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TESTIMONY.

Notice and Grounds of Appeal.

(Filed February 10, 1928.)

New Jersey Supreme Court

JAMES J. MULLEN,
Plaintiff-Appellant,

v.

HARRY R. WALKER, ROBERT G. WALKER and HARRY R. WALKER, JR., doing business under the firm name and style of H. R. WALKER & SONS,
Defendants-Respondents.

On Appeal from New Jersey Supreme Court.

To William B. Stites, Esq., Attorney of Defendants-Respondents.

SIR:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this case on the following grounds:

1. The Supreme Court erred in nonsuiting the plaintiff.

2. The Supreme Court should have denied the motion for nonsuit of the defendants because the questions involved were questions of fact for the consideration of the jury.

3. The Supreme Court erred in nonsuiting the plaintiff because the plaintiff's cause of action was

at common law in that he was a casual employee and such employment did not come under the Workmen's Compensation Act of New Jersey.

Dated January 19, 1928.

Respectfully yours,

COLLINS & CORBIN,
Attorneys of Plaintiff-Appellant.

Service acknowledged February 8, 1928.

WILLIAM B. STITES,
Attorney of Defendants-Respondents.

Complaint.

(Filed August 30, 1926.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

JAMES J. MULLEN,
Plaintiff,

v.

HARRY R. WALKER and ROBERT G. WALKER, doing business under the firm name and style of H. R. WALKER & SONS,
Defendants.

} Action at Law.

The plaintiff, James J. Mullen, residing at Wallington, Bergen County, New Jersey, says that:

1. The defendants Harry R. Walker and Robert G. Walker are engaged in the wholesale flour business in the City and County of Passaic, State of New Jerey, having a place of business at 308 Howe

Avenue and the Delaware, Lackawanna & Western Railroad Company in said City of Passaic, and said defendants carry on said business under the firm name and style of H. R. Walker & Sons, and did so on May 4 and May 7, 1926.

2. On May 4, 1926, as a result of a newspaper advertisement, the plaintiff called at said place of business of defendants and applied for a job.

3. The defendant Robert G. Walker in behalf of said defendants informed plaintiff there was a three hour job unloading a car of flour, which said flour was contained in bags which were to be piled in the warehouse under his direction and that of his foreman, a man by the name of Pete and that said job would pay a dollar an hour.

4. Plaintiff accepted the said job and said defendant took plaintiff into the warehouse and there put him to work under the direction of said foreman named Pete.

5. At the conclusion of said three hours' work, plaintiff received $3.00 from the defendant Harry R. Walker, who inquired of the plaintiff whether he would do more work of that kind on another day, to wit, the following Friday, May 7, 1926. The plaintiff replied that he would if he did not have a steady job elsewhere.

6. On Thursday, May 6, 1926, the defendant Robert G. Walker called upon the plaintiff and left with him a card of the defendants', upon the back of which he wrote 8:00 A. M., May 7th.

7. On May 7, 1926, at 8:00 A. M., plaintiff again went to the said place of business of the defendants and reported to said Robert G. Walker who again took him into the warehouse and requested

him to work under the direction of the said foreman Pete.

8. The said defendants had instructed said foreman Pete as to the manner in which the bags of flour were to be piled in said warehouse.

9. Under the direction of said Pete, plaintiff proceeded to pile the bags of flour in accordance with the instructions of the defendants, and said Pete was likewise piling up said bags of flour.

10. After said bags of flour had been piled in accordance with the instructions of the defendants and under the direction and supervision, and with the assistance of said Pete, said bags of flour suddenly and without warning violently fell to the ground striking the plaintiff and causing the injuries to him hereinafter set forth.

11. Plaintiff had nothing to do with the arrangement of the said bags of flour other than to bring them into the warehouse and put them exactly in the positions he was directed to put them by the said foreman Pete under said defendants. Theretofore he had no knowledge of the piling of bags of flour, never having done the work before. His prior occupation consisted in that of a rigger and maintenance worker in the construction of buildings.

12. Said accident hereinbefore set forth was caused proximately by the negligence of the defendants acting through themselves and their said agent and servant, said foreman Pete, in carelessly and negligently causing said bags of flour to be improperly piled and too high; also in failing to properly instruct the plaintiff as to the proper manner in which to have said bags of flour piled.

Also the carelessness and negligence of the defendants consisted in this: That they failed to properly instruct said Pete in the proper manner of piling said bags of flour and failed to instruct him at all, but merely directed him to pile said bags of flour so that they would reach the ceiling of said warehouse.

13. As a result, the plaintiff was seriously and permanently externally and internally injured in and about his head, body and limbs. The plaintiff's right leg was fractured in two places, between the knee and the ankle. Said right leg was also fractured at the ankle and said ankle was fractured at the instep. Plaintiff's left leg was also fractured between the ankle and the knee. The plaintiff's right ankle was dislocated and is permanently deformed. His entire body was bruised and contused and he has suffered internal injuries, the full extent and nature of which have not been fully determined. He has been unable to work since the day of the accident and will be unable to work in the future and has been crippled for life. He has suffered great pain and mental anguish and has been compelled to expend large sums of money for medicines and medical aid. His earning capacity has been permanently impaired.

14. On said May 7, 1926, plaintiff was merely employed casually for a few hours for the purpose of unloading bags of flour and assisting in piling same in said warehouse. As soon as said cars were unloaded, plaintiff's work would have been at an end. He was to receive one dollar an hour only while he worked.

15. Plaintiff's right to compensation therefore

does not come under the New Jersey Workmen's Compensation Act, but is at common law, because under Paragraph 23, Subdivision "C" of said Compensation Act, it is specifically provided that said Act does not cover casual employments which is therein defined as employment, the occasion for which arises by chance or is purely accidental.

Plaintiff demands $50,000 damages.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Answer.

(Filed, October 11, 1926.)

The defendants residing in the City of Passaic, County of Passaic and State of New Jersey, answering the complaint herein allege:

1. Admit paragraph 1, except that Harry R. Walker, Jr., is also a member of the said partnership therein mentioned.

2. They have no knowledge or information sufficient to form a belief concerning the allegations in paragraph 2, except they admit the insertion of the newspaper advertisement.

3. They deny paragraph 3, except they admit that Robert G. Walker in behalf of the defendants informed plaintiff that there was a job unloading a car of flour, which flour was contained in bags to be piled in the warehouse.

4. They deny paragraph 4, except they admit that the plaintiff accepted the position and that the defendant took plaintiff into the warehouse and put him to work.

5. Deny paragraph 5, except they admit that at

the conclusion of plaintiff's work on the date mentioned, the defendant paid him for his services.

6. Admit paragraph 6, except it was Harry R. Walker, Sr., that called upon the plaintiff.

7. Deny paragraph 7, except they admit that on May 7, 1926, at about 8 o'clock A. M. the plaintiff went to the place of business of the defendants and reported to said Robert G. Walker, who took him into the warehouse to go to work.

8. Deny paragraphs 8, 12, 13, 14 and 15.

9. Deny paragraph 9, except they admit that the person named "Pete" was piling up bags of flour.

10. Deny paragraph 10, except they admit that the bags of flour were piled with the assistance of the person named Pete and that some of the bags of flour fell.

11. Deny paragraph 11, except they have not sufficient information or belief to either admit or deny that the plaintiff at one time was engaged as a rigger and maintenance worker in the construction of buildings.

FIRST SEPARATE DEFENSE.

The defendants allege that if at the time and place mentioned in the complaint the plaintiff, James J. Mullen received any injuries by being struck by a bag of flour in the defendants' warehouse, that the negligence of the said James J. Mullen caused any damages or injuries which he may have received and if any negligence or fault other than that of the said James J. Mullen caused or contributed to cause said damages or injuries,

Reply.

it was the negligence and fault of a fellow servant or fellow servants of the said James J. Mullen in the employment of the defendants.

SECOND SEPARATE DEFENSE.

That at the time and place mentioned in the complaint, the said James J. Mullen was employed by the defendants to store bags of flour in their warehouse and in and about performing the said services, he assumed all ordinary and usual risks incident thereto.

THIRD SEPARATE DEFENSE.

That at the time and place mentioned in the complaint, the said James J. Mullen was employed by the defendants and was engaged within the scope of his authority and if he sustained any damages or injuries while so employed in the service of the defendants, such damages and injuries should be determined, ascertained and fixed by virtue of the New Jersey Workmen's Compensation Act, its Supplements and Amendments.

WM. B. STITES,
Attorney for Defendants.

Reply.

(Filed, October 13, 1926.)

Plaintiff for reply says that:

He denies the allegations of the first, second and third separate defenses.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Stipulation.

(Filed, October 21, 1926.)

It is hereby stipulated and agreed by and between the parties hereto that Harry R. Walker, Jr. be and he hereby is made a party defendant in the above entitled action and it is further stipulated that all the pleadings be amended so as to apply to him as such defendant, said Harry R. Walker, Jr. being designated as one of the persons doing business under the firm name and style of H. R. Walker & Sons.

And it is further stipulated that the cause proceed with the said Harry R. Walker, Jr. as a party defendant.

Dated October 13, 1926.

COLLINS & CORBIN,
Attorneys of Plaintiff.

WILLIAM B. STITES,
Attorney of Defendants.

Amendment to Complaint.

(Filed, December 5, 1926.)

The complaint herein is amended by adding the following paragraph:

16. For the purpose of preventing any shortening of the plaintiff's right leg a certain steel apparatus was attached thereto and said apparatus caused a sore on the right heel of the plaintiff's leg. Said sore has continued up to the present time and there is now a half inch hole in the heel. After the said apparatus was removed there was a large lump on the heel and said lump became decayed

and consisted of flesh which had a considerable odor. An operation was performed on the said heel to remove the said lump and when it was removed it was found to be decayed and infected. In short, it was deed flesh. Since it was removed said heel has continued to be and is still infected. Infection comes from said wound daily when plaintiff bathes it as directed by his doctor. It is inflamed and gives off a burning sensation. Said injury is permanent. It is also very painful.

We consent to the filing of the above amendment to the complaint.

COLLINS & CORBIN,
Attorneys of Plaintiff.

WILLIAM BALLENGER STITES,
Attorney of Defendants.

Answer to Amendment to Complaint.

(Filed, December 15, 1926.)

The defendants, answering the allegations contained in paragraph 16, of the amendment to the complaint herein state that they have no knowledge or information sufficient to form a belief as to the same and leave plaintiff to his proofs.

WM. B. STITES,
Attorney for Defendants.

NEW JERSEY SUPREME COURT,

PASSAIC CIRCUIT.

JAMES J. MULLEN,
Plaintiff,

v.

HARRY R. WALKER and ROBERT G. WALKER, doing business under the firm name and style of H. R. WALKER & SONS,
Defendants.

} At Law.

Paterson, N. J., January 18, 1928.

Before—Hon. NEWTON H. PORTER, J., and a Jury.

APPEARANCES:
For the Plaintiff: COLLINS AND CORBIN, Esqs., by EDWARD A. MARKLEY, Esq.
For the Defendant: WILLIAM B. STITES, Esq., and NICHOLAS O. BEERY, Esq.

(A jury was duly called and sworn.)

(Mr. Markley opened the case to the jury on behalf of the plaintiff.)

(Mr. Stites opened the case to the jury on behalf of the defendant.)

JAMES J. MULLEN, sworn.

Direct examination by Mr. Markley:

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

Q. Where do you reside now? A. 130 Church Street, New Brunswick.

Q. Are you married? A. Yes, sir, three children.

Mr. Stites: I object to that and ask that it be stricken out.

The Court: Strike it out. You were not asked that.

The Witness: Excuse me.

Q. You are married, aren't you? A. Yes, sir.

Q. Now, did you reside at Wallington, Bergen County, before you went to New Brunswick? A. Yes, sir.

Q. How old are you, Mr. Mullen? A. Forty-eight.

Q. Eh? A. Forty-eight.

Q. Now, I want you to go back to May 4, 1926. Do you remember that day going to the place of business of H. R. Walker and Sons? A. Yes, sir.

Q. How did you come to go there? A. There was an ad in the paper; I read it that morning in my house.

Q. And did you, in response to that ad, go down to their place of business? A. Yes, sir.

Q. Whom did you see? A. I will have to call him young Mr. Walker. I don't know his first name.

Q. Young Mr. Walker? A. Yes, sir.

Q. Did you have a talk with him? A. I asked him about the work. I asked him if it was steady work. He said no, it wasn't steady work, that it was only one car of flour and that he didn't know how long it would take, but he would pay three dollars for it.

Q. What did you say? A. Why, I said I would go to work on it.

Q. Did you go to work on May 4, 1926? A. On

May 4, 1926, I went to work at one o'clock in the afternoon and was through about five minutes past four.

Q. What did you get for that? A. Three dollars.

Q. And when were you paid? A. Right immediately, as soon as I was through.

Q. Now, after you got through did you have any further talk with any of the Walkers? A. Mr. Walker, the old gentleman, was in there and asked me how I liked the work, and I told him I liked the work all right. He asked me if I had any experience in piling flour and I told him no, I had no experience before in piling flour. He asked me what I had done before this, and I told him I was a rigger, an iron worker by trade, and worked for Braendner as maintenance foreman. I was out of work and I was willing to go ahead and to do anything.

Q. Now, then, did he say he would send for you if he had any more need for you? A. He told me there was another car coming in on Friday morning, and asked me if I would come there, and I told him if I was not working, or if I didn't get anything steady, that I would come and do his work and be glad to do it, even though it was only a car at a time, no steady work. And so my wife and I was to the theatre in Passaic on Thursday, May 6, and Mr. Walker—

Q. You can't tell that. I have another witness to connect it. And then you returned home from the theatre did you have a card there waiting for you? A. Yes, sir.

Q. Who handed it to you? A. A woman downstairs by the name of Cartledge.

Q. Now, I have a card here, and ask you whether

this is the card that was handed to you on May 6 (handing to witness)? A. Yes, sir, it was.

Q. And on the back I see in pencil, "8 A. M. May 7." Was that on when you got it? A. That was the time for me to go there.

(Card marked Exhibit P-1.)

Q. Now, did you, on May 7th, at eight A. M., report at H. R. Walker and Sons? A. Yes, sir.

Q. Whom did you see when you arrived there on that occasion? A. Again I will have to call him young Mr. Walker.

Q. Young Mr. Walker? And won't you tell us, then, what the conversation was on the morning of May 7? A. Well, he said, "We have one car," he says, "And it is to be piled inside," he says, "Wait a minute and I will call Pete. He is our man in charge. He is the superintendent of the work; he will take care of you. You do exactly what he tells you and you will be all right." And we went to work on the car.

Q. Was he the same Mr. Walker that you had told that you had no experience in piling bags of flour? A. Yes, sir; yes, sir.

Q. The same man? A. The same man as the day before.

Q. This Pete or Peters, did you know him before that? A. Never saw him until the first day I went to work there.

Q. That is, on May 4? A. Yes, sir.

Q. Had you had any experience in piling bags of flour or any bags of cement or anything like that? A. None whatever on flour.

Q. These bags that you piled, how large were they? A. I think—I ain't positive, but I think they are 98 pounds.

Q. About how thick would they be? A. One on

top of the other, I should judge they would be about ten inches.

Q. How long? A. About thirty inches long.

Q. How wide? A. Well, about fourteen inches wide.

Q. Had you ever piled any bags like that before? A. Not flour. Not flour, no.

Q. What had been your occupation? A. General maintenance foreman for Braendner Tire and Rubber Company.

Q. Where is their place of business? A. Rutherford, at the Erie tracks.

Q. When did you last work for them prior to going to Walkers'? A. They failed on February 19.

Q. February, 1926? Is that the same year? A. Yes, sir, yes.

Q. So that, from the time you left there and the time you went to Walker was only a couple of months? A. Yes.

Q. February, March, April and May? A. Yes.

Q. And how long had you been with Braendner? A. From January the 1st, when they took charge of the plant.

Q. 1925? A. 1925 to February the 19th, the following year.

Q. What was your pay there?

Mr. Stites: I object to that.

The Court: What materiality is there?

Mr. Markley: The purpose is to show his earning capacity.

The Court: I will allow it for that purpose.

The Witness: Answer?

Q. Yes, please. A. My average pay—you couldn't figure on it. We worked—

Mr. Stites: I object to it, then, your Honor.

The Court: Let us hear what he says.

Q. Tell us what your pay was. A. From forty-five to sixty-three dollars.

Q. How often? A. $45 all the time.

By the Court:

Q. Is that a week? A. I made at that—

By Mr. Markley:

Q. Was that a week or a month? A. No, sir, we worked by the hour.

Q. You say never less than $45?

The Court: I understood $43 to $63.

A. $45 to $63.

Mr. Stites: I move to strike out the answer on the ground that it is too indefinite and uncertain, and not material to this issue.

The Court: No, I think it is material as to what he was capable of earning shortly before this time. I will allow it.

Mr. Stites: Exception.

The Court: You may have an exception.

Q. That was a week, was it? A. Yes, sir.

Q. And did you work after you left Braendner's? A. I worked for the Flintkote Manufacturing Company, in the shingle department right across the street.

Q. What did you do there? A. General maintenance work.

Q. How much were you paid there? A. Seventy-five cents an hour.

Mr. Stites: I object to that on the same ground.

The Court: I will allow it.

Mr. Stites: Exception.

Q. Seventy-five cents an hour? A. Yes.

Q. How much was your average weekly pay there?

Mr. Stites: The same objection, your Honor.

The Court: The same ruling.

A. As near as I can figure, I only worked about four weeks, and the nearest I can say is about $38.

Mr. Stites: I move that the answer be stricken out, for the same reason.

The Court: I will allow it.

Mr. Stites: Exception.

Q. Thirty-eight dollars a week? A week? A. Yes, sir.

Q. Now, going back to May 7, 1926, did Mr. Walker himself give you any instructions as to the method to be used in piling up these bags of flour? A. The only thing Mr. Walker said in my presence was—he came in while we were working. He came in where we were piling the flour and he asked this Pete if his son had instructed him how to do it, and he said he did.

Q. I don't think you understood my question. Did young Mr. Walker, when he put you to work on May 7, about eight a. m., did he give you any instructions himself? A. No.

Q. As to how the bags were to be piled? A. No.

Q. What did he say about being instructed, if anything? A. He said to go inside to the superintendent or foreman or boss or whatever he was,

this Pete, he would take care of me, to work under his directions.

Q. Did you do that? A. Yes, sir; I had nothing else to do.

Q. Now, then, these bags of flour—where were they to be piled? A. There was—

Q. Where were they to be piled in the Walker warehouse? A. On the floor of the warehouse.

Q. Now, then, did young Mr. Walker come into the warehouse? A. Yes, sir.

Q. And do anything with respect to where they were to be piled? A. Yes.

Q. Won't you tell us what he did? A. He came into the warehouse and looked over the place to see where they would pile them, and he finally found a place on the office side of the building, we will call it, that is, on the opposite side from the railroad track. There was a partition sticking out about this far from the wall (indicating).

Q. Yes? A. He said, "This would be a good place to pile the flour," and he said to take the car in here. He said, "Pile them up as close as you can get them together, because we want them all here without blocking the runway."

Q. Did he say how high they were to be piled? A. Up as high as possible.

Q. Now, how wide was this space from the partition to the next pile of bags? A. I should say about six feet; it just took three bags of flour in length.

Q. In length, to cover the space from the partition to the next pile of bags? A. Yes, sir, close up against it.

Q. What was the height from the ceiling to the floor? A. I should say somewhere around, between—I don't know exactly—about fourteen feet, I should say.

Q. All right. Now, then, when you began to pile those bags, who told you how to pile them, if anybody? A. The superintendent, Pete.

Q. Had you ever piled them before? A. Never piled them.

Q. Now, before the accident did you get any tiers up? A. We got the one tier finished entirely.

Q. What do you mean by finished? Up to the ceiling? A. Yes, sir.

Q. Can you give us any idea how many bags of flour there were in that tier, from the partition on one side to the other pile of bags on the other? A. Yes, sir, ninety bags, six in a tier, one tier going this way, six, and the other tier crossing that way, six, and they went fifteen high; that would be ninety bags.

By the Court:

Q. Just you and Pete were working there? A. Yes, your Honor.

By Mr. Markley:

Q. Now, while you were progressing with the work did any of the Walkers come in? A. Young—only just the old Mr. Walker; I will have to call him old Mr. Walker—pardon me for saying so. But he came in and he said, he asked Pete if his son had instructed him how to pile, and Pete said, "Yes."

Q. Now, then, you finished one pile right up to the ceiling, you say? You finished one pile almost to the ceiling? A. In order to finish the one pile we had to start the second pile, and we carried that up about eight bags high, and then we took the hand truck and go into the car and

take a load of five bags on the truck. We would set the truck in that position with the bags on it (indicating). I would get on one side and him on the other and pile them up on top of this eight high. Then we put a bag on end and climb up on this eight high and then lifted them and piled them in tiers, and he would say, "To me, to you, to center," and so forth, and that was all the time—

Q. What do you mean, to me, to you? A. He would throw it like that to me (indicating).

Q. Were you both standing on the second pile at that time, that was eight feet high? A. Yes.

Q. You would be, then, finishing the first pile? A. We was just finishing the first pile.

Q. Yes. Now, where were you when the accident happened? Where were you standing? A. I was standing on the second pile, with my back to the partition.

Q. Yes? A. We were out, I would say, thirty inches from the wall this way (indicating), and standing on the second tier, with my back up against this partition.

Q. Now, what happened while you were standing on this second pile which was about eight high? What happened? A. Without any warning at all, the middle of this tier—

Q. Which tier? A. The tier against the wall.

Q. The first pile? A. The pile that was up fully. Without any warning whatever the middle of this tier—I will have to use the word bellied out or belged out, and threw me against this partition, which is no possible chance for me to get down, and the bags fell. The force of them put me on the floor.

Q. Did you attempt to hold up that tier at all

with your hands? A. It would be foolishness. No, sir, I didn't.

Q. Did you have a chance to get off? A. Positively not.

Q. Where did you land after this tier had bellied out at the center? A. Right on the floor.

Q. Could you say about how many bags had fallen from that first pile? A. I would say there was about, roughly, thirty bags came off the tier.

Q. About how much did they weigh, do you say? A. 98 pounds, I think.

Q. Apiece? A. Yes.

Q. Were you able to get up? A. Why, no.

Q. Why not? A. I thought my both legs were cut off.

Q. Could you stand up? A. No.

Q. Were you unconscious? A. No, I wasn't unconscious, no, sir.

Q. What was done then? A. Why, Pete, this Pete ran up to the office.

Q. You can't tell what Pete did. But did an ambulance come there? A. Yes, sir.

Q. Were you taken to a hospital? A. Yes.

Q. What hospital were you taken to? A. Passaic General.

Q. How long did you remain at the hospital? A. Twenty-one days, and came out on my own request.

Q. You wanted to go home? A. Yes, sir.

Q. Was anything done for your legs? What was done in the hospital for your legs? What did they do to them? A. Put bandages—the first two days they didn't do anything, only just kept them in ice bandages. I think it was the fifth day they took me up in the operating room, and Dr. Glas-

gow set my legs with the help of Dr. Carlisle, I think his name is.

Q. Was a plaster case put on? A. Yes, sir. And he told me—

Mr. Stites: I object to that.

Q. You can't tell what he told you. The doctor will have to speak for himself, Mr. Mullen. When you went home, how did you get home from the hospital? How many weeks were you there? A. Twenty-one days.

Q. How did you get home? Walk home? A. No, sir, in a car, my wife got a friend of hers to take me home in a car.

Q. Then were you confined to your home? A. Yes.

Q. Do you remember how long? A. Yes, sir, being without funds or any money—

Mr. Stites: I object to that.

The Court: Strike that out.

Q. Never mind that. How long were you confined to your home? A. In Passaic or Wallington?

Q. Yes. A. Till we moved away from there.

Q. Where did you move to? A. To my mother-in-law's in New Brunswick; put my furniture in storage.

Q. Have you been able to take any regular job? A. No, sir.

Q. Have you worked at all? A. Yes, sir.

Q. What have you done? A. Doing janitor work.

Q. Where? A. At a building, 108 Church Street, New Brunswick, the Solomon Building.

Q. How much do you get paid for that? A. $18 a week. My wife helps me.

Q. Your wife helps you with that? A. Every day.

Q. When did you start doing that work? A. There was—about the 15th of December, that is right directly—

Q. The 15th of December what year? This was 1926? A. 1926, the same year I got hurt.

Q. You were hurt in May? A. Yes.

Q. And you do janitor work, did you say? A. Yes.

Q. In an office building? A. Yes.

Q. After hours? A. Yes, sir.

Q. How much did you get paid at first for doing that? A. $15.

Q. When were you raised to eighteen? A. In March.

Q. March of what year? A. The following year.

Q. 1927? A. Yes, sir.

Q. And you are still getting $18 a week? A. Yes, sir.

Q. Now, how much of the work do you do and how much of that janitor work does your wife do? A. I simply open the doors of the offices and pick up the papers and take care of the newspapers and so forth, and my wife does all the sweeping and scrubbing.

Q. Do you have any trouble remaining on your feet at all? A. Yes, sir, I do, at all times.

Q. What seems to be the trouble? A. Very burning sensation in my heel, and my three toes are numb all the time.

Q. Have you any pain? A. Pain? Very severe pain. Some pain all the time, and severe pains at times.

Q. Do you know where your legs were broken? A. Five places in the right leg, I don't know just

where, and there was two fractures or whatever you call them in the left leg.

By the Court:

Q. How many in the one leg? A. Five.
Q. Five in which leg? A. The right.
Q. And how many in the left? A. Two.

By Mr. Markley:

Q. Are they up near the thigh or are they down near the knee and ankle? A. In the left leg they are in the calf of the leg, but in the right leg my knee is affected so as I can't bend my knee properly, and it is from there down almost to my toes.

Q. Have you any pain in those legs? A. In my heel all the time.

Q. Now, what is the matter with the heel? Which heel is it? A. My right.

Q. Just explain that to us, will you? A. When I was in the hospital they put a pressure on my leg in order to keep it straight. They told me at first I had one break. Next morning Dr. Glasgow said I had five in that leg.

Mr. Stites: I object to that.

The Court: Strike it out. Don't tell us what they told you.

Q. You see, Mr. Mullen, you can't tell what the doctor said. A. I didn't know that.

The Court: Tell us about the heel. You were starting to tell about the heel.

Q. Stretching your leg with a brace. A. There was a wooden circle went around my thigh, and two iron rods went down the side, set into another piece and across my instep, with a set screw on the outside, sticking out from the bed.

Q. Yes, and what did they do to your heel? A. Every morning Dr. Glasgow would come and tighten that up, and that night I would sure get no sleep.

Q. Did you sleep at all while you were in the hospital? A. I don't think I slept for fourteen nights—constant pain—and they would give me one of them—

Q. Injections? A. Yes, sir.

Q. What did they do to your heel? A. They didn't do anything to my heel, because it was even while the stretcher was on my leg that this thing came on my heel.

Q. What is it? What was it? A sore? A. Pressure sore.

Q. Did that hurt? A. Sure did.

Q. Well, did it heal up or become infected or what happened to it? A. No, sir.

Mr. Stites: I object, your Honor, unless it is shown that that heel condition was due to the injuries received in this accident.

The Court: No, I think if it is the result of the treatment he received that is part of the injury.

Mr. Stites: Exception.

The Court: You may have it.

Q. Go ahead, Mr. Mullen, and tell me what became of that sore. Did it get worse or better? Did it heal up or not? A. When Dr. Glasgow took the case off in my house in Wallington he said—

Mr. Stites: I object.

The Court: No, no, not what he said. He will be here, I suppose.

The Witness: No, sir, it didn't heal up.

Q. Well, did it become infected? A. On Decem-

ber the 1st I had to come right down here to Passaic to the doctor, and he looked at it and he told me to—

The Court: No, no. You see, you are again telling us what he told you.

Q. When you came to the doctor in Passaic what was the condition of it then? Was it healed? A. Very bad.

Q. What do you mean by "very bad"? That is what we want to get at. Was it healed or not? A. No, it was not healed.

Q. Was it infected or not? A. Yes.

Q. Was there any odor from it? A. Yes.

Q. What did the doctor do? What did the doctor do when you came to him when it was in that condition? A. Dr. Glasgow?

Q. Whatever doctor you saw. A. First was Dr. Simon.

Q. Which Dr. Simon? Philip? A. I think it is Philip, the younger man.

Q. All right, what did he do? A. He took a pair of pliers and he pulled this lump out of my heel. It was a lump as large as a quarter, I should say, and maybe a half inch deep; pulled it right out of my heel. Then he told me—then I went to Dr. Glasgow.

Q. Did you do anything as a result of what he told you? Did you do anything as a result of what Dr. Simon told you? A. Yes.

Q. What did you do? A. I used his treatment.

Q. What did you do? A. Bathed my foot in solutions of different kinds, and powders for different days.

Q. Did your foot heal up? A. No, sir.

Q. Was it still sore? A. Yes.

Mr. Markley: Will your Honor permit me to show it to the jury? Would that be proper?

The Court: No, I don't think so.

Q. Is it painful now? A. Yes.

Q. Can you wear a shoe in a normal way? A. No, sir.

Q. Have you got a shoe on? A. With the heel cut.

Q. Can you show that?

The Court: Yes. Stand up and show it to the jury. The sore is behind the cut in the shoe?

Mr. Markley: Yes.

Q. Is that the way you wear your shoe all the time? A. Yes.

By the Court:

Q. You can't wear it any other way? A. No, sir.

By Mr. Markley:

Q. Do you have pieces of this solid flesh that you have testified to—does that come out or not? A. Well, I have got the second piece of it right in my pocket here.

Q. I guess we don't want to see that, either.

The Court: No, I don't think so.

Mr. Markley: All judges don't rule the same way, your Honor.

The Court: I know, but I think it is poor practice to exhibit those things; the doctors will describe it, I haven't any doubt.

Q. Do you walk normally or with a limp? A.

I walk with a limp. I can't walk any distance without a cane.

Q. If you stand up for, say, ten or fifteen minutes, what happens? A. The pain in my foot gets so that I have to throw off the shoe whenever possible.

Q. Well, now, did you have any treatments after you left the Passaic General Hospital, at any other hospital? A. Yes, sir.

Q. What hospital did you have those treatments at? A. I was treated—I was sent from Dr. Glasgow to the Middlesex Hospital in New Brunswick, and I was treated there until some time in the middle of December away up until March. Twenty-six treatments, and I got to go back there again.

Q. What kind of treatments were they? A. Electrical treatments.

Q. Where were they administered on your body? A. On my both legs.

Q. Do you know how much you owe for those treatments?

Mr. Stites: That is objected to, your Honor, how much he owes.

The Court: Will you have any proof of that?

Mr. Markley: I have the bill here.

Q. Is this the bill you received for those treatments? A. Yes, sir.

Q. From the Middlesex General Hospital?

Mr. Stites: I object to that. I haven't seen it.

The Court: Objection sustained. Show it to him and see if he will consent.

Mr. Stites: I have no way of cross examining. This statement doesn't show—

Q. How many treatments did you have? A. Twenty-six, I think.

Q. How much was each treatment?

Mr. Stites: I object to that, your Honor. It is improper.

Mr. Markley: I will connect it up later.

The Court: You can't connect it up by the Middlesex Hospital people.

Mr. Markley: By my doctors, as to what is the reasonable charge for electrical treatments to two legs of a man.

The Court: All right, I will allow it.

Q. It is electric massage or treatment of the legs; that is what it was, wasn't it? A. Hot, yes.

Mr. Stites: I have no objection if it can be connected up by someone that is familiar with the charges for that particular specialty of medical treatment.

The Court: Counsel says he will connect it up.

By the Court:

Q. What was the charge? A. Two dollars.

Mr. Markley: Making $52 altogether.

(Paper marked Exhibit P-2.)

Q. Now, is this the bill from the Passaic General Hospital for the time you were there? A. Yes, sir.

Q. While Mr. Stites is looking at that I show you another bill from Dr. Glasgow and ask you whether that is the bill for this accident. A. Yes, sir, that is the bill.

Mr. Stites: May I cross examine on this?

The Court: Yes.

Cross examination by Mr. Stites:

Q. Mr. Mullen, the bill of the Passaic General Hospital was paid by Mr. Walker, wasn't it? A. Not that I know of.

Q. You didn't pay it? A. No, sir.

Q. No. And the bill of Dr. Glasgow was also paid by Mr. Walker? A. Not up to December, not the last time I saw him, sir. I don't know if it was or not.

Q. They paid him, though, didn't they? A. I don't know.

Q. You haven't paid him? A. No, sir, I haven't paid any bills.

Q. The bill of Dr. Glasgow is from May 7, 1926, to July 20, 1926?

Mr. Markley: The bill speaks for itself, I suppose.

Q. That was the bill for just immediately after you were injured, wasn't it? A. Yes, sir.

Q. And that was paid by Mr. Walker, wasn't it? A. I don't know, sir.

Q. You don't know? A. No.

Q. You don't know whether it is paid or not? A. No, sir.

Q. I see. And the bill of the Passaic General Hospital, from May 7 to May 25, 1926, you don't know whether that is paid? A. No, sir, I don't.

Mr. Stites: I don't think I will object to those.

(Papers marked Exhibits P-3 and P-4.)

The Court: How much are they?

Mr. Markley: The Passaic General Hospital is $83.

The Court: And Dr. Glasgow?

Mr. Markley: $200.

I have here the hospital record, and I would like to offer that, if Mr. Stites has no objection.

The Court: Let him see it.

Mr. Stites: If Mr. Markley says these are the records I will not object to them.

Mr. Markley: I have the young lady who brought them from the hospital.

(Papers marked Exhibit P-5.)

The Court: That is of the Passaic Hospital?

Mr. Markley: Passaic General Hospital, yes. I won't read it. It is to show the history of the case. That is the main purpose of it. Cross examine.

By the Court:

Q. What happened between the time you got out of the Passaic General Hospital after the twenty-one days, and the time you had treatments in the Middlesex Hospital? Did anyone treat you then? A. Dr. Glasgow.

Q. His bill is up to July? A. Yes.

Q. Who treated you from July to December, when you went to Middlesex? A. I was just working under his directions, bathing my foot in alcohol and rubbing it.

Q. That was all? A. Yes, sir.

The Court: All right, cross examine.

Cross examination (continued) by Mr. Stites:

Q. Mr. Mullen, I show you a paper and ask you if that is your signature? Is that your signature (handing a paper to the witness)? A. I think it is, yes.

Q. That is your signature, too, isn't it (indicating)? A. Yes, sir.

(Paper marked D-1 for Identification.)

Q. Mr. Mullen, did you ever work as a longshoreman? A. Yes.

Q. When? A. Back twelve years ago.

Q. Where? A. New York City.

Q. And for how long a time were you employed as a longshoreman? A. Different periods, for perhaps three years, between structural iron working and longshore work.

Q. For over a period of three years at different intervals you assisted in loading and unloading ships? Didn't you? A. Yes, sir.

Q. And in that work as longshoreman did you ever unload ships which contained bags of sugar? A. Run a winch on them, hoisted them out of the hold, a steam winch.

Q. Did you ever help load them on ships? A. You don't load sugar here.

Q. Just unloaded them? A. Yes.

Q. You are not a stationary engineer, are you? A. No, sir.

Q. As a longshoreman what did your duties consist of in unloading these bags of sugar from the ships? A. What they call drum end work, and run the winch, that is, hoisting the cargo out of the hold.

Q. The winch was run by a stationary engineer, wasn't it? A. Steam supplied by the donkey engine aboard ship.

Q. You didn't operate the engine? A. No.

Q. Did you work on the sling? A. No, sir.

Mr. Markley: On the what?

Mr. Stites: The sling.

Q. That is what they call it, isn't it? A. Yes, the sling.

Q. You didn't work on that? A. No, sir.

Q. Just what was your duty? A. I say no—sometimes I would go down and give them a hand if a man was short or something like that, but my duties as the general routine work was on deck all the time, running the winch, tending the hatch, and rigging up.

Q. Now, Mr. Mullen, just a minute. Didn't you at times help load these bags of sugar in the sling? A. At times, yes.

Q. At times? A. At times.

Q. Then you were familiar, weren't you, with the unloading of bags of sugar from ships? A. Not what you call practical, no.

Q. Well, you saw it done? A. Why, yes.

Q. You saw how they were arranged in the sling? A. Why, they simply throw four in the sling, sometimes they come—

Q. How were they removed from the sling, Mr. Mullen? A. They are put on the truck on the dock. I would lower them over the side, and the man there put them on the truck on the dock and they were taken away on trucks.

Q. Were any of them taken away on lighters? A. Yes, sometimes.

Q. Sometimes. And for a period of three years, at various times, you had been doing that prior to the work that you did for the Walkers? A. It is a long time ago.

Q. Twelve years ago, you say? A. Yes, yes.

Q. Now, you saw the ad in the newspaper that you responded to in reference to this employment? A. I read it in my own house.

Q. What is that? A. I read it in the paper in my own house.

Q. I see. And was that the night before May 4, or the same day? A. Why, on the morning of the 4th I was sitting at breakfast when I read it.

Q. At that time you hadn't any employment, had you? A. No.

Q. And you hadn't had any since the February previous? A. No, sir. I just left the Flintkote the day before.

Q. What is it? A. I just got through with the Flintkote Manufacturing Company the day before.

Q. Oh, then you had worked up until May 4th? A. May the 3rd, I think it was.

Q. May 3rd? A. I think so.

Q. Then, you didn't have anything else to do at that time? A. No, sir, I was laid off that night, Monday night, May 3rd, I think that is the date.

Q. What was the nature of your work there? A. General maintenance work. The last work I done was putting catches on windows.

Q. Sort of a handy man, eh? A. Yes.

Q. Well, when you went down to Mr. Walker's place of business, whom did you see there? A. I saw young Mr. Walker.

Q. Mr. Harry Walker, Junior? A. I guess that is his name.

Q. And what did you say to him? A. I asked him, I said—when I went in I said, "I saw an ad in the paper; I came to answer that ad."

Q. Yes? A. He said, "Well, this work is only temporary." He says it is about, generally takes about three hours. He says, "We have only got one car of flour and we pay three dollars for it." He says, "We don't want anybody permanently; it ain't steady work." I said, "Oh, I thought it

was," and he said, "No." So I said if he wanted me to do it for three dollars, I wasn't doing anything that day, and I would do it willingly to get the money.

Q. Weren't you to work for a dollar an hour? A. What, sir?

Q. Weren't you to work for a dollar an hour? A. The understanding was three dollars for the car, and it would take about three hours, previous—always took about three hours.

Q. Didn't you ask for the rate you were to receive? You were interested in that, weren't you? A. I asked for the amount, yes.

Q. And weren't you told that it was a dollar an hour? A. No, never was. No.

Q. You were not told that? A. Not that I remember. The whole money was in the lump sum, a car lot.

Q. Well, was anything said about other carloads of flour which they were expecting to arrive there? A. After I finished. After four o'clock that day. I worked from one to four, ten minutes past four, something like that.

Q. You worked three hours? A. Yes.

Q. For that you received three dollars, at the rate of a dollar an hour? A. Yes.

Q. I mean at the original conversation with Mr. Walker, before you went to work, was anything said about other carloads of flour coming in? A. No.

Q. But it was discussed that night when you finished the work? A. Yes, sir.

Q. And with whom did that discussion take place? A. Mr. Walker, Senior, was at the desk.

Q. Any one else there? A. Yes.

Q. Who? A. The other Mr. Walker.

Q. Junior? A. Yes.

Q. What was said about other carloads of flour coming in at that time? A. Shall I explain just the way he said it?

The Court: Yes, yes.

A. He said to me, "How do you like this work," and I liked it all right if it was steady, but it wasn't steady and I couldn't afford to hang around for the work like that. "Well," he says, "We got one car more coming in on Friday. Would you come down and do that?" I said, "Only too glad to do it if I ain't working on a steady job." He says, "Well, how will we know?" "Well," I says, "You could let me know." So that is the way he came to come to my house.

Q. Well, you knew at that time that you hadn't any job, didn't you, Mr. Mullen? A. Why, no, sir; I was figuring with the Athenia Car Company, to go to work there.

Q. With whom? A. Athenia Car Company.

Q. Athenia Car Company? A. Yes, sir.

Q. You had anticipated taking a job there? A. In fact, that is where my wife was that afternoon, Friday afternoon.

Q. You didn't take that job? A. I was to go to work the following Monday morning, but I didn't go.

Q. Well, you knew that the Walkers were in the flour business, didn't you? A. Not until I went there that morning.

Q. But you saw the large warehouse, didn't you? A. Yes, when I went there. Yes.

Q. You saw the flour that was in there? A. After I was hired, yes, sir.

Q. Well, when you first went to work on May

4 what did you do, just go right in and go to work? A. Why, Mr. Walker took me in and showed me to this Pete, the superintendent or foreman or whatever you call him, and told me to do as he said; he would show me what to do.

Q. He told you that Pete would show you what to do? A. Yes.

Q. Of course, you knew what the work was, didn't you? A. Why, I knew it was unloading the car of flour when I went in there, yes, when I got the job.

Q. And you would take a hand truck in the car— A. Yes.

Q. —and pile the bags of flour on the hand truck? A. Yes.

Q. About how many? A. Well, the first day I think we put four bags on a truck because they weighed 140 pounds.

Q. Then you pushed the truck out of the car into the warehouse? A. Yes, sir.

Q. To pile the flour up? A. No, sir, not that day; just throwed them off the truck up against the wall, just four high, as they came on the truck; throw them against the wall, to be either piled later on or taken away in the automobiles.

Q. I see. The first day you only piled them four high? A. Didn't touch the piling at all.

Q. I see. Well, weren't these the bags that you had removed on the 4th that you were piling on the 7th? A. No, sir.

Q. Were the bags that you unloaded on May 4th taken in the warehouse? A. Yes, sir.

Q. In the same place where you were taking the bags on May 7th? A. No, sir, different sides, because there wasn't any place they could be put.

Q. Was it in the same warehouse? A. Yes, sir.

Q. Mr. Walker told you that he would like to have you come back and do this work, didn't he? A. Yes, sir.

Q. And you were willing to do it? A. As I said, if—

Q. If you didn't get any steady job you were willing to take this job of unloading flour whenever the cars came in? A. That one car, yes, sir. I couldn't promise him that I would do it, but I would do it if not working.

Q. That is, you promised Mr. Walker that you would do this work of helping unloading the flour if at the time you were not engaged in some other steady job? A. Yes, sir.

Q. I show you another paper, Mr. Mullen, and ask you if that is your signature there (handing a paper to the witness)? A. Yes, sir.

(Paper marked D-2 for Identification.)

Q. I show you another and ask you if that is your signature? You can look at all of it if you want to. A. Yes, sir, that is my writing.

Q. You swore to that, didn't you? That is your affidavit, isn't it? A. I don't think I ever swore to anything.

Q. Is that your signature there? A. Yes, sir. I don't know whether—

Mr. Stites: Mark that, please.

(Paper marked D-3 for Identification.)

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

(Paper marked D-4 for Identification.)

Q. Is that your endorsement? Look at all of these. A. Yes, they are.

(Five papers marked D-5, D-6, D-7, D-8 and D-9 for Identification.)

Q. Now, Mr. Mullen, didn't you consider that whenever you worked for Mr. Walker that your wages were to be fixed upon a basis of forty-five to sixty dollars per week? A. No, sir.

Mr. Markley: May I have that repeated?

The Court: Didn't you consider that whenever you worked for Mr. Walker your wages were to be forty-five to sixty dollars a week? And the answer is, "No, sir."

Q. Will you examine that, Mr. Mullen. Number 28 there. That is the paper which you said you signed. A. I never saw that before.

Q. You never saw it before? A. No.

Q. But you signed it, didn't you? A. That is my signature.

Q. Didn't you read this paper before you signed it?

Mr. Markley: I object to this, your Honor. It is not cross examination.

Mr. Stites: He has been asked about his compensation, your Honor, on his direct examination.

The Court: I suppose it is on that theory, but with respect to that petition, if that is what it is, might contain otherwise, I think perhaps it is not cross examination. With respect to the wages that he received and the nature of his employment, whether it was casual or permanent, I suppose you might cross examine him on that by the use of that paper. But if you propose to go into the contents of that paper, all of it, it would

not be cross examination, I think. You would have to make him your witness at the proper time.

Q. Well, at the time that this paper, which is marked for Identification D-3—you considered that you were to have steady employment with Mr. Walker's concern, didn't you?

Mr. Markley: Objected to.

A. Never knew anything about it.

Mr. Markley: I will withdraw the objection.

Q. Well, it was discussed at that time that you were to have this job if you wanted it and could take it whenever there was a carload of flour in? A. Yes.

Q. That was discussed, wasn't it? A. Of the carloads, yes, if I wasn't working I would come down and do the work.

Q. And for that you were to get a dollar an hour? A. A dollar an hour was never mentioned, sir. It was three dollars for the carload lot, regardless of the time it took, whether two hours and a half or four hours.

Q. Or a half hour? A. Well, it could not be done in a half hour.

Q. You got along all right on May 4, didn't you? No trouble in unloading the flour on that day? A. Yes, sir.

Q. Everything was all right? A. Yes, sir.

Mr. Stites: I think that is all.

ALICE CARTLEGE, sworn.

Direct examination by Mr. Markley:

Q. Where do you live, Mrs. Cartlege? A. I now live at 19 Belmont Avenue.

The Court: A little louder. 19 Belmont Avenue. Paterson?

The Witness: Garfield.

Q. Garfield. Did you live in the same house with Mr. Mullen at one time, in May, 1926? A. Yes.

Q. And do you remember a man's coming to you on May 6 with this card (handing exhibit to witness)? A. Yes.

Q. Did he give it to you? A. Yes.

Q. And did you give it to Mr. Mullen? A. Yes, I did.

Q. Was the writing on the back when you got it, just as it is there? A. Yes, done at my house.

Q. Wrote it in your house? A. Yes.

Mr. Markley: That is all.

Cross examination by Mr. Stites:

Q. Ever see him there before? A. No, sir.

Q. What did he say? A. He asked me—when he came in I came outside, because Mr. Mullen told me if someone came to the house I could see who it was for him, and I came outside when Mr. Walker came and I told him that Mr. Mullen was out.

Q. He told you that he was expecting someone to come? A. No, only in case—I was minding the baby for them, and I thought perhaps it was someone for them.

Q. When Mr. Mullen left that time where did he go, do you know? A. I don't know.

Q. Go to the theatre? A. I don't know.

Q. When he left he told you he was expecting someone to call for him? A. He didn't tell me he was expecting anyone.

Q. What did he say to you? A. In case someone should come, why, I could see who it was, because he lived upstairs and I lived downstairs.

Q. In case someone should come there and find him out? A. Yes.

Q. Then, he was expecting someone, wasn't he? A. No, he was not.

Mr. Markley: I object.

The Court: I always leave word to take my telephone calls, but I am never expecting any. There is a big difference.

Q. That is all he said to you? A. Yes, that is all.

Q. And what did the man say when you saw him? A. I told him Mr. Mullen was out.

Q. What did he say to you at first? A. I can't exactly remember.

By the Court:

Q. Did he ask for Mr. Mullen? A. Yes, he did.

By Mr. Stites:

Q. Did he say what he wanted of him? A. No, he didn't say, but afterwards he did. He left—he said he would leave his card and I should tell Mr. Mullen that he called, and if he could not work the next morning he should ring him up.

Q. If he could not report the next morning he should ring him up? A. Yes.

Q. And then when Mr. Mullen came home— A. I gave him the card.

Q. What did he tell you, what did you tell him? A. I told him what Mr. Walker said.

Q. What did Mr. Mullen say? A. He didn't say anything. He just took the card and went upstairs.

Q. I see. You lived in the same house, I believe? A. Yes.

Q. Mr. Mullen had not worked for some time previous to May, had he? A. Yes, I think he had.

Q. Wasn't there a strike in Passaic at that time? A. No, he just was laid off a few days before, or I don't know how long before.

Q. Wasn't that about the time of the strike? A. No, there was no strike.

Mr. Markley: I object to it as immaterial.

Q. There wasn't any strike? A. No, because he worked in the same place my husband worked in.

Q. Where was that? A. Braendner Tire Company before that.

Q. Your husband worked there, too? A. Yes.

Redirect examination by Mr. Markley:

Q. You say that Mr. Walker said to you that if Mr. Mullen couldn't come the next day to work, to telephone? A. Yes, he should be sure to telephone.

Q. If he could not come? A. Yes.

BERTHA MULLEN, sworn.

Direct examination by Mr. Markley:

Q. Are you the wife of James J. Mullen? A. Yes, sir.

Q. Were you married to him in May, 1926? A. No, sir.

Q. When were you married? A. January, 1923.

Q. Then, you were married in 1926? A. Yes.

Q. If you were married in 1923? A. Yes.

Q. Have you lived with him ever since you were married to him? A. Yes, sir.

Q. You, of course, know nothing about the accident. I suppose you found out your husband was in the hospital? A. Yes, sir, I found out three o'clock that afternoon.

The Court: A little louder. You found it out three o'clock that afternoon?

The Witness: Yes.

Q. Did you go to the hospital? A. Yes.

Q. Did you see him there? A. Yes.

Q. I suppose you visited him after that at the hospital? A. Yes, sir.

Q. Now, when he came home did you take care of him? A. Yes, sir.

Q. And outside of this job that he has in New Brunswick as janitor, has he had any other job? A. No, sir.

Q. You live there with your mother, I believe? A. Yes, sir.

Q. Do you help him with this janitor work every night? A. Every night.

Q. You go down to the place with him, where he works? A. Yes.

Q. To help do the work, as I understand it? A. Yes.

Q. Could you tell whether your husband had any pain from this accident?

Mr. Stites: I object to that.

Mr. Markley: I will withdraw it. Cross examine.

Cross examination by Mr. Stites:

Q. Mrs. Mullen, you live with your mother, do you? A. No, sir.

Q. Whose mother-in-law is this that you live with? His mother? A. No, I live at 130 Church Street, right across the street.

Q. You don't live with your mother-in-law? A. No, sir.

Q. You live right across the street? A. Yes.

Q. How far away is this building of your husband's? A. Right up the block.

Q. Eh? A. It is right up the block.

Q. About a block away? A. Yes, sir.

Q. Eh? A. Yes, sir.

Q. How does he get up there to take care of this work? A. Walks up with his cane and I go up, and then I do the work, and he will just pick up around the papers, what he can.

Q. Does he walk up? A. Yes, sir.

Q. Who does the sweeping? A. I do.

Q. Does he help you? A. No.

Q. How many times do you go down to the building a day? A. Well, we go once a day.

Q. Once a day? A. Yes.

Q. Who tends the furnace? A. There isn't any; it is an oil burner.

Q. What is that? A. It is an oil burner.

Q. An oil burner? A. Yes.

Q. Who tends to that? A. Why, all we have to do is wind the clock up.

Q. Wind the clock up? A. Yes, the oil burner.

Q. Don't you have to turn any oil on? A. No, sir.

Q. Where does the oil come from? Barrels? A. Why, the man brings it in and puts it in through the sidewalk, and it goes down to the cellar.

Q. Who fetches the barrels? A. Why, the concern that they buy the oil off.

Q. Who attaches them to the oil burner? You? A. No, sir.

Q. You and your husband? A. Between us.

Q. Between you? A. Yes.

Q. How large are these barrels of oil? A. Why, it is a tank of oil.

Q. How large is it? A. That I don't know.

Q. That high (indicating)? A. I couldn't say; I don't know anything about them.

Q. Four or five feet high?

By the Court:

Q. Did you ever see it? A. No, sir. We just have to turn a clock upstairs.

Q. Did you ever see the tank? A. No.

Q. If you didn't see it, don't try to describe it.

By Mr. Stites:

Q. I thought you said you and your husband adjusted these tanks to the oil burner so as to get the oil in it? A. No, sir. You go in—they put the oil down through the sidewalk. The oil company comes and puts the oil in. You go upstairs and you turn a clock, and then there is a little thing you move to put it on and shut it off.

By the Court:

Q. Is that a thermostat? A. Yes, sir.

Mr. Markley: As I understand it, this oil is put into a pipe from the street; they had nothing to do with it at all.

By Mr. Stites:

Q. Did you and your husband fix this tank? A. There isn't any tanks.

Q. Well, what was it you and your husband did that you were telling us about in connection with this furnace? A. Why, all we do, when the man

comes you go upstairs and get a thing to unscrew this thing on the sidewalk that the man puts the oil in. That is all to do with it.

Q. Then you just turn it on? A. Yes.

Q. Does it have to be cleaned out? A. Not as I know of.

Q. The burner does not have to be cleaned out? A. Not as I know of. I haven't seen the burner myself.

By the Court:

Q. What? A. I haven't seen it burning myself; all I seen the thermos upstairs.

Q. Well, didn't you ever go into the cellar? A. No.

Q. You don't know what is in the cellar? A. No.

By Mr. Stites:

Q. How do you know there is an oil burner down there? A. My husband and Mr. Seller goes there.

Q. Does your husband go in the cellar? A. He goes in through the shoe store.

Q. You don't know what he does when he goes down there? A. No, sir.

Q. Is there an elevator in that building? A. Not as I know of.

Q. How many floors are in the building? A. Two floors.

Q. The only way to get up the two floors is to walk up? A. Yes.

Q. No elevator? A. No, sir.

Q. Your husband does that all right? A. Well, it takes him quite some time to get up the steps.

Q. But he does it? A. Yes.

Q. He goes up and down, doesn't he? A. He does, yes.

Q. How does he pick this paper up? A. Why,

he collects it from one room—he has a barrel outside—and then dumps it in the barrel, and I carry the barrel down myself.

Q. You carry the barrel down? A. Yes.

Q. Alone? A. Yes.

Q. How big a barrel is it? A. Oh, like an ash can.

Q. How long had it been before your husband had been doing any work prior to May 4, the time he was injured? A. Oh, maybe a week or so.

Q. Prior to May 4, do you remember that was the first day he went to work for Walkers? A. Yes.

Q. Prior to that, you say, he hadn't done anything for a week? A. No, sir. He left Flintkote.

Q. He hadn't been working for a week? A. No, sir.

Q. He hadn't left the Flintkote the day before, had he? A. No, sir.

Q. Been home a week before; is that right? A. I don't know exactly how long he had been home, but when he left the Flintkote he saw the ad in the paper.

Q. But he had been home a week before he saw that ad? A. That I can't say.

Q. Isn't that what you said first? A. But I am not sure.

Q. Isn't that—you don't know whether that is true or not? A. I am not sure.

Redirect examination by Mr. Markley:

Q. When you first went to New Brunswick did you live with your mother then? A. Yes.

Q. And after you had been there a while your husband got this job and you moved your belongings across the street? A. Yes.

Mr. Markley: That is our case, your Honor.

PLAINTIFF RESTED.

Motion for Non-Suit.

Mr. Stites: Your Honor, I move for a non-suit, first upon the ground that it shows by the testimony of the plaintiff that this was not a casual employment, and therefore, it should be decided under—in accordance with the Workmen's Compensation Act; and upon the further ground that it appears from the testimony that the plaintiff was guilty of contributory negligence; and further that he had worked at the defendants' place of business prior to the date of the accident, and he necessarily knew the dangers of piling flour and unloading it, having worked at it at a previous occasion, that the dangers, whatever they were, were apparent; and that he assumed the risks incident thereto; and on the further ground that it appears that if there was any negligence in the case it was both the negligence of the plaintiff and a fellow employee who was working with him at the time.

The Court: I will hear you on the reply, Mr. Markley.

(Discussion.)

The Court: The question of contributory negligence, of course, is a question of fact for the jury. I will overrule the motion on that point. I will reserve decision on the question of the assumption of risk and whether the case comes within the Workmen's Compensation Act. I will reserve decision on the casual employment.

Mr. Stites: And your Honor will protect me as to my exceptions?

The Court: Certainly. When I have ruled definitely. I will hear your defense.

(Adjourned until Thursday, January 10, 1928, at ten o'clock in the forenoon.)

Paterson, N. J., January 19, 1928.

The Court: Decision was reserved yesterday on the motion for a non-suit. One of the reasons urged in support of that motion was that the case came within the Workmen's Compensation Act because the employment by the defendants of the plaintiff was of the nature provided for in that Statute and was not of a casual kind as included under Section 23, Subdivision C, of said Act. That section provides that employer is declared to be synonymous with master and includes natural persons, partnerships, and corporations. Employee is synonymous with servant and includes all natural persons who perform services for another for financial consideration, exclusive of casual employment, which shall be defined, "If in connection with the employer's business, as employment, the occasion for which arises by chance or is purely accidental, or even in connection with any business of the employer, as employment not regular, periodic, or recurring."

It will be noted that the casual employment there defined is that occasioned by chance or that which is purely accidental or which is not in connection with the employer's business, not regular, periodic, or recurring. In the case at bar the defendants were engaged as flour merchants. They received flour at their warehouse by rail. They transferred the flour from the cars to their warehouse. The plaintiff was employed by the defendants on two occasions to assist in moving the flour from the cars to the warehouse with another employee. The first occasion was on May 4, 1926, when he worked for three hours, and the second was on May 7, 1926, when, while engaged in piling the bags of flour in the warehouse, some of the bags became

dislodged and falling on him caused the injuries of which he complains.

The removal of this flour from the cars and the storing of it in the warehouse was not occasioned by chance, nor was it purely accidental, but was a necessary part of and in connection with the regular business of the employer. The fact that the plaintiff was only engaged on two occasions is not the test, but, rather, the nature of the employment.

The recent decision of the Court of Errors in Thompson against Wagner, reported in 139 Atlantic at page 344, which was cited by counsel on the argument on the non-suit, seems to me to be not controlling. The facts in that case are clearly distinguishable, in my opinion, from those in the case at bar. The employment in that case was the removal of snow, and the decision was that the snowfall was by chance and not certain, depending on the vicissitudes of atmospheric conditions, and employment in removing it was casual. In Sabella against Brazilero, in 87 New Jersey Law, at page 710, the employment was the unloading of a ship by a stevedore, and the Court held that the employment was not casual, that is, the Supreme Court so held in that case, and the opinion of the Supreme Court was adopted by the Court of Errors as its opinion, and it was affirmed.

The facts there, as to the nature of the employment, are quite similar to this case. While it is true that that case was decided before the Section of the Act we are considering was amended, still, in my opinion, that fact does not limit its applicability to the instant case.

For these reasons the motion for a non-suit is granted.

Mr. Markley: May I note my exception, sir?

Case.

The Court: That makes it unnecessary for me to consider the other points raised in the motion for non-suit. It is unnecessary for me to consider the other points that you raised, that there was an assumption of risk. I don't need to consider that, because in my view there was no *prima facie* case made out. I think it was clearly a question of law for the Court on that point.

Mr. Markley: On the Workmen's Compensation Act, you mean, not on the assumption of risk at all?

The Court: No, it is not necessary.

Mr. Markley: On the question of negligence?

The Court: I said that was a fact question for the jury, but I reserved decision on the other two points.

Mr. Stites: Whatever your Honor did consider is on the record, but as adverse to my motion, if there was anything, I would like to take exception to. Your Honor said that it was a question of negligence.

The Court: No, I didn't say that. I said it was a question of fact for the jury.

Mr. Stites: I think my motion was that there was no negligence on the part of the defendant.

The Court: I think so.

Mr. Stites: Whatever your Honor—

The Court: But this is the only point involved. This is the only point on which there can be any controversy, the question of the propriety of my granting a non-suit for the reasons that I did.

Mr. Stites: If the case should go up I would like to have the advantage of any exceptions.

The Court: Of course, the record speaks for itself.

Mr. Markley: May I note my exception now, so there won't be any question about it?

The Court: Oh, yes.

Postea.

(Filed January 31, 1928.)

This case was tried before Judge Newton H. Porter (to whom the same was duly referred) with a jury, at the Passaic Circuit on January 18 and 19, 1928, and the plaintiff having submitted his evidence and the Court being of opinion that it was not sufficient to entitle him to recover, ordered judgment of nonsuit to be entered against him.

Dated January 31, 1928.

NEWTON H. PORTER,
Circuit Court Judge.

Judgment.

(Entered February 3, 1928.)

NEW JERSEY SUPREME COURT.

JAMES J. MULLEN,
Plaintiff,

v.

HARRY R. WALKER, ROBERT G. WALKER and HARRY R. WALKER, JR., doing business under the firm name and style of H. R. WALKER & SONS,
Defendants.

Judgment Record.
Action at Law.
On Postea.
Judgment of Non-Suit.
WILLIAM B. STITES, Attorney.

This case was tried before Judge Newton H. Porter (to whom the same was duly referred), with a jury, at the Passaic Circuit on January 18 and 19, 1928, and the plaintiff having submitted his evi-

Judgment.

dence and the Court being of opinion that it was not sufficient to entitle him to recover, ordered judgment of nonsuit to be entered against him.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendants, Harry R. Walker, Robert G. Walker and Harry R. Walker, Jr., doing business under the firm name and style of H. R. Walker & Sons, do recover of the said plaintiff, James J. Mullen, their costs, which have been taxed at the sum of

Costs $

Judgment entered February 3, 1928.

WM. S. GUMMERE,
C. J.

New Jersey Court of Errors and Appeals

JAMES J. MULLEN,
Plaintiff-Appellant,

v.

HARRY R. WALKER, ROBERT G. WALKER and HARRY R. WALKER, JR., doing business under the firm name and style of H. R. Walker & Sons,
Defendants-Respondents.

Action at Law.
On Appeal from Supreme Court.

BRIEF IN BEHALF OF APPELLANT.

1.

Statement of the Case.

This appeal brings before this Court for review, a judgment of nonsuit of the Supreme Court, granted at the Passaic Circuit by Circuit Judge PORTER, in an action wherein the plaintiff-appellant (hereinafter referred to as the plaintiff) brought suit to recover damages for personal injuries sustained by him while engaged in a casual employment with the defendants-respondents (hereinafter referred to as the defendant).

At the close of the plaintiff's case counsel for the defendant moved for a nonsuit on a number of grounds, but primarily on the ground that the plaintiff was not a casual employee, but on the contrary that he was a regular employee of the defendant and that the accident arose out of and in the course of his employment; therefore, his right

to recovery was under the Workmen's Compensation Act of this State (p. 49). After argument the Court granted the motion on the ground that the plaintiff's right of recovery was under the Workmen's Compensation Act (pp. 50-52). It is from the judgment entered on that rule that the plaintiff's appeal is taken (p. 53). The grounds of appeal while three in number are one in point of fact, namely, that the Supreme Court erred in nonsuiting the plaintiff (p. 1).

2.

Grounds of Appeal.

The grounds of appeal as stated are limited to one ground, namely, that the Supreme Court erred in nonsuiting the plaintiff; that the issues should have been submitted to the jury for decision; that the plaintiff was a casual employee and as such did not come under the Workmen's Compensation Act of New Jersey.

Under the well settled rule we presume that the judgment of nonsuit will be sustained if good on any legal ground.

The grounds urged in support of the nonsuit are as follows (p. 49):

1. The plaintiff was not a casual employee and, therefore, his right to recovery should be under and in accordance with the Workmen's Compensation Act.

2. The plaintiff was guilty of contributory negligence as a matter of law.

3. That the plaintiff assumed the risk of the injury which he received.

4. That the negligence was not that of the master but of a fellow employee of the plaintiff.

3.

BRIEF OF THE ARGUMENT.

I.

The plaintiff's employment was a mere casual employment which by the express terms of the Workmen's Compensation Act is excluded therefrom and his right to recovery under the adjudicated cases is at common law.

The decision of this point requires a résumé of the testimony.

The Facts.

The plaintiff testified that as a result of an advertisement in a newspaper, he called at the place of business of the defendant and sought employment on May 4, 1926. That was the date of his call in response to the advertisement and he started work at one o'clock in the afternoon and was through at five minutes after four. When he called to inquire for work he asked whether it was steady work. He was informed by one of the partners that it was not, that they had only one car of flour to unload from a freight car to the warehouse of the defendant and that defendant would pay $3 for such unloading. He accepted the job, performed the task and was through and paid around four o'clock.

After he had finished, one of the partners asked him whether he liked the work and the plaintiff replied that he did. He was asked whether he had any experience in piling flour in a warehouse and he replied in the negative. He was then asked what his employment had been and he replied a rigger, an iron worker by trade and that he could

not secure employment at that job and was willing to do anything.

One of the partners of the defendant then informed him that they expected another car of flour two or three days later and he was asked whether he would come at that time and pile the flour. He replied that if he was not working or if he did not get anything steady he would come and do that job and be glad to get it even though it was only a car at a time and not steady work (pp. 12-13). When he returned to his home on the evening of May 6, 1926, he found a card waiting for him with the defendant's name upon it and on the back the words "8 A. M. May 7." At the appointed time he called at the place of business of the defendant and was received by one of the partners who said that he had one car of flour which would have to be piled in the warehouse. The partner then called the superintendent of the warehouse and directed the plaintiff to put himself in charge of the superintendent and do exactly what he was told to do. Plaintiff had had no experience in piling bags of flour or any bags of similar materials. These particular bags weighed 98 pounds and were about 10 inches thick, about 30 inches long and 14 inches wide (pp. 14-15). Under the superintendent's direction, the plaintiff proceeded to pile the flour, the superintendent doing most of the arranging of the bags and instructing the plaintiff with respect to the arranging thereof. One of the partners of the defendant also assisted in the task of arranging the bags and gave instructions as to how it was to be done. This partner said to pile up the bags as close as possible together so that they did not block the runway and this partner selected the particular space within which these bags were to be piled and they were to be piled "as high as possible" (pp. 18-19). In accordance with the instruc-

tions of the superintendent and the partner and working with the superintendent who was bossing the job, the plaintiff brought in the heavy bags, weighing ninety-eight pounds and one tier was finished completely to the ceiling of the warehouse. After the first tier had been partly up a second tier of bags was started, and in order to pile the first tier to the ceiling, plaintiff was instructed to stand on the second tier. As he was standing on the second tier with the superintendent, the first tier, without warning, started to bulge in the center and fell upon him, breaking his leg in one-half dozen different places and causing him very serious injuries, crippling him for life (p. 21). This testimony as to just how the accident happened is as follows (p. 19, line 30, to p. 21, line 20):

> "Q. Now, while you were progressing with the work did any of the Walkers come in? A. Young—only just the old Mr. Walker; I will have to call him old Mr. Walker—pardon me for saying so. But he came in and he said, he asked Pete if his son had instructed him how to pile, and Pete said, 'Yes.'
>
> "Q. Now, then, you finished one pile right up to the ceiling, you say? You finished one pile almost to the ceiling? A. In order to finish the one pile we had to start the second pile, and we carried that up about eight bags high, and then we took the hand truck and go into the car and take a load of five bags on the truck. We would set the truck in that position with the bags on it (indicating). I would get on one side and him on the other and pile them up on top of this eight high. Then we put a bag on end and climb up on this eight high, and then lifted them and piled them in tiers, and he would say, 'To me, to you, to center,' and so forth, and that was all the time—
>
> "Q. What do you mean, to me, to you? A. He would throw it like that to me (indicating).

"Q. Were you both standing on the second pile at that time, that was eight feet high? A. Yes.

"Q. You would be, then, finishing the first pile? A. We was just finishing the first pile.

"Q. Yes. Now, where were you when the accident happened? Where were you standing? A. I was standing on the second pile, with my back to the partition.

"Q. Yes? A. We were out, I would say, thirty inches from the wall this way (indicating), and standing on the second tier, with my back up against this partition.

"Q. Now, what happened while you were standing on this second pile which was about eight high? What happened? A. Without any warning at all, the middle of this tier—

"Q. Which tier? A. The tier against the wall.

"Q. The first pile? A. The pile that was up fully. Without any warning whatever the middle of this tier—I will have to use the word bellied out or bulged out, and threw me against this partition, which is no possible chance for me to get down, and the bags fell. The force of them put me on the floor.

"Q. Did you attempt to hold up that tier at all with your hands? A. It would be foolishness. No, sir, I didn't.

"Q. Did you have a chance to get off? A. Positively not.

"Q. Where did you land after this tier had bellied out at the center? A. Right on the floor.

"Q. Could you say about how many bags had fallen from that first pile? A. I would say there was about, roughly, thirty bags came off the tier.

"Q. About how much did they weigh, do you say? A. 98 pounds, I think.

"Q. Apiece? A. Yes.

"Q. Were you able to get up? A. Why, no.

"Q. Why not? A. I thought my both legs were cut off.

"Q. Could you stand up? A. No."

It therefore appears without dispute in this case, that the plaintiff was given three hours' work unloading a car containing bags of flour on May 4th, that this work was casual, depending upon when there was a car of flour to be unloaded, that when he had finished the particular car on May 4, 1926, there was no understanding that he was to return as a steady employee, or as any employee of the defendant, but on the contrary indicated that if he did not secure a steady job when another car of flour arrived at the defendant's warehouse he would be willing to assist in the unloading of that car and the piling of the flour in the warehouse because he was willing to work at anything pending the obtaining of steady employment. As a result on the evening of May 6, 1926, a card was left at his home requesting him to report at 8 A. M. on May 7, 1926. When he went to defendant's plant at that time, they again said that they had but one car of flour to be piled at the warehouse and it is clear that when that car was unloaded and piled up he was again through until the next time, depending upon when another car of flour had to be unloaded. The plaintiff's testimony on cross examination emphasized the casual nature of the work he was employed to do. His testimony on cross examination is as follows (p. 34, line 25 to p. 35, line 5; p. 35, line 30 to p. 36, line 30):

> "Q. Well, when you went down to Mr. Walker's place of business, whom did you see there? A. I saw young Mr. Walker.
>
> "Q. Mr. Harry Walker, Junior? A. I guess that is his name.
>
> "Q. And what did you say to him? A. I asked him, I said—when I went in I said, 'I saw an ad in the paper; I came to answer that ad.'
>
> "Q. Yes? A. He said, 'Well, this work is

only temporary.' He says it is about, generally takes about three hours. He says, 'We have only got one car of flour and we pay three dollars for it.' He says, 'We don't want anybody permanently; it ain't steady work.' I said, 'Oh, I thought it was,' and he said, 'No.' So I said if he wanted me to do it for three dollars, I wasn't doing anything that day, and I would do it willingly to get the money."

"Q. You worked three hours? A. Yes.
"Q. For that you received three dollars, at the rate of a dollar an hour? A. Yes.
"Q. I mean at the original conversation with Mr. Walker, before you went to work, was anything said about other carloads of flour coming in? A. No.
"Q. But it was discussed that night when you finished the work? A. Yes, sir.
"Q. And with whom did that discussion take place? A. Mr. Walker, Senior, was at the desk.
"Q. Anyone else there? A. Yes.
"Q. Who? A. The other Mr. Walker.
"Q. Junior? A. Yes.
"Q. What was said about other carloads of flour coming in at that time? A. Shall I explain just the way he said it?
"The Court: Yes, yes.
"A. He said to me, 'How do you like this work,' and I liked it all right if it was steady, but it wasn't steady and I couldn't afford to hang around for the work like that. 'Well,' he says, 'We got one car more coming in on Friday. Would you come down and do that?' I said, 'Only too glad to do it if I ain't working on a steady job.' He says, 'Well, how will we know?' 'Well,' I says, 'You could let me know.' So that is the way he came to come to my house.
"Q. Well, you knew at that time that you hadn't any job, didn't you, Mr. Mullen? A. Why, no, sir; I was figuring with the Athenia Car Company, to go to work there.

"Q. With whom? A. Athenia Car Company.
"Q. Athenia Car Company? A. Yes, sir.
"Q. You had anticipated taking a job there? A. In fact, that is where my wife was that afternoon, Friday afternoon.
"Q. You didn't take that job? A. I was to go to work the following Monday morning, but I didn't go."

The Law.

The Workmen's Compensation Act of this State excludes in section 23c (P. L. 1919, pp. 211-212) casual employment from the benefit of its provisions and in that section defines what is casual employment as follows:

> "(c) Employer is declared to be synonymous with master, and includes natural persons, partnerships, and corporations; employee is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, *exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.*"

A case directly in point construing the foregoing section of the statute is *Thompson* v. *Wagner*, 135 Atl. (N. J. L.) 800, affirmed by this Court on the opinion below in 139 Atl. 334. In that case the Supreme Court said (135 Atl. 800):

> "The material facts are that a snowfall had cumbered the tracks of the Erie Railroad Company, and that Wagner, who apparently was connected with that company as an independent contractor, was charged with the duty of having the snow cleared off. There was no regular working force assigned to such duty. The practice was to take on by the day or

hour any able-bodied unemployed men who might present themselves or were known to be available, set them to work with shovels, etc., and, as soon as the snow was cleared, discharge them. The case does not show how long a time was required in this instance to do the work.

"The petitioner was hired like any other man standing idle in the market place. His pay was 50 cents an hour. There was no claim that he was held in reserve; that there was any regularity about his being called on, or any recurrence of employment at all, as in *Sabella* v. *Lloyd Brazileiro,* 86 N. J. Law, 505, 91 A. 1032, affirmed 87 N. J. Law, 710, 94 A. 1103; the case simply shows that a snowfall occurred; that outside chance laborers were needed to clear it off; and that petitioner was hired as one of these chancemen. He was injured on the very day that he went to work, by the shovel of another man striking his finger, making it bleed, and for lack of proper treatment gangrene set in and he lost the finger. He worked all or part of the second day, and stopped because of the injury.

"In *Laspada* v. *Public Service Railway Co.,* 38 N. J. Law J. 102, Judge OSBORNE in the common pleas held that shoveling snow under circumstances substantially identical with those of this case was a casual employment. That case was decided in 1915, at which time the statute merely used the language 'exclusive of casual employments' without any attempt at definition. In 1919 the Legislature added to the words 'casual employments' the following:

> 'Which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.' P. L. 1919, page 212, par. 9.

"The commissioner who heard the case, giving due weight to the cited decision, considered that the amendment of 1919 had altered matters in such wise that the decision was no longer a valid precedent. However, this may be, we think the *Laspada* case was well decided, and are unable to see that the language added to the statute and quoted above operates to make the petitioner's employment other than casual. It was of course 'in connection with the employer's business'; and consequently the question is whether it was employment 'the occasion for which arose by chance, or was purely accidental;' if either, it was casual. We think it was plainly the first, if not the second. Whether there was occasion for it depended entirely on whether a snowfall should occur. This was, of course, likely to occur at some time in the winter season, but not certain and, should it occur, the time of occurrence depended wholly on vicissitudes of atmospheric conditions.

"We conclude, therefore, that the employment was clearly casual, even under the definition laid down in the statute; and consequently the award will be set aside."

We submit that that case is directly in point, for here as there, while it might be said that the work was in connection with the employer's business, still the occasion for it arose by chance and was purely accidental, depending on when the defendant had a car to unload or whether a car of flour had to be piled in the warehouse. The testimony of the plaintiff in so many words, is that he was informed that the work was not steady, that the work was not definite and only occurred from time to time as appears from the résumé of the testimony *supra.* Furthermore, it might even be argued that the work was not regular employment in the defendant's business, for the defendant's business was the maintenance of a warehouse, not the loading or unloading of freight cars,

and, if regarded in that light, the employment was certainly not regular or periodic, but indefinite and uncertain. Also the employment by the defendant depended upon whether or not the plaintiff obtained a steady job elsewhere and he actually had in view a steady job which he would have gone to on the Monday following the Friday on which this very accident happened.

It will be noted that the Supreme Court in *Thompson* v. *Wagner*, in its opinion which was adopted as the opinion of this Court, relies on the case of *Laspada* v. *Public Service Railway Co.*, 38 N. J. L. J. 103:

> "I think the circumstances of this employment bring it clearly within the twenty-third paragraph of the Act, which excludes 'casual' employments.
>
> "A casual employment is one which comes about more or less by chance, to meet the exigencies of a particular situation or a temporary emergency, and which may or may not be within the general scope of the business of the employer or the occupation of the employee.
>
> "This employment was to meet a temporary emergency due to the extent and severity of the elements (than which there is nothing more variable or uncertain), and the necessity of the respondent to meet the temporary condition thus created in order to enable it to operate its cars. Certainly no occupation could be more uncertain or more casual in its very nature than shoveling snow."

We respectfully submit that the reason in the *Thompson* case is dispositive of the case at bar. Therefore the Trial Court erred in nonsuiting the plaintiff because the plaintiff's employment was clearly casual, and therefore his right of recovery was at common law.

However, there is still another authority directly

in point, namely, *Bosco* v. *Segal*, 4 N. J. Mis. Reps. 952, wherein the facts are almost parallel with those of the case at bar. In that case the Supreme Court reversed the Trial Court which held that the employment of the plaintiff was not casual. The Supreme Court rendering the judgment of reversal said:

> "The situation disclosed by the proofs was this: The boy's regular employment was with a corporation known as the Webb Wire Works, in New Brunswick. On the 25th of July, 1924, he was informed by the manager of this corporation that its factory would be shut down on the next day, which was Saturday. On that day he went with a friend to defendants' place of business to see another friend, who was employed there, and Segal, one of the defendants, seeing him, told him that the bottling company was short of help, and asked him to assist in the work of delivering bottles of soda water. This the boy did, and was paid $1.50 for his services. On the following Friday he was notified by the manager of the Webb Wire Works that its factory would again be closed on the next day, and on that day he went back to the defendants' factory, not pursuant to any arrangement with them, but with the idea that perhaps he might be employed again for that day. He saw Segal, and was told that the company was still short of boys, and was asked to go for a ride to South River and help deliver bottles of mineral water there. Patsy agreed to do this, and he and two other boys jumped on the back of the defendants' truck for the purpose of helping unload the cases and deliver them to customers along the route. While engaged in doing this he fell from the truck and was hurt. So far as the case shows, he never received any compensation for the work that he did on this latter day. This is his own story told upon the witness-stand, and, if it be true, then his employment was casual, within the meaning

of the Employers' Liability Act, and he was not entitled to the benefit of that statute in enforcing his claim for compensation against the defendants.

"It may be conceded that the testimony of witnesses called by the defense supports the conclusion that the employment was not casual; but, in this situation of the proofs, it was plainly for the jury, and not for the court, to determine the question of the nature of the employment, and there was error in directing a verdict for the defendants."

It will be noted that in the *Segal* case, plaintiff was assisting in delivering bottles of soda water which was work incidental to the regular business of the defendant.

It will also be noted that the plaintiff, after having worked one day, was employed a second day and while engaged in delivering bottles in the course of his employment to customers of the defendant, his employer, he was injured. The facts are exactly parallel with those in the case at bar, and if the employment in that case was casual within the Workmen's Compensation Act, then it is casual in the case at bar.

II.

The plaintiff was not guilty of contributory negligence as a matter of law.

The Trial Court ruled that the plaintiff was not guilty of contributory negligence as a matter of law, but on the contrary, held that that question was one of fact for the jury to pass upon (p. 49, line 30). The résumé of the testimony contained in Point I will suffice here. It was the duty of the defendant as the employer of the plaintiff to use reasonable care to provide him with a reasonably safe place in which to work and that duty could

not be delegated. The plaintiff had the right to rely on the defendant's instructions as to the method to be pursued in doing the work in hand. He was entitled to have the defendant exercise reasonable care in providing a reasonably safe method of doing the work. On the first day of his employment, when he was employed for three hours, he was not given any work involving the piling of bags containing flour. His job during the three hours was merely to take a hand truck to the freight car which was on a siding adjoining the warehouse, where he would put four bags of flour on a truck and then push the truck into the warehouse and there throw the bags against the wall, the bags to be piled up later. He did not pile at all on the first day (p. 37, lines 20-30). Those bags of flour weighed one hundred and forty pounds (p. 37, line 20). The bags he was piling up at the time of the accident weighed ninety-eight pounds (p. 14, line 40). On the second day of his employment he started the work at eight A. M. and the accident occurred very shortly thereafter (p. 17). When he reported for work he was directed by one of the firm to report to the superintendent and receive his instructions and work under the latter's directions (p. 17, line 30 to p. 18, line 10). When the work started one of the firm came to the point where the work was being done, selected the place, fixed the space to be occupied and directed that the bags should be piled up to the ceiling as close together as possible, as high as possible. The ceiling was about 14 feet high (p. 18). While the work was in progress another man of the firm known as old Mr. Walker came in and asked the superintendent whether young Mr. Walker had given instructions as to the doing of the work and the superintendent replied in the affirmative, and according to the undisputed testimony the plaintiff

did exactly as he was told. It is therefore clear that there is no evidence in this case of contributory negligence. To say the least that question was one of fact for the jury to pass upon.

III.

The plaintiff as a matter of law did not assume the risk of the injury which he received.

It will be noted that counsel for the defendant did not state as one of the grounds for nonsuit that there was no evidence of negligence on the part of the defendant. Of course the negligence of the master is not one of those risks assumed by the servant as incident to his employment. *Christensen* v. *Lambert,* 67 N. J. L. 341.

In *Dunne* v. *Jersey City Galvanizing Co.,* 73 N. J. L. 586, this Court laid down the well settled rule that a servant has the right to take it for granted that his master has performed his duty by the exercise of that reasonable care for the servant's safety which the law requires, until the servant is warned or notified of danger, or until the danger becomes so obvious that a reasonably prudent servant, under the circumstances, would observe it. This Court said, page 588:

> "A servant is entitled to assume, in the absence of notice to the contrary, that the master has exercised reasonable care and skill to provide for the safety of the place in which he has put the servant to work. *Carroll* v. *Tidewater Oil Co.,* 38 Vroom 679.
>
> "The plaintiff had the right to assume, without notice to the contrary, that the master had taken reasonable care to ascertain that the place where he put him to work was free from latent dangers, or that, if such dangers existed, and were known to the master, he would have warned him of them. The proof is clear that

such dangers did exist, and there is no claim that they were not known to the master. If, then, the jury were satisfied that the danger was a latent one, and that the master knew it, and that the plaintiff was injured because of this fact, and that he had not been warned of the danger, the plaintiff was entitled to recover.

"Mr. Justice PITNEY, in *Smith* v. *Erie Railroad Company,* speaking for this court, says: 'A servant has the right to take it for granted that his master has performed his duty, by the exercise of that reasonable care for the servant's safety, which the law requires, until the servant is warned or notified of danger, or until the danger becomes so obvious that a reasonably prudent servant under the circumstances, would observe it.' *Smith* v. *Erie Railroad Co.,* 38 Vroom 636, 645.

"In *Western Union Telegraph Co.* v. *McMullen,* 29 Vroom 155, the opinion of Mr. Justice Van Syckel will be found, on principle, to support the view taken by us in this opinion. All questions as to the reasonable safety of the place where the plaintiff was put to work—as to the risks incident to the employment, as to latent dangers, and also as to the assumption by the plaintiff of obvious risks—were fully and correctly left to the jury in the charge of the trial judge. Under the proof they were all jury questions."

In *Belleville Stone Co.* v. *Mooney,* 60 N. J. L. 324, affirmed 61 N. J. L. 253, it was held:

> "It is the duty of the master to exercise reasonable care to provide a safe place for his servant to work in, for his protection from all but the assumed and excepted dangers, and this duty remains the same where the dangers arise to the servant by reason of the adoption or use of a system by which the business of the master is performed or conducted."

In *Addicks* v. *Christoph,* 62 N. J. L. 786, this Court held:

> "Where a minor servant is employed at dangerous work, the risks and hazards of which are not, by reason of his youth and inexperience, so obvious that he can fully appreciate them, it is the duty of the master to explain to such servant the dangers of the service, and to instruct him how to avoid them.
>
> "When a duty thus devolves upon the master to explain to his minor servant the hazards of the service, and to instruct him how to avoid them, such duty cannot be delegated, and where the master has entrusted that duty to a foreman, he cannot escape the responsibility of failure to perform it, on the ground that such foreman was a fellow-servant.
>
> "Where the master, under such circumstances, neglects such duty to instruct his minor servant and to warn him of the dangers of the service or gives him improper instructions, the master will be responsible for an injury resulting from his neglect.
>
> "Where the master is required, by his duty, to thus instruct his minor servant, and warn him against danger, he must put his warning in such plain language as to be sure that the young servant understands and appreciates the danger.
>
> "Under the circumstances of this case, the refusal of the trial judge to nonsuit the plaintiff, or to direct a verdict for the defendants, was sustained, and the questions raised by the evidence were held to have been properly submitted to the jury."

As pointed out in *Knutter* v. *N. Y. and N. J. Telephone Co.,* 67 N. J. L. 646, 651, where the negligence of the master is in the non-performance of some duty that is imposed by law upon the master for the safety of the injured servant, the master is responsible.

The recent case of *Fagan* v. *C. R. R. Co.,* 94 N. J. L. 454, 457, is directly in point, for there this Court said:

> "While an employe assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are *not* attributable to the negligence of the employer or those for whose conduct the employer is responsible, the employe has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, reasonably safe appliances, and a reasonably safe system or method of work, and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it. *Chesapeake and Ohio Railroad Co.* v. *Proffitt,* 241 U. S. 462. Moreover, in order to charge an employe with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed from its obviousness to have known) of the defect, but that he knew it endangered his safety, or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Gila Valley, &c. Ry. Co.* v. *Hall,* 232 *Id.* 94. The question of assumption of risk is for the jury unless the evidence tending to show such assumption of risk is clear and from unimpeached witnesses and free from contradiction. *Kanawha, &c. Ry. Co.* v. *Kerse,* 239 *Id.* 576."

Still another case which shows that the plaintiff could not, as a matter of law, have assumed the risk of his injury is *Laragay* v. *East Jersey Pipe Co.,* 77 N. J. L. 514, 519, where this Court held:

> "It did not appear to have been obvious either to the boss who was directing the operation or to the other workmen engaged in it, and this circumstance alone raises some ques-

tion as to its being, beyond a jury question, a plainly obvious risk. The problem presented was essentially one of physics, the factors of which were the height of the frame, its weight, the angle at which it leaned from the building, the direction from which traction was exerted, the weight of the driver, its relative weight to that of the frame, and its location with reference to a line dropped perpendicularly from its apex. No doubt with these factors accurately ascertained a mathematically correct resultant of the various forces involved could be worked out, although it may be open to doubt whether the plaintiff could have done it. This, however, is a very different thing from saying that it conclusively appeared that these factors when casually observed ought so clearly to suggest to one in the plaintiff's station the risk of doing what he was ordered to do that he must be deemed to have voluntarily assumed the dangers that would result from his obedience. On the contrary, the rule is that the question as to the impression that would naturally be made upon the mind of a reasonably prudent man of ordinary intelligence by a congeries of concurrent circumstances is normally for the jury and not for the court. Indeed, the facts of the present case make it peculiarly one that calls for the judgment of practical men of various walks of life rather than that of specialists in the law. To such a case we may aptly apply the rule that it is immaterial what inference the judge draws from the testimony if the opposite inference might in reason be drawn from it by the jury. *Mumma* v. *Easton and Amboy Railroad Co.*, 44 Vroom 653."

In this case we contend under the adjudicated cases cited, *supra,* that the plaintiff had the right to assume that the employer had exercised the proper care with respect to providing a reasonably safe place of work, reasonably safe appliances and a reasonably safe system or method of work and

is not to be treated as assuming the risk that is attributable to the employer's negligence until he becomes aware of it.

In this case the defendant did not provide a reasonably safe system or method for doing the work but, on the contrary, adopted a non-safe method and put the plaintiff to work at it without giving him any instructions or informing him as to the dangers, and with respect to those risks there was no assumption by the employee. We therefore respectfully submit that the plaintiff did not assume the risk of the injury which he received at law, but to say the least, that question was one of fact for the jury to pass upon.

IV.

This accident was not caused by the negligence of a fellow-servant but was caused by the negligence of the master in failing to provide the plaintiff with a reasonably safe place to work, in failing to provide a reasonably safe system or method of work and reasonably safe appliances with which to do the work.

The cases cited in Point III are also applicable to this point.

Where there is negligence in the performance of some duty that is imposed by law upon the master for the safety of the injured employee, the master is responsible, irrespective of the rank of the negligent employee. The negligence of the master here was the failure of the defendant to provide the plaintiff with a reasonably safe place in which to work, with a reasonably safe system or method of work and reasonably safe appliances. According to the undisputed testimony, the plaintiff had no knowledge at all as to how

the work was to be done, never having done it before. It was the defendant's duty to provide him with proper instructions, which the defendant failed to do. It could not delegate these non-delegable duties to a fellow-servant or a superintendent and the failure of the superintendent to do the work properly was the failure of the master, the defendant.

Belleville Stone Co. v. *Mooney,* 60 N. J. L. 324, affirmed 61 N. J. L. 253;
Addicks v. *Christoph,* 62 N. J. L. 786;
Knutter v. *N. Y. & N. J. Telephone Co.,* 67 N. J. L. 646;
Dunne v. *Jersey City Galvanizing Co.,* 73 N. J. L. 586.

The fellow-servant rule has no application where the duty is one that is owed by the master to his servant. If a master owe to his servants a duty that involves the exercise by him of reasonable care he cannot escape liability for its negligent fulfillment by delegating its performance to one or more servants of the class to whom such duty is owing; in such case, if the servants employed to perform the master's duty failed to exercise reasonable care in its performance, the master is legally chargeable with the fault. *Laragay* v. *East Jersey Pipe Co.,* 77 N. J. L. 516; *Fagan* v. *Central R. R. Co.,* 94 N. J. L. 454, 457.

Even where the injury arises to a workman by reason of the united negligence of a master and a fellow-servant, the master is liable to respond damages for such injury. *Belleville Stone Co.* v. *Mooney,* 323, 324.

We, therefore, respectfully submit that in this case when the defendant took the plaintiff, who was entirely a novice, and turned him over to a superintendent in its employ, giving the super-

intendent instructions as to how the work was to be done, the method to be pursued, where the bags were to be piled, the width of the space to be used, and the height to which the bags were to be piled, the defendant was acting as the master, and it is liable for the accident which resulted from its negligence and it cannot escape such liability by saying that it was the duty of a fellow-servant. The failure to provide proper instructions for the doing of the work was the failure of the master and for that failure the defendant is liable.

V.

Conclusion.

We respectfully submit that for these reasons the judgment below should be reversed and a *venire de novo* ordered.

Submitted May Term, 1928.

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New Jersey Court of Errors and Appeals

JAMES J. MULLEN, Plaintiff-Appellant, v. HARRY R. WALKER, ROBERT G. WALKER and HARRY R. WALKER, JR., doing business under the firm name and style of H. R. WALKER & SONS, Defendants-Respondents.	Action at Law. On Appeal from Supreme Court.

BRIEF IN BEHALF OF RESPONDENTS.

Point I.

The motion for a non-suit was properly granted as the plaintiff was not a casual employee and his claim for injuries should have been adjusted in accordance with the provisions of the Workmen's Compensation Act of the State of New Jersey.

The defendants were the owners and engaged in the wholesale flour business with its storage houses and place of business located at Number 308 Howe Avenue and D. L. & W. R. R. in the City of Passaic, County of Passaic and State of New Jersey (Case, p. 2, l. 40).

In the usual course of defendants' business, they purchased flour in carload lots which arrived in bags at their place of business at frequent intervals over the D. L. & W. Railroad along which their storage houses were located, the cars being

switched alongside the storage houses for the purpose of unloading. The defendants required help in and about the unloading of the carloads of flour as they arrived at their plant and inserted an ad in the newspaper for such help (Case, p. 12, l. 20), and the plaintiff having read the ad, applied to the defendants for the position on May 4, 1926 and was accepted and commenced work on that day (Case, p. 12, l. 40), and finished the unloading of the carload of flour that had arrived.

The next carload of flour arrived at defendants' plant on May 7, 1926 (Case, p. 14, l. 11), and the plaintiff was duly notified of its arrival as per arrangements and he reported for work at 8 A. M. and proceeded with the unloading and storage of the flour in defendants' warehouse and after working for sometime, a tier of the bags of flour fell in the storage house, injuring the plaintiff (Case, p. 20, l. 35).

It appeared by the testimony of the plaintiff that he was to have the regular job of unloading and storage of the carloads of flour as they arrived at defendants' plant and he accepted such employment and entered upon the duties incident thereto (Case, p. 13, l. 22). Q. Now, then, did he say he would send for you if he had any more need for you? A. He told me there was another car coming in on Friday morning, and asked me if I would come there, and I told him if I was not working, or if I didn't get anything steady, that I would come and do his work and be glad to do it, even though it was only a car at a time, no steady work (Case, p. 35, l. 35). Q. But it was discussed that night when you finished the work? A. Yes, sir. Q. And with whom did that discussion take place? A. Mr. Walker, Senior, was at the desk. Q. Any one else there? A. Yes. Q. Who? A. The other

Mr. Walker. Q. Junior? A. Yes. Q. What was said about other carloads of flour coming in at that time A. Shall I explain just the way he said it? The Court: Yes, yes. A. He said to me, "How do you like this work," and I liked it all right if it was steady, but it wasn't steady and I couldn't afford to hang around for the work like that. "Well," he says, "We got one car more coming in on Friday. Would you come down and do that?" I said, "Only too glad to do it if I ain't working on a steady job." He says, "Well, how will we know?" "Well," I says, "You could let me know." So that is the way he came to come to my house (Case, p. 38, l. 1). Q. Mr. Walker told you that he would like to have you come back and do this work, didn't he? A. Yes, sir. Q. And you were willing to do it? A. As I said, if— Q. If you didn't get any steady job you were willing to take this job of unloading flour whenever the cars came in? A. That one car, yes, sir. I couldn't promise him that I would do it, but I would do it if not working. Q. That is, you promised Mr. Walker that you would do this work of helping unloading the flour if at the time you were not engaged in some other steady job? A. Yes, sir (Case, p. 40, l. 4). Q. Well, at the time that this paper, which is marked for Identification D-3— you considered that you were to have steady employment with Mr. Walker's concern, didn't you? Mr. Markley: Objected to. A. Never knew anything about it. Mr. Markley: I will withdraw the objection. Well, it was discussed at that time that you were to have this job if you wanted it and could take it whenever there was a carload of flour in? A. Yes. Q. That was discussed, wasn't it? A. Of the CARLOADS, yes, if I wasn't working I would come down and do the work.

Casual employments are defined in the Laws of 1919 at the top of page 212 as follows:

> "Casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring."

The case of Sabella, et al. v. Brazilero, Reported 91 Atl. 1032 and affirmed by the Court of Errors and Appeals in 94 Atl. 1103, is almost in point with the facts in the case at bar and defendants contend is controlling upon the question involved herein. At the bottom of page 1033, the court stated as follows:

> "As to the other point, the evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for that purpose. While this class of work was not constant, depending upon there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called.
>
> We think this supports the finding that the employment was not 'casual' within the meaning of the word as expressed in the statute. The ordinary meaning of the word 'casual' is something which happens by chance, and an employment is not casual, that is, arising through accident or chance, where one is employed to do a particular part of a service RECURRING SOMEWHAT REGULARLY WITH THE FAIR EXPECTATION OF ITS CONTINUANCE FOR A REASONABLE PERIOD."

The defendants necessarily had to have flour in order to sell the same in their wholesale flour business and the carloads thereof in bags had to arrive somewhat regularly, the exact time, however, being indefinite as is not unusual in the shipping of freight and merchandise by rail or water (the facts in the Sabella case being the loading of a ship) and the plaintiff, Mr. Mullen certainly had a fair expectation of the carloads of flour continuing to arrive, for not only a reasonable period, but a long period of time and his employment recurring as long as he wanted the job of unloading the cars as they arrived, as the defendants necessarily had to be continually replenishing their stock of flour to replace the flour sold in their usual course of business.

In the Sabella case, the court held that the employment was not casual and that the deceased was employed to assist in the loading of a ship, while in the case at bar the plaintiff had, previously to receiving his injuries, worked on May 4, 1926 and unloaded one carload of flour and was working unloading another carload of flour on May 7, 1926, when he was injured.

The Sabella case practically held that if deceased had only been employed to load one ship, his employment would not have been casual as is evidenced by the inference gathered from the language of the decision.

Point II.

The employment of the plaintiff in the case at bar was certainly not accidental and did not happen by chance as he was employed in the regular business of the defendants in and about the unloading of flour from the cars and was injured on the second occasion when he arrived and was engaged in the course of his employment.

There was no disputed facts concerning the employment of the plaintiff to be submitted to the jury, as the direct and cross examination of the plaintiff showed that he was employed by the defendants to unload the carloads of flour as they arrived at the defendants' plant, which was admitted by the defendants and it appeared by such testimony that the plaintiff was not a casual employee.

POINT III.

The case of Thompson v. Wagner, 135 Atl. 800, affirmed 139 Atl. 344 is not in point with the case at bar and is distinguishable.

In that case, the employment was the removal of snow, by any one who might present themselves for the work, they being furnished with shovels for the purpose and discharged when the snow was removed and the men so employed were not held in reserve.

A snow storm is an act of God, uncertain and by chance, it may happen or it may not, no one knows, some winters in certain localities, it might snow once a week for every week or once a month

or not at all, while in another locality far north, there is snow nearly all the time and in certain areas in the south, there is no snow at any time.

The court in the Thompson case, comments upon the uncertainty and element of chance concerning snow falls in the following language at page 801:

> Whether there was occasion for it depended entirely on whether a snowfall should occur. This was, of course, likely to occur at some time in the winter season, but not certain and, should it occur, the time of occurrence depended wholly on vicissitudes of atmospheric conditions.

There was nothing accidental or by chance involved in the employment of the plaintiff, Mr. Mullen as the arrival of carloads of flour were recurring at regular intervals with reasonable expectancy and had to be unloaded and stored in the warehouses of the defendants in and about the wholesale flour business.

The court in its opinion in the Thompson case, distinguished it from the Sabella case, which latter case the defendants contend controls the case at bar.

The case of Bosco v. Segal, 134 Atl. 899 is also distinguishable from the case at bar. As in that case, the plaintiff had steady and regular employment with the Webb Wire Works and went to defendant's place of business to see a friend and he was not looking for work, but the defendant being short of help, hired him for the day to assist in delivering soda water and sometime later, the plaintiff again returned to defendant's place of business NOT PURSUANT TO ANY ARRANGEMENT but taking a chance that he might be employed

and he was given work and was injured while delivering bottles.

In the case at bar, Mr. Mullen's employment was not by chance as he saw defendants' ad in the newspaper for help and responded (Case, p. 12, l. 23) and did not have any steady or regular job at the time and was not working (Case, p. 13, l. 26, Case, p. 34, l. 10) and he thereafter returned to defendants' place of business by agreement and arrangement with the defendants (Case p. 36, l. 15) to continue his work which is an entirely different situation than that existing in the Bosco case, where no arrangements whatsoever were made concerning the continuance of the employment.

POINT IV.

The plaintiff was guilty of contributory negligence and assumed the ordinary risk of his employment.

The unloading and storing of the flour was an obvious risk which the plaintiff was engaged in and no machinery was used, except a hand truck and nothing broke and there were no defects of appliances used in and about the storing of the flour, the plaintiff received his injuries by reason of a tier of the bags of flour falling, caused by the manner in which the plaintiff and his fellow employee had placed the bags, in storing them in the warehouse and it is to be observed that the very tier of bags placed or stored by the plaintiff was the one that fell, causing the injuries to the plaintiff (Case, p. 19, ll. 35, 20). The warehouse or place where the plaintiff was working was not dangerous and had nothing whatsoever to do with causing the injuries as it was the fall of a tier of bags that caused the

damage and there was no evidence in the case tending to show that any instructions received by the plaintiff as to the manner of storing the flour were wrong or improper or that the system adopted and used by the defendants in the manner of storing the flour was in any way defective, improper or dangerous.

The plaintiff had previous experience unloading merchandise from ships as he had worked as a longshoreman for three years (Case, p. 32, l. 18) and was therefore familiar with the work of unloading and storing of the flour and the risks incident thereto as the schooling received as a longshoreman in and about loading and unloading merchandise is about as good experience as one could acquire and the plaintiff was certainly no novice in and about the work he was engaged in when injured.

Under cross-examination, the plaintiff was evasive as to his experience (Case, p. 32) but finally admitted that he had unloaded bags of sugar (Case, p. 33, l. 4): Q. Just what was your duty? A. I say no—sometimes I would go down and give them a hand if a man was short or something like that, but my duties as the general routine work was on deck all the time, running the winch, tending the hatch, and rigging up. Q. Now, Mr. Mullen, just a minute. Didn't you at times help load these bags of sugar in the sling? A. At times, yes. Q. At times? A. At times. Q. Then you were familiar, weren't you, with the unloading of bags of sugar from ships? A. Not what you call practical, no. Q. Well, you saw it done? A. Why, yes.

The legal principles of assumption of risks of an employee is too well established to burden this court with citations and the cases cited by the plaintiff's counsel in Point 3 of his brief are not in point with the case at bar, as they relate to cases of latent danger and defects, while in the case at

bar, the storing of the flour was plainly observable and obvious and there was nothing unusual or dangerous about it if the plaintiff had performed the work properly and carefully.

POINT V.

The rule that the negligence of a fellow servant will bar recovery is applicable to this case.

The plaintiff and one Pete had received their instructions to pile the flour (Case, p. 19, l. 30) (and there's no evidence in the case to show that these instructions were improper or dangerous) and they were working together, piling the bags of flour at the time of the accident (Case, p. 19, l. 25, and Case, p. 20) and it was one of the tiers of bags that they had stored that fell and caused the plaintiff's injuries (Case, p. 19, ll. 10, 35; Case, p. 20, l. 32) and they must have necessarily piled the same carelessly or it would not have fallen.

There was no evidence in the case as to what caused the tier of bags to fall and it is only a reasonable inference to assume that the storing was done carelessly by the plaintiff and his fellow servant, Pete, the only explanation given as to the falling is by the plaintiff as follows (Case, p. 20, l. 33): Q. The first pile? A. The pile that was up fully. Without any warning whatever the middle of this tier, I will have to use the word bellied out or belged out, and threw me against this partition.

The defendant respectfully submits that the judgment of non-suit should be affirmed with costs.

WILLIAM B. STITES,
Attorney and of Counsel for the Defendants.