INDEX

WITNESSES

Petitioner's:

Supreme Court
of the
State of New Jersey

Affidavit for Writ of Certiorari

(Filed, February 26, 1916)

State of New Jersey, }
County of Hudson. } ss:

John D. Pierson, being duly sworn according to law on his oath, deposes and says that he is an attorney and counselor-at-law of this state and a member of the law firm of Pierson & Schroeder; that said firm of Pierson & Schroeder were the attorneys of record, for the respondent in a certain suit brought in the Court of Common Pleas of Hudson County wherein Vito Orlando was petitioner and F. Ferguson & Son, a corporation, was respondent; that deponent had actual charge of the preparation and conduct of said case in behalf of said respondent; that said proceeding was brought pursuant to an act of the Legislature of New Jersey, entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the

determination of liability and compensation thereunder," approved April 4, 1911, and the various acts amendatory thereof and supplemental thereto; that in the opinion of this deponent, the determination, statement of facts and order of the Trial Court whereon judgment was entered are contrary to law in many particulars; and that among the said errors the Trial Court found that the injury of the petitioner arose out of and in the course of his employment, whereas deponent alleges and believes that there was not competent evidence to justify such conclusion of the Trial Court and that there was no finding of facts on which the Trial Court was able lawfully to enter judgment for compensation.

Defendant further says that the injury complained of arose in the following manner:

Petitioner opened a rear door of a drying room in the foundry conducted by respondent. The said drying room was a large room, located in respondent's foundry. The inside dimensions, according to the undisputed testimony, were 28 feet in length, by 12 feet in height by 13 feet in width. There were two grates in this room at the rear end erected over fire boxes on which fires were built for the purpose of heating the drying room, the material used for fire being foundry coke. The room was used for drying moulds. These were very large and were brought in on cars on tracks. At the front of this room was a large door approximately the size of the front of the room. At the rear there was at each grate a furnace door about the ordinary size of a steam or hot water furnace door. The flues were at the bottom of the front and the opposite ends from the grates. Pe-

titioner testified that he went to open one of the rear doors to see how the fire was getting along when he was burned by a burst of flame which came out of the door. His burns were deep, injuring his hands, including part of the tissue to such an extent that the Court found a 50% permanent injury of both hands. He was also burned about the face and the Court found a 10% injury of one eye due to contraction of the eyelid. The injury was such as would be made from burning oil. It was admitted that the petitioner's injury happened substantially as he testified but respondent claimed that petitioner had put kerosene or coal oil on an already lighted fire, contrary to the rules of the foundry and contrary to express directions given to the petitioner that this caused the explosion and that the injury did not rise out of and in the course of his employment. The Trial Court refused to find that the injury was caused as respondent claimed but found that it was accidental and arose out of and in the course of petitioner's employment, but did not ascertain and declined to ascertain the cause that produced said burst of flame. No reason was assigned by petitioner or his counsel why such a burst of flame could have occurred. No testimony was produced at the trial which would show how such a burst of flame could have happened under the circumstances, except it were caused by fresh oil thrown upon the fire.

From the testimony of petitioner and his witnesses, it appeared that the materials for the fire so lighted consisted of kindling with coke put thereon; that there were two fires so constructed and that said material was placed a considerable time before the fires were lighted; that in placing

this material two quarts of kerosene oil had been placed on the material for each fire but before the fire was lighted. The fires had been lighted and according to the testimony of petitioner and his witness must have been burning several minutes, in my estimation undisputedly 15 minutes before this accident happened. An expert was examined in behalf of the respondent, who testified that the burst of flame sufficient to have made the burns of the kind and character indicated could not have been caused by any oil which under the testimony in behalf of the petitioner was placed upon the fire before it was lighted and that such a burst of flame could not have been caused by any back draught or by anything out of the construction of the fire but was such a burst of flame as would have happened if kerosene oil had been thrown on the lighted fire, and would have happened practically instantaneous with the throwing of said oil. No testimony was offered by the petitioner to contradict this testimony or to show any physical or chemical possibility of such a burst of flame from any of the facts produced in evidence except such testimony as tended to show that fresh oil had been thrown upon the lighted fire. Testimony was offered by respondent which it believed would show that oil had been thrown on a lighted fire by petitioner.

Deponent believes that the Court, under the circumstances, was legally bound to find some cause for this flame before he could find that it was an accident arising out of and in the course of petitioner's employment and that a finding which failed to show the physical possibility of the flame from any other source than that advanced by the

respondent, is insufficient upon which to base a judgment under the act in question.

Deponent further alleges and believes that the undisputed testimony of the said expert, the testimony of petitioner and his witnesses, the character of the room in which the fire was kindled, the well-known characteristics of all and the common knowledge of the action of fires are such that the testimony of petitioner and his one witness that no oil was thrown by petitioner on the fire cannot be legally relied upon and that a finding of fact and judgment based on reliance on such testimony cannot be legally sustained.

Deponent further believes that there is no competent evidence to show any injury to the eye of petitioner, and that the finding of the Court that there was a 10% injury of the eye is not supported by the testimony under the act in question.

Deponent further says that the Court in an oral finding at the close of the case and before written argument found a 50% injury of each hand and a 10% injury of the eye and stated that if he found liability in the petitioner he would allow in addition to certain compensation for temporary disability 50% of petitioner's wages for 75 weeks for each hand and 10% of 100 weeks for the injury to the eye, making a total of 160 weeks for partial permanent disability; that subsequently the Court's attention was called by the attorney for petitioner to the case of Vishney vs. Empire Steel & Iron Company, 95 Atl. 143, and that the Court thereupon gave petitioner for the 50% disability to each hand, 50% of a total of 400 weeks, the maximum amount for total disability and gave in addition thereto 10% of an additional 100 weeks for the injury to the eye.

Deponent believes and alleges that if the Court was in error in allowing separate compensation under the schedules of the act for each hand and the eye, he was in error in not considering both hands and the eye together and finding the proportionate extent of these injuries with reference to total disability, and that the Court could not take the hands together as a part of total disability and the eye separately as an item of additional compensation, thus, giving petitioner percentages of 500 weeks rather than of 400 weeks, the limit for total disability; that the said case of Vishney vs. Empire Steel & Iron Company does not control this case as there was in that case only injuries to the hands and not to the hands and eye or some other function, total loss of any two of which constitute total disability; that the ruling in Vishney vs. Empire Steel and Iron Company has not been approved by the highest Court of this state and may be considered debatable as the construction of that case was not the construction put upon the facts of this case by the Trial Court in this case in the first instance and deponent believes that the trend of decisions is to the effect that injuries should be considered separately or else should be considered together with relation to the proportion of their extent to that of total disability and that the judgment in this case does neither exclusively; but that the Court should have found the compensation for each injury separately.

In deponent's opinion the said determination, statement of facts, and order upon which judgment was entered are for the reasons above stated and in other respects not in accordance with the

provisions of the act hereinbefore recited in matters of law.

The findings and order for judgment were signed January 21, 1916, and entered and filed February 21, 1916.

JOHN D. PIERSON.

Sworn and subscribed to before me this
26th day of February, 1916.
Edward J. A. Sylvester,
Attorney at Law of New Jersey.

Writ of Certiorari

New Jersey, ss:

The State of New Jersey to the Court of Common Pleas in and for the County of Hudson and John J. McGovern, Clerk of said Court of Common Pleas, and Vito Orlando, GREETING:

(LS)

We being willing for certain reasons to be certified of and concerning a certain determination and order for judgment rendered on January 21, 1916, by the Honorable George G. Tennant, one of the Judges of the said Court of Common Pleas in and for the said County of Hudson, in certain proceedings brought on behalf of Vito Orlando, petitioner, against F. Ferguson & Son, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in

the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto, we command you that the said determination and order for judgment, together with all proceedings for the making of the same, and all things touching and concerning the same, as fully and entirely as before you they remain, or are in your custody and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature at Trenton, on the seventeenth day of March, 1916, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, the Honorable William S. Gummere, Chief Justice of our said Supreme Court at

I allow this writ; let it be sealed. Feb. 26, 1916.

WM. C. GEBHARDT,
Clerk.

Pierson & Schroeder,
Attorneys.

Endorsed:

Issued Feb. 26, 1916.
Returnable March 17, 1916.
I allow this writ; let it be sealed, Feb. 26, 1916.

C. W. PARKER,
Justice Supreme Court.

Service of the within writ on us is hereby acknowledged this 2d day of March, A. D., 1915.

LA PORTA & STITES,
Per A. P. LaPorta,
Attys. of Vito Orlando,
Petitioner and Deft. in Certiorari.

Return to Writ

To the Honorable, the Chief Justice and Associate Justices, of the Supreme Court:

The determination and statement of facts and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same as fully and entirely as before us they remain, or are in our custody or control, whereof mention is within made, we do hereby certify and send under our seal, in the schedule hereto annexed, as within we are commanded.

GEORGE G. TENNANT,
Judge of the Hudson County Court of Common Pleas.

JOHN J. McGOVERN,
Clerk of the Hudson County Court of Common Pleas.

(Seal of Court and County)

Petition

(Filed, May 24, 1915)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO,
Petitioner,

vs.

F. FERGUSON & SON (a corp.),
Respondent.

To the Honorable Hudson County Court of Common Pleas:

Petition

The petition of Vito Orlando respectfully shows:

1. That he is 41 years of age, and resides at #418 Jackson Street, City of Hoboken, County of Hudson and State of New Jersey.

2. That the respondent is a corporation with its office in Hoboken, Hudson County, New Jersey.

3. That respondent is engaged in the Iron Foundry business.

4. That on or about the 20th day of January, 1915, the petitioner was employed by respondent as a foundry helper in its Iron Foundry located at #1122 Clinton Street, Hoboken, New Jersey, operated, conducted and managed by respondent, at the salary of $10.50 per week.

5. That on or about the 20th day of January, 1915,while petitioner was engaged in his said employment and while opening the door of a furnace, the flames from the fire in the said furnace shot out of the furnace when the door of the same was opened and came in contact with the petitioner, severely burning him in and about his eyes, face, neck, body and limbs, and thereby severely injuring him.

6. Your petitioner further shows that at the time of receiving said injuries the relationship existing between petitioner and respondent was that of master and servant.

7. Your petitioner further shows that as a result of said injuries so received by him he is now and will be permanently injured and permanently impaired in that he has lost the use of both hands by reason of the burns received from said flames, and has been severely burned and injured about the eyes, ears, head, neck and body.

8. That the respondent had immediate knowledge of the injuries received by petitioner and the cause thereof as herein stated.

9. That the petitioner and respondent herein stated cannot agree upon the compensation to which the petitioner is entitled from the respondent.

10. That the injuries sustained by petitioner as herein stated arose out of and in the course of his employment.

11. That the petitioner has received from the respondent the sum of $64 on account of the injuries sustained and mentioned herein.

12. That petitioner is a married man residing with his wife and family consisting of five children whose ages are as follows: Charles Orlando, 12 years of age, Marie Orlando, 7 years of age, Congetta Orlando 6 years of age, Angelo Orlando 4 years of age, Theresa Orlando age 5 months; and that petitioner's family is entirely dependent upon him for their support and maintenance, and that petitioner is unable to perform any work of any kind whatsoever, and has no money or source of income from which he can provide for the needs and necessities for himself and family.

Your petitioner therefore prays that an Order may be made by this Honorable Court directing payment to the petitioner by the respondent for such amount in one lump sum as this Honorable Court may decide in accordance with the "Workmen's Compensation and Employer's Liability Act and Supplements and Amendments thereto," of the State of New Jersey, or such other relief as this Court may deem reasonable under the circumstances of this case.

ANTHONY P. LA PORTA & WM. B. STITES,
Attorneys for petitioner.

Petition

State of New Jersey, }
County of Hudson. } ss:

Vito Orlando of full age being duly sworn according to law on his oath says that he is the petitioner named in the foregoing petition, and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge and belief.

his
VITO X ORLANDO.
mark

Sworn and subscribed to before me this
20th day of May, 1915.
Helen Lindsay,
Notary Public of N. J.

Endorsed:

I hereby deputize John Daly to serve the within writ. Witness my hand and seal this 24th day of May, 1915.

EUGENE F. KINHEAD,
Sheriff,
By Jas. F. Clark,
Under Sheriff.

Served the within Petition and order May 25th, 1915, on the Defendant F. Ferguson and Son, a corporation by leaving true copies thereof with John Ferguson, agent of the said defendant company.

EUGENE F. KINHEAD,
Sheriff,
By John Daly,
S. D. S.

Sheriff's Fees $2.78.
Filed:
May 24, 1915,
John J. McGovern,
Clerk.

Order Fixing Time and Place of Hearing

(Filed, May 24, 1915)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO,
Petitioner,
vs.
F. FERGUSON & SON, a corp.,
Defendant.

Application having been made by Anthony P. La Porta and William B. Stites, attorneys for the petitioner above named, to fix a time and place for the hearing of the above entitled cause of action; It is on this 24th day of May, 1915, ordered that the hearing of the above entitled action be had before the Hudson County Court of Common Pleas at the Court House in Jersey City, Hudson County, New Jersey, on the 18th day of June, 1915, at the hour of 10 in the forenoon.

GEORGE G. TENNANT,
Judge.

Endorsed filed:
Clerk's Office, May 24, 1915. 3: p. m.
Hudson County, N. J.

Answer

(Filed, May 29, 1915.)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO, Petitioner, vs. F. FERGUSON & SON, Respondent.	On Petition for Compensation under the Workmen's Compensation Law.

The answer of the respondent F. Ferguson & Son, a corporation of the State of New Jersey, to the petition heretofore filed herein says:

First: The respondent admits that the petitioner is about of the age set forth in paragraph 1 of said petition; but it is not informed as to his exact age.

Second: The respondent admits paragraph 2 of the petition.

Third: The respondent admits paragraph 3 of the petition.

Fourth: The respondent admits that on or about the 20th day of January, 1915, while petitioner was employed by respondent, he was burned about his face and hands and says that the fire did not burn petitioner on any part of his body that was covered with clothes and says that the said fire was not sufficient to burn his body where it was protected by clothes. Respondent says that the said injury happened in this way:

Answer

The petitioner was undertaking to heat a core oven in the foundry of respondent for the purpose of drying the moisture out of cores in preparing the said cores for the purpose of casting; that the material used to furnish heat in said core oven is coke; that said oven does not become heated above 250° Farenheit; that workmen sometimes against the positive orders of respondent use kerosene for the purpose of hastening the generation of heat; that respondent by its president and other agents had warned the said petitioner not to use oil for this purpose and had absolutely forbidden the use of oil for this purpose; that not withstanding the said warning the petitioner threw a quantity of kerosene oil, or coal oil, on the heated coke, which caused the vapor arising from said oil, to burst into flames, which shot out of the door of the oven and inflicted the injury from which the petitioner suffers. Respondent alleges that under these circumstances, it is not liable to the said petitioner for compensation under the law pursuant to which said petition is filed.

Sixth: The respondent admits paragraph 6.

Seventh: The respondent denies that the petitioner is permanently injured and permanently impaired and that he has lost the use of both hands and says that the injury to his eyes, ears, head, neck and body so far as such injuries ever existed are healed and cured. This respondent is informed and believes and alleges the fact to be that the extent of the injuries to the hands of petitioner cannot be definitely ascertained at this time. The respondent further says that it has been at all times ready and willing to pay the pe-

titioner the amount due him under said act, but denies that he is legally entitled to anything.

Eighth: The respondent admits paragraph 8, but says that the injury was received as in this answer set forth.

Ninth: The respondent admits that the petitioner and respondent have not agreed upon the compensation to which the petitioner is entitled. Respondent denies that petitioner is legally entitled to any compensation.

Tenth: The respondent denies paragraph 10.

Eleventh: The respondent admits that the petitioner has received the sum of sixty-four dollars ($64) on account of said injuries and says that he has received a larger sum amounting to one hundred and eight dollars ($108); that said payments were made as follows:

January	28th, 1915,	$10
February	4th, 1915,	14
February	11th, 1915,	14
February	19th, 1915,	14
February	26th, 1915,	14
March	6th, 1915,	14
March	14th, 1915,	14
March	23d, 1915,	14
		$108

Respondent says that these payments were made without any prejudice as against either party as to the amount of compensation to which the petitioner was entitled. And respondent says that it has always contended that the said petitioner was

not legally entitled to any compensation but respondent was willing to make to petitioner, voluntary payments, provided it could avoid litigation. The respondent further says that it paid in addition twenty dollars ($20.00) all that was necessary for reasonable medical and hospital services and medicines for the first two weeks after the injury. Respondent prays that these payments may be applied to the amount due the said petitioner in such a way as shall be just and equitable under the circumstances of the case, provided the petitioner is legally entitled to any compensation whatever. Respondent further says that it has on each week subsequent to the said 23d day of March last, set aside the sum of five dollars and twenty-five cents ($5.25) in an envelope for the said petitioner and has offered to turn the same over to the petitioner any time he might call but that the petitioner has refused and neglected to call for the same; that the petitioner has had notice that the said amounts were held for him.

Twelfth: The respondent admits that petitioner is a married man but respondent does not know the names and ages of petitioner's children, and alleges the fact to be that he is informed that this is not material to this issue. Respondent denies that petitioner is unable to perform any work of any kind whatever.

Respondent alleges that all the payments made by it were made without prejudice and without admitting its liability but because it felt sympathy for the petitioner; that for several weeks after the injury as hereinbefore stated, it paid the petitioner a sum in excess of what his weekly wages had been; that shortly after the last of said payments were made, the respondent was notified by

the Poormaster of the City of Hoboken that the said petitioner had represented that respondent refused to pay him anything for his said injury; and that thereafter respondent only offered to pay said petitioner the half of his weekly wages, being the amount to which he would be entitled under the act pursuant to which said proceedings were brought provided the said petitioner was entitled to anything under said act.

Respondent further says that there is no compensation legally due to the said petitioner from the said respondent, and it prays to be hence dismissed with its costs in this behalf so wrongfully sustained.

PIERSON & SCHROEDER,
Attorneys of Respondent.

State of New Jersey, }
County of Hudson, } ss:

Margaret Ferguson, being duly sworn, according to law on her oath says that she is the treasurer of F. Ferguson & Son, the respondent named in the foregoing answer and knows the contents of said answer and that the matters and things therein set forth are true to the best of the knowledge and belief of deponent.

MARGARET FERGUSON.

Sworn and subscribed to before me this twenty-eighth day of May, A. D., 1915.
Ruth Hetzel,
(L. S.) Notary Public of New Jersey.

(Endorsed) Filed May 29, 1915.

John J. McGovern,
Clerk.

Notice of Motion to Amend

(Filed, November 5, 1915.)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO,
Petitioner,
vs.
F. FERGUSON & SON,
Respondent.

Please take notice that on the trial of the above entitled action petitioner will make a motion to amend the petition filed herein by inserting the following:

Petitioner will claim compensation for the permanent loss of the use of both hands the sum of $10.00 per week for the period of 300 weeks, also a partial disability by reason of injuries to the eyes, ears, neck and body at the rate of $10.00 per week for 300 weeks.

STITES & LA PORTA,
Attorneys for Petitioner.

To:
Pierson & Schroeder,
Attorneys for Respondent.

(Endorsed)
Service of a copy of within notice is hereby acknowledged this 11th day of October, 1915.
PIERSON & SCHROEDER,
Attorneys for Respondent.

(Endorsed) Filed Nov. 5, 1915.
John J. McGovern,
Clerk.

Findings of Court

(Filed, December 14, 1916.)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO,
vs.
F. FERGUSON & SON.

Mr LaPorta, for the petitioner.
Mr. Pierson, for the defendant.

The Court (TENNANT J.)

At the close of taking testimony in this case I proceeded to the calculation of the compensation to which the petitioner was entitled, if anything, reserving at the request of defendant's attorney the determination of the question whether the accident arose out of and in the course of the employment of petitioner. There was some testimony introduced purporting to show that the cause of the accident was the throwing of oil on the fire after it had been ignited, and that this was contrary to specific orders issued to employees.

I am satisfied that there was an accident, and that it arose out of and in the course of the employment. The defendant claims that the accident arose because of the petitioner's violation of explicit instructions not to pour oil on the fire after it was lighted. But the petitioner denies he did this and is supported in his story by a fellow

workman. No one saw the petitioner do what the defendant claims, and I am left to infer or conjecture because of other evidence which is entirely circumstancial, viz: that he was seen with an oil can prior to the accident,—that an oil can was found in the ash pit after the accident,—that a mechanical engineer gives his opinion that the flame could not have come out of the door in the manner described unless oil was poured on the fire after ignition. I am not content to accept this evidence and to thrust aside the evidence of the petitioner and the only other man who was actually present.

On the question of the method of calculation, counsel calls my attention to the case of Vishney vs Empire Steel and Iron Co., 95 Atl. 143. By the opinion in that case, I find that the Supreme Court has given expression to a view entirely contrary from the view I expressed at the close of the case. The interpretation of the schedule as given by the Supreme Court must govern this Court and in drawing the conclusion counsel will follow the rule as defined in the Supreme Court.

GEORGE G. TENANT,
Judge.

Filed Dec. 14, 1915.
John J. McGovern,
Clerk.

Findings of Facts and Determination

(Filed, February 18, 1916.)

HUDSON COUNTY COURT OF COMMON PLEAS

VITO ORLANDO, Petitioner, vs. F. FERGUSON & SON, (A CORP.,) Respondent.	On Petition for Compensation.

The above matter coming on for hearing and having been submitted to me for decision I hereby find and determine as follows:

1. This is a proceeding brought by Vito Orlando against the above named F. Ferguson & Son., a corporation, under an act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder." Approved April 4th, 1911, and the Acts amendatory and supplemental thereto. That the petition was filed on the 24th day of May, 1915, that the order was made setting the same down for hearing for the 18th day of June, 1915 which hearing was adjourned from time to time until the 11th day of November, 1915, at which time this matter came on for hearing before me; that process was served upon the Respondent on or obout the 24th

day of May, 1915, and that the Answer of the Respondent was filed on the 29th day of May 1915, that the case came on for hearing on the 11th day of November, 1915, which hearing was held in the presence of Anthony P. LaPorta and William B. Stites, Attorneys for the Petitioner, and Pierson & Schroeder, Attorneys for the Respondent, on which day both parties produced witnesses who were examined in the presence of said counsel.

2. That the petitioner was employed by the Respondent as a mold helper and furnace attendant on or about September 1912, and that he continued in such employment up to the 20th day of January, 1915, that his duties consisted of working in and about the plant of the Respondent situated at 1122 Clinton Street, Hoboken, New Jersey, and attending to the fires in the furnace and assisting in makig the molds.

3. That the Petitioner at the time of the injury received for his services wages amounting to $10.50 per week.

4. That on the 20th day of January, 1915, the Petitioner sustained personal injuries as the result of an accident consisted of flames shooting out of the door of one of the furnaces which Petitioner opend thereby coming in contact with Petitioner and inflicting severe burns, and that the said accident arose out of and in the course of Petitioner's employment.

5. That the Respondent have actual knowledge of the occurrence of the said injury.

6. That as a result the Petitioner received injuries to his face, eye, and hands, and that the

said injuries caused the Petitioner a temporary disability which lasted for a period of 21 weeks, and that he has a disability permanent in quality and partial in character which is as follows:

Contraction of the left eye lid which the Petitioner is not able to close entirely and has thereby sustained a 10% loss of the use of the function of the left eye, and also to the muscles and tendons of the hands thereby sustaining 50% loss of the use of function of each hand.

7. I find, therefore, that the petitioner is entitled to compensation for temporary disability from February 3d, 1915, for a period of 21 weeks at the rate of $5.25 per week and compensation for the injury to the eye which is permanent in quality and partial in character for a period of 10 weeks to commence June 30th, 1915, at the rate of $5.25 per week, and compensation for injury to the hands permanent in quality and partial in character for a period of 200 weeks to commence September 8th, 1915, at the rate of $5.25 per week making a total of 231 weeks at $5.25 per week.

8. That the petitioner has been paid by the respondent on account of his injuries for which these proceedings were commenced up to and including the 24th day of January, 1916, 50½ weeks at the rate of $5.25 per week said payments having been made by Respondent without prejudice to its rights to defend its action.

9. That by the payment of 50½ weeks heretofore paid to the petitioner, the award herein for temporary disability having been paid and also part of the award for partial permanent disability up to the 24th day of January, 1916, the bal-

ance of the award for partial permanent disability will and is to commence from the 24th day of January, 1916.

10. The legal advisers of the petitioner are entitled to compensation in addition to their costs allowed by law, in the sum of $200.00 to be paid in the following manner that is to say: the full amount of the costs to be paid at once and the petitioner to pay one dollars per week from the compensation payments received by him on account of the counsel fees herein awarded until the same is fully paid.

It is therefore, on this 21st day of January 1916, ordered that judgment final be entered in favor of the petitioner Vito Orlando and against F. Ferguson & Son, a corporation, in the sum of $5.25 per week for a period of 180½ weeks, beginning with the 24th day of January, 1916.

GEORGE G. TENNANT,
Judge.

Entered and filed,
February 18th 1916.

Clerk's Certificate

State of New Jersey }
County of Hudson, } ss:

I, John J. McGovern, Clerk of said County and of the Court of Common Pleas thereof, the same being a Court of record, do hereby certify that the foregoing are true copies of all pleadings filed, orders and rules entered and statement of judg-

ment as entered in the judgment record in the case of Vito Orlando, petitioner, against F. Ferguson & Son, respondent, as fully as the same remain on file and of record in my office.

WITNESS my hand and official seal at Jersey City, this 6th day of March, 1916.

JOHN J. McGOVERN,
Clerk.

(Seal)

Order to Include Testimony in Return

(Filed, February 28, 1916.)

NEW JERSEY SUPREME COURT

VITO ORLANDO, (Petitioner.)
Defendant in Certiorari,
vs.
F. FERGUSON & SON, (Responder
Presecutor in Certiorari

Application having been made on behalf of the prosecutor of the writ of Certiorari heretofore issued in the above entitled cause for an Order that a Transcript of the testimony taken at the hearing before the Court of Common Pleas in and for the County of Hudson, be certified and returned with said writ.

It is on this 26th day of February, A. D., 1916, ORDERED that a Transcript of the testimony taken at the hearing before said Court of Common Pleas in and for the County of Hudson upon the petition of Vito Orlando, petitioner, against F. Ferguson & Son, respondent, if produced by the prosecutor be certified and returned into this Court, together with the determination and statement of facts and order for entry of judgment, and all other proceedings for the making of the same which are returned into Court in accordance with the command of the said writ of Certiorari.

C. W. PARKER,
Justice Supreme Court.

Entered, February 28, 1916.

On motion of
Pierson & Schroeder,
Attys.

Testimony

HUDSON COUNTY COURT OF COMMON PLEAS

TENNANT, J.

VITO ORLANDO, vs. F. FERGUSON & SON.	On Petition for Compensation Under Employer's Liability Act.

Trial of the above stated case, November 5, 1915, before HON. GEORGE G. TENNANT, Judge.

Appearances:

Mr. A. P. La Porta, for the petitioner,
Mr. John D. Pierson (Messrs Pierson & Schroeder) for respondent.

The Court: Is it agreed that the injury is the result of an accident which grew out of and in the course of his employment?

Mr. Pierson: No, that is the main contention.

The Court: What were his wages?

Mr. Pierson: Ten dollars and fifty cents per week.

The Court: What is the date of the accident?

Mr. Pierson: The 20th day of January, 1915.

The Court: Is there any question about the extent of the injury?

Mr. Pierson: I don't think there will be very much, but we have not agreed upon that.

Mr. La Porta: There has been paid two hundred and sixty-five dollars on account.

VITO ORLANDO, the petitioner, was sworn, but withdrawn as a witness at this time.

JOHN ROMANO, a witness produced on behalf of the petitioner, being sworn testified as follows:

Examination by the Court:

Q. How long have you been in this country? A. Six years.

Q. Married? A. No. Too young.

Q. How old are you? A. Twenty-two.

By Mr. La Porta: Q. What is your name? A. John Romano.

Q. Where do you live? A. Hoboken.

Q. Were you on the twentieth—A. I don't know how to speak English.

Q.—of January, nineteen hundred and—don't you understand my question? A. No.

The Court: Tell me the best you can.

Q. Were you on the 20th day of January, 1915 working for John Ferguson & Son? A. I don't speak English.

The Court: Answer the question.

Q. Where were you working on January 20th 1915? A. Where I work?

Q. Yes. A. Well, I work for iron foundry.

Q. For John F. Ferguson & Son, January 20, 1915? A. Yes, I work there about four years.

Q. Was Vito Orlando working there the same day? A. Yes, lot mans working there.

Q. Do you remember the day he was hurt? A. Yes.

Q. The 20th of January? A. Twentieth January.

Q. You were where when he was hurt? A. Yes.

Q. Where? A. Iron foundry.

Q. In John F. Ferguson's Sons? A. Yes.

Q. By what was he burned? A. I don't know.

Q. What burned him? A. The fire.

Q. What fire? A. The coke, coke fire.

Q. The furnace? A. Yes, the furnace.

Q. What was it that came out of the furnace? A. I don't know how speak English, I no speak English.

Q. Was it the blaze from the furnace that burned him? A. Fire.

Q. What came from the furnace? (No answer)

By the Court: Q. How did he get burned? A. You got to open the little door, to see if the fire is light, open the door, fire come out, burned him.

Q. Came out of the furnace? A. Yes.

Q. When he opened the door the fire came out of the furnace and burned him? A. Yes.

Q. You were working there, were you? A. Yes.

Q. What time of day did this happen? What time of the day or night did this happen? A. After six o'clock at night.

Q. After six o'clock? A. Yes, at night.

Q. Who made the fire that evening? A. I made it.

Q. Did you make it? A. Yes.

Q. How did you make it? A. I chop wood first, about gallon kerosene, and after, coke, put in, close the door, and light the fire.

Q. You put a gallon of kerosene on the wood to make this fire? This fire that Mr. Orlando, the petitioner in this case, was burned by, who made the fire? A. I.

Q. You made it. You used a gallon of kerosene? A. Yes.

Q. What for? A. To light the fire.

Q. Can't you light the wood without kerosene? A. No.

Q. Why? A. I can't light it without kerosene.

Q. These big pieces of wood—A. Well, look like—

Q.—were they wet? A. Sure, that is why.

Q. Is that why you used kerosene? A. It was winter time, too.

Q. Do you always use kerosene when you make the fire? A. Yes, every time, use kerosene.

Q. Did you ever make the fire with kerosene in the presence of Mr. Ferguson? Was he there when you put kerosene on? A. Yes. Sometime he calls me to get kerosene, to put on the fire.

Q. Is that the way you were instructed to make your fire? A. Yes.

Q. Who is it generally that makes the fire in this furnace? A. What do you mean?

Q. Who makes all these fires? While you were working there, with Mr. Orlando in the shop, who made the fires? A. Anybody who had a job on had to make the fire.

Q. Everybody was fireman? A. Everybody.

Q. Who was your boss? A. No boss—Mr. Ferguson.

Q. He was your foreman? A. Yes.

Q. Who bossed you? A. Ferguson.

Q. Who bossed you? A. Ferguson.

Q. John Ferguson? A. Yes, John Ferguson.

Q. Same boss of Mr. Orlando, the petitioner in this case? A. Yes, he has same boss.

Q. Never anybody else bosses you except him? A. No.

Q. He is the one that shows you how to make the fire? A. He showed me, to make the fire that way.

Q. Where did you get your kerosene to put in the furnace? A. There was big tank there, hundred gallons.

By the Court: Q. Did they use that kerosene

for any other purpose? A. Sure, anybody use it.

Q. Did they use it for anything else? A. Sure, use it for anything else.

Q. Did they use it for anything else besides starting fires? A. No.

By Mr. La Porta: Q. Not that you know of. What time of day did you say this was? (No answer)

Q. Who picked Orlando up? A. I.

Q. Where was he lying? A. Down in the hole.

Q. In the hole? A. Yes.

Q. Near where? Near the furnace? A. Yes.

Q. Where did you take him to? A. I have the fire out.

Q. Where did you take him to? A. Bring him water, put water on top, put water on top.

Q. On his head? A. Yes. After bring the officer.

Q. Was his clothes burning? A. Yes, bring him in the office, watchman bring him in the office.

Q. Did you see Mr. Ferguson that night? A. Yes.

Q. Who was working that time—six o'clock—who was in the shop? A. Nobody, only me and him.

Q. Besides you and him? A. Only me and him.

Q. Was Mr. Ferguson there then? A. No. He was in there about half past five. He call me in, says he want good fire, I say, "All right, I make good job for you."

Q. Mr. Ferguson was not there at six o'clock when this happened, was he? A. No.

Q. Did you see Mr. Orlando any place that evening? A. Yes, he see him, night, in the hospital.

Q. On the same night, in the hospital? A. Yes.

Q. Were you there? A. Yes.

Q. You saw Mr. Ferguson in the hospital, did you? A. No, not me.

Q. Were you there when Mr. Ferguson saw him in the hospital? A. I was in the hospital too.

The Court: Do you admit notice?

Mr. Pierson: Yes.

Q. How long was Orlando working there before he was burned? A. About two years, more than two years.

Q. How long have you been working there? A. About four years.

Q. During those four years you always used kerosene to make the fire? A. Yes.

Q. What was Orlando's business there? What was he employed to do? A. Any kind job, iron foundry, anything.

Q. Was he your helper in—A. Yes.

Q.—building fires also? A. Building fires?

Q. Did he make fires—help to make fires, too, sometimes? A. Yes.

CROSS-EXAMINATION by Mr. Pierson:

Q. This, where Orlando was burned, was the core oven? A. They call it the wheel oven to bring the wheel.

Q. You bring things to the oven on wheels? A. The oven wheel, the shop wheel.

Q. It is a big oven, isn't it? A. Yes, big oven.

Q. They put the things that they heat in one end? A. Yes.

Q. On that end is a little pit, a hole, and a door just above that, which is the door where you look in the oven and put the coke in: is that right? A. No, the coke door, not the big door, before you put the job in, after coke, put the job inside, after, light.

Q. You light it by that door in the pit? A. Yes.

Q. Was John Ferguson there that night, when you lighted the fire? A. No. John was there before. He was there before.

Q. Then he saw you light the fire? A. Yes.

Q. Was that before John went home? A. Yes, he was there.

Q. He was there when you lighted the fire? A. No, he wasn't there when I light the fire.

Q. Do you mean he left—John left the foundry that night, before the fire was lighted? A. No. Yes. He was in there before the fire was lighted.

Q. He went away before it was lighted? A. Yes.

Q. Are you sure about that? A. Yes.

Q. Wasn't it after the fire was lighted, he went away?

Mr. La Porta: Do you understand the question?

Witness: I no understand the question.

Q. (Question repeated) A. Before fire was lighted, John wasn't there.

Q. How long did you light the fire before Orlando was burned? A. I don't know how speak English.

Q. Was it fifteen minutes, or ten minutes, half an hour, you lighted the fire before the accident happened? A. A quarter.

Q. Quarter of an hour? A. Yes.

Q. In lighting this fire, ordinarily, you put in wood first? A. Yes. The wood was in there.

Q. You didn't put that in? A. Yes, I put it in, then coke on top.

The Court: What is it you want to show?

Mr. Pierson: We want to show—the defence is that contrary to positive instructions—

The Court: Ask him that one question —if those instructions were given. That is the whole pith of this case.

Mr. Pierson: I think my cross-examination is quite pertinent to our theory of the defence.

The Court: If you feel that way I don't want to prevent your doing it.

Q. You used to sometimes, then, put oil on for starting the fire? A. Yes, before that, start fire, put wood in, have to get kerosene, on top kerosene, the coke.

Q. Then you light the fire? A. Put the job in, after, you close door, you light the fire.

Q. You close the big door on the other end? A. Yes, then you light the fire, in back.

Q. In back, at the other end, where he was burned? A. Yes.

Q. That starts it, and he was burned because of this oil? A. No, sir.

Q. The oil was in there? A. Yes.

Q. You put it in there so when the fire is lighted it will start well? A. Yes.

Q. You lighted the fire? A. I lighted the fire.

Q. Where did you go then? A. I light the fire, after I light the fire, he go see the fire, he open the door, and the fire came out. John Ferguson said, "Pete, I want good fire to-night."

Q. When did John Ferguson tell Pete that? A. That night.

Q. What time? A. Half past five.

Q. After the fire was started? A. Half past five.

Q. After the fire was started? A. There was no fire, no light, after he go home I light the fire.

Q. It was about fifteen minutes after the fire was lighted, Orlando looked at it? A. Yes.

Q. Where were you? A. I was in there.

Q. How near to him were you? A. Where you mean?

Q. How far away from him? A. That way, (indicating) near the bench.

(Stenographer's note: Witness indicates about fifteen feet.)

Mr. La Porta: About ten feet.

Q. By "Pete," you mean the burned man, don't you? A. Yes.

Q. How was Pete standing when he was burned—in the pit or in the back? A. Right down in the hole, the fire come out.

Q. This hole is about how deep? A. That high. (Indicating)

Q. Indicate on your body where the door is. Do you know the door you look into? A. Yes.

Q. How high on your waist would the door come?

The Court: If your defence is there were what are known as contrary orders, I do not see that this prolonged cross-examination is not on matters different and apart from that. Why not get down to the point in the case?

Mr. Pierson: I understand his testimony is that he had put oil on the fire before it was lighted, he had lighted that fire, and then, fifteen minutes after, Orlando came and opened the door, and because of that oil, this flame burst out. I have brought out this time because it will be one of our contentions that if there had been any oil, it would have been entirely consumed in fifteen minutes, there would be no vapors left to create such a flame. Our theory is that this man, contrary to positive instructions, opened the door of the lighted fire and put oil upon it.

Q. Don't they use this oil for what they call skin drying, do you know what that is? A. No, I don't know what that is.

Q. Do you know whether they use this oil for other purposes than lighting the fire with?

(No answer.)

By the Court: Q. Did they use oil to skin-dry with?

(No answer.)

(Question withdrawn.)

Q. Do you know what the torch is? A. Yes.

Q. What did they use in torches? A. To dry the molds.

Q. What did they use to get the heat with? A. What do you mean?

Q. The heat to dry the molds, in the torches? A. They put oil in the torches.

Q. What did they fill the torches with? A. Kerosene oil.

Q. Had you been told this night, that Orlando was burned, to go home, that the fires were all right? A. When—the time we go home?

Q. Before he was burned, had you and Orlando been told to go home, that the fires were all right? A. Who say so?

Q. Had anybody—did anybody say that? A. The fire wasn't lighted.

Q. Weren't you told you should go home, the fires were all right? A. No, sir, I light the fire, I never seen nobody to go home.

Q. Did anybody tell you to go home? A. Who?

Q. Did anybody tell you to go home? A. Never was anybody, only me and him.

Q. Didn't John Ferguson— A. He wasn't there.

Q. —tell you that night, before Orlando was burned, that you should go home? A. Who say so?

Q. Didn't John say so? A. No.

Q. Didn't John tell you that night, before this accident, you and Orlando should go home, the fire was all right? A. Have to see the fire—what do you mean— to go home? Have to see the fire first, and then go home.

Q. Wasn't the fire all right, and weren't you told so? A. I never told so, have to see the fire first; after see the fire, then go home.

Q. Are you still working for Ferguson & Son? A. Yes.

Q. Are you working there now? A. No, I am not working there now.

Q. How long since? A. About three months.

Q. You were discharged, were you? A. What?

Q. Were you discharged—fired? A. The foreman chased me out.

RE-DIRECT-EXAMINATION by Mr. La Porta:

Q. You worked there how long before Orlando worked there? A. Two years.

Q. Did they use kerosene then? A. Yes.

Q. Did Mr. Ferguson use it too? A. Yes, everybody used it.

Q. On this 20th day of January, when Orlando was burned, were you working overtime? A. Sure, we were working overtime.

Q. Did you work overtime the same week, before this day?

The Court: What are you trying to prove now?

Mr. La Porta: I want to show that he had worked overtime on other work and overtime on this occasion. That is the principal reason Mr. Ferguson was not there.

The Court: You don't have to show that now.

RE-CROSS-EXAMINATION by Mr. Pierson:

Q. Did I understand you to say that John Ferguson came to the hospital where Orlando was? A. John told me I shall go—

Q. Did you see John Ferguson in the hospital after Orlando was burned? A. No, never see him in the hospital, I never see him.

Q. Haven't you heard the foreman and John Ferguson and others tell men not to put kerosene oil on a lighted fire, or fire after it was burning? A. I don't understand this.

By the Court: Q. Did Mr. Ferguson or anybody there tell you not to put oil on there after you started the fire? A. Well, the fire wasn't started.

Q. Did he ever tell you not to put oil on after the fire was started? A. Well, I never put oil on the fire, the fire wasn't started.

Q. Did he ever tell you not to put oil on after you put the match to it—on the fire you lighted it? A. Yes, he said, after light, don't put any more kerosene.

By Mr. Pierson: Q. He told you that, when Mr. Orlando was present, hadn't he, not to put oil on the fire after it was lighted? A. Never put on, the fire was lighted; this time, put oil on, the fire wasn't lighted.

Q. He told you not to put oil on after the fire was lighted? A. Yes.

Q. You only put kerosene on the fire? A. Yes.

Q. You put kerosene—you didn't put oil, only kerosene? A. Yes, only kerosene.

Q. Did Orlando put kerosene on the fire that night? A. No, sir.

Q. He didn't put any on at all? A. No.

Q. You put it on? A. I put it on.

Q. Had Mr. Ferguson used kerosene himself in your presence? A. Sometimes he fire make, sometimes he said me, some kerosene, put on fire.

Q. Who would say that? A. Mr. Ferguson.

Q. Told you that? A. Sure.

VITO ORLANDO, sworn:

Direct-examination by Mr. La Porta:

Q. You are the petitioner in this case, are you not? A. Yes, sir.

Q. Where do you live? A. 522 Monroe Street.

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

Q. Were you on the twentieth day of January this year working for John F. Ferguson & Son? A. Yes, sir.

Q. Doing what? A. Moulder's helper.

Q. What happened to you on that day? A. I was working for Mr. Ferguson. I was working for a master who makes wheels for ships.

Q. What happened to you when you opened the door to a furnace of the John F. Ferguson Company? A. What happened to me? When I opened the door of this furnace to find out how the fire stood, then I burned myself. In the meantime I asked some man by the name of John what was the trouble with the fire.

Q. What burned you? A. The face. (Indicating from the collar up to his head.)

Q. Where did this blaze come from? A. Behind the small door of the furnace, in the back.

Q. Did this happen just as soon as you opened the door or afterwards? A. In the same moment.

Q. What time of the evening was that? A. Ten minutes after six, may be.

By the Court: Q. What time did you start work?

Q. What time did you start work? A. In the morning?

Q. Yes. A. Seven o'clock.

The Court: How long had you been working

when this thing boomed? How long had you been working that day when the "boom" came? How long had you been working that day when you opened the door and the thing burned you?

A. (Interpreter.) He says he went to work seven o'clock in the morning; he started work seven o'clock in the morning; but when this thing happened it was six o'clock in the evening.

Q. Who else was working with you that night? A. Myself and a man by the name of Johnny Romano.

Q. He is this witness? (Indicating) A. Yes, sir.

Q. Who made the fire that night? A. John.

Q. Did you use any kerosene that night? A. No, sir; not at all; just opened the door; the fire came up and burned; just fall down. The other fellow says, "I can't; I can't give the hand." The other fellow comes in front. When I close the door the fire go in again; the other fellow take him up himself and put the water; all the clothes were burned.

Q. Did John ever tell you not to use this kerosene? A. He never told me anything like that. He even used it himself.

Q. Did you see him use it? A. Sure, sure.

Q. Who is your boss in that factory? A. Mr. Ferguson.

Q. You mean John Ferguson? A. John.

Q. Did you receive instructions from anybody else there? A. No, sir.

Q. Only from Mr. Ferguson? A. Yes, sir.

Q. How long have you worked there? A. About three years.

Q. And did they always use kerosene during those three years you have been working there? A. All the time.

Q. Did they use it for the furnace? A. Yes, sir; all the time.

Q. What did they use it in the furnace for? A. In order to burn the logs, or otherwise the wood wouldn't burn.

Q. Why wouldn't it burn? A. Because the logs are wet, and wouldn't burn unless kerosene is used.

Q. Are fires ever made in that shop without the use of kerosene? A. No, sir; no, sir.

Q. What do you mean, "no, sir?" A. Always use kerosene; always, everybody use kerosene. There wasn't a person did not use kerosene.

Q. How many children have you? A. Five and one coming—six.

Q. What is the age of your oldest child?

Mr. Pierson: I object to that.

Mr. LaPorta: We are petitioning for a lump sum, if your Honor please. We want to show the facts to warrant your Honor giving us the lump sum.

The Court: You tell me what the facts are, on the record, and I will deal with those facts.

Mr. La Porta: The fact is that this man has five children, no means of supporting them; he is being supported himself now together with his family, and the children are all under age. He is very anxious to see them go to school; and if he is not rendered a lump sum he will either have to put them away in some home, or bor-

row the money, or do something of that kind in order to keep them at school.

The Court: I will settle that now. I suppose that is the full statement of facts that you would present on the question of commutation?

Mr. La Porta: That is practically what it is.

The Court: I will deny commutation. I will deny commutation; so do not spend any more time on that.

Q. What were you employed to do? A. Everything, help; I do helping around there; do anything.

Q. Did you ever make fires for Mr. Ferguson.

The Court: Why go over that again? He has been asked that half a dozen times. He has testified to it very fully. Why repeat so much?

Mr. La Porta: Very well.

Q. What injuries have you now, Mr. Orlando, by reason of the burns?

The Court: What is the matter with you now?

Witness shows his hands.

The Court: Can't you close either hand tight? A. No, sir.

The Court: Can you feel when I press the fingers? A. No, sir.

The Court: Can you feel that? A. Yes.

You can feel it when I pinch it; you can feel me take hold of that, can't you? A. A little warm; a little heat.

Q. Now, what happened to your neck and face and ears? Were they burned, too? A. All burned.

Q. And ears? A. (Witness indicates face.)

The Court: How long was it before you were able to go out? A. Somebody carried me out.

Q. Were you brought to the hospital when you were burned, right away? A. Yes, sir.

Q. And how long did you stay in the hospital? A. Two months, and three months home: two months sick in the hospital, and three months home.

Q. Now, what about the neck? Have you the full function of your neck in looking up? A. No, sir.

Q. It is contracted is it?

The Court: Can you put it 'way back, like that? (Indicating.)

A. No more than that. (Indicating.)

Q. Can't you close your mouth when you do that? A. No, sir.

Q. Now, what is the matter with your eye, Mr. Orlando, the eyelids of the eyes? A. When the sun shines I can't see well; my eyes shed tears; I could not look from one block to the other.

Q. How was your vision prior to this burning? A. I could see a person one hundred miles away.

Q. Close your eyes. Can you close your eyes? Can't you close that eye at all? (Indicating the left eye.) A. No, sir.

The Court: Can you see out of the left eye? A. Yes, I can see.

Q. Could you control entirely—could you control—could you close your eyes entirely before they were burned—the eyelids? A. Yes, sir; very nice, beautiful, fine.

Q. Can you use your hands at the present time? A. How could I use it?

Q. Yes, or no? A. No.

Q. Did you get all those scars on your face from this burning—accident? A. The doctor say that; the doctor know that; yes.

Q. Did those scars come from the burning.

The Court: He says yes.

Q. Did you have to lift heavy weights in Ferguson's? In the foundry there? A. Sure.

Q. Can you do it now? A. No, sir.

Q. Could you use a shovel very well? A. No, sir.

Q. Why? A. Because I can't close my hand.

CROSS-EXAMINATION by Mr. Pierson:

Q. Where were you standing when you opened the door, down in the hole or on top? A. Up. As I opened the door then the flame came in my face.

Q. You had to bend down, then, to reach the door, had you not? You had to bend over to reach the door? A. Yes, sir; a little bit.

Q. Which hand did you open the door with? A. With right hand.

Q. Where was your left hand? A. I had it along side of me.

Q. Will you show just how you reached and opened the door as near as you remember? A. This way. (Indicating.) As soon as I tried to open the door, then all of a sudden the flame came out and I was burned; and then I went down in the hole.

Q. This John Romano was there, you say, at that time? A. Sure; yes, sir.

Q. Was the watchman there, too? A. In the office.

Q. Where is the watchman now? A. Dead

Q. The watchman had not been around there that evening, had he? A. No, sir.

Q. Did you see John Romano start the fire? A. I asked him to do it.

Q. The question was did you see him do it? A. No; I did not

Q. Where were you, do you know, when he did light it? A. I was also in the shop.

Q. How far away? A. I was all around the shop. May be I was fifteen feet away from him at the time he made the fire.

Q. What were you doing when he lighted the fire? A. I was placing clay over the door at the time.

Q. This clay that you were placing over the door was placed on the other end of the furnace, was it not? A. In the front, side.

Q. And you put that there to keep the heat in? A. Yes, sir.

Q. Well, now, when after that did you go to look at the fire? A. Yes, sir.

Q. How long after that? A. About ten minutes more or less; not even so.

Q. Had there been any oil put on that fire after it was started? A. No, sir.

Q. It is customary to put the oil on the material before the fire is started, is it not? A. Yes, sir; it is used; but I did not see that.

The Court: Do they put oil on before they start the fire, or do they put the oil on after they start the fire? A. Before.

The Court: Is that what this man did that time? A. That is always done.

The Court: Is that what he did that day? A. That day it was done.

Q. Aren't you told never to put oil on the fire after it is started? A. Yes; when there is fire, yes; when it is lighted we put no kerosene.

The Court: He says yes; that is what they have been told to do. You have been told not to put oil on the fire after the fire was started? A. When the fire is burning, no; no, sir.

The Court: I would not spend any more time on that. He says those were his orders.

Q. Did you have anything at all in your hands that night when this fire came out? A. Nothing at all.

Q. Was John Ferguson, the boss, there when Romano lighted the fire? A. He was there. I can not speak here.

Q. Don't you know that John Ferguson, the boss, was there after the fire was lighted? A. Yes.

The Interpreter: He refused to answer. He wants to talk in his own way.

Q. (Repeated by the stenographer.) Don't you know that John Ferguson, the boss, was there after the fire was lighted? A. Yes, sir; as soon as the fire was made he was there. Yes, sir.

Q. Do you remember John Ferguson coming around to the front and opening the little door in the big door there? A. Yes, sir.

Q. And he felt to see whether the oven was warm or not? A. No, sir; he told me to open the door.

The Court: What did he go around there for, to open the little door? What did he do that for? A. I opened the door myself and not Mr. Ferguson, for the wind; Mr. Ferguson said, "Close the door."

Q. That was the little door in the big door around in front, wasn't it? A. Yes, sir.

Q. Now, what did he say then? What did John Ferguson, the boss say then to you? A. Close the door, for otherwise the factory would get black.

Q. Did he say anything else? A. He told me to be careful; that he wanted the job right.

Q. Didn't he tell you that the fire was all right? A. He didn't see the fire.

Q. Didn't he tell you that the fire was all right and that you should go home? A. No, sir; he was not there at that time. He went away. He had gone.

Q. No, but at the time that the door was opened in the front, didn't John Ferguson then tell you to go home? A. No, sir; he told me to watch the fire.

Q. Now, how long was that, at the time John Ferguson was there, after the fire had been started? A. About a quarter of an hour. I was still waiting this fire was started.

Q. Now, how long after John Ferguson went away was it that you looked in the door where you were burned? A. About a quarter of an hour; not even so.

Q. Where did they take you after they took you out of the foundry? Where did they take you then, first? A. They first took me to the office, and then the watchman took me to the station house.

Q. The station house is about a block away, is it not? A. Yes, sir; Willow Avenue.

Q. Do you know "Eddie," the driver? A. Sure I know him.

Q. The watchman then went back to the foundry, did he not? A. Yes.

Q. Then after a little while "Eddie" came in the station house?

Mr. La Porta: Q. Who is "Eddie"? A. The boss came.

Q. But didn't "Eddie," come; "Eddie," the driver? A. The only one I saw was Mr. Ferguson, the boss; I didn't see anybody else.

Mr. Pierson: "Eddie," stand up!

Q. Did this man come to the station house while you were there? A. If he came there I don't know; I couldn't see well.

Q. The boss did come there, did he not? A. Yes, sir.

Q. What did the boss say to you when he came? A. I was crying over my children. He told me to have courage and not to worry about it.

Q. Did John Ferguson when he came there ask you what you had been doing that this happened? A. He didn't tell me anything. "Courage, courage;" that is what he said.

Q. Did he ask you anything about how the accident happened?

Mr. LaPorta: I object. It is not proper cross-examination.

The Court: It lays a foundation, I suppose, to see if he made an inconsistent statement previously. Go on.

Q. (Repeated by the stenographer.) Did he ask you anything about how the accident happened? A. That is all; he tried to give me courage, nothing else.

Q. Didn't John Ferguson say to you: "What have you been doing that this happened?" or

words of that character? A. I was keeping—I kept on telling Mr. Ferguson that it was his fault, and he says: "Don't be afraid. Courage."

Q. Why did you say it was his fault? A. Because he caused me to close the door.

Q. You said that it was his fault because he had closed the door? A. Yes, sir.

(Last two questions and answers repeated by the stenographer.)

Mr. Pierson: I misunderstood the answer. I think this might be stricken out. That makes it clear.

The Court: Ask him another question.

Q. Didn't you in answer to a question of John Ferguson as to how this accident happened say: "me put a little oil on the fire"? A. No, sir.

Q. Didn't you say anything of that kind? A. Nothing at all.

Q. Didn't "Eddie," the man that stood up there, go there to the station house that night and ask you how this accident happened? A. No, sir; he didn't tell me anything.

(Witness excused.)

Matter adjourned to Monday at 3:30.

Continuation of the trial of above case, November 11, 1915, before Hon. George G. Tennant, Judge.

VITO ORLANDO, the petitioner, re-called for further cross-examination, testified as follows:

Cross-examination by Mr. Pierson:

Q. Let me see how you hold the pencil when you make your mark. A. (Witness does so.)

Q. Can you write at all? A. (Witness apparently tries.)

Q. Could you ever write—before you were hurt? A. No, sir.

By the Court: Q. Could you write before you were hurt? A. No, sir; I couldn't write and read.

Q. Didn't you ever learn to read and write in Italy? A. No, sir.

Q. How old are you? A. Forty-one.

By Mr. Pierson: Q. Can you make numbers—figures? A. Yes.

Q. Write some number. A. (Witness does so.)

Q. When did you go back to Ferguson's to work? A. I don't remember.

The Interpreter: He started to mention something about five months.

Q. After you were burned, do you know what month you went back there again? A. June. About the thirteenth day of June.

Q. You stayed there from that time until after you were insisting upon bringing on this trial? A. Yes.

Q. Were you not satisfied there?

Mr. Stites: I object. It is immaterial.

The Court: Objection sustained.

Q. This flame that came out of the furnace, at the time you were burned, did you see that flame? A. No, sir, I didn't see it.

Q. Did you see anything at all? A. Nothing at all. I was blinded.

Q. Did you see any fire at all? A. Nothing at all.

The Court: Is this the case where one eye was partially destroyed?

Mr. Pierson: Yes.

The Court: Not the sight.

Q. As I remember, you said the other day, when this flame broke out you fell down in the pit there, the hole; is that right? A. Yes.

Q. None of this time you saw any flame at all? During this time you saw no flame at all? A. No, sir, nothing at all.

Q. Do you remember when you opened the door? A. Sure, I do remember.

Q. Could you see any flame then, when you looked into the furnace or oven? A. Nothing. Smoke, that is all I saw.

Q. Do you remember the other day you testified that after the fire was started, the boss, Ferguson, was around there a while and then went away? Do you recall that? A. I didn't say that. I said that the boss was there, then he went away. And the boss ordered me to shut the door in order to not make any smoke.

Q. That was after the fire was started? A. After that moment, yes.

Q. Then the boss went away after that? A. Went away.

Q. How long after the boss went away was it you looked into this furnace? A. I don't remember, I hadn't the watch in my hand; maybe ten minutes, more or less, maybe less.

Q. It was about ten minutes, was it? A. Maybe less than.

Q. Maybe more? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. LaPorta:

Q. How soon after you opened the door of this furnace were you thrown into the hole? A. The same moment.

Q. When was this fire made, after Mr. Ferguson went away, or before? A. After.

Q. The fire was built after Mr. Ferguson went away? A. Yes.

Q. How many furnaces have you in the shop? A. Two.

Q. Did you have fires in both furnaces that night? A. Both were lit up.

Q. Was one started before Mr. Ferguson went away? A. As soon as Mr. Ferguson went away John made the fire in both furnaces.

Q. And just as soon as he went away you started the fires; is that right? A. Yes.

Q. Are you left handed? A. No, sir.

Q. What are you? A. Right.

Q. When you went back to work what did you do? What were you employed as? (No answer.)

Q. After the injury you came from the hospital, you went back to work, what did you work as? A. Watchman.

Q. When you were taken to the station house and from there to the hospital, what was your condition? A. I couldn't see anything at all.

Q. What was the condition of the skin? A. I am forty years old now, I look like a young man then.

Q. What did they do to the skin that was burned on you? A. The doctor cut off the skin at my face, and from my hand, take it off like a pair of gloves.

Q. Were you in extreme pain at the station house? A. Yes, I felt lot of pain.

By the Court: Q. Where did they take you from the station house, to the hospital? A. Hospital.

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

Q. When you came out of the hospital did you go right to work? A. I was three months sick, home, I was cured, taken care by Dr. Rudolph.

Q. What was the matter with you during the three months you couldn't get around—three months after you came from the hospital? A. Yes, three months; I was—my face was still sore, I was —my hands was in this, I couldn't even eat.

By Mr. La Porta: Q. Were your hands bandaged up while you were at home? A. Yes.

The Court: What was the date of the accident?

Mr. La Porta: January 20, 1915.

The Court: Is it admitted in the case that the hospital treatment was provided for him? Did he have any expenses?

Mr. La Porta: We cannot admit that. My client never knew that the expenses were being paid by Mr. Ferguson.

The Court: Did he pay out any money for hospital treatment for the first two weeks?

Mr. La Porta: No, none at all.

RE-DIRECT-EXAMINATION by Mr. La-Porta:

Q. Can you bend the fingers of your right hand? A. Yes, the doctor could see, and can examine my hand, the way it is.

Q. Could you make figures, numbers, better before the accident than you can now? A. I could make them all then.

Q. Could you write your name in Italian before the accident?

The Court: He said he could not write.

Q. After the accident, when you went back to work, how much were you paid as wages—how much were you paid as compensation, per week? A. Ten-fifty.

Q. What did that ten dollars and fifty cents include? What was it for?

The Court: After the accident?

Mr. La Porta: After accident.

The Court: What difference does it make?

Mr. La Porta: It shows the earning capacity has been diminished, he is earning five dollars and twenty-five cents a week as watchman, and the same amount is given as compensation, in case any liability should be shown upon litigation.

The Court: You admit that before the accident his wages were $10.50 a week?

Mr. La Porta: Before the accident, yes, $10.50. Now the $10.50 are paid, not as wages, but $5.25 as wages, and $5.25 as compensation.

The Court: Your theory is that his earning capacity has decreased, by reason of his disability he has suffered, fifty per cent?

Mr. La Porta: That is my theory, exactly.

Q. When you opened the door to the furnace what happened to your eyes, that you couldn't

see? A. As I opened the door the flame came out and blinded me, when I fell down in this pit.

RE-CROSS-EXAMINATION by Mr. Pierson:

Q. How do you know the flame came out and blinded you?

The Court: Why go over that again?

Mr. Pierson: It seems to me, in view of what he testified some time ago, I could ask him how the flame came out.

The Court: If you want to go over it again, I will give you the opportunity. He has said, about half a dozen times; go on.

Q. How do you know the flame came out? A. As I opened the door I heard "Boom," and felt something in my face, and I fell down in this pit.

Q. As I remember, you told Mr. La Porta, when he asked you this morning, that both of the fires were lighted after Mr. Ferguson, the boss, went away; is that true? A. I say so.

Q. Why did you tell me this morning, and why did you tell me the other day, when you were on the witness stand, that Mr. Ferguson was there after the fire was lighted?

Mr. La Porta: He didn't. I object to that. He did not say that at all.

Mr. Pierson: He said it very distinctly this morning.

The Court: I will allow it.

A. I said he wasn't there, but I said he went away and came back.

Q. Oh, he was back there then, after the fire was lighted? A. Right away, the same moment.

Q. The same moment that the fire was lighted? A. Yes, same moment.

By the Court: Q. Which eye is it you cannot shut entirely? A. (Witness indicates the right eye.)

Q. Shut your eyes now. (Witness does so.)

Q. What harm does it do to you? A. When I sleep my eyes, remain open.

Q. What harm does it do to you? A. My family get scared, see me sleeping with open eyes.

Q. I don't mean your family. What harm does it do to you? Do you suffer from your inability to shut your eyes when you go to sleep?

The Interpreter: He indicates on both sides, he says it hurts me here, sometimes I feel something pricking in my eyes, a little pain.

Q. I don't mean about that. Listen to the question. How does it affect you, what harm does it do you if your eyes are open when you are asleep? A. My family tell me I was not sleeping, my eyes open, but I don't know that myself, I don't notice that myself.

Q. It doesn't bother you then, does it? A. I only feel a little pain, but if I sleep with my eyes open or not, I don't know.

Mr. La Porta: May I suggest to ask him, when he walks in the street, in the sun-light, how are his eyes affected?

The Court: He has already testified about that.

By Mr. Pierson: Q. After you went back you used the shovel to shovel sand in the molds, didn't you? A. No, sir.

Q. Sure about that, are you? A. Most sure.

By the Court: Q. What did you do? A. Watchman.

Q. Didn't you use a shovel to shovel sand? A. I done that once there before the doctor, to find out I could do it.

Q. Did you use the ladle to skim the metal that was melted? A. One time they place one in my hand, the foreman did, but I couldn't do it.

Q. Put your hand up there (indicating on the bench in front of the Court). Make your thumb go. Your first finger go. Second, third, fourth.

The Court: The right hand; scars from the middle of the hand, back of the knuckles of the hand, shrivelled condition of all fingers; nails eaten away from all except the second and third fingers; the nails on those two fingers seem to be growing again.

Q. Close your hand up.

The Court: Showing, when requested to close the hand, inability to close up hand—fingers and right knuckles to remainder of hand.

Q. Your wrist. (Court moves the wrist.) No hurt there? A. No, sir.

The Court: Ability to throw entire hand back at wrist with some considerable freedom, but not entirely free. Fourth finger or little finger, first phalange bent crooked, scars on the back of the hand continued back of the fourth finger, further than the scars on the back of the hand, back of the other fingers. Scars on the back of the thumb continued about even with the scars as they appear on the back of the hand, back of the fourth finger. In other words, the scars continue as already stated, almost across to midway between knuckles and the wrist.

The left hand: Left hand, the the fourth or little finger, first phalange bent almost at right angles with the rest of the finger. Scars of this hand continue from the fingers past the knuckles, back almost to the wrist.

Q. Move your thumb.

The Court: Shows ability to move his thumb.

Q. Put the thumb close to your hand.

The Court: Cannot apparently press his thumb against the first finger. When I take it in my hand I seem able to push it down.

Q. Squeeze that thumb against the first finger, tight. Pick that book up between first finger and thumb.

The Court: Is able to hold book between thumb and fingers.

Q. Pick the book up with your left hand.

The Court: Takes hold with the first finger, and has to bring the book over on the thumb and is still able to hold the book between first finger and thumb.

Q. Press the third and fourth fingers down on that book.

The Court: Is able to do this and still hold the book.

Q. Take the book with your right hand.

The Court: Repeats the process as with the left hand and with the first, second and third fingers pulls the book on the thumb, and lifts the book between the thumb and the first finger.

Q. Press your fingers down on the book.

The Court: Seems to be able to press first second, and partly the third finger on the book, holding the book by the under part of the thumb.

Q. Press the fourth:

The Court: Does not seem to be able to press very hard, or to be able to push down the fourth finger on the book.

The left hand: The little finger, the first phalange is bent right at the knuckles, the nails of the fourth, third, second and first fingers seem to be growing all right, as well as on the thumb. There seems to be a holding together of the cords below the knuckles, close to the fingers. And on this left hand, the fingers, he seems to be able to close about half way.

Mr. Stites: Will you get the scars on his face on record?

The Court: Physical disfigurement will not be allowed for.

Mr. Stites: Could we have the petitioner endeavor to lift a chair?

The Court: Yes, I think I have given him a pretty exhaustive examination.

Q. Can you pick that chair up, raise it (indicating the chair on which witness has been sitting)? Take hold with both your hands.

(Stenographer's Note: Tries, and lifts it just a little bit.)

Q. Try the other chair. Can you raise it to your stomach?

(Stenographer's Note: Lifts it.)

The Court: Takes hold of chair between thumb and fingers, raises it, but

complains of weakness in doing so; and falters with chair.

By Mr. Stites: Q. How high could you raise the chair before the accident?

The Court: He says he was in good health.

Mr. Pierson: This is a very heavy chair.

Mr. Pierson: One thing that was not clear—I understand this room had two fires—whether Romano divided that gallon of kerosense between the two fires, I would like that cleared up.

JOHN ROMANO, re-called, for further cross-examination.

Cross-examination by Mr. Pierson:

Q. You testified the other day of the building the fire in this oven or drying room—you remember that? A. Yes.

Q. As I understand, there were two fires in this room? A. Yes.

Q. You kindled both fires? A. Yes.

Q. You said you used a gallon of kerosense? A. Yes.

Q. Did you use it on the two fires? A. Yes.

Q. About half on each? A. Yes.

JOHN J. RUDOLPH, a witness produced on behalf of the petitioner, being sworn, testified as follows:

Mr. La Porta: Is there any question of the doctor's qualification?

Mr. Pierson: I don't know what he is going to testify to.

By the Court: Q. Are you a practicing physician? A. Yes.

Q. Where? A. Hoboken.

Q. Where did you graduate? A. Albany University.

Q. How long have you been practising medicine? A. Since 1898.

Q. Where? A. Hoboken.

Q. Have you done hospital work? A. Yes.

Q. Where? A. Columbus Hospital, New York, and Post Graduate, New York.

Q. Are you admitted to practice medicine in New Jersey now? A. Yes.

By Mr. La Porta: Q. Have you seen the hands of the petitioner of late, Doctor? A. Yes.

Q. Have you seen him recently? A. Yes.

Q. When was the last time you saw him? A. I have seen him every day, but I have not seen his hands to examine them in the last three months.

Q. Will you examine them now, to refresh your recollection? A. I remember his condition.

Q. You remember the condition of his hands? A. Yes.

Q. How much loss of function is there, of the use of both hands? A. Loss of both hands?

Q. Yes. A. The one, seventy-five per cent, and the other, fifty.

Q. Which one is seventy-five per cent? A. I believe the right one.

Q. Right hand. By showing you him, can you say positively which one? A. The right hand.

Q. How much function has he lost of the left hand? A. About half.

Q. What is the total function of the loss of both hands? A. Well, I should think—

Mr. Pierson: I don't think that question is clear.

Q. Take both hands together; how much function has he lost of both hands together? A. I should think seventy-five and fifty, one hundred and twenty-five; I think half of that. Do you mean percentage of both hands taken together?

Q. Yes, put together. A. I think—

Q. Would you say sixty-two and one half per cent? A. Yes.

Q. From the appearance of the hands as you see him now, is it likely there will be an improvement in their condition? A. I hardly think so.

Q. Assuming that his hands were burned on January 20th of this year, up to the present time—I believe that covers a period of about ten months—is it likely his hands will remain in their present condition, by reason of the long time that has elapsed? A. I think they will.

By the Court: Q. Will they get any better? A. I don't think they will.

Q. Have you examined his inability to close the left eye? A. I have not, no.

Q. You are under subpoena here? A. Yes.

CROSS-EXAMINATION by Mr. Pierson:

Q. Have you had any special experience in burns? A. Why, only in the ordinary run.

Q. You have not made any specialty along that line, have you? A. I have not, no.

Q. What do you mean—what do you understand

by loss of function? A. Why, inability to close his hands.

The Court: Even a lawyer knows what loss of function is, I suppose. Don't you?

By the Court: Q. You mean his inability to use his hand, do you? A. Yes.

Q. How do you judge that in this particular case? A. When I last examined him I tried to close his hands. It was impossible.

Q. That was two months ago, about? A. Yes, I think it is longer.

Q. You have not examined enough to know whether there has been any improvement since then or not? A. No, I have not.

Q. Isn't it a fact that scar tissue stretches—instead of contracts? A. Yes.

Q. And there is scar tissue in this hand, is there not? A. Yes.

Q. There was when you examined it two months ago? A. There was.

Q. After the scar tissue if formed that way, there can be no more contraction, can there? (No answer.)

Q. After scar tissue if formed, after a burn, the contraction is ended? A. Yes.

Q. There will be no more drawing up of the fingers? A. Not now, no.

Q. And the fact this would stretch would have a tendency to let the fingers extend more—open more fully? A. I don't think, now.

By the Court: Q. Are the flexors in those hands injured? A. I think the ligaments of the posterior upper hand are contracted; I think that causes—that is the cause of the inability to close them.

Q. In other words, the ligaments that run down

the back of the hand on the outside are contracted; when he tries to shut it, this ligament holds it open? A. Yes, that is what I think is the cause of that.

Q. Is that curable, in your judment? A. I do not think so.

By Mr. Pierson: Q. What sort of burn was this? What degree of burn? A. I could not tell you because I did not see the man for over two months after it happened.

Q. As a matter of fact you don't know whether there was any injury of any part of the hand under the skin, do you? A. Only from the condition of his hand.

Q. If there were a burn of only the first, second or third degree, there would be no injury of the muscles or tendons or any of them? A. No.

Q. Is that so? A. That is so.

Q. Not knowing the degree of the burn, you cannot tell whether there is anything wrong with the muscles or tendons or not? A. That is simply my opinion, from examining the hand.

Q. So all the inability in his hand may be simply due to contraction of the skin and lack of use? A. It may be.

Q. After a certain stage of healing it simply becomes lack of use, doesn't it? A. You mean after the—

Q. I mean after the skin is formed, this scar skin is formed, then the inability to use the hand depends on lack of use, doesn't it? A. Provided there is no pain.

Q. Isn't one of the forms of treatment of a burning of the hands that way, the moving of the hands, exercise? A. Yes.

Q. If it is persisted in, the hand will get practically normal, if there is no injury of the muscles or tendons? A. If there is no injury of the muscles or tendons.

Q. And in your opinion there has been no improvement since two months ago? A. I don't believe there has.

Q. You are basing your testimony entirely on what you saw two months ago? A. From what I saw after he came from the hospital; what I saw the last time I saw him.

Q. That was two months ago, about? A. About.

Q. How long before that had you seen him—before the two months ago? A. I saw him after he came from the hospital.

Q. What was the difference between what you saw at that visit and what you saw at the later visit? A. Why, his hands were not healed, and his face was not healed when he came from the hospital.

Q. But two months ago they were healed? A. Yes, same as they are now.

By Mr. La Porta: Q. Are you also basing your observation on what you saw of his hands today? A. What I saw, looking at his hands.

VITO ORLANDO, the petitioner, re-called by the Court:

Q. Close your hand.

(Witness does so.)

Q. Close the other hand.

(Witness does so.)

Petitioner's Case Closed.

Defense

FERDINAND C. WOLF, a witness produced on behalf of the defendant, being sworn, testified as follows:

Direct-examination by Mr. Pierson:

Q. Will you state where you graduated as a physician and what you experience has been?

Mr. Stites: We don't question the doctor's qualifications as a physician.

Q. When did you first examine the petitioner in this case? A. I examined him in the beginning of June of this year.

Q. How frequently have you examined him since? A. I have examined him twice since.

Q. How recently have you examined him? A. On the 19th of October.

Q. State his condition, how you first found him, and how you now—(I will withdraw that.) What did you find when you examined him first in June? A. I found this man in pretty bad condition.

By the Court: Q. That was June, 1915? A. June, 1915. His hands were covered with bandages and were not completely healed; he had been shortly out of the hospital.

By the Court: Q. What was the date? A. I think the seventh of June. At that time his hands were not completely healed, and it was impossible to make any definite report about the function of his hands because he was unable to move them; they were not healed properly. I examined him then on the 19th of October, I found a remarkable improvement in the motion of the hands, they were completely healed, and the left hand—well, in my opinion the function of his left hand was about seventy-five per cent; of the right—

Q. He had seventy-five per cent use of the left hand? A. Of the right hand he had approximately between forty and fifty per cent use.

Q. On what do you base your estimate? A. From experience I have had with burns.

Q. Will you state something of your experience with burns? A. I am the physician to the North German Steamship Company, the Holland American Line Steamship Company. From those companies we have many cases of burn. I also am connected with St. Mary's Hospital in Hoboken, and have seen very many cases of burns there.

Q. What causes this loss of function? A. The scar tissue, the inability to flex and extend his fingers. The scar tissue has shortened the skin; due to that he is unable to bend or close them.

Q. What was the nature of this burn, as to degree? A. It was a burn of the third degree.

Q. Will you explain to the Court what that means? A. In a burn of the third degree, there is some destruction of the tissue; first degree, there is simply a reddening of the skin; second, a reddening of the skin plus blistering; third, we have both, with destruction of tissue.

Q. In the third degree, is there any destruction of the matter of the hand—the material of the hand—under the tissue? A. I think of the one hand, yes, I think on both hands some of the tissue was destroyed.

By the Court: Q. Were the flexors destroyed? A. Not destroyed, but injured.

By the Court: Q. To what extent is it possible to heal the flexors? A. They will never be well, he will never be able to close his hand completely.

I think the function of the hands will become progressively better as he uses them, but I do not think he will ever have normal use.

Q. It is a question of use? A. Proper exercise and proper treatment.

Q. When was the wound or burn entirely healed? A. I think the end of June—I cannot say—I simply saw him then.

Q. From that time on it became a question of— A. —of the resiliency of the scars.

Q. How does the burn of the fourth and fifth degree distinguish from one of the third? A. We have no burn of the fourth or fifth degree. We have only the first, second and third.

Q. Aren't there, in some classifications of some physicians? A. No.

Q. How do they speak of the— A. They come under one of the three degrees, the third degree— you mean destruction completely of the tissue, or complete destruction of the tissue?

CROSS-EXAMINATION by Mr. Stites:

Q. Where did you examine Mr. Orlando? A. At his home.

Q. October 19th? A. In June.

The Court: Do you think you will do your client any good by cross-examining this witness?

Mr. Stites: I don't know. The doctor may have made a further examination and found other things he has not spoken of.

Q. Did you examine his eyes? A. Yes.

Q. What did you find, with his eyes? A. I found his eyes did not close completely. I found the pupil entirely covered.

Q. Which eye was it? A. Both eyes.

Q. How long did that condition remain? A. How long will it remain?

Q. Yes. A. That I cannot say.

Q. Will that condition affect his eyesight? A. Not at all.

Q. What effect has it, if any? A. No physical—simply cause an inconvenience, I suppose; what is not closed is covered by the eye lash.

Q. Does the eye lash on the left eye close completely when he closes his eyes? A. It does not close completely.

Q. About how much opening was there when he came home? A. Very small opening.

Q. One of the functions of the lid is to protect the eye? A. Yes.

Q. Will he ever be able to close entirely the lid of the left eye? A. That I cannot say.

Q. In your opinion do you think he will? A. I think he will be able to.

Q. About when? A. I should think in the course of three or four months.

Q. Do you think that exercise and use of those hands will enable him to close his hands sometime? A. What do you mean—close his hands completely?

Q. Entirely? A. I testified, sir, he would not be able to close them completely.

Q. Did I understand you to say the third degree of burn was the classification that he has suffered—burn? A. That is what it is, yes.

Q. The burns of the petitioner are in that class? A. Are in that class.

By the Court: Q. In other words, the tissue is destroyed? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Pierson:

Q. Could you at the time you first examined that burn, form any idea how it was caused? A. When I saw it, no.

Q. You could not do that. Was it a uniform burn, practically, where he was burned, without specially deep small places? A. As much as I could see.

Q. To what extent was the tissue destroyed—to a large extent or small extent? A. On one hand, to a very small extent—that is—what do you mean by tissue, skin or tendons?

Q. I will ask you what you mean. Explain what you mean by the injury of the tissue. A. In one hand the skin was destroyed. In both hands the skin was destroyed extensively; in the left hand the tendons were not affected very much. In the right hand they were affected a greater degree.

Q. You take that into consideration in your judgment of the loss of function? A. Yes.

CHARLES O. GUENTHER, a witness produced on behalf of the defendant, being sworn, testified as follows:

Direct-examination by Mr. Pierson:

Q. Are you a graduate of any technical school? A. Yes.

Q. When did you graduate from Stevens Institute of Technology? A. 1900.

Q. What degree did you get there? A. Mechanical engineer.

Q. What have you been doing since you left there? A. Teaching engineering, mathematics, and consulting engineer, outside of that.

Q. Where have you been teaching? A. Stevens Institute.

Q. Still teaching there? A. I am.

Q. For whom are you working as consulting engineer? A. Most of my consulting engineering work now is in connection with one of the largest chimney construction works in the country.

Q. Does the nature of the work you are doing for this company give you any experience in combustion of fuel and tests of a general nature? A. Relates to chimneys rather than it does to furnaces; they could come pretty well within the scope—

Q. Have you examined the oven in the foundry of Ferguson & Son at which, according to your information, this accident occurred? A. Yes.

Q. Describe what you found, how that oven is constructed.

Mr. Stites: I object unless it can be shown it is the same furnace.

By the Court: Q. One of these ovens was pointed out to you? A. Yes.

By the Court: Q. As indicating the place where he was hurt? A. Yes.

By the Court: Q. You examined it? A. Yes. It is nothing more than a drying oven, about thirty feet long, twelve feet high, by fourteen in width. The one end is capable of being enclosed, closed in with an iron door, and the other end is provided with two fire boxes, grates, in which a coke fire is started and maintained. The oven is practically a combustion chamber, and the gas must pass from the coke inside through to the furthest end, down through flues that lead into the chimney.

Q. Where are the flues situated? A. The flues are furthest away from the fire, as made up, and go up through the walls, connecting with the chimney.

Q. Those two doors by the back of the furnace, how large are they? A. The doors, I did not measure them, I should think about twenty inches wide and maybe fourteen or fifteen inches high. There are two holes in the wall, a door on the outside, that opens into the grate.

By the Court: Q. Is that on the combustion chamber? A. The entire room is a combustion chamber.

Q. These fires are simply built in one end of this large room, thirty feet long. Do you know what is meant by foundry coke? A. The foundry coke, I believe, is a type of coke which is a little—

The Court: Coke used in a foundry?

A. —it is probably a little harder than the ordinary run of coke.

Q. There is some slight difference in cokes, is there not? (No answer.)

By the Court: Q. You get a greater heat from foundry coke than from the cheaper form of coke? A. Yes.

Q. Suppose material had been laid for a fire in those two grates, consisting of wood, somewhat damp or green, and coke on top of that, ready for kindling, that there had been placed on top two quarts of kerosene, and that that had been allowed to stand for at least half an hour before the fire was kindled, then the fire was kindled in each one of those grates, describe the length of time it would take to burn up the oil that was there, so that when that was burned, there would be no possibility of any explosion or flame out of the doors.

Mr. Stites: I object. There is no proof in the case to warrant such a proposition.

The Court: I will take it, subject to a motion to strike it out.

A. I presume you mean ordinary commercial kerosene. If it has been allowed to stand half an hour it would disseminate and trickle through, in no case could there be any amount of liquid retained in bulk, and the surplus would have had to drop within the fire box, to the floor. In half an hour there is nothing but the wet wood, or whatever may have been used, and that being burned, I do not believe it could possibly take any great length of time, I should not think it would take more than—I don't know how I could really qualify that, because you can't get it down on—not more than two minutes or so, I should think. Your question is the danger of explosion—I do not think, giving it half an hour afterward, I do not think under those conditions there would be any danger of explosion, after ignition—when it is ignited.

Q. Ordinarily, if kerosene is put on material before a fire is started, and then the fire is kindled, what is the effect? A. The effect is to make flame enough, to make it burn sufficiently, to start the coke or whatever is to be burned.

Q. Is that, if that is done, for any reason, a safe proposition, to start the fire? A. I think it is safe, yes, if it is allowed to stand, yes, I think it is perfectly safe to light the fire.

Q. Would there be any material difference if the oil had been placed on that coke or put on the wood, immediately before the fire was lighted? A. The only point I can see, if it is put on, given

a chance to get through, it is not possible to collect any oil in any bulk.

By the Court: Q. On its being disseminated in the material desired to be burned, it is not apt to go off in a flash? A. It can flash. It will certainly light, take fire, but there is no danger of anything blazing out on you, in back-flashing.

Q. Suppose it were put on immediately before and it did not disseminate, there might be some quantity caught by something, what might be the effect of that? A. If there were any possible way there could have been an amount of that kerosene collected, the natural result would be for that to burn up quickly, it will create a lot of gas, if it is in any way confined it will create a pressure and something has got to go.

Q. And would that be done immediately? A. As soon as the flame got to it, if it didn't get a chance to burn up fast enough it would create pressure and something would have to blow.

Q. It would do it pretty quick after the fire was started? A. Yes.

Q. About the creation of gas in coke, independent of oil, what would you say as to that? A. The gases in coke are all driven off in its process, it leaves you practically carbon, eighty per cent carbon, it has either got to burn into CO or CO^2, that is, carbon monoxide or carbon dioxide; if there is insufficient air supplied it will burn into CO. Carbon dioxide will not explode, but carbon monoxide will. If it is confined in the combustion chamber and there is a sudden inrush of air, to supply the necessary oxygen to produce carbon dioxide, it will take place very quickly and burn with a blue flame which is practically invisible in daylight.

Q. Will it explode if it is confined? A. That is possible, but I do not see how you can confine it here.

Q. Why not? A. Because the cumbustion chamber is an entire room. This room, twenty by forty, is your combustion chamber.

By the Court: Q. You don't think it was CO or CO^2 that exploded; if there was anything, it was kerosene, in this case? A. I am only basing it upon what I heard of the conditions. Carbon monoxide is a blue flame, it is liable to come out and hit you, singe the eye brows, but I do not think it could set any one on fire or burn him so badly.

The Court: Do you want to show this was an explosion of carbon monoxide?

Mr. Pierson: I want to show it could not have occurred, under the testimony, from any explosion, or from anything, except there were fresh oil placed on the fire.

The Court: Ask him that.

Q. If there were carbon dioxide thrown off, would it diffuse through the room? A. It would work in the room, yes, if there were any explosion it would be in the room. If you ever got an explosion in that room of that kind there would be trouble—if you got enough to blow it up. You cannot get in that chamber—you have such an amount of air, you cannot choke it off; it is only when you have a fire place with a limited amount of air, you cannot get enough oxygen to turn it into CO^2, it goes into CO. As soon as you get the air in it will turn to CO^2 very quickly, just simply a snap.

Q. If it were possible to happen it would blow

the room out? A. You would certainly have some explosion.

Q. Suppose after this fire had been lighted for some time, a period of ten minutes or more, but while the coke was still dark on top, fresh oil were thrown on the lighted fire, then what would take place? A. Then I would want to get away from it. To throw the oil on a fire that has been started up, the top layers of coke not as yet having reached the point of ignition, they would be cooled off by the kerosene, which in addition would mean that some of the kerosene would be vaporized, and the free kerosene would trickle through, as soon as it got in touch with the lighted coke it would be immediately ignited and a flame would shoot up, the kerosene vapor and everything in the vicinity would immediately go, which would cause a very light yellow flame, it would also carry out, because in throwing it in, you would be creating the kerosene vapor inside your doors. In throwing it in, in striking the fire or coals, it would be set on fire.

Q. What effect would that vapor, if ignited, have upon the character of burn a person might get? A. The liquid is liable to be thrown out. If that was on the skin, I should say the oil would cling to it, and it would burn, it would make a pretty bad burn.

Q. Like a burn of hot grease on the hand. A. Absolutely. But carbon monoxide is different, it is a gas, as it flashes up there is a certain amount of heat, would scorch the eyebrows and hair.

Q. Have you seen the hand of this petitioner? A. Yes, I saw it casually.

Q. Is it possible that his hands could be so

burned if this flame was a carbon monoxide flame? A. I would have to qualify that, if you should keep putting on large amounts of carbon monoxide, keep burning it—

Q. Could you get such a burn as that? A. I don't believe you could. You would have to have a continual flame shooting out.

Q. In other words, if a person were burned by the shooting into flame of carbon monoxide, caused by putting kerosene on a lighted fire would he be apt to get such a burn as this, as you have seen on the hands of this petitioner? A. He would have to be in an actual fire; but the oil would cling to the skin, and burn on the clothes.

Q. How long would it be, if the coke was incandescent on top, but there was a fire underneath, if you threw kerosene on, before this burst of flame would come—this flame would be ignited? A. I should hardly think you would be able to close the door.

Q. If it were incandescent on top? A. If it was, still worse.

Q. It would make a flash of flame come back? A. Everything would be gone. Everything would be set on fire.

Q. If at least ten or fifteen minutes had elapsed after the fire was started, would there be any possibility of this burst of flame coming out from the door, or from that particular furnace, if it was put on before the fire was ignited? A. I do not think so.

Q. Suppose in any instance, in any case, that there had been oil put on the fire before it was lighted, and that should have trickled down, and caked, or something, and exploded, or there should

be any other explosion from causes in the interior of the furnace, what would be the difference between that case? A. If there was any explosion in the interior, of course it would take the path of least resistance, which might be through the door or back into the chamber, but it would carry coke and everything else with it, all the surrounding material that would break loose.

CROSS-EXAMINATION by Mr. Stites:

Q. Do you do any work for Mr. Ferguson? A. No, sir, never did any work for him.

Q. Or the respondent, John F. Ferguson & Son? A. No, sir. I never done any business with them at all.

Q. When did you examine these furnaces? A. On Monday, about—Monday, of this week—at about eleven or half-past eleven in the morning.

Q. Of what does the grate consist in these furnaces? A. Simply iron bars.

Q. How far apart are they? A. I don't know. I didn't climb down into—underneath the ash pit, there was coke in there. I should say probably an inch.

Q. An inch apart? A. Somewheres around there.

Q. Round or square? A. That I don't know.

Q. How low is the base of the ash pit from the grate? A. From the grate?

Q. Yes. A. Let me see— I didn't measure it; it must be about—it must be at least a foot, to the bottom of the door.

Q. Of what did the bottom of the ash pit consist—what kind of material? A. Simply ashes and refuse of ashes. I did not climb in underneath there.

Q. What kind of coke did you see there at the time you made your examination? A. I am not an expert, to tell coke. Coke, as far as I am concerned, is coke.

Q. You were asked something about foundry coke? A. I said there were different grades of coke. I believe the kind they use in a foundry is a kind rich in carbon, a little harder in texture than the other.

Q. More gas in it? A. No, less, because it comes down to a little higher percentage of carbon, the illuminants are driven off, leaves us a higher percentage of carbon, it simply disintegrates, it gets red hot.

Q. It takes more oxygen to ignite it? A. It doesn't take any more oxygen, carbon for carbon, because there is the chemical phenomenon that takes place in nature; it takes a certain amount of oxygen to carbon, to form carbon dioxide.

Q. Was there a damper on these furnaces to regulate the draft? A. Damper—there is—there was no damper on the flue. I don't remember whether there was a damper—you mean in the ash pit?

Q. Anywhere about the furnace. A. There is what you might call a damper on the back door; there is one door has a check draft—that I know.

Q. Would the draft have any effect upon an explosion? A. Yes.

Q. What effect would it have in a furnace of this kind, using the material they use there—could there be any explosion with those materials that they had in that furnace, without the use of kerosene? A. No, I don't think there could.

By the Court: Q. Suppose kerosene had been

put on the coke while the coke had been lighted, and then there was a draft in the back, at the other end of this fire box—combustion room —and that draft was partially open, when they opened the furnace door after oil had been on some little time, would the draft from the back door drive out a hot flame? A. I don't think it could, for the reason that the chamber is so large, you have such a large room, that it is like a window in the front of a large room, the effect is that small.

Q. Is it possible? A. I don't think it is possible under those conditions, no.

Q. Isn't it so when you have an ordinary boiler, and the back draft, when you open the door the flame rushes out? A. That is exactly it, but in that case you have a confined—a confining chamber—it is confined in small space, but you haven't that condition here, you have a large room.

Q. You don't think the opening of this door— A. I don't think it could possibly have any effect.

Q. Suppose it happened; what would you say? A. What happened?

Q. Suppose it did happen, that the flame came out of the door when the door was opened, what would you say then? What explanation would you give of it? A. I am afraid I would not be able to give an explanation.

Q. Suppose the flame came out of the front door. A. That was the one I was referring to. I say I would not be able to give an explanation.

The Court: This man stood at the front door, didn't he?

Mr. Stites: He stood by the door where the grate—where the fire was.

Q. Suppose he stood by the back door, as you

found this combustion room, and the other door was open, could you say then that the flame could have come out the back door—if the front door at the other end was open? A. Let me get it straight, what you call front and back.

Mr. Pierson: We call the door by the grate the back door.

Mr. Stites: I don't know.

The Witness: We will call those by the grate, the back.

The Court: Where was it the evidence shows that this man stood at the time this happened?

Mr. Stites: At the back.

The Court: Where the grate is?

Mr. Stites: Where the fire was built.

The Witness: Where the grate is.

Q. Do you call that the back? A. That would be the back, and the one in front is where the large door opens.

Q. If he stood by the back, where the fire was built, if for any reason that door of that furnace was opened, would you say that flame could come out? A. I should not think so.

Q. What door is there at the other end of this room than where he stood—that is, the other room than the one in which he stood? A. The front door is nothing but a very large iron door with a close narrow opening.

Q. Suppose that door was open for any reason, and a man stood at the other end, where the fire was, and that door was open for any purpose— A. You mean the large door with the hole in it?

Q. The door where the fire was—and the other door was open too. Suppose this man, the peti-

tioner, stood at the door inside of which was the fire on the grate, suppose for any reason the door in the rear—call it the door at the other end of this room—was open, would it make a draft which would cause this flame to shoot out of the door at which he stood? A. It would check the draft, but whether it would with this large chamber—whether it would have any effect—

Q. Would it be possible? A. It might be possible, but I should hesitate—

Q. Suppose there was a draft blowing the other way, instead of where he stood, would it drive a flame out? A. Would have to drive it through the fire.

Mr. Pierson: There is not testimony that the large doors were open to all.

RE-CROSS-EXAMINATION by Mr. Stites:

Q. The rear door, where the fire was burning, is built in the wall of this large chamber you speak of, is it? A. That door is in the wall. The back door, you mean?

Q. The back door, where the fire was. A. That is on the outside of a brick wall, outside the brick wall, looking in.

Q. Not in the large chamber? A. No, it is not in the large chamber but the fire is in the large chamber.

Q. There would be nothing to prevent the flames from coming out the back door if there was back draft, would there? A. Prevent it from coming out the back door?

Q. Yes? A. Nothing to prevent them. You cannot stop them.

Q. They could come? A. They could go if you make them.

Q. Did you examine Mr. Orlando's hands? A. No; just what I saw of him. I am not an expert on burns.

Q. You testified what kind of a burn he had. A. I said—I have been burned myself, with hot coal gas on my hand, I know it will sting and burn. If it is oil, it is a different proposition from what it would be with gas.

Q. Can you tell what burned his hands by looking at them? A. No, I don't know whether—I don't know anything about it. I don't attempt to offer any information of that kind.

By Mr. Pierson: Q. As I understand it, you call the back door—what you call the back door, opens where—in that big room? A. Now you are going to call the back—

Q. At the grates? A. At the grates, yes; the ones with the hole, just above the grate, at the grate end of this big chamber, and there is the big room on the other side of the wall.

By Mr. Stites: Q. Are there any door in this chamber opening outside? A. What do you mean —outside? There are two doors in the wall.

Q. When people enter this chamber— A. I have said on the other end there is a door twelve by fourteen; that closes the whole thing up.

FERDINAND PFLUG, a witness on behalf of the defendant being sworn, testified as follows:

Direct-examination by Mr. Pierson:

Q. You are a physician, licensed to practice in New Jersey? A. Yes.

Mr. Stites: We will admit his qualifications.

Q. When did you first examine this man? A. Around April or March; either one of those two months.

Q. Was he ill in the hospital at that time? A. No, he had left the hospital.

Q. What did you find then? A. I found the bandages had been—he didn't have any bandages on, scar tissue had formed, he had a permanent loss of tissue.

By the Court: Q. He didn't have any bandages on? A. No, sir.

Q. By the Court: Q. In March or April? A. March or April.

Q. There has been testimony he had bandages on the latter part of June. A. I saw him at the hospital with Mr. LaPorta. He didn't have any bandages on.

Q. He may have had bandages on after that? A. He may have.

Q. Was he in the hospital then? A. He had left the hospital, was brought back to the hospital with Mr. LaPorta for examination.

Q. Were you connected with the hospital at that time? A. I was.

Q. Were there any sores at that time or had the wounds all healed? A. In my judgment the healing had stopped because fibrous tissue or scar tissue, which is the last stage in healing, had formed.

Q. It then became a question of— A. Function.

Q. —improving by use? A. Functioning.

Q. When did you next see him? A. November 5th—November 4th.

Q. What did you find at that time? A. I found he was still permanently scarred but he had gained a considerable degree of function during the interval.

Q. Which hand did you find was the worst injured? A. The right hand.

Q. What would you say—what do you say—is the power or function of that hand at the present time? A. Fifty per cent.

Q. What do you say is the power or function of the left hand? A. Anywhere between seventy and seventy-five per cent.

Q. On what do you base that? A. On his ability to use his hands.

Q. What tests did you make to determine? A. His ability to exert pressure on my fingers.

By the Court: Q. Practically what I did, Doctor, close his hand over a book, or pick up a chair, that is what you did? A. I didn't use the same articles.

By the Court: Q. Substantially, that would be the means by which you would test his ability to use his hands? A. Yes.

CROSS-EXAMINATION by Mr. Stites:

Q. When you first examined this man was there a permanent loss of function of the right hand? A. Permanent loss?

Q. Yes. A. Yes.

By the Court: Q. Do you mean permanent loss or temporary disability? A. Temporary disability, but his scar tissue was permanent; he will always have that.

Q. By the Court: Q. He will always have an injury? A. Yes.

By the Court: Q. Do you think he will be able to shut his hand— A. No.

By the Court: Q. Any further than he has now? A. No; that is hard for me to say.

Q. You certified on May 10th, 1915, that Mr. Orlando had lost the function of the right hand, didn't you?

The Court: He says he has lost it.

Q. That was your signature to that certificate (indicating)? A. Yes.

Q. On May 10th, 1915,—it reads as follows:—"Patient has loss of function of the right hand." A. I admitted that before. I don't mention how much loss.

JOHN FERGUSON, a witness produced on behalf of the defendants, being sworn, testified as follows:

Direct-examination by Mr. Pierson:

Q. You are an officer of the respondents in this case? A. Yes.

Q. What office do you hold? A. President.

Q. Do you spend your time at the foundry? A. I do.

Q. What work do you do there? A. Supervising, superintendent.

Q. Are you a graduate of any technical school? A. Stevens Institute.

Q. What degree? A. Mechanical degree.

Q. When did you graduate? A. 1900.

Q. How soon did you go to this foundry? A. 1901.

Q. Have you been connected with this foundry ever since? A. I have.

Q. Same foundry? A. Yes.

Q. What have your duties been in the foundry since 1901, when you went in there? A. Supervising, superintending, and managing.

Q. Have you any other large drying oven than this one of which Professor Guenther testified? A. We have only one large one, we have two small ones.

By the Court: Q. Do you know the oven at which this man was hurt? A. Yes.

Q. Was it the same oven Mr. Guenther examined? A. Yes.

Q. You were there when the Professor examined it? A. Yes.

By Mr. Pierson: Q. What are the dimensions of that oven? A. It is 28 feet long, 12 feet high, 13 feet wide.

Q. Interior dimensions? A. Those are the interior dimensions.

Q. What grates are there, or places for the fire? A. There are two fire boxes, four feet square at one end of it.

Q. In the corners? A. Not exactly in the corners, a little way from the corner, the center of the fire would be half way, quarter way, of the entire width of the oven.

Q. What is the character of these grates? A. They are cast iron bars, three quarters, with air spaces between them.

Q. Any pockets in there that could hold oil? A. Absolutely no.

Q. What is the method of construction of fires in that oven? A. Some wood is broken up, placed

in the fire box, with a little waste or paper put in, coke put on top of it.

Q. When is this material put in the oven, with reference to the lighting of it? A. Sometimes it is made for half a day, sometimes it is made an hour, befort it is lit. It is always an hour at least before it is lit.

Q. From what part of the oven is it put in? A. From the end with the iron door, we call the front end.

By the Court: Q. Where do you light it? A. From the little grates.

Q. Why do you call the large door the front door? A. Because it opens into the shop.

Q. You place the material in from this front end? A. Yes.

Q. How do you get the moulds in? A. Take them off a travelling crane, there are two carriages that roll in on tracks.

Q. How long does it take? A. About half an hour, possibly three quarters.

Q. They are always put in after the material for the fire is provided? A. Yes.

Q. That is the reason for the lapse of time. How big is the pocket door in the front door? A. The front door is sheet iron, about four inches thick, and covering the entire opening, thirteen by twelve. In that there is a small door two feet wide and four feet high, we open to see how things are coming along.

Q. Have you had occasion to open that pocket door on occasion when the fire had been lighted? A. Yes, many times.

Q. During how many years? A. Fourteen years; since 1901.

Q. Does that have any effect, you have ever noticed, on the draft at the back? A. Absolutely none.

Q. Why couldn't it have any? A. The percentage of air that would come out of that door would be very small. The percentage of air sifted in would be small. It is a slow draft.

Q. Do you remember the night that this man was burned? A. I do.

Q. Do you remember when the material for the fire was placed that night? A. When it was placed—I couldn't say distinctly, no; it was done that afternoon, the exact time I couldn't say.

Q. How long before the fire was lighted? A. At least an hour.

Q. What coke do you use in that oven? A. Foundry coke, seventy-two hour coke.

Q. Were you using foundry coke at that time? A. Yes.

Q. Were you there that night when the fire was lighted? A. I was.

Q. Do you know who lighted the fires? A. Vito Orlando.

By the Court: Q. Did you see him light them? A. I didn't see him light them.

By the Court: Q. How do you know? A. He was the only one back there, he was told to light them.

Mr. Stites: I move it be struck out.

The Court: It may be struck out, as far as his conclusion is concerned.

Q. How long were you around there after the fire was lighted, before you went away? A. At least half an hour.

Q. Who was there at that time? A. Joan and Orlando.

Q. Joan was the first witness? A. Yes.

Mr. Stites: Romano? Who else?

The Witness: That is all; and the watchman. Joan, Orlando, the watchman and I were the only ones in there at the time.

Q. What became of the watchman? A. He is dead.

Q. What if anything took place at the back door before you went away that night? A. I closed it, I went to the oven, looked at the temperature of the oven, closed the back door myself, told him to go home, the fires were all right, and Joan was then on top of the oven, mudding up, Orlando in back, looking after the fires.

Q. You told him the fires were all right, to go home? A. Yes, I looked in the back door, felt the temperature of the place, saw it was burning all right, told him to go home, everything was all right.

Q. On your way home did you see the driver? A. I met the driver coming from Staten Island, stopped a few minutes, then I met Orlando coming from the shop with a can in his hand, I asked him what he was going to do, he said he was going to put oil on the fire, I told him not to put oil on the fire, that it was in first class condition. I then went out.

Q. What have been your rules as to putting oil on the fire? A. They have been told very strictly, and the rules are very stringent, not to put any oil on a lighted fire.

Q. Have you told Orlando that? A. I have told him personally many times.

Q. On this occasion— A. I told him on that occasion distinctly.

Q. Where did you go then? A. I went home.

Q. Did something bring you back to the foundry? A. I was in the house about ten or fifteen minutes when the watchman rang the bell, he told me that Orlando had been burned, he was in the station house.

Q. What did you do then? A. I went down to the station house.

Q. What did you see? Whom did you see there? A. I saw Orlando in pretty bad shape.

Q. Did you have any conversation with him? A. I asked him what happened, he said he put some oil on the fire, it went "Woof."

Q. Did you go back after that to the foundry? A. I went back with the watchman. The watchman and the driver were at the station house when I got there.

Q. Did you make any examination of this furnace when you went back? A. We went down looked it over, and we found the oil can that Orlando had been carrying at the time I told him not to put it on the fire; it was lying in the ash pit.

By the Court: Q. Underneath the fire? A. Under this little door that opens in the back, to light the fire, there is an ash pit, about this size (indicating) and about two feet deep. It goes down and under the fire, so we can take out the ashes. In that ash pit, lying down there, was the can. That was the ash pit that he testified he fell into when the flame came out.

Q. What use have you for kerosene about your foundry? A. We use it for skin drying moulds.

We use it in the torches. The tank holds ten gallons, and one pipe going into the tank and one going out to the metal burner that we use to remove surplus moisture, to eliminate snapping and burning.

Q. Do you use much of this oil? A. We use as a rule fifty gallons every other day, twenty-five gallons a day.

Q. Where do you purchase this oil, this kerosene? A. Standard Oil Company, because they have it in large quantities.

Q. You get a barrel every two days? A. Yes, Just about.

Q. Do you know anything about the quality of this kerosene? A. I couldn't tell you a thing about the quality. It is simply what is known as commercial kerosene oil, that is all I know about it.

Q. Same as they distribute in their commercial wagons? A. Same as they distribute to grocery stores.

Q. Have you ever tried on a small scale, kerosene in this way? A. I attempted it in your presence one evening.

Q. Very small scale? A. Yes.

Q. What happened?

The Court: Assume you can prove what you say, what difference does it make? What is the materiality of it?

Mr. Pierson: That I can prove that the witness, contrary to instructions—

The Court: Assume you can prove that oil put on a fire already ignited makes an explosion, a jet of flame, what difference does it make?

Mr. Pierson: I want to show in this case there is—

The Court: Danger in it?

Mr. Pierson: Not only that, but there is one exclusive theory on which this burst of flame could have happened—that there had been fresh oil placed on the fire.

A. Mr. Pierson came down to the shop—(interrupted).

Q. What happened? A. There was just exactly the same conditions as there was that evening—

Q. What happened? A. I took about a quart of kerosene, threw it in this little door, and the flame came out with a roar.

Q. Continued to burn? A. Burned for about half a minute, three-quarters of a minute, some of it burning in the ash pit.

Q. You stood such a distance away that the flame couldn't possibly reach you? A. Yes.

CROSS-EXAMINATION by Mr. Stites:

Q. Are the grates square or round? A. I suppose they are four feet square, in my estimate.

Q. The grate bars, how large are they? A. They are long enough to fill the opening, three-quarters of an inch wide, half an inch between them.

Q How large is the opening? A. The opening is four feet square.

Q. How are the bars set? A. They are lengthwise, four feet long, three-quarters of an inch wide, to a depth of three inches, approximately.

Q. Do they become clogged with any substance? A. Not to any extent.

Q. Do you clean them out occasionally? A. Clean them out before you light the fire.

Q. Always? A. Always.

Q. You always supervise that? A. If I don't do it the foreman does it.

Q. What could collect between the bars that might clog them up? A. Ashes is the usual thing to collect between grate bars.

Q. Wouldn't it, if there was a deposit of ashes, provide a pocket for kerosene to accumulate? A. I don't believe it would.

Q. Why not? A. Because the ashes is a little porous, it is porous unless it is rammed; to ram that hard enough to hold liquid—

Q. Would the ashes absorb the kerosene? A. Naturally would.

Q. And a large quantity of ashes collected between the bars could absorb quite a large quantity of kerosene, couldn't it? A. No, I don't believe it could absorb any great amount of kerosene, but if there was ashes and they were thoroughly clogged up it would be impossible to light the fire.

Q. I am not assuming that all the grate was clogged—just two or three bars, say; how many bars are there in the grate? A. You can work it out, I didn't count them. There is about thirty bars there.

Q. When you told Mr. Romano and Orlando to go home did you leave immediately? A. I left within three minutes after that.

Q. They were still there? A. He said he was going down the shop to get his coat. He said, "All right, I will go home." He went down the shop to get his coat. That was the last I saw him until I saw him in the station house.

Q. Do employees, when you direct them to go home obey your directions and go home? A. They sure do, or they are not employees very long.

Q. Didn't you think it strange then after you had told these men that the fire was O. K., that they bothered with it any further? A. Didn't I think it strange?—no. I told Joan to go home. Whether Pete heard me tell him to go home, I don't know. It is possible that Vito don't hear me.

Q. You testified you told them both to go home and you told Orlando to go home? A. I testified I told Orlando to go home distinctly, when I met him up there, carrying the can of kerosene, and then I told Joan to go home when I was in front of the oven.

Q. You testified also that you told Orlando that the fire was O. K., to go home? A. I didn't testify Orlando, individually. I said, "The fires are all right, go home." You read the testimony.

By the Court: Q. Who did you say that to? A. Joan was in back of the oven, I looked in the oven and said, "The fires are all right, boys, you can go home." I went up the shop, met the driver, came back, up came Orlando with the oil can. I asked him what he was going to do. He said, "I am going to put some oil on the fire," I said, "Don't you do it, the fires are all right, go home."

By the Court: Q. Where did you meet him? A. Just near the exit to the shop, just near, right near where we keep the oil.

By the Court: Q. Where is that? A. In the shop.

Q. What kind of a can did he have? A. A gallon can.

Q. What was the nature of the can? A. A tin can, it tappered, it was about ten inches high, possibly four inches at the top and five inches at the bottom.

Q. Had you seen it before? A. Yes.

Q. What was it used for? A. To carry kerosene oil.

Q. Did you ever notice any employee use kerosene to light the fires? A. I have caught them two or three times, yes.

Q. Didn't you instruct them to use it? A. No.

Q. Did you ever catch Orlando using it? A. Two or three days before that he threw some on the fire and I caught him.

Q. Did you see him do it? A. I didn't see him do it, but I saw the flame come out the door. I went down and saw Orlando there and I gave him very explicit instructions at that time. That was three days previous to this accident.

Q. When you say you caught him, you don't mean you saw him do it? A. I went down there. I was possibly thirty or forty feet away. I didn't see him actually throw the oil in.

Q. Why did you tell them many times not to use oil? A. Because it was very dangerous.

Q. It can be used without being burned? A. If you are a safe distance from the flame.

Q. You have used it yourself? A. I have, two or three times.

By the Court: Q. After the fire was lighted? A. Under unusual conditions.

By the Court: Q. After the fire was lighted? A. After the fire was lighted.

By the Court: Q. Did you ever do it in Orlando's presence? A. No.

By the Court: Q. Why did you do it—because you were not getting sufficient heat and you wanted to bring it up a little more. A. In winter time we heat the shop with these fires occasionally, the fire will be sluggish and smoky, and I use oil to bring up the fire and eliminate the smoke.

Q. Where is the can? Have you it in your possession? A. I don't know what became of it. It may be there yet, I don't know.

Q. Did you take the can away from the factory? A. I did not.

RE-DIRECT-EXAMINATION by Mr. Pierson:

Q. If the ashes had absorbed the kerosene, that would not make any pocket of oil, would it? A. It would make oil that would burn very slowly, it would not flash because there could not be sufficient oxygen to make it flash.

SAMUEL RYAN, a witness produced on behalf of the defendant, testified as follows:

Direct-examination by Mr. Pierson:

Q. Are you an employee of F. Ferguson & Son? A. Yes.

Q. Work there quite a while? A. Twelve years.

Q. What are your duties there? A. My duties—boss laborer.

Q. What do you have to do with the building of fires in the drying room? A. Tell the man to make the fire as suits me, I tell them if a big fire, to make up a big fire, if a small fire, a small fire, not so much coke in it.

Q. Does the size of the fire depend on the work you have to do? A. Yes.

Q. What were your instructions to the men as to how to build a fire? A. Yes.

Q. What did you tell the men about building it? A. I told them to clean out the open grate, put their wood on the bottom, and their coke on top, and some paper or waste—anything—in the bottom, before you put anything on it.

Q. How is that material put in the oven? A. They can get in with the coke in the back door, with their coke and wood.

Q. When do you put the material in—the coke and wood in? A. In the back.

Q. When? What time of day? A. Sometimes four o'clock, sometimes five o'clock.

Q. Is it put in before or after you put in the cores? A. Put in, to make the fire, first, before the stuff is in the oven.

Q. How long is this fire made before you light it? A. Maybe two hours, maybe one hour. It will light with a pint of kerosene as soon as it will with ten gallons. I can do it and every man in the shop can do it.

Q. Are not the rules of this foundry about the placing of oil after the fire has been lighted and is already burning—what are the rules of the foundry about putting oil on the fire after it has been lighted? A. You ain't supposed to do it. If they does it, nobody tells them.

Q. Did you ever tell Orlando or anybody when Orlando heard, not to put oil on the lighted fire? A. Yes. I looked after the fire before and I come up and left two men to take care of it. If I need two baskets more of coke, I say, "Put it on."

Q. Were you there the night Orlando was injured? A. No, I was gone home.

Q. Were you there when the fire was made? A. Yes.

Q. How long after the fire was made did you stay? A. I go at five o'clock that night, they stayed after six, I believe.

Q. Do you remember how long after the fire was made you went? A. I don't remember that now.

Q. Had the fire been lighted before you left? A. No.

Q. Do you remember when Orlando came back to work in June, after he had been burned? A. Yes.

Q. What did you see him doing after that time? A. When I seen him he was going up to help a fellow named Shorley (Charlie?). Help him ram sand down.

Q. How big is that rammer? A. It is about five feet high with a square head on it, same as a street rammer.

Q. Did you ever see him do anything else? A. Help around.

Q. Did you ever see him use the skimming ladles? A. Yes, I seen him do that, red iron too; I told him to keep away from it he got hurted before, and that didn't keep him away.

Q. What do you mean? A. Skin the dirt off the top of it so that no dirt would get in the mould.

Q. On the melted metal? A. Yes.

CROSS-EXAMINATION by Mr. Stites:

Q. It is very easy work, isn't it? A. Yes.

Q. It is light work? A. Yes, it is.

Q. Did you ever use any kerosene on these fires yourself? A. I did, sir.

Q. How many times? A. Often and often. I made fires there ten and twelve years.

Q. Did Mr. Ferguson ever see you use kerosene? A. He didn't see me use it?

Q. Did he? A. Certainly he did.

RE-DIRECT-EXAMINATION by Mr. Pierson:

Q. This kerosene you used, was used in putting the material in? A. That is it, to start the fire.

Q. When did you use this kerosene? A. Just a little bit of kerosene to start this fire, you put a match to it, you couldn't light the fire without a bit of kerosene on the bottom.

RE-CROSS-EXAMINATION by Mr. Stites:

Q. Mr. Ferguson has said he has told the man not to put kerosene on the fire after the fire started to burn? A. You ain't supposed to do it.

Q. Did you ever see him do it? A. No.

Q. Did you ever do it? A. I didn't indeed. If I did I would run away quick.

JOSEPH F. WALTON, a witness being sworn on behalf of the defendant, testified as follows:

Direct-examination by Mr. Pierson:

Q. You work for Ferguson & Sons? A. Yes.

Q. How long? A. Going on two years.

Q. What is your business? A. I am a core maker.

Q. You knew Orlando? A. Yes.

Q. Do you know what the rules of the foundry are as to the placing of oil, kerosene oil, on the fire after it has been lighted?

Mr. Stites: I object—the orders now. Maybe it is, now.

The Court: You mean the standing orders of the last two years?

Q. The standing orders since you have been employed there? A. The rules are we should not throw kerosene on it after the fire was lighted.

Q. Have you heard Orlando told, or have you heard the men told, when Orlando was present, not to put kerosene on the fire after it was lighted? A. Mr. Ferguson, right in back of me, told him, I suppose six times a week, yes. I work at the core bench, right alongside the big one, Mr. Ferguson told him most every night—come near exploding the big oven one time, I heard Mr. Ferguson tell him not to do it any more. There was the rest of us in the shop.

Q. Were you there when the accident happened? A. I went home at five o'clock.

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

Q. After Orlando came back did you see him do any work? A. I saw him skim twice, once on the floor right by me, another time, on the floor right over the—

CROSS-EXAMINATION by Mr. Stites:

Q. Are you still employed by Mr. Ferguson? A. Yes, sir.

Q. And you heard Mr. Ferguson tell Mr. Orlando nearly every other night not to throw kerosene on the fire? A. I did not say that I heard

Mr. Ferguson tell Orlando alone; I heard Mr. Ferguson tell a whole lot of helpers that were helping—there was ten or twelve there working there—not to throw kereosene oil on the fires.

Q. Why did he tell them that, were they throwing kerosene on the fires? A. Because it was only the night before that Joan, the fellow that testified here first, came near exploding the whole of them.

Q. You mean Romano? A. The man who testified here first.

Q. After he caught him throwing kerosene on the fire did he discharge him? A. No; he only cautioned him not to do it any more.

Q. How many times did he catch him putting kerosene on the fire, to your knowledge? A. He only caught him that night. We had to jump from the flame; otherwise we would have got burned.

Q. Did you ever see Mr. Ferguson throw it on the fires himself? A. No, sir; I didn't.

EDWARD H. LANGLHAN, sworn:

Direct-examination by Mr. Pierson:

Q. How long have you worked for F. Ferguson and Sons? A. Going on four years.

Q. You are still working there? A. Yes, sir.

Q. What is your business? A. Driver.

Q. As driver are you frequently around the shop—the foundry? A. Yes, sir; after five o'clock, and in the morning.

Q. Do you remember the day that Orlando was burned? A. Yes, sir.

Q. Were you there around seven o'clock that night? A. I came in about ten minutes to six, and just as I came in the door the boss came up to me and said, "How's things, Eddie?" I said, "Fine."

Q. Where was he at that time? A. About ten feet away from me.

Q. Where was Orlando; did you see him? A. Up further, I think, down there in the shop, working there; then he came up.

Q. Do you know whether the fires in this oven had been started then or not? A. No; I wasn't there at that time.

Q. No; the question is, were the fires burning at that time? A. The fires must have been burning, because the boss had told me—

Objected to.

Q. Do you know of your own knowledge whether or not the fires in this drying room had been lighted when you came in there? A. They must have been lit, because—

The Court: Q. Oh, did you see them? A. No; I didn't see them burning.

Q. State what you did see and what you heard. A. When I came in it was about ten to six or so, and the boss said to me—

The Court: Never mind about that.

Q. Did you see Orlando? A. Yes; I saw Orlando.

Q. What did you see Orlando doing? A. Just as I came in the door the boss asked me how I was making out, and I told him, "Fine," and I heard him tell Orlando and them to go home. I takes my wagon and puts it over at the side where we keep them, and takes the hired horse back to

the livery stable, and as I come along I seen the crowd at the station house. I goes up and the watchman says to me, "Pietro has been burned."

The Court: Q. Never mind about that. You did not see the accident, did you? A. No; I didn't see the accident.

Q. By Pietro you mean Orlando? A. Orlando.

Q. Is he called Pietro, or Petie, in the shop? A. I call him Pietro always.

Q. Did you see him in the station house? A. Yes, sir.

Q. Did you say anything to him? A. I went up to him and I said, "Pietro, for God's sake, what happened to you?" He said, "Oh, me go to fire; him smoke; and me take the oil"—he couldn't hardly talk; he was so nervous; and he said he opened the door, and Bang! it knocked him, and Juan ran away from him, and he had to jump in the pit; and I said, "What's the matter with Juan?" He says, "Juan afraid; and me roll around till me get to the water." So I gave him a drink of water and I held his hands while the doctor bandaged him up, and I helped put him in the ambulance. Then I came back and got Juan and told him to go down and break the news to his wife as good as he could.

Q. I don't care anything about that.

The Court: Q. That is all you know about the accident, is it? A. Yes.

Q. Did you ever hear anything said in the foundry when you would be there about putting oil on the fire to light the fire? A. Oh, that's warned every day. Just before Pietro was burned there was a man there threw in about a gallon of oil

and it shook the whole building: His name is Curley; he is here.

Objected to as immaterial.

A. And the boss always warned them.

Q. Did you ever hear the men when Orlando was by told not to put oil on the fire? A. Yes; that was what the boss was saying when I came in—was telling them "Never mind the fire; go home."

CROSS-EXAMINATION by Mr. Stites:

Q. They use a lot of oil all the time around their boiler fires, don't they? A. I cannot tell you that because the oil can is always locked, and I see them take the oil out of a torch they have there; they use it.

Q. You heard Mr. Ferguson warning them all the time not to use it, didn't you? A. Yes; always. He tells them every night before he goes home.

Q. Naturally if he was telling them all the time not to use it it would indicate that they were using it, wouldn't it? A. Yes; but they open up these five-gallon torches. I have seen them unscrewing it and throwing it in over and over again.

Q. How close was Orlando to Mr. Ferguson when he told him to go home, that the fire was all right? A. He was walking down; I was busy carrying in my patterns.

Q. How close were they together? A. I couldn't say exactly. I ain't going to tell no lie about it.

Q. As far as I am from you? A. Oh, a little further than that. I wouldn't say just how much.

Q. As far as the front rail there? A. He was walking up to me, the boss was, as he was telling him. I couldn't tell you exactly.

Q. How far was Orlando from the boss? A. I could not tell you that. The boss was walking and Orlando was going down.

Q. How far apart were they in feet, about? A. Well, about ten feet at the time. They were walking up and they were getting further away.

Q. Was that in the shop? A. In the shop, yes.

Q. Was anyone else there? A. Juan was there and the watchman was there.

Q. How far away was Juan from the boss? A. I didn't see Juan but I heard Juan afterwards because he told me—

Q. You saw Orlando? A. Yes; and Juan was there too but I didn't see him at the time.

Q. And Orlando was standing about ten feet from Mr. Ferguson when he told him to go home, the fire was all right? A. They were walking. As they were walking it got to be more.

Q. What did Orlando say? A. To me?

Q. No; to Mr. Ferguson when he told him that? A. I did not catch that. I walked out of the door then.

Q. He said something, didn't he? A. I couldn't tell you.

Q. Didn't you hear him say something? A. I didn't; no.

Q. Mr. Orlando was very much excited and suffering considerable pain in the station house, wasn't he? A. He was in terrible pain. He was in agony, yes.

Q. He could hardly talk? A. Well, I gave him a drink of water to keep him from fainting.

Respondent rests.

VITO ORLANDO, re-called, testified through interpreter:

Direct-examination, by Mr. Stites:

Q. On the night that you were injured did Mr. Ferguson tell you that the fire was O. K. and to go home? A. No, sir.

Q. Did Mr. Ferguson on the night you were injured meet you when you had a can of kerosene and did you state to Mr. Ferguson that you were going to place it on the fire? A. Yes; he asked me to do it.

The Court: Asked you to do what? A. Go ahead, and get some kerosene.

The Interpreter: He tried to talk English.

Q. Did this take place on the night you were hurt or some other time? A. In another time.

Q. But on the night that you were hurt did Mr. Ferguson see you with a can of kerosene—on the night you were hurt? A. No, sir; I didn't do it.

By the Court: Q. Did you see him go away that night? A. Yes: I did see him.

Q. Did he say anything to you when he was going out? A. He says, "Now take care and make a good job of this; this is a new customer of mine."

Q. Did he say that to you? A. Sure; he said so.

DIRECT-EXAMINATION (resumed):

Q. Were you working overtime that night? A. Yes; and also other evenings—other nights.

Q. How late do you work when you work overtime? A. Nine or ten or eleven o'clock.

Q. When you saw Mr. Ferguson in the station house after you were burned did you say that you threw oil on the fire? A. No, sir.

Q. Did you tell anyone that you threw oil on the fire? A. No, sir.

CROSS-EXAMINATION by Mr. Pierson:

Q. When was it that Mr. Ferguson ever told you to put oil on the fire? A. I do not remember when that was.

Q. Did he tell you to put oil on the fire when it had been lighted? A. No sir,

Q. Did you see this Eddie, the driver, that night before you went home? A. I didn't see him at all that day.

Q. You did not see him that day at all? A. Not at all.

Q. What did Mr. Ferguson tell you just as he went home?

Objected to on the ground that he has answered that.

A. He says, "Look out; I want to make a good job;" and he says that this casting was going to take place the following evening.

Q. When Mr. Ferguson, the boss, came to the station house what did he say to you and what did you say to him? A. I was crying, and he said to me, "Courage; courage;" and then I was crying and worrying about my children.

RE-DIRECT-EXAMINATION:

Q. Did you ever see Mr. Ferguson throw oil on a lighted fire? A. Sometimes—

The Interpreter: I can't—when I start to talk he says something else.

(Question repeated and re-interpreted.)

A. Yes; he did that once.

Q. Did he send you for the oil for him? A. Yes.

RE-CROSS-EXAMINATION:

Q. Were you by when he threw the oil on the fire? A. Yes.

Q. And what happened; what took place? A. Nothing.

Q. How much oil did he throw on this lighted fire? A. A gallon—but the fire wasn't lit at the time. It was making quite a smoke.

BOCCO BERRADINI, sworn:

Direct-examination by Mr. Stites:

Q. Were you working at Mr. Ferguson's place during the time that Mr. Orlando was there? A. Yes.

Q. Was kerosene prohibited at that time or after that time at any time by Mr. Ferguson?

Objected to unless he shows that he knows. He may have been working at another foundry.

Q. Have you ever built fires for Mr. Ferguson in your shop with Mr. Orlando? A. Yes.

Q. And have you used kerosene? A. Yes, sir.

Q. And have you ever received any instructions from Mr. Ferguson never to use kerosene, either before—

Objected to.

Q. —either before this accident or on the day of the accident?

Objected to.

By the Court: Q. Do you work there now? A. No, sir.

Q. When did you stop working there? A. Three months.

Q. You were working there at the time Orlando was working there? A. Yes, sir.

Q. What kind of work did you do? A. Help.

Q. The same as Orlando? A. Yes, sir.

The Court: Now you ask the question.

DIRECT-EXAMINATION (resumed):

Q. Has Mr. Ferguson ever sent you out to buy kerosene? A. No, sir.

Q. Put the question to him again. I think he misunderstood you. Has Mr. Ferguson sent you to some place to buy kerosene? A. No, sir.

Q. Not at all? (No answer.)

Q. Then I misunderstood him.

The Court: You have not asked him the question which was covered by the questions that I asked—which my questions led up to, and which I permitted. (Question repeated as follows: "Q. And have you ever received any instructions from Mr. Ferguson never to use kerosene, either before this accident or on the day of the accident?)"

A. No, sir.

CROSS-EXAMINATION by Mr. Pierson:

Q. You were discharged from Ferguson's place, were you not? A. No, sir; I went away myself, of my own accord.

CARMINE SENTRELLO, sworn:

Direct-examination by Mr. Stites:

Q. Were you working with F. Ferguson and Son on the day that Orlando was injured? (No answer.)

The Court: Did you work there when Orlando was hurt? A. Yes.

Q. Was kerosene ever prohibited by Mr. Ferguson—was the use of kerosene prohibited by Mr. Ferguson during that time you worked, on that day or before that day?

Objected to.

By the Court: Q. What kind of work did you do there? A. Helper.

Q. Did you do the same kind of work that Orlando did? A. Sure.

Q. Did anyone ever tell you not to use kerosene on the fire if it had been started? A. Who do you you mean—Mr. Ferguson?

Q. Anybody. A. Sure.

Q. Who told you not to? A. Mr. Ferguson says, and Ryan too says not to put on too much, he says; he says so.

Q. Did he ever tell you not to use any kerosene on the fire after it had been started? A. No; not after it started.

The Court: Ask him that, Mr. Interpreter.

(Question interpreted.) A. No, sir.

DIRECT-EXAMINATION (resumed):

Q. Never told you anything? (No answer.)

Q. Have you ever built a fire yourself in the presence of Mr. Ferguson? A. What do you mean?

Q. Have you? A. Sure.

Q. Did you use kerosene in his presence for the furnace? A. Sure.

Q. And put it on the wood? A. Yes.

By the Court: Q. After the fire was lighted, A. Not after the fire was lighted.

Q. Before it was lighted? A. Before it was lighted.

DIRECT-EXAMINATION (resumed):

Q. Did you ever see Mr. Ferguson throw kerosene on the fire after it was lighted? A. No, sir.

Q. You come here under subpoena, do you? (No answer.)

CROSS-EXAMINATION by Mr. Pierson:

Q. Now the kerosene of which you speak was put on the fire before it was lighted, was it not?

The Court: He said so.

Q. Yes; and you were never told to put it on after it was lighted?—I think he said that.

The Court: Yes, he said that.

Mr. Pierson: That is all right. The witness spoke broken English and I did not know whether I got it or not.

JOHN ROMANI re-called, testified through an interpreter:

Direct-examination by Mr. Stites:

Q. Mr. Romani, you were working with Mr. Orlando that night? A. Yes, sir.

Q. And did you pick him out of this pit or this hole right near the furnace? A. Yes, sir.

Q. And did you find an empty gallon can for kerosene? A. No, sir; I didn't find anything.

Q. You didn't see anything at all? A. I didn't see anything at all.

Q. You are the witness who threw the gallon of kerosene on the fire?

The Court: This is the witness who was sworn before.

CROSS-EXAMINATION, by Mr. Pierson:

Q. What examination did you make of that fire pit after this accident? A. Nothing at all.

Testimony closed.

Findings

The Court: In this case I find that there was an accident which arose out of and in the course of the employment of the petitioner by the respondent, that the respondent had notice thereof and that the petitioner is entitled to compensation under the statute. I will fix the compensation to which the petitioner is entitled, in view of the testimony. His wages were ten dollars and fifty cents per week. The accident occurred on the 20th day of January, 1915. I find and determine that he was in the hospital two months and was incapacitated within the meaning of temporary disability for three months thereafter. I find and determine that for that disability com-

pensation should be allowed commencing two weeks after the 20th day of January, 1915—that would mean the 3d of February—and according to the testimony of one of the physicians for the respondent who found the petitioner still bandaged as late as the last part of June, 1915, I will allow for those weeks, excluding the first two weeks period provided by statute, twenty-one weeks; that is to say, until the 23d day of June, 1915, for which the petitioner is entitled to compensation on the basis of fifty per cent of his weekly wage or $5.25 per week. That multiplied by the number of weeks, will give him $110.25.

In relation to the injury to the eye I find and determine there is a disability there of ten per cent; and as the loss of the eye is compensated for by the terms of the act at the rate of fifty per cent of the weekly wage during one hundred weeks, I find and determine he is entitled for the injury to the eye to ten weeks' compensation at the rate of fifty per cent of his weekly wage, or $5.25, making $52.50.

In dealing with the loss of the use of his hands I find and determine there has been, in addition to his temporary disability, a permanent disability to both hands to the extent of fifty per cent. I do not think there is as much total permanent disability as was testified to by the physician for the petitioner but I think there has been considerably more permanent disability to the hands than was testified to by the physician for the respondent. I fix and determine the permanent disability to the hands at fifty per cent for each hand. As the statute provides for the

loss of a hand fifty per cent of weekly wage for one hundred and fifty weeks, and as I find the disability as to each hand to be fifty per cent, and the relation that his disability to each hand bears to his injuries is on the basis of fifty per cent, I will allow him fifty per cent of one hundred and fifty weeks for each hand. That amounts to the same thing as allowing him one hundred and fifty weeks at the rate of $5.25 per week.

Counsel may calculate what part of these weeks have now expired, and beginning with the expiration of that period the compensation will be continued until the total number of weeks provided shall have expired. The compensation which has been paid must be allowed on that. Counsel can agree upon that. Whatever the number of weeks are which have been provided for, must be credited.

I will allow counsel a counsel fee of one hundred dollars.

NOTE: At the close of the case there was a partial oral argument. Decision as to the liability of respondent was reserved and the case was submitted on briefs. The Court subsequently rendered the opinion or findings hereinbefore set forth. The findings of facts and determination and order for judgment was afterwards signed and filed. The refusal of the Court to dismiss the petition and the awarding of compensation in favor of the petitioner was made over the objection of the attorneys for the respondent.

Reasons

(*Filed, March 23, 1916.*)

NEW JERSEY SUPREME COURT

VITO ORLANDO, (Petitioner) Defendant in Certiorari, against F. FERGUSON & SON, (Respondent) Prosecutor in Certiorari, *et*	On Certiorari.

The prosecutor presents the following reasons for setting aside the proceedings, determination, statement of facts and order for judgment and the judgment entered thereon and the other proceedings brought before this Honorable Court by the writ of certiorari in the above entitled cause:

FIRST: Because the facts as found were not sufficient upon which to base a judgment for the petitioner in that it does not appear from the said facts that the accident arose out of and in the course of petitioner's employment.

SECOND: Because the finding of facts and determination of the Court is not sufficient upon which to base a judgment in favor of the petitioner because it does not appear from said finding of facts and determination what the cause of the flame which burned the petitioner was, and it does not therefore appear whether said burns happened from a violation of positive instructions or not and therefore whether or not the accident did arise out of and in the course of petitioner's employment.

Reasons

THIRD: Because the Court erroneously applied the law in determining the liability of respondent as the Court fails to hold that he would not have found that the accident would not have arisen out of and in the course of petitioner's employment if the cause thereof had been the throwing of fresh kerosene oil on a lighted fire contrary to instructions.

FOURTH: Because it does not appear from the Court's determination of facts but that the Court found that the accident was due to the throwing of oil on a lighted fire contrary to instructions, yet notwithstanding arose out of and in the course of petitioner's employment.

FIFTH: Because the Court in the determination and finding of facts fails to settle the disputed question as to the source of the flame which burned petitioner.

SIXTH: Because there was no competent evidence on which to base a determination of fact that the accident arose out of and in the course of petitioner's employment.

SEVENTH: Because, on taking into consideration the undisputed testimony and the common knowledge of men as to the character of kerosene oil, it appears that there is not evidence to show that the accident arose out of and in the course of petitioner's empoyment.

EIGHTH: Because the determination and finding of fact is contrary to the evidence.

NINTH: Because if the Court properly determined the liability of the respondent, the Court erred in fixing the compensation to which petitioner was entitled.

Reasons

TENTH: Because the Court did not determine the amount of compensation for each separate injury separately, that is to say 75 weeks for the injury to each hand and 10 weeks compensation for the injury to the eye.

ELEVENTH: Because if the Court should not have found the compensation for each separate function separately, as indicated in the tenth reason, it should have found the proportion that the loss of function in the two hands and the eye bore to total disability and based the award of compensation on that proportion of 400 weeks.

TWELFTH: Because, if the Court should not have found the compensation for each injured member separately, it should not have treated the two hands together as a part of total disability, basing the compensation on the maximum of 400 weeks, and found for the loss of the eye separately the proportion of an additional 100 weeks, thus basing the compensation on a number of weeks in excess of that provided for total disability.

THIRTEENTH: Because in said determination statement of facts and order, it was ordered that judgment be entered in favor of the petitioner and against the respondent, whereas the said petition should have been dismissed.

FOURTEENTH: Because the said determination of facts and the compensation based thereon is in other respects erroneous.

PIERSON & SCHROEDER,
Attorneys of Prosecutor.

(*Endorsed*) Filed, March 23, 1916.

Opinion in Supreme Court

(Filed, November 9, 1916)

NEW JERSEY SUPREME COURT

JUNE TERM, 1916

VITO ORLANDO,
Petitioner-Defendant,
vs.
F. FERGUSON & SON,
Prosecutor.
} On Certiorari.

Before JUSTICES SWAYZE, MINTURN and KALISCH.

For the prosecutor, Pierson and Schroeder.
For the defendant, La Porta and Stites.

PER CURIAM:

The petitioner was in the employ of the prosecutor as a mold helper and furnace attendant. The petitioner's employment required him to attend to the fires in the furnaces of the prosecutor's plant and to assist in making molds.

While the petitioner on the 20th day of January, 1915, was attending to the furnaces and opening the door of one, a flame of fire shot through the opening made, severely burning him.

A mechanical engineer testified for the prosecutor that a flame could not have come out of the door in the manner, as described, unless oil was poured upon the fire after ignition. There was some testimony that prior to the accident the

petitioner was seen with an oil can and that an oil can was found in the ash pit.

The petitioner, and a witness, who was present when the accident happened, deny that any oil was thrown upon the fire. As the evidence then stood there was a disputed question of fact for the trial judge to determine. His finding of a fact is not reviewable where there is some evidence in support of it.

The testimony of the mechanical engineer does not establish with that degree of certainty which the law requires that it was impossible for a flame to have shot through the open door, unless oil was thrown upon the fire after it was ignited, and, therefore, the trial judge was not legally bound to hold that the petitioner's testimony and that of his witness was so clearly contrary to the operation of the well known laws of mechanics as to stamp such testimony as utterly absurd and incredible.

The award of compensation was made in accordance with the rule laid down in *Vishney v. Empire Steel and Iron Co.*, 87 N. J. L., 481.

The judgment will be affirmed, with costs.

Order of Affirmance and Remittitur

(Filed, November 14, 1916)

SUPREME COURT OF THE STATE OF NEW JERSEY

VITO ORLANDO, Defendant-in-Certiorari, vs. F. FERGUSON & SON, Prosecutor-in-Certiorari.	On Certiorari to Hudson Common Pleas Order on Affirmance of Judgment.

This cause having been duly argued at the June Term, 1916, of this Court, by William B. Stites, of counsel for the defendant-in-certiorari, and John D. Pierson, of counsel for the prosecutor-in-certiorari, and the Court having considered the same and finding no error in the record or proceedings of the Hudson Common Pleas;

IT IS THEREUPON ORDERED AND ADJUDGED on this 9th day of November, 1916, that the judgment of the Hudson Common Pleas removed by the Writ of Certiorari in this cause be affirmed with costs, and that the record be remitted to the Hudson Common Pleas to be proceeded with in accordance with the judgment and practice of said Court.

Entered, November 14, 1916.

On motion of Stites and La Porta, attorneys for defendant-in-certiorari.

Notice and Grounds of Appeal

(Filed, December 13, 1916)

NEW JERSEY SUPREME COURT

VITO ORLANDO, (Petitioner), Defendant-in-Certiorari, Appellee, vs. F. FERGUSON & SON, Prosecutor-Certiorari, Appellant.	On an Appeal From New Jersey Supreme Court.

DEAR SIRS:

PLEASE TAKE NOTICE that the prosecutor-in-certiorari, F. Ferguson & Son, appeals to the Court of Errors and Appeals of New Jersey, from the whole of the judgment entered into this cause in the New Jersey Supreme Court.

TAKE FURTHER NOTICE that the following are the grounds of said appeal:

1. Because the New Jersey Supreme Court affirmed the judgment of the Hudson County Court of Common Pleas and did not reverse the said judgment of the said Hudson County Court of Common Pleas in whole or in part as in law it ought to have done for the reasons stated by appellant in the said proceeding in the New Jersey Supreme Court.

2. Because the New Jersey Supreme Court failed to hold that the facts as found by the said Court of Common Pleas were insufficient upon which to base a judgment for the petitioner and

appellee, and because it does not appear from the said facts as found that the accident arose out of and in the course of petitioner's employment.

3. Because said New Jersey Supreme Court erred in holding that the finding of facts and determination in the said Court of Common Pleas was sufficient upon which to base a judgment in favor of the petitioner and did not hold that said finding of facts and determination was not sufficient upon which to base such a judgment on the ground that it does not appear from the said finding of facts and determination what the cause of the flame which burned petitioner-appellee was and it does not, therefore, appear whether said burns happened from a violation of positive instructions or not and, therefore, whether or not it did arise out of and in the course of petitioner's employment.

4. Because the Supreme Court erred in refusing to hold that it was necessary for the Trial Court in the determination and finding of facts to settle the disputed question as to the source of the flame which burned petitioner.

5. Because the said Supreme Court erred in holding that the testimony offered in behalf of appellant was not sufficient to establish to a certainty that it was impossible for the flame to have shot through the open door of the oven at which petitioner was burned unless oil was thrown upon the fire after it was ignited; and that, therefore, the trial judge was not legally bound to hold that the testimony offered in behalf of petitioner was so clearly contrary to the operation of the well known laws of mechanics as to stamp such testimony as utterly absurd and incredible.

6. Because the Supreme Court in holding as referred to in the fifth ground of appeal failed to consider that the burden of proof was on petitioner.

7. Because the said Supreme Court erred in holding that the award of compensation was made in accordance with the rule laid down in *Vishney v. Empire Steel and Iron Co.*, 87 N. J. L., 481.

8. Because the rule laid down in said case of *Vishney v. Empire Steel and Iron Co.*, has not been approved by this Court and is erroneous and is not applicable to the case here brought up for review.

9. Because if the Supreme Court properly affirmed the judgment of the Court below in determining that the appellant was liable for compensation to be paid the petitioner, it erred in holding that the Court adopted a proper method in fixing the amount of compensation to be paid based upon the injury and wages of petitioner as found.

Dated, December 5, 1916.

Yours respectfully,
PIERSON & SCHROEDER,
Attorneys for Appellant.

To:
Messrs. La Porta & Stites,
Attorneys for Petitioner-Appellee.

(Endorsed)

Service of the within notice is hereby acknowledged this 5th day of December, 1916.

STITES & LaPORTA,
Attorneys for Petitioner-Appellee.

PIERSON & SCHROEDER,
Steneck Building,
Hoboken, N. J.

New Jersey Court of Errors and Appeals

VITO ORLANDO, (Petitioner), Defendant in Certiorari, Appellee, vs. F. FERGUSON & SON, (Respondent), Prosecutor in Certiorari, Appellant.	On Appeal from New Jersey Supreme Court.

BRIEF OF PIERSON & SCHROEDER IN BEHALF OF THE APPELLANT

This appeal brings up for review a judgment of the New Jersey Supreme Court affirming a judgment of the Hudson Common Pleas in a proceeding instituted under the Workmen's Compensation Law of this state. The determination and order for judgment will be found on pages 22-25. The reasons urged in the Supreme Court will be found commencing on page 118. The grounds of appeal will be found commencing on page 124.

The grounds of appeal may be conveniently discussed under three general heads, which we think will be comprehensive enough to embrace all of them.

1. *Is the determination and finding of facts by the trial judge sufficient on which to base a judgment in favor of petitioner?*

2. *If the facts as found are sufficient on which to base a judgment for the petitioner, is there competent evidence on which to base this finding of facts?*

3. *If the trial judge did not err in finding that the petitioner was entitled to compensation, is the compensation properly awarded?*

The first two of the foregoing heads are so closely related that the discussion of them can be best taken up after a review of the facts in the case.

Statement of Facts

The petitioner was severely burned by flame which came out of the door of a drying room in the factory of appellant. There is no dispute as to this. The dispute concerns the cause of the flame which came out of this door and the question as to whether or not it was so caused as to impose liability on the appellant, and whether or not the finding of the Trial Court on this phase is sufficient.

The best description of this drying room is found in the testimony of John Ferguson in behalf of the appellant. This testimony is entirely undisputed. This drying room or oven (p. 89, l. 21) is 28 feet long, 12 feet high and 13 feet wide, interior dimensions. There are in the rear of this room two fire boxes, 4 feet square, a little way from the corners. The grates consist of cast iron bars with air spaces between them without any pocket that could hold oil. The front of this room consists of a large door covering the entire opening (p.

90, l. 29). In this there is a small door called a pocket door 2 feet wide and 4 feet high. In the rear by each fire there is a furnace door approximately 20 by 14 or 15 inches (see. p. 74, l. 8).

It will be noted that these fires are built in one end of this room. The whole room is a combustion chamber (see p. 74, l. 15). The method of building the fires is largely undisputed. The testimony of petitioner as to how the fires were built on the night of the accident appears on page 30, line 21, in the testimony of John Romano, one of his witnesses. This method put in a compact form is, that the witness made the fire on the evening in question by putting in kindling wood, green and large in size first, and then two quarts of kerosene on the fuel at each grate and coke over that. The fires were afterwards lighted and then the rear doors closed. The witness on being re-called makes it clear that there were about two quarts of kerosene used on each fire, (see p. 62, commencing at l. 23.)

It is further undisputed that this fuel was placed and the oil put on a considerable time before the fires were lighted. A clear statement of this is in the testimony of the appellant, but is undisputed (p. 90, l. 21). This testimony is to the effect that the molds are brought to the door of the drying room or oven on traveling cranes. They are placed on two carriages that run on tracks. The cars are then moved in, a process that takes at least a half an hour, so that there is at least that lapse of time after the material is placed before the fire is started. See also the testimony of Samuel Ryan as to this (p. 100, l. 16). The testimony of Romano, the petitioner's witness, bears this out as far as he goes and in no particular contradicts it (p. 34, l. 10; see also p.

100, l. 21). The large door in front is then closed and any openings closed with clay to prevent the heat from escaping (p. 47, l. 16). The petitioner's witnesses testify that the fires on the night of the accident were lighted by Romano and that petitioner was placing the clay around the door at the other end at the time (p. 47, l. 2, *et seq.*).

The fires were then left burning and burned an indefinite time before the accident. This must have been at least 15 minutes and might have been, even under the testimony of petitioner's witnesses, a much longer time. The witness Romano testified that the manager of the factory, Ferguson, was not there that evening any time after the fire was lighted (p. 34, l. 29). This is distinctly denied, however, by Ferguson (p. 91, l. 37, *et seq.*), and the presence of Ferguson after the fire was lighted is admitted by the petitioner (p. 48, l. 26; p. 53, l. 8). The witness Romano in response to a question on page 35 line 8 responded as follows:

> "Q. Was it fifteen minutes or ten minutes, or half an hour, you lighted the fire before the accident happened? A. A quarter.
>
> "Q. Quarter of an hour? A. Yes."

Again on page 36, line 23, this question and answer appears from the testimony of this witness.

> "Q. It was about fifteen minutes after the fire was lighted, Orlando looked at it? A. Yes."

The petitioner on page 47 at line 16, testified that he was placing clay over the door, that is the large door in front, when Romano was lighting the fire. This was at the other end of the

furnace. The witness was then asked how long after that was it that he looked at the fire. The answer was "about 10 minutes, more or less, not even so." This was before his attention was directed to the fact that Ferguson was there after the fire was lighted. Later in his testimony (p. 48, l. 29), the petitioner testified as follows:

> "Do you remember John Ferguson coming around to the front and opening the little door in the big door there? A. Yes, sir.
>
> "Q. And he felt to see whether the oven was warm or not? A. No, sir; he told me to open the door.
>
> "The Court: What did he go around there for, to open the little door? What did he do that for? A. I opened the door myself and not Mr. Ferguson, for the wind; Mr. Ferguson said, 'Close the door.'
>
> "Q. That was the little door in the big door around in front, wasn't it? A. Yes, sir.
>
> "Q. Now, what did he say then? What did John Ferguson, the boss say then to you? A. 'Close the door, for otherwise the factory would get black.' "

This and other testimony shows clearly that after the fire was lighted and started the witness Ferguson was there and had some sort of conversation with the petitioner. The testimony differs as to what this conversation was. Ferguson testifies as to his being there on page 92, line 13, and petitioner admits Ferguson's presence at other places in his testimony (see p. 53). Petitioner was then asked (p. 49, l. 22), referring to this interview at the front door:

"Q. Now, how long was that, at the time John Ferguson was there, after the fire had been started? A. About a quarter of an hour."

Then follows:

"Q. Now, how long after John Ferguson went away was it that you looked in the door where you were burned? A. About a quarter of an hour; not even so."

The most favorable view of petitioner's testimony is that the accident happened at least a quarter of an hour after the fire was started. It can be readily gleaned from the petitioner's own testimony that it was approximately half an hour, in other words a quarter of an hour about elapsed after the fires were lighted before Ferguson came back, then the conversation at the large door took place, the pocket door was opened and Ferguson after that went away. Then it was about a quarter of an hour after that when the accident occurred.

The testimony of the witness Ferguson for the respondent on this point is found at page 91, line 38. This put the time between the kindling of the fire and the accident as a much longer time. The trial judge, of course, was not bound to believe this but certainly could take no more favorable view than was testified to by petitioner's witnesses. We do not see how he was entitled to take a more favorable view than was testified to by the petitioner himself so positively and clearly. Romano either was unquestionably mistaken about John Ferguson's being there after the fire was lighted or in his zeal to help his former co-employee he testified falsely.

There is other testimony in this case, which although it is the testimony of appellant, is not

contradicted. This is the testimony of the witness Charles O. Guenther. This testimony commences on page 72. He is a mechanical engineer, engaged in teaching in the Stevens Institute of Technology, and consulting engineer for one of the largest chimney construction works in the country. He had examined this furnace. His testimony is rather long to repeat at length. He testified however, that he had examined the oven and gave a description of it. There are five prominent facts in his testimony:

1. It is a safe proposition to have put two quarts of oil on each of the fires in question as testified to by Romano and then to have lighted the fires (p. 75, l. 27), that this would be safe is a matter, we think, of common knowledge. No accident occurred when the fires were lighted, none occurred when Ferguson and Orlando looked in later. It seems from petitioner's testimony that this was a common practice, yet although the burden was on the petitioner to show how the accident happened there is in the whole case not a breath of testimony to show that it had ever resulted in any possible sort of an explosion, either when lighted or later. Romano had worked there four years and petitioner two.

2. This oil could not have caused the explosion or burst of flame after the fire was lighted, particularly 15 minutes or more after it was lighted (p. 79, l. 29). This must also be a matter of common knowledge. Why was this oil put on to start the fire? It was the first thing to burn. The heat of this lighted the wood, which in turn lighted the coke. Manifestly there was no oil left sufficient to cause the burst of flame at the time. It must be remembered, too, that this fire was burning in a large room, not a confined space.

3. There could not have been a back draft (p. 81, l. 39). The flame was in no sense confined. It had to all intents as much space as though it were burning in the open.

4. There could have been no explosion from gases formed by the burning coke that would have caused the injury (p. 76, l. 27).

a. It would not explode because not confined (p. 77, l. 8).

b. If there could be an explosion, it would have caused a different sort of burn (p. 77, l. 11).

c. It would have damaged the furnace (p. 77, l. 26, *et seq.*).

5. Exactly the sort of explosion that did happen would have happened if the petitioner had thrown kerosene on a lighted fire (p. 78, l. 26).

This is also a well known fact.

Appellant's Theory of the Accident

The appellant claims that the injury occurred because petitioner contrary to positive instructions threw kerosene oil on a lighted fire or incandescent coke.

There is no doubt that instructions were given not to put oil on a lighted fire.

See the testimony of John Romano (p. 40, l. 17), the petitioner (p. 48, l. 1). The Court considered it an established fact (see also p. 100, l. 29; p. 106, l. 34; p. 113, l. 29; p. 92, l. 34).

The petitioner denies that he threw oil on the lighted fire (p. 42, l. 19).

Appellant's witnesses testify to the following facts bearing on this: John Ferguson testifies, that after the fires had been lighted and on his way home he met Orlando coming from the shop

with a can in his hand and that Orlando in response to an inquiry from Ferguson said he was going to put oil in the fire which he was specifically forbidden to do (p. 92, l. 28). He further testifies (p. 93, l. 17):

> "Did you have any conversation with him (petitioner at station house after the accident)? A. I asked him what happened, he said he put oil on the fire, it went 'woof.'
>
> "Q. Did you go back after that to the foundry? A. I went back with the watchman. The watchman and the driver were at the station house when I got there.
>
> "Q. Did you make any examination of this furnace when you went back? A. We went down, looked it over, and we found the oil can that Orlando had been carrying at the time I told him not to put oil on the fire; it was lying in the ash pit."

Eddie Langhlan testifies that Orlando made the same admission to him that same evening (p. 106, l. 15).

We feel that both the trial judge and the Supreme Court failed to grasp the significance of the expert's testimony and the force of the strong circumstantial evidence of appellant set forth above. Moreover, they seem to have lost sight of the principle that the burden of proof is on the petitioner. Of course it is true that if it were only a question of belief as to the truth of Orlando and Romano on the one hand and Ferguson and Langhlan on the other, the finding of the Court would be conclusive; but we insist that much more is involved.

In this situation, we are brought to the first reason relied on for reversal.

POINTS

I

The facts contained in the determination of the trial judge in this case are not sufficient on which to base a judgment for petitioner.

1. The burden was on petitioner to show that the accident arose out of and in the course of the petitioner's employment.

Bryant v. Fissell, 84 N. J. L., 72.
Reimers v. Proctor Publishing Company, 85 N. J. L., 441.

See also other cases hereinafter referred to.

2. We contend that under the law and the rulings of this Court the findings must show on their face facts from which this Court can determine that the accident arose out of and in the course of petitioner's employment. If there are different theories as to how the accident might have happened, the findings must show that it happened in a way that would make the employer liable.

It has been held that the trial judge must set forth in the findings sufficient to enable the higher courts to determine whether reasons for commutation exist.

New York Shipbuilding Co. v. Buchanan, 84 N. J. L., 543.

It has been held that the determinations likewise must contain sufficient to enable the Court of review to determine the extent of the petitioner's injuries.

Long v. Bergen Co. Common Pleas, 84 N. J. L., 117.
Mocket v. Ashton, 84 N. J. L., 452.
Diskon v. Bubb, 96 Atl., 660.
New York Shipbuilding Co. v. Buchanan, 84 N. J. L., 543.

It follows, therefore, that the findings must contain sufficient to enable the reviewing Court to determine that the accident did arise out of and in the course of employment. There is no difference between such facts and those relating to the extent of the injury or the propriety of commutation.

The language of the Court in *New York Shipbuilding Co. v. Buchanan,* 84 N. J. L., at page 544, confirms this view. There the Court said:

> "Clearly, it is intended that the judgment in every phase shall be supported by a specific finding of fact which may be submitted to and considered by a Court of review."

That this is true appears more clearly from the case of *Dunnewald v. Henry Steers, Inc.,* 99 Atl., 345, decided by the Court of Errors & Appeals since the Supreme Court decision in this case. The Court, in the *Dunnewald* case, in speaking of the facts necessary to warrant a judgment, says:

> "And all these essential facts must be found by the trial judge, and must be contained in his written determination, because paragraph 20 of Section 2 (P. L., 1913, p. 308) requires that the determination of the trial judge shall be filed in writing, and shall contain a statement of the facts as determined by the judge."

The Court continued later,

> "The evidence in the Trial Court which was sent up is no substitute for the finding of facts as required by the statute."

As far as the finding of facts which was signed by the Court and filed as such in the case at bar is concerned, the Court fails absolutely to find the source of the flame, and therefore the real cause of the injury. It might therefore have been any of the suppositions hereinafter stated. Some of these there is no evidence to support at all. There is no evidence that there is a physical possibility of any other source of the flame than that of fresh oil thrown on the fire, except of course the bare statement that the flame came out and no oil was thrown on the fire. We respectfully insist that if there is evidence from which the Court might find that the accident happened in a particular way, which would not make the respondent liable, the petitioner cannot meet the burden cast upon him until he can produce evidence from which the Court finds that the accident did happen in a way to cause liability. Neither do we think where there is evidence that the accident happened in a particular way which would not make the petitioner liable, that the mere fact that there was a flame which burned petitioner is sufficient alone to make appellant liable. It will be noticed that nowhere does the Court specifically find that the petitioner showed that oil was not thrown on the fire. He says in the written opinion (p. 21, l. 14),

> "I am not content to accept this evidence and to thrust aside the evidence of the petitioner and the only other man who was actually present."

He does not say that he accepted the evidence of petitioner and thrust aside that of respondent yet that would be necessary if the petitioner met the burden cast upon him.

We further insist that a written opinion not filed as a final determination of fact does not comply with the requirements of said Section 20. It is only the judgment that becomes res adjudicata.

This finding as to the oil, even if we look upon it as a positive finding does not appear in the written determination. The Court in the *Dunnewald* case is positive in the statement that not only must the required facts be found by the trial judge, but they must be contained in his written determination. Why may not the judge have changed his mind as to this as well as concerning the compensation to be awarded? (Compare p. 116, ll. 20 and 26 and p. 24, l. 18).

The theory of appellant was, that the accident was due to oil thrown on fire contrary to instructions.

There is abundance of evidence to show that this was done (see *supra*).

The petitioner advanced nowhere through the trial any theory as to the cause of the flame. The trial judge found none. There was none shown except that proposed by appellant and rebutted by it. If any other cause existed the burden was on petitioner to show it. The real dispute is the cause of the flame. Until that is found, this Court cannot tell whether the injury was an accident for which appellant is responsible or not. It cannot tell whether the finding is supported by competent evidence or not.

Must appellant be left to conjecture as to the cause of the injury for which it must pay? We believe our solution is the correct one and only

one. How easily that explains everything. All the testimony could then be believed except that of petitioner to the effect that petitioner threw no oil on the lighted fire. But if our solution is not the proper one, then what is? How is appellant in the future to provide against its recurrence? This combustion expert can only say, "Keep workmen with oil away from the lighted fire." He cannot offer relief. Did the trial judge suggest any? Can this Court suggest any if the judgment is affirmed?

The case must not be confused with those cases where there is no evidence to show any way that the accident may have happened that would not make the employer liable; or where there is no rational explanation of the accident except such as to make the employer liable; or where there is no probability that the trial judge may have misconceived the evidence as to some fact which he used as the basis of his determination.

Petitioner's counsel may on the argument suggest some theories which may have caused the flame. Let us assume that some of the following are suggested or are probable solutions which led the trial judge to determine that there was liability.

a. Oil put on the fire before it was lighted. This would have been the first to burn. That is why it was put there. In fifteen minutes or more it was gone. Common sense tells us so. The expert told us so. The Court did not find that this did cause the explosion. There is no evidence that it did rather than something else. It could not have done so. No trouble was experienced when the fire was lighted. None was experienced when Orlando and Ferguson looked in

later. Why? Because the oil originally put on was so diffused it only caused fire to light the wood. In a few seconds it was gone. There is testimony that the wood was damp. The oil was certainly gone before this wood got dry and hot enough to burn. There could not conceivably be any left 15 minutes or more after the fire had been started. Had there been there was abundance of room for it to burn in this large room. It did not have to go shooting out the little door.

b. Backdraft. Backdraft in this open room? There was abundance of opportunity for the flame without rushing through this small door. A backdraft makes a different sort of burn. It could not have been a backdraft. Common sense tells us so. The expert tells us so and his evidence is not disputed. The trial judge did not find it was so. There is no evidence that it was this.

c. An explosion of gases. This was a coke fire. Coke has the gases driven off. There was no place to confine gases. They would have made a different sort of burn. There would have been a wrecked furnace if such an explosion were possible. The expert tells us that this could not have cause the accident. The court does not find that it did. There is no evidence that it did. There is no evidence that it was this rather than something else.

d. Was it caused by the opening of the door in the front?

The Court asks particularly about the effect of opening this (p. 82, l. 40, *et seq.*). The expert testifies about it (p. 83, l. 25). But according to all the testimony it was not opened at the time or near the time. The only two persons about at the

time were Romano and Orlando. Orlando at the rear and Romano 10 or 15 feet away (p. 32, l. 30; p. 36, l. 23), the front door was over 30 feet round in the front some where. This door had not been opened since the fire was started. It was mudded up to keep the heat in (p. 45, l. 15). The pocket door had been opened but not since Ferguson had gone away. Yet as likely as anything the trial judge may have found this the cause. He withheld the case for consideration (p. 20, l. 21). The testimony was not written up for him. He may well have carried in his mind a wrong conception of the testimony that could have been corrected had he found the cause of the flame. There is nothing to show that he did not think the flame was caused by opening the door in front, notwithstanding it was not opened at or near the time and would not have caused the flame if it had been. The trial judge questioned about this particularly showing his mind was directed to it. Petitioner's counsel urged the attention of the Supreme Court to this on page 7 of their brief as follows: "The Court might have inferred from the evidence that there was a back draught which might possibly have caused the flames to burst forth as Mr. Guenther at lines 13 and 37, page 84, state of case, testified that it might be possible for the flame to act in the manner in which it did if there was a draught." An examination of this testimony shows that at line 13 witness was talking of what would happen if the two doors were open at the same time, that is the large iron door in front and the door by the grate. At 1.37 the witness simply says that a back draught, if there was one, could come out of the open rear door. Manifestly it could, but that is no proof

that there could be one to come out. This shows the necessity of having the specific determination of fact in the filed findings or else how can this Court determine where the conclusions are justified by some evidence. We insist that petitioner's counsel misconceived this evidence when it was written out. How much more probable that the trial judge did when he had after several days only his memory to guide him.

We think it quite probable that the trial judge believed there was a back draught caused by the two doors being opened at once, though the evidence shows that they were not so open.

e. Was it oil thrown on a lighted fire?

The trial judge in his memorandum apparently holds that this was not the cause. The Supreme Court treats this as a found fact; but the Trial Court does not so find in the final determination. Did he so find but find that this did not constitute a legal defence, even though petitioner was forbidden to use oil on a lighted fire? The Trial Court has not expressed himself on this point. On page 94 at line 30, a colloquy commenced indicating that the Court did not consider evidence as to the effect of throwing oil on a lighted fire had any materiality. The Trial Court in this case has not specifically found that it would have constituted a defense had appellant shown that the accident was due to throwing oil on a lighted fire contrary to positive instructions. In fact this was one of the questions particularly briefed. The trial judge has not indicated his view on the subject. That it would constitute a defense is clear.

Reimers v. Proctor Publishing Co., 85 N. J. L., 441.

Smith v. Corson, 87 N. J. L., 118.

Hully v. Moosbrugger, 95 Atl. 1007; reversing 93 Atl., 79.

Lynch v. Newman, 37 N. J. L. J., 17 (C. P.).

Schelf v. Kishpaugh, 37 N. J. L. J., 173 (C. P.).

Pope v. Hill's Plymouth Co., (1910), 102 L. T. N. S., 632, 3 B. W. Com. Cas., 339.

Brice v. Edward Lloyd, Ltd., 127 L. T. J., 322, 2 B. W. Com. Cas., 26.

M'Daid v. Steel, (1911) S. C., 859, 48 Scot. L. R., 765; 4 B. W. Cas., 412.

Without knowing how the trial judge arrived at his conclusions, we cannot tell whether or not he misdirected himself in law. It may well be that the trial judge did not think when he signed the finding of facts and determination that it made any difference where oil was thrown on a lighted fire or not.

We feel that neither of the Courts below found that the burden of proof rested on petitioner throughout.

We think the opinion of the trial judge on pages 20 and 21, fairly infers that surely if the respondent did not establish his contention, no burden was placed on the petitioner to show that the accident arose out of petitioner's employment more than the mere fact that he was burned. In other words the trial judge felt that the respondent had to show that the accident happened in some way that was not out of the employment and not that the petitioner had to show that it happened in some way that was out of the employment. He says of appellant's evidence (p. 21, l. 14),

> "I am not content to accept this evidence and to thrust aside the evidence of the petitioner and the only other man who was actually present."

We insist that he had to accept the petitioner's evidence and thrust aside that of respondent. He nowhere says that he does so. On the finding of facts, we cannot tell again but that the trial judge misdirected himself in a point of law.

Again if the trial judge believed the testimony of John Ferguson that Orlando had been told to go home (p. 92, l. 14), Orlando's subsequent conduct in opening the door would be contrary to instructions and defeats recovery under the doctrine of *Reimers v. Proctor Publishing Co.,* 85 N. J. L., 441, and *Smith v. Corson,* 87 N. J. L., 118.

Without a finding in this particular we cannot tell but that the judge misdirected himself in point of law.

The following excerpts from opinions in other jurisdictions on the questions of the burden of proof, conjecture, etc., are deemed pertinent in view of the discussion above:

We think the language of the Court in *Gardener vs. Horseheads Const. Co.,* 156 N. Y. S., 899, at 902, is applicable to the case at bar. The Court there in speaking of the findings among other things said:

> "The findings are in the most general terms, and in arriving at the conclusion reached we are not hampered by the rule that the decision of the commission shall be final as to all questions of fact, nor by the presumption that the claim comes within the terms of the statute. The employer and the insurance carrier are en-

titled to a hearing. The hearing is of a summary character, and the commission is not bound by the ordinary rules of evidence and practice. Nevertheless its determination as to the facts is a *quasi* judicial determination, *and must rest upon the facts presented to it, the undisputed facts of the case and the reasonable inferences which may be drawn from them.* The commission cannot act arbitrarily on the information it receives, or in direct violation of the conceded facts. Its duty therefore is to base its determination upon the undisputed facts of the case and the reasonable inference to be drawn from the general situation. When its findings are without evidence, and in direct conflict with the undisputed facts and all reasonable inferences which may be drawn from them, its determination may be reversed as error of law. * * * *The findings of fact by the commission must be read in connection with the known facts of the case. The findings omit the material facts, and do not decide the real question litigated, but evade it.* They are so indefinite and vague that the undisputed facts render them valueless as the basis of an award'' (The italics are our own).

See also *People vs. Troupe,* 156 N. Y. S., 950.

''In cases under this act, in the same way as in cases under any other statute or at common law, the plaintiff must prove his case; and, although he may establish a state of facts which lead one to think that his version is a quite possible version of what took place, he must do something

> more than show a state of facts which is consistent either with one view, or with another view."
>
> Lord Loreburn in Barnabas Colliery Co., 103 L. T., 513; 4 Butterworth's W. C. C., 199.

We think the case of *Chandler v. Great Western Railway Co.*, 106 L. T., 479; 5 Butterworth's W. C. C., 254, very pertinent in the principles involved. There the workman had injured his finger at home and blood poisoning subsequently developed. Cozzens-Hardy, M. R., said:

> "I think it is quite plain that the burden which the applicant must take upon himself has not been discharged. He has only shown several causes which might have contributed to it and asks us to fix upon this one; whereas, in my opinion that one is by no means the most probable (if we are to go into probabilities), cause of what happened."

Flecher Moulton, L. J., in the same case said:

> "In my opinion the workman has not brought this case higher than 'surmise, conjecture, or guess.' "

We think that peculiarly applicable to the case at bar, except further here the petitioner has left the guessing to the appellant and this Court. He did not furnish evidence on which the trial judge ventured a guess as to the real source of this flame.

In *Perry v. Ocean Coal Co.*, Ltd., 106 L. T., 713; 5 B. W. C. C., 431, Buckley, L. J., says:

> "I do not say that the judge might not

> by way of inference have arrived at a finding of fact which would have supported his award, my difficulty is that he has not arrived at any finding of fact."
>
> "The Court is entitled to draw inferences of fact from the evidence, but it does not mean that the Court may guess. The House of Lords has said on more than one occasion that it is not sufficient to think this or that is probable. There must be practical probability."

Cozzen-Hardy, M. R., in *Howe v. Fernhill Colleries, Ltd.*, 5 B. W. C. C., 629.

Where all the evidence is reported, it may become a question of law whether there was any evidence upon which the finding could have been made.

> *In re* Herrick, 217 Mass., 111; 104 N. E., 432.
>
> *In re* Buckley, 218 Mass., 354; 104 N. E., 979.
>
> "Unless there is some evidence tending to show that the substance which fell in the eye caused the infection, and unless the fact be found, we cannot regard the subsequent loss of the eyes as proximately resulting from an injury 'incidental to or growing out of the employment.' "
>
> Voelz vs. Industrial Co., 152 N. W., 830.

It will be noted that the Supreme Court in its opinion did not discuss the sufficiency of the determination of facts at all.

We respectfully submit, if this Court does not agree with us in our foregoing conclusions, that the Common Pleas Judge was not legally justified in making the findings he did.

II

There is no competent evidence on which to base a Finding of Fact that the injury arose out of and in the course of petitioner's employment.

We discuss this point with full knowledge that the decision of the trial judge is conclusive upon all questions of fact where there is competent evidence on which to base such a conclusion. If it were simply a question of veracity between the petitioner and Romano on one hand and Ferguson and Laughlan on the other hand, the decision of the trial judge on a question of fact raised would of course be conclusive. What we conceive to be the situation here can be better shown by illustration. Suppose the appellant, in response to the petitioner's claim that he was injured by flame while at work, had set forth the claim that it has actually set forth in this case, and petitioner met the defense by saying that he had gone to take a drink of water from the ice-water cooler and the water had burst into flame and caused the injury. Manifestly if the Court had found generally that the respondent was liable on such evidence, this Court would set such a finding aside on the ground that there was no believable evidence to support the finding of liability. It could yet be claimed that there was evidence upon which to base such finding and that the decision of the Common Pleas Judge was final. In our opinion the legal situation in this case is exactly the same. It may not be so clear but it exists to the same extent. If the Court takes into consideration the undisputed testimony of the witness Guenther, the common

knowledge that men possess of the qualities of oil, the undisputed details of the construction of the oven and all other unquestioned circumstances, the testimony of Orlando that he did not throw fresh oil on the fire is as legally unbelievable as though he had said ice water burst into flame and caused the burn. We have outlined the facts before and we simply here desire again to emphasize the points therein made.

The Supreme Court disposed of this contention in the following words:

> "The trial judge was not legally bound to hold that the petitioner's testimony and that of his witness was so clearly contrary to the operation of the well known laws of mechanics as to stamp such testimony as utterly absurd and incredible."

We can only submit the facts as discussed and the law cited to this Court. We still insist that appellant's explanation of the cause of the flame is the only rational one under all of the facts.

Suppose, however, the trial judge found as he probably did, certainly as he may have done, that the injury was caused by a back draught due to the opening of both doors at once. The testimony shows that this was not done. There would then be absolutely no evidence to support the finding.

There are a few questions of law which we wish to refer to at this point.

Jurors, or judges trying facts, may act upon matters of common observation within their general knowledge without any testimony on these matters.

16 Cyc., 852 (39).

Courts may also properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary standing and intelligence.

16 Cyc., 852 (42).

Uncontroverted evidence produced to establish a fact does not preclude the Court from finding the fact to be otherwise by resorting to judicial knowledge (see 16 *Cyc.*, 852, citing *Lidwinofsky's Petition,* 7 Pa. Dist., 188).

This case fits in with our contention precisely so far as the general principle of law involved is concerned. The evidence of the petitioner of course, in the case at bar is not uncontroverted.

The expert in testifying as to properties of oil, gas, etc., was really testifying to a fact.

17 Cyc., 67.

As there was no evidence to dispute these facts, they became undisputed facts in the case.

The language of the Court in the case of *Daggers vs. Van Dyck,* 37 N. J. E., 130, at 132, is deemed pertinent:

> "Evidence, to be believed must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cognizance."

We believe the undisputed facts in this case to be decisive of it. These cannot be disregarded unless there are palpable reasons for disregarding them. Unless in this case undisputed facts are disregarded, where there is no reason for disregarding them, the testimony of petitioner as to the use of oil must fall.

> "Highly improbable facts 'should have credence in nothing less than the most convincing proofs.' The proof should be clear and strong in proportion to the degree of improbability."
>
> 17 Cyc., 765.

If the fact is impossible it follows that no proof can establish it.

It is respectfully submitted that for the reasons above set forth, the findings of the Trial Court should be reversed.

III

The Court erred in his method of ascertaining the compensation.

The Court found that there was a 50% loss of function in each hand and a 10% loss of function in one eye (p. 24, l. 8). The statute provides tor the loss of an eye compensation for 100 weeks and for the loss of a hand compensation for 150 weeks. The Court at the close of the trial decided to allow 10% of 100 weeks for the injury to the eye and 50% of 150 weeks for the injury to each hand (p. 116, l. 8, *et seq.*) making a total of 160 weeks. After the attorneys of petitioner called the attention of the Court to the case of *Vishney vs. Empire Steel & Iron Company,* 95 Atl., 143, he modified this in the filed findings taking the two hands together as 50% of total disability and al-

lowing therefor 200 weeks, 50% of the 400 weeks allowed for total disability, and allowing an additional compensation of 10% of 100 weeks, for the injury to the eye, making a total of 210 weeks for the total permanent disability (p. 24, l. 18).

It is respectfuly submitted that this is error. That at the first trial the trial judge in this case and the trial judge below in the *Vishney* case found a percentage of each injury separate naturally raises the inference that there is a question as to the construction of paragraph 11 of the act.

Paragraph 11 divides injuries in 3 classes: those producing (*a*) temporary disability, (*b*) total permanent disability and (*c*) partial permanent disability.

The paragraph then continues:

> "The loss of both hands or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of clause (*b*)."
>
> "In all other cases in this class, or where the usefulness of a member or any physical function is permanently impaired, the compensation shall bear such relations to the amounts stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

We respectfully question if that portion of this paragraph providing that the loss of both hands, etc., or of any two thereof, shall constitute total and permanent disability, to be compensated according to the provision of clause (*b*) provides for partial disability of these functions. But if partial disability is to be apportioned on the basis of total disability, it must be on the basis that all

of the injuries bear to total disability, and not part on the ratio portions of these bear to total disability, and part on the provisions of schedules.

Four methods of construing this schedule are possible:

(1) Compensation may be determine by taking each injury separately as was first done in the case at bar. This would give a total of 160 weeks for partial permanent disability. We respectfully submit that this is a convenient and uniform way of construing this section and that the Supreme Court in construing the *Vishney* case did not take into consideration the complications that would arise when there were partial permanent injuries to three or more of these separate functions. If this method is adopted, there can be no confusion or uncertainty. Given an injury to each of three or more of the members of the designated classes reduced to a percentage basis in each case, and the number of weeks of compensation becomes only a matter of computation. It is easier to find the percentage of each injury separately than it is to find percentage that two or more different injuries bear to total loss of all three functions.

This is what the Trial Court did in the case at bar. Suppose he had found say 35% injury to one hand 50% to the other and 10% of the eye, what compensation would he have awarded? On the theory in this subdivision recommended, it would be only a matter of computation, but it is not clear what the theory actually adopted would lead to.

We respectfully submit also that the clause of this paragraph providing for other cases in this class intends that each injured function be considered separately, at least unless they are collectively apportioned to total disability. Neither was done in the case at bar.

The language "where the usefulness of a member," etc., seems to us to require a treatment of each injury separately, but if not, then it must require the injuries to these three to be considered as a unit in proportion to total permanent disability.

It is manifest that compensation for total permanent disability cannot exceed 400 weeks; and that if there is a partial permanent disability the compensation cannot exceed a certain definite portion of 400 weeks, unless each injury is taken separately as the Trial Court was first inclined to do. The Trial Court by pursuing the method finally adopted, gave a portion of 400 weeks and a portion of an additional 100 weeks, making a proportion of a total of 500 weeks. This method is manifestly erroneous.

(2) The trial judge might have considered the injuries to the two hands and the eye as a certain percentage of the total loss of both hands and the eye. This can only be more or less conjecture even after the Trial Court has fixed the separate proportion of loss for each injured member. This total percentage was not fixed by the Trial Court and, if it is the proper one, the case will have to be remitted for that purpose. This percentage may under the facts, however, be fixed in a uniform and scientific way provided the Court approves the *Vishney* case and rejects the methods set forth in (1). This would give us a third method similar to (2) but capable of being uniformly worked out. The Court might also have considered the injuries to the two hands and the eye as a certain percentage of total disability independent of the provisions of the statute in the case of the loss of two of the certain designated functions.

(3) The method referred to in (2) would be by apportioning the different injuries according to

their relation to total disability as stated in schedule, that is, to the two hands and eye on a basis of 150 to 150 to 100, or as 3 to 3 to 2. This would make each hand 3/8 of total and the eye 2/8. For 50% injury to each arm then, there would be compensation for 3/16 of 400 weeks, or 75 weeks, and for an injury to the eye 1/10 of 2/8, or 1/40 of 400 or 10 weeks. This is scientific and mathematical, and given the proportion of total disability for each injured function, the courts will always arrive at the same result.

In this case (1) and (3) give the same results, as the total of the compensation for total loss of the 3 separate functions is 400 weeks, the same as for total disability. Had the compensation for total loss of the 3 separate functions aggregated more than 400 weeks (1) would give higher compensation than (3), and had the total of the three been less than 400 weeks (1) would have given less compensation than (3).

(4) The method adopted by the Trial Court. The inconsistency and illegality of this method can be seen by supposing for convenience the injury to the eye had been a 50% one. There is no legal relation that would cause the two hands to be considered together rather than one hand and an eye. There is a physical relation between the two but not a legal one, as the statute considers any two indiscriminately. If the court had combined the one eye and one hand as a 50% of the total, giving 200 weeks, and taken the other hand separately, it would have resulted in a total of 275 weeks. Whereas, if the two hands had been combined resulting in 200 weeks and 50 weeks added for half of the loss of the eye, the total would have been 250 weeks. We consider either one of these methods as legally justifiable as the other.

Let us suppose a more complicated case involving this identical principle. Suppose there were a 50% injury to the hand, a 50% injury to a foot (the schedule for a total loss of a foot being 125 weeks), and a 50% loss to an eye. Manifestly under the theory of the Court below two of these would be combined and taken as a proportion of total disability and the other would be taken separately. We conceive that the three justices who heard this case in the Supreme Court might each work out and get a different total compensation. For instance, if the hand and eye were combined as a 50% of total loss, or 200 weeks, and 50% of 125 weeks was added for the foot, it would result in the total of 262½ weeks. If the hand and foot were combined as a 50% of total loss, or 200 weeks, and 50 weeks were allowed for the injury to the eye, it would result in 250 weeks. If the foot and eye were combined as a 50% of total loss, or 200 weeks, and 75 weeks for the injury to the hand, it would result in a total of 275 weeks. Yet in each of these cases the principle adopted by the Courts below would be adhered to. We respectfully submit that this method of computation is indefensible.

In reading the whole of paragraph 11 it is clear that the schedule therein referred to is made up of clauses a, b, and c. Partial permanent disability can result in a percentage of total permanent disability and the compensation would then be fixed on the basis of clause b; or it may consist of a partial loss of one or more of the functions set forth in clause c and be based upon the provisions of that clause. We do not conceive it possible, however, that an injury received in any one accident should be compensated partly pursuant to clause b and partly to clause c which was done by

the Trial Court in this case. It clearly should have been based upon clause b in the methods set forth in (2) or (3) or based wholly upon clause c in accordance with (1). We do not believe that there is any other case decided by the Supreme Court than the case at issue in which the compensation was based on both clauses b and c and such a basis should not be adopted as the law of this Court.

The *Vishney* case if correct in principle is not applicable in this way and we respectfully insist that both Courts below erred. No attempt in the Supreme Court opinion was made to show how the case was applicable. The decision forms no guide to employers, employees or their attorneys in cases that should be controlled by a proper application of the principles involved in that case. Suppose a 10% injury to a foot and 20% to a hand and a 30% to an eye. How many weeks compensation should be awarded? We suggest that each judge who hears this case work it out for himself on the theory of the case at bar and that there be then a comparsion of results. It can be worked out by (1) or (3) and the result would be uniform. It could be worked out by (2) if the trial judge had fixed the percentage the injury bore to total disability; but try to work it out on the theory adopted by the trial judge and what will the result be?

Under these circumstances, we urge that if the Court was right in finding the respondent liable for compensation, it erred in the method of ascertaining it.

Respectfully submitted,
PIERSON & SCHROEDER,
Attorneys for Appellant.

John D. Pierson,
Of Counsel.

New Jersey Court of Errors and Appeals

VITO ORLANDO, Defendant in Certiorari, Appellee, vs. F. FERGUSON & SON, Prosecutor in Certorari, *et als.*, Appellant.	On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT IN CERTIORARI

Object

This writ of certiorari brings up for reviewal the entire record of the proceedings and the determination and order for judgment rendered on January 21st, 1916, by the Honorable George G. Tenant, one of the Judges of the Court of Common Pleas in and for the County of Hudson, in certain proceedings brought on behalf of Vito Orlando, petitioner, and F. Ferguson & Son, respondent, for the determination and recovery of compensation under an act of the legislature of the State of New Jersey, entitled:

> "An Act prescribing the liability of an employer to make compensation for injur-

ies received by an employee in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder. Approved April 4th, 1911 and the acts amendatory and supplemental thereto."

Statement of Facts

On the 20th day of January, 1915, Vito Orlando, the petitioner below, was employed as a foundry helper at the iron foundry located at number 1122 Clinton Street, Hoboken, New Jersey, by the prosecutor in certiorari, F. Ferguson & Son, and while so engaged was severely burned by reason of flames bursting through the door of the furnace when the same was opened by the petitioner.

POINT I

The facts as found by the Hudson Common Pleas were sufficient upon which to base a judgment for the petitioner as such facts show that the accident arose out of and in the course of petitioner's employment.

The answer to the petition admits the employment of petitioner by respondent as a foundry helper (State of Case, p. 14).

On page 41 of the State of Case, petitioner was asked the following question:

"Q. What happened to you on that day?
A. I was working for Mr. Ferguson."

And at line 21 he stated:

> "When I opened the door of this furnace to find out how the fire stood, then I burned myself. In the meantime I asked some man by the name of John what was the trouble with the fire."

And then again at page 56, line 39, he testified as follows to the following question:

> "Q. When you opened the door to the furnace what happened to your eyes, that you couldn't see? A. As I opened the door the flame came out and blinded me, when I fell down in this pit."

The petitioner was corroborated by the only eye witness to the accident John Romano who testified on page 30 of the State of Case that fire came out of the furnace door and burned the petitioner when the door was opened by the petitioner.

POINT II

The accident did not happen through any fault or negligence of the petitioner.

The petitioner's sworn testimony as it appears, line 20, page 42, State of Case is as follows:

> "Q. Did you use any kerosene that night? A. No, sir, not at all; just opened the door; the fire came up and burned; just fall down."

And in this respect the petitioner is corroborated by the only eye witness, John Romano as appears by his testimony at line 29, page 40, State of Case:

> "Q. You only put kerosene on the fire? A. Yes.

"Q. Did Orlando put kerosene on the fire that night? A. No, sir.

"Q. He didn't put any on at all? A. No.

"Q. You put it on? A. I put it on."

The respondent's contention being that the petitioner threw kerosene on a lighted fire and endeavored by an expert named Guenther to show that the accident could not have happened in any other manner, but the testimony of the expert is given in a doubtful and uncertain manner, and he merely ventures opinions not swearing positively that the accident could not have happened in the manner sworn to by the petitioner and Mr. Romano. At page 85, State of Case, he could not give an opinion as to what kind of a burn petitioner had received whether from oil, kerosene or gas and again at the bottom of page 78, State of Case, he testified as follows:

> "Q. Is it possible that his hands could be so burned if this flame was a carbon monoxide flame? A. I would have to qualify that, if you should keep putting on large amounts of carbon monoxide, keep burning it—
>
> "Q. Could you get such a burn as that? A. I don't believe you could, you would have to have a continual flame shooting out."

The petitioner's contention and proof shows that just such a flame did shoot out and kept continually shooting until the furnace door was closed, and again at line 29, page 79, State of Case; he testified as follows:

> "Q. If at least 10 or 15 minutes had lapsed after the fire was started, would

there be any possibility of this burst of flame coming out from the door or from that particular furnace, if it was put on before the fire was ignited? A. I do not think so."

The petitioner contends that such evidence given by an expert should have very little weight against the evidence given by persons who were actually present and eye witnesses as to what occured, and in any event the expert Guenther does not swear that the accident could not have happened in the manner in which the petitioner's proof shows that it did occur.

The uncertainty of the testimony of Mr. Guenther is quite apparent as shown by his testimony on page 83, State of Case, line 39, where he testified as follows:

"Q. The door where the fire was—and the other door was open too. Suppose this man, the petitioner, stood at the door inside of which the fire on the grate, suppose for any reason the door in the rear—call it the door at the other end of this room—was open, would it make a draft which would cause this flame to shoot out of the door at which he stood? A. It would check the draft, but whether it would have any effect—

"Q. Would it be possible? A. It might be possible, but I should hesitate—

"Q. Suppose there was a draft blowing the other way, instead of where he stood, would it drive a flame out? A. Would have to drive it through the fire.

"Mr. Pierson: There is no testimony that the large doors were open to all.

"RE-CROSS-EXAMINATION by Mr. Stites:

"Q. The rear door, where the fire was burning, is built in the wall of this large chamber you speak of, is it? A. That door is in the wall. The back door, you mean?

"Q. The back door, where the fire was. A. That is on the outside of a brick wall, outside the brick wall, looking in.

"Q. Not in the large chamber? A. No, it is not in the large chamber but the fire is in the large chamber.

"Q. There would be nothing to prevent the flames from coming out the back door if there was back draft, would there? A. Prevent it from coming out the back door?

"Q. Yes? A. Nothing to prevent them. You cannot stop them.

"Q. They could come? A. They could go if you make them.

"Q. Did you examine Mr. Orlando's hands? A. No; just what I saw of him. I am not an expert on burns.

"Q. You testified what kind of a burn he had. A. I said—I have been burned myself, with hot coal gas on my hand, I know it will sting and burn. If it is oil, it is a different proposition from what it would be with gas.

"Q. Can you tell what burned his hands by looking at them? A. No, I don't know whether—I don't know anything about it. I don't attempt to offer any information of that kind.

The Supreme Court in its opinion, page 122, State of Case, line 12, comments upon the testimony of the expert, Mr. Guenther, as follows:

"The testimony of the mechanical engineer does not establish with that degree of certainty which the law requires that it was impossible for a flame to have shot through the open door, unless oil was thrown upon the fire after it was ignited, and, therefore, the trial judge was not legally bound to hold that the petitioner's testimony and that of his witness was so clearly contrary to the operation of the well known laws of mechanics as to stamp such testimony as utterly absurd and incredible."

POINT III

Disputed questions of fact will not be set aside if the record shows evidence which amply supports the order.

The question as to whether the petitioner disobeyed any orders was a question of fact for the Court below to determine and having been determined in favor of the petitioner the same should not be disturbed on appeal.

Hulley vs. Moosebrugger, 95 A., 1007;
Siemient Kowski vs. Berwind White Coal Mining Co., 92 A., 909;
Scott vs. Payne Bros., 89 A., 927;
De Fazio's Estate vs. Goldschmidt Detinning Co., 88 A., 705;
Jackson vs. Erie R. R. Co., 91 A., 1035.

POINT IV

Not necessary for the Court to find the source or cause of the flame which burned the petitioner.

It was only necessary for the Court to determine whether the injuries received by the petitioner arose out of and in the course of his employment.

A finding by a Common Pleas in workmen's compensation case that the employee's death resulted from an accident arising out of and in the course of his employment will not be reversed if there was evidence to support it. *Winter vs. Atkinson-Frizelle Co.*, 96 A., 360. The Court in the *Winter* case states as follows: Judge Tenant in the Pleas after an exhaustive review of the English cases applicable to the proceedings before him regarded as one in which the decedent's death resulted solely from a strain incurred in the course of his employment on November 18th. Found from the testimony that such was the fact. This is the only conclusion that can be drawn from his opinion as a whole although *the finding is not stated as such in so many words.*

Where decedent in defendant's employ at the time of his death was found dead lying under a train with a hole 6 inches in diameter in his abdomen the physical facts were sufficient to make a *prima facie* case of accident. *De Fazio's Estate vs. Goldschmidt Detinning Co.*, 88 A., 705.

In the *De Fazio* case the deceased was found dead and there was no proof of an accident yet the Court held that the circumstances surrounding the death was sufficient *prima facie* to make out a case of accident.

In this case now before this Honorable Court, there was proof showing how the accident occurred to wit: that flames of fire came out of furnace door when the door was opened. And the Court had a right from the evidence to infer that when kerosene was placed in the furnace to start a fire, as was the custom, that some of the kerosene might have become pocketed in a certain part of the furnace and did not become ignited until the furnace door was opened, or the Court might have inferred from the evidence that there was a back draught which might possibly have caused the flames to burst forth as Mr. Guenther at lines 13 and 37, page 84, State of Case, testified that it might be possible for the flame to act in the manner in which it did if there was a draught.

An accident which happens to a workman when he is doing something which he was employed to do arises out of and in the course of his employment. *Houton, Adm. vs. W. G. Root Construction Co.*, 35 N. J. L. J., 332.

Where there is evidence sufficient to justify the inference that the injury was an accident, that the accident arose in the course of the workman's employment and that the accident arose out of the employment the Trial Court should find that such accident arose out of and in the course of the employment. *Muzik vs. Erie R. Co.*, 89a., 248.

In the case of *Tirre vs. Bush Terminal Co.* Supreme Court, Appellate Division, Third Department, State of New York, decided May 3d, 1916), and reported in Volume 158 New York Supplement, at page 884, states as follows:

> "August Tirre was a floatman employed by the appellant, which operated a terminal at Brooklyn, New York, and in the prosecution of its business transported floats, carry

cars, between its terminal and the various termini of the railroads along New York Harbor. It was the duty of a floatman to take records of the cars upon the float; to see that the cars were properly charged up; that the brakes were applied and placed under the wheels; and that the tugboats were properly tied. The floatman was subject to orders from the tugboat when the float was being transferred. At midnight of July 24, 1915, the deceased arrived at the terminal of appellant on float 31 from the Lehigh Valley Railroad terminus at Jersey City. Thereupon he was directed by the bridgeman who was his superior, to take his three lamps and other portions of his gear and go aboard float 6 then at the pier, which was loaded with cars, and to stand by until the tug which had brought float 31 over should return to take float 6 to the bridge, where the cars which were upon the float would be run upon the tracks of the terminal system and thence to various points of ultimate destination. The deceased was not seen alive subsequent to the giving of such directions to him by the bridgeman. That the deceased followed said directions and went upon float 6 is proven by the fact that about 20 minutes later, when the tug came to take the float to the bridge, the lanterns and gear of the deceased were upon the float. Two or three days later the drowned body of the deceased was found floating in the slip. While the precise cause of deceased getting into the water is left to conjecture, the evidence was sufficient to fairly make the question as to

whether it arose out of the employment one of fact for the Commission. That the death was accidental and that it occurred in the course of his employment while the deceased was doing his regular work, is admitted by the employer in its first notice of injury. That the deceased may have slipped and fallen from the float while inspecting the manner in which the car brakes had been left, or in examining to see that the lines by which the float was stayed to the pier were free is not improbable. The doing of each of these acts was in the line of his duty. He was doubtless ignorant of the manner in which the brakes and the lines were, as he had just arrived at the pier while float 6 had been there for five or six hours. It was a matter or ordinary prudence for the deceased to make such inspections in order that he might be assured that when the tug had been attached to the float he might be able while standing upon the float, to swing the the lines off the pier posts, which it would then be his duty to do, and might also be assured that the cars were so stayed upon the float that they would remain there while the float was being moved. The performance of these or other duties which would take him about the float was doubtless what suggested to the bridgeman the testimony that deceased might have fallen and hit his head against the pier. It is also to be noticed that the toilets were upon the pier and tugs, and none upon the floats. The theory of suicide finds no support in the evidence, and is excluded by the concession that the

> death was accidental. We think the question as to whether the death arose out of the employment was fairly one of fact, and that the finding of the Commission in that regard was a reasonable inference from the proofs. The finding of the Commission is therefore conclusive upon this appeal."

The prosecutor in certiorari contends that the findings must show on the face the facts from which this Court can determine that the accident arose out of and in the course of the petitioner's employment. In other words, the respondent contends that the Trial Court should have made an express finding negativing the assertion of the employer that the petitioner threw oil on a lighted fire contrary to positive instructions when injured, and that such violation proximately caused the injuries sustained by the petitioner. We contend that such a finding was included in and presumed from the finding that the accident happened in the course of employment (see State of Case, p. 23, l. 33).

In *Napoleon vs. McCullough*, 99 At. Rep., page 385 (N. J. L., advance sheet No. 7), the Court of Errors and Appeals says as follows:

> "In proceedings under the Workmen's Compensation Act, to recover compensation for the death of a servant, *the trial judge was under no legal duty to make an express finding negativing the assertion of the employer* that decedent was intoxicated when injured, and that such intoxication proximately caused the injuries and death; *such a finding being included in and presumed from the finding that the accident happened in the course of the employment.*"

The Court as a matter of fact did find that the injuries sustained by petitioner were not caused by reason of the violation of positive instructions not to throw oil on a lighted fire. The Court says as follows:

> "I am satisfied that there was an accident and that it arose out of and in the course of the employment. The defendant claims that the accident arose because of the petitioner's violation of explicit instructions not to pour oil on the fire after it was lighted, but the petitioner denies he did this and is supported in the story by a fellow workman. I am not content to accept this evidence and to thrust aside the evidence of the petitioner and the other man who was actually present." See State of Case, p. 20, l. 32 and State of Case, p. 21, l. 14).

Expressio unius exclusio alterius (the expression of one thing excludes the other thing), to wit: that the petitioner's injuries were caused by pouring oil on a lighted fire contrary to positive instructions.

Chludzinski et al. vs. Standard Oil Co. In re State Insurance Fund (Supreme Court, Appellate Division, Third Department. Decided December 28th, 1916). Reported 162 New York Supplemental, 225:

> "Where a workman in an oil refinery, who had during working hours gone into the locker room, where his street clothes were kept, from which he emerged with his shirt, which was highly inflammable because of the oil it had absorbed, on fire, as a result of which he received burns which

> caused his death, and it was not known whether the shirt caught fire from his lighting a match in an attempt to smoke, which was not forbidden, or from a burner, which was in the locker, or from some other cause, there was no substantial proof to overthrow the presumption, created by Workmen's Compensation Law (Consol. Law, e. 67, 21), that the injuries were within the law, and his dependents are entitled to compensation."

In the *Chludzinski* case above cited the Court, after stating various means in which the fire may have been caused, states as follows:

> "These are all matters of speculation, but under the rule that the claim is presumed to be within the law, in the absence of substantial proof to the contrary, we are not required to speculate and draw unfavorable inferences."

POINT V

The Court did decide that the accident did not occur from throwing oil on a lighted fire contrary to instructions, page 20, State of Case, line 32.

POINT VI

There was no error in the Court's method of fixing compensation.

Construction of Clause B—allowing compensation for 400 weeks. *Vishney vs. Empire Steel & Iron Co.*, 95 A., 143.

POINT VII

The respondent contends that the petitioner received his injuries by reason of placing kerosene on a lighted fire contrary to instructions, and for the purpose of argument admitting that the petitioner did throw kerosene on a lighted fire we contend that if such had been the case petitioner would still have been entitled to recover compensation for the reason that there was a waiver of instructions.

The testimony shows by several witnesses that kerosene was continuously and publicly used at the plant of the respondent for the purpose of building fires. From top of page 43 to line 20; from top of page 102 to line 20; page 40, line 36 to line 40 inclusive; page 30, line 24 to line 40 and page 31 top of page to line 24 inclusive; page 111 line 32 to line 35 inclusive; page 114, line 6 to line 8, State of Case; and there was also testimony that kerosene was used on occasions for the purpose of increasing the rapidity of the fire after the same had been started, page 98, line 32 to line 39 inclusive, top of page 99 to line 10, State of Case, page 102, line 4 to line 20, State of Case.

Mr. Ferguson, the president of the respondent corporation testified that he himself, on different occasions had thrown kerosene on a lighted fire, page 98, State of Case, line 32, and Mr. Orlando, the petitioner, also testified that he was present when Mr. Ferguson threw kerosene on a lighted fire, page 110, line 36, page 111, top of page to line 10 inclusive, State of Case.

The respondent contends that while kerosene was necessary and authorized for use in building fires that its use after the fires were built was prohibited yet the testimony shows that respondent had knowledge that kerosene was used upon fires which had been started especially so when the wood used in the furnace was wet, page 31, line 1, State of Case.

In the case of *Reimers vs. Proctor Pub. Co.*, 89 A., page 931, the Court remarked:

> "He, referring to the petitioner, had at one time used an automobile of the defendant and had met with an accident which damaged the machine. The defendant then borrowed an automobile and its president and one of his sons who was in its employ, both forbade the decedent to use the car. Nevertheless he used it frequently to distribute newspapers. There is no evidence that any except the president had authority to authorize its use but the use was so *frequent* and so *public* that if there was nothing more in the case the trial judge would have been justified in finding that the decedent was authorized to use it NOTWITHSTANDING THE PROHIBITION."

If the petitioner was permitted to continue in the employment of the respondent which had full knowledge that kerosene was being placed upon lighted fires at times, it certainly cannot be disputed that such conduct on the part of the respondent would operate as an implied revocation of any orders preventing such use of kerosene. However, there is very little use of any further discussion along this line as the petitioner swore he did not throw kerosene on a lighted fire which

testimony was corroborated, and the Court below believed.

POINT VIII

This Court should accept the findings of the Common Pleas Court upon the facts if there by any legal evidence to warrant them. The evidence of petitioner and John Romano, the only eye witness, fully support the findings of fact.

Sexton v. Newark District Telegraph Co., 86 At. R., 451;
Bryant v. Fissell, 86 At. R., 458;
Davidson v. Whitehill, 89 At. R., 1081.

We respectfully submit that the judgment should be affirmed with costs.

La Porta
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