed that before the elevator struck or after it had struck? A. After it had struck.

Q. Then you don't know as a matter of fact whether it was extending out two or three inches before it struck or not, do you? A. That I can't tell.

Q. You say marble was sticking out? A. Yes, sir.

Q. Where did you see any marble? A. In the crate.

By THE COURT:

Q. How did you know it was marble? A. Because the marble people were using it to hoist it at the time.

By MR. CARTON:

Q. You didn't see any marble sticking out anywhere, did you? A. I couldn't say I did.

Q. Well, you did say you did. A. Well, it was a box of marble or a crate of marble.

By THE COURT:

Q. You see he is trying to get from you how you knew it was marble? You saw the crate? A. Yes, sir.

Q. Do you know what was in the crate? A. Yes, sir.

Q. How do you know that? A. Because at that time the marble people were using the hoist to hoist the marble up.

Q. How did you know that? A. Because I had seen the marble coming up in a previous load.

Q. Did you see marble? A. Yes, sir.

Q. Or the crate? A. I cant' say, but I believe they sent several slabs up at that time.

By MR. CARTON:

Q. On this particular trip did they have something crated or did you see slabs of marble? A. Saw crates of marble.

Q. So what you saw were the boards making up the crating outside of the marble? A. Yes, sir.

Q. Had you had your attention attracted to this elevator on its trip up on this particular occasion before it came up to the sixth floor? A. What is that?

(Question repeated.)

By THE COURT:

Q. Did you see the elevator before it reached the sixth floor? A. No, sir; I didn't.

By MR. CARTON:

Q. Did not? A. It was at the sixth floor.

Q. When you saw the crating or marble or whatever it was extending over two or three inches it was after the collision, wasn't it? A. Yes, sir.

Q. And you are quite sure, are you, that on previous trips of this elevator that it was nicking, hitting all the floors as it came up? A. I don't say it was hitting and nicking all the floors; it was hitting that particular floor that I was on.

Q. That is on this particular trip? A. I mean on prior trips. Not the other floors, just the sixth floor.

Q. You saw this elevator as it had gone up the previous trip also hitting the planking on the sixth floor? A. Yes, sir.

By THE COURT:

Q. In other words, had hit it before? A. The plank had hit before.

By MR. CARTON:

Q. What happened when it hit before? A. Nothing happened.

Q. My attention was directed to something else when you described something as being two feet square; what was that?

THE COURT—He said the rough tile, there were two feet square of rough tile taken or knocked off the iron column and went down the elevator, two feet square of rough tiling around the iron column.

REDIRECT EXAMINATION

By MR. COOK:

Q. An omitted question or two. Mr. Carton asked you a question about how you noticed this accident, or something of that kind; I dont' remember particularly what it was; and he said, "What comment did you make?" and you started to say but you were interrupted. Now what was that comment you made at the time or just before it? A. The carpenter that I was working with said—

MR. CARTON—Objected to.

MR. COOK—Well, you provoked it.

MR. CARTON—No, I didn't.

THE COURT—No, you are not permitted to tell. You see you can't bind any one of these defendants by something you may have said any more than you could bind it by what you thought. You might have thought they were careless or somebody was careless, but that is not proof, it is not evidence. The jury are to do the thinking in this case.

Q.—You were stating about these boxes of marble. Did you see any of this marble unloaded on any of the floors? Did you see them uncrating it, any of the workmen? A. I can't say I did.

By THE COURT:

Q. To whom did that particular crate that you have been talking about belong, if you know? A. It belonged to the marble people.

Q. How do you know that? A. Because they were the only ones that were using marble on that operation.

Q. Did you see anything on the crate that indicated any name? A. Why, I can't say that I did.

THE COURT—All right. Any more, gentlemen?

By MR. COOK:

Q. And this was about what time of the day? A. It was in the afternoon, I think.

Q. Did you learn about the accident happening? A. Not until later.

Q. Until later? A. I looked down the hoist but I didn't know any accident happened.

Q. Did you take Mr. Shaw to the hospital or assist him, the Long Branch Hospital? Did you or not? I don't know. A. I did, once. I don't know when it was.

Q. And where did you take him from? A. From where he was staying.

THE COURT—From his boarding place?

MR. COOK—And from his boarding place; that is after the accident. That is all.

RECROSS EXAMINATION

By MR. CARTON:

Q. Just a moment, Mr. Bland. When did you first tell Mr. Shaw or his attorney that you would be a witness in this case? A. I didn't ever know that I would be a witness.

Q. How did they come to seek you out? A. I was subpoenaed.

Q. Who interrogated you about what you knew about this case? Who talked with you about it? A. The young lady.

Q. Miss Castle? A. I don't know her name.

Q. When did she first talk with you about it? A. This young lady?

Q. Yes. A. Yesterday afternoon.

Q. Yesterday afternoon? A. Yes, sir.

Q. And did you go over with her what you were going to testify to? A. I didn't go over it.

Q. Did she give you any statement of how this accident happened? A. No, sir; she didn't.

Q. Did she tell you anything about it? A. No, sir.

By MR. FLANAGAN:

Q. Mr. Bland, will you tell me where you live? A. 907 Comstock Street.

DR. OTTO R. HOLTERS, Sworn for Plaintiff.

MR. COOK—Qualifications admitted, I suppose?

MR. CARTON—No objection.

MR. ACKERSON—Yes, as far as I am concerned.

DIRECT EXAMINATION

By MR. COOK:

Q. Doctor, you are practicing at Asbury Park. A. Yes, sir.

Q. And you remember treating this plaintiff, George Shaw, in February, 1927? A. Yes, sir.

Q. Was he brought to your office A. Yes, sir.

Q. And did you make an examination of some injuries that he had? A. I did.

Q. And what did you find in regard to his neck? A. On examining him I found a large abrasion, and testing the area on the back of his neck I found that there was a stiffness of his neck, painful stiffness, that he couldn't move one way or the other; and I ordered an immediate X-ray to be made of his neck, suspecting that there might be some injury to his bone. The X-rays were taken and revealed a fracture of the fifth, sixth and seventh cervical vertebra, the spinous process being broken off the same, or rather, the main part of the vertebra.

Q. Is that a continuous solid that goes from the back of the head down to the base of the spine? A. No, it is an interruption; it is a building up of one bone on top of another.

Q. That is what I mean. A. Just superimposed upon one another.

Q. Is that what you see in the skeleton of a man? A. Yes.

Q. And it is the ends of those that were broken off, you say? A. Yes, sir.

Q. Called cervical vertebrae? A. Yes, sir.

By THE COURT:

Q. Sometimes called collar-bone? A. No.

Q. Where is it? A. The collar bone?

Q. No, the cervical. A. The cervical are these vertebrae that really comprise the neck.

Q. It is the thing that interferes with your collar button? A. That is it; that is the prominence of the seventh cervical.

THE COURT—Go on.

By MR. COOK:

Q. In other words, Doctor, after the examination of this man's injury was this man suffering pain? A. Yes, sir.

Q. Quite painful? A. Yes, very painful.

Q. What did you prescribe or do for him? A. I suggested to the patient that he go to the hospital and that there we would apply a plaster cast to his neck, to his head and to his body, in order to remove the pressure of his head on those injured vertebra.

Q. And he did go to the hospital? A. Yes, sir.

Q. And an X-ray was taken; you saw the X-ray afterwards? A. Yes, sir.

Q. Doctor, have you the X-ray, please? A. No, sir; I haven't. I thought I gave that to Dr. Herrmann or to the patient himself.

Q. The doctor thought he gave them to you. A. So there we have missed them somewhere.

Q. Doctor, you have referred to Exhibit P 3, and I ask you if that fairly describes the injury to Mr. Shaw as you observed it. A. I think that if I may say here that the patient, if I recall correctly, requested to keep two pictures, did you not?

THE PLAINTIFF—Yes, I think I did.

THE WITNESS—And this is the copies that were made for Dr. Herrmann?

THE PLAINTIFF—Yes.

A. Yes, I would say that that represents the condition.

Q. And after he was placed in the plaster cast did you see him? A. Yes.

Q. I show you a picture and ask you if this was a fair representation of the plaintiff with the plaster cast in question and the cast as you observed it. A. I would say yes.

Q. And how long did that cast remain on him, Doctor? A. Well, I only saw the patient about two or three weeks, and his residence was not in Asbury Park, and he found it necessary to return to his home, which I think was in New York or somewhere, and that was the last I saw of him except for one time he came in and asked me about the X-ray pictures.

Q. You saw him at the Long Branch hospital for about three weeks thereafter? A. Yes.

Q. And while there was he suffering pain? A. Yes.

Q. This necessarily is a painful injury, isn't it, Doctor?

MR. CARTON—Objected to.

THE COURT—Well, that would be subjective, of course.

MR. COOK—Yes, it would be.

Q. Well, can you say as a medical man, Doctor?

THE COURT—I think he may express an opinion, however, as to whether it is a painful injury.

MR. CARTON—Well, that might be so. My objection was to the highly leading character of the question.

THE COURT—They were so common I didn't know that you were making that point.

Q. In your opinion as a medical man, Doctor, is such an injury as Shaw sustained painful? A. I should say yes.

Q. What have you to say as to limitation upon his ability to move his neck? A. After having examined him since the time of the accident I might say that it is possible that due to the production of callus, which is the effort upon Nature to form new bone, that these broken pieces might unite to form one solid piece of bone instead of having three different segments.

MR. CARTON—If your Honor please, the question did not suggest all this answer, suggesting the point what might or might not happen. I think it is an improper answer.

By THE COURT:

Q. Is your present statement based upon your examination, Doctor? A. No, sir.

MR. COOK—No recent examination.

MR. CARTON—I therefore move to strike out that part of the answer.

THE COURT—Strike that out. He may state what the reasonable probability would be in that regard, I suppose, not what it might be.

Q. What are the probabilities of this man's recovery from an injury of this character as you observed it at the time?

MR. CARTON—I wish to object to this question because this witnesss, it appears, had not seen this plaintiff within two or three weeks after the accident. After the examination we do not have to ascertain what the reasonable probabilities are in the examination to tell what the fact is.

THE COURT—He may direct his attention to the last time he saw him and then ask him what, in his opinion, the reasonable probability of recovery would be or whether there were any permanent results.

Q. I do that, Doctor. I direct your attention to the last time you observed him.

MR. CARTON—I object to that because I take it the witness has not seen this plaintiff in two years.

By MR. CARTON:

Q. Isn't that so? When did you last see him, Doctor? A. The accident happened in 1927, did it not?

THE COURT—Yes.

A. I saw him probably in the summer of 1927.

Q. You haven't seen him since? A. No, sir; not until the courtroom today, no, sir.

Q. Did you examine him in the courtroom today? A. No, sir.

THE COURT—I think you had better reframe your question, Mr. Cook.

MR. COOK—Yes, I think so.

THE COURT—There is, of course, a way to lay a foundation for such examinations.

MR. COOK—Oh, yes; by hypothetical questions, but I did not produce the doctor for that purpose.

By MR. COOK:

Q. Do you know how long he was in the plaster cast, Doctor? A. No, I don't. I instructed the patient to be in a plaster cast probably about eight weeks.

Q. Did you subsequently remove the cast? A. No, sir.

Q. You were just directing the hospital authorities? A. Well, to his doctor in New York.

Q. While he was at the hospital was he confined to his bed? A. Yes, sir.

Q. What, in your opinion, from your experience, Doctor, causes such a condition as you saw on Shaw's neck? What could have been the cause? A. I would say an act of violence.

By THE COURT:

Q. Injury? A. Yes, sir.

By MR. COOK:

Q. And did it indicate considerable or less violence? A. I would say considerable.

MR. COOK—That is all. Cross-examine.

MR. CARTON—No cross-examination.

MR. ACKERSON—No examination from Peterson & Company.

NO CROSS-EXAMINATION

THOMAS WRIGHT, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Wright, what is your business? A. Carpenter.

Q. Were you in the electric building February 8, 1927, working? A. Yes, sir.

Q. As a carpenter foreman? A. Yes, sir.

Q. Did you see an accident happen or know of an acdent happening? A. I knew of an accident. I was in the first floor.

Q. On the first floor? A. Yes.

Q. Were you down on the first floor? A. Yes.

Q. What time of day was it? A. Around quarter after three, I think, between three and quarter after three.

Q. In the afternoon? A. Yes.

Q. Will you describe to the jury just what you observed in relation to this accident to the plaintiff, Shaw?

A. Well, Mr. Shaw and I was standing talking close to the elevator or near the Bangs Avenue side. He was going along with a laborer with some castings of stone for the vestibule entrance.

Q. All right. Go ahead. A. He stopped and spoke to me about it and asked me what I thought of the castings coming out, and he walked on towards the office, which was on the north side end of the Electric Building; and he just left me and I went towards the Bangs Avenue side. As I heard a crash I looked around and I saw brother Shaw lying on the ground face foremost, face downward, alongside of a mortar tub.

Q. What did you do? A. I rushed along and two laborers was just picking him up there and wanted to carry him into the office. From there we took him out into a taxicab or cab, I just forget which—automobile of some kind—and took him to the Asbury Park Hospital, where there was a wound in the top of his neck, right here, (indicating); got it dressed, the face dressed. From there I took him to his boarding house in Summerfield Avenue, and that was all really. After that I came right back to the job. It was close to half past four, quitting time, and I went up through the different floors to look around and see where the accident had come from, and I found this column with the two-inch fireproof tile around it there had been stripped about two feet up, and that had fallen down the shaft.

Q. To the floor of the shaft? A. The sixth floor.

By THE COURT:

Q. Where was the tile? A. Around about the column.

Q. I know, but did you see where it had fallen? A. I seen pieces of it lying down on the ground, down in the shaft, where it had fell down.

Q. What size tile was that? A. It is what they call a two-inch fireproof tile. It is twelve by twelve; Twelve square, two inches thick.

By MR. COOK:

Q. You say you looked at a place on the sixth floor? A. Yes, sir.

Q. Where you say this happened? A. Yes, sir.

Q. And you found a tile ripped? A. Yes, I saw a hole there.

Q. Did you notice anything else around the place there? A. I noticed where the plank which is across from one column to the other between where the elevator run had been torn out by a crate or something else that had been on the elevator.

MR. CARTON—Objected to.

THE COURT—Yes, take that latter out. Strike out all that part of the answer excepting where the plank had been torn out.

Q. Who was using the elevator at that time, if you know? A. The Vermont Marble Company.

By THE COURT:

Q. How do you know that?

By MR. COOK:

Q. How do you know that? A. I saw them using it all the afternoon.

Q. Saw them putting anything on? A. Yes, putting crates on all the afternoon.

Q. Were they large or small crates? A. They were around four feet by five feet six. They were some of them larger and some of them smaller.

Q. Some of them larger and some of them smaller? A. Yes, some of them were possibly five inches wide. It depended on the different sizes, different pieces of marble they had inside the crate.

Q. What did you say was the size of the elevator platform? A. I would figure—the one we had was a larger one than Peterson had, but I was figuring the Peterson platform for his elevator was five feet square.

Q. When you refer to Peterson's you refer to what? A. The south hod hoist.

Q. On which the marble was being hoisted? A. Yes, sir.

By THE COURT:

Q. That afternoon?

MR. COOK—That afternoon, yes.

A. Yes.

By MR. COOK:

Q. Can you give us any idea of the distance from the sixth floor down to the ground floor where Shaw was? A. Around seventy feet.

Q. About seventy feet. A. Yes.

Q. Had the tile work around the columns been completed on that floor, the sixth floor, at that time? A. Outside of some partitions.

Q. Outside of some partitions? A. Outside of some partitions.

Q. I mean on the columns. A. Yes, around the columns.

Q. They had been completed? A. Yes.

Q. And those columns, what were they, square or round? A. Twelve by twelve iron columns, which support the girders on the floor above the building, fireproof place around it; they build those two-inch tile right around and that forms a square column.

By THE COURT:

Q. What is that tile like? A. It is something similar to this here only it is two inches thick.

(Referring to Exhibit A for Identification.)

MR. COOK—Cross-examine.

CROSS EXAMINATION

By MR. CARTON:

Q. Mr. Wright, you have told us that you were a carpenter foreman? A. Yes, sir.

Q. Did you tell us by whom you were employed? A. Dwight P. Robinson Company.

Q. Had you been on the job during its entire construction? A. I was on the job from the 30th of November.

Q. And you were an associate of Mr. Shaw, the plaintiff. A. Yes, sir.

Q. Who constructed the tile work to which you have just referred? A. Dwight P. Robinson.

Q. Who was the foreman of that work? A. George Shaw.

Q. The plaintiff in this case? A. Yes, sir.

Q. I understood you to say that what was there was something like the exhibit, other than the tile in the construction was about two inches thick. A. Two inches thick.

Q. And how did that therefore differ from this sample that has been shown. A. That is what we term a four-inch tile. It was twelve inches square both ways only it was just half of that, two inches thick.

Q. This is about twice as large in other words. A. It is twice as large; it is twice as thick, four inches.

Q. Do you know whether down on the job they had any samples of that tile that were used there? A. Of course there was plenty of it laying around.

Q. This was the wrong tile then? A. Yes, this here is what they term a partition tile.

Q. Now I think you said after the accident you took Mr. Shaw to the Asbury Park Hospital? A. Yes.

Q. And did he receive some first aid treatment there? A. Yes, sir.

Q. Was he conscious during this time? A. He regained consciousness in the Asbury Park Hospital.

Q. And received some treatment there and then I think you said you took him to his home A. Yes, sir.

Q. And left him there? A. Yes, sir.

Q. You were standing on the first floor, the same floor that Shaw was at the time of the accident? A. Yes, sir.

Q. And you didn't see Mr. Shaw struck but simply saw him after he had fallen? A. Yes, sir.

Q. Did you say that sometime thereafter you went to the sixth floor and made an examination? 2A. After I came back from the hospital.

Q. But that very evening? A. That evening.

Q. And what did you tell us you found? A. I found where the tile had been stripped off the column.

Q. The tile had been stripped off the column? A. Yes, sir.

Q. Is that all you did then? A. That is all I found outside of where I seen this plank had been ripped up.

Q. The plank, I think you said, was torn up? A. Yes, torn up.

Q. Did you hear the witness, Franciosa, who had charge of the helpers, when he was on the stand? Did you hear him testify? A. I was here.

Q. I recall he said that the plank was pushed back. That was not what you observed, was it? A. No, sir.

Q. You say it was pushed up? A. Pushed up.

Q. How high was it pushed up? A. It was practically an hour and a half after the accident when I saw that, after I had taken the gentleman to the hospital, and the plank was standing up there, it had been ripped up there, standing out, and the tile fell down.

Q. Just what was its posture or position at that time when you saw it? How did it lie? A. It was lying up about a foot above the floor level.

Q. About a foot above the floor level? A. About a foot above the floor level on one side.

Q. It hadn't been pushed back at all, pushed up? A. Pushed up.

Q. That is what you saw? A. That is what I saw.

Q. Both sides of the plank pushed up? A. No, just one edge.

Q. Just the outer edge? A. Just one edge.

Q. Now you referred to this elevator as Peterson's elevator? A. Yes, sir.

Q. Why did you say that? A. Well, as a general term, that is our term, for Peterson had been using it for practically all through the job, putting in flat arches, right through to the top, and it was known as Peterson's elevator.

Q. Known on the job as Peterson's elevator? A. Yes.

Q. And so known by you? A. Designated as Peterson's elevator.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. You knew that Peterson didn't own the elevator, though, didn't you? A. I knew he didn't own it outright, but he had rented it from the company.

Q. You had been the second men on the job following the steel workers, hadn't you? A. Yes, sir.

Q. And he had put in—Peterson & Company had put in the arches? A. Yes.

Q. That is the second construction work on the job? A. Yes, sir.

Q. And the arch work had been finished by February 1927, hadn't it? A. Yes, outside of the two arches that was left out for the two elevator shafts, and he had to come back to finish them later.

Q. And he couldn't do that until the building was finished? A. Until the hod hoist come down.

Q. But prior to February 8, 1927, the Peterson Company had done and finished those arches in the building? A. Yes, as far as I know. We were entirely finished, as far as I know, with the exception of the two arches in each floor which was left vacant for the hod hoist.

Q. And that he couldn't do until they were taken out? A. Correct.

Q. After he finished his work then the other subcontractors used this elevator? A. Yes, sir.

Q. You say that you know the Vermont Marble Company were using it on February 8, 1927, when this accident happened? A. Yes, sir.

Q. The plank that you referred to on the sixth floor, do you know who had placed that there? A. Well, the Carlow people at one time, but all the different contractors that was using it had all put the plank in between the two columns. The elevator runs between a column here, one here and one here, and they are what the elevator runs between, and they put the plank between those two columns, was a space possibly four or five inches between the car and the shaft, and they put that plank across there so the wheelbarrows could go out and not go down that hole.

Q. And each contractor does that himself? A. Yes, practically every one that goes in.

Q. And on February 8, 1927, the Peterson Company were not working there? A. No; that is, as far as I can remember.

Q. And do you recall the particular plank that you speak of, as to who had placed the plank there? A.

Well, the Carlow people was using it at that time and the Vermont Marble people was using it.

Q. Two of them. A. Both were using it; but of course they rented it off of whoever owned it.

FURTHER CROSS-EXAMINATION

By MR. CARTON:

Q. Do you know who was operating the elevator the day in question, who had charge of it? A. You mean the operator?

Q. Yes. A. Mr. Grady.

Q. Who is Mr. Grady? A. The engineer on the job.

Q. Who did he represent, if you know. A. Well, as far as I know he was always working for Peterson.

Q. Always working for Peterson? A. For we we called it Peterson's elevator.

Q. Peterson put the elevator in, didn't he? A. Yes, he installed the one elevator.

Q. And he took it out, didn't he? A. Yes, sir.

Q. And he filled up the hole after it was taken out, didn't he? A. Yes, sir.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. Were you there when the elevator was first used, first put in? A. No, the elevator was there about two days before I got there.

Q. So the elevator was there before you came on the job? A. Yes, the one elevator. I installed the other one, and Dwight P. Robinson.

Q. I am speaking of the south elevator that you referred to as the Peterson elevator. A. Yes.

Q. You don't know who put that elevator in there of your own knowledge? A. Not to my knowledge they did but I saw them putting the extension on it.

Q. But you didn't see who put it in? A. No.

Q. You do know that elevator didn't belong to Peterson, don't you? A. Yes.

Q. And that they only rented it? A. Yes, sir.

Q. And they had finished their work there prior to the date of this accident, hadn't they? A. Yes, sir.

Q. And after that time they had nobody there on the job, did they? A. Had nobody there on the job at all outside of an assistant superintendent, might take a run down to see when he was going to get his arches.

Q. When he was ready to finish the arches over the elevator shaft? A. When the elevator was taken out, yes.

Q. When you speak of the elevator shaft or the dismantling of it, that they participated or helped in doing after the building was finished for the purpose of filling up the hole that it had occupied in running up and down the building? A. Yes, sir.

MR. COOK—If your Honor please, I have a motion that I would like to make at this time. It is apparent to counsel for the plaintiff that the defendants, Meyer & Rybicki are not concerned in this accident, and I submit to a voluntary nonsuit as to them.

MR. CARTON—Well, might I ask brother Cook as to the other defendant, George Peterson?

MR. COOK—Just what does Mr. Ackerson say?

MR. ACKERSON—Of course we preceded Meyer & Rybicki in the use of this elevator.

THE COURT—Well, it is purely a matter of discretion on the part of counsel. He may ask for a voluntary nonsuit at any time for any party. His motion for a voluntary nonsuit as to Meyer & Rybicki will be granted and they will be eliminated from the case.

ALBERT COLES, Sworn for Plaintiff.

DIRECT EXAMINATION

By THE COURT:

Q. Mr. Coles, you live at Asbury Park or Neptune City? A. Asbury Park.

Q. Were you working in the Electric Building on February 8, 1927? A. I were.

Q. What were you doing there? A. Laborer.

Q. Do you know George Shaw? A. Yes, sir.

Q. Did you notice the accident there that day in which Shaw was hurt? A. I did.

Q. Will you tell us what you observed in regard to the accident? A. I was working putting up a scaffold for the bricklayers and I heard a noise that attracted my attention, and when I heard that noise I stopped, and when I looked up I seen pieces of tile coming down, and just in a flash Mr. Shaw was standing about ten feet

from me, and I seen a piece of tile come down and strike him, knock him on his face.

Q. Did you pick him up or help pick him up? A. I did, I helped pick him up.

Q. Was he conscious or unconscious? A. He was unconscious.

Q. Did you notice what sort of material was being hoisted on the elevator just at that time or just before that time? A. Yes, sir.

Q. What was it? A. Crates of marble.

Q. Did you see the men putting the crates on the platform of the elevator? A. I did at times.

Q. You did? A. I did.

Q. And who was doing the marble work in that building, if you know? A. The Vermont Marble Company people.

Q. Who were the men that were placing the marble or crates of marble on the platform? Who were they working for? A. Vermont Marble Company.

By THE COURT:

Q. How do you know that, Mr. Coles? A. Because we were all working there together and I knew those different men.

Q. Knew who they were? A. Yes, sir.

Q. Did you see Thomas Wright there that day, the witness that was on the stand a few moments ago? A. Yes, sir.

Q. He is the man that helped pick Shaw up, wasn't he? A. Yes, sir.

Q. Is that all you know about the occurrence of the accident, Mr. Coles? Have you told us all about it? A. Yes, sir.

MR. COOK—That is all. Take the witness.

CROSS-EXAMINATION

By MR. CARTON:

Q. You were putting up a scaffold at the time, were you, Coles? A. Yes, sir.

Q. Where? A. On the ground floor.

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

Q. Who were you working for? A. Dwight P. Robinson.

Q. Were you under the supervision of Mr. Shaw. A. I was.

Q. You heard this accident and you saw pieces of tile coming down, you say? A. I did.

Q. How near were you standing to where Mr. Shaw was? A. About ten feet from Mr. Shaw.

Q. Were you engaged in work at the time. A. The crash of this tile attracted my attention. I hap stopped to see what it was.

Q. How far away were you from the elevator shaft? A. I judge about fifteen feet.

Q. And how far was Mr. Shaw away from the elevator shaft? A. I judge he was about ten feet; I don't know how far.

Q. Some distance further away then where you were? A. No.

Q. Nearer? A. I was further away from it then he was.

Q. You were further away from it than he was? A. Yes, sir.

Q. And did you assist Mr. Shaw at the time of the accident? A. I did.

Q. Now you say that you knew that these men were working for the Vermont Marble Company because you were all working there together. These men worked for different contractors, didn't they? A. They did.

Q. Do you know Mr. Arnott? A. Yes, sir.

Q. Who did he work for? A. The marble company.

Q. Who else did he work for? A. I don't know.

Q. Do you know whether he worked for Carlow & Company or Robinson? A. I don't know.

MR. ACKERSON—No questions.

PATSEY PROCONO, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Where do you live, Mr. Procono? A. 319 Morris Avenue, Long Branch.

Q. Were you working in the Electric Building, Asbury Park, on February 8, 1927? A. Yes, sir.

Q. And did you see Mr. Shaw get hurt that day? A. Yes, sir.

Q. Will you tell us what you saw? Tell the jury what you know about the accident. A. Yes, sir. You see I was working downstairs on the ground floor. I was around the mixer mixing mortar. So all at once I heard a tile falling down from the elevator shaft right alongside of my platform. George Shaw was passing by. As soon as I seen it George got hurt, that he fell; he fell right

on the back of the neck and chin. So I jumped off the platform and lifted him up.

Q. You say you heard a noise of a tile falling down? A. Yes, sir.

Q. And who was using that elevator that day? A. The marble people.

Q. And do you know who they are? A. Certainly I do.

Q. You were working along there? A. Certainly.

Q. Alongside of that tile? A. Only about twenty feet away from the elevator.

Q. What were they using that elevator for? What did you see go on the elevator? A. I seen goes on big crates with the marble in.

Q. Crates with marble? A. Yes, sir.

THE COURT—Crates with marble.

Q. Did you do anything to find out or learn how this accident was caused afterward? A. Afterwards I heard, you know, they was hitting the column, but I don't know, I couldn't tell.

Q. Yourself. A. I only seen when he got hit with the tile in the back of the neck here.

Q. Did you see just before the accident how these crates of marble were placed on the platform? A. I seen them, the way they put them on. They set them in catercornered, didn't put them on straight.

Q. Ran them across this way? A. Crossways.

Q. Were these large cases? A. Certainly; weighs about half a ton.

Q. What did you notice about the boxes on the platform, were they in on the platform or was there any part of them outside of the platform? A. In the platform.

Q. All on the platform that you saw? A. That is all I saw.

By THE COURT:

Q. How were the boxes placed? A. How were the boxes placed?

Q. On the platform?

MR. CARTON—I think he has answered the question.

Q. Well, how do you say they were? A. They was catercornered.

Q. Well, just describe with reference to the elevator platform. I know what Mr. Cook wants.

MR. COOK—I do, too, but I can't telegraph it.

THE COURT—Oh, I will exercise my authority and permit a leading question. Go ahead.

By MR. COOK:

Q. Were the boxes over the platform, outside of the edges of the platform? A. No.

Q. Or were they on the inside of the platform? A. All inside.

MR. COOK—I am not going to press him at all. I had information the other way.

THE COURT—Cross-examine.

CROSS-EXAMINATION

By MR. CARTON:

Q. Patsey, who were you working for? A. C. F. Robinson.

Q. And Mr. Shaw, he was your boss, was he? A. Certainly.

ADJOURNED TILL JANUARY 4, 1929 at 10 A. M.

Freehold, N. J., January 4, 1929.

Trial of the cause resumed at 10 A. M.

ALBERT WAINRIGHT, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Wainwright, were you employed in the Electric Building at Asbury Park on February 8, 1927? A. I was.

Q. What was your business? A. I was plumber foreman.

Q. And do you recall this accident? A. Yes, sir.

Q. Where were you at the time the accident happened? A. On the mezzanine floor.

Q. Is that the floor above where the accident happened? A. Yes, sir.

Q. That would be called, from the ground floor, the mezzanine floor; it is all open there, isn't it? A. Yes.

Q. Just a railing or balcony around the whole floor? A. Yes, sir.

Q. Will you tell the jury just what you saw relating to injuries to Mr. Shaw? A. Well, I was walking back to our toolhouse—we had our toolhouse back in the back of this mezzanine floor, and I was walking there to where we had them and I heard this noise on the elevator. I naturally looked over and I saw this tile coming down, and saw this tile slide over and hit some part of the shafting and hit Mr. Shaw in the back of the neck or somewhere in the back.

Q. Did you hear the noise of the tile falling, you say? A. Yes, sir.

By THE COURT:

Q. What happened to Shaw? A. He went down face first.

THE COURT—Go on.

By MR. COOK:

Q. How far was he, about, from the shaft where this— A. I should judge about twenty feet.

Q. About twenty feet? Do you know the height of the floors of the building? A. Why as I remember it I think it was something like eleven feet six.

Q. Eleven feet six? A. Yes.

Q. That was uniformly so going up through the building? A. Yes; I think the first floor was a little higher.

Q. From the ground floor to the mezzanine was a little higher than the rest of the floors? A. Yes, I think it was.

Q. And when you say eleven feet thick you refer to the other floors, not the difference between the first floor and the mezzanine? A. Yes, sir.

Q. What did you do, if anything? A. I ran around downstairs, and there was a lot around him taking him in the office.

Q. Were you near the elevator? A. I was on the mezzanine floor, on the opposite of the room.

Q. How far were you from the elevator in question? A. Well, possibly twenty or twenty-five feet across an opening, I guess.

Q. Was there much noise of this descending tile or whatever it was? A. Well, it was just a noise and I naturally looked that way.

Q. Enough to attract your attention? .A Yes, sir.

CROSS-EXAMINATION

By MR. CARTON:

Q. Who are you a plumber foreman for? A. A. T. VanCleaf, Asbury Park.

Q. And you say you saw this tile slide over and hit Mr. Shaw? A. Yes, sir.

Q. What do you mean by sliding over? A. Well, it hit on some of the crosswork around some part of the shafting there and it just hit a glancing blow like.

Q. Was that all you observed, this tile came down and hit on some of the cross pieces of the shaft? A. On the side, hit something in there.

Q. That knocked off the hoist and went twenty feet further to where Mr. Shaw was? A. I should judge around twenty feet.

Q. Did you see the tile when it struck the obstruction in the shaft before it— A. No; that is, I saw it all at once. I heard the noise and just looked.

Q. When you heard the noise and first looked where did you see the tile, the piece of tile? A. Well, it was just leaving from the shaft like.

Q. Just going from the shaft over? A. Yes, sir.

Q. To where Mr. Shaw was? A. Yes, sir.

Q. What sort of a piece of tile was it? A. It was driven around the—

Q. I mean what did it look like? What was its size? A. Well, I think they are twelve by twelve by two.

Q. Not what they are, but what you saw sliding through the air; what did that look like and what was its size? A. It was a piece of the tile.

Q. How big a piece? A. Well, larger than your hand.

Q. Larger than your hand? A. Yes, it was quite a large piece.

Q. Just about the size of this exhibit, I suppose, wasn't it? A. Well, it was somewheres like that. I wouldn't say just the exact size, because I just know it was a piece of tile.

Q. Did it look anything like this? A. It was a piece of this red tile, two inch tile.

Q. A tile piece like this, was it? A. Yes; that is not that part of the tile.

Q. No, but it is a whole section. It was not a piece of tile, it was just the whole hollow tile, was it? A. No, it was a piece of tile.

Q. And about as big as your hand? A. Well, I wouldn't say what it was.

Q. Did you observe what happened when this tile came down from the sixth floor and struck on this obstruction on the elevator shaft? Did the tile smash or break? A. Well, there were some pieces on the bottom of the shaft.

Q. And what portion of tile slid over to where Mr. Shaw was? How big a piece slid over to where he was? A. Well, possibly a little larger than your hand. I woudn't say.

Q. A little larger than your hand? A. Yes.

Q. That is all.

EDWARD WARREN, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Warren, were you in the Electric Building on February 8, 1927? A. Yes, sir.

Q. Where were you standing? A. Standing down by the elevator hoist.

Q. Do you remember the accident to Mr. Shaw? A. Yes, sir.

Q. And what is your business? A. Steam fitter foreman.

Q. How near the elevator were you? A. About twenty-five feet away.

Q. Will you tell the jury what you observed in regard to this accident? A. I was standing there talking to another man at the time. He came in for a job. This Shaw here and a carpenter foreman stood over in front of the elevtor talking.

Q. Mr. Wright? A. Wright, yes, sir. Shaw he left and came around there. As he was walking around I heard a kind of a crash upstairs from somewhere or other. I stepped back, gets back out of the way to get under the protection there on the stairway; and as he came around a block came down and seemed to hit somewheres up there and we heard this stuff all going down and we moved right away; but it caught him and when I seen him he fell right down on his face, never put his hands up or anything, fell right down on his face on the plank.

Q. You heard this noise? A. Yes, sir.

Q. Other substances coming down besides the tile or just the tile? A. Other stuff—just a tile broke, I suppose. I didn't go to look over there at all, because it didn't concern me and I didn't go to look.

Q. You didn't look at it afterwards? A. No, sir.

Q. You just heard the noise and saw Shaw fall? A. Saw him fall, yes, sir.

Q. Did you go down where Mr. Shaw was afterwards? A. Yes, sir.

Q. And was he conscious or unconscious? A. He was unconscious then. They had picked him up. The laborers jumped down off the mixing board they had there and picked him up and carried him away.

CROSS-EXAMINATION

By MR. CARTON:

Q. At the time of the accident, Mr. Warren, who was nearest to the elevator shaft, you or Mr. Shaw? A. Mr. Shaw.

Q. How far away from the shaft was he located? A. I should judge about fifteen or twenty feet. He was walking at the time.

Q. Walking toward it or away from it? A. Away from it.

Q. And how much further away were you? A. When he hit I judge about ten feet further back of him.

Q. Were you walking or standing? A. I was standing.

Q. You first heard some noise, did you? A. Yes, sir.

Q. You didn't see Mr. Shaw actually hit, did you? A. No, when I stepped back to get under this shelter here I seen Mr. Shaw fall.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. You were not working for George Peterson Company A. I was working for A. T. Van Cleaf.

THE COURT—Anything more from this witness?

MR. COOK—Nothing more from this wtiness, no.

GEORGE SHAW, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Shaw, where do you live? A. 1237 Hoe Avenue, New York.

Q. What is your trade or business? A. Bricklayer.

Q. How long have you been a bricklayer? A. For about thirty-five years.

Q. What is your age now? A. Forty-nine.

Q. Married? A. Yes, sir.

Q. Living with your wife? A. Yes, sir.

Q. Have you any children? A. Two boys.

Q. How old are they? A. About twenty-five and twenty-four.

Q. They are married and away from home, I suppose? A. No, sir.

Q. Oh, they are not? A. Live with me.

Q. On and before February 8, 1927, were you engaged in the work of the erection of the Electric Building, Asbury Park? A. Yes, sir.

Q. By whom were you employed? A. Dwight P. Robinson, New York City.

Q. And what was your business? A. Foreman bricklayer.

Q. Foreman bricklayer? A. Yes, sir.

Q. Did you meet with an accident on that day? A. Yes, sir.

Q. About what time did it take place? A. I would say close to three o'clock in the afternoon.

Q. Prior to that time were you in good health? A. Yes, sir.

Q. What was your weight? A. One hundred and seventy-eight pounds.

Q. What were you doing just prior to the time you got hurt? Where were you and what were you doing? A. I was fitting some artificial stone to go in the main vestibule.

Q. And how near the elevator in question were you? A. Well, at the time of the accident I was walking from the vestibule to the office, at the time of the accident. I was out of the vestibule walking towards—to do some business in the office.

Q. Was that towards Bangs Avenue or from Bangs Avenue? A. From Bangs Avenue. The vestibule is in Bangs Avenue.

Q. I don't suppose you remember anything except falling, do you? A. I remember hearing the crash and the next think I waked up in the hospital.

Q. Now you were on the ground floor? A. Yes, sir.

Q. Did you notice or did you not who was using the elevator at the time? A. I do.

Q. Who? A. Vermont Marble.

Q. How do you know that? A. Because I had occasion to see them and talk to the men during the day, speak to them just fifteen minutes before the thing happened.

Q. And what were they doing with that elevator, the Vermont Marble Company? A. They were hoisting crated marble up to the upper floors.

Q. Hoisting crates on this elevator? A. Yes, sir.

Q. Was this an electric elevator? A. Yes, sir.

Q. And as to its speed, do you know about how fast it traveled on its journey up? A. Well, I wouldn't wish to say, sir, it is very fast.

Q. Very fast? A. Very fast motor, yes, sir. They can drop, they just go like that. (Indicating.)

Q. They drop with that load down to the floor? A. Yes, sir.

Q. They come down rapidly, you mean? A. Yes, very fast.

Q. What type of material were they hoisting on the hoist that day? A. At the time of the accident?

Q. Yes. A. Marble, crated marble; marble inside of crates, crated marble.

BY THE COURT:

Q. You saw them, Mr. Shaw? A. Yes, sir.

Q. You saw it yourself? A. Yes, sir.

Q. Did you see the particular crates that went up just before this accident? A. I wouldn't say that, no, sir.

By MR. COOK:

Q. What was the size of the elevator platform? A. I would judge about four feet six square, as near as I remember.

Q. What was the size of the marble crates that were on the elevator, if you know, about? A. Well, they varied from—I would say they varied from four feet up to maybe five feet six, as near as I can judge. I never had occasion to measure them.

Q. How were they placed on this elevator? How were any of them placed on the elevator, if you know?

MR. CARTON—If your Honor please, I object, unless it is to refer to the crate at the time.

THE COURT—Yes, confine yourself to that.

MR. COOK—That is true. I withdraw that.

THE COURT—As I understand, he didn't see this particular crate?

MR. COOK—No.

Q. Who was the engineer in charge that day? A. Mr. Grady.

Q. The witness who was on the stand yesterday? A. Yes, sir.

Q. Prior to that time did you ever have occasion to go to the sixth floor of the Electric Building? A. Yes, sir.

Q. It has been testified to by witnesses about the planking that was placed on the floor by the elevator. You heard that testimony yesterday? A. Yes, sir.

Q. Did you ever see that plank referred to, or whatever it was, or strip? A. Yes, I have seen all those planks. They were always there.

Q. And have you seen it particularly on the sixth floor? A. It was on the sixth floor, yes.

Q. You have seen it on the sixth floor? A. Yes.

Q. Will you describe to the jury what it was, how it was placed there? A. Well, in building a building of this type, to get their hoist up through the floors they have got to leave an opening in the arches, which is filled in afterward. This opening, as a rule, is larger than the size of the platform of the hoist. Therefore, if they approach that opening from the edge of the concrete they have got to bridge it over with planks so the men can take things on from the floor to the hoist; and those planks are fitted to be put in all jobs. It is a regular proceeding in all buildings that I have been any place all my days.

Q. There was nothing unusual about those planks being there? Did this plank on the sixth floor, did you see whether or not prior to the accident it extended over the edge of what we call the well hole on the west side? A. I know the plank on the sixth floor must have been clear of the shaft at the all times, clear of the platform.

Q. Must have been clear of the shaft?

By THE COURT:

Q. Was it? A. Yes.

Q. Not must have been; was it, in fact? A. Yes, sir.

By MR. COOK:

Q. How was the end of it placed? Was it under any tile column or did any of the tile rest upon the boards that you have referred to or strips? A. I can testify to what I seen after the accident, when I was fit to go around. You could see where the plank had been under the tile and burst out, raised the tile.

Q. What type of tile were on these columns, if you know? A. Yes, two inch building tile; column covers, we call them.

Q. Was that the tile uniformly used in the building? A. Yes, sir.

Q. Had the tile work all been completed in the building at that time, that tile work on the columns? A. Yes, sir.

Q. How heavy were the tile on the columns? A. I would say they are two inch tile; is a much heavier tile than this type you have shown here as Exhibit A for Identification. I would say that a two inch tile is heavier

because a two inch tile, only two inches wide, there is no room for perforations through there, it is a solid tile, and it makes a much heavier tile than this. As to the weight I wouldn't want to go record.

Q. Couldn't tell about the weight? A. No.

By THE COURT:

Q. What they call a two inch tile? A. Two inch tile, sir; no perforations.

Q. How are they affixed to the iron column? A. They are just filled against it with cement; not affixed to it at all, just a binder on the corners.

Q. I suppose they are used to only fit around? A. Yes, they are bonded together around the corner, attached to the corner.

By MR. COOK:

Q. As they build up it is made in a section of the column? A. Yes, sir.

Q. Did you have any warning whatever of the approaching material down the shaft to enable you to get out of the way? A. I only remember hearing the crash, and the next thing I knew I waked up in the hospital with a nurse and a doctor sitting on the bed beside me.

By THE COURT:

Q. When did you go back to look at the column and the tile as you have just testified? A. I went back the next day.

Q. You remained in the hospital overnight ? A. No, sir.

Q. How long did you stay there? A. I was taken to the Asbury Park Hospital. The doctor thought there was nothing the matter with me and he sent me home. The next day I went to Dr. Holters and he recommended me to have X-rays taken right away, which showed the break in my neck, but in the meantime I was going around.

Q. And you did go back to the building? A. Yes, sir.

THE COURT—Proceed.

By MR. COOK:

Q. Will you tell us what you saw on the sixth floor the next day when you went back? A. I saw the indication, as I have already stated, of the plank being burst up.

Q. Did you, when you regained consciousness, suffer any pain from this blow on your neck? A. Yes, sir.

Q. You did suffer pain? A. That is what induced me to go to Dr. Holters, because I didn't know who the doctor was that treated me first, I was unconscious; but I didn't believe there was anything wrong with me when he discharged me, and the pain I had made me go to Dr. Holters.

Q. What was done there? A. He had X-rays taken.

Q. By Dr. Herrmann? A. Yes, sir.

Q. And then you went to the Long Branch hospital? A. He ordered me to go to the Long Branch hospital right away.

Q. How long did you remain there? A. Oh, two weeks.

Q. Where did you go from there? A. I came back to Asbury Park.

Q. Did you work? A. No, sir.

Q. How long was it from the time of the accident that you were able to do any work? A. I haven't worked since the accident at my trade.

Q. You have worked at your trade? A. I have not, no, sir.

By THE COURT:

Q. Why? A. Because I am not competent to lay bricks.

By MR. COOK:

Q. Why are you not competent? A. Owing to the fact of disability of my neck.

Q. What is the matter still with your neck? A. It is very painful and I haven't got free use of it.

Q. What do you mean by haven't the use of it? In what way? A. Well, by moving it around, especially stooping over with it, which I have got to do to carry out the work.

Q. Can you stoop over? A. Not much, extending my leg behind me.

Q. Can you bend over? A. Partly.

Q. Can you bend over such as a bricklayer is required to do in his trade? A. No, sir; a bricklayer has got to keep stepping eight hours a day. I couldn't do that.

Q. Can you revolve your neck? A. To a certain extent, yes, sir.

Q. How far can you?

(Witness illustrates.)

Q. That is as far as you can do it? A. Yes, without being too painful.

Q. What prevents it from being revolved further? A. Well, it seems to me I have got a pain right through where the accident happened, and it is the way the pains are recurring and the size of them.

Q. Is it stiff? A. Yes, sir.

Q. In stooping over is it stiff? A. Yes, sir.

Q. Do you feel a resistence in the back of your neck? A. Yes, all the time.

Q. Stooping over? A. All the time.

Q. Will you describe to the jury how you would have to do if you did stoop over to do the business of laying brick or handling stone? Just show the jury. A. The jury understands that a bricklayer has got to keep stepping around eight hours a day, and all the way I get somewhere and get down is putting my leg like that, keeping my body rigid, instead of moving from the waist, as I have to.

By THE COURT:

Q. What do you feel when you do that? A. It is painful right in the back of the neck. I have always had that pain since the accident.

By MR. COOK:

Q. When you try to move your neck is that painful? A. Yes, sir.

Q. Can you move your head downward? A. Yes.

Q. How far? A. When I go beyond the point of resistence it pains me. (Illustrates.)

Q. Is that about the limit of it? A. Yes, sir.

Q. You feel a stiffness in the back of your neck? A. Yes, sir.

Q. Where this accident occurred? A. Yes, sir.

MR. CARTON—Mr. Cook, let him testify.

Q. Mr. Shaw, where did you go after that? A. I would say about a month after that I went to New York City, my home.

Q. You have never been able to work at your trade of bricklayer? A. No, sir.

Q. You haven't worked at it? A. No, sir.

Q. While you were at the hospital did you suffer pain? A. Yes, sir.

Q. And was the doctor there to see you? A. Yes, sir.

Q. Some time? A. Yes, sir.

Q. And while you remained there? A. Yes, sir.

Q. How about your nervous condition? Were you nervous? A. I am nervous now, yes, sir.

Q. How did it affect your sleep, if it did affect it? A. Well, at the time of the accident, you mean, while I was in the cast?

Q. Yes, after the accident. A. Well, I couldn't sleep at all. You know you can't even lie at that time, with a plaster cast on.

By THE COURT:

Q. How long did you have that cast on there? A. Nine weeks.

Q. Nine weeks? A. Yes, sir.

Q. Showing you Exhibit—

MR COOK—P 2.

Q. That is a picture of you, is it? A. Yes, sir.

Q. Does that indicate how the plaster cast was placed on you? A. Yes, that is a true indication. It is a real photograph.

By MR. COOK:

Q. And after the nine weeks in this plaster cast, I mean while you were in this plaster cast, was it uncomfortable. A. While I was in it?

Q. Yes. A. Yes; very much so.

Q. It was not a pleasant sensation, was it? A. No, you get an itch underneath it and there is no way of getting in there.

Q. Did it hold your head rigid? A. Yes, you can't move your head—or iron it is now—as you see, away up in this position.

Q. Who took the cast off? A. Lasher, of New York City, Park Avenue.

Q. And after the cast was off was anything used in substitution of it? A. Yes, he replaced the collar. I will have to explain that.

Q. Go ahead; explain it. A. They didn't take this cast off all at one time. They start from the body here and cut off a small piece at a time, and gradually work it until there is nothing but the collar left on; and when it came to taking off the collar Dr. Lasher measured me for a steel brace, collar, steel collar of some kind, and put it on to replace this cast when it was taken off my neck, because he figured I wouldn't be able—

MR. CARTON—I object and move to strike it out.

MR. COOK—Cut that out, what the doctor figured.

THE COURT—It goes out by consent.

Q. You did have an iron collar? A. No, sir.

Q. You didn't? A. I didn't.

Q. What did you have? A. I had this cast you see in this picture reduced to a collar. He put a joint on the side of it and I took it home with me and I put it on and took it off as convenient.

Q. How long did you wear that? A. On and off for two months.

Q. Do you know what it cost you, what you owe for doctor bills, hospital expenses and appliances and medicines by reason of this accident?

MR. CARTON—I object to the question. I think the details of the question involve how much he has expended or owes for doctor bills and hospital bills and incidental matters connected with the accident. I object to the question as to broadness.

THE COURT—Well, if he has had bills rendered he may state what they are, or if he has got no expenses he may state. I assume that is the purport of the question. If he doesn't know what the charges are he will not be permitted to testify.

MR. CARTON—There is no question as to that. I don't object to that; but he covered it all in one question. It seems to me the details will have to be given.

Q. How much did you spend for medical expenses or what you owe? A. Can I look at the record of that?

Q. Yes, for doctors? A. For medical?

Q. Yes. Just take those items. A. Well, my bills haven't all been rendered, Mr. Cook.

Q. What you have and what you know about. A. What I know about?

Q. Yes. A. Well, I just paid a bill—I paid most all bills, medical bills, because when I was in this condition I went to different doctors and had treatments there and paid them on the spot for what they done there.

By THE COURT:

Q. Well, whom did you pay, for example, Mr. Shaw? A. Oh, I paid the different local doctors up in the Bronx, New York City. They used to take me around in a taxicab to different places.

Q. Well, name some of the doctors, because you will be asked that. A. Well. I will have to get these names.

Q. Do you recall any of them? A. Well, we wife might be able to recall them. She did all that for me.

THE COURT—Now proceed, Mr. Cook.

By MR. COOK:

Q. Do you know how much you paid Dr. Holters? A. No, Dr. Holters was taking care of me under the Traveler's Insurance Company.

Q. Hospital also? A. Yes, sir.

Q. What bills have you had rendered that you know about, doctors' bills? A. I know I have several bills pending and one bill I have got here for $330 which has not paid yet.

By THE COURT:

Q. Whose is that? A. It is Dr. Milton Bridges.
Q. New York? A. 580 Park Avenue, New York.

By MR. COOK:

Q. How much did you pay Dr. Lasher? A. Dr. Lasher was a Traveler's Insurance doctor.

By THE COURT:

Q. By that you mean under the employer's liability? A. Yes, sir.
Q. You received compensation? A. Yes, sir.
Q. Plus the surgical and medical expenses and hospital care? A. Yes, sir.

By MR. COOK:

Q. What have you paid yourself for your medical services?

THE COURT—It would make no difference, Mr. Cook, assuming that the provisions of the Employers Liability Act has been observed here, and notice served by the employer upon the defndant; I don't whether that was done or not.

MR. COOK—Yes.

Q. Do you know what the bills were that were rendered by the doctors or were paid by anybody for your injuries? A. No, sir.
Q. You don't? A. No, sir.

Q. Is one bill of three hundred— A. $330.

Q. $330? A. The others I would have to get itemized.

Q. What? A. I would have to have them all itemized by the people. I didn't pay these bills because I couldn't go around and do that.

Q. Who did it? A. My wife.

Q. Oh, well, we will call her.

THE COURT—Proceed.

Q. What were you earning at the time of this accident, Mr. Shaw? A. $122 a week.

Q. And you were working regularly before that? A. Yes, sir.

Q. Within the period of say two or three years had you been earning that sum? A. No, sir; it fluctuated up and down.

Q. It fluctuated up and down? A. Yes.

Q. What was the average of the two or three years before the accident, your average earnings? A. I would say $110.

Q. And you say that you did no work, have done no work, since the accident? A. Not at my trade, no, sir.

MR. COOK—Not at his trade. I will bring that out, if the court please.

By THE COURT:

Q. Have you done any other work? A. Yes, sir.

Q. What? A. Supervising work.

Q. How much have you been earning at that? A. I have been earning as high as $100 a week.

Q. And how long have you been earning $100 a week as supervisor? A. Since the accident?

Q. Yes. A. Well, after the accident I went down to $96 a week.

Q. All right. When did you first begin to earn any money after the accident, how long after? A. I was never taken off the payroll with the concern I worked for.

Q. Oh, they continued you as an employee? A. Yes, sir.

Q. And kept you at regular wages? A. No, they reduced me to $96.

Q. $96? A. Yes, sir.

Q. How long did you work for $96? A. For about a year.

Q. And after that? A. After that I was discharged.

Q. You were discharged? A. Yes, sir.

Q. And then how long were you out of employment? A. Five months.

Q. And then you obtained employment as supervisor? A. Yes, sir.

Q. With whom? A. With Starrett Brothers, New York City.

Q. And they have been paying you $110 a week? A. $100.

Q. $100 a week sisnce then? A. Yes, sir.

Q. Been regularly employed? A. Yes, sir.

By MR. COOK:

Q. How long was it after the accident before you were able to do any work of any character? A. Do you mean supervising now, Mr. Cook, or work?

Q. Yes, any work of any kind.

THE COURT—Well, of course it involves your earnings, whether you earned in any capacity.

A. I have already answered that. I never was off the payroll.

Q. You never were off the payroll? A. No, till I was discharged.

Q. You were in the office? A. Yes, sir.

Q. And whose office were you in? A. Dwight P. Robinson's.

Q. Were they the ones you were employed by at the time of the accident? A. Yes, sir.

Q. And what kind of work did you do in the office? A. Just hang around the office and look over the plans. I couldn't go around; I was in the cast at the time.

Q. You were in a plaster cast at the time? A. Yes, sir.

Q. How long was that after you got out of the hospital? A. I would say about six—after I got out of the hospital?

Q. Yes. A. About a month after I got out of the hospital.

Q. About a month after you got out of the hospital? A. Yes, sir.

Q. So there is a period there from the time of the accident on about a month and a half that you didn't do anything; is that right? A. Yes, sir.

Q. And then they gave you a position in the office as supervisor? A. Yes, sir.

Q. You had this cast on? A. Up till nine weeks, yes, sir.

Q. How long had you been employed by Dwight P. Robinson before that time? A. Six years.

Q. Six years? A. Yes, sir.

Q. Do you know why you were discharged at the end of the time you spoke about? A. Yes, I believe it was after the—

MR. CARTON—Objected to.

Q. No, do you know why you were discharged? A. Yes, sir.

Q. Why? A. Being incompetent.

By THE COURT:

Q. How do you know you were incompetent? A. Because my neck made me that way.

Q. Could you do the work? A. Yes; in my occupation I have got to go around a building and look around and look up and down.

By MR. COOK:

Q. Make observations, you mean? A. Yes, sir; place men.

Q. Well, is that the reason for your discharge? A. I believe so.

Q. Were you told so? A. No, sir.

Q. So you don't actually know why you were discharged? A. No, sir; I will say no.

Q. Excepting that you got the notice to quit? A. Yes, sir.

By MR. COOK:

Q. There was no other reason that you know of, was there? A. No, sir.

Q. And how long did you remain out of employment after that? A. Five months.

Q. And did you have any offers of positions or jobs as a bricklayer at any time? A. Yes, sir.

Q. Could you have procured labor? A. Yes, sir.

Q. Steadily? A. Yes, sir.

Q. Were you able to do it? A. No, sir.

Q. Have you any assurance of the continuance in your present position? A. No, sir.

MR. CARTON—Objected to, if your Honor please. No one has any assurance.

THE COURT—None of us have any assurance of continuance in our present business, have we?

MR COOK—No, I mean independent of the fact that he might die.

THE COURT—It is too general a question.

Q. Do you know whether you are going to hold your position or not?

MR. CARTON—Objected to.

Q. Do you know, this present position?

THE COURT—No, it is objectionable, Mr. Cook. All we are concerned now with is the measure of damages to the date of the trial.

MR. COOK—All right.

THE COURT—Of course anything that might in all reasonable probability affect his earning capacity in the future, involving any permanent injury, naturally would be considered; but the gentleman says that his earning capacity at the present time is slightly less but not so much less than it was before.

MR. COOK—True.

THE COURT—Of course he has had experience; he is a supervisor now. He has gotten out of the trowel class and gotten into the position of boss.

Q. What is your present position now, did you say? A. Foreman bricklayer.

Q. Do you do any actual physical work? A. No, sir.

By THE COURT:

Q. Does the foreman make more than the bricklayer today? A. Yes, sir.

day? A. Yes, sir.

Q. And the bricklayer makes $18 a day, doesn't he? A. No, sir.

Q. How much does he make? A. In New York City I believe $14, possibly $12.

Q. $14? A. Yes.

Q. And the foreman gets how much a day? A. There is no set price for that.

Q. Weekly position? A. Yes, agreement.

Q. You are getting $100? A. Yes, sir.

Q. A week? A. Yes, sir.

By MR. COOK:

Q. Prior to the accident, Mr. Shaw, you say your weight was about one hundred and seventy-eight? A. Yes.

Q. What is your height? A. Five feet nine and a half.

Q. Prior to the accident were you losing in weight or were you holding your weight? A. I was holding my weight.

Q. Prior to the accident did you have a constant thirst and drink large quantities of water? A. No, sir.

MR. CARTON—Objected to.

MR. COOK—Why?

MR. CARTON—There is an allegation that this blow—

THE COURT—Now he didn't live in Asbury Park, he was living in New York; he didn't live in Ocean Grove. Why bring that up?

MR. COOK—The reason for that is this: there is an allegation in the complaint that by reason—he was a strong, healthy man prior to this, and by reason of

this blow he developed diabetes. We have taken testimony in New York to show it, and those are symptoms.

THE COURT—Oh, you are entitle to show that.

Q. What is you present condition, Mr. Shaw aside from the neck difficulty? Have you any other trouble of organic nature? A. Yes, sir.

Q. What is it? A. I am diabetic.

By MR. COOK:

Q. Were you so before the accident? A. No, sir.

MR. CARTON—Objected to, unless he knows.

Q. Were you before this accident? A. No, sir.

MR. CARTON—Objected to.

MR. COOK—Well, he ought to know.

THE COURT—No, I don't know about that. He may or may not.

By THE COURT:

Q. Were you treated for diabetes before the accident? A. No, sir.

Q. Did you ever have occasion to go to a physician or surgeon? A. No, sir.

Q. Did you have any organic trouble of which you were conscious? A. No, sir.

Q. Before the accident? A. No, sir.

MR. COOK—You see, Your Honor, I am proving what the testimony shows developed afterward, negativing it because he didn't have these symptoms before.

MR. CARTON—Well, You haven't shown that, that he had symptoms—

THE COURT—It is more or less rebuttal situation, Mr. Cook. I would not have brought it out now if I had been out there in front.

MR. COOK—No, it is part of my original proof. If I close without it I couldn't get it in.

THE COURT—Oh, no; he tells you what his injuries were and Mr. Carton is going to come along after while and say it is not the neck trouble at all, is the diabetic condition; and then you come back with your rebuttal and say that the diabetic condition was not the proximate result of the injury at all—

MR. COOK—It was the proximate result.

THE COURT—Or it was the proximate result.

MR. COOK—That is the evidence.

THE COURT—Why anticipate their defense?

MR. COOK—It is not their defense, it is part of my affirmative proof.

THE COURT—All right, go ahead if you insist on it.

MR. COOK—All right.

THE COURT—He says he had no such conditions of which he had any knowledge prior to the accident, before the accident.

(Intermission.)

THE COURT—I am informed by counsel for the plaintiff that as a matter of fact in his pleading he is claiming that one of the direct consequences of this accident was a diabetic condition which developed with Mr. Shaw as one of the proximate results of the accident in question. That being so, then of course he would be obliged to show the man's condition. I thought that you were going to set up that the man really was not hurt, at least his present condition was not due to the accident, that he was diabetic.

MR. CARTON—No, that was not the point of my objection. The point was he was asking what thirst he had before the accident.

THE COURT—I will allow Mr. Cook to examine him on it.

MR. COOK—I want to ask Mr. Carton about that. He may laugh about that, but it is one of the conditions. I want to show whether or not he had that before the accident.

THE COURT—Perhaps you can eliminate that and examine on it.

MR. CARTON—The reason I thought it was objectionable, his physician will develop that he has this thirst now, and it was anticipatory.

THE COURT—All right; call him and agree to start over.

MR. COOK—I have the evidence in New York, taken of what the doctors found.

THE COURT—Taken on notice, was it?

MR. COOK—Oh, yes; they were present and examined.

MR. CARTON—This man was not examined, was he, Mr. Cook?

MR. COOK—No, the doctors were examined who had him in charge.

THE COURT—Of course you will have some physician who has examined Shaw and found a diabetic condition, will you not?

MR. COOK—I have got him right here, yes, sir.

By MR. COOK:

Q. I will have to repeat that question: were you holding your weight prior to the accident? A. Yes, sir.
Q. Did you suffer from great thirst prior to the accident? A. No, sir.

MR. CARTON—Objected to, if your Honor please.

THE COURT—Why?

MR. CARTON—Because there is no evidence in the case that he is suffering from great thirst now.

MR. COOK—I am going to come to it.

MR. CARTON—Let him come to it first.

THE COURT—On his assurance that he will connect it properly I will allow it.

Q. Have you since the accident suffered from great thirst? A. Yes, sir.

Q. Do you do it now? A. Yes, sir.

Q. What was your condition as to strength prior to the accident? A. I was a strong, robust man prior to the accident, and as I have already said, I weighed one hundred and seventy-eight pounds.

Q. What is your condition since the accident as to that? A. I went down as low as one hundred and forty pounds.

Q. And how quickly did you go down to that after the accident? A. I would say a month after the accident.

Q. After the accident did you pass large quantities of urine?

MR. CARTON—I object. These questions are highly leading.

THE COURT—Yes, don't lead, Mr. Cook.

Q. What about the discharge of urine prior to the accident as to quantity? A. I would say it was normal.

Q. What since that time? A. Abnormal.

Q. Does it affect you in the night? A. Yes.

Q. Did it prior to the accident affect you in the night? A. No, sir.

Q. Have you been under medical treatment for diabetes? A. Yes, sir.

Q. From what point? A. The date?

Q. Yes. A. From two days after the accident.

Q. Who were your physicians in New York, if you have any? A. Dr. Guile, Dr. Lasher and Dr. Bridges. He is a free doctor.

Q. Have you since the discovery of your condition of diabetes, as you describe, been on any different diet than you were prior to the accident? A. Yes, sir.

Q. In what way? A. I am not allowed to eat any starches or sugar and I have a very restricted diet. I have got to weigh my diet out on computing scales.

Q. Does it cost you more for your diet now than it did prior to the accident? A. Much more, yes, sir.

MR. COOK—Take the witness.

CROSS-EXAMINATION

By MR. CARTON:

Q. Mr. Shaw, you are now forty-nine years of age? A. Yes, sir.

Q. You weighed one hundred and seventy-eight pounds before the accident? A. Yes, sir.

Q. How much do you weigh now? A. I weigh one hundred and fifty now.

Q. When were you weighed last? A. Yesterday.

Q. When were you weighed before yesterday? A. A few days before that.

Q. What did you weigh then? A. The same. I am hitting one hundred and fifty now steady.

Q. When prior to the accident had you been weighed? A. I weighed myself two or three times a week.

Q. Why did you do that? A. Why?

Q. Yes. A. Because I think it is essential to do that.

Q. Well, did you have any suspicion that there was something the matter with you at that time, and isn't that the reason why you were weighing yourself two or three times a week? A. No, sir; this weighing that I speak of I did in the public streets on those slot machines. Now since the accident I have had to buy scales, under the instruction of the doctor, and I have them in my bathroom now.

Q. And before the accident you thought it was prudent to weigh yourself two or three times a week? A. Only curiosity.

Q. Only curiosity? A. Yes.

Q. What was the curiosity? Was your weight given at that time to sudden fluctuating? A. No, if I might explain that, I had been sick previous to that.

Q. You had been sick previous to that? A. Yes.

Q. How long had you been sick? A. I was sick for about six weeks.

Q. When was that sickness? A. That was about, I would say, 1926, I would say.

By THE COURT:

Q. What was the matter? A. I had pneumonia.

By MR. CARTON:

Q. Had pneumonia? A. Yes, sir.

Q. And were laid up about six weeks? A. Yes, sir.

Q. Were you then working for Dwight P. Robinson? A. Yes, sir.

Q. And prior to that occasion when was your last illness? A. I don't remember having one prior to that.

Q. After you were ill for the six weeks with the pneumonia attack did you then start work? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. And when did you entirely recover from the effects of the pneumonia? A. I don't know what you mean by entirely recovered.

By THE COURT:

Q. Well, you had pneumonia. There was a time when you got well. A. Well, I had got out and had to go to the mountains for some time.

Q. When did you get well? A. I would say six weeks after I took sick.

By MR. CARTON:

Q. You mean between the time of your sickness and the time you were to the mountains consumed six weeks? A. Yes, sir.

Q. Where did you go to the mountains? A. Sullivan county.

Q. Under the advice of your doctor? A. Yes, sir.

Q. Who was your doctor then? A. Dr. McGhan, of Boston.

Q. Did he tell you why he was advising you to go to Sullivan County? A. To recuperate from my sickness, the pneumonia.

Q. Was that then the time that you first started weighing yourself, after the pneumonia attack? A. I have always weighed myself, as any person does.

By THE COURT:

Q. Your answer would be no? A. Yes, I have always done it.

By MR. CARTON:

Q. Were you heavier before the pneumonia attack or afterwards? A. I didn't get that question.

Q. Did you weigh more after the pneumonia? A. Less after the pneumonia, yes.

Q. Now just before you had pneumonia did you weigh more than one hundred and seventy-eight pounds? A. No, I didn't weigh more, no, sir.

Q. You weighed just that amount? A. I should say so, yes.

Q. Were you treated for any other illness outside of pneumonia prior to the accident? A. Had I other illness?

Q. Yes. A. No, sir.

Q. You were employed by Dwight P. Robinson on this job, were you not? A. Yes, sir.

Q. And your special job was mason foreman? A. Yes, sir.

Q. And bricklaying foreman, or foreman of bricklayers? A. Yes, sir.

Q. And what are the duties of a foreman of bricklayers? A. To hire the men, place them on the job, supervise them during construction and discharge them at the finish of the job.

Q. It doesn't consist of laying bricks though? A. At times, yes, sir.

Q. It does? A. Yes, sir.

Q. When? A. When a job gets too small to afford you to walk around you have got to jump in and work at it.

Q. Will you tell us in the past five years if you have been actually laying bricks as a supervising foreman? A. Yes, I have been laying bricks in lots of jobs that I supervised.

Q. Tell us one. A. 200 Madison Avenue, New York City.

Q. How long ago was that? A. That is, I will say, four years ago.

Q. About four years ago? A. Yes.

Q. You haven't laid any since that though, have you? A. Yes, sir.

Q. Where? A. 87th Street and Fifth Avenue.

Q. The job four years ago when you laid brick, how long were you at it? A. How long laying brick?

Q. How long laying brick? A. Well, I might work for a few days and then walk around a few days, according to the accommodations of the job, as they needed me.

Q. So in the past five years—how long were you with Dwight P. Robinson, six years? A. As near as I can recollect, six years.

Q. During the six years how many days would you say that you would actually lay brick? A. I couldn't answer that question.

By THE COURT:

Q. Oh, an average each week. A.Oh, on an average —that would be a hard question to answer.

By MR. CARTON:

Q. Well, that is a very small part of your work, isn't it, Mr. Shaw, a man in your position? A. At times I would be steady laying brick. Other times, if the gang is large enough, you can't afford to lay brick, it takes you all the time to supervise your job.

Q. Dwight P. Robinson are big operators, aren't they? A. Yes, sir.

Q. And handle big jobs? A. Yes, sir.

Q. And therefore have a great number of men on their work? A. If the jobs are big enough, yes.

Q. Well, such jobs are big enough? A. Yes, to prepare, dig around the job and hunt down for them lots of men.

Q. And your employment is to lay out the work and supervise these bricklayers and see that they do it properly? A. Yes, sir.

Q. And when you were demonstrating here before the jury how you had to put your feet back, the motion for that had regard to the men who were laying brick? A. Yes.

Q. And not your work as an ordinary foreman? A. Yes, I have got to do it. I have got to lay the work out.

Q. What say? A. I have got to lay the work out.

Q. But as a foreman you don't lay brick? A. Yes, I do.

Q. Well, the instances in which you have just related. A. Yes, I lay brick just as I have related.

Q. Just as you related? A. Yes, sir.

Q. Were you on this Electric Building job from the beginning? A. Yes, sir.

Q. And you had charge of the work of stone construction, I suppose? A. Yes.

Q. Did you have charge of putting up the tiling aroung the elevator shaft? A. Yes, sir.

Q. You supervised that? A. Yes, sir.

Q. Including the shaft that was around the—I mean on the sixth floor? A. Yes.

Q. Around the— A. Around it, yes, sir.

Q. Yes, around the column; and had this tile been laid around the columns on each floor? A. Yes, sir.

Q. As I recall, you stated that at the time of this accident you were walking away from the elevator and toward the office? A. Yes, sir.

Q. And how many feet away from the elevator shaft were you? A. I would say fifteen feet.

Q. About fifteen feet? A. Yes, sir.

Q. And then you heard the crash? A. Yes, sir.

Q. What did you do when you heard the crash? A. I don't know what I done.

Q. Well, there was quite a perceptible time between the time of the crash and the time that you were struck, wasn't there? A. I don't know, sir.

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

Q. This crash was on the sixth floor, was it not? A. I don't know, sir.

Q. You afterwards learned that it was? A. Yes, sir.

Q. And you understood that something, one of these tile or something, fell down the shaft? A. I was told so, yes, sir.

Q. And it struck something in the elevator somewhere? A. Yes, sir.

Q. And a piece slid over and hit you; that is how you understood this happened, isn't it? A. Yes, sir.

Q. Do you mean to say that you did nothing from the time you heard the crash, while this tile was coming down the elevator and smashing and something flew over and hit you, didn't you do anything in that interval? A. I didn't know a thing after I heard the crash till I waked up in the hospital.

Q. Well, you must know what you did or thought about it. A. No, sir.

Q. From the time you heard the accident until the time you were struck, the time you heard the crash. As far as you recollect the crash and you being hit were simultaneous? A. As far as I know.

Q. That is your recollection about it? A. That is my recollection.

Q. Thinking the matter over since do you think that could be so? A. I don't know.

Q. Well, you understand that this elevator struck into the tile and knocked them down and they went down the elevator shaft from the sixth floor and crashed on something and then from there flew and struck you? A. Yes, sir.

Q. That would take quite a little time, wouldn't it? A. I imagine so, yes.

Q. But you have no recollection of what you did or any action on your part from the time you heard the crash until you were struck? A. No, sir.

Q. Did you pay any attention to the crash? A. Just as I have already told you, when I heard the crash I was hit simultaneously.

Q. You were hit simultaneously? A. Yes. I don't remember from there on after that.

Q. Are you quite sure about that? A. Yes, sir.

Q. Did you know what hit you? A. No, sir.

Q. It is your recollection, Mr. Shaw, that the crash and striking you came at the same time? A. As far as I know, sir.

Q. There is nothing the matter with your recollection before this accident? You would know everything that was transpiring between the time of the crash and up to the time you were struck, wouldn't you? A. There was not time, as far as I know.

By THE COURT:

Q. What is your last recollection? A. My last recollection, I was speaking to one of your witnesses here, Mr. Wright, I turned from Mr. Wright and walked towards the office, I heard the crash and after that crash I don't remember a thing till I waked up in the hospital, with a colored nurse and a doctor.

Q. Where were you standing when you talked to Mr. Wright? A. Right in front of the elevator.

By MR. CARTON:

Q. Where this tile was supposed to come down from the sixth floor through the elevator shaft and possibly

struck something and a piece went over and hit you, how much opening is there between the—was it all open between where you were and the elevator shaft? A. Yes.

Q. No structures or tiling or anything of that sort? A. No, sir.

Q. How high was the opening of the shaft on that floor? A. I would say that would be the top of the mezzanine floor; it would be at least fifteen feet or more.

Q. Who put that elevator in the building, Mr. Shaw? A. I don't know.

Q. Were you there when it was put in? A. No, sir.

Q. I thought you were there at the outset, from the beginning of the work? A. No, sir.

Q. Oh, you were not? A. No, sir.

Q. How long had you been on the job before the accident? A. I have got the date right in this book.

Q. Well, your best recollection. A. This was the book I took on the job with me and the date is on the book, I think. (Refers to book.)

Q. Well, all right. A. No, sir; I would say ten weeks on the job.

Q. And the elevator was in when you came to the job? A. Yes, sir.

Q. Who was using it prior to this time? I mean do you know who owned it or had charge of it or who was using it? A. No, sir.

Q. Don't know? A. No, sir.

Q. Did you ever make any inquiry? A. No, sir.

Q. You never heard who owned it or used it? A. I heard that Peterson used it.

MR. ACKERSON—Objected to.

THE COURT—No, you can't do that.

Q. That is all you know about it? A. Yes, sir.

MR. ACKERSON—I move it be stricken from the record.

THE COURT—Strike it out.

Q. How was this elevator shaft constructed, Mr. Shaw? A. This elevator shaft is an opening—take that as an illustration, that ceiling. There was an opening up there for the shaft to pass through, just an opening in the floor, the open part of the floor left out, and those cars just went through that opening.

Q. A similar opening between each floor? A. Yes, sir.

Q. Do you know the dimensions of the opening through which the elevator went? A. No, I couldn't say that.

Q. With relation to the size of the elevator platform, how much larger was the opening? A. I wouldn't go on record saying how much larger.

By THE COURT:

Q. What was the size of the floor of the elevator? A. I think I said four feet six square, didn't I, each elevator?

Q. Four feet six square? A. Four feet six square, each platform. There is two of these platforms.

By MR. CARTON:

Q. How wide? In other words, was there any room between the platform of the elevator as it went up? A. Yes, sir.

Q. And these openings? A. Yes, sir.

Q. Some inches? A. Yes, sir.

Q. On all four sides, I suppose? A. Yes, sir.

Q. About how many inches? A. I would say it varies from three to four inches.

Q. From three to four inches? A. Yes, sir.

Q. And what was there about the construction of the elevator or about its use, if you saw it operated, that kept the elevator going up and down in any certain path, or did it wiggle or wobble from one side to the other?

MR. ACKERSON—I object, if your Honor please. I don't think it is proper cross-examination; and the same objection that I made yesterday; the pleadings show that my codefendant, if there is any question as to the possible construction of the elevator—

THE COURT—Did you build the elevator?

MR. ACKERSON—Yes, to this extent. I might make this for the purpose of the record at this time: that the elevator was not owned by this defendant.

THE COURT—Peterson?

MR. ACKERSON—Peterson. It was owned, as has been testified, by the International Hoisting Company. It was leased by the Peterson Company, just as you would buy buildings from Sears & Roebuck.

THE COURT—I don't buy buildings from Sears & Roebuck's, I buy hardwood floor.

MR. ACKERSON—Well, they also sell buildings now and they come in sections, numbered, and so forth. The elevators are bought, or leased, rather—by the contractor or subcontractor.

THE COURT—Put together?

MR. ACKERSON—For his own particular purpose, I would say, put together by him on the job. That was the situation here. Our lease from the International Hoisting Company expired and ceased on January 12th. From January 17th to February 24th it was under lease by contract with the International Hoisting Company by Meyer & Rybicki.

THE COURT—Your leasehold interest, as it were, had expired?

MR. ACKERSON—On January 12th, sir.

THE COURT—Meyer & Rybicki had it?

MR. ACKERSON—They had it under leasehold right from the International Hoisting Company from January 17th there were five days elapsed to February 24th. Now my objection now, sir, is this: as to answering as to the construction of the elevator and so forth; that it is not proper cross-examination.

THE COURT—Oh, I am not so sure about that.

MR. ACKERSON—All right. Now further, sir, for this reason: that they deny any possible allegation that is alleged in the complaint of Mr. Cook and they raise no special defense.

THE COURT—No, I know, but the complaint was joint. It charged negligence against three defendants.

MR. ACKERSON—Separate counts, sir.

THE COURT—No, there are two. It is double pleading.

MR. ACKERSON—The first count is general.

THE COURT—The first count is general and charged all three with being joint tort feasors; and the second is separate, but based upon the same accident. So that the situation still involves the alleged join liability, excepting as Mr. Cook has consented now to a formal nonsuit, at least has asked for a formal nonsuit as to Rybicki and whoever it was. The objection is overruled. You may have an exception.

(Objection noted for defendant, Peterson Company, as ground of appeal.)

MR. CARTON—And I assume Mr. Ackerson intends to follow up the statement he is placing on the record with the actual proof concerning this last. Of course if that is so, in the event that his client is held in the case, assuming naturally, he would have to offer evidence.

MR. ACKERSON—I merely made that due to the court's questioning me. You asked me directly.

THE COURT—Yes, it is well to be informed.

By MR. CARTON:

Q. I think I had asked you, Mr. Shaw, whether there was any play, we will call it, in the elevator as it went up and down through this shaft, or just went through a single groove.

MR. ACKERSON—The further objection that I would like to enter on the record, of course, that having surrendered our entire right in the elevator, and finished our work, the elevator having been merely erected or set up by us, of course to whom the following owners as a matter of law leased the elevator—of course whatever we had done in connection with erecting for our own use.

THE COURT—Suppose you had, however, defectively erected it in the beginning.

MR. ACKERSON—Our position, fortified by law, is that we had no duty to the lessee who took the elevator after we said—

THE COURT—The question is whether you owed a duty to Shaw.

MR. ACKERSON—We owed no duty, sir, after we had ceased our leasehold rights and had said to our owners, "Take it down; we are through." They said, "No, we want to lease it to some one else."

THE COURT—It is a matter of proof.

MR. ACKERSON—According to my statement that is the proof.

(Objection noted for defendant, Peterson & Company, as ground of appeal.)

(Question repeated.)

MR. ACKERSON—I object unless Mr. Shaw had observation of the elevator.

THE COURT—Of course he can only answer that in the event that he knew.

MR. ACKERSON—And had gone up and down in the elevator.

THE COURT—Well, that may or may not be so.

MR. CARTON—I don't think any one ever went up and down the elevator.

THE COURT—It was a freight elevator?

MR. CARTON—Yes. I mean it was operated from the floor.

THE COURT—It was operated from the floor. Proceed. He may answer.

A. What is the question?

(Question repeated as follows:) I think I had asked you, Mr. Shaw, whether there was any play, we will call

it, in the elevator as it went up and down through this shaft, or just went through a certain groove. If you know. A. You mean play in the rails which guided this car?

Q. No, any opportunity for play, we will say, between the platform of the elevator and the side or partitions through which it went as it went up and down. A. I couldn't say.

Q. You couldn't say? Was there room for play? A. I couldn't say.

Q. Well, you have said there was some two or three inches on either side, have you not? A. That is the other way. The play would be in the opposite direction.

Q. I don't understand. A. The play would be in the opposite direction from what we are speaking about.

Q. Explain what that is. A. Well, you would only come off that elevator one side, and that is the side where the planks were ripped off. That is the side a person would get the play, see?

Q. Won't you answer that question actually? A. The other side you ask me, I don't know. There are four sides to the elevator.

Q. Was there play in any side? A. Yes.

By MR. ACKERSON:

Q. That is, of your own knowledge now? A. Yes, sir.

By MR. CARTON:

Q. Do you say this because of your knowledge of the construction of the shaft and the sides of the elevator platform?

MR. ACKERSON—I object to that question because I understand he was not on the job when the shaft was erected.

THE COURT—He may say whether he saw the elevator and the condition he saw it and whether he observed the items to which Mr. Carton's question relates.

Q. Did you ever see this elevator in operation, going up and down? A. Yes, sir.

Q. Very many occasions, did you? A. Yes, sir.

Q. And did you ever observe whether there was any play in it as it went up and down? A. If you mean by play motion of the elevator I can't say, for I never noticed.

By THE COURT:

Q. Did it ride free of the platform and the planks? A. Yes, sir.

Q. You saw it in operation for some time? A. Yes, sir.

Q. And it rode free? A. Yes, sir.

Q. Without scraping? A. Yes, sir.

Q. Did you ever see it scrape? A. No, sir.

Q. The elevator scrape the planks? A. No, sir.

By MR. CARTON:

Q. What was the construction of the elevator? Was it a shaft or rope? How was it pulled up? How was it hooked up, the elevator platform?

MR. ACKERSON—So that I won't appear objectionable, may my objection run to this entire question?

THE COURT—Yes, the objection is overruled. He may answer. You may have an exception.

(Objection noted for defendant Peterson Company as ground of appeal.)

Q. Explain the construction of this elevator, won't you, Mr. Shaw? A. Yes, sir; the platform is, as I have already said, four feet six inches square, as near as I can mention, with two sides going up and what we call a crosshead, formed like a basket, with no sides to it; on the top of the crosshead having attached a cable, which they take up to the main roof and put it over a pulley and bring it down to the first floor again and hook it up to the motor on the first floor.

Q. And that cable is right in the center of the elevator platform, I suppose? A. Yes, sir.

Q. The thickness of the platform, the floor of the platform of the elevator, how thick is it? A. Three inches.

Q. And is that planking? A. Yes, sir.

Q. You referred to the planking on the sixth floor, I think you said also on other floors from the hallway or room into the elevator, was there not? I think you said that was the usual thing as the method of operation in all buildings? A. Yes, sir.

Q. What was the nature of that planking that was placed in front of the elevator shaft on the different floors? A. You mean what it was there for or the nature?

By THE COURT:

Q. No, what kind of plank was it? A. Wooden plank.

By MR. CARTON:

Q. How thick were they? A. Three inches.

By THE COURT:

Q. How long? A. Thirteen feet, I would say. I didn't measure, but I would say the average plank is thirteen feet, and therefore it should be that.

Q. How were they placed with reference to the shaft? A. They were placed running parallel with the shaft, this side we run off on.

By MR. CARTON:

Q. Running parallel with it? A. Yes and keep about three or four inches from the clearance of the platform.

Q. And who placed those planks there?

THE COURT—If you know.

Q. Well, you did, didn't you, Mr. Shaw? A. I did it?

Q. Yes; didn't you? A. No, sir.

Q. Didn't you place that connection with the plank, tile on top of the plank? A. No, sir.

Q. Who put the tile on top of the planks? A. That I don't know.

Q. Well, you did it or your men did it under your supervision, didn't they? A. Possibly they might.

Q. You know, don't you? A. I don't know definitely that they did. I take it they did.

Q. Well, nobody else would have supervision of that particular work except you, would they? A. Yes.

By THE COURT:

Q. Who would? If you didn't, who would? A. John Peacock, the foreman bricklayer.

By MR. CARTON:

Q. You mean another foreman? A. Yes, sir; another; two foremen.

Q. How many foremen did you have on that job? A. One foreman.

Q. One foreman outside of you? A. Yes, sir.

Q. Did you have supervision of the laying of any of this tile and any of this plank on any of the floors? A. It was direct under my supervision, yes, sir.

Q. You knew it was being done and it was being done as a part of the plan of construction of the building, wasn't it? A. Yes, to fireproof those columns; we called that fireproofing, putting those tiles around the column.

Q. Why didn't you saw this planking off before you put the tiling down? A. I didn't get that question.

Q. Why didn't you remove the planks or saw them up before you put the tile down? A. I don't know where those planks were, sir?

Q. The fact is the planks were covered up, were they not? A. I don't know.

Q. You say in putting those planks next to the elevator openings they were kept back some three inches, so the elevator might clear? A. That is right.

Q. Is that what you say? A. Yes, sir.

Q. And was that so on various other floors above and below the sixth? A. Yes, sir.

Q. Now you stated that you went down to the job the next day and you saw the plank was bursted up? A. Yes.

Q. How was it bursted up? A. It just appeared to me that something had hit it, evidently, and raised it up.

Q. How high had it been raised? A. Well, a matter of inches. I couldn't say. I didn't measure those things. A matter of inches, I would say.

Q. Tipped up some inches? A. Yes, sir.

Q. Did you know Mr. Franciosa? A. Yes, sir.

Q. He had charge of looking after that work, didn't he, keeping those holes and everything in proper shape? A. He was foreman laborer, yes, sir.

Q. What time of day did you go there the next day? A. I would say the forenoon; that is all I can say.

Q. In the forenoon? A. Yes.

Q. This plank had not been put back in place yet? A. No, sir.

Q. Was Mr. Franciosa on the job? A. Yes, sir.

Q. He hadn't got to this particular floor yet, had he, to put this plank back? A. No, sir.

Q. Did I understand you to say in your direct examination that you hadn't worked since the accident? A. Yes, sir.

Q. Well, you don't mean that in just that way, do you, Mr. Shaw? A. Well, I mean I haven't been employed as a bricklayer, laying bricks; yes, I mean that.

Q. Well, you were not employed as a bricklayer before the accident, were you? A. How far back are you going?

Q. At the time of the accident you were not employed as a bricklayer? A. Partly, yes, sir.

Q. Well, in the way in which you have explained to us, there were certain times you did bricklaying? A. Yes, sir.

Q. You got $122 a week as a bricklayer? A. Yes, sir.

Q. Well, you could get another man for $12 or $14 in New York to do that work, or your company could? A. Yes, sir.

Q. And you mean to say that they paid you $122 a week for laying brick? A. Yes, sir.

Q. The pay, however, is that of a bricklayer foreman, is it not? A. Yes, sir.

Q. Well, you have been serving as bricklayer foreman since the accident, havent' you? A. Yes, but not laying bricks.

Q. I haven't said you had. So that when you say that you hadn't done any work since the accident you mean you haven't been laying any bricks since the accident? A. That is what I mean.

Q. You were not a bricklayer at the time of the accident? A. Yes, sir.

Q. You were a bricklayer foreman? A. Yes, sir.

Q. Getting a bricklayer foreman's pay? A. Yes, sir.

Q. When did you start work? When after the accident did you start work? A. I was kept on the payroll.

Q. You were kept on the payroll all the time? A. Yes, sir.

Q. When did you actually start work? The accident was February 8th. Now when did you start work? A. I would say about three and a half months afterwards.

Q. Didn't you start work on the 11th day of March on the 75th Street job? A. I didn't start work, no, sir.

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

Q. And didn't you work continuously from the 11th day of March to the 8th day of September, 1927, on the 75th Street job? A. No, sir.

Q. Do you know the 75th street job? A. Yes, sir.

Q. You say that is not so? A. That is not so. I was on the payroll, not working.

Q. You were on the payroll, not working? A. On the job; in the office on that job, but not working.

Q. What was the first job that you went on, the first outside job that you went on, after you started work? A. 75th Street and Park Avenue.

Q. 75th Street? A. Yes, sir.

Q. That is the job we are talking about, isn't it? A. Yes, sir.

Q. When did you go there? A. I would say a month after the accident.

Q. When? A. A month after the accident.

Q. A month after the accident? A. Yes, sir.

Q. Well, didn't you tell us a little while ago that you didn't go for three and a half months? A. I said I didn't work. It is a different thing entirely between on the job and sitting in the office.

Q. Well, when did you go on the job, the 75th Street job? When did you go up there to do anything? A. About six weeks after.

Q. About six weeks after? A. Yes, sir; about two and a half months after.

Q. And where did you go from the 75th Street job? A. 87th Street and Fifth Avenue.

Q. 87th Street? A. Yes, sir.

Q. And how long did you work there? A. Up till the following February.

Q. The following February? A. Yes.

Q. You worked there from September 9, 1927, to February 15, 1928, didn't you? A. I believe that is right.

Q. As a bricklayer foreman? A. Yes, sir.

Q. And you got paid? A. Yes, sir.

Q. Will you tell us, do you recall, Mr. Shaw, when it was that you first went to work on the 75th Street job? Was it six weeks or two and a half months? A. I would say, as near as I can recollect, two and a half months.

Q. Two and a half months? A. Yes, sir.

Q. Would that be the latter part of April or the first of May? A. Well, from the 8th of February you will see what it is.

Q. What did you mean then when you answered in your interrogatories served in this case that you were confined to your house for seven or eight months—five or six months, I think? A. I meant that when I got discharged from Dwight P. Robinson's I couldn't go to work laying brick and I stayed in the house.

Q. For about five months, that is what I mean. A. That is this year.

Q. That is what you mean? A. Last year.

Q. You didn't mean by that answer that you were laid up in the house five or six months after the accident? A. No, sir; I didn't.

Q. That was after you got through your employment with Dwight Robinson, then you went in the house? A. As a foreman, yes.

Q. Well, that is when you were looking for a job, I suppose, wasn't it? A. Yes, sir.

Q. It was not because of your condition of health that you were laid up in the house. A. Yes, sir.

Q. Well, you had been working several months before that outside. A. Well, but not laying brick, no, sir.

Q. You are not a bricklayer, are you? A. Yes, sir.

Q. You don't get bricklayer's pay? A. Yes, when I haven't got a foreman's job I am looking for a job laying brick.

Q. You didn't take a bricklayer's job during that five or six months, did you? A. I wasn't fit to do it.

Q. The next job you took was a foreman's job? A. Yes, I had to wait till I got a job to suit me. I couldn't lay bricks.

Q. In the interrogatory you were asked, "Were you confined to your house as a result of the alleged injuries?" and you said, "Yes." A. Yes, sir.

Q. Then you were asked, "How long were you so confined?" and you said, "Five or six months." A. Yes, sir.

Q. Now you say that is so, do you? A. Yes, sir.

Q. Notwithstanding the fact that you had worked several months prior to the time and subsequent to the accident for Dwight Robinson? A. That is right.

Q. And this confinement, so called, happened over a year after the accident and when you were out of a job? A. It was not a confinement.

Q. Well, you have said you were confined to your house. A. Yes, sir, because—I started to say it was

not confinement in the house caused directly through the accident; it was an after effect of the accident. I couldn't take a job laying bricks, therefore I had to stay in the house till some one came and gave me a job as foreman, which I eventually got through a friend.

Q. Is that all you did do, stay in the house until some one came after you? A. Yes, sir.

Q. You never tried to get a job during that five months as a bricklayer, did you? A. No, sir.

Q. Did you ever during that five months try to get a job as foreman? A. I did, yes, sir.

Q. You wouldn't take a job as bricklayer, would you? A. No, sir.

Q. You say that besides your work Dwight Robinson kept you on the payroll right along? A. Yes, sir.

Q. Did you receive any other compensation? A. No, sir.

Q. From no one? A. Outside of these medical bills I told you about, no, sir.

Q. What say? A. Outside of the medical attention I got I received no compensation.

Q. You got compensation sometime back, care of your doctors and medical expenses? A. Yes, I mentioned that.

Q. Did you get any compensation from any one during the five months period you were in the house? A. No, sir

Q. Did you make any application for any? A. No, sir.

Q. Do you know whether you were entitled to any or not. A. I don't know.

Q. Did you try? A. I did not.

Q. Never investigated that? A. No, sir.

Q. Didn't you mention the Travelers' Insurance Company paid you compensation? A. The Travelers' Insurance Company paid me $17 a week for two weeks after the accident, but that amount was deducted from my wages. Dwight P. Robinson deducted that from my wages, therefore I only got wages.

Q. You were then paid compensation, but what happened, Dwight P. Robinson took it and paid you your full pay? A. Yes.

Q. Do you know how long that compensation continued? A. I didn't get the compensation but—

Q. Do you know how long Dwight P. Robinson received it? A. No, sir; I don't know.

Q. You never made an investigation about that? A. No, sir; I didn't get that money direct, I got my wages and they kept it.

Q. In the arrangement you had you didn't have to get it direct, because they paid you your full salary? A. Yes, sir.

Q. The only bill, I think, you could tell us about, was the $330 bill of Dr. Burdges or Bridges? A. Yes, I have got a bill of that.

Q. What did Dr. Bridges treat you for? A. Diabetes.

Q. For diabetes? A. Yes, sir.

Q. That is all? A. That is all.

Q. How long did he treat you? A. He has treated me now up to—

By THE COURT:

Q. The present time? A. Yes, sir.

By MR. CARTON:

Q. How many trips did you make to Dr. Bridges' office? A. I have been going there once every month at the least.

Q. Once every month? A. Yes, sir.

Q. How many trips has he made to your house? A. None at all.

Q. For how many months had you been going to his office at least once a month? A. Well, the bill says.

Q. Well, do you know? A. I will tell you in a minute. (Refers to bill.) Between June 9th and the above date, which is December 31, 1928; that is a year and a half.

Q. From June 9th to what year? A. 1927.

Q. 1927? A. Yes, sir.

By THE COURT:

Q. And how many times did you see him there, go see him or he come to your house? A. I seen him once a month at his office.

Q. Once a month, and he charged $330? A. Yes, sir.

Q. You haven't got that bill? A. No, sir.

Q. He has testified for your in this case also, has he not? A. I believe so, yes, sir.

Q. The biggest part of his charge is for his appearance to testify for you, isn't it, and not for services? A. I don't know a thing about that.

Q. Don't know about that? A. I didn't engage him to testify.

Q. Have you got that bill there with you? A. Yes, sir.

Q. Will you let me see it? A. Sure.

(Witness produces bill to Mr. Carton.)

Q. When did you get this bill? A. I think about the second month—this week, I got it, just after the new year.

Q. December 31st, it is. A. Yes. I got it by mail.

Q. It says, "Professional services between June 9, 1927, and above date," which would be December 31, 1928;" and that bill, you understand, represents monthly calls you made at this doctor's office? A. That is all I engaged him for, yes, sir.

Q. He is rather an expensive physician, isn't he? That would be over $25 a call. A. I believe he is one of the most expensive physicians in New York. He is a specialist in diabetes.

Q. You are now with Starrett Brothers? A. Yes, sir.

RECESS TILL 1.10 P. M.

Trial of the Cause Resumed at 1.10 P. M.

DR. DAVID S. CAREY, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Doctor, you reside in Freehold? A. Yes ,sir.

Q. How long have you been practicing medicine here?

A. Here in Freehold?

Q. Yes. A. About fourteen years.

Q. And the total? A. About twenty-two years.

Q. You are a graduate of any college? A Yes, sir.

Q. What? A. Fordham University School of Medicine.

Q. You have been in continuous practice for the last twenty-two years? A. Yes, sir.

Q. Did you make an examination of the injuries to the neck, the region of the neck, of the plaintiff George Shaw? A. Yes, sir.

Q. When did you make that? A. Yesterday afternoon.

Q. What did you examine him for, Doctor? A. I examined him for the motion of his neck, his arms and his back.

Q. What did you find by that examination? A. He had limited motion in all directions, in his neck, both laterally and up and down.

Q. To what extent would you say? A. Well, I would say—from an occupational standpoint, assuming that the man was a bricklayer—

MR. CARTON—I object to that question, assuming that he was a bricklayer.

THE COURT—Yes, I think that you are putting it too broadly.

A. Well, he said that that was his business.

By THE COURT:

Q. Assuming that he was a foreman of a bricklaying crew and occasionally laid bricks himself.

By MR. COOK:

Q. All, right with that amendment, Doctor. A. I don't know just exactly what a foreman is supposed to do.

By THE COURT:

Q. He is a supervisor. He directs the crew what to do and how to do it. As to that, of course, the condition of the neck would not interfere, I presume, Doctor? A. I don't think it would interfere, unless the man had to look up or down.

Q. Would it to some extent? A. Yes, sir; it would.

Q. Suppose he were to in an emergency lay bricks, could he do it? A. No, sir; I don't think so.

Q. Why? A. Because he doesn't seem to be able to move his back in a bending down position. I am talking about, for example, when laying a brick he reaches down for the brick and then puts them up. Yesterday when I tested out the mobility in his back he was not able to get down and pick up anything. When I tried to trick him on picking up things from the floor he has always seemed to go right down with his leg behind him, and he claimed that he couldn't bend in a normal position like any one would who was bending over to pick up anything.

By MR. COOK:

Q. You learned that he had an injury in 1927, did you not? A. Yes, sir.

Q. Did you examine the X-ray plates that were in evidence in this case? A. No, sir; I haven't seen the plates.

Q. Were you told what the injury was? A. Yes, sir.

MR. CARTON—Objected to.

THE COURT—Wait a moment till we ask the real question. Go ahead. He is heading for the location but he hasn't reached there yet.

Q. Did you, by your examination, ascertain, Doctor, what the original injury was? A. Why, the original injury, in my opinion, was that the man—

MR. CARTON—I don't think he is asked what it was; I think he is just asked whether he did or did not ascertain it.

THE COURT—I will allow you ask the doctor whether the condition of the neck as he found it in all reasonable probability was of traumatic origin or the proximate result of an injury.

MR. COOK—I was coming to that, if the court please.

THE COURT—Why not go right to it?

Q. You understood that question the Judge asked, Doctor? A. Yes, sir.

Q. What is your answer to that? A. Yes, sir.

By THE COURT:

Q. And what kind of an injury, Doctor? A. Traumatic injury, your Honor.

Q. And where? A. It was over the fifth, sixth and seventh cervical vertebræ.

Q. The fifth, sixth and seventh cervical vertebræ? A. Yes, sir.

Q. Will you indicate on your own neck where that injury was? A. Right up in through here. (Indicating.)

Q. As we said yesterday, where the collar button interferes with it? A. Yes, just about starting there.

Q. Have you any idea as the result of the diagnosis as to the nature of that injury? You have given us the location; now what is the trouble? A. It is callus there, your Honor.

Q. Due to what? A. Evidently to a fracture.

Q. Callus, of course, is the result of a fracture usually? A. Yes, sir.

By MR. COOK:

Q. Will you describe, Doctor, what the condition of the neck is as you found it and as you observed it by the movements of the body? A. He has a partial ankylosis there.

By THE COURT:

Q. That means a stiffening? A. A fixation.

Q. A fixation? A. Yes.

By MR. COOK:

Q. What caused that, Doctor, in your opinion? A. Well, it is due entirely, in my opinion, to this fracture that he has evidently had, and this callus is in between the

articular surfaces and the rings of his vertebræ and in that way he has got this limitation of motion; for instance, he can't get his neck down because when he does he has no give there, it has no hinge-like motion.

Q. You mean rotary motion? A. It is the same way with his rotation. He has got callus blocking off all rotary motion.

Q. Doctor, in your opinion, would an injury of the character that you have diagnosed in this man be a producing cause of pain? A. Oh, yes.

By THE COURT:

Q. When? A. At the time of the accident and probably for some period of time after.

Q. Would he have pain now? A. Weather conditions might affect it so that he would.

THE COURT—Anything more, Mr. Cook?

MR. COOK—Yes, just a moment.

By MR. COOK:

Q. Doctor, do I understand you to say that the condition as you have described the injury to the neck of Shaw, is it or is it not, in your opinion, a permanent condition? A. In my opinion it is permanent.

Q. I don't know whether I asked you or not as to the condition. Is there total or partial or what percentage of loss is there to him?

MR. CARTON—In what, Mr. Cook?

THE COURT—Percentage of loss to the normal use of the neck.

MR. COOK—Yes, percentage of loss to the normal use of the neck.

A. Sixty.

Q. Sixty? A. Yes, sir.

Q. And assuming the man was a bricklayer, could he, in your opinion, work at bricklaying?

MR. CARTON—I object to that question.

MR. COOK—Well, he said he was a bricklayer.

MR. CARTON—He wouldn't take a job as a bricklayer and he said so.

THE COURT—Why do you stick to bricklayer? He has already testified. I asked whether in an emergency he would lay bricks or not as a foreman of a gang of bricklayers. We have gone over that. Why repeat it?

MR. COOK—I am just getting the fact of it.

THE COURT—He said that the man couldn't lay brick, in his opinion.

MR. COOK—All right.

Q. Doctor, have you had any experience in the treatment of diabetes? A. Yes, sir.

Q. From your experience is it possible for a man receiving a blow in the neck which caused the fracture of the fifth and sixth cervical vertebrae, by an outward blow, a heavy substance striking him, to be the producing cause of diabetes?

MR. CARTON—I object. This witness has not qualified as an expert.

By THE COURT:

Q. Well, are you qualified to answer that question, Doctor? A. Why, I have read about it, your Honor.

Q. Merely your reading? A. Yes. I don't ever remember having a case of it myself.

Q. Never had a case of it? A. No, sir; not that I know of.

Q. Well, an expert is one who becomes such by reason of practice and study or study without practice, but never by mere observation. Now have you made any study of the subject, Doctor? A. There was a great deal of work done on that subject, your Honor, during the war and after the war there were several very interesting papers that went in the medical journals and textbooks.

Q. All you would be able to say then it is what you have read? A. Yes, sir.

Q. In other words, you could have read it to me and I would say the same thing? A. Yes, sir.

THE COURT—He is not qualified.

By MR. COOK:

Q. Doctor, have you consulted other medical men about the proposition submitted to you, as to whether this blow could cause diabetes? A. It has been talked over in medical societies where I have been, yes, sir.

Q. What is the consensus of opinion of the medical—

MR. CARTON—Objected to as hearsay.

THE COURT—Certainly it impinges on the hearsay rule. It is not exactly that, but it is much the same situation as though he had merely read the paper, brought the paper here and said, "Here, Judge, here it is." I would say, 'Well, they say here in this paper so and so. I attended some medical meeting and they say so and so." Objection sustained. Is there anything more.

MR. COOK—Just one more question.

Q. Doctor, would an injury such as you describe in Shaw's neck be a producing cause of nervousness? A. He might suffer from nervousness, from shock, for a short time after the injury, yes.

CROSS-EXAMINATION

By MR. CARTON:

Q. Doctor, you made this examination of Mr. Shaw just yesterday? A. Yes, sir.

Q. Never had seen him before that time, I suppose? A. No, sir.

Q. And you made an examination for the express purpose of coming here today and testifying? A. Yes, sir.

Q. Had you read the testimony of Mr. Shaw's New York doctors? A. No, sir; I have not.

Q. That has not been brought to your attention? A. No, sir.

Q. How did you know where there had been an injury to the fifth, sixth and seventh cervical vertebrae? A. From the history that Mr. Shaw gave me and from my own examination.

Q. Did you have the X-ray pictures before you? A. No, sir; I didn't.

Q. They were not brought to your attention? A. No, sir.

Q. Did you advise any X-ray pictures of the neck being taken at this time? A. No, sir; I didn't.

Q. If there were such pictures taken at this time they would be very helpful to you in diagnosing this case, would they not? A. Yes, sir.

Q. Where did you find the callus? A. The callus was between the lateral rings of the vertebrae, seemed to me to be more on the external—that is right, the side facing me—and more on the right side than on the left.

Q. And how did you observe that, by feeling? A. By palpitation, by feeling, yes, sir.

Q. Well, callusing of that sort is just Nature's means of healing an injury, is it not? A. Yes, sir.

Q. That is all.

GEORGE SHAW, Recalled.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. Mr. Shaw, this elevator that has been referred to is really what you would call a hod lift, isn't it? A. Yes, sir.

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

Q. And is in no sense, was it, an elevator, such as a passenger elevator? A. No, sir.

Q. Merely for the hauling up of materials? A. That is it.

Q. The elevator that has been referred to that was on the job where you were working was the same exact type of elevator or hod lift that is usually and generally used in construction work of that nature, wasn't it? A. Yes, sir.

Q. And it was erected and constructed in the usual manner in which those lifts are so constructed, wasn't it? A. Yes, in my opinion, yes, sir.

Q. And as a matter of fact there was another hod lift on this same job, wasn't there? A. Yes, sir.

Q. And that was the hod lift which the Dwight Robinson people erected or owned? A. Yes, sir.

Q. And that hod lift was just the same as this other hod lift that has been referred to in this case, wasn't it? A. Same thing exactly.

Q. Same thing exactly, and they both were erected and constructed in a like manner, were they not? A. I believe so.

Q. From your observation you would say that was so? A. Yes, sir.

Q. Were both the lifts of about the same size? A. I believe the Dwight P. Robinson was a little larger.

Q. A little larger? A. I think so.

Q. It was a little larger; I see. On the day in question when you received your injury you know that the Vermont Marble people were using and operating this lift that has been referred to in this case, were they not? A. Yes, sir; they were.

Q. And Mr. Grady was operating that lift for them? A. Mr. Grady, yes, sir.

Q. The man that has testified in this case? A. Yes, sir.

Q. And who loaded and placed the materials on the lift that day? A. I believe it was done under the supervision of Mr. Arnott.

Q. And do you know by whom Arnott was employed? A. Vermont Marble.

Q. He was the man that supervised the loading of the elevator? A. Yes, sir.

Q. Now the George Peterson Company had been working on that building, had they not? A. Yes, sir.

Q. And they had done the arch construction work? A. Yes, sir.

Q. That is the second step after the steel work, isn't it? A. Yes, sir.

Q. That work had all been completed before the day of the happening of your accident, hadn't it? A. All but filling in these holes which were caused by the elevator hoist; they had to be filled later on after the elevator was taken out.

Q. Only they couldn't be filled in until after the job was finished? A. That is right.

Q. So they had finished their work prior to the day of the happening of the accident, had they not? A. As far as I know, yes, sir.

Q. And as far as you know on February 8, 1927, the day of the happening of this accident, there were none of Peterson's, George Peterson, Inc., men working on this job? A. Not that I know of.

THE COURT—Does it appear in the testimony of Grady that he was paid by the Vermont Marble Company? I have forgotten for the moment.

MR. ACKERSON—Yes, it does, your Honor.

MR. CARTON—Paid him $20.

MR. ACKERSON—$5 an hour.

THE COURT—And did that include the day of the accident?

MR. ACKERSON—Yes, it was the day of the acdent.

MR. CARTON—Just for that day.

MR. COOK—That is all.

By MR. CARTON:

Q. You say that Grady on the day of the accident was operating the hoist for the Vermont Marble Company; how do you know that? A. Because I seen them.

Q. Well, you saw him operating the hoist. A. Yes, sir.

Q. And you saw the Vermont Marble people putting their materials on the hoist? A. I did, yes.

Q. That is what you mean when you say that Grady was operating the hoist for them? A. That is what I mean, yes.

Q. You knew nothing about the contractual relation between the Vermont Marble Company and Grady or Peterson, did you? A. No, sir.

Q. You say that the construction of this elevator shaft was all right? A. Yes, sir.

Q. And you think it was constructed the same as the larger one built by the Dwight Robinson Company? A. I think so.

Q. Did you ever make an examination of either of these elevator shafts to escertain that? A. Any more than a casual observation when I was going around the job.

Q. Well, that is all you did? A. Yes, sir.

Q. You never made any examination of them to ascertain whether they were properly constructed or not, did you? A. No, sir.

Q. Have you had any recent X-rays taken of the injured parts, Mr. Shaw? A. No, sir.

Q. As I recall there were two X-rays taken, one the next day after the accident, on the 8th or 9th, probably, and another on the 12th of February, 1927? A. There were several after that.

Q. There were several after that? A. Yes, sir.

Q. Where were they taken? A. New York.

Q. Where are they now? A. I don't know. We can't—there is some, I believe, were shown in the court here, weren't they, the record here? No, nothing taken since the first time.

Q. You have had other X-rays taken outside of those two that were offered? A. Yes, sir.

Q. Where are they? A. They are right here in the court.

Q. They are right here in the court? A. But owing to the fact—

Q. They haven't been offered? A. If you will let me explain—

Q. No, you can explain afterwards. A. All right.

Q. When was the last one taken? When did you have the last X-ray picture taken? A. When I was in the plaster cast.

Q. Oh, well that was in a few weeks after the injury, wasn't it? A. That is right, yes.

Q. And have you had any taken since then? A. No, sir.

Q. You haven't had any taken just recently before this trial, have you? A. No, sir.

Q. To show the present condition of your injuries? A. No, sir.

Q. You say you are suffering with diabetes, you think? A. I know.

Q. Have you had any recent examination made to ascertain whether that is so or not? A. Yes, I have them every month.

Q. Every month? A. Yes, sir.

Q. Do you know what those examinations have consisted of? A. Yes, I have had sugar tolerance tests.

By THE COURT:

Q. Urinalysis, as they call it?

By MR. CARTON:

Q. Urinalysis tests? A. Yes, I have got that in my pocket.

Q. What other tests have you had? A. I have urine tests every month and several blood tests.

Q. Blood tests? A. Taken at the Long Branch hospital, taken in New York.

Q. Have you the result of the blood tests? A. Of the Long Branch hospital?

Q. Well, no matter where they were taken. A. Yes, I have got the record.

Q. When were these tests taken in the Long Branch hospital? A. The day after the accident.

Q. The day after the accident? A. Yes, the day after the accident I was in there. I was down the 10th.

Q. Did they show the absence of diabetes the day after the accident? A. I never saw those records. They put me right on a diabetic diet right away.

Q. Right at the time? A. Yes, sir.

Q. Right in the hospital? A. The first intimation I had that I was diabetic, they brought me a tray with a little tag on the tray that said "diabetic" that is the first I knew of it.

Q. How long was that after you got into the hospital? A. Two days.

Q. And prior to that time had they taken a urinalysis? A. Who had taken?

Q. The people in the hospital, the doctors and nurses. A. That was the day I entered in the hospital. That was the first test they made.

Q. My question was had an examination been made of the urine before they sent you up this tray with "diabetic" over it? A. Yes, sir.

Q. When was that made, the day before? A. It was made the first night I was in the hospital, and they tested my urine. I went in there—

Q. The urine was tested that night? A. I went in there on the 9th, the day after the accident.

Q. And you were pronounced diabetic right away? A. The first I knew was the tag was on the tray "diabetic" the next morning.

Q. Was that all that you did know about it, was when you saw the note on the tray to that effect? A. No, Dr. Holters told me all about it.

Q. And Dr. Holters is the physician who testified here yesterday? A. That is so.

Q. And did he testify about that here yesterday? A. I don't know.

Q. He told you all about it? A. Yes, sir.

Q. But you are sure that you were declared to be diabetic the next day after you went in the hospital? A. Yes, sir.

Q. Have you had a blood test taken recently to ascertain the presence of diabetes? A. No blood tests, no.

Q. Have you had any test? A. Yes, sir.

Q. What sort of a test have you recently had? A. Urine tests.

Q. Well, you haven't had any urine tests since June 28, 1928, have you? A. One in the month of December, 1927—or 1928, rather, last month.

By THE COURT:

Q. 1928? A. 1928, last month.

By MR. CARTON:

Q. Would you have any objection to submitting to an examination at this time by our physicians to ascertain the presence of diabetes in the blood? A. What has my lawyer got to say to that?

By THE COURT:

Q. Your lawyer releases you now. You answer that question: are you willing to submit to an examination?

MR. COOK—You will have to answer that.

Q. Yes or no. A. Yes.
Q. And you will do that? A. Yes, sir.

THE COURT—I would allow that anyway, Mr. Carton.

MR. CARTON—We wish to make a blood chemistry, your Honor.

THE COURT—Well, he is willing. He say he will.

MR. COOK—He understands what it is, if your Honor please.

THE COURT—He has had a blood test?

MR. COOK—He has had a blood test before and it is painful. He is willing to do it.

MR. CARTON—Well, I know how painful it is Mr. Cook.

MR. COOK—Well, he is willing to do it.

FURTHER CROSS-EXAMINATION

By MR. ACKERSON:

Q. The Dwight Robinson hod lift, of course, that was removed by you people later at the conclusion of the building, wasn't it? A. That I don't know.
Q. Well, it had to be as a matter of course, didn't it? A. Yes, sir.

Q. And of course George Peterson & Company had to fill over this space in that shaft after it was taken out, didn't they with the arches? A. Yes, I believe so.

FURTHER CROSS-EXAMINATION

By MR. CARTON:

Q. In filling up the holes, the elevator shaft, it is necessary to use the elevator for that very purpose isn't it? Or, in other words, that is the method by which the hole is filled up; they start on top and come down to the elevator, don't they? A. No, they hoist the material previous to taking the elevator out and then they fill the holes in.

Q. Do you know what actually happened in the filling of the holes in this building or floors in this building? A. I was not there at the time.

Q. You don't know who filled it up, do you? A. No, sir.

THE COURT—That seems to be all, Mr. Shaw.

MR. COOK—If the court please, I have the original testimony, sealed, that was taken in New York by consent. Shall I open it?

THE COURT—Yes, you may. Walk over to Mr. Carton and open it in his presence. Let him open it. You are now referring to the testimony of Dr.—who is it?

MR. VICTOR CARTON—Two doctors, Dr. Bridges and Dr. Lasher.

THE COURT—And that was taken on notice, as I understand it?

MR. COOK—Yes, sir.

Deposition de bene esse of Dr. Willis W. Lasher, 565 Park Avenue, New York City, N. Y., taken on behalf of plaintiff pursuant to notice, before John Winans, a Master in Chancery of New Jersey, at No. 50 Church Street, Borough of Manhattan, City and State of New York, on the 10th day of July, 1928 at 11:30 o'clock in the forenoon.

Edna M. Cahill was designated to act as stenographer and was duly sworn by said Master in Chancery to take the deposition stenographically and transcribe it accurately to the best of her skill and understanding.

DR. WILLIS W. LASHER, a witness produced in behalf of the plaintiff, being first duly sworn by the Master in Chancery, testified as follows:

DIRECT EXAMINATION

By MR. COOK:

Q. Doctor, are you a physician duly licensed to practic medicine in the State of New York? A. I am.

Q. How long have you been so practicing? A. I graduated from Columbia College in 1915, interned at Post Graduate Hospital and was then in the United States Army, attending surgeon at Beekman Street Hospital, operating surgeon at United States Marine Hospital, 67 Hudson Street, I have been for the past eight years on the staff of the New York Post Graduate Hospital and

director of the Department of Industrial Surgery in the Mid-Town Hospital, an associate instructor in the New York Post Graduate Medical College and a fellow of the American College of Surgeons.

Q. Doctor, in your years of practice has it been a general medical practice or have you specialized in any particular branch of the work? A. I have always specialized in surgery, particularly that dealing with accidents and injuries.

Q. Are you acquainted with George Shaw, the plaintiff? A. I am.

Q. Did you attend him for any injuries he received at any time? A. I did.

Q. Do you recall the first attendance upon him? A. I cannot give the exact date, it seems to me it was about a year ago.

Q. Was the indication of the injury you observed a fresh wound? A. Yes. I do not know the exact date of the case but I have a record of the case and can look it up.

Q. Did the patient give you the history of an accident at that time? A. He did.

Q. Will you tell, Doctor, in your own way, what your examination of this patient consisted of and what you discovered? A. When I first saw him he had a plaster paris jacket around his neck fitting down around his shoulder. He brought an X-ray picture which showed that he had a fracture of the cervical vertebræ, I believe it was the fourth and fifth or the fifth and sixth, I forget which.

Q. Will you describe what you mean by the fracture that you described? A. Well, there was not a crushing of the bodies, but the transverse processes which are bony projections from the seat of a vertebra had been

fractured so that there was a distinct separation of the bone which goes to form up these processes.

Q. Was that all of the symptoms you discovered? A. Well, aside from that the man lost weight rapidly and we examined his urine and found that it contained sugar. He also passed large quantities of urine, so that he was suffering from a general disease in the nature of diabetes, with both the type causing sugar and also the type which causes an excess amount of fluid to be excreted.

Q. Did you obtain a history from the patient as to whether or not he had sugar before? A. I questioned him about it very carefully and he claims to have had a life insurance examination a few—

MR. FLANAGAN—I object if the doctor is now going to relate the examination of some one else as related to him by the patient.

THE COURT—Was any statement made by the doctor treating the man at the time?

MR. COOK—I won't answer your Honor's question until I look a little further. I think it was.

THE COURT—If he was treating the patient then it would be competent. Subjective symptoms, of course, may be received.

MR. COOK—The answer to that is that the doctor was responding to a question of whether he obtained a history from the patient whether or not prior to this accident he had sugar. The doctor can answer the question subject to your objection.

A. Well, he told me that he had a test made and that he did not show any sugar and had not had this urinal trouble previous to this.

MR. FLANAGAN—I desire to make further objection to such portion of the doctor's testimony given above as discloses that it was mere hearsay which the doctor has repeated.

Q. Did you make a urinalysis? A. I did.

Q. And you know what percentage of sugar was disclosed? A. Well, I made a test myself which showed sugar, but I referred him to the New York Post Graduate Hospital where an extensive study was made of his urine and urinal tolerance studied and I talked with Dr. Mosenthal, a recognized specialist in diabetes, in connection with this case and several other medical men so that I talked it over with a number of surgeons and medical men.

Q. What examination did you make and what treatment followed? A. After a few weeks I removed a portion of the cast and finally removed all of the cast and ordered a collar to be worn and I believe the patient was treated with massage, baking, exercises and so forth.

Q. Would an injury such as you observed upon his first visit and subsequently, cause pain? A. Yes, it would cause pain?

Q. Would it interfere with the motion of the head? A. Yes, it would.

Q. What was this cage made of that you described, what was its material and construction? A. I believe it was a steel frame covered with leather, I do not recall exactly.

Q. What was the purpose of this cage? A. To give additional support to his chin and to take the weight off the injured vertebræ, so as to relieve the pain in his neck that he complained of.

Q. Was it, in your opinion, very painful? A. Well, of course he was in a plaster cast which fit underneath his chin and took a great deal of the weight off, and of course with this jacket on I do not consider that he was in any great pain.

Q. Have you had cases of this character before? A. I have had cases of this character before and have treated several up to and after the time of the accident.

Q. In your opinion would such a condition cause pain? A. I believe that it would cause a great deal of pain because of the great number of nerves in the cervical vertebræ and there is no doubt that there would be more than severe pain in this area.

Q. I want to understand how long you continued your treatment for this fracture? A. Well, it is hard for me to remember these things. I see fractures every day, that is my work and I do not recall the exact time, but I should say that I treated him three or four months at least.

Q. Were you paid for your services for the treatment of this patient or have you rendered a bill? A. As I remember it, this was a compensation case. I think I was paid by the Travelers' Insurance Company a small fee, which, I will say, was not what I would have charged if this were to be a legal matter, as the rates are very low and I do not care for this sort of work and charge more in my own practice.

Q. Doctor, in your own opinion will the fracture of the verterbræ affect the patient permanently or not? A. Well, this is very difficult to say and I would not care to answer yes or no.

Q. Assuming that the plaintiff was a bricklayer, that being his business. A. A great deal will depend there upon the production of bone at the area of the injury and

also upon the condition of the muscles about the area of the fracture, so that there may be a permanent stiffness, but will not, in my opinion, ever cause a total disability.

Q. In the course of your examination of this particular injury did you take X-rays? A. Yes.

Q. What did they disclose?

MR. FLANAGAN—I object to that as the X-rays will speak for themselves, the doctor not having them with him.

A. The X-rays showed injuries to the same vertebræ as those brought by the patient at the time of his first visit.

Q. Did the patient produce to you the X-ray plate? A. He did.

Q. Do you know who took those photographs? A. I understand those were taken in a hospital in New Jersey.

Q. Did you retain the X-ray photographs that you had taken? A. I am not sure whether I have these or not, I believe so.

Q. Doctor, assuming that the plaintiff, as I said before, was a bricklayer by profession could you tell us in your opinion what percentage of impairment there would be from him pursuing his occupation or employment?

MR. FLANAGAN—I object to that as the doctor has already stated that in his opinion there would be no total disability depending upon the amount of bone that was recreated and the condition of the muscles.

Q. Have you examined the patient recently, Doctor? A. I believe I saw him a month or so ago and at that

time he still had sugar and his general condition was affected by his diabetes and there was some stiffness in his neck.

Q. Would the presence of diabetes in any way interfere with the restoration? A. Well, it is a known fact wounds and lesions do not heal as well in people having blood sugar as they do in normal individuals so that this may be a factor in the speed of his recovery.

Q. From your examination of the fracture at the time you mentioned, did conditions present indicate how and by what method the fracture was received or occurred? A. Well, it would seem to me that inasmuch the bodies were not crushed, of the vertebrae, that the injury was due to a heavy blow received over this vertebra rather than by muscular violence such as seen by forcing the head strongly forward. I believe it due to a direct blow.

Q. Doctor, can diabetes result in a patient from a blow of this character? A. Well, I believe it can. This is open to a great discussion, the question being whether it is due to a direct injury to the metabolic centers which are located in the region of the medulla oblongata which is found at the base of the brain or whether it is a direct involvement of a reflex involving the circulation of the pancreas and other glands or whether it is due to the shock as a result of the accident. Any one of these three are possibilities which may account for development of this man's diabetes.

Q. Have you ever known of cases in your practice where an injury received by the trauma produced diabetes? A. Well, I have had cases develop sugar in the urine following traumatic injury, but just as in this case I can't say positively that the trauma did produce it although I have a firm conviction and have consulted leading authorities who claim—

MR. FLANAGAN—I object to that which is repeated as hearsay.

THE COURT—That will be stricken, that part of it about the leading authorities. You may allow his opinion to stand to the extent that he says "I believe." Read that.

MR. COOK—"I believe it can. That is open to a great discussion."

THE COURT—The rest of it may he strike, what the authorities say. We recently had a discussion by authorities in New York, last week, and I find there is a great difference of opinion among them. If you haven't read that report you ought to read it.

MR. COOK—Is your Honor making an observation from the testimony or your own?

THE COURT—No, I was talking of Heckel, Osborn and Sim in New York last week—so-called scientists.

MR. VICTOR CARTON—The answer is the objectionable part.

THE COURT—Let me have the answer.

MR. VICTOR CARTON—That is what we object to having read.

THE COURT—Well, I will rule that out, starting with the expression " leading authorities who claim" on page 10, and going down to the next question, the

answer to that and preceding the question "Doctor, what is the gland called at the base of the brain that you have referred to?" That question may be asked. The rest of it will go out when, it speaks about the pituitary gland.

MR. COOK—Witness continue.

A. That a shock or an accident involving the back of the neck and base of the brain or a reflex condition has produced diabetes and there is a very noted experiment conducted by Dr. Claude Bernard in which, by puncturing the brain of a dog, diabetes was developed.

Q. Doctor, what is the gland called at the base of the brain that you have referred to? A. Well, this particular area is in the floor of the ventricle, but there is a pituitary gland which if fed in excess will create an increase in the volume of the urine and may upset the sugar metabolism.

Q. The shock, as I understand it, or blow has, in your opinion, an indirect effect upon the pancreas? A. No, a direct effect.

Q. The pancreas is what? A. The pancreas is a gland located exterior to the stomach in which are found small islands which produce an internal secretion which governs the sugar metabolism, and these are called the Islands of Langerhans.

Q. And the function of the pancreas is what? A. The function of this particular portion of the pancreas is to pour into the circulation an internal secretion which, as I have said, governs the power of the body to handle sugar.

Q. And if the pancreas is impaired so as the patient cannot assimilate sugar, does not the patient lose weight?

A. It depends on the degree, some lose slowly and other rapidly, he also passed an unusually large amount in the urine. He had an unusual kind of diabetes, that referred to as diabetes insipidus and also had diabetes mellitus.

Q. What is the distinction between these two? A. One is an increased amount of urine and the other is an increase in sugar. He passed too much of both and lost weight more rapidly than one who just passed the one.

Q. What is the normal amount of urine passed by a healthy person? A. That would depend upon activity and climatic conditions and volume of fluid intake so that it would vary greatly.

Q. Between what quantities? A. Twenty to forty ounces. A hot day when one perspires the volume is small and a cold day more. Twenty to thirty ounces I should say.

Q. What was the quantitiy passed by the plaintiff, if you recall? A. I cannot answer that, but to the best of my recollection it was twice as much as it should be. I believe it was measured at the Post Graduate Hospital very carefully and the records of this institution would be most important to you.

Q. Is diabetes a permanent disease of this character or not? A. Well, I consider it as permanent when it develops slowly, but in a case of this nature I believe that the volume of sugar passed and losing should not be as severe as diabetes would be coming on in a young child or younger person.

Q. From you urinalysis when first taken what, if you recall, was the percentage of sugar in the urine? A. I cannot answer that. You will have to get the hospital records. I sent him to the hospital for extensive study,

to measure his sugar tolerance, to determine how much sugar he could carry.

Q. You took no fluid test? A. I did not but the hospital took fluid tests. I myself am not one who treats diabetes and I believe that he was referred to a specialist, by the insurance company, who treated his diabetes.

Q. You have practice in that diabetic line, have you not? A. Well, I have operated on patients with diabetes and along with my surgical work I have to deal with that condition.

Q. Did you ever know of a case of diabetes from which a patient entirely recovered? A. Recently it has come into the medical practice to use a drug called insulin and by means of the drug certain people who have been known to have a large amount of sugar in the blood have been able to prevent this condition by the use of this drug, so that they appear to be cured of the diabetes. They simply take this treatment and carefully watch their diet, but if this is not done it will recur, so that the disease is there but not apparent.

Q. Then one of the methods of control is carefulness of diet, reduction of carbohydrates, a certain amount of calories which the patient can tolerate and if the case is very severe and it requires a rather high caloric value of food in order to take this food, they have to resort to insulin? A. Exactly.

Q. And this is necessary for them to carry on with their occupation and employment? Is that right? A. A. That is right.

Q. And if that were not done the patient would be a low caloric diet which would not give him strength enough to carry on with his occupation? A. That is right.

Q. Unless it was aided by the use of insulin? A. That is right.

Q. And by its use patient can tolerate a higher diet? A. Yes.

Q. How is it administered? A. Hypodermically, and this is more or less of a painful, unpleasant process and—

MR. CARTON—Objected to unless the doctor has treated this patient with insulin.

MR. VICTOR CARTON—There is an objection to that question of how insulin is used. This is objected to unless the doctor has treated the patient. There is no testimony so offered as yet that he treated this patient.

THE COURT—Mr. Cook is not pressing that question. The answer that Mr. Cook started to read was inserted before the objection.

MR. COOK—I consent that that go out.

MR. COOK—Witness continue.

A. I would say it is not exactly painful but very unpleasant.

Q. Will that, in your opinion, lessen his ability to be very careful of his diet in the future to keep down sugar? A. He will.

Q. Will that, inyour opinion, lessen his ability to perform heavy manual labor? A. It will.

Q. In your opinion, if this condition continues, that is, the diabetes, and the other injury, will the patient be

affected in the motion of bending and lifting, would they require him to give up his occupation as a bricklayer?

MR. FLANAGAN—I object to that because the doctor has been asked to testify upon facts which have not been proven.

MR. VICTOR CARTON—I object to that because the doctor has been asked to testify upon facts which have not been proven.

THE COURT—Well, I assume now that having in mind all of the evidence in the case, that the question will be admissible as having been conected with some issue. Of course the man here is not solely a bricklayer, he was a foreman of a bricklayer outfit and occasionally did lay bricks himself; so that would make it competent for the time, now that the testimony is being read. The objection is overruled. You may have an exception.

(Objection noted for defendant Vermont Marble Company as ground of appeal.)

THE COURT—What did he answer?

MR. COOK—The answer is, "I do not believe he can work as a bricklayer."

(Cross-examination read by Mr. Victor Carton.)

CROSS-EXAMINATION

By FLANAGAN:

Q. Do you know that he has been working as a bricklayer? A. I have never seen him.

Q. Would your answer have been the same if you had known this? A. Yes.

Q. If you knew that he had been working as a bricklayer since he left your care, would your answer be the same? A. If he had been working of course he would have proven his ability, but I did not think that he was able.

Q. When you say that you reach that conclusion on the assumption that he has not been working as a bricklayer, do you not? A. Yes, precisely.

Q. As I understand it, Doctor, you were asked by the Travelers' Insurance Company, the insurance carrier of this man's employer, to treat this case and you did so and rendered your bill to the Travelers' Insurance Company for said treatment? A. I did and that bill has been paid, I believe.

Q. Now then, are you positive of the length of time over which your treatment extended? A. Not positive, no.

Q. What is your best recollection? A. Three or four months, I believe.

Q. You saw him only a month ago? A. About that.

Q. Was it three or four weeks that you treated him? A. No, months.

Q. How frequently? A. I believe three times a week.

Q. Where? A. At my office and at the hospital.

Q. Was he confined to the Post Graudate Hospital or any hospital continually? A. No, I saw him but not as a patient in the bed.

Q. He came to and from the hospital for examination and treatment after which he went home, is that right? A. Exactly.

Q. Could you tell from the clinical examination whether he had suffered any injury to the tranverse processes? A. As I have already stated, he was in a plaster cast which ran from the back of his neck down to his shoulder when I first saw him and I left it on for a month or more and as I recall it all that was apparent was a small swelling and very definite point of tenderness and limitation in motion of the neck.

Q. What motions of the neck were limited? A. Particularly rotary and forward bending motions.

Q. By point of tenderness just what do you mean? A. When I pressed over the vertebral column I noticed that a certain definite areas in the region of the lower cervical vertebra that the man showed indications of it being painful to him, and such places are called points of tenderness.

Q. And that wincing is voluntary on the part of the patient? A. Well, I am able to determine a point of tenderness because of the fact that in examining a patient I usually go at a distance from the area of the supposed injury and then using a blunt instrument, like the rubber on a pencil, and gradually press over the area where the injury is supposed to have occurred and moving away and back to the spot; repeating this process two or three times and if the patient claims to have pain two or three times in the same spot I believe this is a definite point of tenderness.

Q. When did you make the examination you refer to; how long after the patient was in your care? A. After the month and a half or more after his first visit to me when I was able to see the back of his neck.

Q. To the best of your recollection he was in your care three or four months? A. Yes.

Q. When in the course of this time did the injury clear up? A. I would not say that it has all cleared up now in that there is still some stiffness there.

Q. Can you assign any cause? A. Yes, it may have been a disturbance in the nerve center or the nourishment of some of the muscles of the neck or certain of these muscles cells may have been completely destroyed by the original accident and are now replaced by scar tissue.

Q. Would this sometimes also be acounted for by constitutional reason as opposed to traumatic? A. I do not believe that diabetes, for example, would cause a destruction of any muscle cells or that it would interfere with the muscles of the neck in their nerve supply or in their ordinary action.

Q. Is there any means that you know of whereby it can be definitely determined whether these injured transverse proceses have healed? A. I believe that an X-ray would show a union of the bone.

Q. Did the X-ray that you had taken show a union of the bone? A. It did show a production of callus which is new bone formation about the area.

Q. Give your best recollection as to when that X-ray was taken. A. I believe that it was about two months after he came to me.

Q. And no further X-ray has been taken to disclose the condition there, to your knowledge? A. It seems to me that we had him X-rayed twice; I think that two

studies of X-rays were made to the best of my recollection.

Q. Did you discover any injury to the medulla? A. I saw no evidence of injury to the medulla other that that which may have been evidenced by a disturbance in the metabolism of this man's body.

Q. Now what other causes did you assign to account for the disturbance in the metabolism noted other than the trauma? A. Well, I believe that one suffering from an injury to the neck can suffer a reflex.

Q. I am afraid that you misunderstand me and I ask that it be stricken out. A. Well, I do not know of any other cause of this man's case judging from the history of the case.

Q. Do you know of any other causes of diabetes? A. Well, diabetes is a disease which can be caused by a growth of the pancreas, by an arterial sclerosis involving a proper circulation of this gland.

Q. What is the office and function of the pancreas? A. The pancreas is to produce two juices; one to aid in digestion and one which enters the blood stream and has to do with the burning of the sugar.

Q. What was there in this man's condition to incline you to the view that the types of diabetes from which you think he was suffering were due to a trauma rather than a reason which you have otherwise stated? A. Well, I noted no evidence of any growth nor do I believe that he has suffered from arterial sclerosis or any other diseases which would affect this gland.

Q. As I understand it, Doctor, you have been very careful to limit your testimony in this case to your own opinion, indicating that it is very much discussed subject among physicians and one about which they have not

reached a decision and that you have given your own view of the subject. Now, Doctor, do you believe in the infectious theory of diabetes? A. Well, I have noticed that certain people who have infection have developed this disease and have had syphilitic patients develop diabetes.

Q. Coming to the view that lesions of one sort or another heal very much less quickly where there is an involvement of this kind, that would be true of a person who had pneumonia, would it not? A. I do not believe that a short lived disease has any bearing on this.

Q. Some believe that syphilis has to do with the failure of the bones to unite, is it true? A. It is not true.

Q. What other disease from which a man might ordinarily suffer might retard the process? A. Tuberculosis.

Q. What else? A. (No answer.)

Q. I understand that you did not take a blood count yourself. A. I did not.

Q. Might his blood have been in such a condition that it was responsible for this outbreak of diabetes? A. It may be that he has such a condition in his blood.

Q. As I understand it, whatever inability this man may suffer from in the future you think will be entirely an outgrowth of this diabetic condition rather than the fracture of the cervical vertebræ? A. No, I would not say that because he may have more stiffness of the neck.

Q. How will stiffness of the neck affect his ability to work? A. Well, it seems to me one who has difficulty in turning his neck would have difficulty in turning out the same work.

Q. This would not have any effect upon his ability to lift, would it? A. Well, in lifting one turns the

neck, but it would not particularly bear upon his weight lifting, no.

Q. Did you discharge the patient, Doctor? A. I do not recall definitely discharging him, but I know that he was sent for treatment to another doctor for his diabetes and I told him to stop in occasionally to see how his neck is progressing.

Q. I understand that you yourself took the X-ray. A. No, I did not take it.

Q. As I understand it, the X-ray taken at your direction showed a callus formation and showed that this condition was clearing up and that was about two months after the accident. A. Well, I would not say that it was clearing up, but it did show that new bone was being produced.

Q. Did this X-ray show a clear spot? A. The X-ray would look more cloudy if it was clearing up.

Q. If you took a radiograph of a fractured rib, naturally the place would look more cloudy than the fractured rib but the presence of callus records it as making progress? A. Probably but not clearing up.

Q. That was the only X-ray taken at your direction except possibly the one taken later? A. Yes.

Q. Do you recall who took that X-ray? A. I believe that it was probably made by Dr. Flerger or Dr. Lewal.

Q. Have you any distinct recollection as to what the second X-ray showed? A. Yes, I have a distinct recollection that there must have been signs of a union or I would not have removed the cast. The reason I took this off is because I thought that the fracture showed that it was ready to come off.

Q. When was it taken off? A. Six or eight weeks from the time of his first visit to my office.

Q. What type of diabetes is pronounced by injury to the medulla? A. Well, it is largely the type which causes the increase in the volume of the urine passed.

Q. Do I understand that when you say injury to the medulla that you mean injury to the pituitary gland? A. The floor of the fourth ventricle and also to certain nerve centers found in the medulla. The floor of the fourth ventrical is in the base of the brain and there are also in the medulla certain groups of nerve cells called centers which have to do with the glandular processes of the body.

Q. I think you have already said that you think that this man had both types of diabetes? A. I believe he had both types.

Q. Doctor, I understand that you have not made a special study of diabetes A. I have not.

Q. Is it not a fact that some patients pass a large amount of urine and some pass a small quantity while both have the same type of diabetes? A. When one passes huge quantities of urine I do not believe that applies to the sugar type of diabetes.

Q. What type do you call that? A. I believe that is diabetes insipidus, when one passes huge quantities of fluid.

Q. Have you ever seen a patient who had sustained an injury and suffered from glycosuria? A. Yes.

Q. Just for the purpose of record define that term. A. Traumatic glycosuria is the presence of sugar in the urine following an injury.

Q. You do not call that true diabetes, do you? A. It is true diabetes at the time, yes, but if it disappears in a short time it is not true diabetes.

Q. And it usually disappears, does it not? A. Yes.

Q. Do you think that this man suffered from glycosuria and not true diabetes? A. I think that he had true diabetes.

Q. He passed out of your care three or four months after the accident, did he not? A. I saw him a month ago.

Q. Was that examination made to qualify you to testify today? A. Well I do not know how you expect me to answer that. He came in and said that this case was coming up and wanted to be examined.

Q. How long before that had you seen him? A. Several months.

Q. Six or seven months? A. It may have been that long, maybe six months.

Q. And I assume that the accumulation of a large amount of sugar would have produced the results that you have discovered? A. Well, it would have produced a large amount of sugar, yes.

Q. And when you spoke of a method of treating these patients with insulin being unpleasant, I am sure that you will agree that a dose of castor oil is unpleasant. A. Well, to me personally castor oil is very distasteful.

Q. Do you know the age of this patient? A. The exact age? No.

Q. Well, how old do you think he is? A. I think about forty-five years old.

Q. And his ability to work at manual labor irrespective of any accident is not increasing, is it? A. No.

Q. And five years from now he would be less able to do laborious work, would he not? A. Well I have seen certain men who have been able to do laborious work at sixty years and others at fifty years who cannot do it.

Q. Well, can you answer this? Can a man continue to do such laborious work approaching and after fifty years? A. Well, I have known men fifty-five to sixty years old who laid brick.

CROSS EXAMINATION

By MR. CARTON:

Q. Dr. Lasher, this man had a perfectly normal recovery did he not? A. Well, I cannot say that he did because I have just said that I do not think that he has recovered entirely, but he has made normal progress.

Q. Do you think that his diabetes influenced his recovery any? A. Well, it may have, but very little if any.

Q. What percentage of cases were caused by a blow? A. Very small.

Q. It is almost unheard of, is it not? A. It is rare.

Q. This fracture was in the transverse processes, was it not? A. If you mean both, it was out side of the spinal or neural canal.

Q. This man shows no nervous symptoms, does he? A. Well, as I recall it, he complained of some weakness in his arm.

Q. Are you certain? A. To the best of my recollection.

Q. Your recollection is somewhat hazy, is it not? A. Whatever you please, I remember this man and I believe he complained of weakness in his arm.

Q. Did he complain in the last examination of weakness in his arm? A. Not that I recall, in the arm, but in the neck.

Q. What would you say of this man's ability to work at this time? A. I believe that he could do light work.

Q. What do you mean? A. Any occupation of a city nature or one that does not require manual labor.

Q. Could he work as a foreman bricklayer? A. I do not know the duties.

Q. If this does not require him to turn his neck high up or to the side? A. Yes, if he can keep his head straight; it is not going to be very nice to have to work with one who is continually complaining of a pain in his neck.

Q. He would be able to work as a salesman, couldn't he? A. Yes, certainly .

Q. In fact, he could do amost any work which did not require turning of the neck? A. Yes.

Q. You spoke extensively of treatment with insulin; was he treated with insulin? A. I do not know whether he was treated with insulin.

Q. Have you had any experience in estimating possibilities in percentages? A. Yes, I have.

Q. What, in your opinion, would be the percentage of this man's possibilities? A. I lectured on this this morning. We consider this as allowing eighty per cent for function, ten per cent for union and ten per cent for appearance. There will be no deduction made in the union or in the appearance of this man's neck; there may be not over forty percent less in function, not that much, about thirty-five per cent.

Q. If you were told this man had been working as a bricklayer since you treated him would you change that estimate; would you say that he could do it? A. Well, yes; he could do it with a loss in function, but could not be as good.

Q. Would you say that the percentage was as much as thirty-five per cent? A. Well, I would have to see him lay the bricks.

Q. Assuming that he laid bricks as well as the average. A. I would have to reduce the percentage of loss.

Q. Reduce down to what percentage? A. Well, if he laid the bricks as well as the average bricklayer, I would say that he had no loss in function.

REDIRECT EXAMINATION

By MR. COOK:

Q. Doctor, the use of insulin has been spoken of here as one of the treatments of diabetes. Is that or not a costly product? A. I believe that it is not very cheap.

MR. CARTON—I object, because there is no evidence that this man was ever treated, or that he ever will be or that he has ever paid for any insulin treatment.

A. Well, for a man of small means it is costly; it it is costly for a man without much money.

Q. Is not the diet that is used by a diabetic costlier than that used by a normal person? A. Yes.

Q. I understand you to say that the cast supporting plaintiff's neck was taken off six or eight weeks after and then an iron cage placed upon his neck. A. Yes, sir; a steel frame covered with leather.

Q. And I also understand you to say that the plaintiff when he first called upon you produced a set of X-ray pictures which you understand had been taken in New Jersey? A. Yes.

Q. Doctor, in your experience and within learning and knowledge, do you know of cases that have been caused by nervous shock? A. I believe it, to the best of my knowledge, yes.

MR. FLANAGAN—I ask that that be stricken out as it does not answer the question.

THE COURT—Objection sustained. That will go out, all reference to insulin.

A. Well, I believe that a mental condition has something to do with it, yes.

Q. Doctor, is there any impairment or diminution of the sexual powers in diabetes?

MR. FLANAGAN—There is no allegation of any such in the pleading and I object to it if there is.

THE COURT—Do you want to pursue the objections?

MR. CARTON—No, we are not going to pursue that.

THE COURT—Well, it is abandoned. What is the question?

MR. CARTON—"Doctor, is there any impairment or diminution of the sexual powers in diabetes?"

THE COURT—How is that pertinent?

MR. COOK—Because it is part of the injury.

THE COURT—You don't allege it?

MR. COOK—No, I am going to amend it. I am going to insist upon it.

THE COURT—No, leave it out. Objection sustained. There is no claim made for it in the complaint.

MR. COOK—Then there is a reference to radium and alcohol. I think that ought to go out, the whole of page 30.

MR. VICTOR CARTON—We will consent that the entire page 30 be stricken out, and page 31.

THE COURT—It goes out. It is not pressed.

(The second deposition was read by Mr. Cook as follows:)

Deposition de bene esse of Dr. Milton A. Bridges taken on behalf of plaintiff pursuant to notice, before John Winans, a Master in Chancery of New Jersey, at No. 50 Church Street, Borough of Manhattan, City and State of New York, on the 18th day of July, 1928, at 11:30 o'clock in the forenoon.

Edna M. Cahill designated to act as stenographer and was first duly sworn by the Master in Chancery to take the deposition stenographically and transcribe it accurately to the best of her skill and undertaking.

DR. MILTON A. BRIDGES, a witness produced in behalf of the plaintiff, being first duly sworn by the Master in Chancery, upon examination, testified as follows:

DIRECT EXAMINATION

By MR. COOK:

Q. Doctor, are you a physician duly licensed to practice medicine in the State of New York? A. I am.

Q. In New York City? A. Yes.

Q. And what is your address? A. 580 Park Avenue.

Q. And how long have you been practicing? A. Since 1920. I have a B. S. degree from Columbia University, Master of Science degree from Columbia University, Doctor of Medicine from Columbia University, four year residency at New York Post Graduate Hospital, chief of Metabolic Clinic at New York Post Graduate Hospital, specialty diagnosis and metabolism.

Q. Doctor, have you specialized in any particular branch? A. I have just answered that.

Q. Does the term "specialist in metabolism," indicate treatment of diabetic patients? A. Diagnosis and treatment of diabetes.

Q. Was George Shaw, the plaintiff in this case, a patient of yours at any time? A. He was and has been.

Q. Is he still? A. He is.

Q. Have you your records with you? A. I have.

Q. Will you tell us when he first visited you or you him? A. First visit June 7, 1927.

Q. Will you describe what it was for and what you did? A. He was referred to me by a surgeon, namely, Dr. Willis W. Lasher, with the statement that he was suffering from diabetes.

Q. Did you confirm that? A. I did.

Q. Will you tell us what you did for that condition and what was the result? A. A glucose tolerance test, a blood sugar test and a urinalysis were made, all of which substantiated the presence of an existing diabetes mellitus.

Q. Doctor, on your first urinalysis what percentage of sugar did you find? A. 8/10 of one per cent.

Q. And on your blood chemistry what did you find? A. 0.364 mgm.

Q. Did you make any inquiry from the patient as to any prior history of the diabetes or sugar? A. I did.

Q. By reason of that inquiry did you learn whether or not there had been such manifestation? A. The patient admitted that there had been.

Q. Did you make inquiry as to the history as to how this occurred or did you learn from your investigation how the condition arose? A. I learned the complete history of the patient.

Q. Did you learn that in the month of February, 1927, he had received a fracture of the vertebrae of the neck? A. I learned that he had received a traumatism.

Q. In your experience in specializing in the treatment of diabetes and from research and observation could you say whether or not diabetes mellitus will arise by reason of a trauma? A. I cannot.

Q. Do you know of any cases where it has arisen as a result of a trauma? A. I know of a number of cases in which apparently a traumatisms was the cause.

Q. What is the gland at the base of the head, that is affecting the metabolic centers or system, what is the name of that gland? A. There are two, the hypophysis and pineal. The pituitary and hypophyseal glands are the same.

Q. Would you say from your medical experience that an injury to one of these glands would have direct or indirect effect upon the pancreatic organ or gland?

MR. CARTON—Objected to on the ground that the complaint does not set forth any injury to the three glands referred to in the question.

MR. COOK—It sets up diabetes and this is in relation to the causes and effects: "Would you say from your medical experience that an injury to one of these glands would have direct or indirect effect upon the pancreatic organ or gland?"

MR. VICTOR CARTON—That is the pituitary gland. The only testimony that we have had so far was from the doctor yesterday.

THE COURT—Unless you show that the pituitary gland is related in the position where the cervical injury complained of here, or bears some relation to it —are you going to examine any doctor to show the location of the pituitary gland?

MR. COOK—I think it is covered here later.

THE COURT—Whether a cervical injury such as complained of here would affect the pituitary gland, is there anything in the testimony? As I understand it, the pituitary gland is located some distance from the cervical.

MR. VICTOR CARTON—According to Dr. Herrmann's testimony yesterday he said this injury would

have no relation to that, because that would be some seven or eight inches above.

MR. COOK—This doctor says differently.

THE COURT—Where does he say it?

MR. COOK—These questions in reference to the injury to the cervical vertebrae. Shall I read it or does the court want it?

THE COURT—Yes, go ahead.

MR. COOK—"Q. In your opinion as a medical man, would a person by a trauma forcible enough to fracture the fourth or fifth cervical vertebra, suffer an injury or affect the gland just referred to?"

THE COURT—What does he say to that?

MR. COOK—"It might, by associated injury."

MR. VICTOR CARTON—There is a further objection, that it is an attempt to discredit his own witness, Dr. Herrmann, who said it was not possible yesterday.

THE COURT—No, that is not so. Doctors might disagree, even though they are on the same side of the case. I think in the circumstances that objection will be overruled and you may have an exception.

(Objection noted for defendant, Vermont Marble Company as ground of appeal.)

MR. COOK—This question was objected to: "Would you say from your medical experience that an injury to one of these glands would have direct or indirect effect upon the pancreatic organ or gland?"

MR. COOK—You may answer it.

A. It will not affect the external secretion, to the best of my knowledge, but will have an effect upon the internal secretion.

Q. Doctor, where is the cervical vertebra in relation to the pituitary gland? A. Cervical vertebrae are those vertebrae which commence in the spinal column below the atlas, which is the support for the skull.

Q. In relation to the fourth and fifth or fifth and sixth vertebrae, where is this gland located? A. Approximately two or three inches above.

Q. In your opinion as a medical man, would a person by a trauma forceful enough to fracture the fourth or fifth cervical vertebra, suffer an injury or affect the gland just referred to? A. It might, by associated injury.

Q. Would the presence of diabetes arising in a patient who had sustained a fractured of the vertebræ described, interfere with the restoration of the patient? A. It would.

Q. Will you tell us why? A. Due to the fact that the healing processes of the entire body, in all the tissues, in the presence of diabetes is unduly delayed.

Q. Diabetes, as I understand it, is an impairment of the pancreas? A. It is.

Q. Will you describe what the effect of such impairmen of the pancreas has upon the patient? A. I will

give you, in brief, the cardinal symptoms: marked thirst, increased appetite, gradual loss of weight, polyuria, susceptibility to infections, general lassitude, general weakness, dryness of the skin.

Q. Did you find these conditions present in this patient? A. I did.

Q. What is the normal operation or function of the pancreas? A. To stabilize the assimilation of sugars.

Q. When the pancreas is impaired by reason of a diabetic condition what is the result in the patient? A. The above mentioned symptoms.

Q. Then I understand the pancreas distributes the sugar into the body? A. The pancreas assimlates the sugar in order that it may be oxidized and utilized by the body as such.

Q. Then that results in the use of the proper distribution of energy in the patient? A. It does.

Q. Now if the pancreas is impaired by reason of the diabetic condition, what effect does it have upon the patient as to his usefulness from an occupational standpoint? A. It diminishes his usefulness.

Q. Why? A. Owing to the fact that the man is suffering from a disease which is disturbing his entire body metabolism which renders it essential that he maintain for the rest of his days a markedly restricted dietary and incurring the ever present danger of infection which may or may not become serious, and incurring the probability of the introduction of coma.

Q. What causes, in this disease, coma to arise? A. Improper diet, traumatism, shock, improper assimlation of fats, operative interference.

Q. By operative interference, what do you mean? A. Operation for a major or minor surgical condition.

Q. Did this patient lose weight? A. He did.

Q. You have stated that as one of the indications. Would the presence of diabetes as in this patient, assuming the patient was a bricklayer, interfere with that occupation? A. It would to some degree.

Q. Will you describe how it would? A. In producing the presence of some or all of the symptoms before noted.

Q. Did you get the quantity of urine passed in twenty-four hours from this patient? A. Approximately three quarts.

Q. Is that large or normal? A. Somewhat above normal.

Q. Did you inquire into the frequency? A. I did.

Q. From that objective inquiry what did you ascertain? A. Averaging six to ten times a day and once or twice at night.

Q. Is diabetes a permanent disease in its character? A. It is.

Q. In your opinion is there any cure or restoration from that condition once it sets in? A. You are asking two questions.

Q. In your opinion is there any cure for that disease? A. There is not.

Q. As I understand it, the balance of the patient's life he will suffer with diabetes, he has to exert great care with his diet— A. He does.

Q. And is the caloric value of the food low? A. It is.

Q. Carbohydrates diminished? A. As a general rule, yes.

Q. And by reason of that diet being of rather low caloric value a man who is given to laborious work such as bricklaying is affected, is he not?

MR. CARTON—Objected to on the ground that there is no testimony that the plaintiff in this case has ever put on a diet by this or any other doctor.

MR. VICTOR CARTON—Not pressing the objection.

MR. COOK—He will supply that.

Q. Doctor, did you put this patient on a diet? A. I did.

(Question repeated.)

A. He is.

Q. Is a diabetic diet such as you prescribed more or less expensive than an ordinary diet? A. Somewhat more.

Q. Doctor, I understand that from the time of Mr. Shaw's first visit to the present time you have made tests— A. I have.

Q. Of the urine and blood? A. Of the urine.

Q. Will you tell us when the last test was made? A. The last test was made June 29, 1928.

Q. What did you find? A. No sugar.

Q. Is the fact that no sugar appeared in the urine evidence of cure? A. No.

Q. What does it spell? A. That the dietary has been adhered to to a better degree than when present.

Q. What does the occasional absence of sugar in the urine indicate? A. Stricter adherence to the diet.

Q. If not adhered to would sugar appear again? A. It would.

Q. And if the greatest consideration is not given by the patient in acting under instructions by his physician, would sugar be likely to appear again? A. It would.

MR. CARTON—Objected to as a leading question.

THE COURT—It is not pressed, is it, Mr. Cook?

MR. COOK—He has already given the answer now.

10

THE COURT—What is it, that objection?

MR. CARTON—I move that it be stricken out. The question is, "And if the greatest consideration is not given by the patient in acting under instructions by his physician, would sugar be likely to appear again?"

THE COURT—That is merely asking whether if a patient did not follow the doctor's advice he would

20

get worse.

MR. CARTON—"If the greatest consideration is not given."

THE COURT—That means that he should strictly obey the doctor, the direction of the doctor, that is all that means. Oh, its harmless, I think. Let it go. I wouldn't waste time on it. We all know if we don't obey the doctor there is trouble.

30

Q. Would it or would it not? A. It would.

Q. Is diabetes curable or incurable? A. Incurable.

Q. In a patient suffering from diabetes mellitus, such as this patient, would there be any impairment of the sexual powers?

MR. CARTON—Objected to, in that the complaint does not contain any count alleging any such impairment.

MR. CARTON—Do you consent that the answer be stricken out?

MR. COOK—Yes, I will consent that that be stricken out, except the last two questions on page 11.

Q. I understand, not wishing to be guilty of repetition, that this patient is still suffering from diabetes mellitus? A. He is.

Q. And under your care? A. He is.

(Cross-examination by Mr. Victor Carton as follfollows:)

Q. Doctor, what are causes of diabetes? A. The causes are unknown.

Q. In your direct examination you stated that you examined Shaw on June 7, 1927? A. I did.

Q. On how many occasions since then have you examined him? A. Approximately twenty.

Q. Have you noted an improvement in his condition? A. I have.

Q. You have also stated that the urinalysis showed 8/10 of one per cent sugar and the blood test 0.364 mgm. Would you call that a severe case of diabetes or not? A. I would.

Q. Doctor, in a person that is not affected with diabetes is there any percentage of sugar in the urine? A. Approximately 1/100 to 2/100 of one per cent.

Q. And what would the blood show? A. Anything from approximately .080 mgm. to .120 to .130 mgm.

Q. Doctor, you stated that the plaintiff admitted manifestation of diabetes prior to your examination? A. He did.

Q. Will you tell us in detail what he told you? A. He complained, on his first visit to my office that for a period of time prior to this visit and subsequent to the alleged accident he had been suffering from gradual loss of weight, loss of strength, loss of desire for sexual intercourse, frequent passing of the urine in day and at night.

Q. Will you state whether or not he had any of these symptoms prior to the accident? A. He stated that he did not.

Q. You questioned him on that point? A. I did.

Q. Doctor, you said that you could not say whether diabetes mellitus could arise from a trauma? A. I did.

Q. And by a trauma you mean a blow? A. Yes.

Q. Doctor, have you ever heard of any case of diabetes that you could directly trace the cause to a trauma or blow? A. I have seen a number of cases in which the only determinable etiology was a complained of traumatism.

MOTION BY MR. CARTON—That the answer be stricken out as not responding to the question.

MR. CARTON—There was a motion to be stricken out as not responsive.

MR. COOK—The question is,"Doctor, have you ever heard of any case?"

MR. CARTON—"That you could directly trace the cause to a trauma or blow?" He said he "had been a

number of cases in which the only determinable etiology was a complained of traumatism."

THE COURT—He says, "Well, I have seen a few cases in which the cause could be directly traceable to trauma." I suppose, strictly speaking, you would be entitled to have it stricken out. Strike it out.

Q. In your experience of some eight years can you tell us one single case where you could definitely state that it was caused by a trauma or blow? A. No.

Q. You have stated that the injury in question, that is the plaintiff's injury, is a fracture of the cervical vertebrae and might, by associated injury, affect the glands at the base of the skull? A. I did.

Q. What is the probability of this particular injury affecting these glands? A. The probability will be determined by the determinable or non-determinable associated injuries.

Q. And whether or not the injury in this case caused the alleged diabetes you cannot say? A. I cannot.

Q. Doctor, how much would diabetes interfere with the restoration of the plaintiff, that is, the restoration of the fracture? A. That is indeterminable.

Q. In other words, you cannot tell us how much diabetes would interfere with the patient regaining his normal condition? A. I cannot.

Q. You have also stated that there was a probability of coma. What is the probability in this present case? A. The probability of coma is dependent entirely upon the degree of care, environmental conditions, including mental disturbances as well as physiscal injury.

Q. If the plaintiff in this case adheres to the diet prescribed by you and treatment suggested can you tell us

then what the probability of coma would be? A. The same probability persists with the exception of the omission of dietary indiscretions.

Q. In percentages can you tell us what the probabilities are? A. I cannot.

Q. Is it anything more than a probability? A. A mere possibility.

Q. And by that you mean? A. More than fifty per cent.

Q. How much weight has this patient lost since he has been under your treatment? A. He has lost no weight since then.

Q. Has he gained weight? A. He has, eleven and a half pounds.

Q. And the only thing which causes you to say that is the fact that he told you that he had lost weight since the alleged accident. A. It is not. My physical examination determined the loss of weight.

Q. And how much? A. Approximately he lost ten to fifteen pounds.

Q. Over what time? A. Undetermined.

Q. Would you say that it is probable that a patient suffering from diabetes for two or three months would lose ten to fifteen pounds? A. It is likely that he would lose twice that much.

Q. Is it likely that this patient lost that much weight in that time? A. It is indeterminable with the history of traumatism and invalidism.

Q. In other words, you do not know and you cannot tell us how much weight this patient lost from the time of the alleged injury to the time of your examination of him? A. I cannot.

.Q To what extent would diabetes, as you find it in this patient, interfere with his occupation? A. There would be a limitation to his degree of activity.

Q. Can you answer that in percentages? A. I cannot.

Q. If you were informed that the facts were that this patient has been working as a bricklayer would you change that answer? A. I would not.

Q. Doctor, what is the average amount of urine? A. Approximately 1800 to 2000 cc.

Q. Is it not a fact that many persons pass three quarts of urine in twenty-four hours? A. Yes.

Q. And is it also a fact that numerous normal, healthy persons pass urine six to ten times a day? A. That is not to excess.

Q. What would you say was the average? A. Three to four times a day and not at night. By night I mean from midnight to 6 A. M.

Q. There are treatments which will eliminate the bad effects of the disease? A. Yes.

Q. And you are an expert in this particular line? A. I claim to be.

Q. And are treating this patient to the best of your ability and under your treatment he has shown a marked improvement? A. He has.

Q. Could you tell us just how the diet of this patient would cost more than the ordinary diet? A. In the first place the diet for the existence of the patient in question is that which consists essentially of green vegetables of a certain restricted group; these vegetables to be obtained irrespective of season and economically more expensive than a heterogeneously selected diet due to indiivdual fancy.

Q. Doctor, in the summer season when green vegetables were plentiful, would you say that it would cost this man any more? A. I would not.

Q. Is it not possible or even probable that a person can receive a blow and shortly thereafter show sugar in the urine; and that this condition is temporary and not true diabetes? A. It is very likely the case.

Q. Do you believe in the infectious theory of diabetes? A. I do not.

Q. Doctor would you state that this patient is suffering from diabetes today? A. I would.

Q. (No question.) A. By the presence of sugar in the urine over a period of thirteen and a half months by my close periodic examinations coupled with a definitely diagnostic previously determined glucose tolerance test.

Q. However, your last examination or your last urine test which you took on June 29, 1928, showed no sugar and whether or not a test now would show sugar or not you do not know? A. I do not.

MR. CARTON—It is consented that the last two questions on cross-examination be stricken out.

(Redirect examination read by Mr. Cook as follows:)

Q. I understand that this patient had been to Dr. Lasher prior to coming to you? A. He had.

Q. And it had been determined by Dr. Lasher and was convey to you that this condition had been found in the patient? A. Correct.

Q. From your examination of this patient, considering the injury to the vertebræ and the presence of diabetes and the history of the case generally, have you or not, formed any opinion as to how this condition arose? A. I have not.

Q. You say that as one of the possible consequences coma may result? A. I did.

Q. What is coma and what is its effect upon the patient? A. A terminal effect, if not eradicated.

Q. Does it come on suddenly or not? A. Gradually, as a rule.

Q. And that means if the patient had any warning of the approach? A. He does not need any warning.

Q. So that coma may arise gradually and take him off. A. Right.

Q. And that is one of the constant fears in the mind of this man?

MR. CARTON—Objected to as a leading question.

THE COURT—Objection sustained.

A. It is.

Q. You have explained why this patient, under your direction, has gained weight. Would a violation of the dietary rules be likely to cause a loss of weight? A. It would.

Q. In order then, that in proper consideration of himself and that he has a diet suitable to his condition, he shall be obliged, during the balance of his life, to seek medical advice and direction from time to time, relative to this condition? A. He will.

(Recross examination read by Mr. Carton as follows:)

Q. And by your last answer you are confining yourself strictly to his diabetic condition and to no condition which may be a result of the fracture? A. I am.

Q. Would you say that this man's weight now is normal? A. I would.

Q. Doctor, would you say that this man is able to work as a bricklayer now? A. I would.

Q. (No question.) A. As far as the presence of diabetes is concerned he is qualified to do bricklaying work to a somewhat moderated degree.

Q. How much moderated a degree? A. That I cannot say.

Q. In other words, you cannot tell us whether or not he can work as a bricklayer with the same degree of usefulness as before the diabetic condition? A. I do not know.

(Redirect Examination read by Mr. Cook as follows:)

Q. You have the total calories that he is consuming each day? A. He is not on a calorically measured diet.

Q. Doctor, will you give us, as applied to this case and the occupation of the patient, your observation of the quantity and quality of his diet to enable him to carry on his work, if possible, as a bricklayer and what the effect would be if he attempted to do so? A. At the present time, whatever his occupation is, the diet as prescribed is adequate to maintain his body weight and to render him, with careful adherence to the diet, sugar

free. In the event that more manual labor was to be instituted, as his vocation, it would be immediately rendered necessary to increase the total caloric intake, which involves the increase of sugar contained in his diet in order to primarily maintain the body weight. In the event that this were done it is most likely that a recurrence in the urine of a presence of sugar would ensue with an increase in the blood sugar, a condition which would result, in the instance of the patient, in a recurrence to a greater or less degree of the originally complained of diabetic symptoms.

Q. In other words he would overstep his tolerance? A. He would.

(Re-recross examination read by Mr. Carton as follows:)

Q. Doctor, whatever work the plaintiff is now carrying on he is perfectly able to carry on without change in present diet? A. He is.

Q. In your answer to the last question by Mr. Cook would your answer be the same if you were informed that he has been working? A. It would be the same as it is at present.

Q. And could you tell us whether or not this plaintiff is able to engage in the ordinary occupation of bricklaying at the present time? A. He would be.

ROBERT ARNOTT, Sworn for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Arnott, what is your business? A. Laborer.

Q. Whom did you work for in February, 1927? A. Vermont Marble Company.

Q. Do you know who installed the elevator in the Electric Building, the one we have been talking about in this case? A. Peterson's people.

Q. How do you know that? A. I seen it being erected by them.

Q. Did you ever see them using it? A. Yes, sir.

Q. Who took it out, if you know, after the building was complete or the usefulness of the elevator was over? A. Peterson's people.

Q. Did you see them take it out? A. No, I didn't see them take it out.

MR. ACKERSON—I move it be stricken out.

MR. COOK—It ought to be stricken out.

MR. ACKERSON—I move that that answer be stricken from the record.

THE COURT—It will be stricken, although I am curious to know why he made that answer.

By THE COURT:

Q. How do you know it was taken out by the Petersons? A. Well, the Peterson people owned it.

THE COURT—Well, strike it all out.

By MR. COOK:

Q. Do you remember the occurrence of this accident?
A. Yes, sir.
Q. After that date do you know whether Peterson & Company used that elevator? A. After that date?
Q. After that date, yes.

MR. ACKERSON—Objected to as being wholly immaterial to the issue here being tried, as to whether the elevator was used after February 8th or not.

THE COURT—How do you say it is competent?

MR. COOK—The purpose is to show dominion over it.

THE COURT—But you must show dominion over it and operation on the day of the accident, the moment of the accident. It doesn't make any difference—

MR. COOK—I don't claim that they were using it on that day, of course.

THE COURT—The only way you can hold the Peterson concern responsible would be some defective construction of the elevator in the circumstances, or that they were operating it at the time. The testimony tends to indicate now at the present moment that they were not operating it.

MR. COOK—We don't claim that.

THE COURT—Nor any employee of theirs.

MR. COOK—No.

THE COURT—Nor do I understand that you claim defective construction. Do you claim defective construction of that elevator?

MR. COOK—We claim it was negligently managed.

THE COURT—No, you claim negligence in the use of it.

MR. COOK—In the use of the elevator, yes.

THE COURT—And you claim, as I understand, that the proximate cause was the improper placing of the crate of marble on the elevator at that time.

MR. COOK—That is true.

MR. ACKERSON—That was his opening.

MR. COOK—That is true, that was our claim.

THE COURT—That being so, why do you seek to hold the Peterson Company?

MR. COOK—I won't pursue it any further.

THE COURT—Any further cross-examination? If you show me some reason for holding the Peterson Company in regard to defective construction I will consider it. What you did, as lawyers usually do, you

put in everything that you could think of that might possibly arise during the progress of the trial to counter any objection, and it is good pleading; a good lawyer does that, whether he expects to prove it or not. Now you first charge joint liability against all of the three or four defendants, then as a paragraph you charge the same thing precisely against them individually in separate counts; that is what you do.

MR. COOK—Oh, yes; but in reference to that I say it became their duty—

THE COURT—Whose duty, Peterson's?

MR. COOK—All of them; it became their duty—

THE COURT—To do what?

MR. COOK—In the erection and construction of this elevator well hole and hoisting apparatus so used as aforesaid, to use due care—

THE COURT—To do what?

MR. COOK—I will have to read back. "Became the duty of defendants and each of them to use due and proper care in the employment and selection," etc. (Reads.)

THE COURT—That is all right so far as the formal statement goes, but what is the proof in the case?

MR. COOK—What do you mean, as to—

THE COURT—Anything Peterson had to do with it at the time of the accident.

MR. COOK—There wasn't a thing that they had to do with it.

THE COURT—If you can show defective construction or any issue of fact in that regard that would be another story.

MR. COOK—I charge that they erected this elevator and it did come out from Mr. Ackerson's statement, I think he admitted that they constructed this elevator.

MR. ACKERSON—I did, in response to the court's question I made a statement to that effect.

MR. COOK—Then there was some evidence here in this case that this elevator wobbled.

THE COURT—That was not the term. Mr. Carton asked that question.

MR .COOK—Yes, and it was anwered.

THE COURT—And he didn't get any positive response to it, as I remember.

MR. COOK—Patsey Procono, while he was on the stand last night—

MR. JAMES CARTON—The witness said it wobbled one way but didn't the other way, I understand.

THE COURT—I won't pass on this question now.

(Question repeated as follows:) After that date do you know whether Peterson & Company used that elevator?

THE COURT—That would be immaterial, after the date of the accident. Objection sustained. Anything more from this witness?

MR. COOK—That is all from this witness.

MR. ACKERSON—No questions.

MR. CARTON—No questions.

MR. COOK—Only in response to that argument, there is a recent case in the—I think it is the Court of Errors and Appeals of New York, that I think is very much in line with this situation.

THE COURT—I will examine it. I am not going to pass on that at the present moment.

MR. COOK—I would like to submit it to your Honor to look at at your leisure.

THE COURT—That will turn up on the question of the motion by Mr. Ackerson.

MR. COOK—We rest.

PLAINTIFF RESTS

THE COURT—Now are there any motions?

MR. ACKERSON—Yes, sir; if your Honor wishes to hear me at this time.

THE COURT—I would like to ask counsel of they have any witnesses in court that they are particularly anxious to examine now.

MR. VICTOR CARTON—I was just about to make that statement. We have one man who cannot possibly be here on Monday. I would like to have this motion deferred, if I can.

THE COURT—I will allow Mr. Ackerson to postpone his motion with regard to the Peterson Company.

MR. CARTON—And I have a motion. I would like to have that postponed too, if you will.

THE COURT—All right.

MR. CARTON—I would like to put this witness on before the jury.

THE COURT—Go ahead. Put him on.

DEFENDANTS' TESTIMONY

DR. FRANK ALTSCHUL, Sworn for Defendants.

DIRECT EXAMINATION

By MR. VICTOR CARTON:

Q. Doctor, you are a practicing physician in this state? A. Yes, sir.

Q. And where are your offices? A. Long Branch.

Q. Will you state your qualifications, please? A. I graduated from Columbia University in 1921, Doctor of Medicine, and from Columbia College, and had two years interneship in St. Vincent's Hospital, New York, and took a post graduate course in diseases of metabolism after that; and six months resident physician at the Monmouth Memorial Hospital, following which I began to practice.

Q. Are you associated with any hospitals at the present time? A. Yes, I am visiting physician at Monmouth Memorial at present.

Q. And do you specialize in any branch, Doctor? A. Diseases of metabolism.

Q. And does a specialist in diseases of metabolism indicating diabetes and its treatment? A. Yes, it is one of the main diseases we have to treat in that particular field.

Q. What experience have you had in that line? Are you treating any diabetic patients at this time? A. I have one hundred and fifty cases on my files at present, active cases, and I have been doing this work for five years.

Q. Doctor, in your opinion as a specialist is it possible that diabetes could arise from trauma or a blow? A. No, I don't think so, no.

Q. Have you ever heard of one case of diabetes that has come under your observation that you could directly trace to a blow.

MR. COOK—Objected to on the same ground it was objected to on my witness, "Have you ever heard?" The court ruled it out.

THE COURT—Well, I have right here a form of question.

By THE COURT:

Q. In your opinion, Doctor, does diabetes arise in any case from trauma or blow or injury? A. I have never seen a case and I have never—no case has ever been reported where that condition has been proved to follow an injury.

By MR. CARTON:

Q. Doctor, what are the tests of determining whether or not a person has diabetes? A. The only absolute test that you can prove without any question of doubt that a man has diabetes is to do what they call the glucose tolerance test, which consists of taking a specimen of blood before the man has had his breakfast, and giving him a certain amount of glucose or sugar, usually one hundred grammes, and then taking the blood again a second time afterwards, two hours, three hours, four hours afterward.

Q. Were you brought here today by us to make that test? A. Yes, I had expected to do the blood sugar and at the same time a study of his urine.

Q. And you didn't do that? A. No, I didn't.

Q. Do you know why you didn't do it? A. The patient didn't want to have it done.

Q. Doctor, does the presence of sugar in the urine necessarily indicate diabetes? A. No, it does not.

Q. And are there situations where sugar develops in the urine after a term, or the blood, that is not a true diabetic condition? A. There are cases after an injury to the head or thereabouts where you find occasionally traces of sugar in the urine, but those are not cases of true diabetes.

Q. And does this condition gradually pass away? A. It is usually temporary.

MR. CARTON—That is all.

CROSS EXAMINATION

By MR. COOK:

Q. Doctor, you have been practicing metabolism for five years, you say? A. Yes.

Q. You adopted that as a specialty; right? A. Yes, sir.

Q. Do you know Dr. Milton A. Bridges or had you heard of him, in New York City? A. I think he was in Columbia University when I was there, if I remember the fact, but I didn't know him personally.

Q. Well, I mean by reputation do you know him? A. No, sir; I don't.

Q. Do you not know that he is the foremost diabetic specialist in the country today? A. No, sir; I don't; news to me.

Q. A man of vast experience and a lecturer upon those subjects in the hospitals and clinics of New York City? A. I have not.

Q. And a man referred to as an authority in that particular line of business? You haven't heard of it? A. Yes, I have heard of it. I said I didn't know he was the leading specialist in the country.

Q. Did he lecture to you while at Columbia? A. No, sir; he didn't.

Q. He couldn't teach you anything? A. He probably could.

Q. And you couldn't teach him anything? I say you don't think Dr. Bridges could teach you or tell you anything about diabetes? A. I didn't say that, no.

Q. You know Dr. Banting, don't you, the discoverer of insulin? A. Certainly.

Q. Do you recognize him as an authority on diabetic subjects, metabolism? A. I recognize him as a specialist in physiology and in the subject of chemistry, and as far as insulin is concerned, but I don't consider him as a specialist in diabetes in general, no.

Q. You don't consider him that? A. No.

Q. Notwithstanding two countries awarded him gold medals for his services? A. True enough, but not as a diabetic specialist.

Q. Don't you know that he was a diabetic specialist? A. Originally he was an orthopedic surgeon.

Q. And he is also an expert on diabetic subjects? A. Dr. Banting happened to be an orthopedic surgeon and after the war he became interested in the chemistry and the physiology of the pancreas, and in cooperation with

Dr. McLeod and other workers in the University of Toronto, they were able to demonstrate the active principle of the pancreas, which he called insulin. That work doesn't necessarily make him a diabetic specialist.

By THE COURT:

Q. He found it useful, however, in that disease, and so stated? A. Yes.

By MR. COOK:

Q. That is one of the greatest boons for that disease? A. I would consider a man like Joslyn, in Boston, or Allen K. Merston, or Mosenthal, in New York, as in the class of diabetic specialists ahead of such men that you have mentioned; although these men are all right in their own field.

Q. You heard in Dr. Bridges' testimony in reference to his taking this case up with Dr. Mosenthal? A. No, I didn't.

Q. Well, it is in the testimony. Then you do recognize Dr. Mosenthal as one of the foremost authorities in diabetes in this country? A. We think so.

Q. Did you ever know diabetes to develop from mental shock? A. Well, it all depends on what you mean by developing after. There are many cases where you find a diabetic case—

Q. I want yes or no. Did you ever hear of it? A. No.

Q. And did you ever hear of this expression in the medical books in relation to a certain type or class of business people, particularly brokers of Wall Street that when stocks go down diabetes goes up? Did you ever hear

that quotation? A. I may have heard it but that doesn't mean that it is so.

Q. It is well known that men in highly excitable promdeical books in relation to a certain type or class of fessions or business are more subject to diabetes than others; isn't that so? A. No, sir.

Q. You deny that? A. Yes, sir; there have been studies made where analysis of urine have taken of people under strain, and recently there has been some work done, for example, football players, immediately after an exciting game, and had the urine alanyzed and there found sugar. These cases are not diabetes; these are cases of transitory or glycosuria, which are not true diabetes at all.

Q. But it is sugar in the urine, isn't it? A. Yes, but that is not—

Q. Isn't it sugar in the urine? A. Yes.

Q. And it is sugar in the blood, isn't it? A. No, not any higher than you normally find it.

Q. Then it did not appear in the blood? A. It appears in the blood because there is always some sugar in the blood; there is always some sugar in the blood and in some of these cases there may be a slightly increased blood sugar; but that increase is only there temporary, and as soon as the emotional strain disappears, in a few hours, the blood sugar goes back to normal. Those cases are not due at all to any necrotic disease, but are due to perineal stimulation.

Q. Have you ever noticed diabetes developing from trauma? A. No, I have not.

Q. Have you ever noticed diabetes developing from an injury to the gland? A. You mean diabetes mellitus?

Q. Either that or inspidus. If the pituitary glands were punctured or injured isn't it a fact that diabetes would set up? A. I would rule out puncture. I can't conceive of the pituitary being punctured. You are referring to Piqure Claude Bernard. He did some experimental work puncturing the fourth ventricle. That has nothing to do with the pituitary.

Q. Haven't you heard of the puncture in a rat? A. It is news to me.

Q. You haven't heard that? A. Not diabetes.

Q. What do you call it? A. That might have shown an increase in the total output of urine, but that doesn't mean diabetes.

Q. It doesn't? A. No, sir.

Q. You disagree with the experiment of the eminent gentlemen referred to? A. I don't know of the experiment.

Q. You haven't read that in your textbook, have you? A. No.

Q. You know nothing about that? Doctor, have you ever been mistaken in your life in your diagnoses of things? A. Yes, I expect to be very many more.

Q. And you have thought that your diagnosis was correct and you found out afterwards the patient died, didn't you? A. Yes, and they died when the diagnosis was correct and wrong both.

MR. VICTOR CARTON—With the court's permission, Dr. Featherstone informs me that he has an operation Monday morning. There are only about three questions to be asked the doctor.

DR. DANIEL F. FEATHERSTONE, Sworn for Defendant.

DIRECT EXAMINATION

By MR. VICTOR CARTON:

Q. Doctor, you are a practicing physician of the City of Asbury Park? A. Yes.

Q. How long have you been such? A. Six years.

Q. What are your qualifications?

MR. COOK—I will admit the doctor's qualifications.

Q. Did you examine George Shaw, the plaintiff in this case? A. I did.

Q. When? A. July 10, 1928.

Q. And whereabouts? A. Some lawyer's office on Church Street, New York, I think it was.

Q. What was the result of that examination? A. The result of the examination and the examination of X-rays supposed to have been taken of this man indicates he had received fractures of the transverse processes of two of the cervical vertebrae.

Q. In your opinion is that a serious condition or not? Is that condition serious or not at the present time or at the time you noticed it, at the time you examined it? A. The condition as found in this man was not serious.

Q. Was it a serious condition at the time it happened? A. It might have been but the man had a very good recovery.

Q. And what would you say as to the ability of the patient at the time you examined him to move his neck,

in connection with the mobility of his neck? A. His neck was very—showed a very slight loss of motion.

Q. And would you say that he would be able to lay bricks? A. I would.

CROSS EXAMINATION

By MR. COOK:

Q. Did you see him laying brick, Doctor? A. No, sir.

Q. He had an injury, didn't he? A. He did.

Q. Present at your examination? You determined that? A. Well, he had a very slight restriction of motion in his neck from side to side.

Q. You examined him in my presence, didn't you? A. I believe so.

Q. You heard him complain of pain when you went to handle him a little bit roughly, didn't you? A. Yes.

By THE COURT:

Q. You didn't think that was on the advice of counsel, did you? A. No, but I think it was an exaggeration on the part of the patient, because he complained of pain in places that he apparently was not injured. He didn't cooperate very well in the examination.

Q. But you did find an evidence of fracture? A. Well, I found evidence of a slight restriction of motion which could be the result of the injury complained of.

By MR. COOK:

Q. That was present wasn't it, Doctor? A. Yes, sir.

REDIRECT EXAMINATION

By MR. CARTON:

Q. Could the injury as you noticed in any way affect the pituitary gland? A. No, sir.

By THE COURT:

Q. Where is the pituitary gland? A. The pituitary gland reposes in a middle cavity called the Sella Turcica, which is right in the middle of the brain, practically the middle of the brain, taking it from all angles

Q. The base, isn't it? A. The base of the brain and the middle of the skull, well protected by bone.

Q. Is there any relation at all to the cervical region? A. No, sir.

Q. Would an injury to the cervical region affect the pituitary gland? A. No sir.

Q. Would an injury of the nature of which the plaintiff complains affects his pituitary gland? A. I think not.

Q. Would Bright's disease, of which he now complains, be proximately the result of the injury of which he—diabetes? A. I believe not.

RECROSS EXAMINATION

By MR. COOK:

Q. It is merely a belief, isn't it, Doctor, your answer? A. Well, I answered negatively.

Q. You don't know? A. No, I don't think that it is.

Q. Well, I say that is as strong as you put it?

THE COURT—It is not entirely true, he says. He doesn't have to express the opinion of these other gentlemen.

MR. COOK—That he is not suffering from diabetes as the result of the injuries?

THE COURT—That he is not suffering from diabetes as the result of the injury.

Q. But an injury to the pituitary gland could develop diabetes, in your opinion? A. No, sir.

Q. You don't think so? A. No, sir.

Q. Or none of the glands of the body? A. I don't know.

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

By MR. CARTON:

Q. Are there any glands, Doctor, in this vicinity, that part of the cervical region where those fractures were? A. No, sir.

MOTION FOR NON-SUIT

MR. ACKERSON—I make a motion for a nonsuit at this time in favor of the defendant, George Peterson, Inc., at this time on the following grounds:

That the plaintiff's proof has failed to show any negligence whatsoever on behalf of George Peterson, Inc., one of the defendants. There is no testimony in the case to the effect that George Peterson, Inc., were using the elevator on the day of the accident, February 8, 1927, but on the other hand, the uncontroverted testimony is that the Vermont Marble Company were using the elevator, and this is testified by several witnesses, to wit, Hugh Grady, Thomas Wright, the plaintiff, Joseph Franciosa and Arthur Bland, and the evidence does show positively, as instanced by the plaintiff's own testimony, that George Peterson, Inc., was not working on the building, had no men there on the day that this accident happened. The case shows, and according to opening of counsel for the plaintiff and the evidence, that negligence is based upon the loading of the crated slab of marble upon the elevator mentioned in the case, otherwise known as the hod lift, and that that marble belonged unquestionably to the Vermont Marble Company and their employees entirely handled it, the name of Robert Arnott having been mentioned as doing the work or supervising it. He was identified as a Vermont Marble Company employee and the testimony of Hugh Grady was to the effect that he operated this particular elevator or hod lift on this day under the employment of the Vermont Marble Company and was given $20 for this particular day's work. The testimony of Hugh Grady, the elevator operator, is to the effect that

he was not at this time employed by George Peterson, Inc., and in fact had been discharged by them the latter part of January, 1927, and had not worked for them since, and George Peterson, Inc., had not used or had anything to do with the elevator since that time; that the elevator belonged to the International Hoisting Company and not to George Peterson, Inc.

The testimony uncontradicted further is, as supported by the testimony of Grady, for one, that after the last part of January, 1927, which was the last that he worked for George Peterson, Inc., that the elevator then was in the possession of and operated by and used by Meyer & Rybicki; and that after their use of the elevator then other contractors used the elevator and in each instance he was paid by the particular contractor using it. There is no testimony or evidence supporting any allegation of the plaintiff as to any defect in the possible erection of this elevator or hod lift, and there is no testimony in the case so far that George Peterson, Inc., erected the elevator or who erected it; although the testimony is uncontroverted as to who owned it, to wit, the International Hoist Company.. But assuming that George Peterson, Inc., had erected the shaft or hod lift, there is no testimony whatsoever to show that there was any defect whatsoever in its erection or construction. In fact, the testimony of the plaintiff himself was to the effect that it was identical with the elevator hod lift which they had on the job and the same as was used and erected and constructed in the same manner as elevators or hod lifts used on jobs of that sort, and that the elevator ran up and down smoothly, without any contact whatsoever with any part of the shaft in which it operated, and that the planking referred to on the sixth floor did not extend out into the shaftway

of the elevator whatsoever and was the usual planking used on all jobs for lifts and elevators of this sort for the intervening space between the termination of the floor and the side of the wall or shaftway of the elevator.

Further, that regarding the placing of the plank there is no testimony whatsoever connecting Peterson with that, if that was in any sense an allegation of negligence. And that testimony is clearly borne out by Thomas Wright, to the effect that either the Carlow Company, another co-defendant, or the Vermont Marble Company had placed the particular planking there which it ripped out and caused the tile to fall; and as to the testimony as to the work in the tile, it was uncontroverted that this was done by Dwight Robinson & Company under the supervision of the plaintiff himself. We contend that we are an independent contractor and under no obligations.

THE COURT—To the Vermont Marble Company?

MR. ACKERSON—To the Vermont Marble Company or to the plaintiff.

THE COURT—Or Grady?

MR. ACKERSON—And to Grady; and that the proof being that we had finished all of the arch work on the job, we having followed the steel workers, and finished the use of the elevator, in whatsoever manner it was used and operated by us, that there was no further duty on our part to this plaintiff from the use of that elevator by some one else, some other subcontractor, under a further lease from the owners, George Peterson, Inc., not being the owners.

THE COURT—What have you got to say, Mr. Cook?
(Mr. Cook replies.)

THE COURT—I incline to the view that this motion with regard to the defendant, George Peterson, Inc., for a nonsuit should prevail, on the ground that there is no testimony offered here of a contradictory nature which would tend to indicate that anything that the Peterson Company did of a careless nature or which might be said to involve negligence on its part as a proximate cause of the accident with which we are here concerned. It appears in the case that the Peterson Company was not in possession or operation of the elevator in question at the time, and that the gravamen of the plaintiff's complaint is that the proximate cause of the accident and the consequent injury was the negligent manner in which the crated case of marble had been placed upon the elevator, leaving a portion of such crate extending over the side of the elevator floor, and as it was driven to the fifth or sixth floor such projecting crate striking a plank, which was pushed up and dislodged certain fireproof tiling surrounding an iron column, the latter falling into the shaft below and striking and causing portions of it to fly out of the shaft to a place where the plaintiff was then standing and striking him. This seems to be the gravamen of the plaintiff's complaint, and inasmuch as there is no evidence at the close of his case which would tend to indicate that the Peterson Company did anything or was a party to the negligence of which complaint is made, I incline to the view that the motion for nonsuit as to that company should be granted. You may have an exception.

(Objection noted for plaintiff as ground of appeal.)

Adjourned till January 7, 1928, at 10 A. M.

Freehold, N. J., January 7, 1928.

Trial of the cause resumed at 10 A. M.

MR. CARTON—On behalf of the Vermont Marble Company I desire to move for a nonsuit at this time on the ground that the proofs as made out by the plaintiff do not show any liability on the part of the Vermont Marble Company; that there is no proof of negligence. The only witness who made any statement that the car was improperly loaded with the marble was the witness, Bland, who stated that he thought that the marble was over two or three inches; and at the end of the direct examination the testimony as I recall, stood in that position; but on his cross-examination the witness Bland admitted that when he referred to the marble being over two or three inches it had relation to its condition as he observed it after the accident, and he admitted that he did not see any extension or overlapping of the marble before the accident.

Now that is the only proof, if your Honor please, in the case outside of Franciosa. Franciosa, however, has made no statement—he was a man who was working on the sixth floor with the carpenters or helpers and ran down and came up and examined all the floors thereafter. He made one or two statements that he figured so and so or imagined so and so, but he has made no statement to the effect that this car was improperly loaded.

There is no other witness who has testified—that is, the defendant's case in this respect is brought out and strengthened by the witness, Patsey Procono, or whatever his name was, who, being interrogated on two occasions wherein the loading of the crate did not extend over the platform of the elevator, and he stated on two occasions that they did not.

On the question of proximate cause it does not appear by the proof that the use that the Vermont Marble Company people made of this elevator was responsible for this accident. The accident did happen. The elevator was there, it was owned by Peterson or Grady or somebody else; it was in operation, had been in operation during the progress of this building. We had hired it for this use. Now in the absence of proof that in our use of it that said use was the proximate cause of the accident here, I think we are entitled to a nonsuit.

THE COURT—I incline to the view that the motion should not prevail. There is testimony in the case to the effect that the elevator had been used on previous occasions immediately prior to the day of the accident and that it had been carried to the upper floors where construction was under way and that on the day of the accident, in fact, that just prior, immediately prior to it, the Vermont Marble Company was using the elevator for the purpose of carrying its marble to the upper floors. In a sense the evidence as developed by the plaintiff presents a circumstantial case, as it would seem, subject to such rebuttal testimony as the defendant may offer. But in any event the circumstances do involve issues of fact rather than of law, which necessarily would be for the

jury to determine. Being of that opinion the motion will be denied and you may have an exception.

(Objection noted for defendant, Vermont Marble Company, as ground of appeal.)

DEFENDANT'S TESTIMONY

PETER R. ROGERS, Sworn for Defendant.

DIRECT EXAMINATION

By MR. VICTOR CARTON:

Q. Where do you live, Mr. Rogers? A. Yonkers, New York.

Q. By whom are you employed? A. Dwight P. Robinson.

Q. In what capacity? A. Job accountant.

Q. And does job accountant cover the books and records of various employees of the Dwight P. Robinson Company? A. Yes, sir.

Q. Have you the books showing the employment of the plaintiff in this case, George Shaw, from February 8th on? A. No, sir.

Q. What? A. March 11th on.

Q. From March 11th on? A. Yes, sir.

Q. Are those books kept under your supervision? A. Yes, sir.

Q. Will you turn to your record and tell us what those books show commencing with March 11, 1927,

which was one month after the accident in question?? A. On March 11th Mr. Shaw was employed as a bricklayer foreman on a job at 75th Street and Park Avenue.

Q. What salary was he getting? A. $96 a week.

Q. That was March 11th? A. Yes, sir.

Q. How long did he remain on that job? A. September 8, the same year.

Q. And do your records show anything from September 8,1927 on? A. Shows that he was transferred to another job at 87th Street and Fifth Avenue on September 9th.

Q. And how long was he on that job? A. February 15, 1928.

Q. And in what capacity? A. Bricklayer foreman.

CROSS EXAMINATION

By MR. COOK:

Q. Mr. Shaw was not actually working from March 11th on, was he? A. He was in and out of the office.

Q. Wasn't he just on the payroll, continued on the payroll? A. He was on the payroll but he appeared there.

Q. Appeared at the office? A. Yes.

Q. You don't know that he did any work during that period? A. He had nobody to supervise.

Q. He had nobody to supervise? A. No.

Q. So as a matter of fact from that statement he was on the payroll, wasn't he? A. Yes, sir; he was on the payroll.

Q. And he had nobody to supervise? A. Not for a while.

Q. Did you see him with the plaster cast? A. Yes, sir.

Q. That he had on his neck and body? A. Yes, sir.

Q. In March? A. Yes, sir.

Q. And for some time after that time? A. Yes, sir.

Q. He was all strapped up, wasn't he? A. Yes, sir.

Q. In a cast? A. Yes, sir.

Q. And how long did that continue, do you recall, approximately? A. Oh, it was a matter of weeks.

Q. A matter of weeks after March 11th? A. Yes, sir.

Q. Then did you see him with the iron thing, the collar around his neck after that?

MR. CARTON—Objected to as improper cross-examination.

THE COURT—Well, I am not so sure. The implication from your direct examination is that the man really was working. Now the cross-examination is for the purpose of bringing out that as a matter of fact his employer merely continued his salary, he was not actually working, which is proper. The objection is overruled. You may have an exception.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

A. Yes, sir.

Q. Did that continue for some time thereafter? A. Yes, sir; it did.

Q. Do you know whether or not to your knowledge that he was during those periods just mentioned under medical treatment? A. I believe he was.

REDIRECT EXAMINATION

By MR. CARTON:

Q. Did there come a time, Mr. Rogers, when Mr. Shaw had any one under his supervision? A. The first masons were hired—bricklayers were hired—from March 25th, seven of them.

Q. On March 25, 1927? A. Yes, sir.

Q. And who supervised those bricklayers? A. Mr. Shaw.

Q. And after March 25th was Mr. Shaw in supervision of any bricklayers? A. Yes, sir.

Q. Continually? A. The gang built up from then on, March 25th.

Q. So if I understand you correctly, from March 25, 1927, on Mr. Shaw was actually in supervision of those bricklayers on those jobs? A. Yes, sir.

Q. That is from March 25, 1927, to February 15, 1928? A. Yes, sir; March 25th.

RECROSS EXAMINATION

By MR. COOK:

Q. What happened on February 15, 1928? Was he discharged? A. He was not employed any more with us.

Q. You had work right along just the same, didn't you, that required foremen bricklayers?

MR. CARTON—Objected to as immaterial.

THE COURT—What do you want to show?

MR. COOK—I want to show that he was let go, that they didn't employ him afterwards.

THE COURT—That is a mere circumstance, I will allow it to stand. He discontinued his connection with the company on the 15th of February?

MR. COOK—Yes, sir; 1928. Does the court allow the question?

THE COURT—Yes, I will allow that.

By THE COURT:

Q. That is so, isn't it? A. Yes, there was work to be done by a bricklayer foreman.

Q. By a bricklayer foreman after that time? A. There was work to be done.

JAMES E. GALLOWAY, Sworn for Defendant.

DIRECT EXAMINATION

By MR. VICTOR CARTON:

Q. Where do you live, Mr. Galloway? A. Newark.

Q. And by whom are you employed? A. George Brown Marble Company.

Q. By whom were you employed during the month of February, 1927? A. Vermont Marble Company.

Q. And on what job were you working? A. On the Asbury Park job.

Q. This Electric Building? A. Electric Building.

Q. And what was your capactiy at that time? A. Foreman of the marble company.

Q. Foreman of the Vermont Marble Company? A. Yes, sir.

Q. Did you as foreman of the Vermont Marble Company ever at any time make any arrangement with any party on the job in connection with using the elevator that we have been discussing here for the past couple days? A. Well, I had to make arrangements with Hugh Gray.

Q. Hugh Gray? A. Hugh Grady, to use the elevator.

Q. And what was the arrangement? A. Well, we made the arrangement at $5 an hour.

Q. And had you made any such arrangement prior to February 8th, the date of the alleged accident? A. I might have on the 7th. I am not certain; the 7th, I think.

Q. Had you made any before the 7th? A. Not that I remember.

Q. Are you the party who made arrangement on February 8th? A. Yes, sir.

Q. And that arrangement was what again? A. That is for him to use the elevator in the afternoon at $5 per hour.

Q. And what did that arrangement cover? A. Well, it covered the running of the elevator.

Q. It covered the use and the running of the elevator? A. The use of the elevator.

By THE COURT:

Q. What did you use it for? A. Hoisting marble.
Q. To what floor? A. To various floors.

By MR. CARTON:

Q. Who operated the elevator? A. Hugh Grady.
Q. And did the hiring cover the operation of the elevator? A. Oh, yes.
Q. By Grady? A. By Grady.

By THE COURT:

Q. I understood you to say that it not only covered the hiring of Grady but the use of the elevator; that was right, Mr. Galloway? A. Yes, sir.

By MR. CARTON:

Q. And did you pay him? A. Yes, I paid him.
Q. You paid him? A. I paid him.
Q. Was Grady on the payroll of the Vermont Marble Company? A. Well, of course they paid me if I paid him.
Q. You mean you paid him out of your pocket and the Vermont Marble Company reimbursed you? A. Yes, sir.

CROSS-EXAMINATION

By MR. COOK:

Q. Was Meyer & Rybicki one of the firms working in the building during the course of construction? A. Meyers and who?

Q. Rybicki. A. I don't recall the name.

Q. The cement finishers. A. Yes, there were some cement finishers in the building.

Q. Did you talk with any of them about the use of the elevator or any of their foremen? A. Not that I recall.

Q. There was an elevator installed in the place and which each of the different persons performing the work in the building used by arrangement? A. Yes, by arrangement.

Q. Who was using the elevator just prior to the afternoon of February 8th, before you started to haul marble up to the different floors? A. That I couldn't say.

By THE COURT:

Q. When did you start to haul marble? A. In the afternoon.

Q. Of what date? A. February 8th.

By MR. COOK:

Q. And what time did you start, about? A. I think it was one o'clock.

Q. And what time did you stop? A. 4:30.

Q. You saw these cases of marble being placed on the elevator from time to time, didn't you? A. From time to time, yes.

Q. You were not there all the time? A. No.

By THE COURT:

Q. Who placed them? A. Mr. Arnott.

Q. In whose employ was he? A. Vermont Marble Company.

By MR. COOK:

Q. How many men assisted you with these cases? A. Three or four.

Q. They were very heavy cases, weren't they? A. About a thousand pounds.

Q. About a thousand pounds? Do you know that the capacity of the elevator was limited to a thousand pounds? A. Well, of course the engineer watched out that we didn't put too much on.

Q. But you knew that that was the capacity, didn't you? A. Yes, sir.

Q. And these cases weighed about the capacity of that elevator? A. Some of them.

Q. How long were those cases? A. Well, they varied; some about five feet square and four feet thick.

Q. What was the maximum length? A. I would say about four feet six.

Q. You mentioned five a moment ago, didn't you? A. Well, the maximum, you said, was about four feet six.

Q. Was what? A. About four feet six by five feet six.

Q. Well, that five feet, would that be the length of the case? A. No, four feet six.

Q. And the height, you are speaking about? A. About five to five feet six. It varied.

Q. And those were marble slabs, were they not? A. Slabs, yes.

Q. And were used to place on the side walls of the halls of the building? A. Yes, sir.

Q. And they were all cased? A. All cased.

By MR. CARTON:

Q. You are not employed with the Vermont Marble Company at this time? A. No.

ROBERT ARNOTT, Recalled for Defendant.

DIRECT EXAMINATION

By MR. CARTON:

Q. Mr. Arnott, where do you live? A. Neptune City.

Q. By whom were you employed during the month of February, 1927? A. The Vermont Marble Company.

Q. And in what capacity? A. Laborer.

Q. Laborer? A. Yes, sir.

Q. And you have been here the past couple days and you have heard of this accident that we have been discussing? A. Yes, sir.

Q. Are you the Robert Arnott that has been referred to as having placed these crates of marble on the elevator? A. I am.

Q. Will you tell us how you placed those crates on the elevator? A. I had already placed thirteen cases of marble on the various floors, varying from the third to the ninth. This was the fourteenth case I put up, and

gave the signal to the engineer to go ahead; and it was going to the eighth floor; and shortly after it left, I didn't know really what had happened—some smashing, I see a lot of falling tile come down the elevator shaft, I then heard a shout and I looked on the side and see the man laying on the floor.

Q. Directing your attention to the time you placed this crate of marble on the elevator, what was the position of the crate of marble in relation to the edge of the elevator?

By THE COURT:

Q. How had it been placed on the elevator? A. It was placed kind of catercornered, placed across the elevator.

Q. Catercornered? A. Yes.

Q. Why did you do that? A. Because it was too large otherwise.

Q. Too large otherwise? A. Yes, sir.

By MR. CARTON:

Q. Do you recall placing the crate on in question? A. Yes.

Q. On the fourteenth trip? A. Yes, sir.

Q. Did any portion of that crate protrude or extend out over the edge of the elevator? A. The crate was placed just similar to that going to the floor below, one previous to that.

Q. But that is not an answer to my question, Mr. Arnott. Did any portion of this case containing the marble extend or stick out over the edge of the elevator? A. Yes, on the rear of the elevator.

Q. On the rear of the elevator? A. Yes.

Q. What do you mean by the rear of the elevator? A. On the west side of the elevator, that is, the back side. There was plenty of room there for it to work over.

Q. But did it protrude out on the rear? A. Yes, sir.

Q. On the west side? A. Yes, sir.

Q. When you say there was plenty of room what do you mean? A. Well, there was plenty of room between the floor space and the elevator platform.

Q. What do you mean by that, clearance? A. Yes, sir.

Q. How far did this protrude out on the rear side of the elevator? A. Nothing but about three or four inches.

Q. How much clearance was there? A. There was about two feet clearance.

Q. Two feet clearance? A. Yes, sir.

Q. So that it would be impossible for that to strike anything on the rear side of the elevator? A. Couldn't strike anything. There was nothing there to strike.

Q. There was two feet of clearance but it protruded out approximately three inches? A. Yes, sir.

Q. Did it protrude out anything on the front side of the elevator? A. No.

Q. But if it had protruded out would it have been able to pass the second, third, fourth and fifth floors up to the seventh? A. Not very well.

Q. Well, why not? A. Why, it would have caught the planks that were placed there.

Q. Were those planks placed on other floors than the seventh floor? A. They were placed on every floor from the second to the tenth.

By THE COURT:

Q. What are those planks used for? A. For pulling the wheelbarrows off the elevator platform.

Q. You say that thirteen cases of marble had been sent up before the accident? A. Yes, sir.

Q. Nothing had happened? A. Nothing, sir.

THE COURT—Go on.

10

CROSS-EXAMINATION

By MR. COOK:

Q. How many cases were sent upon on this elevator after the accident happened? A. Well, I can't just quite remember how many; there were quite a few.

Q. A few? A. Well, I say one or two.

20 Q. This happened about three or three-thirty in the afternoon, didn't it? A. About three o'clock.

Q. And you worked till four? A. Yes, sir.

Q. In that remaining hour can you tell us how many cases went up? A. There was quite a considerable time lost, you know, after the accident, nothing doing.

Q. After the accident nothing doing? A. Yes, sir.

Q. How many? A. Well, there was quite a considerable time lost after the accident in the loading. I couldn't really tell what time.

30 Q. Were there more than two cases went up? A. I couldn't be sure.

Q. But you had no accident after this accident, did you? A. No.

Q. Every one went up all right then, didn't it? A. Yes.

Q. Now you had sent thirteen cases up? A. Yes, sir.

Q. Between one o'clock and the time of the accident? A. Yes, sir.

Q. And nothing happened then? A. No.

Q. And when the fourteenth case went up you noticed that there was an accident? A. I didn't really know what had happened.

THE COURT—Well, he said he noticed tile falling and then later he looked and saw a man lying on the floor.

Q. You noticed tile falling? A. Yes, sir.

Q. That is quite a considerable distance from the sixth floor to the ground floor, isn't it? A. Yes, sir.

Q. About how many feet, sixty? A. Around sixty or seventy feet.

Q. And did you notice afterward where the tile had been taken off of the pillar on the sixth floor? A. Well, I did go up and have a look afterwards and I saw where the tile had been stripped off the column.

Q. You saw where the board had been ripped up, too, didn't you? A. Yes, sir.

Q. The board you spoke about that the wheelbarrows came over onto the floor? A. Yes, sir.

Q. From the time the elevator started up to the time the tile fell down was just about the time it would take to get to the sixth floor, wasn't it? A. Well, it all depends how fast he drove the elevator.

Q. Well, it was very close in point of time, from the time you observed the elevator to the time you saw the tile falling down? A. Well, I didn't know where—

what really was coming down. Anything could happen up there and anything could be put down the elevator shaft.

Q. Now this particular case was placed catercornered because it was too large? A. Just similar to the other cases of the same dimensions.

Q. It was the same dimensions as the other cases? A. Some of them.

Q. But did you put those catercornered on any of the others? A. We had to put the others catercornered, the others, too.

Q. You put this in the usual way? A. The ones previous to that we had put catercornered, too.

Q. But you did notice when this case went up that one end of it projected over the platform? A. It was the rear end.

Q. It was the rear end? A. Yes.

Q. You are sure about that, aren't you? A. Yes, sir.

Q. Did you see Mr. Shaw on February 9, 1927, at the Electric Building, the day after this accident? A. My attention was called—

Q. No, did you see Mr. Shaw that day? A. Yes, sir.

By THE COURT:

Q. Did you see Shaw the day after the accident? A. Yes, sir.

Q. Did you have any talk with him? A. Yes, sir.

By MR. COOK:

Q. Did you have a talk with him? A. Yes, sir.

Q. Did you say to Mr. Shaw that this crate was larger than the rest but you couldn't get it on the platform and it overhung and for that reason in going up it struck the strip on the sixth floor? A. No, sir; I didn't make such a statement.

Q. You didn't make that statement to him? A. No, sir.

Q. Are you sure about that? A. Yes, sir.

Q. Now the case was over three or four inches, as you have described? A. On the rear of the elevator.

Q. What say? A. On the rear part of the elevator. vator.

Q. Yes, was over three or four inches? A. Yes.

Q. But you say it was on the west side? A. That is the west side.

REDIRECT EXAMINATION

By MR. CARTON:

Q. Who are you now employed by? A. Terry.

Q. And you are not employed by the Vermont Marble Company now? A. No.

Q. Do you know who put those planks down? A. Yes.

Q. Who did? A. I did.

Q. Who were you working for at that time? A. The Carlow Corporation.

Q. At the time you put those planks down you were not employed by the Vermont Marble Company? A. No, sir.

RECROSS EXAMINATION

By MR. COOK:

Q. Just one more question. You talked with Mr. Shaw here this morning in the courtroom, didn't you? A. Yes, sir.

Q. Did you tell Mr. Shaw in that talk that you had in the courtroom this morning that that crate was too large, was larger than the others, and you couldn't get it on the platform and it overhung and that is the reason that it struck the strip? A. No, sir.

Q. You deny that, do you? A. Yes, sir.

Q. Not over ten or fifteen minutes ago? A. No, sir.

By MR. CARTON:

Q. Did you ever tell Shaw that or anybody else at any time? A. No, sir.

HARRY E. JOHNSON, Sworn for Defendant.

DIRECT EXAMINATION

By MR. VICTOR CARTON:

Q. Mr. Johnson, you live in Asbury Park? A. Yes, sir.

Q. You were employed by the Vermont Marble Company during the month of February, 1927? A. Yes, sir.

Q. In what capacity? A. In handling their stock, handling their laborers and stock of marble.

Q. Do you remember February 8th, the day of this alleged accident? A. I do, yes, sir.

Q. Where were you at the time of the accident? A. On the seventh floor; I just unloaded a car with my men on the seventh floor and was waiting for the next car to come up.

Q. Who had charge of the unloading of these cars of marble? A. I had charge of it.

Q. How many loads had come up prior to the accident? A. Thirteen crates.

Q. Thirteen crates? A. On the different floors.

Q. Where was the thirteenth crate unloaded? A. On the seventh floor.

Q. Where was the fourteenth to go? A. To the eighth.

Q. Now after the thirteenth crate was unloaded on the seventh floor what did you do then? A. I waited to get my signal from Mr. Arnott, that had charge of the loading, and watched the elevator start and then come to the floor—

Q. You mean it was the fourteenth car? A. On the fourteenth car.

Q. Where were you when you waited to get this signal? A. Standing at the edge of the elevator well.

Q. On what floor? A. On the seventh.

Q. The seventh floor? A. Yes.

Q. Did you get the signal from Mr. Arnott? A. I did.

Q. And did you see the elevator at the time you got this signal? A. I saw it start, yes. I always waited to see that Mr. Grady didn't get too much speed on the elevator, because some of these crates were quite heavy.

Q. And after this started did you observe the elevator start to come up? A. Yes.

Q. How many floors could you see? A. I wouldn't say; possibly one or two floors.

Q. And when that elevator started could you see the position of these marble crates on the elevator? A. I couldn't see whether it projected or not. It couldn't have, because if it had—

MR. COOK—Objected to.

THE COURT—No, only what you saw.

MR. COOK—That is conjecture.

Q. Did you see it when it started? A. I could see it when it started, yes, sir.

Q. And at that time do you know whether or not the crate protruded or not? A. I couldn't say.

Q. Now you saw it coming up to the—probably to the mezzanine or to the first floor? A. Yes.

Q. And then what did you do? A. I turned to go to the eighth floor above, where the crate was going up.

Q. How did you do that? A. We have to go up about twenty-five or thirty feet to the stairs and go up two flights of stairs and turn a flight to the floor above and back to the elevator to receive the crate.

Q. Tell us what you know about the accident from that point on. A. I didn't know anything about it until when I heard a tile rattle and fall down the elevator well. When I got to the eighth floor the men were there waiting to take the crate off.

Q. Did the elevator come up to the eighth floor? A. It came right on up to the eighth floor.

Q. Did it stop at the eighth floor? A. It stopped at the eighth floor. When it stopped it was six inches too low.

Q. At that time did you see the crates of marble on the elevator? A. Oh, yes; I took them off.

Q. Now what was the position of this crate of marble immediately after the accident when it stopped at the eighth floor in relation to the floor of the elevator? A. In relation to the floor of the elevator?

Q. Yes; that is, was it protruding or extending over? A. No, it was in the clear the same as all the rest of them.

Q. No, I mean do you remember this one? What was this one? That is the one we are interested in. A. This one?

Q. Yes. A. The same as all the others. There was no difference in the crates. They had to be loaded practically the same.

Q. Was it entirely in on the platform? A. Yes, it was on the inside. We had to let it come just to the edge, and those crates, the longest ones I took up, protruded some of them, two or three inches, because they were too long for the elevator. We had to lower all those crates except the short ones on that angle, because the elevator body was not large enough to hold the crate straight across.

Q. And you say some of them protruded on the back end? A. Yes.

Q. Is that the west side? A. That is the west side of the building.

Q. Where is the west side of the elevator with relation to that portion of the elevator well where the tile was

broken? A. Why there is two feet opening there or more on the back side.

Q. No, you don't understand my question. Was the west side of the elevator the side where the accident occurred and where the tile fell out or was it on the east side? A. No, it was on the east side; that is the front of the elevator.

By THE COURT:

Q. What made the tile fall, do you know? A. I don't know, your Honor, but something caught under this plank that was there or something struck it.

Q. You didn't actually see it? A. I didn't see it. I was on my way.

Q. It did fall, however? A. Yes, a tile fell. There was three of them fell.

Q. That fell at the moment the elevator was going up; is that right? A. I couldn't say.

Q. Where was the elevator when the tile fell? A. The elevator was very near the eighth floor.

Q. Near the eighth floor? A. Yes, sir.

Q. So the tile fell after the elevator passed the sixth? A. It did.

THE COURT—Go on.

By MR. CARTON:

Q. You are familiar with the type of marble that was being brought up? Is that marble easily broken or is it not? A. Very easily broken.

Q. Did you unload the marble? A. I did.

Q. Did you take it out of the crates? A. I did not. I took it out when we needed it afterwards but not at that time.

Q. Did you at any time take the marble out of this crate that was on the elevator on this fourteenth trip? A. I did.

Q. And were the slabs broken in any way? A. There were no broken slabs on that job in the building at any time.

By THE COURT:

Q. Was the crate broken? A. The crate was not. We had no crates broken on that job at all.

Q. In other words, the crates of marble were intact? A. The crates of marble were intact, positively.

By MR. CARTON:

Q. And when the elevator arrived at the eighth floor the crate was on the platform and not extending over? A. No.

CROSS-EXAMINATION

By MR. COOK:

Q. These crates stood on edge, didn't they? A. Yes, that is so you have to handle them.

Q. What is so? A. That is the only way you can handle them to keep them intact. You can't lay them down and handle them, because the slabs will break across the center at the least jar.

Q. How many slabs of this marble were in this car? A. Two.

Q. Two slabs? A. Yes.

Q. What was the size of the slab, do you know? A. About five feet six by five, I believe, or something like that. I don't remember now.

Q. And they weighed about a thousand pounds? A. They weighed between eight hundred and a thousand pounds.

Q. Very heavy? A. Very heavy. We had eight crates of that kind of marble to go on the different floors.

Q. The other marble was similar? A. No, eight crates of that size. It is what we call partition slab for toilets.

Q. And the other slabs were similar, you mean? A. No, the same size exactly.

Q. All the same size? A. No, in all the other six or eight crates.

Q. I see what you mean. But you had slabs that you pulled up there that were similar? A. Yes, sir.

Q. These slabs were placed in wooden crates? A. Yes, sir.

Q. Was there anything packed between the marble slabs, like any material, to keep them from dumping out? A. They used a heavy wrapping paper.

Q. No, between. A. In stores they turn the polished side of the marble together with this wrapping paper between, and they pack excelsior in the corner of the box or around the edges to keep the marble intact.

Q. Very carefully packed? A. Have to be.

Q. And then it was wholly inclosed in wooden cases? A. Yes, sir.

Q. They were nailed together? A. Yes, sir.

Q. So you had to rip the wooden cases off to get the marble out? A. Yes, sir.

Q. And you had to carefully pack them in order to keep the marble from being broken in transit, is that right? A. That is right.

Q. Now do you know what the speed of that elevator is? How long did it take it from the time it started to get up to the seventh floor where you were? A. Not being an engineer, I don't know.

Q. Quite a rapid elevator, wasn't it? A. Not for marble, no.

Q. What? A. Not for them crates of marble, no.

Q. Why? A. Because I would not stand for it.

Q. You mean too heavy? A. Not only being too heavy but any little accident would jar and break that marble and I wouldn't be responsible for it.

Q. Break the marble in the cases? A. Oh, yes; very easy.

Q. Notwithstanding the carefulness of the persons who packed this marble up? A. Yes, very easy.

Q. But it is a fact that when you were on the seventh floor you saw the marble start upward in the particular case? A. Not this particular case but every car that was sent up?

Q. I am asking you about this particular crate; you saw it start? A. Yes.

Q. And you say it got to the mezzanine floor, which is the first floor on the way it started from? A. Yes.

Q. And then your attention was not further attracted to it at that moment? A. No.

Q. But right after that you heard a tile rattling down the elevator shaft? A. I was very near the stairs when I heard it.

Q. And you were a distance how far from the opening of the shaft of the seventh floor at that time? A. Twenty or twenty-five feet.

Q. Twenty or twenty-five feet? A. Yes, sir.

Q. What did you do after you heard the rattling? A. I looked around and saw the elevator coming up.

Q. You saw the elevator coming up? A. Yes, sir.

Q. Immediately after this rattle? A. Yes, sir.

Q. And you knew something had happened in connection with that elevator and the sixth floor, didn't you? A. No, I didn't know.

Q. You knew it afterwards? A. I knew it afterwards?

Q. And you went down to look at the strip of wood that had been ripped up? A. No, after I had unloaded that car of marble at the eighth floor I immedately went down to the sixth floor to see what had caused the trouble and noise.

Q. What caused the trouble? A. I see where there had been some tile, three tile, I believe, twelve inches square, two inches thick, had been torn off this column and I concluded that that was what had caused the noise going down the elevator.

Q. Did you see the strip that went alongside the well hole? A. You mean the plank?

Q. Yes. A. Yes, sir.

Q. Was that ripped up? A. The plank was tore a little, yes.

REDIRECT EXAMINATION

By MR. CARTON:

Q. Do you know Mr. Franciosa? A. Mr.. Franciosa?

Q. Yes, that testified Thursday or Friday in this case, the man that was on the stand here. A. Oh, yes; that used to be foreman for the D. P. Robinson Company.

Q. The man that was clearing the sixth floor? A. Yes, sir.

Q. Did you have occasion to meet him prior to the accident to pass through the sixth floor? A. I did.

Q. Did you see Franciosa there? A. I did not.

Q. Was he working there at that time? A. Mr. Franciosa, to the best of my knowledge at that time was on the roof taking care of the labor for the terra cotta masons, the masons that were putting the terra cotta up. He might have been on the sixth floor some place but I didn't see him.

Q. He testified he was there within five or ten feet of the elevator shaft with a gang of men cleaning up; is that true or not? A. If he had been there I would have see him, because I had been unloading marble on the sixth floor just previous to that. I had unloaded on the third, fifth, sixth, seventh and eight floors.

By MR. COOK:

Q. You didn't see Farnciosa there? A. I didn't no, sir.

DEFENDANT RESTS

PLAINTIFF'S TESTIMONY IN REBUTTAL

GEORGE SHAW, Recalled for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Shaw, on February 9, 1927, the day after this accident, did you see Mr. Arnott in the Electric Building? A. Yes, sir.

Q. Did you talk to him? A. Yes, sir.

Q. Did he tell you that the crate causing the accident was too large and he couldn't get it on the platform and it overhung, and while going up the crate struck the strip on the sixth floor causing the accident? A. Yes, sir; he told me that.

Q. Did he tell you that same thing this morning in court? A. Yes, sir.

Q. Were you talking to him out here? A. Yes, sir.

CROSS-EXAMINATION

By MR. JAMES D. CARTON:

Q. Who was present this morning with you when you were talking to Arnott? A. No one.

Q. Tell us just what Arnott told you this morning? A. I was surprised to see Mr. Arnott—I know him pretty well and I was surprised to see him in the court this morning.

Q. You have seen him prior to this, haven't you? A. Yes, I will explain that if you will let me. I was surprised

to see him in court and that he should be brought in as a witness. I says, "What are you doing here?" He says, "I am for the Vermont Marble Company." I was surprised to know that. Of course he had been a witness for us and I said, "Well, do you remember what you told me the day after the accident?" I put it right up to him. And he said yes, he remembered that. And I says, "You are not going to change that story now, are you?" And he kind of just hung his head and gave me no answer.

Q. Now that was the conversation you had this morning with him? A. Yes, sir.

Q. So that he didn't tell you this morning that this crate hung over the platform two or three inches, did he? A. Yes, he did.

Q. Well now, did he? A. Yes.

Q. Didn't you only refer this morning to a conversation you had with him the day of the accident? A. Yes, we spoke about the crate hanging over and he shook his head and admitted it did hang over.

Q. And did you speak to him this morning about it hanging over? A. I did, yes.

Q. You didn't tell us that a few minutes ago. A. I didn't tell you that?

A. No. A. I tried to tell you that, sir.

Q. When you were on the stand last week, Mr. Shaw, you agreed to permit us to have a test made. A. Yes.

MR. COOK—I object to that, because this is purely rebuttal.

THE COURT—Of course it is not proper cross-examination.

MR. CARTON—Then the witness is mine for this purpose.

THE COURT—Yes; that is to say, I will allow you to recall him for that purpose afterward.

MR. CARTON—I am now recalling him.

THE COURT—It may be so recorded, as having been recalled by defendant for direct examination.

Q. When you were on the stand the other day and qualified, after being pressed, about this diabetic condition, you were asked if you would submit to an examination and a sample, so that the blood chemistry might be taken in order to determine the question of the presence of the sugar or diabetes. Do you remember you hesitated and finally consented? A. Yes.

Q. And when I took it up with you afterwards to have the doctors make an examination, you refused, didn't you? A. Yes.

REDIRECT EXAMINATION

By MR. COOK

Q. Why did you refuse? A. I refused because I wished that test taken in the presence of my doctor as well as the Vermont Marble Company's doctor as a protection to me.

Q. Any reason why it should not be taken? A. Yes, I don't want any strange doctor taking a test of me and then turning it in with his report without being protected by a report of my own doctor.

RECROSS EXAMINATION

By MR. CARTON:

Q. Who told you to take that position after you yourself consented when you were on the stand? A. My good sense told me that.

Q. Your good sense told you that A. Yes.

Q. You had advised with Dr. Carey, the local physician here in Freehold, about your condition, had you not? A. Previous to that, yes, sir, not after.

Q. Dr. Carey lives right here in Freehold, doesn't he? A. I don't know, sir.

BOTH SIDES REST

MOTION FOR DIRECTION

MR. CARTON—At this time I wish to move for a direction for the defendant on the same ground as offered for the motion for nonsuit and on the defendant's proofs as now offered.

THE COURT—The motion will be denied, the court being of the opinion that the same reasons, with the additional testimony now in, which controlled the action of the court on the motion for nonsuit still apply.

Exception allowed. (Objection noted for defendant on ground of appeal.)

(After agument.)

THE COURT—The case will be reopened to allow the re-examination of the plaintiff and the witness Arnott.

GEORGE ARNOTT, Recalled for Defendant.

DIRECT EXAMINATION

By MR. CARTON:

Q. Mr. Arnott, you have been here in the courtroom and have you heard Mr. Shaw testify just a few minutes ago? A. Yes, sir.

Q. About a talk with you this morning? A. Yes, sir.

Q. Did Mr. Shaw come to you and have a talk this morning? A. Yes, sir.

Q. What did he say to you? A. He wanted to know what I was doing here and if I was a witness for the Vermont Marble Company. I told him yes, I was a witness for the Vermont Marble Company; they had notified me to that effect. Well, he told me then that I wouldn't make his case any better, or words to that effect.

Q. What did he say now, as near as you can recall, just exactly what the conversation was that passed between you? A. Well, as already stated, he asked me if I was a witness for the Vermont Marble Company and did I remember what happened and what I had said to him. I says yes, I remembered everything I had said. "Well," he says, "I hope," he says, "because," he says, "it will do my case a lot of good."

Q. Did he say what would do his case a lot of good? A. I expect he meant by that—

THE COURT—No, no; what did he say?

Q. What did he say to you about what would do the case a lot of good? A. No, he didn't mention what would do the case a lot of good.

By THE COURT:

Q. He simply said, "I hope it will do my case a lot of good?" A. Yes, sir.
Q. That is all he said? A. Yes, sir.

MR. COOK—I would like to call Mr. Shaw to clear that up, whatever there may be. I don't think there is much to clear up.

GEORGE SHAW, Recalled for Plaintiff.

DIRECT EXAMINATION

By MR. COOK:

Q. Mr. Shaw, you heard the testimony of Mr. Arnott just now? A. Yes, sir.
Q. What did you say to him and he to you here in the courtroom this morning? A. Well, I know Mr. Arnott pretty well and I was surprised to see him here, because he was a witness on our side, of course, and I said, "Mr. Arnott," I said to him, "what are you doing here?" He says, "I have been subpoenaed for the Vermont Marble Company." I says, "I hope you are going to stick to the story you told me the day after the accident," and he said, "Yes." And that was as it stood.

By THE COURT:

Q. Did you use the expression, "I hope what you say will do my case a lot of good"? A. What I says, "If

you stick to the story you told me the day after the accident it will do me a lot of good."

Q. He did make that statement the day after the accident that you have testified to? A. Yes, sir.

By MR. CARTON:

Q. And that was all that was said between you and Mr. Arnott this morning? A. Yes, sir.

BOTH SIDES REST

RECESS TILL 1:20 P. M.

CHARGE OF THE COURT

Ladies and gentlemen of the jury: As you now know, the plaintiff is seeking to recover of the defendant, which, as the case comes to you, is the Vermont Marble Company, a corporation, compensation for injuries alleged by him to have been due proximately to the negligence of employees of the marble company on a state of facts that apparently has been developed under the evidence in the case.

Briefly stated, it appears that the plaintiff was working as a foreman of bricklayers at the time of the accident in what has been referred to in the case as the Electric Building, then in course of construction at Asbury Park, in this county, and on the day alleged in the complaint, which was the 8th of February, 1927, it appears that at some hour in the afternoon which will be indicated by the testimony he was standing in the neighborhood of the elevator as it was being loaded with crates of marble belonging to the defendant for the purpose of carrying them to floors above to be placed in the construction work. It further appears, or at least tends so to do, that as the elevator at the time of the accident was being driven to the upper floors certain fireproof tile which had been placed around an iron pillar on the sixth floor were dislodged and the broken pieces fell to the floor of the shaft and one or more of them—whatever the testimony may be found by you to indicate—ricocheted and struck the defendant, and according to his testimony, if you believe it, struck him on the back, causing an injury of which complaint is made and for which

compensation is now sought, with the consequences entailed there under.

Originally this suit was brought against a number of defendants, who appear to have been sub-contractors, or perhaps a better term would be sectional contractors, in the construction of the building. During the course of the trial and particularly at the close of the plaintiff's case the court had occasion to rule on the proven liability of certain of the defendants under the law, and it appearing to the court that a prima facie case had not been made out as to the defendants in question, a nonsuit was allowed as to one of them and a voluntary nonsuit as to the other. In any event the ruling of the court resulted in the case finally coming to you only as against the Vermont Marble Company.

Now you will understand that the court's rulings were based upon its conception of the law and they have no tendency whatever to indicate to you the court's opinion as to the liability or nonliability of the present defendant, but as to which, the court being of the further opinion that an issue of fact is created, I say, you members of the jury must determine. And therefore the surviving defendant, as I shall call it, is not to be prejudiced by any rulings that the court has heretofore made with reference to the original defendants. Therefore the case comes to you on the primary question to ascertain as a fact whether the Vermont Marble Company, through its employees, has been shown to have been negligent in a way which would make it liable to respond to the plaintiff in compensation for the injury, as he now seeks.

I have had occasion to say that, legally speaking, negligence is either the omission to do something which a reasonable person, guided by circumstances which ordinarily

regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable person would not do; but when negligence arises out of an act of commission or omission by one for whose conduct another is responsible, it must be with reference to some duty which the responsible person owed to the party injured. Applying that definition, it would perhaps be needless to say that if you found under a fair preponderance of the proof, the burden of which is on the plaintiff to show you by credible legal evidence, that an employee or employees of the defendant marble company was or were in fact within the definition, in other words, he or they failed to exercise the care of an ordinarily and reasonably prudent person or persons by placing the marble or crates of marble upon the elevator in a way that the proximate result was that the crate being so placed upon the platform of the elevator, as it has been said here, to use the lay phrase, in a "catercornered" manner, so that it would interfere with the free and clear progress of the elevator to the floors above, and you find that to have been the proximate cause of the dislodgment of the tile from the iron column, then you may say that the plaintiff has shown a case here under the rules indicated which would justify the jury in returning compensation; to what extent, however, I shall presently refer.

Now in examining this situation you will bear in mind that the elevator apparently was owned by a concern known as the International Machine Company, or some name which you will recall if I do not give it to you correctly; that it was apparently operated at the time and had been by one Grady, who was paid by the independent contractors or sectional contractors during the period of time that he was employed in running the elevator, to enable

them respectively to have their materials carried to the upper portions of the building.

Now it may be suggested in this case that it was the duty of Grady, in the exercise of the care of an ordinarily and reasonably prudent person, to see that any of the material such as the marble of the defendant company, or the crated marble, was so placed upon the elevator that it would not interfere, that is to say, the marble, crated or otherwise, with the free traveling of the elevator from the ground floor to the top of the building, where the freight was to be delivered. I say that because the question might arise in the lay mind as to whether Grady did not owe some duty to the plaintiff in that respect; in other words, as a corollary, should he have begun operating the elevator with the marble, crated or otherwise, as claimed here to have been placed upon the floor of the elevator, and he so send it through the operating of the machine to the floors above? Grady was not a defendant; in other words, he was not made a party to this suit. But since that question may arise I have deemed it proper to refer to it. We have in the law a rule generally recognized that it does not necessarily follow that one person who may be involved in an act of negligence in cooperation with others would be alone responsible. There is the rule of what we technically know as joint tort feasors; that is to say, where two or more persons are concurrently guilty of negligence, causing an injury to a third person, such as the plaintiff here. And therefore if it should appear under the fair preponderance of the proof that Grady was negligent in allowing that elevator to ascend without observing how the crate of marble was placed upon it, nevertheless, if it at the same time should appear that the employees of the defendant marble company were careless

or failed to exercise the care of ordinarily and reasonably prudent persons in placing the crate of marble upon the elevator, nevertheless, such concurrent negligence would not relieve the defendant marble company; assuming you find under the fair preponderance of proof that its employees did act negligently within the definition.

Therefore in examining the question which will first, of course, logically come up in your deliberations, as to whether the defendant company has been shown through its employees to have been negligent within the definition, you will not take the position that the company should not be held because of something that Grady did in a negligent manner, concurrently causing an injury of which complaint is here made. The marble company, in other words, will not be heard to say that after all, even though its employees were negligent, that it should not be held because of something that Grady did; or, indeed, of something that the concern that erected the elevator did, if it is shown in the case—and I am not aware of any evidence which would justify such conclusion—that is a mere comment of the court, of course; you are free to examine that phase of the case independently, and anything the court may say as to the testimony and the inference of fact to be drawn therefrom—so that your sole question will be now whether the testimony, under the fair preponderance of the proof, shows the employees of the defendant company to have been negligent within the definition I have given you.

Of course if the proximate cause of this accident was not the manner in which the marble, crated or otherwise, was placed upon the elevator, but there was some other cause with which the crate of marble had nothing to do, you cannot hold this company; because even if you find

that to be the fact, there would be lacking in the case that important element. The marble company cannot be held unless you find that its negligence, through its employees, was the proximate cause of the injury to the plaintiff. If there was some other cause, such as defective construction of the elevator, or the manner in which the elevator was sent up to the floor in questsion, as indicated in the testimony—in other words, if the operation, the manner in which the elevator was operated, was the proximate cause of the injury, and the presence of the crated marble of the defendant company on it was not a concurrent proximate cause, why, of course then you would be obliged to let out, as it were, the defendant company. I say that because the testimony to a degree is contradictory. The plaintiff undertakes to show that as a matter of fact the crate of marble was placed in a manner which left some portion of it extending over the floor of the elevator next to the planks on the various floors; that is to say, on that side; and that the result was that this extended crate, when it got to the sixth floor, lifted the plank there and so dislocated the tile as to drop it into the shaft below.

The defendant, however, produced a witness—perhaps more than one; in any event you will remember—who states that as a matter of fact that crate was larger in size than those which had been previously sent up to the upper floors of the building and that by reason of its size it was so placed that the rear, as I would call it for the purpose of illustration merely, was away from the side on which the planks were placed on the several floors, and that therefore the proximate cause was not the crate upon the elevator but something that the elevator did in its progress under operation by Grady to the upper floors.

Now which view you will take I am unable to say, because that is your function. You are the judges of the facts and you must determine. I would not be inclined to the view—in the way of mere comment now—that if you find that on the contrary a crate was so placed that an end extended over next to the plank on the several floors, that it would not be doing violence to your reasoning powers if you concluded that was the way the that the crate was placed instead of the way that the defendant's witness testified; that you may find that the crate interfered with the running of the elevator to the extent of striking the plank on the sixth floor and raising it, thus causing the tile to drop.

Now you have the two contrary views in the case, and you as judges of the facts will determine whether the plaintiff in the circumstances has satisfied you under the greater weight of the evidence or the fair preponderance of the proof, I may say, that the accident happened as he alleges, which is that the crate as a matter of fact extended over the floor of the elevator next to the floors where the planks had been placed.

So that I am impressing upon you, ladies and gentlemen, the necessity of examining all of the testimony in the case to ascertain whether the defendant company, through its employees, so placed its marble, crated or otherwise, as the case may be—it depends upon how you find it—carelessly so that it proved the proximate cause of the dislodging of the tile and its falling to the floor of the shaft.

There seems to be no real question in the case that the plaintiff was struck by tile which ricocheted from the shaft to the place where he was standing. Of course I say that again in comment; that is merely an impression I have,

but I do not recall now that counsel for the defendant seriously questions that; in other words, that the plaintiff did receive an injury of the nature he complains of by being struck with a piece of tile at the time that a quantity fell into the elevator shaft. That would seem not to be seriously disputed. However, I am not withdrawing that phase of the case from you, because it is your duty to ascertain.

Now in the event that you resolve the charge of negligence against the defendant company, through its employees, then of course you would have what we call the second question, and that is whether the plaintiff himself did anything to contribute to his own injury. Contributory negligence is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that but for his own negligence he would have received no injury from the negligence of the other party. Just what the plaintiff did, if anything, in this case to contribute to his own injury I am unable to see. You examine the case, however, and see whether there is any testimony which would justify you in finding that he did. Of course if he did not, and you find that the defendant company was negligent as charged, and that negligence as the proximate cause of the injury, then of course you would take up the question of damages. In other words, you would have to find—and that is not a direction from me; I do not want that expression misunderstood. This case is left absolutely with you to determine as a question of fact. I am not controlling your judgment in any way, have no business to. But if you should resolve the question of negligence and contributory negligence in favor of the plaintiff, then you would take up the question of damages to be awarded. And I may

say generally that the plaintiff would be entitled to receive a sum which would adequately compensate him for the injury; and in that respect it becomes necessary for you to consider whether his condition now, as indicated in the testimony, if you believe it, is proximately due to the negligence of the defendant company through its employees, assuming you find against it in that respect under the rules of law I have given you, and then that the plaintiff is not guilty of contributory negligence. That is to say, we have again the question that has been raised here as to the diabetic condition of the plaintiff. The rule applicable is this: the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his negligence; and the term natural imports such as might reasonably have been foreseen, such as occur in the ordinary state of things; and the term proximate indicates that there must be no other culpable and efficient agency intervening between the defendant's negligence and the loss. The proximate cause is that which naturally and probably led to and which might have been expected to produce the result. It is the efficient cause, the one that necessarily sets the other causes in operation.

I may say that the plaintiff here claims that his injury consisted first of a fracture or fractures of the cervical vertebrae, the neck bone. It may be, if you believe the testimony, plus an examination of the exhibits in the form of X-rays, their use having been permitted here by the physician or expert who was called in that regard, that you will find that the man did suffer a neck injury, and necessarily, I take it, there would be pain attached to it. And if that were all in the case with regard to his injury you would return a sum which in your judgment and discretion would adequately compensate him for such in-

jury. He goes further, however, and urges upon you and offers testimony which would tend to indicate that as a direct result of the injury he developed a diabetic condition. And if that were so you may say that his injury was more extensive than that involving the neck and a larger sum necessarily, would be awarded to him than if the vertebrae were the sole question involved.

Now whether you are going to say, however, that the diabetic condition directly and proximately resulted from his injury, becomes peculiarly one of fact for you; because there is rather a sharp attack made by the defendant on that phase of the case; and you will recall that the experts who have been produced here, including the depositions of two in New York City, which, by the way, you will take out with you and examine, one of whom, a Dr. Bridges, apparently has a reputation as a specialist in diabetic diseases—such testimony would tend to create a sharp issue here as to whether after all, if the plaintiff has diabetes, it was due proximately to the accident in question or the injury that directly resulted therefrom.

Now you will be obliged to examine that phase of the case, because if you find that diabetes has nothing to do with the injury, in other words, that that is isolated from a neck injury and does not involve the gland that has been spoken of here as the pituitary gland, or if it does that there was no injury to that gland which would set up a diabetic condition, then of course you would not allow the plaintiff any compensation for the diabetic condition. In other words, it can only be included in what I would call a schedule of injury if you find it to be the proximate result of the accident, in turn found to be due to the negligence of the defendant, through its employees, and the plaintiff's own freedom from contributory negligence.

Now they, in the main, are the issues in the case as I see it here. It is one of importance, and both sides are entitled to a fair, impartial and unprejudiced deliberation of the jury, which in turn must observe the rules of law the court has given you.

The case accordingly comes to you with the injunction that you must first find, under a fair preponderance of the proof, the burden of which is on the plaintiff, that the accident spoken of and involved happened as the result, direct and proximate, of the negligence of the employee or employees of the defendant company. Unless you so find there can be no recovery, bearing in mind what I have said about the contributory negligence of the plaintiff himself. If he contributed to his own injury of course he cannot recover. If you resolve those two questions in his favor then, and then only, can there be an award, and the compensation awarded must be based upon the injury which the plaintiff received.

Now I may say in addition to the physical injury, the pain and suffering involved thereunder, having in mind its extent and nature, that the plaintiff would be entitled to have added to the award any expense incurred by him with physicians and surgeons or in hospitals for the purpose of endeavoring to cure himself of the injury. The testimony as to the amount so involved, as I now recall, is confined to the sum of about three hundred and thirty odd dollars; the exact amount you will ascertain from the testimony. There are other expenses of which no proof, apparently, as put in, for reasons which will occur to you. In other words, after the accident it appears that the employer or employers of the plaintiff continued him on the payroll, and indeed, did so up to a comparatively recent period. So that really he suffered no loss in his earning capacity during this period.

Now he claims, in addition to the expense involving medical and surgical care, that he has been unable to earn through his labor as much as he did before the accident. But it does appear that he lost nothing for some period of time—you will ascertain how long it was—after this accident because of the fact that I have just stated: namely, that his employer carried him upon the payroll. Now it appears that he is again at work, earning a sum perhaps less than he did before the accident. You will ascertain, therefore, what he has lost in that respect if anything. And such sum as you do find you would add, of course, to any sum that you award in his favor in other respects, assuming you find him entitled under the rule of law given you.

He likewise claims that he is so permanently injured that it will incapacitate him from earning as much as he did before the accident. That again is a question of fact. You have the right to consider it as an item and an element in the award of damages if you see fit to make it under the rule I have given you and your ascertainment of the fact.

I think that is all I feel called upon to say to you, ladies and gentlemen of the jury. You will take the case and endeavor to do justice between these parties, bearing in mind that you must observe the rules of law I have given you and will award damages only in the event that you resolve the issue of negligence on the part of the employees of the defendant company and the contributory negligence in favor of the plaintiff. Otherwise there can be no recovery.

My attention is called to the alleged fact of the testimony in this case that Grady at the time of this accident and as he operated this elevator was the employee of the marble company instead of an independent contractor.

Now of course if you find the fact to be that Grady was an employee of the marble company for the time being, then he was in the same situation as any other employee of the marble company, including those who placed the crate of marble on the elevator. Of course I am not withdrawing from you the right to consider all of the testimony. If I have made any misstatement in that respect of course you correct me. Your recollection must prevail as to what the testimony was rather than mine; and if you find it to be a fact that Grady really was in the employ of the marble company at the time, and they were paying him, then the same rule as to their responding for the negligence of their servants and employees would apply to Grady as to others who were loading the marble upon the elevator. On the other hand, if you find that he was an independent contractor, then what I have said about concurrent negligence would apply. Bear that in mind.

DEFENDANT'S EXCEPTIONS

MR. CARTON—I wish to take these exceptions to the court's charge.

1. As to the comments of the court about Grady at the outset of the charge, in which he said that it might be commented that Grady should have seen that the elevator was properly loaded. My objection to this is that it tends to confuse the jury in considering the question of negligence or the lack of it and does away with the question of any other contributing cause, either by Mr. Grady as an independent contractor or the owner of the elevator, whoever it may have been.

2. I wish to except to that part of the court's charge wherein he said in effect that the defendant, in order to prove that this crate was larger than others that had been loaded and was therefore loaded differently. I object to this because this is not the proof. The proofs of the defendant are that several other crates were the same size and had been loaded similarly.

3. Also to what the court said, that the jury would not be doing violence to the case if they found that the crate extended over and was responsible for the accident. This gives the court's view that there are proofs that warranted such finding.

4. Referring to the question of damages that might be included, namely, the right to have damages for doctors, surgeons, hospitals and so forth, for the reason that there is no evidence of any such expenses.

PLAINTIFF'S EXCEPTIONS

MR. COOK—I take exception to that part of your Honor's charge which is substantially as follows: "If you find that the box or crate was placed catercornered on the elevator" all that portion down to the conclusion "that then the defendent, the Vermont Marble Company, cannot be held liable."

2. The plaintiff also excepts to that part of your Honor's charge which is in effect substantially as follows: "It might be suggested that Grady should have seen to

it that the marble crate was properly placed before allowing the elevator to ascend," and continuing the charge.

3. The plaintiff also takes exception to that portion of the charge which reads substantially as follows: "Of course if the proximate cause of the accident was not the manner of placing the crate on the elevator"—all that portion of the charge down to the conclusion—"that then the plaintiff cannot recover."

4. The plaintiff also takes exception to that portion of the charge which is substantially as follows: "Or the manner in which the elevator was sent up;" in other words, if the operation of the elevator was the proximate cause and the placing of the crate on the elevator was not the proximate cause, down to the conclusion, "Then the plaintiff cannot recover."

5. The plaintiff also takes exception to that portion of the charge which defines contributory negligence.

6. The plaintiff also takes exception to all reference to contributory negligence in this regard.

7. The plaintiff also takes exception to that portion of the charge which is substantially as follows: "If you find there was no injury to the pituitary gland then you cannot allow any compensation for diabetes."

NEW JERSEY SUPREME COURT

GEORGE SHAW,

Plaintiff,

vs.

VERMONT MARBLE COMPANY (Body Corporate); GEORGE PETERSON, INC.; JOHN H. MEYERS (the first name being fictitious), partners, trading as (the first name being fictitious) and ISAAC F. RIBICKI MEYERS & RIBICKI, and CARLEY & COMPANY, INC., (Body Corporate),

Defendants.

ACTION AT LAW.

POSTEA.

This case was tried before his Honor Ruliff V. Lawrence, Judge of the Monmouth County Circuit Court, and a Jury at Freehold, Monmouth County, New Jersey, on January 3rd, 4th, and 7th, 1929.

On motion of William K. Flanagan, attorney for the defendants, John H. Meyer (true name being J. Henry Meyer), and Isaac F. Ribicki (true name being I. Frank Ribicki), partners trading as Meyer & Ribicki; a nonsuit was granted as to these defendants.

On motion of Ackerson & Van Buskirk, attorneys for the defendant, George Peterson, Inc., a non-suit was granted as to this defendant.

Thereupon the cause proceeded to trial against the Vermont Marble Company (Body Corporate) and the jury rendered a verdict in favor of the plaintiff and against the defendant, Vermont Marble Company, (Body Corporate), in the sum of $18,500.00.

RULIF V. LAWRENCE,
Judge.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,* vs. VERMONT MARBLE COMPANY, body corporate, *et als.*, *Defendants.*	ACTION AT LAW. RULE TO SHOW CAUSE WHY NEW TRIAL SHOULD NOT BE GRANTED.

This matter being opened to the court on motion of DURAND, IVINS & CARTON, attorneys for defendant, Vermont Marble Company, above named, within six days after the rendering of the verdict in this cause;

It is, on this Fourteenth day of January, Nineteen Hundred and Twenty-nine ORDERED, that the plaintiff show cause before the Justices of our Supreme Court, at the State House in Trenton, on the first Tuesday of May next, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why the verdict entered in this cause should not be set aside and a new trial granted; and

IT IS FURTHER ORDERED that all exceptions and objections noted for defendant, Vermont Marble Company,

body corporate, as grounds of appeal be, and the same hereby are reserved.

RULIF V. LAWRENCE,
Judge.

Entered: January 23, 1929.
On motion of
DURAND, IVINS & CARTON,
Attorneys for Defendant,
Vermont Marble Company.

A true copy
FRED L. BLOODGOOD,
Clerk.

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

GEORGE SHAW, *Plaintiff,*	ACTION AT LAW.
vs.	
VERMONT MARBLE COMPANY, body corporate, *et als., Defendants.*	ON RULE TO SHOW CAUSE. REASONS.

Defendant, Vermont Marble Company, assigns the following reasons why the verdict rendered against it in the above stated cause should be set aside and a new trial granted.

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is excessive.

DURAND, IVINS & CARTON,
Attorneys for Defendant,
Vermont Marble Company,
body corporate.

A true copy
FRED L. BLOODGOOD,
Clerk.

Opinion of Supreme Court
(Filed Oct. 22, 1929)

NEW JERSEY SUPREME COURT
No. 42, May Term, 1929

GEORGE SHAW,
vs.
VERMONT MARBLE CO., *et als.*

Submitted May Term, 1929; decided October 21, 1929.
On defendant's rule to show cause.
Before Chief Justice Gummere and Justices Kalisch and Campbell.
For rule, James D. Carton.
Contra, Cook and Stout.

PER CURIAM:

The defendant was engaged in moving large pieces of marble weighing 1000 pounds and upward from the ground to the eighth or ninth floor of a new building of the electric light company at Asbury Park. They were moved by means of an elevator. The pieces were too large to be placed in the usual manner on the platform of the elevator and were accordingly placed in a diagonal position thereon. At each floor a plank had been placed so that laborers in wheeling barrows from the elevator would not break the concrete flooring. Columns at or

near the floor entrance of the elevator had been tiled. Thirteen loads had been hoisted when on the fourteenth load as the elevator reached the sixth floor, a piece of tiling became dislodged and fell down the shaft injuring the plaintiff. He sued for such injuries as he received and has a verdict for $18,500.

This verdict we are asked to set aside because it is against the weight of evidence and there is no evidence of negligence and finally because it is excessive.

We conclude that the proofs do not warrant us in setting aside the verdict for any of these reasons.

The rule will, therefore, be discharged.

NEW JERSEY SUPREME COURT
No. 42, May Term, 1929.

GEORGE SHAW, *Plaintiff*,

vs.

VERMONT MARBLE COMPANY, (body corporate) *et als*, *Defendants*.

ON DEFENDANT'S RULE TO SHOW CAUSE.

ORDER DISMISSING.

A rule to show cause having been entered in this cause on the Fourteenth day of January, One Thousand Nine Hundred and Twenty-nine, and this cause having been submitted on brief, May Term, 1929, by James D. Carton, attorney for Vermont Marble Company, a body corporate and Cook & Stout, attorneys for George Shaw, and the Court having considered the same and finding no cause for making the rule absolute.

It is thereupon on this 1st day of November, 1929, on motion of Cook & Stout ORDERED that the said rule to show cause be, and the same is hereby dismissed with costs.

NEW JERSEY SUPREME COURT

GEORGE SHAW, *Plaintiff-Respondent,* vs. VERMONT MARBLE COMPANY, *Defendant-Appellant.*	ACTION AT LAW. NOTICE OF APPEAL AND GROUNDS OF APPEAL.

To Cook and Stout, Attorneys for Plaintiff:

Take notice that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following grounds:

1. The Trial Court erred in denying defendant's motion for non-suit.

2. The Trial Court erred in denying defendant's motion for the direction of a verdict in favor of the defendant and against the plaintiff.

3. The Trial Court erred in charging the jury as follows:

"Now in examining this situation you will bear in mind that the elevator apparently was owned by a concern known as the International Machine Company, or some name which you will recall if I do not give it

to you correctly; that it was apparently operated at the time and had been by one Grady, who was paid by the independent contractors or sectional contractors during the period of the time that he was employed in running the elevator, to enable them respectively to have their materials carried to the upper portions of the building.

"Now it may be suggested in this case that it was the duty of Grady, in the exercise of the care of an ordinarily and reasonably prudent person, to see that any of the material such as the marble of the defendant company, or the crated marble, was so placed upon the elevator that it would not interfere, that is to say, the marble, crated or otherwise, with the free traveling of the elevator from the ground floor to the top of the building, where the freight was to be delivered. I say that because the question might arise in the lay mind as to whether Grady did not owe some duty to the plaintiff in that respect; in other words, as a corollary, should he have begun operating the elevator with the marble, crated or otherwise, as claimed here to have been placed upon the floor of the elevator, and he so send it through the operating of the machine to the floors above? Grady was not a defendant; in other words, he was not made a party to this suit. But since that question may arise I have deemed it proper to refer to it. We have in the law a rule generally recognized that it does not necessarily follow that one person who may be involved in an act of negligence in cooperation with others would be alone responsible. There is the rule of what we technically know as joint tort feasors; that is to say, where two or more persons are concurrently guilty of negligence, causing an in-

jury to a third person, such as the plaintiff here. And therefore if it should appear under the fair preponderance of the proof that Grady was negligent in allowing that elevator to ascend without observing how the crate of marble was placed upon it, nevertheless, if it at the same time should appear that the employees of the defendant marble company were careless or failed to exercise the care of ordinarily and reasonably prudent persons in placing the crate of marble upon the elevator, nevertheless, such concurrent negligence would not relieve the defendant marble company; assuming you find under the fair preponderance of proof that its employees did act negligently within the definition.

"Therefore in examining the question which will first, of course, logically come up in your deliberations, as to whether the defendant company has been shown through its employees to have been negligent within the definition, you will not take the position that the company should not be held because of something that Grady did in a negligent manner, concurrently causing an injury of which complaint is here made. The marble company, in other words, will not be heard to say that after all, even though its employees were negligent, that it should not be held because of something that Grady did; or, indeed, of something that the concern that erected the elevator did, if it is shown in the case—and I am not aware of any evidence which would justify such conclusion—that is a mere comment of the court, of course; you are free to examine that phase of the case independently, and anything the court may say as to the testimony and the inference of fact to be drawn therefrom—so that your sole question will be

now whether the testimony, under the fair preponderance of the proof, shows the employees of the defendant company to have been negligent within the definition I have given you."

4. The Trial ourt erred in charging the jury as follows:

"The defendant, however, produced a witness—perhaps more than one; in any event you will remember —who states that as a matter of fact that crate was larger in size than those which had been previously sent up to the upper floors of the building and that by reason of its size it was so placed that the rear, as I would call it for the purpose of illustration merely, was away from the side on which the planks were placed on the several floors, and that therefore the proximate cause was not the crate upon the elevator, but something that the elevator did in its progress under operation by Grady to the upper floors."

5. The Trial Court erred in charging the jury as follows:

"Now which view you will take I am unable to say, because that is your function. You are the judges of the facts and you must determine. I would not be inclined to the view—in the way of mere comment now —now that if you find that on the contrary a crate was so placed that an end extended over next to the plank on the several floors, that it would not be doing violence to your reasoning powers if you concluded that was the way that the crate was placed instead of the way that the defendant's witness testified; that you may

find that the crate interfered with the running of the elevator to the extent of striking the plank on the sixth floor and raising it, thus causing the tile to drop."

6. The Trial Court erred in charging the jury as follows:

"Now I may say in addition to the physical injury, the pain and suffering involved thereunder, having in mind its extent and nature, that the plaintiff would be entitled to have added to the award any expense incurred by him with physicians and surgeons or in hospitals for the purpose of endeavoring to cure himself of the injury. The testimony as to the amount so involved, as I now recall, is confined to the sum of about three hundred and thirty odd dollars; the exact amount you will ascertain from the testimony. There are other expenses of which no proof, apparently, as put in, for reasons which will occur to you. In other words, after the accident it appears that the employer or employers of the plaintiff continued him on the payroll, and indeed, did so up to a comparatively recent period. So that really he suffered no loss in his earning capacity during this period."

7. The Trial Court erred in permitting the following question to be answered:

(To Dr. Willis W. Lasher):

'Q. In your opinion, if this condition continues, that is, the diabetes, and the other injury, will the patient be affected in the motion of bending and lifting, would they require him to give up his occupation as a brick layer?"

8. The Trial Court erred in permitting the following question to be answered:

(To Dr. Milton A. Bridges):

"Q. Would you say from your medical experience that an injury to one of these glands would have direct or indirect effect upon the pancreatic organ or gland?"

9. The Trial Court erred in permitting the following question to be answered:

(To Peter R. Rogers):

"Q. Then did you see him with the iron thing, the collar around his neck after that?"

DURAND, IVINS & CARTON,
Attorneys for defendant-appellant,
Vermont Marble Company.

NEW JERSEY COURT OF ERRORS AND APPEALS

GEORGE SHAW, Plaintiff-Respondent, vs. VERMONT MARBLE COMPANY, Defendant-Appellant.	ACTION AT LAW ON APPEAL

BRIEF OF DEFENDANT-APPELLANT

This case is before the Court on an appeal taken by the defendant-appellant from a judgment rendered against the defendant, Vermont Marble Company, at a trial held in the Monmouth Circuit in January, 1929, and in favor of the plaintiff, George Shaw, for the sum of $18,500.00.

STATEMENT

This action was brought by George Shaw for injuries alleged to have been sustained by him by reason of a piece of tile falling down a temporary elevator shaft during the construction of the Electric Building in Asbury Park, in February, 1927, following which injuries and as a result therefrom the plaintiff alleged that he suffered from diabetes. The case was tried in the Monmouth Circuit on January 3, 4, and 7, 1929. Following a verdict of $18,500.00 for the plaintiff the Court allowed a rule to show cause with all exceptions reserved for the defendant. The Supreme Court discharged the rule to show cause. This matter is now before this Court on the exceptions of the defendant, Vermont Marble Company.

The defendant-appellant had the contract for the installation of marble in the Electric Building, and on the day of the accident was engaged in carting crates of marble to various floors of the building, having begun such operation at one P. M. on the day in question. At three o'clock, the approximate time of the accident, the defendant-appellant had carted thirteen crates of marble to various floors of the building. While the fourteenth crate was being carried to the eighth floor, a piece of tile fell from an iron column on the sixth floor to the first floor, injuring plaintiff.

The elevator used by the defendant was installed by Peterson and Company, one of the sub-contractors, and had been used by various other sub-contractors for the hauling of materials to the different floors of the building. It was used for this purpose only. On the east side of the elevator shaft loose planks had been laid by Carley and Company, one of the sub-contractors, some time prior, the purpose of these planks being to prevent the rough concrete floor from being broken when wheel barrows were taken off the elevators. These planks were laid on each of the floors between the second and tenth floors. At each corner on the east side there was an iron column. The planks, being about 2″ x 12″, and 12′ or 13′ in length, were laid between these columns. The columns had been covered with tile by the Dwight-Robinson Company, for which company the plaintiff was mason foreman. He had charge of putting up the tiling around the elevator shaft, and around the columns (S. C. 200), and the men under his supervision undoubtedly put the tiling around these columns. (S. C. 213-214). The tiling had been laid on these columns over the plank in question on the sixth floor (S. C. 172). These tiling were known as 2″ tiling, and were fitted to the columns with cement.

The planks on each of the floors were laid so that they did not extend out to the elevator shaft but were flush with the shaft (S. C. 172), and there were three or four inches of clearance between the elevator and the edge of the shaft on the east side where the plank was located (S. C. 205), and about two feet clearance on the west side of the elevator. (S. C. 321). The elevator rode free of the planks.

The elevator in question was being operated on that day by one Hugh Grady, hoisting engineer, who was engaged for that purpose by the defendant's agents at $5.00 per hour. His duty was to start and operate the elevator upon signals to him. He had previously done this work for various other persons who were required to use the elevator for their work.

On the sixth floor at the time of the accident Joseph Franciosa, labor foreman, and also an employee of Dwight-Robinson, the same Company that employed the plaintiff, was engaged with a gang of laborers in cleaning up the floor. As labor foreman Franciosa had charge of keeping things in proper shape (S. C. 215). The defendant produced Robert Arnott who testified that the crate in question was properly loaded on the platform and was wholly within the platform of the elevator on the east side (S. C. 321), and that on the west or rear side of the elevator where there was a two foot clearance, the crate protruded three or four inches. He also testified that the crate being carried on the fourteenth trip was the same dimension as some of the other cases carried that day. (S. C. 324).

Patsy Procono, a witness for the plaintiff, was working on the first floor of the building that afternoon, and testified that he saw the crates being loaded, and that they were on the inside of the platform (S. C. 159-160).

Hugh Grady, the hoisting engineer testified that when the accident occurred he could not feel that

the elevator had struck any object; that usually such an occurrence can be felt through the cable and into the drum.

Harry E. Johnson, an employee of the defendant was on the seventh floor at the time of the accident, and stated that when the elevator reached the eighth floor where it was bound, following the accident, the crate of marble was wholly within the platform of the elevator on the east side (S. C. 329). Johnson also stated that he saw the elevator start from the ground floor. After the load was started Johnson left the seventh floor, and started for the eighth floor to receive the crate of marble. This particular crate, he testified was loaded the same as the other crates (S. C. 329), and was wholly within the line of the platform after the accident.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NON-SUIT.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTION OF A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

On the rule to show cause granted to the defendant in this cause, defendant argued that the verdict was contrary to the evidence and to the weight of the evidence, and in its argument contended that the jury should have rendered a verdict in favor of the defendant.

Defendant submits that notwithstanding this contention that the verdict was erroneous because of the fact that it was contrary to the evidence and

contrary to the weight of the evidence, the Supreme Court did not pass upon the exceptions taken by the defendant at the trial, namely, that the Court should have granted a non-suit, or failing in this, should have directed a verdict for the defendant upon the grounds claimed at the trial.

The error of the Trial Court, if any, in refusing to grant a non-suit and refusing to direct a verdict for the defendant was not contemplated in the rule to show cause as that question was not raised.

Defendant submits that there was no evidence sufficient for the jury to pass upon in so far as any negligence of the defendant was concerned, and respectfully submits that the motion for a non-suit and the motion for a direction of a verdict in favor of the defendant should have been granted by the Trial Court.

The Vermont Marble Company began its operations in the Electric Building on February 8, 1927, and for its purposes it was necessary to use the freight elevator then installed in the building. This elevator had been used by many sub-contractors prior to that time, and was installed solely for the purpose of carting materials to the upper floors of the building. The elevator, according to the testimony, was not defective in any way.

The planks which were laid on the east side of the elevator shaft at all the floors from the second to the tenth floors, were not installed by the defendant, but, in fact, were installed by Carley and Company (S. C. 325), and had been used for the purpose of preventing materials being taken off the elevator damaging the rough concrete floor. These planks did not extend out into the elevator shaft, but were flush with the edge (S. C. 97).

Prior to the time of the accident thirteen trips had been made by the elevator with loads of marble being carried to various floors. Some of these crates

were of the same dimensions as they carried on the fourteenth trip, without any unusual occurrence. On the fourteenth trip, with a crate of marble of a size as had been previously carried and loaded in an identical manner, wholly within the elevator platform, an accident occurred as the elevator passed the sixth floor.

In order to hold the defendant responsible for this accident it was manifest that some negligence should have been charged against the defendant as this was not a case where the rule of res ipsa loquitur applied. This was not a case where anything belonging to or in the control of the defendant fell and caused injury. Neither is it a case where any lack of proper care was shown to have been omitted by the defendant. The elevator was not owned or constructed by the defendant. It had been in use for a long time prior to the day of the accident by other persons. The planks on the various floors were not laid by the defendant, but had been laid a long time prior thereto, and had been used by others; the tile which fell was not placed by the defendant, but on the contrary, by the plaintiff himself, or under his supervision (S. C. 200, 213-214).

Therefore from the foregoing the rule laid down in Sheridan vs. Foley, 58 N. J. L. 230:

> "That a contractor who is engaged in the erection of a building is bound to take care to prevent materials which he is using from falling upon and injuring other persons who are at work about the building; and it will be presumed, from the mere happening of such an accident, in the absence of explanation by the contractor, that it occurred from want of reasonable care,"

would not apply.

Neither is the case of Bergen County Traction Co. vs. Demarest, 62 N. J. L. 755, applicable so far as the question of res ipsa loquitur is concerned. In that case the Court held the doctrine of res ipsa loquitur applicable where the accident would not have happened in the ordinary course of events if proper care had been used by the defendant.

There was no lack of proper care on the part of the defendant in hauling its marble on the elevator in question. The only way in which defendant could have been guilty of lack of care would have been by reason of the improper loading of the elevator with the crates of marble so that the crates protruded in a space on the east side between the elevator and the edge of the shaft.

It is true that plaintiff produced a witness, Arthur Bland, by name, a carpenter's helper, who was employed on the sixth floor at the time of the accident, and who testified on direct examination as follows: (S. C. 125)

> "Q. Then you saw the corner of the box containing the marble strike the board?"
> "A. Right."
> "Q. And the board lifted part of the tiling off the column?"
> "A. Yes, sir."

but the same witness on cross-examination testified, however: (S. C. 132)

> "Q. Did you notice that the marble—you say you noticed the marble sticking out some three inches. Had you noticed that before the elevator struck or after it had struck?"
> "A. After it had struck."
> "Q. Then you don't know as a matter of fact whether it was extending out two or three inches before it struck, or not, do you?"

"A. That I can't tell."

and again, (S. C. 134):

"Q. When you saw the crating or marble or whatever it was extending over two or three inches it was after the collision, wasn't it?"

"A. Yes, sir."

The plaintiff's witness, Franciosa, a labor foreman for the Dwight-Robinson Company, also testified that he was on the sixth floor and did not see anything sticking out. (S. C. 101, 106).

This constituted the testimony of plaintiff to hold the defendant for negligence.

On the contrary, one of the plaintiff's own witnesses, Patsy Procono, who was at work on the first floor, testified that he saw the crates of marble being loaded on the platform of the elevator, and that these crates were inside the platform. (S.C. 159, 160).

Robert Arnott, a witness for the defendant, and the person who loaded the crates upon the elevator, testified that this particular crate was loaded similarly to the crates going to the floor below, previous to the accident, and that it protruded three or four inches on the rear or west of the elevator where there was a two foot clearance (S. C. 321), and that it was the same dimensions as some of the other crates (S. C. 324).

Harry E. Johnson testified that when the elevator arrived at the eighth floor the crate was on the platform of the elevator and not extending over (S. C. 331); neither was the crate broken.

As the defendant was not guilty of negligence in the loading of the elevator, the only other question as to its negligence would have arisen if the plank on the sixth floor extended out into the elevator shaft.

The plaintiff himself testified on direct examination (S. C. 172):

"I know the plank on the sixth floor must have been clear of the shaft at all times, clear of the platform."

"Q. Must have been clear of the shaft?"

BY THE COURT:

"Q. Was it?"
"A. Yes."
"Q. Not must have been? Was it in fact?"
"A. Yes, sir,"

Joseph Franciosa, a witness for the plaintiff, also testified (S. C. 97) that the plank did not lap over the elevator shaft.

If the plank did not lap over the shaft as the plaintiff and his witness both testified, it could not have been struck by the crate of marble as the plaintiff sought by inference to show. The crate of marble instead of striking the plank would have necessarily hit the wall of the elevator shaft upon which the plank rested before the plank would be touched. No attempt was made to show that any of the walls of the elevator shaft were struck by any crates being carried. The plaintiff and his witness both testified that the plank did not extend beyond the edge of the shaft. That being so, upon plaintiff's own testimony, it would have been impossible for the crate of marble to have hit the plank.

If there was any negligence in this case it was that of the plaintiff himself, and of the witness Franciosa. The latter was labor foreman for the Dwight-Robinson Company, plaintiff's employer, and was employed on the sixth floor at the time of the accident. If the plank resting on the floor was

not in its proper position it was his duty to properly place same. The plaintiff testified that Franciosa had charge of keeping the elevator holes in proper shape. The plaintiff testified (S. C. 215):

"Q. Do you know Mr. Franciosa?"
"A. Yes, sir."
"Q. He had charge of looking after that work, didn't he, keeping those holes and everything in proper shape?"
"A. He was foreman laborer, yes, sir."
"Q. What time of day did you go there the next day?"
"A. I would say the forenoon; that is all I can say."
"Q. This plank had not been put back in place yet?"
"A. No, sir."
"Q. Was Mr. Franciosa on the job?"
"A. Yes, sir."
"Q. He hadn't gotten to this particular floor yet, had he, to put this plank back?"
"A. No, sir."

Bearing out the testimony of the plaintiff as to the responsibility of the witness Franciosa, to keep the planks in shape, that witness testified relative to the plank on the fifth floor as follows: (S. C. 114):

"Q. And you don't know what the condition was on the day before in regard to that plank, do you?"
"A. I know in the morning that I had left it straight, because I had cleaned that floor in the morning; not even in the morning, a couple of hours before that."

It must be remembered that the elevator did not carry an operator, but was used for the hauling of

materials only. It had been safely used since its installation weeks before, for the purposes for which it was intended. The planks had been laid a long time prior to the day of the accident, and operations of the elevator and the use of the planks to prevent damage to the rough concrete floor had been carried on in the same manner as defendant used the elevator, for a long time prior to the date of the accident. If the plank on the sixth floor was not in its proper position at the time of the accident the testimony of the plaintiff and his witness would have to be disregarded. Moreover, if the plank was not in the proper position on the fourteenth trip of the elevator there is a possibility that it may have been moved by some of the laborers working under Franciosa during their cleaning process of the sixth floor.

Defendant submits that from the foregoing there was no evidence whatsoever which would warrant the trial court to deny defendant's motion. If there was any negligence that negligence was either that of the labor foreman, Franciosa, for his failure to observe and replace any plank not in position, or it was the negligence of the plaintiff himself.

The plaintiff testified (S. C. 200):

"Q. Do you have charge of putting up the tiling around the elevator shaft?"

"A. Yes, sir."

"Q. You supervised that?"

"A. Yes, sir."

"Q. Including the shaft that was around the—I mean on the sixth floor?"

"A. Yes."

"Q. Around the ———?"

"A. Around it, yes, sir."

"Q. Yes, around the column; and had this tile been laid around the columns on each floor?"

"A. Yes, sir."

and again, (S. C. 213):

"Q. Who put the tile on top of the planks?"

"A. That I don't know."

"Q. Well, you did it or your men did it under your supervision? Didn't they?"

"A. Possibly they might."

"Q. You know, don't you?"

"A. I don't know definitely that they did. I take it they did."

and at (S. C. 214):

"Q. Did you have supervision of the laying of any of this tile and any of this plank on any of the floors?"

"A. It was direct under my supervision, yes, sir."

Instead of cutting the plank off where it was loosely placed between the columns, Shaw, according to his own testimony, caused tile to be placed on the columns at the corner of the shaft notwithstanding that these tiling were only attached by a cement binder. Any disturbance of the plank against the tiling would undoubtedly have been sufficient to cause the tile to fall, and defendant submits that if there was any negligence it was that of the plaintiff himself, in placing the tile on this loose planking.

Defendant submits that this case falls within the rule set forth in Stumpf vs. D. L. & W. R. R. Company, 76 N. J. L. 153, in which the Court stated:

> "It may be stated as a general principle that the burden rests on the plaintiff to prove that the defendant was negligent, and that such negligence was the proximate cause of the injuries; in other words, negligence is not presumed, but must be proved. The difficulty in proving the negligence charged does not affect the principle."

In the same case the Court said:

"The jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant is not sufficient."

And again:

"* * * * * * * the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business unless that course itself is improper."

The testimony in this case clearly shows that there was nothing upon which the jury could base negligence on the part of the defendant, except that of conjecture.

For these reasons defendant respectfully submits that the Court's refusal to grant defendant's motion for a non-suit, and defendant's motion for direction of a verdict in favor of the defendant was erroneous.

"The mere happening of the accident raised no presumption of the negligence of the defendant. It was necessary to show, by direct evidence, that the defendant was responsible for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected." Paynter vs. Bridgeton Traction Company, 67 N. J. L., 619 at 625.

In the case of Hoff vs. Public Service Railway Company decided by the Court of Errors and Ap-

peals and recorded in 91 N. J. L. 641, it was held that where there was no testimony in the case from which an inference could be drawn that the defendant had failed to use due care for the protection of the plaintiff and that in the absence of such proof the defendant was entitled to a direction in its favor.

POINT II.

THE COURT ERRED IN ITS CHARGE TO THE JURY

In its charge to the jury the Court said:

> "A. The defendant, however, produced a witness—perhaps more than one; in any event you will remember—who states that as a matter of fact that crate was larger in size than those which had been previously sent up to the upper floors of the building and that by reason of its size it was so placed that the rear, as I would call it for the purpose of illustration merely, was away from the side on which the planks were placed on the several floors, and that therefore the proximate cause was not the crate upon the elevator but something that the elevator did in its progress under operation by Grady to the upper floors." (S. C. 348).

This instruction that the crate carried on the fourteenth trip of the elevator when the accident occurred was larger in size than those which had been previously sent up on the elevator, was contrary to the testimony given in the case. The witness Arnott, who loaded the elevator, testified (S. C. 324) that the crate in question was of the same dimensions as some of the other crates carried on the elevator. And the witness Johnson testified (S. C.

332) that the marble Company had eight crates of that size marble to go on different floors of the building, and that the other slabs were of the same size exactly as the other crates. There was no testimony that the crate in question was larger than some of the others carried by the defendant previous to the time of the accident.

Defendant submits that this instruction was prejudicial to the defendant and constituted error, especially so in this case where no negligence has been shown and undoubtedly this misled the jury and influenced it to find that the defendant by such act was negligent.

In the case of Stave vs. Nesbit, 2 Mis. Reports, 921, the Court said with respect to the instruction of the Trial Court:

> "This instruction was, in effect, that both defendants had sworn that the contract did not include payment for the coal, when, in fact, only one defendant had so testified. It was, therefore, a mis-statement of the evidence on a material fact. It was probably misleading to the jury, and was prejudicial to the plaintiffs. It was definitely excepted to and was not thereafter corrected, and hence was an error requiring reversal."

B. In its charge the Court also instructed the jury as follows:

> "Now which view you will take I am unable to say, because that is your function. You are the judges of the facts and you must determine. I would not be inclined to the view—in the way of mere comment now—that if you find that on the contrary a crate was so placed that an end extended over next to the plank on the several floors, that it would not be do-

ing violence to your reasoning powers if you concluded that was the way the that the crate was placed instead of the way that the defendant's witness testified; that you may find that the crate interfered with the running of the elevator to the extent of striking the plank on the sixth floor and raising it, thus causing the tile to crop." (S. C. 349).

Defendant's witnesses testified that the crate of marble carried on the fourteenth trip was wholly within the platform of the elevator on the east side. One of plaintiff's witnesses testified that the crate of marble was loaded on the platform and was inside the platform. Plaintiff did not produce a single witness who would testify that prior to the time of the accident the crate of marble extended beyond the platform of the elevator. It is true that the witness Bland did so testify, but on cross-examination (S. C. 132) the witness stated that he could not tell whether or not the crate stuck out beyond the platform before the accident. Notwithstanding this, and contrary to the evidence the Court told the jury that it would not do violence to their reasoning powers if they concluded that the crate was so placed that an end extended over next to the plank instead of the way that the defendant's witnesses testified, and that the jury might find that the crate interfered with the running of the elevator to the extent of striking the plank on the sixth floor and raising it, thus causing the tile to drop.

Defendant submits that this instruction to the jury that they might find that something existed contrary to the testimony of the case was equivalent to a direction that the jury so find such contrary fact to exist. If the defendant had so loaded its crate on the elevator that an end of the crate extended out next to the plank there would have been no question

of the negligence of the defendant, and it was on this vital point that this case was fought. It is possible and extremely probable that some of the jurors on this case were serving on the jury for the first time in their lives, and an instruction to them that they might find a certain fact to exist contrary to the testimony of the case, was tantamount to instructing the jury to find that the defendant was negligent. Defendant submits that there was no evidence in the case to justify the Court's instruction in this regard, and that it was contrary to the very evidence in the case, and was positively harmful to the defendant.

This instruction placed a greater burden on the defendant than it was required to bear, and was a harmful error.

Vitucci vs. Public Service Railway Company, 2 Mis. reports, 465.

C. The Court also charged the jury as follows:

"Now I may say in addition to the physical injury, the pain and suffering involved thereunder, having in mind its extent and nature, that the plaintiff would be entitled to have added to the award any expense incurred by him with physicians and surgeons or in hospitals for the purpose of endeavoring to cure himself of the injury. The testimony as to the amount so involved, as I now recall, is confined to the sum of about three hundred and thirty odd dollars; the exact amount you will ascertain from the testimony. There are other expenses of which no proof, apparently, as put in, for reasons which will occur to you. In other words, after the accident it appears that the employer or employers of the plaintiff continued him on the payroll, and indeed,

did so up to a comparatively recent period. So that really he suffered no loss in his earning capacity during this period." (S. C. 353).

This instruction has to do with the sum of $330.00, for which amount the plaintiff testified that he had received a bill from Dr. Bridges, diabetic specialist, for treatment rendered up to December 31, 1928.

The plaintiff based his allegation of damages not only on the injury to the cervical vertebrae, but also upon the fact that he had diabetes, alleged to have resulted from the injuries sustained by the plaintiff in the fall of the tile.

In support of his contention plaintiff offered the depositions of two physicians, Dr. Lasher, specializing in surgery, particularly that dealing with accidents and injuries, and Dr. Bridges, diabetic specialist.

On direct examination Dr. Lasher stated that he believed diabetes could result in a patient from a blow such as was sustained by the plaintiff. He qualified this, however, by stating that this question was open to a great discussion. He further stated (S. C. 248) that while he had had cases develop sugar in the urine following traumatic injury, that he could not say positively that trauma produced this condition.

Dr. Lasher further testified (S. C. 259):

"Q. Might his blood have been in such a condition that it was responsible for this outbreak of diabetes?"

"A. It may be that he has such a condition in his blood."

He further testified (S. C. 263) that the percentage of cases caused by a blow is rare.

Dr. Bridges, diabetic specialist, testified with reference to diabetes following a blow as follows: (S. C. 269):

> "Q. In your experience in specializing in the treatment of diabetes and from research and observation could you say whether or not diabetes mellitus will arise by reason of a trauma?"
> "A. I cannot."

And again at page 279 he also testified:

> "Q. In your experience of some eight years can you tell us one single case where you could definitely state that it was caused by a trauma or blow?"
> "A. No."

And again:

> "Q. And whether or not the injury in this case caused the alleged diabetes, you cannot say?"
> "A. I cannot."

Opposed to this testimony Dr. Frank Altschul, a specialist who had one hundred and fifty cases of diabetic patients at the time of the trial, testified that in his opinion as a specialist he did not think it was possible for diabetes to arise from a blow (S. C. 294), and that he had never seen a case and that no case had ever been reported where that condition was proved to follow an injury.

This witness further testified on cross examination (S. C. 298):

> "Q. Have you ever noticed diabetes developing from trauma?"
> "A. No, I have not."

It was upon the inconclusive and qualified testimony of the plaintiff's physicians that this case was permitted to go to the jury on the question of diabetes resulting from the injury, and upon the question of the $330.00 expenses for diabetic treatment. No positive testimony, whatever, was offered by the plaintiff to show that he had diabetes as a result of the accident on February 8, 1927. If that accident did not cause diabetes then manifestly the $330.00 expenses which plaintiff claimed and upon which the jury was permitted to pass, was no part of plaintiff's damage. That plaintiff failed to establish that he suffered from diabetes by reason of this injury is positive. Neither of his doctors would unequivocally state that his diabetic condition was caused by the injury.

In Houston vs. Traphagen, 47 N. J. Law, 23, it was held (Syllabus):

> "When it is claimed that the fall produced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause."

In Chester vs. Cape May Realty Company, 78 N. J. Law, 131, at page 133, the Court said:

> "It must be conceded that the plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon the plaintiff, in the absence of direct evidence of the fact, to show not only the existence of such pos-

sible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected."

In Scali vs. Public Service Electric and Gas Company reported in 6 Mis. Reports, 795, the Court said:

"The verdict of a jury must be based upon proved facts supporting it, and not upon mere guess or speculation. The correct principle is stated in the case of Houston vs. Traphagen, 47 N. J. L. 23, namely, that where it is claimed that the physical injury produced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the injury was a possible cause thereof, but other causes should be excluded."

In the case at bar plaintiff did not even show that diabetes was a possible cause of his injury. His doctors did not unequivocally state that diabetes was the result of his injury. No attempt whatever was made in excluding other causes of the diabetes.

Defendant submits, therefore, that the instructions to the jury on the question of diabetes, and particularly on the question of the expenses of the plaintiff in endeavoring to cure himself of his diabetes, were erroneous, and prejudicial to the defendant.

CONCLUSION

Defendant respectfully submits that the judgment entered herein should be reversed and set aside:

1. Because the Trial Court should have granted the defendant's motion for a non-suit.

2. Because the Trial Court should have granted the defendant's motion for a verdict in its favor.

3. Because the Trial Court erred in its charge to the jury.

4. Because the verdict was contrary to law.

Respectfully submitted,

DURAND, IVINS & CARTON,

Attorneys for Defendant-Appellant.

JAMES D. CARTON,
Of Counsel.

10

20

30

40

10

20

30

40

NEW JERSEY COURT OF ERRORS AND APPEALS

GEORGE SHAW,
Plaintiff-Respondent,

vs.

VERMONT MARBLE COMPANY,
Defendant-Appellant,

Action at Law
On Appeal

BRIEF OF PLAINTIFF-RESPONDENT

The plaintiff recovered judgment against the defendant, Vermont Marble Company, a corporation, in the Monmouth Circuit Court on January 7, 1929, after a three days trial, for the sum of $18,500.00 for personal injuries sustained by him. The defendant, Vermont Marble Company prosecuted a rule to show cause which was dismissed by the Supreme Court on November 1, 1929. Thereupon, defendant takes this appeal.

NARRATIVE

On February 8, 1927, between the hours of 1 and 4:30 P. M., plaintiff was working on the ground floor of the Electric Building in the City of Asbury Park, New Jersey, as a foreman bricklayer, in the employ of Dwight P. Robinson and Company, general contractors. There were several sub-contractors working independently on the construction of an eleven story structure, among which was the defendant. At the trial all the defendants except the present defendant were eliminated, it being conclusively proved, and not denied, that none other than defendant was using the elevator that afternoon. The Vermont Marble Company was engaged in installing marble in the building.

About 3 P. M., plaintiff was injured while he was standing on the first floor of the Electric Building, being struck by a piece of tiling, which fell from the sixth floor of the building down a temporary elevator well-hole to the first floor. Plaintiff was fifteen or twenty feet away from the shaft; the original tiling dislodged from a column on the sixth floor was a large piece, but on its way down struck different portions of the shaft, split up, striking plaintiff on the neck, rendering him unconscious, fracturing the fifth, sixth and seventh cervical vertebrae. He received other injuries.

Defendant began its operation about 1 P. M. and continued until 4:30 P. M. hoisting large pieces of crated marble, weighing about one half a ton, to the eighth and ninth floors. It admitted the operation was in charge of Hugh Grady, Engineer, employed by it. While one of the crates was being hoisted to the eighth floor of the building, about 3 P. M. tiling was ripped from a column standing near the well-hole on the sixth floor, fell down the shaft and a broken piece thereof was cast against the neck of plaintiff. It is admitted

the elevator platform was too small to permit the crate to be placed straight across the platform of the elevator, and it was placed "catercornered."

At each of the floors above the second or mezzanine floor, a plank had been laid on the floor of the well-hole or shaft of a size approximately 2 inches by 12 inches to protect the floor concrete from being cracked or broken by loaded wheelbarrows being taken off the elevator. Ordinarily there was a clearance between the elevator and the plank or planks. Some witnesses said these planks projected slightly into the well-hole.

While the elevator was making one of its trips upward to the eighth floor the plank on the sixth floor was struck by a box of crated marble, on the elevator platform. This plank was anchored under the tile on the column referred to. The plank was ripped upward, the tiling supporting that part of it was ripped off, causing it to fall down the shaft. Hugh Grady heard the noise of falling tile and momentarily stopped the elevator, and then proceeded on to the eighth floor. In this he is corroborated by some of plaintiff's witnesses. The tile thus having opportunity to fall down the shaft. (S. C. p. 51-53.)

ARGUMENT

Point One

The first points raised by the defendant-Appellant are:

That the trial court erred in denying the defendant-appellant's motion for a non-suit, and the trial court erred in denying defendant-appellant's motion for a direction of the verdict in favor of defendant and against plaintiff.

After the verdict, defendant obtained a rule to show cause why the verdict should not be set aside. In prosecuting the rule in the Supreme Court, defendant assigned and argued the following reasons:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is excessive.

Defendant in its brief acknowledges that such argument was made in the Supreme Court, but contends that since the rule to show cause provided that all its exceptions were reserved as grounds of appeal, it is at liberty to argue in this court the propriety of the trial court's refusal to non-suit plaintiff and direct the verdict for the defendant, Vermont Marble Company.

The motions of the defendant at the trial were made solely upon the ground that there was no proof showing that defendant was guilty of any negligence which was the proximate cause of the injury to plaintiff.

We think this court has laid down the rule in respect to the matters which may be argued on appeal

after unsuccessful prosecution of a rule to show cause in the Supreme Court, which settles adversely to defendant the contention it now makes.

Argument on reasons assigned by defendant on the rule to show cause — that the verdict is contrary to the evidence and to the weight of the evidence — necessarily includes argument on the question of negligence of the defendant and contributory negligence of plaintiff, which defendant desires to argue here on exceptions to the denials of its motions to non-suit and direct the verdict.

In Catterall v. Otis Elevator Co. 109 N. J. L. 381; 135 Atl. 865, a rule was allowed, requiring plaintiff to show cause why the verdict should not be set aside, reserving, however, all exceptions taken by the defendant at the trial. Notwithstanding this reservation, the prosecutor of the rule specified as a ground for making it absolute, **that the verdict was contrary to the weight of the evidence.** After hearing the argument, the Supreme Court decided that the verdict was not contrary to the weight of the evidence, and discharged the rule to show cause. Defendant thereupon appealed to this court, seeking reversal of the judgment and relying upon the exceptions reserved, namely: **to the refusal of the court to grant a motion to non-suit the plaintiff** and **to direct a verdict for the defendant,** which motions were based upon the ground that there was no evidence of defendant's negligence, and that the contributory negligence of the plaintiff conclusively appeared. This court there held that a reason assigned for a new trial that the verdict is contrary to the weight of the evidence is necessarily embraced within exceptions to the refusal to non-suit and to direct a verdict on the ground that there was no evidence of defendant's negligence, and that contributory negligence conclusively appeared.

It was decided in the Catterall case that such exceptions could not be argued in this court for the reason that to review the refusal of the trial court to non-suit and to direct the verdict would necessarily include a review of whether or not the verdict was contrary to the evidence.

The question presented in the Catterall case is the same as is presented in the instant case. Here defendant-appellant was allowed a rule to show cause in the Supreme Court and assigned as reasons, among others, for setting the verdict aside—

That the verdict was contrary to the evidence and, in this case, as in the Catterall case, after discharge of a rule to show cause, defendant appeals to this court, assigning as grounds for reversal, the denial of the motions for non-suit and for direction of the verdict and argue the question of negligence of defendant and contributory negligence of plaintiff (contributory negligence was not made one of the grounds upon which the motions were rested in the trial court).

We think that both the trial court and the Supreme Court were justified in finding that the evidence in the case showed or tended to show that plaintiff's injuries were received as the proximate result of the negligence of defendant's employees acting within the scope of their employment.

Defendant-appellant was engaged in installing marble in the Electric Building, Asbury Park, and on February 8, 1927, between 1:00 and 4:30 P. M. its employees were using an elevator or hoist in the building to raise marble to various floors. The engineer operating the elevator was employed by defendant-appellant (S. C. p. 50 L. 15;

p. 315 L 20 to 32). The marble which was enclosed in crates, was placed on the elevator by employees of defendant-appellant (S. C. p. 50 L. 13 and 29; p. 105 L. 1). The elevator, which was for use in the construction only, was a basket-like affair, consisting of a platform about 4 ft. 6 inches square, and two uprights, with a cross-bar joining the uprights, to which a cable was attached (S. C. p. 212 L. 10) ran through an open shaft through openings cut in the floors, (S. C. 171 p. 5). At each floor planking was placed parallel to the elevator shaft (S. C. p. 212 L. 26; p. 213 L. 21). Between the planks and elevator platform, there was a clearance of 3 to 4 inches (S. C. p. 213 L. 28 to 30) or 4 to 5 inches (S. C. 152 L. 24). The plank was used as a roll for wheelbarrows (S. C. p. 122 L. 29) to protect the rough concrete floor (S. C. p. 120 L. 15-20) and extended into the elevator shaft 2 or 3 inches.

Thirteen cases had been sent up on the elevator, between one o'clock and the time of the accident (S. C. p. 323 L. 3) — three o'clock (S. C. p. 322 L. 20). Some of the previous loads on the elevator had been hitting the plank set at each floor (S. C. p. 130 L. 9 to 20). The fourteenth case was so large that it was placed catercornered across the platform of the elevator (S. C. p. 320 L. 15-20). Practically all of the witnesses for both Shaw and Vermont Marble Co. were agreed that something happened on the sixth floor when the fourteenth case of marble was being sent up on the elevator. Bland, who was working on the sixth floor and who had noticed that previous loads on the elevator had hit the plank (S. C. p. 122 L. 17-20; p. 130 L. 19-24), saw the marble come up on the elevator and hit the plank (S. C. p. 122 L. 20 and 21; L. 26-32). The crates of marble, which projected beyond the floor of the elevator 2 or 3 inches (S. C. p. 124 L. 1-20) engaged the edge of this plank, ripped it up and tore

several pieces of tile off one of the columns and the tile was cast down the elevator shaft (S. C. p. 124 L. 22-35).

It is true that Bland did not note the position of the marble on the elevator prior to the time it hit the plank; but the elevator stopped immediately (S. C. p. 124 L. 26-50) and the marble then extended 2 or 3 inches over the elevator platform next to the plank (S. C. p. 124 L. 22). Each crate of marble was very heavy, weighing about 1,000 pounds (S. C. p. 318 L. 8) and three or four men were required to load the crates on the elevator (S. C. p. 318 L. 8).

The engineer, Grady, heard a noise as this particular load was being lifted on the elevator and heard and saw falling tile (S. C. p. 51 L. 15 and 30). One of the pieces of tile falling down the elevator shaft (S. C. 158 L. 30 to 35) hit Shaw in the back of the neck (S. C. p. 151 L. 24; p. 162 L. 10-20). He was on the ground floor, about 20 ft. away from the elevator shaft (S. C. p. 162 L. 32). There was further testimony that the similar planks on other floors had been disturbed by the marble (S. C. p. 99 L. 18-35; p. 100 L. 1-10). There was a great mass of other evidence supporting the testimony here specified.

Upon the evidence in the case, the trial court, as well as the Supreme Court held, that an issue of fact was presented which must be passed upon by the jury.

The refusal of the trial court to non-suit the plaintiff and to direct a verdict in favor of defendant, Vermont Marble Company was proper.

Defendant has argued that the plaintiff's negligence in failing to properly supervise the placing of

the tile around the iron columns at each end of the plank was the proximate cause of his injuries. There is nothing in the case to indicate that the planks or the tiles were improperly placed or that plaintiff was in anywise negligent; and, as we have pointed out, defendant did not rest either its motion for non-suit or its motion for direction of the verdict on the ground of plaintiff's negligence.

Point Two

A

The appellant complains that in his charge the trial court said:

> "The defendant, however, produced a witness — perhaps more than one; in any event, you will remember—who states that as a matter of fact that crate was larger in size than those which had been previously sent up to the upper floors of the building, and that by reason of its size, it was so placed that the rear, as I would call it for the purpose of illustration merely, was away from the side on which the planks were placed on the several floors, and that therefore the proximate cause was not the crate upon the elevator, but something that the elevator did in its progress under operation by Grady to the upper floors."

The fact is, that the witness Johnson, an employee of Vermont Marble Co. and in charge of handling their stock of marble (S. C. p. 329 L. 1 to 2), who was called by defendant, in speaking of the particular load which caused the injury, did testify (S. C. p. 329 L. 13-20):

> "Yes, it (the marble) was on the inside. We had to let it come just to the edge, and those crates, the **longest ones I took up,** protruded some of them 2 or 3 inches, because they were too long for the

elevator. We had to lower all those crates except the short ones on that angle, because the elevator body was not large enough to hold the crate straight across."

Arnott who loaded the marble on the elevator for the Vermont Marble Co. testified (S. C. p. 324 L. 4-18) that the crates in question were placed catercornered on the elevator platform because they were too large to be placed otherwise, (S. C. p. 320 L. 19-21; p. 324 L. 4-12), and a portion extended over the rear of the elevator platform (S. C. p. 320 L. 35; p. 321 L. 13).

We think that the court correctly stated the testimony. But whether the statement was correct or not, it did not harm the Vermont Marble Co. because, as the testimony showed, all the crates were placed on the platform in the same catercornered way, and, at this time, the court was speaking of the contention of the defendant that the part of the marble which protruded over the side of the elevator platform, was on the side opposite the planks (S. C. p. 320 L. 35) where there was a clearance of about 2 ft. (S. C. p. 321 L. 17).

The court in his charge pointed out several times that the case was submitted to the jury to find the facts, and the inferences to be drawn therefrom and that wherever his recollection differed from theirs, the jury's recollection was to prevail. The following excerpts from the charge are pertinent:

"Of course I am not withdrawing from you the right to consider all of the testimony. If I have made any misstatement in that respect of course you correct me. Your recollection must prevail as to what the testimony was rather than mine." (S. C. p. 355 L. 5-9).

"In other words you would have to find — and that is not a direction from me; I do not want that expression misunderstood. The case is left absolutely with you to determine as a question of fact. I am not controlling your judgment in any way, have no business to." (S. C. p. 350 L. 26-31). "Whatever the testimony may be found by you to indicate." (S. C. p. 343 L. 29 and 30).

"Now you will understand that the court's rulings were based upon its conception of the law and they have no tendency whatever to indicate to you the court's opinion as to the liability or non-liability of the present defendant, but as to which, the court being of the further opinion that an issue of fact is created, I say, you members of the jury must determine." (S. C. p. 344 L. 17-23).

"Applying that definition, it would perhaps, be needless to say that if you found under a fair preponderance of the proof, the burden of which is on the plaintiff to show you by credible legal evidence, that an employee or employees of the defendant marble company was or were in fact within the definition, in other words, he or they failed to exercise the care of an ordinarily and reasonably prudent person or persons by placing the marble or crates of marble upon the elevator in a way that the proximate cause was that the crate being so placed upon the platform of the elevator, as it has been said here, to use the lay phrase, in a "catercornered" manner, so that it would interfere with the free and clear progress of the elevator to the floors above, and you find that to have been the proximate cause of the dislodgment of the tile from the iron column, then you may say that the plaintiff has shown a case here under the rules indicated which would justify the jury in returning compensation." (S. C. p. 343 L. 8-25).

B

The appellant complains that the court stated:

> "Now which view you will take I am unable to say, because that is your function. You are the judges of the facts and you must determine. I would not be inclined to the view — **in the** way of **mere comment now** — that if you find that on the contrary a crate was so placed that an end extended over next to the plank on the several floors, that it would not be doing violence to your reasoning powers if you concluded that was the way that the crate was placed instead of the way that the defendant's witness testified; that you may find that the crate interfered with the running of the elevator to the extent of striking the plank on the sixth floor and raising it, thus causing the tile to drop." (S. C. 349).

on the ground that defendant's witnesses testified that the marble in question was within the platform of the elevator on the side near the plank and that there was no testimony showing that the marble was placed in any other way.

As the court had pointed out in the two preceding paragraphs of his charge, to which no exception was taken, the contention of plaintiff was that the defendant was negligent in the manner in which the crates were loaded on the elevator. There was testimony showing that the crates carried on the fourteenth trip of the elevator were too large to be placed entirely within the confines of the platform. That on previous trips the marble had been hitting the plank on the sixth floor (S. C. p. 130 L. 9-20) between which and the platform of the elevator there was a clearance of 3 to 4 inches (S. C. p. 213 L. 28-30) or 4 to 5 inches (S. C. p. 152 L. 24). It was not disputed by defendant that the plank on the sixth floor was struck and two

eye witnesses said that the crate of marble hit the plank. (S. C. p. 122 L. 20-32; p. 95 L. 21). Others, including some of defendant's witnesses, testified that they saw evidence of a striking of the plank after the accident. The plank on the sixth floor was ripped up. There was further testimony that similar planks on other floors had been hit (S. C. p. 99 L. 18-25) although all the planks had been in proper order earlier in the afternoon of the accident (S. C. p. 99 L. 27-29). The testimony also showed that the planks were fitted between iron columns on each side of the opening for the elevator (S. C. p. 172 L. 20). The crate extended over the edge of the platform 2 to 3 inches (S. C. p. 124 L. 1-20) when the elevator stopped at the time of hitting the plank. The elevator ran at the rate of 250 feet per minute and the crates weighed 1,000 pounds.

We submit that from this testimony it might reasonably be inferred that the crate was so placed on the elevator as to extend over the edge of the platform far enough to hit the plank, and that the statement of the court, which as he expressly says, was by way of comment, was not harmful to the defendant and was not error.

This contention raised by the defendant we think is also settled by the decision of the Supreme Court on the rule to show cause.

Far from being harmful to the defendant, we think that the comment of the court was unduly favorable to it. The elevator was being used by defendant to hoist its marble to various floors of the building. No one but defendant had any control of the elevator at the time. The planks were used by defendant for the same purpose that they had previously been used by others, namely, to take up some of the space between the platform and the floor, and also to prevent

the breaking of the concrete flooring by the rolling of heavy objects over the edge. Defendant owed a duty to plaintiff to see to it that all the facilities used in connection with the elevator were in proper order. The fact, unsupported by any other thing, that the marble and the plank engaged in such fashion as to cast down the tile which injured plaintiff, gives rise to the presumption that defendant was negligent. No explanation was offered by defendant in exculpation. The doctrine of res ipsa loquitur applies.

"A contractor who is engaged in the erection of a building, is bound to take care to prevent materials he is using from falling upon and injuring other persons who are at work about the building, and it will be presumed, from the mere happening of such an accident, in the absence of explanation by the contractor, that it occurred from want of reasonable care." **Sheridan v. Foley, 58 L. 230.**

"Where the testimony which proves the occurrence by which the plaintiff was injured, discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented, which calls for a defense." **Behr v. Lombard, Ayres & Co., 53 L. 233.**

In **Mumma v. Eastern & Amboy Railroad, 73 L. 653:** Mr. Justice Green held: "This principal (res ipsa loquitur) is that, when through any instrumentality or agency under the management or control of the defendant or his servants, there is an occurrence of injuries to the plaintiff, which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself in the absence of explanation by the defendant affords prima facia evidence, that there was want of due care," citing, **Sheridan v. Foley, 58 L. 230.**

"**Bergen Construction Co. v. Demarest, 62 L. 755,** where plaintiff was injured by the derailment of a car in which he was riding, the court held that proof of the happening of the accident is sufficient to charge the company with negligence and to place upon it the burden of showing that the injuries were not received through any fault on its part. 'All that they (plaintiffs) were required to do was to show the existence of negligence on the part of defendant which occasioned the injury, and this they did by proving the car left the track.' 'Ordinarily, proof of the occurrence of an accident will not of itself support a conclusion of the defendant's carelessness, but this principle is not of universal application. Where the accident is one which in the ordinary course of events, would not have happened if proper care had been used by the defendant, res ipsa loquitur.' "

C

Defendant complains that the court charged the jury as follows:

"Now, I may say in addition to the physical injury, the pain and suffering involved thereunder, having in mind its extent and nature, that the plaintiff would be entitled to have added to the award any expense incurred by him with physicians and surgeons or in hospitals for the purpose of endeavoring to cure himself of the injury. The testimony as to the amount so involved, as I now recall, is confined to the sum of about three hundred and thirty odd dollars; the exact amount you will ascertain from the testimony. There are other expenses of which no proof, apparently, was put in, for reasons which will occur to you. In other words, after the accident it appears that the employer or employers of the plaintiff continued him on the payroll, and indeed, did so up to a comparatively recent period. So that really he suffered no loss in his earning capacity during this period." (S. C. 353).

Defendant's argument is based upon the ground that the sum of $330. expended by plaintiff was for diabetic treatment and that there was no proof that plaintiff contracted diabetes as a result of being struck by tile.

It will be recalled that one of the reasons assigned by defendant for a new trial on the rule to show cause, was that the verdict was excessive. Argument of that point on the rule to show cause must necessarily have involved the question of whether or not the sum of $330. was a proper item to be considered by the jury and also whether or not there was sufficient proof produced to show that plaintiff had contracted diabetes as a result of the blow and whether the jury should have taken into consideration the question of assessing compensation for the diabetic condition. Since this question was brought before the Supreme Court on the rule to show cause, we understand the rule to be that the decision of the Supreme Court on that question is a finality, and there can be no appeal. **Catterall v. Otis Elevator Co., 109 N. J. L. 381; 135 Atl. 865.**

There was no objection made to the charge of the trial court for the reason now urged for reversal. The only objection raised to this portion of the charge was--

> "Referring to the question of damages that might be included, the right to have damages for doctors, surgeons, and hospitals, etc. for the reason that there is no evidence of any such expenses."

but that objection is not raised here, probably because testimony concerning the item of $330. for doctors expenses was admitted without objection (S. C. p. 180 L. 33).

Since the objection now urged was not raised in the trial court, it cannot avail the defendant here.

Some of the testimony concerning diabetes is as follows:

Shaw's testimony showed that he did not have diabetes prior to being struck and that immediately after, the symptoms of diabetes were present. That a blood test was taken in the Long Branch Hospital immediately after the accident. That he was then placed on a diabetic diet.

The evidence of Dr. Bridges, specialist in metabolism its diagnosis and treatment appears in State of the Case, page 268.

Shaw first visited Dr. Bridges in June, 1927, having been referred by Dr. Lasher, who discovered the diabetic condition. He applied the ordinary tests and found sugar present, both in the blood and in the urine. The normal blood chemistry in a healthy person is 0.130 M.G.M. Shaw had 0.364 M.G.M., 0.234 in excess of normal blood sugar. He says patient suffering from diabetes; insipidus and diabetes mellitus—both types are most unusual. He obtained a complete history from the patient and found he never had diabetes or any of its symptoms prior to the injury.

He said "I know a number of cases in which apparently a traumatism was the cause." (S. C. p. 268).

And on page 271 this question was asked and answered:

BY MR. COOK:

Q. In your opinion as a medical man would a person receiving a trauma forcible enough to fracture the 4th or 5th cervical vertebrae, suffer an injury or affect the gland just referred to?

THE COURT:

Q. What does he say to that?

A. It might, by associated injury (S. C. p. 272).

The doctor further says that while he never had a case himself like the present, he did say "I have seen a number of cases in which the only determinable etiology was a complained of traumatism."

As to the diabetic condition found present he obtained information from the patient that he never had diabetes or any symptoms before the accident. He made a urinalysis, and found sugar present; patient lost weight rapidly; passed large quantities of urine, daily. (S. C. p. 244). Diabetes insipidus and diabetes mellitus were present — both types — (S. C. p. 251) a most unusual occurrence.

Diabetes in his opinion can result from trauma (S. C. p. 248). He had had cases in his practice where diabetes developed from traumatic injuries (S. C. p. 248). "It is my belief that it can." (S. C. p. 248-249).

We think a case was made out by the testimony from which the jury might legally have found that diabetes was caused as a result of the blow from the tile.

The appeal should be dismissed and the judgment affirmed.

Respectfully submitted,

COOK and STOUT,
Attorneys for and of Counsel
with Plaintiff-Respondent.

WILLIAM J. O'HAGAN,
on the brief