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WITNESSES FOR DEFENDANTS.

Summons.

THE STATE OF NEW JERSEY TO: GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York. YOU ARE SUMMONED to answer the annexed Complaint of PATRICK CORBETT, in an Action at Law,

[L. S.]

in the New Jersey Supreme Court, Essex County. AND TAKE NOTICE that unless you file your Answer to said Complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this Writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the New Jersey Supreme Court, at Trenton, this 27th day of August, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

A. MILTON JACOBS,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York. Defendants.	Action at Law COMPLAINT.

The plaintiff, who resides at #90 Congress Street, in the City of Newark, County of Essex, and State of New Jersey, says that:

FIRST COUNT.

1. At and during all the times hereinafter mentioned the defendant, George Peterson, Inc., a corporation of New Jersey, through its agents, servants and employees, was the sub-contractor employed in furnishing the flooring in the erection and construction of a certain new building at Cedar and Broad Street, in the City of Newark, Essex County, New Jersey.

2. On the 29th day of July, 1926, while the plaintiff was lawfully in said building and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendant, his agents, servants and employees, he was injured by reason of the negligence and

carelessness of the defendant, through its agents, servants and employees in performing their duties in said building in that they carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

3. By reason of the negligence of the defendant, through his agents, servants and employees, the said plaintiff was injured in and about the head, shoulders, legs, his skull fractured and his eyesight impaired, from which injuries he will suffer permanently, and he was otherwise injured so that he has suffered from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headaches and dizziness, and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises, the plaintiff was forced to expend a large sum of money, a sum not yet calculated by the plaintiff, in and about endeavoring to be cured, for doctor bills and medicines, and was kept, and will be kept in the future from attending to his business for a long time, and prevented from earning his wages which he otherwise would have made, and during all of which time he underwent and suffered great pain, and still undergoes and suffers great pain, and will be compelled to expend large sums of money endeavoring to be cured.

Plaintiff demands of the defendant the sum of $25,000.00 and costs of suit.

SECOND COUNT.

1. At and during all the times hereinafter mentioned, the defendant, Starrett Brothers, Inc., a corporation of New York, through its agents, ser-

vants and employees, was engaged as the general contractors employed in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

2. That on the 29th day of July, 1926, while the plaintiff was lawfully in said building and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendant, their agents, servants and employees, he was injured by reason of the negligence and carelessness of the defendant, through its agents, servants and employees in performing their duties in said building in that they carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

THIRD COUNT.

Plaintiff Patrick Corbett, repeats the allegation in the foregoing counts, makes him a part herein, and says that:

1. At and during all the times hereinafter mentioned the defendant, George Peterson, Inc., a corporation of New Jersey, through its agents, servants and employees, was the sub-contractor employed in furnishing the flooring in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

2. At and during all the times hereinafter mentioned, the defendant, Starrett Brothers, Inc., a corporation of New York, through its agents, servants and employees, was engaged as the general contractors employed in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

3. On the 29th day of July, 1926, while the plaintiff was lawfully in said building and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendants, George Peterson, Inc., and Starrett Brothers, Inc., their agents, servants and employees, he was injured by reason of the negligence and carelessness of the defendants, through their agents, servants and employees in performing their duties in said building in that they carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

4. By reason of the negligence of the defendants, through their agents, servants and employees, the said plaintiff was injured in and about the head, shoulders, legs, his skull fractured and his eyesight impaired, from which injuries he will suffer permanently, and he was otherwise injured so that he has suffered and still suffers from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headaches and dizziness, and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises, the plaintiff was forced to expend a large sum of money, a sum not yet calculated by the plaintiff, in and about endeavoring to be cured, for doctor bills and medicines, and was kept, and will be kept in the future from attending to his business for a long time, and prevented from earning his wages which he otherwise would have made, and during all of which

time he underwent and suffered great pain, and still undergoes and suffers great pain, and will be compelled to expend large sums of money endeavoring to be cured.

Plaintiff demands of the defendants the sum of $25,000.00 and costs of suit.

A. Milton Jacobs,
Attorney for Plaintiff.

Answer.

NEW JERSEY SUPREME COURT,

Essex County.

Patrick Corbett, Plaintiff, *vs.* George Peterson, Inc., a corporation of New Jersey, and Starrett Brothers, Inc., a corporation of New York, Defendants.	Action at Law. Answer.

The defendant Starrett Brothers, Inc., having its registered office in the State of New Jersey, at No. 15 Exchange Place, Jersey City, answering the complaint herein, says:

Answering the First Count.

I. It admits paragraph "1".
II. It denies paragraph "2".
III. It denies paragraph "3".

First Defense to First Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Answering the Second Count.

I. It denies paragraph "1".
II. It denies paragraph "2".

First Defense to Second Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Second Defense to Second Count.

This answering defendant alleges that the plaintiff at the time of the alleged accident was in the general employ of a sub-contractor of the defendant Starrett Brothers, Inc., general contractors; all of the employees of the sub-contractor, together with the employees of the general contractor, and of the defendant George Peterson, Inc., were engaged in a common enterprise of constructing a building; that plaintiff was subject to the provisions of Chapter 95 of the Laws of 1911 and Acts Amendatory thereof and Supplemental thereto, known as An Act Prescribing the Liability of an Employer to Make Compensation for Injuries Received by an Employee in the Course of Employment, more commonly known as the Workmen's Compensation Law of the State of New Jersey, and also subject to the provisions of Chapter 178 of the Laws of 1917 and Acts

Amendatory thereof and Supplemental thereto, known as the Workmen's Compensation Insurance Act of the State of New Jersey, and never, under the terms of said Laws, elected to reserve his Common-law rights, either as against said general employer of the plaintiff or either of these defendants; that the provisions of said Workmen's Compensation Laws are exclusive and plaintiff is thereby precluded from recovering against the defendant Starrett Brothers, Inc., herein.

Answering the Third Count.

I. It admits paragraph "1".
II. It admits paragraph "2".
III. It denies paragraph "3".
IV. It denies paragraph "4".

First Defense to Third Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Second Defense to Third Count.

This answering defendant alleges that the plaintiff at the time of the alleged accident was in the general employ of a sub-contractor of the defendant Starrett Brothers, Inc., general contractor; all of the employees of the sub-contractor, together with the employees of the general contractor, and of the defendant George Peterson, Inc., were engaged in a common enterprise of constructing a building; that plaintiff was subject to the provisions of Chapter 95 of the Laws of 1911 and Acts Amendatory thereof and Supplemental thereto,

known as an Act Prescribing the Liability of an Employer to Make Compensation for Injuries Received by an Employee in the Course of Employment, more commonly known as the Workmen's Compensation Law of the State of New Jersey, and also subject to the provisions of Chapter 178 of the Laws of 1917 and Acts Amendatory thereof and Supplemental thereto, known as the Workmen's Compensation Insurance Act of the State of New Jersey, and never, under the terms of said Laws, elected to reserve his Common-law rights, either as against said general employer of the plaintiff or either of these defendants; that the provisions of said Workmen's Compensation Laws are exclusive and plaintiff is thereby precluded from recovering against the defendant Starrett Brothers, Inc., herein.

WHEREFORE, the defendant Starrett Brothers, Inc., demands judgment in favor of the said defendant, with costs against the plaintiff.

WALTER L. GLENNEY,
Attorney for Defendant,
Starrett Brothers, Inc.,
No. 916 Madison Avenue,
Plainfield, N. J.

Stipulation.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York, Defendants.	Action at Law. STIPULATION.

It is hereby stipulated by and between A. Milton Jacobs, attorney for the plaintiff, and Walter L. Glenney, attorney for the defendant, Starrett Brothers, Inc., and Lindabury, Depue & Faulks, attorneys for the defendant, George Peterson, Inc., that the complaint herein filed be stricken out, and that the plaintiff be permitted to file an amended complaint in the cause above stated.

A. MILTON JACOBS,
Attorney for Plaintiff.

EDWARDS & SMITH,
Attorney for Defendant,
Starrett Brothers, Inc.

LINDABURY, DEPUE & SMITH,
Attorney for Defendant,
George Peterson, Inc.

Rule.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York, Defendant.	Action at Law. RULE.

Upon reading and filing the stipulation of counsel herein, and on motion of A. Milton Jacobs, attorney for plaintiff, it is hereby

ORDERED that the complaint filed herein be stricken out, and that the plaintiff be permitted to file an amended complaint in the cause above stated.

Dated—October 1st, 1926.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice of the Supreme Court.

Amended Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York, Defendant.	Action at Law. AMENDED COMPLAINT.

The plaintiff, who resides at #90 Congress Street, in the City of Newark, County of Essex, and State of New Jersey, says that:

FIRST COUNT.

1. At and during all the times hereinafter mentioned the defendant, George Peterson, Inc., a corporation of New Jersey, through its agents, servants and employees, was the sub-contractor employed in furnishing the flooring in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

2. On the 29th day of July, 1926, while the plaintiff was lawfully in said building and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendant, its agents, servants and employees, he was injured by reason of the negligence and

carelessness of the defendant, through its agents, servants and employees, in performing its duties in said building, in that it carelessly, negligently, and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

3. By reason of the negligence of the defendant, through its agents, servants and employees, the said plaintiff was injured in and about the head, shoulders, legs, his skull fractured, and his eyesight impaired, from which injuries he will suffer permanently, and he was otherwise injured, so that he has suffered, and still suffers from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headaches and dizziness, and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises, the plaintiff was forced to expend a large sum of money, a sum not yet calculated by the plaintiff, in and about endeavoring to be cured, for doctor bills and medicines, and was kept, and will be kept in the future, from attending to his business for a long time, and prevented from earning his wages which he otherwise would have made, and during all of which time, he underwent and suffiered great pain, and still undergoes and suffers great pain, and will be compelled to expend large sums of money endeavoring to be cured.

Plaintiff demands of the defendant the sum of $25,000.00 and costs of suit.

SECOND COUNT.

1. At and during all the times hereinafter mentioned, the defendant, Starrett Brothers, Inc., a

corporation of New York, through its agents, servants and employees, was engaged as the general contractors employed in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

2. That on the 29th day of July, 1926, while the plaintiff was lawfully in said building, and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendant, its agents, servants and employees, he was injured by reason of the negligence and carelessness of the defendant, through its agents, servants and employees in performing its duties in said building, in that it carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

3. By reason of the negligence of the defendant, through its agents, servants and employees, the said plaintiff was injured in and about the head, shoulders, legs, his skull fractured, and his eyesight impaired, from which injuries he will suffer permanently, and he was otherwise injured, so that he has suffered, and still suffers from nervous shock from the violence of the injuries, which nervous shock has produced lack of sleep, headaches and dizziness, and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises, the plaintiff was forced to expend a large sum of money, a sum not yet calculated by the plaintiff, in and about endeavoring to be cured, for doctor bills and medicines, and was kept, and will be kept in the future, from attending to his business for a long time, and prevented from earning

his wages which he otherwise would have made, and during all of which time, he underwent and suffered great pain, and still undergoes and suffers great pain, and will be compelled to expend large sums of money endeavoring to be cured.

Plaintiff demands of the defendant the sum of $25,000.00 and costs of suit.

THIRD COUNT.

Plaintiff, Patrick Corbett, repeats the allegations in the foregoing counts, makes them a part hereof, and says that:

1. At and during all the times hereinafter mentioned, the defendant, George Peterson, Inc., a corporation of New Jersey, through its agents, servants and employees, was the sub-contractor employed in furnishing the flooring in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

2. At and during all the times hereinafter mentioned, the defendant, Starrett Brothers, Inc., a corporation of New York, through its agents, servants and employees, was engaged as the general contractor employed in the erection and construction of a certain new building at Cedar and Broad Streets, in the City of Newark, Essex County, New Jersey.

3. On the 29th day of July, 1926, while the plaintiff was lawfully in said building and in the employ of another contractor, without any fault on his part, and solely through the negligence of the defendants, George Peterson, Inc., and Starrett Brothers, Inc., their agents, servants and employees, he was injured by reason of the negli-

gence and carelessness of the defendants, through their agents, servants and employees in performing their duties in said building, in that they carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff.

4. By reason of the negligence of the defendants, through their agents, servants and employees, the said plaintiff was injured in and about the head, shoulders, legs, his skull fractured and his eyesight impaired, from which injuries he will suffer permanently, and he was otherwise injured so that he has suffered and still suffers from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headaches and dizziness, and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises, the plaintiff was forced to expend a large sum of money, a sum not yet calculated by the plaintiff, in and about endeavoring to be cured, for doctor bills and medicines, and was kept, and will be kept in the future, from attending to his business for a long time, and prevented from earning his wages which he otherwise would have made, and during all of which time he underwent and suffered great pain, and still undergoes and suffers great pain, and will be compelled to expend large sums of money endeavoring to be cured.

Plaintiff demands of the defendants the sum of $25,000.00 and costs of suit.

A. Milton Jacobs,
Attorney for Plaintiff.

Answer to Amended Complaint.

NEW JERSEY SUPREME COURT,

Essex County.

Patrick Corbett, Plaintiff, *vs.* George Peterson, Inc., a corporation of New Jersey and Starrett Brothers, Inc., a corporation of New York, Defendants.	Action at Law. Answer to Amended Complaint.

The defendant Starrett Brothers, Inc., having its registered office in the State of New Jersey at No. 15 Exchange Place, Jersey City, answering the amended complaint herein, says:

Answering the First Count.

I. It admits paragraph "1".

II. It denies paragraph "2".

III. It denies paragraph "3".

First Defense to First Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Answering the Second Count.

I. It admits paragraph "1".

II. It denies paragraph "2".

III. It denies paragraph "3".

First Defense to Second Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Second Defense to Second Count.

This answering defendant alleges that the plaintiff at the time of the alleged accident was in the general employ of a sub-contractor of the defendant Starrett Brothers, Inc., general contractor; all of the employees of the sub-contractor, together with the employees of the general contractor, and of the defendant George Peterson, Inc., were engaged in a common enterprise of constructing a building; that plaintiff was subject to the provisions of Chapter 95 of the Laws of 1911 and Acts Amendatory thereof and Supplemental thereto, known as An Act Prescribing the Liability of an employer to Make Compensation for Injuries Received by an Employee in the Course of Employment, more commonly known as the Workmen's Compensation Law of the State of New Jersey, and also subject to the provisions of Chapter 178 of the Laws of 1917 and Acts Amendatory thereof and Supplemental thereto, known as the Workmen's Compensation Insurance Act of the State of New Jersey, and never, under the terms of said Laws, elected to reserve his Common-law rights, either as against said general employer of the plaintiff or either of these defendants; that the provisions of said Workmen's Compensation Laws are exclusive and plaintiff is

thereby precluded from recovering against the defendant Starrett Brothers, Inc., herein.

Answering the Third Count.

I. It admits paragraph "1".

II. It admits paragraph "2".

III. It denies paragraph "3".

IV. It denies paragraph "4".

First Defense to Third Count.

This answering defendant alleges that any injuries received by the plaintiff at the time and place described in the complaint were caused or contributed to by negligence on his part.

Second Defense to Third Count.

This answering defendant alleges that the plaintiff at the time of the alleged accident was in the general employ of a sub-contractor of the defendant Starrett Brothers, Inc., general contractor; all of the employees of the sub-contractor, together with the employees of the general contractor, and of the defendant George Peterson, Inc., were engaged in a common enterprise of constructing a building; that plaintiff was subject to the provisions of Chapter 95 of the Laws of 1911 and Acts Amendatory thereof and Supplemental thereto, known as An Act Prescribing the Liability of an Employer to Make Compensation for Injuries Received by an Employee in the Course of Employment, more commonly known as the Workmen's Compensation Law of the State of New Jersey, and also subject to the provisions of

Answer to Amended Complaint.

Chapter 178 of the Laws of 1917 and Acts Amendatory thereof and Supplemental thereto, known as the Workmen's Compensation Insurance Act of the State of New Jersey, and never, under the terms of said Laws, elected to reserve his Common-law rights, either as against said general employer of the plaintiff or either of these defendants; that the provisions of said Workmen's Compensation Laws are exclusive and plaintiff is thereby precluded from recovering against the defendant Starrett Brothers, Inc., herein.

WHEREFORE the defendant Starrett Brothers, Inc., demands judgment in favor of the said defendant, with costs against the plaintiff.

WALTER L. GLENNEY,
Attorney for Defendant
Starrett Brothers, Inc.,
No. 916 Madison Avenue,
Plainfield, N. J.

Answer of Defendant George Peterson, Inc., to Amended Complaint.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation, *et al.*, Defendants.	Action at Law. Answer of Defendant George Peterson, Inc., to Amended Complaint.

The defendant George Peterson, Inc., a corporation of the State of New Jersey, says that:

FIRST DEFENSE TO FIRST COUNT.

1. It admits the allegations of paragraph 1 of the first count of the amended complaint heretofore filed in the above stated cause.

2. It denies the allegations of paragraph 2 of the said count.

3. It denies the allegations of paragraph 3 of the said count.

4. It denies that the plaintiff is entitled to the damages claimed or to any thereof from this defendant.

SECOND DEFENSE TO FIRST COUNT.

5. It says that the plaintiff is guilty of contributory negligence.

Answer of Defendant George Peterson, Inc.

THIRD DEFENSE TO FIRST COUNT.

6. It says that the risk of the alleged accident resulting in plaintiff's alleged injuries was obvious to the plaintiff and was assumed by him.

FOURTH DEFENSE TO FIRST COUNT.

7. It says that the risk of the alleged accident which caused the plaintiff's alleged injuries was known to the plaintiff, or in the exercise of ordinary and reasonable care would have been known to him, and that he therefore assumed the same.

FIRST DEFENSE TO SECOND COUNT.

8. It has no knowledge or information sufficient to form a belief with respect to the allegations of paragraph 1 of the second count of the amended complaint heretofore filed in the above stated cause.

9. It has no knowledge or information sufficient to form a belief with respect to the allegations of paragraph 2 of the said second count in so far as the same refer to the defendant Starrett Brothers. It denies all of the allegations of said paragraph in so far as the same refer to this defendant.

10. It denies the allegations of paragraph 3 of the said second count.

11. It repeats paragraph 4 hereof.

SECOND DEFENSE TO SECOND COUNT.

12. It repeats paragraph 5 hereof.

THIRD DEFENSE TO SECOND COUNT.

13. It repeats paragraph 6 hereof.

Answer of Defendant George Peterson, Inc.

FOURTH DEFENSE TO SECOND COUNT.

14. It repeats paragraph 7 hereof.

OBJECTION TO SECOND COUNT IN POINT OF LAW.

15. It says that the said second count does not state any cause of action against this defendant.

FIRST DEFENSE TO THIRD COUNT.

16 With respect to the allegations of the said first count, repeated in the third count of said amended complaint, it repeats paragraphs 1, 2, 3, 4, 8, 9 and 10 hereof.

17. It admits the allegations of paragraph 1 of the third count of the amended complaint heretofore filed in the above stated cause.

18. It has no knowledge or information sufficient to form a belief with respect to the allegations of paragraph 2 of the said third count.

19. It denies the allegations of paragraph 3 of the said third count in so far as they refer to this defendant.

20. It denies the allegations of paragraph 4 of the said third count.

21. It repeats paragraph 4 hereof.

SECOND DEFENSE TO THIRD COUNT.

22. It repeats paragraph 5 hereof.

THIRD DEFENSE TO THIRD COUNT.

23. It repeats paragraph 6 hereof.

Answer of Defendant George Peterson, Inc.

FOURTH DEFENSE TO THIRD COUNT.

24. It repeats paragraph 7 hereof.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant
George Patterson, Inc.

A true copy.

EDWARD J. KELLEHER,
Acting Clerk.

Reply.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York, Defendants.	Action at Law. REPLY.

Plaintiff, Patrick Corbett, residing in the City of Newark, County of Essex and State of New Jersey, replying to the answer of the defendant, Starrett Brothers, Inc., filed herein, says that:

1. He denies the allegations contained in the first defense to the first count.

Reply.

2. He denies the allegations contained in the first defense to the second count.

3. He denies the allegations contained in the second defense to the second count.

4. He denies the allegations contained in the first defense to the third count.

5. He denies the allegations contained in the second defense to the third count.

6. The plaintiff reserves the right, at or before the trial, to move to strike out the said answer filed in this cause, on the ground that the same does not set forth or disclose a good and legal defense, and is sham and frivolous, and filed for the purpose of delay.

A. MILTON JACOBS,
Attorney for Plaintiff.

Reply.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of New York, Defendants.	Action at Law. REPLY.

Plaintiff, Patrick Corbett, residing in the City of Newark, County of Essex and State of New

Reply.

Jersey, replying to the answer of the defendant, George Peterson, Inc., filed herein, says that:

Reply to Defenses to First Count.

1. The plaintiff denies all the allegations contained in the first, second, third and fourth defenses to the first count.

Reply to Defenses to Second Count.

1. The plaintiff denies all the allegations contained in the first, second, third and fourth defenses to the second count.

2. The plaintiff denies the allegations set forth in the objection to second count in point of law.

Reply to Defenses to Third Count.

1. The plaintiff denies all the allegations contained in the first, second, third and fourth defenses to the third count.

A. Milton Jacobs,
Attorney for Plaintiff.

A true copy.

Edward J. Kelleher,
Acting Clerk.

Stipulation.

NEW JERSEY SUPREME COURT,

Essex County.

Patrick Corbett, Plaintiff, *vs.* George Peterson, Inc., a corporation of New Jersey, and Starrett Brothers, Inc., a corporation of New York, Defendants.	Action at Law. Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the complaint heretofore filed by the plaintiff, Patrick Corbett, in the above case be amended by changing the last paragraph of the first, second and third counts to read

"Plaintiff demands of the defendant the sum of Seventy-five Thousand Dollars ($75,000.00) and costs of this suit".

A. Milton Jacobs,
Attorney for the Plaintiff.

Lindabury, DePue & Faulks,
Attorney for the Defendant,
George Peterson, Inc.

Edwards & Smith,
Attorney for the Defendant,
Starrett Brothers, Inc.

Testimony.

NEW JERSEY SUPREME COURT
ESSEX CIRCUIT

Wednesday, December 14, 1927.

PATRICK CORBETT *vs.* GEORGE PETERSON, INC., a corporation of New Jersey, and STARRETT BROTHERS, INC., a corporation of the State of New York.	ACTION AT LAW.

Before
Hon. NELSON Y. DUNGAN, J., and a Jury.

For the Plaintiff appear A. MILTON JACOBS and JACOB SCHNEIDER.

For the Defendant George Peterson, Inc., appear WALTER L. GLENNY and EDWARDS & SMITH (by EDWIN F. SMITH and RAYMOND DAWSON).

For the Defendant Starrett Bros., Inc., appear LINDABURY, DEPUE & FAULKS (by JOHN W. BISHOP, Jr.)

Mr. Schneider: In this suit the plaintiff was employed on the Kresge Building, and he was working down on the foundation, and was struck

by a board which fell from one of the upper stories. The plaintiff was employed by a firm known as Spencer, White & Prentiss. We are suing Starrett Brothers and Peterson, who had a subcontract.

The Court: He was a subcontractor under Peterson or Starrett?

Mr. Schneider: Under Starrett. Our man was employed by Spencer, White & Prentiss, who is not a party to this suit. We are suing both of them, alleging that both or one of them owned the board. The second defense to the second count and the second defense to the third count are the ones of which we complain. The plaintiff worked for a party who is not a defendant in this suit. As against him, of course, our exclusive remedy would be under the compensation act, but there have been hundreds of cases tried in these courts where an employee who has been injured while working on a building sued the third party, like in this case. There can be no double recovery, and then he can take a lien, they have to pay that back to the employer, but he is in no way barred from the act or the insurance act relating thereto, by suing these other parties. I ask that that be stricken out. It will prejudice us if counsel, even in the opening, should speak about the insurance act or the compensation act, because the jury might get the impression that he is getting a double recovery, and that has nothing to do with this case.

The Court: (After argument.) This action is not brought against the person or corporation in whose employ the plaintiff was at the time of the accident. He was an employee of a subcontractor of Starrett Brothers. Starrett Brothers, in the second defense to the second count, and in the

second defense to the third count, set up the employers liability act, the law of 1907, an act amendatory thereto, which includes the 1924 act, page 224, and it might be that that defense would be a proper one under the circumstances set forth in the amendment, section 5, and as set forth in the 1924 act; but the general contractor should not be held liable under the compensation act unless the subcontractor fails to carry workmen's compensation insurance, as required by the act. There is no allegation in the answer that the subcontractor, in whose employ the plaintiff was at that time, did not carry such insurance. I think, therefore, that the second defense to the second count and the second defense to the third count must be stricken out.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Mr. Schneider: There is a typographical error in the answer of George Peterson. It says "Answering fifth." It means affirmative.

The Court: The amendment will be permitted. My attention was just called yesterday to an opinion by the Chancellor, reported in 136 Atlantic, holding that all amendments in cases tried in the Circuit Court should be returned with the postea, so that when amendments are made they should be made in writing. That has not been our practice heretofore. Our practice has been to require an amendment to be written out and forwarded to the Supreme Court, but this opinion of the Chancellor received the entire approval of the Court of Errors and Appeals, and, regardless of our form of practice, we will have to draw up the amendments so that we can return them with the postea.

Mr. Schneider opens for plaintiff.

Mr. Smith opens in behalf of defendant Starrett Brothers.

Mr. Bishop opens in behalf of defendant George Peterson, Inc.

J. Franklin Chattin sworn in behalf of plaintiff.

Direct examination by Mr. Schneider:

Q. Doctor, are you a practicing physician in this county and state? A. Yes, sir.

Q. How long have you been practicing? A. Thirty years.

Q. What college are you a graduate from? A. University of Pennsylvania.

Q. Connected with any institution? A. Yes; Newark Eye and Ear Infirmary.

Q. Have you specialized in any branch of medicine? A. Yes, sir.

Q. What branch? A. Ohpthalmology, eye surgeon.

Q. That is the eye? A. Yes, sir.

Q. Did you treat Patrick Corbett? A. Yes, sir; I did.

Q. When did you treat him first? A. August 12, 1926.

Q. What did you treat him for? A. As a matter of fact, I didn't really treat him. He had an incurable condition and I had him under observation for approximately seven or eight months.

Q. About how many times did you see him during that time? A. Five times.

Q. Do you know the dates? A. Yes, sir; I can give them to you.

Q. What are they? A. August 12th, September 11th, 24th of January, 1927, 9th of May, 1927, 17th of September, 1927.

Q. What did you observe him for, for what condition? A. Well, he had a peculiar type of atrophy of the optic nerve.

Q. Will you please explain that in ordinary English, as near as you can? Atrophy means what? A. It means loss of function or action or use of the part affected.

Q. Of the optic nerve? A. When that is affected, the nerve that controls the function of the eye.

Q. It is the nerve that controls the eye? A. No, the visual function.

Q. Any disturbance of that nerve affects the eye and vision? A. It usually does.

Q. What was the matter with Mr. Corbett? A. In my judgment, as the result of the fracture—and there may have been more than one—one, at least, affecting the base of the skull, he had, in my judgment, a hemorrhage into the sheath of the optic nerve.

Q. A hemorrhage from what? A. From a blood vessel in the brain which was ruptured as a result of the injury.

Q. And hemorrhage from a blood vessel in the brain itself? A. Yes, sir.

Q. And in the brain proper? A. Yes, sir.

Q. And you saw that blood? A. Of course, we couldn't see it, but we know the symptoms. That is the only way we do know anything.

Q. What is that you say about the sheaths of the nerves? A. That is the covering. There is a delicate covering surrounding the nerve, more or less of a protection to the nerve. As the nerve leaves the brain it goes through a bony canal,

which is part of the skull, and the hemorrhage occurring in there causes pressure on the optic nerve.

Q. What is the sheath made of? A. That I can't answer.

Q. The hemorrhage of blood into the nerve would affect the nerve?

Mr. Smith: I object to that.

Q. What was Mr. Corbett's condition? A. Shall I make a statement or do you want the question?

Q. Tell us all about it in as plain English as possible. A. When he first came to me it was as a private patient. He was not sent to me by any corporation or concern, and he came to me because his sight was poor as the result of the experience he had gone through, and I questioned him closely. I found that the sight in his left eye was reduced at that time—that is, the occasion of his first visit—to industrial blindness in that eye.

Q. What does that mean? A. That means, as far as the Compensation Board of which Dr. Kessler is a member, it means that although the man could see something with the eye, yet he was not properly able to perform his usual duties.

Mr. Bishop: I object to that and move that it be stricken out.

The Court: It will be.

Q. Just tell us what his vision was. A. That wouldn't mean anything perhaps to you. On the occasion of his first visit his vision was twenty-hundredths.

Q. Twenty-twenty is normal? A. Yes, sir.

Q. What effect does the one hundred off have, what does that mean? A. Roughly speaking, that

would represent a visual loss of eighty-four per cent, but for the purpose of comparison on the occasion of his last visit, his vision was reduced to what we express as four two hundredths. That would be his ability to read the first letter which we have on our card at a distance of four feet or about a room's length.

By the Court:

Q. Can you express that in percentage of loss of vision? A. I am doing it from memory. That would be ninety-nine per cent.

Q. Ninety-eight? A. I don't know. I didn't bring the chart with me.

Cross-examination by Mr. Smith:

Q. What do you mean by the word "atrophy"? You say it means loss of function, is that what you mean? A. I did say that.

Q. Suppose the optic nerve is cut, is it atrophied? A. That would necessarily follow.

Q. Do you mean by reason of the nerve being cut the nerve would then waste away? A. Yes, sir.

Q. So the atrophy is wasting away of the nerve really? A. It is.

Q. Atrophy is a disease of progress? A. Usually it is, when it is cut, then you can see the effect immediately.

Q. You don't mean it is the nerve that is cut? The instant it is cut it is atrophied. A. Certainly not. I didn't say that.

Q. Atrophy is a gradual progressive wasting of the nerve, that is the fact? A. Yes, sir.

Q. You say this man had atrophy of the nerve? A. Yes, sir.

Q. That is, he has a progressive disease of the nerve? A. He has.

Q. That is a fact? A. Yes sir, in my judgment.

Q. You haven't any means of ascertaining when that atrophy commenced, have you? A. Yes, sir, I have.

Q. You have? A. I think so.

Q. On what? A. On the occasion of his first visit he told me that he was a volunteer in the army, not a drafted man, a volunteer, and I was on one of the draft boards, and I know when the amount of defective sight he had was rejected as a volunteer and later the Draft Board accepted him. This man had his discharge papers, which showed that he had been in the army.

Q. Don't you know that plenty of men with defective eyesight have been in the army? A. I do, but not as a volunteer.

Q. Do you mean that? A. I believe that to be the fact.

Q. Doesn't it all depend on who examines him? A. You are pinning me down to things I know nothing about.

Q. Doesn't it mean that some sort of a sergeant in the recruiting staff examined him by the use of the chart?

Mr. Schneider: I object to that.

The Court: I think he may answer that.

Q. That is a fact, isn't it? A. I am forced to admit that it is.

Q. From your personal examination of the man, without a history from the man, by word of mouth from the man, what did you find that would enable you to determine when the atrophy of this eye began? A. The outstanding feature was his loss of vision.

Q. That was the outstanding feature? A. Yes, sir.

Q. There are thousands of people with loss of vision that have no atrophy; isn't that so? A. Quite true.

Q. You say that in your opinion there had been a hemorrhage into the sheath of the nerve; is that right? A. Yes, sir.

Q. The sheath of a nerve is the outside covering in which the nerve functions, isn't it? A. That is correct.

Q. That is the fact? A. Yes, sir.

Q. And when you talk about this canal, you mean there is a groove in the skull in which this sheath and nerve together works; that is what you mean? A. That is exactly it, yes, sir.

Q. You haven't any method of determining or you didn't determine whether there had been a hemorrhage in that canal? A. No.

Q. And you were not able to observe by the use of any instruments, as far as you were concerned at that time, that there had been a hemorrhage in the sheath, were you? A. No.

Q. So that what you are saying, assuming that there had been a fracture of the skull and assuming there had been a hemorrhage, as you call it, which is an extravasation of blood, that is what you mean? A. Yes, sir.

Q. Assuming that that might have come from atrophy, that is what you mean? A. I do, yes, sir.

Q. And you also know that there are dozens of other reasons causing atrophy of the nerves? A. That is true.

Q. So that atrophy comes, I was going to say, more frequently from idiopathic conditions than it does from traumatic conditions? A. No, sir, it doesn't.

Q. Isn't a majority of atrophies the result of diseases? A. Yes.

Q. Isn't it a fact that this man had an extreme condition of what is known as far-sightedness? A. Yes, sir.

Q. That was the fact? A. That is true.

Q. That frequently develops, doesn't it? A small infant having trouble with the eye, far-sightedness of the eye, not wearing glasses, but as time goes on his far-sightedness increases? A. No, sir.

Q. That is not so? A. No, sir.

Q. Would you say that doesn't develop by the failure of the child to wear proper glasses? A. No, sir.

Q. A person with far-sightedness as a child, doesn't that far-sightedness increase if it is not corrected by the use of lenses? A. I think not.

Q. You think not? A. I will say no.

By the Court:

Q. Which eye was it? A. The left eye.

By Mr. Smith:

Q. Is there what is known as congenital far-sightedness? A. Yes, sir.

Q. That is, a person born with far-sightedness? A. That is usually the case.

By the Court:

Q. You mean far-sightedness is usually congenital? A. Yes, sir, I do mean that.

By Mr. Schneider:

Q. Did you get the history of this man's case from him? A. Only from him, yes, sir.

Q. You base your diagnosis and your prognosis on the history and on the symptoms? A. I did.

Q. Both on the objective and subjective symptoms. A. Yes, sir.

Q. Did his history disclose any sickness or disease of any kind? A. I made tests to find out whether it can be due to other causes and it was negative.

Q. What was your conclusion as to the condition of this eye? A. That he had a rare type of the optic nerve resulting from a hemorrhage or extravasation of blood into the sheath of the optic nerve.

Q. Did he give you a history of trauma? A. Yes, sir.

Q. What did he tell you? A. He did tell me that while he was at work a plank struck him on the head and that he was unconscious and that he was removed to a hospital, St. James', I believe, where X-rays were made and showed fractures on his skull. He showed me these pictures at the time and he took them away with him.

Q. Did you examine the X-rays? A. I did.

Q. Did you decide from the history of this man's case and from the symptoms, objective and subjective, that the origin of his optic trouble was traumatic? A. Not on the occasion of his first visit, no.

Q. Did you finally decide that? A. I did, finally.

Q. You mean by that that its origin was due to being struck by this board? A. I would say yes, sir.

Re-cross-examination by Mr. Smith:

Q. The only reason you say it was traumatic is because the man said he was hit by a board; that is the reason? A. I must qualify my answer to that by saying this, that any break of the optic nerve from idiopathic causes, that is, causes arising in the body, it always affects both eyes, inevitably, in the end. I found no trouble with his right eye, other than the far-sighted condition.

Q. He has far-sightedness in his right eye? A. Yes, sir.

Q. And he is far-sighted in his left eye? A. Yes, sir.

Q. As I understand you, you got the history from him, didn't you, on your first examination? A. I did.

Q. At that time, of course, he told you that he had been struck by a board on the head? A. Yes.

Q. And you say he had a fracture of the skull? A. He told me that.

Q. So that the reason you made up your diagnosis, as I gather, is because he said to you that he had been hit by a board in the head and received a fractured skull, you found a condition of atrophy, as you call it, and, therefore, you said the atrophied condition resulted from the injury received on the head?

Mr. Schneider: The Doctor also said that he saw the X-rays.

Q. I will include that in the question. You say you saw the X-rays? A. I did.

Q. And I suppose the X-rays did show a fracture? A. They did.

Q. That is your own opinion? A. Yes, sir.

Q. Sure? A. Yes, sir.

Q. You haven't had that bolstered up by anybody else? A. I never talked to anyone about this case.

Q. Where was the fracture? A. I don't remember.

Mr. Schneider: I have the X-rays here.

Q. You don't know where that fracture was? A. I do not.

Q. Did the fracture interfere with the optic nerve? A. No.

By the Court:

Q. Have you any prognosis in this case? A. Yes, sir. My prognosis was unfavorable.

Q. Just what do you mean by that? A. I don't think the man's sight would get any better, in fact, it has progressively gotten worse between his first and last visit.

Q. What is your opinion now? A. I believe that the eye is hopelessly blind.

By Mr. Schneider:

Q. Do you want to look at the X-rays? A. I can tell you that I am not an X-ray expert and we are guided largely by the opinion of the man who makes the X-rays.

Q. Describe the fracture now. A. I am obliged to announce that I am not able to actually describe the fracture there. I would much prefer being excused from answering that and it being left to the ones that made the pictures interpret them.

By the Court:

Q. I wonder if that is not covered by your answer to Mr. Smith that you talked to no one? Do you want to say that it is what the radiographer told you? A. My recollection is that there was a report of the radiographer. I can't answer that yes or no. My recollection is not accurate on that.

Q. But as expressing your opinion you assume that there was a fracture of the skill? A. Yes, sir.

FRANK DEVLIN, sworn in behalf of the plaintiff.

Direct examination by Mr. Schneider:

Q. You are a practicing physician in this county and state? A. Yes, sir.

Q. When were you admitted to practice? A. June 27, 1887.

Q. Have you specialized in anything? A. Yes, sir.

Q. What do you specialize in? A. X-ray work.

Q. How long have you specialized in that? A. The last ten years.

Q. And before that were you a practicing and general physician? A. Yes, I was a surgeon, physician and surgeon, at St. James Hospital, and at the same time did X-ray work.

Q. What institutions are you connected with? A. Now?

Q. Yes, or have been in the past. A. St. Michael's Hospital, St. James Hospital and City Hospital; St. Peter's in New Brunswick.

Q. Connected with all those four? A. Yes, sir.

Q. The City Hospital in Newark? A. Yes, sir, St. James.

Q. St. James? A. Yes, sir.

Q. What else? A. St. Michael's and St. Peter's in New Brunswick; not at present St. Michael's, only St. James and City Hospital at present.

Q. What do you for those two hospitals? A. I make plates and I interpret them.

Q. Is that your exclusive work now? A. Yes, sir.

Q. Is that your exclusive practice? A. Yes, sir.

Q. Did you make plates of the head of Patrick Corbett? A. Yes.

Q. When did you make those? A. I couldn't tell you the date. I believe the dates are on the

plates. Unfortunately I have lost the records of one set of plates.

Q. Where was Patrick Corbett when you made the plates the first time? A. The last ones, I think, at my office, which is 17 Broadway.

Q. When was that? A. That was November 6, 1927.

Q. When did you make the first one? A. I couldn't tell you.

Q. Where was he when you made the first? A. I think in my office.

Q. Do you know how soon after his reports you made them? A. Very shortly; I wouldn't be positive whether I made them at my office or St. James; I am not sure of that.

Q. Are these the plates here? A. Those are the plates taken at St. James Hospital.

Q. Do they show the dates? A. No, they don't show the dates.

Q. And they were taken in the hospital? A. Yes, sir.

Q. What do these plates disclose? A. The plates, in the first place, were very hazy, possibly due to some congestion that the man had when the plates were taken and a definite fracture of the inner table of the skull of the vault of the skull, a little to the front and leaning over towards the left side, right opposite that on the lower part of the skull. (Indicating on plates.) This would be the point of the fracture of the internal table, right across this point here; about here is a very suspicious line which suggests a fracture to the base of the skull without much distortion. You understand that when we get a fracture of the skull there is not a distortion of the bone and it only manifests itself in the form of a crack which we have to differentiate between

that and sutures of the skull and veins and arteries. I would not be positive of this fracture here, but it is very suspicious at the base of the skull, right through the line of the optic nerve which comes off the brain.

Q. Anything else on those pictures? A. No, sir.

(The plates referred to are offered in evidence and marked Ex. Pl. 2, and 3 respectively.)

Q. These pictures you have now were taken recently, November 6, 1927? A. Yes, sir.

Q. Will you tell us what they show? Of course, you took these pictures and developed them yourself? A. Yes, sir, those were taken in the office.

Q. You have charge of the whole process and do it yourself? A. Yes, sir.

Q. Tell us what they show? A. This plate No. 591, it shows the left lateral of the skull. It shows definitely the fracture of the internal table of the vault of the skull, a little to the front from the median line and leans over towards the left side.

Q. Is that in the region of the left eye? A. That is way above the left eye.

Q. But it is towards the top of the head? A. Yes, sir. It shows on that place, right opposite the fracture of the vault and below, opposite, at the base of the skull, a line which to my mind is a definite fracture at the base of the skull and in the line of the optic nerve. There doesn't seem to be any distortion of that bone there which is usually the case in the fracture of the base. It simply cracks and the bone gets back in its place and it doesn't leave much space between the broken end of the bone. The plate 590 is the right lateral through the skull. The fracture to the

vault there, the internal table, is not very definite. It is on the right side, but the crack opposite that at the base of the skull is more discernable, but not as definite as it was on the left side. The plate 592 is a view of the frontal part of the head. There is nothing definite in that on account, I suppose, the man moving, or something or something of that kind. It is simply a conglomeration of shadows and does not show any fracture.

Q. You said something about one of the plates being hazy and was caused by some congestion or something. A. That was taken at St. James' Hospital. Sometimes we take pictures of a skull where there might be possible injury there and a certain sort of serum pour out and it obstructs the rays and it shows a definite condition like a normal skull.

Q. So the second pictures are clearer? A. Yes, sir.

Q. When you describe the haziness you mean the serum? A. Yes, sir.

Q. Where does the serum come from? A. The brain goes around in a serum, but from a slight injury may be aggravated and by that means obstruct the rays.

Cross-examination by Mr. Smith:

Q. Frequently X-ray pictures do not show definitely fractures that may exist, that is so, isn't it? A. Any fractures at the base of the skull, that is so.

Q. Frequently X-rays are obscured, as you call it, without any loss of serum. A. It is not the loss that makes it.

Q. Will you show me on this picture, which is 591, where the crack is. A. (Witness indicates.)

The Court: Mark it with a pencil.
(Witness indicates.)

Q. Will you show me on this picture 590 where you say it is cracked? A. (Witness indicates.)

Q. 592 doesn't show anything? A. No, sir.

Q. On those two pictures where you have marked them, you say. A. Between these two marks.

Q. You took these two pictures, too, didn't you? A. Yes, I did.

Q. Will you give me the number of the first one? A. 128, 127.

Q. Those were taken at the request of Dr. Vanderhoof? A. Yes, sir.

Q. The reason these last two pictures which I will offer for identification was because there was just a difference of opinion between you and Dr. Vanderhoof as to whether or not there was any fracture there? A. Yes, sir.

Q. And physicians disagree at times as to whether a shadow is a crack or whether it is not. A. Yes, sir.

Q. And there is also a disagreement between doctors as to whether or not a line which you might think was a fracture might be nothing more than what you call a suture or bruise in the skull? A. There are definite places for sutures and definite places for bruises, and definite places with lines and arteries and which are known by the profession, and it would be far fetched to say that he made a diagnosis of fracture, say it is a fracture, and another doctor come along and said that is a suture, that would be impossible, because I know where the sutures are.

Q. That would be impossible? A. That would be impossible.

Q. So any roentgenologist may examine these pictures which you have shown to the jury and say that they do not disclose any fracture and be honest in his opinion? A. Let me qualify my answer.

Mr. Schneider: I object.

The Court: Objection sustained.

Q. On this picture 127 would you mark what you said is the line of fracture? A. You see, that is the right view and the vault depression does not show there.

Q. Will you take the other picture 128. A. This is the left.

By the Court:

Q. In your opinion, would these two which you have just examined, Nos. 127 and 128, show the same as 591 and 590? A. They don't show as definite as the last plate.

Q. 590 and 591? A. They are the most definite plates, they are the last plates taken.

Q. Which ones do you say are the last ones? A. The one I took of Mr. Corbett himself.

By the Court:

Q. The fact that you took those plates November 6, 1927, when this accident was alleged to have occurred July 29, 1926, a year and four months, and they are not healed? A. A fracture at the base which only shows a line, that line is still persistent, and there is a possibility—no man on earth could tell—there is a possibility that there is a little ridge, a line that keeps the shadow there, that gives it the shadow. That is the only way I can answer your question. The fracture of the

vault, where the internal table is, it is still there because it was never replaced and it might stay there until the last day and it shows just the same.

Q. What happens usually if the healing process of the fracture is actually thrown out? A. In all flat bones, where we have flat bones, we have no callus thrown out like we do in bones, but usually when there is a callus thrown out it is healed up callus, but that is not so in the fractures of the skull. Sometimes in a child, where we have a young child, and they get a fracture of the skull, and there is a distortion or a depression, we may get callus out of the dura mater, but really in an adult of Mr. Corbett's age you very seldom get callus thrown out.

By Mr. Smith:

Q. Did I understand you to say that where there is a fracture of the vault and there is no depression the bones do not unite with callus? A. Where there wasn't a fracture of the inner table the bones are never separated. It is only a suture which occurs from some sort of injury. Nobody knows how it occurs, and yet there is a connection between the two plates, what is called the inner and outer table.

Q. Isn't there such a thing as a depressed fracture? A. Yes, sir; when they are apart, when they are separated.

Q. Take that depression, whether there is only what you call the crack itself, only if that is an infinitesimal crack, it indicates? A. It looks as if it is lost between the bones.

Q. If there is a crack at all there must be separation of the parts infinitesimally? A. Certainly.

Q. In a case where there is a broken bone of

that kind, even in the skull, isn't there a callus thrown out that mends the bone? A. I have seen thousands of heads and I have never noticed it, I never heard of speaking of callus.

Q. Do you mean to say that where there is a fracture of the skull it is always a fracture and never unites? A. No, sir.

Q. You know when they trephine and take out the bone itself it grows right over it and covers it? A. Yes, sir.

Q. So the point the crack was will come together and unite, wasn't that so? A. Not in this condition. Now, I have got to qualify my answer to answer your question intelligently. I will say you are right. Where a bone is separated positively, then the bone, flat from the end of the bone, without you take and fit a bone that way and striking together that way, if there are any bone cells come between that crack that will never go back to its place unless there is a trephine done.

Q. Ordinarily where there is just a crack, there is no depression, is there? I am not asking about Mr. Corbett. A. Which are you speaking of?

Q. Any fracture of the skull where there is no depression, it is just a crack? A. Yes.

(The plates marked No. 590 and 591 are marked Exhibits P4 and P5, respectively.)

At one o'clock, P. M., the court took a recess for one hour.

AFTER RECESS.

JOHN THOMAS, sworn in behalf of plaintiff.

Direct examination by Mr. Schneider:

Q. Where do you live? A. At Journal Square, Jersey City.

Q. What street? A. 353 Sipp avenue.

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

Q. Where did you live before that? A. Oklahoma.

Q. You are a westerner? A. Yes, sir.

Q. What is your business or occupation? A. I am a dock builder.

Q. You work on different jobs all around the country? A. Yes, sir, mostly on foundation jobs.

Q. What do you mean by foundation jobs? A. Anything below street level.

Q. Were you working on this Kresge job in July, 1926? A. Yes, sir.

Q. By whom were you employed? A. Spencer, White & Prentiss.

Q. At this time what was the firm doing? A. Building forms in the basement of the building.

Q. How many men did they have there, if you know? A. Approximately twenty, twenty-five.

Q. Where were those men located? A. In the basement. Q. By basement, do you mean below the street level? A. Yes, sir.

Q. Where was Corbett at this time? A. He was cutting a wall out in the basement, a wall with an air gun.

Q. What is that? A. It is a drill.

Q. How is it operated? A. By air pressure.

Q. Were you near Corbett? A. Alongside of him.

Q. Where were you? A. He was right next to where the street comes through, I forget the name of the street, Grove street on one side; it was approximately forty or fifty feet from Broad street.

Q. You mean Cedar street? A. Yes, sir.

Q. That would be the northerly side of the building? A. Yes, sir.

Q. How close were you to Cedar street? A. Right next the building on Cedar street.

Q. And down below the sidewalk? A. Yes, sir.

Q. Was there a sidewalk there at the time? A. Partly. I couldn't say whether all the sidewalk was there at that time or not, but there was a bridge overhead; the sidewalk wasn't being used at that time.

Q. Was the structural iron work up at that time? A. Oh, yes.

Q. From the sidewalk down to the bottom of the pit was there structural ironwork from the sidewalk down? A. Yes, up to approximately five or six stories.

Q. How about down? A. The same thing down.

Q. Describe the layout there as well as you can. A. Well, I was sawing boards while we were building a form right along the building line that closed in between where the structural iron work was from one post to the other, while my partner was nailing the boards on and handing them to him, and I heard somebody say back of me at that time, "clear up that hole," and I turned around and this board fell. He had hold of the hose, what he was doing that day, and this board fell through an opening in the outside of the building and this bridge that ran overhead and it hit Pat Corbett on the head. He fell at my feet and I picked him up and I saw he was groggy; he was knocked off

his feet at that time and I saw his hair was all matted, the blood started to run down his face. I called Mr. Murphy, who was the foreman at the time. Mr. Murphy took him from there up to the office. I don't know what happened to him after that.

Q. Did this board hit anybody besides Corbett? A. It fell on his head and it bounced off and hit me on my shoulder. I have a scar on my shoulder where it just bounced off and it had a nail in and just grazed the skin.

Q. Describe this board. A. It was a seven-eighth by six, approximately ten feet long. I think I measured the board, if I remember, I measured it.

Q. The first figure you give is seven-eighths by six inches. A. Yes, sir.

Q. Tell us what sort of a board it was, tell us all you can about it. A. If I remember right, it was a tongued and grooved dressed lumber.

Q. What kind of a board, pine or hemlock, or what? A. Pine, I suppose.

Q. Do you know? A. I couldn't swear to that. Most lumber used on all that is pine.

Q. It wasn't hardwood? A. No, sir.

By Mr. Schneider:

Q. Tongued and grooved, tell us about that. A. It is tongued and grooved and it fits in where you put them in.

Q. What do you mean by dressed lumber?

The Court: Plain trim?

Witness: Yes.

Q. Did you see this board falling? A. I got a glimpse of it, that is all I could see. I was look-

ing at Pat Corbett at the time, and the board fell in the cellar from an opening overhead. You might say I seen it or didn't see it, but fell from his head right over on me.

Q. Could you see the board? A. Only when I went to Pat Corbett. There was an opening there some two or three feet. You have to be practically under it to look up the building line from the outside.

Q. Was Corbett more to the building line? A. Yes, sir, he was to the outside of the building line.

Q. What position was he in when he was struck? A. He was directing the hose over towards me. I don't know whether he was going to change connections or what. He was bringing the hose over towards me and would be leaning towards me.

Q. How was he leaning towards you—illustrate. A. (Illustrating.) Practically, he would be leaning over like this.

By the Court:

Q. Did you see where that board hit him? A. Right here (indicating).

Q. Right on the top of the head. What part of the board? A. The end of it, and fell down in the hole just like that.

By Mr. Schneider:

Q. The end of the board hit him on the top of the head? A. Yes, sir; it bounced off and the board just rocked me.

By the Court:

Q. Did you see this opening that the board came through? A. It was on the outside of the building, between the bridge that went over the sidewalk, there was an opening between the bridge and the building where that board fell down through. It could have fell from anything up to five stories. I don't know how far it fell.

Q. How was the board in appearance? A. What do you mean?

Q. Was it clean, dirty, or not? A. It was a clean board.

Q. Did you look up? A. Yes, sir.

Q. What did you see? A. The brick masons' scaffold was up five or six stories with the brick masons working up there at that time, also up a story or two—I couldn't say just how many. I could see two men on the inside of the building at the edge. I don't know what they were doing.

Q. Do you know what these two men were doing? A. No, sir.

Q. Do you know who they are? A. No, sir.

Q. Can you tell us anything about them? A. No; I don't even know who they were working for.

Q. Do you know how they were dressed? A. Dressed in overalls and jumpers like most of us fellows work.

Q. I suppose everybody wears those regardless of the job? A. Yes, sir.

Q. You say you don't know who these men were? A. No, sir.

Q. You say five stories up you saw brick masons working? A. Yes, sir.

Q. Whose men were they? A. I couldn't say.

Q. You don't know? A. I don't know.

Q. Did you know anybody else on the building? A. Only on this building. We only know our own little part placed by the contractor.

Q. Did you know whose men were in the building besides your company's men? A. No, I don't.

There was Starrett and Petersons, but I didn't know one contractor's name from the other.

Q. Starrett Brothers and Petersons were there? A. Yes, sir.

Q. What was Starrett Brothers up there? A. They were general contractors, but what their men were doing I don't know.

Q. What was Peterson's men doing? A. I understood they were contractors.

Q. What sort of work were they doing there? A. I couldn't say.

Q. You said that Corbett was rocking. Just what do you mean? A. The man couldn't stand alone. He didn't know what was taking place. He didn't know anything—oh, well, you might say he was staggering around holding on to something.

Q. Was he bleeding? A. Yes, sir, the blood was running from the top of his head down his face.

Q. Was there much blood? A. Quite a bit.

Q. At the very time when this board struck him did he say anything? A. No, he went crawling up my leg as I was trying to help him up, and he didn't know what had hit him, I don't believe.

By Mr. Schneider:

Q. Did you know Patrick Corbett personally? A. Not before that time, no, sir. I saw him on the job, that is all.

Q. You didn't know him except from the job? A. No; just what I met him while he was working. He was a laborer and I was in the form work. Our work didn't correspond one with the other.

Q. How long had he been working together with you on this job? A. I think I came back from

Atlantic City and I had only been on this job two or three weeks before Mr. Corbett was hurt.

Q. Had Mr. Corbett been there those two or three weeks? A. Yes, sir.

Q. Did you have an opportunity to observe his appearance? A. Yes, sir.

Q. You have seen Mr. Corbett since the accident? A. Yes, sir.

Q. Looking at him now, as he is now, and the time he was in this place, do you notice any difference in his physical condition? A. Mr. Corbett was possibly forty pounds heavier than he is now. He was a considerably stronger man than I am now. He had a complexion very near like Mr. Murphy's, red complexion.

Q. What do you mean a complexion like Mr. Murphy's? A. A reddish complexion, heavier skin.

Q. How do you know he was stronger than you? A. He is a bigger man than I was.

Q. Did you see him work? A. Yes, sir.

Q. How was his temperament, how did he act? A. He seemed to be very friendly and a man that had lots of friends in his own organization of laborers.

Q. How was he, cheerful or sad? A. Very cheerful all the time, as much as I know him.

Q. Have you seen him since? A. Yes, sir.

Q. How does he act now as compared with then? A. He seems downcast, seems very melancholy, as far as I can see.

Q. How are his actions? A. You would hardly know he was the same man.

Q. Why do you say that? A. There is much difference in his movements now than at that time.

Q. What do you mean? A. He is slower, he is not active. He doesn't seem to take much interest in things now.

Q. How do you gauge that loss of weight that you speak about, forty pounds? A. It must have been caused by——

Q. No, how you figure the loss of forty pounds? A. He was a man that weighed possibly 190 to 195 pounds, and now I shouldn't judge that the man would weigh 140, 45, 50, something like that. He has just shrunk away. His cheeks were full. He was rather fleshy. He is not that now.

Not cross-examined.

THOMAS MURPHY sworn in behalf of plaintiff.

Direct examination by Mr. Schneider:

Q. Where do you live? A. 503 Reid avenue, Brooklyn.

Q. Where are you employed now? A. At present I am not doing anything.

Q. Just lately have you been employed in Newark? A. Yes, I have been working on the Evening News up until last Wednesday.

Q. You have done a lot of work in Newark? A. Yes, I have been in Newark close on to three years.

Q. Were you working on the Kresge Building, Cedar and Broad? A. Yes, sir.

Q. Whom were you working for? A. I work for Spencer, White & Prentiss.

Q. The same firm that Mr. Corbett and this last witness were working for? A. Yes, sir.

Q. What was your position? A. Labor foreman.

Q. Do you know what Corbett was getting per week as wages? A. The laborers, $9 for eight hours.

Q. $9 a day? A. Eight hours a day.

Q. What would it average, about, a week when Corbett was working there? A. Without overtime that amounts to $40—forty some odd dollars, I imagine.

By the Court:

Q. Five and a half days and forty-four hours? A. Yes, sir.

By Mr. Schneider:

Q. Was he working there steadily? A. Yes, sir.

Q. Were you there at the time of the accident? A. Well, I was on the job. I wasn't exactly there when it happened.

Q. You didn't see how it happened? A. No, sir.

Q. Where were you when it happened? A. I was down in the cellar, that is what they call the subcellar, one flight below where it happened. I happened to be coming up the stairs out of the subcellar when it happened. I was coming up the stairs.

Q. About how far away from the point where it happened? A. About half a flight, I imagine. It only had just happened.

Q. About how many feet away? A. Probably twenty-five or thirty feet.

Q. What called your attention to the accident first? A. If I remember right this man Thomas called me. I seen him help him, and I went to his assistance and helped him.

Q. Just what did you see when you got there? A. Thomas had him by the arm and Corbett was bent over and he was holding his cap on his head.

Q. Was he bleeding? A. There was blood coming down his face, yes, sir.

Q. You say Thomas was holding him? A. He was bringing him towards the stairs to get him up to the street level.

Q. And what was the position of Corbett? A. Corbett was bent over and Thomas had him under the arm.

Q. Was Corbett walking with him? A. He was making an attempt to walk, yes, sir.

Q. What was his appearance? A. He didn't have anything to say. He was just struggling along with the man Thomas helping him, with his head down. I guess he was kind of dazed at the time.

Q. Did you take him anywhere? A. I took him up to the timekeepers' office.

Q. You alone? A. Yes, I believe. If I remember, Thomas went back when he got to the stair and I took him directly away.

Q. What did you do with Corbett there? Did he sit down there? A. The timekeeper, I guess handled the rest of it. Somebody was there and asked me what happened to him and I told him.

Q. Finally did the ambulance come and take him? A. Yes, I believe there was an ambulance there.

Q. Did you see the board there? A. I was sent down afterwards by the superintendent.

Q. Did you get the board? A. Yes, sir.

Q. What size was the board? A. It was a seven-eight board, that is, six inches in diameter——

Q. In diameter? A. Six inches wide and eight or nine or ten feet long.

Q. Ten feet long? A. I couldn't say.

Q. Where did you find this board? A. Thomas showed me the board, told me that was the board that hit him.

Q. Where did you take this board? A. I took it up and gave it to the superintendent of the office.

Q. Can you give us any description of this board, the way it looked, and so on? A. At that time I didn't take any interest. I just done as I was told, to bring it to the office, and I done so.

Q. Was it rough or plain? A. That I couldn't say. All I could tell is that it was an ordinary seven-eight inch board.

Q. At the time this accident happened where were your men, the men that worked for Spencer, White & Prentiss? A. He was working where Corbett got hit. There was six of them.

Q. Where was that? A. One floor below the street level; that was the basement floor we called it, and all the rest of my men were working in the subcellar digging out a fan room, what they call a fan room.

Q. Who else was working? A. There were different subcontractors. I couldn't tell you, electricians, and floor men, and different men.

Q. Did Starrett have men there? A. They did have men there, but I don't know where they were at the time.

Q. Were Peterson's men there? A. He had four men pouring the arches, concrete, filling concrete forms.

Q. Just how had they formed the arches? A. They build forms.

Q. Then what? A. Out of seven-eights lumber.

Q. They built forms out of seven-eights lumber? A. Yes, sir.

Q. Was the board you saw lumber of that kind? A. Similar, yes, I should say so.

Q. What did they do after they built these forms out of seven-eight inch lumber? A.They are made fast with steel wire and then they pour the concrete in.

Q. What do they do then? A. That remains so many hours to allow the concrete to set and then they take that concrete off and shove it to another floor.

Q. After the concrete sets they take the board off? A. Yes, sir.

Q. You say Peterson's men were doing that? A. That was their contract, yes, sir.

Q. Do you know what floor they were doing that? A. No, sir, I couldn't tell you.

Q. Do you know what Starrett's men were doing? A. No, sir, I do not.

Q. Do you know whether he was doing any work, any particular work at that time? A. Why, no, of course, I wasn't acquainted with the building. My work didn't require any higher than the basement and subcellar. I was on the foundation work, so I didn't get up to the building.

Q. Did you ever get on the outside? A. Very seldom.

Q. Did you ever take any notice of what was on the first floor? A. They had a head hoist hauling up bricks and mortar to the bricklayers.

Q. That is a machine. A. Yes, run by an electric motor.

Q. Who was doing that? A. Starrett Brothers.

Q. What was the appearance of the building where this board fell, was there an open space there? A. Yes, sir.

Q. Will you please describe the layout there, where that open space was? A. Where the sidewalk used to be that was bridges over, there was a bridge over it, and between this bridge and the building there was a space of—I couldn't say—two or three feet, something like that, and in that way you could look up the whole side of the building.

Q. Was anything done in that open space shortly after this accident?

Mr. Smith: I object.

Mr. Schneider: Might it not be relevant on the question of control? Not on the question of negligence, just like a landlord and tenant case——

Mr. Smith: The charge is that we dropped a board. The allegation made is one straight charge against us that we dropped a board negligently.

The Court: Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Were there scaffoldmen there on the job? A. There is on all buildings, you got to have scaffoldmen.

Q. On that job, did those scaffoldmen follow up anybody in particular? A. I couldn't say that.

By the Court:

Q. Was there a scaffolding along the north side of the building? A. At that time I couldn't say that they were there or that they were shifted around on Broad street or where they were at the time. Of course, in all buildings there are scaf-

folds to work on. Where it was located, I couldn't say.

Q. About what was the weight of the board? A. I couldn't tell you.

Q. What kind of a board was it, what material, pine or cedar? A. I imagine they are cedar boards.

Q. Do you know what it was? A. No, I couldn't say.

Q. Do you know what weight it was? A. No, I couldn't tell you exactly, no, sir.

Q. Can you tell us about what it weighs? A. I don't suppose a board like that would weigh over twenty or twenty-five pounds.

Q. A board ten feet long, six inches wide, a pine or cedar board, would it weigh that much? A. Yes, sir.

Q. A pine board seven-eighths weighs two pounds to a foot? A. I don't know that.

By Mr. Schneider:

Q. How long had Mr. Corbett been working for you? A. He worked for me somewheres in the neighborhood of two years, I imagine, maybe a little less or maybe a little over.

Q. On different jobs? A. That job only.

Q. Has that job been going on two years? A. Yes, sir.

Q. He has been working for you for two years? A. No, sir.

Q. Did you know him outside of the job socially? A. No, sir, I didn't know him until I hired him.

Q. You have seen him just recently? A. Yes, I have seen him today and on one occasion I was called to court or a couple of months ago.

Q. Does he look any different from the time you employed him? A. Yes, sir, he looks a little different.

Q. Will you tell us in what way? A. He seems to have lost his color and his weight. He seems to be grouchy over things. He has lost his color. He was a husky fellow when I employed him. In fact, I wouldn't know him if I passed him in the street.

Q. You wouldn't recognize him. Tell us all about it. In what way is he different? A. I just told you, quite thin, and he seems to stoop over now, shoulders, and he has not got any complexion like he used to have.

Q. What kind of a complexion did he have? A. He had a big red face, fat and heavy.

Q. You say he has lost weight. Would you say much or little? A. It looks like a lot of weight. I couldn't say how many pounds. He don't look to me any more like he did.

Q. Was he a good working man? A. Yes, sir, he was dependable in any work I put him to, he would do it.

Q. What about his strength? A. He was very strong.

Q. The average strength of a laborer? A. He was extra good as a laborer.

Q. In what way? Tell us all about it. A. He was strong and active. You have got to have good strong men for a good laborer.

Q. How was he as to agility and speed? A. He was lively.

Q. When you came over what was his appearance as to blood? A. When I saw him?

Q. Yes. A. After the accident?

Q. Yes. A. He was bleeding quite a lot. The blood was running down his face. In fact, when

we got up to the street he asked me if he was cut bad and he took his cap off and there was too much blood and I didn't bother.

Cross-examination by Mr. Bishop:

Q. You don't know on what floor Peterson's men were working at the time of this accident? A. No, sir.

Q. What part of the building? A. No, sir.

Q. You don't know, as a matter of fact, there were any of Peterson's men working there? A. I couldn't say yes or no because that wasn't part of my duty to go up in the building.

Q. You were not acquainted with Peterson's men? A. No, sir.

Q. You don't know whether there were any there or not? A. I imagine they were there——

Q. I don't want to know what you imagine. You couldn't say? A. No, sir, I couldn't swear to it.

Q. What time of the day was this? A. It was the forenoon; it was shortly after starting, between eight or nine or ten. I know we hadn't started long to work because I know this man Corbett was hooking up a drill starting to work.

PATRICK CORBETT, plaintiff, sworn in his own behalf.

Direct examination by Mr. Schneider:

Q. You are the plaintiff in this suit? A. Yes, sir.

Q. Where do you live? A. 547 Twelfth avenue, Newark.

Q. How long have you lived there? A. About three months.

Q. Where did you live before that? A. 162 South Twelfth street, Newark.

Q. How long have you lived in Newark altogether? A. Going on thirteen years. I was out of the state for about a year and a half while I was in the military service.

Q. Where did you live before you came to Newark? A. I lived with my father in Ireland.

Q. How old are you? A. Thirty years.

Q. Are you married or single? A. I am married.

Q. Any children? A. Three children.

Mr. Smith: I object to that.

The Court: Objection sustained. The answer will not be recorded.

Q. What was you business or occupation? A. I was a laborer.

Q. Going back to July 25, 1926, by whom were you employed then? A. By Spencer, White & Prentiss.

Q. At what? A. Laborer.

Q. Where were you working? A. In the basement of the Plaut Building.

Q. Doing what? A. Doing laborers' work.

Q. Who was your foreman? A. Thomas Murphy.

Q. How long had you been working for Spencer, White & Prentiss? A. Over two years.

Q. What were your average weekly wages? A. Some weeks I made over a hundred dollars. Our average wages were $49, $50; that was our average wages, but sometimes we made over a hundred dollars.

Q. How did you make the hundred dollars? A. Several times for Saturdays and Sundays.

Q. Did you work overtime on Sundays? A. Yes, sir.

Q. When the accident happened just where were you? A. I was in the basement of the Plaut building.

Q. Where is this Plaut Building, what street? A. Broad and Cedar streets, it runs to Halsey street.

Q. Were you on the Cedar street side? A. Yes, sir.

Q. About how far from Broad? A. Maybe about fifty feet.

Q. Where were you with reference to the building line on Cedar street? A. I was on the other side of the Plaut line, which is outside.

Q. What were you doing? A. Connecting the air hose.

J. Just how do you do that? A. There is a connection. There is a bit of pipe and you screw it up. I was in that position.

Q. What happened to you then? A. Something came from the top and hit me on the head.

Q. Hit you where? A. Right here.

Q. Indicating the top of the head? A. The left side of the head.

Q. Do you know what hit you? A. No.

Q. Was there an open space there where you were standing? A. Yes, sir, about two feet around there. I don't know how long.

Q. On the ouside of the building? A. Yes, sir, between the bridge and the outside of the building.

Q. Was Mr. Thomas there at the time? A. Yes, sir.

Q. When you were struck did you experience any pain? A. Just looked as if everything got

dark in front of me and I was knocked down, like if I was dreaming. I didn't know just what right was going on. I thought it had gone right through my head and I was wondering why I wasn't able to stand up, why I wasn't dying.

Q. What was done with you? A. Thomas, I believe, helped me. I don't know what happened right there.

Q. Where did you finally wind up? A. I found myself in the office of Spencer, White & Prentiss.

Q. From there where did you go? A. I got first aid there.

Q. Where were you taken then? A. St. James' Hospital.

Q. How? A. In an ambulance.

Q. Were you bleeding? A. Yes, sir.

Q. Much or little? A. It was all down my face and dripping on the ground.

Q. Were you in pain? A. I didn't seem to be in much pain. I was like more dreaming than anything else.

Q. What was done with you when you went to the hospital? A. Dr. McCabe took care of me.

Q. Did he get there the same day? A. Yes, sir.

Q. Do you know when the X-rays was taken of you? A. Yes, sir.

Q. When? A. The same day.

Q. The same day you were in the hospital? A. Yes, sir.

Q. When did Dr. McCabe come to see you? A. He was there shortly after I got there.

Q. Do you know what he did to you? A. Yes, sir, he stitched it and had the pictures taken of my head.

Q. He stitched what? A. My head had been opened.

Q. Were you in bed there? A. Yes, sir.

Q. About how often did Dr. McCabe call to see you? A. He called a couple times, I believe, every day, the first couple of days, and after that every day while I was there.

Q. When did you leave the hospital? A. I left it a week after.

Q. Why did you leave the hospital? A. We were expecting a baby——

Objected to.

The Court: I think the question may be answered.

Q. Why did you leave the hospital? A. My wife was expecting a baby and I was afraid there was nobody with the children and so I wanted to be home and near them.

Q. Did you leave with the Doctor's advice or against it? A. Dr. McCabe, I asked him couldn't I leave, and I explained the situation to him——

Objected to.

The Court: Just answer that yes or no.

Q. (Question read.) A. I left it against advice.

Q. Then where did you go? A. Home.

Q. While you were in the hospital how did you feel? A. I felt my head, felt clouded for the first three or four days.

Q. Very clouded? A. Yes, sir, everything was dark in front of me and then about the fourth day, I believe it was, and my right eye seemed to clear.

Q. You could see with it? A. Yes, sir; and I thought the other one was going to clear the same way, but it never has.

Q. For the first three or four days could you see well. A. I couldn't see anything at all, everything was very dark. I could see things, but not very plain. They looked awful dark to me.

Q. After three or four days your right eye started to clear? A. Yes, sir.

Q. How about your left eye? A. It is never clear.

Q. Has it gotten better or worse? A. It is worse.

Q. Can you see anything with your left eye? A. I can see lights, lamps close to me, things like that, but I can't read.

Q. How was your left eye before the accident? A. Just as good as the right.

Q. How was your right eye? A. All right.

Q. Had you ever had any trouble with your eyes before the accident? A. No, sir, I never had any trouble.

Q. At any time in your life? A. No, sir.

Q. What else did you experience in the hospital besides this trouble with your eye? A. I threw up in the hospital.

Q. You mean you vomited? A. Yes, sir and I spit blood up.

Q. You spit blood? A. Yes, sir.

Q. About how often did you vomit? I couldn't exactly tell you; maybe three or four times.

Q. Was that during the time you were in the hospital? A. Yes, sir.

Q. About how many times did you spit blood? A. I spit blood for about, I imagine, it was about a month after.

Q. Besides the trouble with your eyes while you were in the hospital and spitting blood and vomiting, was there anything else? A. Yes, I got nose bleeds very regular.

Q. Nose bleeds? A. Very often.

Q. Was there anything else while you were in the hospital? A. That is all, I guess.

Q. How did you feel while you were in the hospital? A. I felt awful dizzy.

Q. After you got out of the hospital you went home? A. I did.

Q. Did you go to bed when you went home? A. Yes, sir.

Q. About how long were you in bed? A. I laid down for about an hour and I got very nervous and I was always inclined to jump—the bed was near a window and I was always inclined to jump out of the window, and my wife had to lay alongside of me and hold me in bed, well, until I went to sleep.

Q. How long did this last? A. Until I went to sleep.

Q. How often has that occurred? A. It has occurred very often.

Q. Does is still occur at times? A. Yes, sir.

Q. After you left the hospital and came home did you vomit at all? A. Yes, I vomited often.

Q. What? A. When I got headaches I was vomiting at times.

Q. About how often did you vomit when you got home from the hospital? A. Sometimes once a week; maybe sometimes two or three times a week.

Q. Still do at times? A. Yes, sir.

Q. You speak of headaches. Do you get headaches? A. Yes, sir.

Q. How often do you get those? A. Sometimes I get them two or three times a week. More times I go a week or two without them.

Q. How about the dizziness? A. The dizziness seems to be getting worse all the time.

Q. That is getting worse? A. Yes, sir.

Q. How does the dizziness affect you? A. The first time I was always inclined to turn around to the right, fall to the right.

Q. What would happen to you when you would get dizzy, if anything? A. I get very nervous and

I do have to stay in the house all the time and if I am in the street I have to hold on to the pole or something in the street.

Q. Why? A. I would fall.

Q. Have you ever fallen from that? A. Yes, sir.

Q. Do you get that dizziness now with falling? A. Yes, sir.

Q. You say you spit blood for about a month and after that the blood spitting stopped? A. Yes, sir.

Q. And you haven't spit blood at all? A. No, sir.

Q. Have you had nose bleeds since that time? A. Yes, I have had nose bleeds right along.

Q. How about your weight, what did you weigh before the accident happened? A. I weighed two hundred and four pounds.

Q. What is your height? A. About five feet eight.

Q. What do you weigh now? A. About 174, I believe.

Q. What was your average weight before this accident happened? A. That was my weight, 204 pounds was what I used to weigh.

Q. Have you tried to do any work since this accident happened? A. Yes, sir.

Q. When did you try to do work? A. I think it was last April.

Q. Where did you try to work? A. I tried in East Orange Tennis Grounds.

Q. Where are they? A. East Orange, off of Park avenue.

Q. And what kind of a job did you get there? A. Repairing the greens, putting tapes down.

Q. That is, laying out the course? A. Yes, sir.

Q. What else? A. And rolling them down and whitewashing them.

Q. Are they a grass course? A. No, sir, they are just plain.

Q. You have tape on them? A. Yes, sir.

Q. And you were doing that kind of work and how long did you work there? A. I started on a Monday morning and I worked until, I guess, the next day I started, and I was knocked off.

Q. Why did you have to knock off? A. This dizziness came on me.

Q. Did you start again? A. I stayed up there then for the rest of that week and then I started again the next week I worked Monday and this was about eleven o'clock I fell.

Q. Where did you fall? A. On the course.

Q. While you were doing what? A. When I was putting down those tapes.

Q. Do you use a machine to put the tape down? A. No, sir, just laying them up by hand.

Q. What happened to you when you fell? A. I don't really know. I found myself in the shower baths and they had me all wet with water.

Q. Who was taking care of you? A. The foreman of the grounds.

Q. What is his name? A. Michael Lowther.

Q. What was he doing to you? A. He was putting cold water on my head until I came to.

Q. Did you know what happened then? A. Not until they told me.

Q. Have you tried to work since? A. No, I came home and rested up and my wife called up the doctor.

Q. How long did Dr. McCabe treat you? A. He is treating me yet.

Q. After you got out of the hospital did you see Dr. McCabe in his office or did he come to the house? A. He came to the house about a month.

Q. And then did you see him at the office? A. Yes, sir.

Q. And you say he is treating you yet? A. Yes, sir.

Q. What kind of medicines does he give you? A. I don't know what kind they are.

Q. Are they powders, liquids, or what? A. They are liquids.

Q. Do you take them internally? A. Yes, sir.

Q. Does he give you anything else? A. No, just the medicine.

Q. Has he advised about your working? Just yes or no. A. Yes, sir.

Q. He has advised you about it? A. Yes, sir.

Q. Are you following his advice in that respect? A. Yes, sir.

Q. Did Dr. McCabe send you to any eye doctor? A. Yes, sir.

Q. To whom did he send you? A. Dr. Chattin.

Q. The doctor that was on the stand here today? A. Yes, sir.

Q. Who took the X-rays of you? A. Dr. Devlin.

Q. And the first set of X-rays were taken the same day at the hospital? A. Yes, sir.

Q. And the second set of X-rays were taken at my direction by Dr. Devlin? A. I don't understand that.

Q. I sent you to Dr. Devlin to take the later X-rays? A. Yes, sir.

Q. Did he send you to any other doctor? A. Yes, sir.

Q. Who else? A. Dr. Dowd.

Q. Where is he? A. I think it is 235 Broadway.

Q. Newark? A. Yes, sir.

Q. About how many times have you been to see Dr. Dowd? A. I think four, maybe five times. I am not sure.

Q. What did he do, did he examine you? A. Yes, sir.

Q. Did he give you any medicine? A. No, sir.

Q. Who is treating you now? A. Dr. McCabe.

Q. You are going by his advice now? A. Yes, sir.

Q. How do you feel these days? A. I am not feeling bad yesterday and today.

Q. How have you felt recently? A. The dizziness was all the time after me.

Q. What else besides the dizziness? A. Nervous.

Q. How does that show itself? A. If the children are running in the house I get very excited, I have to go out of the room to keep away.

Q. The children excite you? A. Yes, sir.

Q. And besides your dizziness and nervousness. What else? A. Headaches.

Q. Did you ever have this dizziness before the accident? A. No, sir.

Q. In no way whatever? A. No, sir.

Q. Did you ever have headaches before the accident in anyway whatever? A. No, sir.

Q. Did you ever have these nose bleeds? A. No, sir.

Q. Did you ever have these vomiting spells before? A. No, sir.

Q. Were you nervous before the accident? A. No, sir.

Q. Did you ever have any tendency to jump out? A. No, sir.

Q. Did you ever fall down before the accident? A. No, sir.

Q. How were you before the accident physically? A. I felt fine until I got hurt.

Q. How were you as to strength? A. I was strong.

Q. Were you irritable before the accident? A. I don't understand you.

Q. Were you cranky before the accident? A. No, sir.

Q. How are you when you go in public vehicles, trolley cars and things like that? A. I can't ride on a trolley car.

Q. Why not? A. I get puffed up.

Q. Have you paid Dr. McCabe? A. No, sir.

Q. Did you pay for the X-rays? A. No, sir.

Q. Do you know what the cost? A. I guess Mr. Jacobs has the bill.

Q. Have you had a bill from Dr. McCabe? A. No, sir.

Q. Have you had a bill from Dr. Dowd? A. No, sir.

Q. Or from Dr. Chattin? A. No, sir.

Q. Have you paid your hospital bill? A. No, sir.

Q. Did you get a bill from the hospital? A. I did.

Q. Is this the bill from the hospital? A. Yes, sir, that is it.

Q. Did you work steadily before the accident? A. Yes, sir.

Cross-examination by Mr. Smith:

Q. You were working in the cellar, were you not, in the basement? A. Yes, sir.

Q. How long had you been working in that basement before the time of the accident? A. It must have been about three months the last time there.

Q. And your work had all been done in the basement? A. I worked all over the building. The last time it was down in the basement.

Q. How long a period had you been working down in the basement? How long a period had you been working in the basement before the time

of the accident? A. I believe about three months.

Q. Is that what they call a subcellar or just a cellar? A. Just a cellar.

Q. You hadn't paid any attention to where the other contractors were working, had you? A. I used to put in gasoline in the morning; I used to be on the street about an hour.

Q. What would you do? A. I would put in gasoline in the air compressor.

Q. About how early? A. From eight to nine, I should say.

(At this point the witness is temporarily withdrawn.)

THOMAS F. MCCABE sworn in behalf of plaintiff.

Direct examination by Mr. Schneider:

Q. Doctor, you are a regularly licensed physician in this county and state? A. Yes, sir.

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

Q. You are a graduate of what college? A. College of Physicians and Surgeons.

Q. That is connected with Columbia University? A. Yes, sir.

Q. Connected with any institutions in this city? A. Visiting surgeon in St. James' and consultant Essex County Hospital.

Q. Did you treat Patrick Corbett? A. Yes, sir.

Q. Did you know him before then? A. No, sir.

Q. How did you come to treat him? A. I was called in by his wife after he was brought to the hospital as a private patient.

Q. You are on the staff of that hospital? A. Yes, sir.

Q. In what condition did you find him? A. Well, he was in a severe state of shock. He had quite a severe lacerated wound on top of the skull.

Q. What else? A. That is all at that time.

Q. In what condition was he as to consciousness? A. He was semi-conscious.

Q. How long did he remain in this semi-conscious condition? A. The rest of the day, I believe.

Q. About what time were you called in? A. I guess about half an hour after the accident.

Q. In the morning? A. I don't know just what time it was.

Q. You say he was in the same condition for the rest of the day? A. Yes, sir.

Q. How was he the next day? A. He was still in a state of shock, but conscious.

Q. How long did he remain in that state of shock? A. He remained that way for about three more days.

Q. Did he vomit at all? A. Yes, sir.

Q. Do you know whether he vomited much or little? A. I think he did the first day.

Q. You say he was in a severe state of shock. Just what do you mean by that? A. The shock was due to concussion of the brain.

Q. What is concussion of the brain? A. It is almost immediate widespread loss of function of the brain itself.

Q. Is it a brain injury? A. Pressure on the brain, yes, sir.

Q. What would you say as to the concussion, was it considerable or little or what? A. It was a severe concussion.

Q. Did you get his history from him? A. What do you mean by history, you mean ask how he was hurt?

Q. Yes. A. He wasn't in a state to answer that day.

Q. I mean later? A. Yes, sir.

Q. How much later before you could ask him just how he was hurt? A. The next day.

Q. Did he tell you? A. Yes, sir.

Q. What did you do with the wounds on the head? A. They were sutured—first I examined for fracture of the skull.

Q. Did you find a fracture? A. There was a suspicious crack along a longitudinal line of the skull, but no depression.

Q. What did you have done then? A. The scalp was sutured.

Q. How many sutures? A. I think there were five.

Q. Five stitches? A. Yes, sir.

Q. Then you found, you say, a specific crack along the line of the skull? A. Yes, sir.

Q. What did that indicate to you? A. Probably a possible fracture.

Q. Did you do anything to confirm this? A. Ordered him to the X-ray room.

Q. Whom did you ask to X-ray him? A. I think Dr. Devlin was on duty at that time.

Q. He is the regular X-ray man for St. James? A. He was on service at that time. There are two men.

Q. Did you see the X-rays? A. Yes, sir.

Q. What did you find? A. Except what he reported, that is all I know.

Q. You accept what he reports? A. Yes, sir.

Q. You read his report? A. Yes, sir.

Q. How long did he stay in the hospital? A. I think he was in the hospital a week.

Q. When you first saw him had he been cleaned up or about started? A. No, hadn't finished with him; he hadn't been washed up and shaved.

Q. Was he bleeding? A. Yes, sir.

Q. Where? A. From the scalp.

Q. Were you able to stop that blood? A. Yes, sir.

Q. How? A. Sutures.

Q. Could you stop it without suturing it up? A. Probably could, yes, sir.

Q. You say he left in a week. Was that with your advice or against it? A. Against it.

Q. Why did you advise him not to leave? A. On account of his condition; he wasn't in fit condition to leave the hospital.

Q. What was your diagnosis of the case? A. Concussion of the brain with possible fractured skull.

Q. What other objective symptoms did he have there that you saw? A. At that time nothing special.

Q. How about his eyes? A. There wasn't anything discernible at the time.

Q. When did you first notice anything regarding his eye? A. I think it was the second day his eye began to get discolored.

Q. What was the progress of that eye? A. The discoloration cleared up all right, but the sight hadn't.

Q. Did you send him to anybody for the eye? A. Yes, sir.

Q. To whom? A. Dr. Chattin.

Q. Could he see while he was in the hospital there? A. I don't remember.

Q. You don't pretend to cover the eyes? A. That is right.

Q. That is not your line? A. No, sir.

Q. What other symptoms did he have while he was in the hospital there, what did he complain

of? A. The reaction, his nerves, was the principal thing.

Q. What is that? A. He has been practically nervous ever since.

Q. What does he complain of? In other words, what are his subjective symptoms? A. His subjective symptoms are headaches, dizziness, occaional vomiting.

Q. Did he have any bleeding of any kind? A. I don't remember now.

Q. Have you been treating him since? A. Yes, sir.

Q. What is his condition now? A. He has not improved very much. In fact, he has lost a lot of weight.

Q. How much weight has he lost? A. I think about thirty pounds.

Q. And what symptoms has he now? A. Principally nervous conditions.

Q. What are the symptoms of that, as he has them? A. He is easily excited. He is unable to work, do anything.

Q. Why is he unable to work? A. On account of his head condition.

Q. Will you explain that to the Court and jury. A. During, I think it was, last summer, I asked him to go out and do something and I think he was able to work two days and he had to quit, and I think down Franklin street they tried him there, too, and he had to quit.

Q. Do you think he is fit to work now, based on your knowledge of him? A. No, sir.

Q. Could he go back to his work as a living? A. No, sir.

Q. And why not? A. The general nervous condition.

Q. What does he complain of now? A. He still complains of his dizziness.

Q. What causes the dizziness in this case? A. Probably from the day of shock, from the first day of the accident, concussion.

Q. Has he or has he not suffered from a brain injury? A. I couldn't tell you that.

Q. You sent him to some other doctor? A. Yes, sir.

Q. Whom? A. Dr. Dowd.

Q. What is he a specialist on? A. Nervous diseases.

Q. A specialist on brain diseases? A. I believe so, yes, sir.

Q. You sent him to Dr. Chattin for his eye and you sent him to Dr. Dowd for his nervous condition? A. Yes, sir.

Q. Have you rendered him a bill? A. No, I have not.

Q. What is the reasonable value of your services? A. Up to the present time I think it is around $450.

Q. That includes the hospital treatment and all the subsequent treatments? A. Yes, sir.

Q. Will you be obliged to treat him in the future? A. I think so.

Q. In what way? A. Just keep him under observation, general observation.

Q. Did you give him any medicines? A. Yes, sir.

Q. What did you give him? A. Potassium iodide, nerve sedative.

Q. What is your prognosis in this case—in other words, what do you think of his future? A. I don't think he is ever going to be much better.

Q. What do you base that on? A. He has been under observation for a year and he has not made any improvements.

Q. Have you had any experience with concussion of the brain cases? A. Yes, sir.

Q. Do you base your prognosis on your experience on this case? A. I do.

Q. When he was in the hospital did he act like a normal person? A. Yes, he was very quiet.

Q. Was he in bed at any time? A. Yes, sir.

Q. Up to the time he left? A. Yes, sir.

By the Court:

Q. How long was he in bed after he went home? A. About a month.

Cross examination by Mr. Smith:

Q. I understand what he is suffering from now is this nervousness that you speak of. A. Yes, sir.

Q. A species of neurasthenia? A. No, sir.

Q. But it was nervousness? A. Yes, sir.

Q. You mean by that an enlargement of the nerves? A. Yes, a general shock to the whole nervous system.

Q. And frequently a shock to the nervous system of that kind clears up, doesn't it? A. Sometimes.

Q. And might clear up at any time? A. Yes, sir.

Q. It might be a sudden clearing or a gradual clearing? A. It might never clear up. It hasn't cleared up in this last year.

Q. It hasn't cleared that you saw? A. No, sir.

Q. In a condition like this there may be a sudden clearance or there may be a gradual clearance? A. I don't think so.

Q. In other words, in your opinion you don't think there will ever be a clearance? A. No, sir, I don't.

Q. The nervousness is by observation and tests? A. Yes, sir.

Q. And those tests are all knee jerks and so on? A. Yes, sir.

Q. Those are the sole tests for you? A. Yes, sir.

Q. Those are the sole tests made? A. Yes.

Q. For nervousness unaccompanied by injury? A. Sometimes.

Q. They are all the same symptoms? A. Not always.

MICHAEL LOWTHER, sworn in behalf of plaintiff.

Direct examination by Mr. Schneider:

Q. Mr. Lowther, where do you live? A. 259 Mt. Vernon Avenue, Orange.

Q. What is your business or occupation? A. I take care of tennis courts.

Q. What tennis courts do you take care of? A. The East Orange Tennis Club.

Q. Where is that located? A. In East Orange.

Q. And on what street? A. Between Glenwood Avenue and Eastwood Street.

Q. How long have you been doing that? A. Seven years.

Q. Do you hire men to assist you? A. Yes, sir, in the spring of the year.

Q. How many men have you there? A. I got two or three, and sometimes four in the spring of the year.

Q. Are these clay courts? A. Yes, sir.

Q. What do you hire men to do in the spring of the year? A. To clear up and line and get it ready for playing tennis.

Q. When it starts getting warmer you do that? A. Yes, sir, in the early part of the summer.

Q. Did you use Patrick Corbett in the spring of this year? A. Yes, sir, he worked for about three weeks for me.

Q. Three weeks? A. That is, he worked about three days the first week. He said he felt his head dizzy and he said he couldn't work.

Q. At any rate, at the end of three days he quit? A. Inside of three days, something like that.

Q. What kind of work was he doing there? A. He was screening clay.

Q. Just how do you do that? A. You throw the clay up on the screen and you separate the clay from the stone and gravel.

Q. And he was doing just that kind of work for three days? A. Yes, sir.

Q. After he quit when did he come back? A. The following week.

Q. What was he doing then? A. The same kind of work, all the same, until it is finished.

Q. How long did he work then? A. The second week he worked two or three days and he had to quit again, about Wednesday evening he had to quit again.

Q. Did he come back again? A. He came back the following week and he worked two or three days and he collapsed on the ground. Another fellow and myself had to carry him in.

Q. What was he doing? A. Screening this clay with a wheelbarrow and spreading it.

Q. What did you do with him? A. Another man and myself put cold water on him and he had to go home and that was the last I saw of him.

Q. Are you still connected with the Tennis Club? A. Yes, sir.

Cross-examination waived.

Patrick Corbett, plaintiff, resumes the stand.

Further direct examination by Mr. Schneider:

Q. When you were working there in the cellar about how many other men were working down there? A. In that place I guess there would be about three or four men.

Q. The men of your company? A. Yes, sir.

Q. Were there men from any other company working in that cellar? A. No, sir.

Q. Do you know what other company's men were working in that building at that time? A. There was the general contractor.

Q. Who was he? A. Starrett Brothers.

Q. Did you know at that time, that morning, where Starrett's men were working? A. Only the bricklayers.

Q. What? A. The bricklayers are the only men I saw. The other men were scattered all over, the laborers, I was on the street.

Q. Were they Starrett's men? A. Yes, sir.

Q. Where were they working? A. On scaffolds.

Q. What part of the building? A. About the fifth or sixth floor. I couldn't tell you exactly what floor.

Q. Where were these scaffolds? A. They were swinging on the outside of the building.

Q. What were these men doing? A. Laying brick.

Q. Were any boards being used? A. For the scaffolding, that is all.

Q. Were there any other men of another company? A. Yes, there was the Peterson Company.

Q. What were Peterson's men doing around the building? A. They were putting in floors.

Q. You don't know what floor they were on that morning? A. That I couldn't tell you.

Q. What time was it when this accident happened? A. I used to be on the street about an hour each morning.

Q. When was it that this accident happened? A. About quarter past nine; I am not sure, but about that time.

Q. What time did you get to work? A. About eight o'clock.

THOMAS KANE, sworn in behalf of the plaintiff.

Direct examination by Mr. Schneider:

Q. How long have you lived in Newark? A. Fifteen years.

Q. Were you employed on this job at that time? A. Yes, sir.

Q. By whom? A. Starrett Brothers.

Q. What was your job? A. On the street, hoist, outside, putting bricks on.

Q. Did you know Patrick Corbett personally before this accident happened? A. I knew him by sight, but I didn't know his name.

Q. Do you know Mr. Thomas and Mr. Murphy? A. I knew Mr. Murphy, but I didn't know his name. That is the first time I saw him around there.

Q. Did you see this board fall? A. Yes, sir.

Q. Were you there when the board fell? A. Yes, sir.

Q. What did you see? A. See the board fall down through the platform and striking the bridge, and coming right down the opening, right down in the cellar. The bridge that was over the sidewalk.

Q. Did you see this board fall? A. Yes, sir.

Q. From what story did it fall? A. From the second story.

Q. And where did it fall? A. It came right down into the bridge that was over the sidewalk.

Q. Where did it fall, into what? A. Struck the corner of the bridge and right down into the cellar.

Q. Did you go over to see? A. Yes, sir.

Q. What did you see? A. I saw the two men down in the cellar and I saw one fellow picking up the other fellow.

Q. Who was the fellow being picked up? A. I didn't know then. I was called to hoist my bricks.

Q. Who was the man that was being picked up? A. I heard afterwards it was Mr. Corbett who was picked up.

Q. Was it Mr. Corbett? A. Yes, sir.

Q. Who was picking him up? A. I don't know.

Q. One of the men who was on the witness-stand today? A. Yes, sir.

Q. Was he Mr. Thomas? A. Yes, sir.

Q. Where did this board fall from—you say the second story? A. Yes, sir.

Q. Who was up there on the second floor? A. Starrett's men was taking some planks upon the second floor where they were working.

Q. What were Starrett's men doing there? A. Some were scaffolding.

Q. Did you notice who was nailing it? A. Starrett's men were up on this floor and they were taking planks to the window and this plank fell through the window.

By the Court:

Q. Repeat what you said. A. Starrett's men were taking up the planks from the——

By Mr. Schneider:

Q. Talk slowly. Who was nailing this board that fell down? A. Starrett's men.

Q. How many men were there up there? A. There were nine or ten men there.

Q. And then what were they doing, what kind of work? A. They were taking these planks and putting them up in the other floor for scaffolding.

Q. They were taking the planks from that floor and putting them on the other floor for scaffolding? A. Yes, sir.

Q. You say you were called away. What were you called away by after? A. I was called away to hoist the brick.

Q. Who called you? A. The engineer.

Q. What did he say? A. He said, "Come on and put the bricks on."

Q. When you came back did you see Mr. Corbett take them away? A. When I came back I seen this other fellow picking him up.

Q. How much space was there where this board fell down? A. About six feet.

Q. What was over the sidewalk? A. A bridge, like the bridge over the sidewalk. No one was allowed to come up the sidewalk.

Q. What street was that? A. Cedar street.

Adjourned until tomorrow, Thursday, December 15, 1927, at ten o'clock A. M.

Second Day.

Thursday, December 15, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

Thomas Kane recalled in behalf of plaintiff.

Cross-examination by Mr. Smith:

Q. You say you were working for Starrett? A. Yes, sir.

Q. What position? A. On the street hoist.

Q. Where was it? A. On Cedar street.

Q. How far from Broad street? A. About sixty or seventy feet.

Q. On Halsey street? A. Yes, sir.

Q. How close to the curb of Cedar street was it, out on the street or on the sidewalk? A. On the sidewalk.

Q. How wide is the sidewalk on Cedar street from the buildings to the curb, how wide is it? A. About five feet.

Q. You know what a sidewalk is? A. Yes.

Q. You know where the sidewalk was on Cedar street alongside of the building? A. Yes, sir.

Q. How wide was the sidewalk? A. About five feet.

Q. The sidewalk was only five feet wide? A. Five or six feet.

Q. You are sure of that, are you? A. I am not positive.

Q. Just where was your hoist, was it on the sidewalk where you were? A. It was right on the sidewalk.

Q. And were you right alongside of it? A. Yes, sir; I was alongside of it.

Q. How near to you was it? A. About from me to you.

Q. About eleven feet? A. Yes, sir.

Q. Is that where you were, alongside of the hoist on the street or the sidewalk? A. The stuff was piled on the sidewalk.

Q. And you were where this stuff was? A. Yes, sir.

Q. And you were standing there at the time you looked up, were you? A. Yes, sir.

Q. How close were you standing to the building? A. About ten feet away from the building.

Q. That is where you were standing? A. Yes, sir.

Q. And standing there you say you looked on? A. Yes, sir.

Q. You say they had a scaffold there? A. Yes, sir.

Q. What kind of a scaffold? A. That is plank, from what they make these scaffolds.

Q. Where was it? A. Alongside of the building.

Q. And all one scaffold was it? A. No, it was just inside.

Q. How long did it extend along the building? A. Right on along.

Q. And you say they had planks on it, did they? A. Yes, sir.

Q. Did you see planks? A. Yes, sir.

Q. How was that scaffold, was it made of wood? A. Yes, sir.

Q. The whole scaffold was wood? A. Yes, sir.

Q. Just the ordinary scaffold you see men working on? A. Yes, sir.

Q. How is it raised and lowered, by ropes? A. No, they had a pulley, jacked it up, worked up and down.

Q. It was a patent scaffold? A. Yes, sir.

Q. And they pulled it up and down? A. Yes, sir.

Q. Can you tell me how it was constructed—by brackets? A. Yes, sir.

Q. And the planks were placed on the brackets? A. Yes, sir.

Q. What size planks were used on that scaffold? A. About ten or fifteen feet long.

Q. And how thick? A. About five or six inches thick.

Q. And how wide? A. About eleven inches.

Q. About eleven inches wide, five or six inches thick and ten or fifteen feet long, is that it? A. Yes, sir.

Q. You worked on Saturdays? A. Yes, sir.

Q. And you were discharged, were you not? A. Yes, sir.

Q. When were you discharged? A. When the building was finished.

Q. Is that all? A. Yes, sir.

Q. Weren't there other men working there after you left there, for Starrett? A. Yes, sir.

Q. Doing the same kind of work? A. Yes, sir.

Q. And you know Mr. DeKenip? A. He was our time clerk.

Q. At that time? A. Yes, sir.

Q. And after the happening of this accident you talked to Mr. DeKenip, didn't you? A. Yes, sir.

Q. And you told him at that time you didn't see this accident? A. I told him what I am telling in court today.

Q. Did you tell him at that time that you didn't see this accident? A. I told him what I am telling in court today.

The Court: One minute. Answer that question.

Witness: I told him I did.

Q. You told him you did see the accident? A. Yes, sir.

Q. Who was working with you? A. I was putting up some stuff. I was down there in the street alone.

Q. Was there anybody with you? A. No, sir.

Q. And wasn't there a man named Terrence Moriarity there? A. No, he was upstairs putting up some lentils.

Q. Could you see him? A. No, sir.

Q. You don't know what he was doing? A. No.

Q. Would you say he was putting something up to the second floor? A. Yes, sir.

Q. When was it Mr. DeKenip came to see you, how soon after the accident? A. In the evening.

Q. And you were standing by the hoist? A. I was at the hoist.

Q. Where was the hoist, inside the building? A. Outside the building.

Q. And you got out of the hoist? A. Yes, sir.

Q. And the hoist ran up the side of the building? A. Yes, sir.

Q. And how high would the hoist run? A. To the top of the building.

Q. And you said you were sending something up to the second floor? A. Third floor.

Q. From what other floor? A. From the street.

Q. What were you sending up? A. Face brick.

Q. You put those on this little hoist and the engine ran it up? A. Yes, sir.

Q. And while you were standing there, you say, about ten feet from the building line; is that right? A. Yes, sir.

Q. You were then looking up? A. Yes, sir.

Q. Where was this plank when you first saw it?

A. It was taken down from the inside, the third window. The scaffold was inside——

Q. Did you see anybody have hold of it? A. Yes, sir, there was three or four men.

Q. Whom? A. I didn't know his name.

Q. You don't know their names at all? A. No, sir.

Q. But you saw them have hold of it? A. Yes, sir.

Q. How many had hold of it? A. There were two or three men there, shoving planks toward this window.

Q. Who had hold of this plank? A. One man that I could see.

Q. Who was it? A. I don't know.

Q. What did he look like? A. Just in working clothes; I couldn't tell one from the other; they are dressed alike.

Q. You don't know who he was? A. No, sir.

By the Court:

Q. What were they doing with the planks? A. They were taking these planks away from the third window where they had a scaffold inside.

By Mr. Smith:

Q. You mean to say they had a scaffold inside the building? A. Yes, sir, around this window and they were taking these planks off. They was finishing off.

Q. What were they planking off around the windows? A. Finishing the brick work inside.

Q. Could you see it? A. I was up there every other day.

Q. Were the bricks up? A. They had finished and the scaffold was left there and they were taking it away.

Q. Where was the plank when you first saw it? A. When I first saw it I saw it coming right out

through the window, hitting on the side of the platform and came down between the opening.

Q. When you first saw the plank it was falling? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. In what position was it falling, was it coming out of the window or below the window? A. It was coming out of the window like that.

Q. And fell right down? A. Yes, sir.

Q. Where was the man that had hold of it? A. He was inside.

Q. Did you see him have hold of it? A. No, sir.

Q. All you saw was a plank coming out of the window. A. Yes, sir.

Q. That is all you saw—you are sure now? A. I saw that.

Q. You didn't see him have hold of it? A. No.

By the Court:

Q. After the plank came through the window what happened then to the plank? A. It struck on the edge of this bridge and went down in this opening, right down to the sidewalk.

By Mr. Smith:

Q. As I understand you, the first you saw this plank it was coming out of the window falling and you saw it fall down and hit the bridge, as you call it, and went down between the bridge and the building? A. Yes, sir.

Q. This bridge, as I understand you, there are some uprights that run from the outside of the sidewalk up and on top of them are laid planks? A. Yes, sir.

Q. That is what you call the bridge? A. Yes, sir.

Q. How wide from the building line, towards the curb, how wide was this bridge? A. About eight or nine feet, I think.

Q. If we take this wall, the wall of the building from your same position that we did from the building this way, the edge of the sidewalk, and across from that was some planks that ran, we will say, within two feet of the wall? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. And the bridge itself was about eight or ten feet wide? A. It took over the whole sidewalk.

Q. You are sure of that? A. Yes, sir.

Q. How close to the boards on top of the bridge comes the wall? A. About half a foot.

Q. As I understand you, the whole sidewalk, we will call it, from the outside nine or ten feet, up to within half a foot of the wall, was covered by this bridge? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. The sidewalk was cut off altogether and this plank that you saw come out of the window or fell down, it struck the side of the bridge next to the wall, is that right? A. Yes, sir.

Q. And then slid down between the bridge and the wall? A. No, sir, it struck on the outside of the bridge and went right down on the outside on the street. There was an opening of about four feet.

Q. It struck the side of the bridge toward the street? A. Yes, sir.

Q. (Illustrating.) Here is the window, you are here, and the bridge comes out about ten feet, and this board came out of the window, and struck the side of the bridge toward the street and went down in the opening? A. Yes, sir.

Q. How wide or long was the opening from the wall to the sidewalk? A. It was opened up right along the length of the building.

Q. How wide was it? A. About three feet.

Q. You were standing on the sidewalk, you were under this bridge? A. No, I was away from the bridge.

Q. Towards the street? A. Yes, sir.

Q. As I understand you, you were not standing eight feet from the wall, but you were fifteen feet from the bridge out in the street. is that right? A. No, sir, I stood this way and I stepped away.

Q. Where was the machine, away from the bridge? A. No, the machine was here and our stuff was in the street.

Q. And you were out there watching your stuff as it went up? A. Yes, sir.

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

Q. You are sure, are you? A. Yes, sir.

Q. As far as you know now, you didn't see anybody handling that plank at all—yes or no—that plank, you didn't see anybody have hold of? A. There might be men inside taking hold of the plank.

Mr. Schneider: I object to that as repetition.

The Court: Sustained.

Re-direct examination by Mr. Schneider:

Q. How high was this platform that was on this sidewalk? A. Well, as near as I can get to it, about eight feet.

Q. Was that where the sidewalk would be? A. Yes, sir.

Q. And where was you operating, where was your work? A. I was right on the street.

Q. I didn't quite understand what there was in the street that you were near. You spoke of several piles. Where was that? A. On the hoist.

Q. Was that on the street? A. It was on the sidewalk; the sidewalk was cut off.

Q. Did you see the men on the inside of the window, could you see them? A. Yes, I could see them.

Q. What is that? A. Yes, sir.

Q. And whose men were they?

Mr. Smith: I object unless he identifies the men.

A. Starrett's men.

Mr. Smith: I object to that as a conclusion.

Q. For whom were these men working that were on the inside of the window? A. The Starrett men.

Q. What were these men doing? A. They were scaffold men; they were taking the planks away from the window.

Q. And were they taking them anywhere? A. Sending them up to the other floor.

Q. What were they doing on the other floor? A. Building scaffolds for the bricklayers.

Q. Whose men? A. Starrett's.

Q. What else were they doing except building scaffolds? A. The bricklayers were working there.

Q. Whose men were they? A. Starrett Brothers.

Q. And who was doing the brick work on the building? A. Starrett Brothers.

By the Court:

Q. And what was the size of this plank that you saw fall down? A. About nine feet long, as near as I could guess.

Q. How wide was it? A. About six inches wide.

Q. How thick was it? A. About that (indicating).

Q. You are indicating about two inches? A. I didn't measure it. About two inches or, say, two and a half.

Q. The plank was about nine feet long, six inches wide and to two and a half inches thick? A. Yes, as near as I can tell you.

Q. Did you see that plank afterwards? A. No, sir.

Q. And you saw it falling, didn't you? A. Yes, sir.

Q. You gave those measurements just from what you saw, as you saw it falling down the pit? A. Yes, sir.

By Mr. Smith:

Q. You said to this jury a minute ago that this plank was five or six inches thick——

Objected to.

The Court: That was not the question. The question was the length and dimensions of this plank.

By Mr. Smith:

Q. Are you speaking about the plank that fell when the court asked the question? A. Yes, sir.

Q. Did you testify a little while ago that the plank which fell was four or five inches thick?

The Court: He did not so testify. He told you they were ten or eleven feet long, five or six inches thick and about six or seven inches wide.

Q. I thought I was questioning you about the plank that fell? A. No.

Q. Are you saying that the plank that fell was different than the plank which you saw on the scaffolding? A. Certainly.

Q. So what you are saying now is that the plank that fell was not the same as the plank that you saw on the scaffold? A. No, sir.

Q. Am I right now? A. You are right.

By Mr. Schneider:

Q. We are talking about planks and scaffolds—if you don't know say so, don't guess. Did they have a guard rail on the side? A. The big scaffold had, but this had no guard rail inside.

Q. What is that? A. This was inside and there was no guard rail at all, just plain.

Q. And you are telling us the dimensions of those boards as best you can? A. Yes, sir.

Q. Were there scaffolds around there about that time that had been used on the outside, too? A. Yes, sir.

Q. And had Starrett's men been using those scaffolds on the outside? A. Yes.

Q. I don't mean that very day. I mean, days before that, on days before that, had they been using scaffolds on the outside? A. Yes, sir.

Mr. Smith: I object to what they had been doing other days.

Mr. Schneider: Here is a board and it has been testified as to its presence on the inside there. It does not make any difference whether it was used on that particular scaffold or not. It may have been, shortly before that time, on the general situation of the thing, used for some other purpose. If

that board had been used, if we can prove it, by Starrett's men, and it was caused to fall down by the negligence of Starrett's men, that would make our case.

The Court: That is absolutely so, the use to which that plank had been put on some other occasions would make no difference. It appeared there were several contractors on this building and Starrett's men never had anything to do with this scaffold or the boards composing the scaffold, and yet, as you have suggested, if they were moving it and the board fell because of their negligence, that is all that is necessary.

Q. On scaffolds that were used on the outside were guard rails used? A. Yes, sir.

Q. Had Starrett's men shortly before this day, when this accident occurred, did they use scaffolds on the outside or on that floor? A. No, sir.

Mr. Schneider: I object.

The Court: Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

By the Court:

Q. I am not quite sure that I understand or the jury can understand from your testimony, or from any testimony in the case, just what the situation was outside of this building. Had you been down in the cellar at all? A. I had been down a couple of times in the summer.

By Mr, Smith:

Q. There was a subcellar? A. Yes, sir.

Q. And above that was the regular cellar? A. Yes, sir.

Q. The sidewalk had been entirely taken away? A. Entirely taken away, cut off altogether.

Q. Had it been excavated under the sidewalk, had it been dug out under the sidewalk? A. Yes, sir.

Q. Was there a covering where the sidewalk formerly was? A. Yes, sir.

Q. How high above the street was that covering over where the sidewalk had originally been. A. The bridge.

Q. Is that what you call the bridge? A. Yes, sir; about eight feet.

Q. So down where the sidewalk formerly was there was no covering? A. There was; half the sidewalk was cut off, you see, underneath the bridge.

Q. Had it been entirely excavated under the entire sidewalk? A. No, sir.

Q. How much of the sidewalk had been excavated? A. About half of it.

Q. Was there anything over that excavation at the level of the street? A. No, sir.

Q. Nothing there at all? A. No, sir.

Q. Or where the excavation was there was nothing until you got above the street level; is that right? A. Yes, sir.

Q. And there was there what you call the bridge? A. Yes, sir.

Q. And that bridge was how wide? A. About eight or nine feet wide.

Q. How close did it come to the building, the construction work of the building? A. Within about half a foot.

Q. Of what kind of planks was that composed? A. About seven or eight inches thick.

Q. How wide. A. About eight or nine inches wide.

Q. How long were they? A. About ten or fifteen feet long and they had to cut——

Q. Are you talking about the uprights that hold the bridge up there or the planks that were laid across? A. The planks that were laid over.

Q. What held those planks up? A. Posts.

Q. Was it all open under the bridge? A. Yes, they had it built up and then planks across.

Q. Was it all open under the planks? A. Yes, sir.

Q. Was there anything above the bridge? A. No.

Q. Where was the scaffold? A. The scaffolding was alongside of the building.

Q. Wasn't that above the bridge? A. Yes, sir.

Q. About what story was the scaffold? A. About the fourth story.

Q. What was that made of? A. Planks.

Q. What was the size of those planks? A. I don't know—five or six inches thick and ten or fifteen feet long.

Q. How wide? A. About eight or nine inches wide.

Q. Was there anything above that scaffold on the outside of the building? A. It had a cover on top for fear anything might drop.

Q. Was that canvas or wood? A. Planks.

Q. That was a movable scaffold? A. Yes, sir.

Q. Was there anything above that scaffold? A. No, sir.

Cross-examination by Mr. Bishop:

Q. Was there any difference between the plank used on the outside of the building and the kind used on the inside of the building? A. Yes, sir.

Q. What kind of planks were used on the scaffold inside the building? A. The same kind as the outside.

Q. How wide were those planks? A. About eight or nine inches wide.

Q. And how thick? A. About five or six inches thick.

Q. How long? A. Ten or fifteen feet long.

By the Court:

Q. Then the plank that fell was different from the plank that holds those scaffolds on the inside of the building, was it? A. Yes, sir.

Q. Have you seen any such planks around there as the one fell? A. The floorman was there——

Q. (Question read.) A. Yes, sir.

Q. What were they being used for? A. The floorman was there and they were putting in the forms to put the concrete in, and there was three or four different contractors there.

Q. (By Mr. Smith.) These men inside were using the same thing, weren't they? A. Yes, sir.

Q. When I say these men inside, you speak of the floormen, don't you? A. There was floormen; there were three or four contractors in there.

Q. Whom did you see inside there using this same sort of plank? A. The floor man was there and there was plasterers there.

Q. And they were using the same kind of planks? A. They were using different kinds of stuff.

Q. You told the court you had seen the same kind of stuff being used inside. A. Yes, sir.

Q. And they had been used by the floormen? A. Different kind of men.

Q. And carpenters? A. Yes, sir.

Q. And who else? A. Plasterers were there.

Q. The floormen, the carpenters, the plasterers? A. Yes, sir.

Q. Who were the floormen? A. Peterson's.

Q. And who was doing the plastering work? A. McEvoy.

By Mr. Bishop:

Q. Who was doing the carpenter work? A. I don't know.

Q. Bricklayers were working there, too? A. Yes, sir.

Q. Whose men were they? A. Starrett Brothers.

Q. Any other contractors working there? A. Not as I know of.

Q. Iron workers? A. Yes, sir, iron workers.

Q. And who was doing the iron work, do you know? A. I don't know.

Q. There were plumbers there, too, weren't there? A. Yes, sir.

Q. Do you know who was doing the plumbing work? A. No, sir.

Q. And there were some electricians there? A. Yes, sir.

Q. Did you know who was doing that work? A. I don't know.

Q. There were some steamfitters there? A. Yes, sir.

Q. Painters? A. Yes, there were painters there, too.

Q. The painters used scaffolds, too, didn't they? A. Yes, sir.

Q. Any other men working there? A. That is all I can think of.

By Mr. Schneider:

Q. Talking about all these men, who were the men who were at that window at the time the board fell? A. Starrett Brothers.

Q. How do you know they were Starrett's men —tell us. A. I was up on the floor in the morning and I saw them taking planks away from there and asked them what they were doing and they said they were putting them up on the other floor.

Q. Could you see them from downstairs? A. Yes, sir.

Q. How do you know they were Starrett's men? A. I knew them by sight.

Q. When had you seen them when you knew them by sight? A. I saw them that morning.

Q. When were you paid by Starrett, what day of the week? A. Saturday.

Q. Who paid you? A. The paymaster.

Q. Were any of those men paid when you were paid? A. Yes, sir.

Q. By whom? A. By the paymaster.

Q. Whose paymaster? A. Starrett's paymaster.

Q. How were you paid when you were paid off? A. We had to check our number in and give it to the paymaster.

Q. What sort of a check was that? A. A brass check.

Q. Was there anything on that check? A. Our number.

Q. When you were paid off did you see these men paid off? A. Yes, sir.

Q. And did they have these same kind of checks? A. Yes, sir.

Q. Whom were they paid by? A. Starrett Brothers.

By Mr. Smith:

Q. There is not one of these men that you say you saw at the window that time that you can identify, you don't know one man? A. I don't know their names, but I know them by sight.

Q. At the time this plank fell you didn't see any men there? A. They were inside taking planks away from the window.

Q. But you didn't see them? A. I saw them there.

Q. You saw them in the morning when you started in on the building? A. Yes, sir.

Q. But you didn't see them when this plank fell? A. Yes, sir.

Q. But you saw nobody have hold of it? A. No, because they were inside pulling planks away.

Q. You couldn't see them? A. Yes, sir, I saw them.

Q. You saw some men inside pulling planks away? A. Yes, sir.

Q. Was the wall up? A. Yes, sir.

Q. How wide was the brick wall? A. Up to the fourth floor; they were raising these planks up to the fourth floor.

Q. Where were these men, on the second or third floor? A. On the third floor.

Q. When you went downstairs on the street? A. Yes, sir.

Q. Where were the men standing, on the floor or standing on the scaffold? A. Standing on the floor inside of the window.

Q. How high was the scaffold above the floor? A. Just where they could reach it.

Q. And you saw them pull them down? A. Yes, sir.

Q. At the time the plank fell you saw nobody have hold of it? A. No, sir; they was inside of the window at the same time.

Ambrose F. Dowd, sworn in behalf of the plaintiff.

Direct examination by Mr. Schneider:

Q. You are a practicing physician in this county? A. I am.

Q. How long have you been practicing here? A. Seventeen years.

Q. And a graduate of what? A. University of Vermont.

Q. Medical college there? A. Yes, sir.

Q. What institutions are you connected with at the present time? A. I am connected with St. James Hospital, St. Michael's Hospital, the Irvington General Hospital, Bethany Home Hospital, the New Jersey Department of Labor and the New Jersey Rehabilitation Committee, and the State Board of Control.

Q. Did you treat Mr. Patrick Corbett? A. I examined him for the purpose of advising treatments on May 7, 1927.

Q. Have you specialized in any branch of surgery and medicine? A. Yes, sir, mental and nervous disease.

Q. Does that include the head and the brain? A. Yes, sir.

Q. Who sent Mr. Corbett to you? A. Dr. McCabe.

Q. Tell the court and jury what you found? A. On May 7, 1927, Mr. Patrick Corbett came to my office and I obtained his family history, past personal history, and the complaints which he then set up as a reason for his presence in my office. I examined him to determine the presence or absence of any nervous or mental condition. I found him to be depressed, acting sluggish in his ways, tremulous, his eyelids were tremulous, his

tongue and lips were tremulous, his station and gait were unsteady and found in the left eye that it was conspicuously defective.

Q. Will you tell us the history you got? A. Yes, sir.

Mr. Smith: I would like to question him on that.

The Court: You may.

By Mr. Smith:

Q. You didn't treat this man, did you? A. I advised treatment as the result of this examination. This is the first time that I saw him.

Q. But you never treated him? A. I don't know whether he followed my advice or not. I advised treatments.

Q. Before the day on which you had made this examination you had never seen him? A. Never before.

Q. From the day that you either made this examination or upon the day when you made this examination did you see him? A. Yes, subsequently thereto I saw him and examined him in my office.

Q. Did you give him any treatments? A. Advised treatments again. I administered no treatment in my office, if that is what you mean.

Q. You gave advice? A. Yes, sir.

By Mr. Schneider:

Q. Will you give us the history. A. Mr. Corbett said that he was entirely well until July 29, 1926, and that while at work on that date something fell about three stories and hit him on his head, knocked him to his knees, he arose, started to fall again, but was supported

and taken upstairs by a foreman. A physician was summoned, who administered first aid. An ambulance then removed him to St. James Hospital where he remained for one week. He has not worked since the date of the accident. He was not unconscious, but he was dazed. The day following the accident he expectorated blood and continued to do so for three or four days, his nose bled, and continued to do so intermittently. He complained of vertigo, that is, dizziness, which he says was present all the time; that sometimes it was so intense he could not maintain an upright posture and that he vomited frequently, and severe headaches every ten days of two or three hours duration.

Q. You examined him? A. Yes, sir.

Q. What was your diagnosis? A. My diagnosis was that he was suffering from a disability subsequent and incident to a concussion of the brain.

Q. Just what was his condition medically, what was the matter with him? A. He was suffering from the result of an injury to his brain, the concussion of the brain.

Q. What was the condition of the brain at that time, that you could determine from the history? A. The general tremulousness, the unsteadiness of gait and state of defective vision in the left eye, and his lack of initiative, lack of spontaneity, and his depression.

Q. What did you advise him? A. I advised rest and a change of environment and advised him to do whatever little occupation he could do at that time.

Q. When did you see him again? A. On the 24th of May.

Q. Did you examine him then? A. Yes.

Q. What was his condition then? A. The same objective findings were intensified, they were as marked then on the the 7th of May.

Q. And you mean just what by objective symptoms? A. What I saw when I examined the man.

Q. What did you find? A. Tremulousness and unsteadiness of gait, lack of initiative.

Q. What was the probable cause of those symptoms? A. The injury he had in July, 1926.

Q. Where was the seat of the injury? A. The head.

Q. What part of the head? A. The contents of the skull, the brain.

Q. Was it worse or better or the same on the second examination? A. It was worse.

Q. To what extent? A. That the objective findings had been severely intensified at that time.

Q. You mean the things that you saw were more apparent? A. More apparent.

Q. And did you advise him again? A. The same advice.

Q. When did you see him again? A. June 28, 1927.

Q. Did you examine him then? A. Yes, sir.

Q. What did you find? A. The same as on May 24, 1927.

Q. Was he better or worse? A. He was the same as on that day, on that examination.

Q. How about the objective findings? A. They were substantially the same.

Q. When did you examine him again? A. On September 17, 1927.

Q. What were your findings then? A. To the other objective findings there was a conspicuous loss of weight. I didn't weigh him but he was obviously much thinner than he was before.

Q. You could see that? A. Yes, you could see that, it was very plain, and his nervousness was

very much more marked, he was much more disturbed and much more apprehensive and at that time he was perspiring very freely, his hands and under his arms, and his feet were very, very wet from perspiration on that date.

Q. What was the cause of that? A. His general nervousness, general cause of instability.

Q. What was his condition on that day? A. Worse. Worse than any time I had seen him. He was unable to do anything on that date, he was incapacitated.

Q. Did you see him again after that? A. No, that was the last examination.

Q. When you last saw him, I am basing your answer on the history of the case and your examination and the objective and subjective symptoms, what would be your prognosis—in other words, what would you say would be the outcome of the case? A. I don't think, in view of the long standing illness, that it is safe to offer favorable prognosis. He may do well—he has in front of him a rather long standing disability. He may not recover at all.

Q. Is that the best answer you can give? A. That is the best answer to that.

By the Court:

Q. How can you express that in percentage? A. The possibilities are that he will never get well. He might show some improvement over his present condition, but complete recovery, I think is out of the question.

By Mr. Schneider:

Q. And if he does get somewhat better will that take a long or short time? A. A long time, in all probability.

Q. Would you express that in terms? A. In terms of a year or two.

Q. Is that the best answer you can give? A. Yes, sir; that is the best answer I can give.

Q. Can't give a better answer? A. I can't. I don't know whether anybody else can.

By the Court:

Q. What do you say as to the probability of his improvement so as to be able to engage in some occupation? A. I think perhaps in a year or a year and a half, approximately that time, he may show some improvement and he may engage in some like occupation.

By Mr. Schneider:

Q. You mean manual or clerk? A. There are all degrees of manual labor. Anything that is not too strenuous.

Q. Do you know what his occupation was? A. He told me he was employed in construction work.

Q. Could he go back as general laborer in construction work? A. No, that would be too much for him.

Q. Why? A. Because of this conspicuous nervous disability which he has.

Cross-examination by Mr. Smith:

Q. You say he lost his vision. Did you examine him as to that? A. Yes, sir.

Q. Which eye? A. Left eye.

Q. Do you make a specialty of eye troubles? A. No, sir; I make a specialty of nervous and mental conditions.

Q. So far as the physical condition of the eye was concerned at that time, you don't know ex-

cept that he had loss of vision? A. I demonstrated the loss of vision to my own satisfaction and examined the eye ground.

Q. By demonstrating loss of vision, that is asking him to see? A. Yes, sir.

Q. And you examined him? A. Yes, sir.

Q. And you examined the eyes with an opthalmoscope? A. I examined him with an opthalmoscope.

Q. All these symptoms which you found are all symptoms of nervousness? A. Some people call them nervousness.

Q. They are the classical symptoms of what is known as neuresthenia? A. They occur in neuresthenia and many other conditions.

Cross-examination by Mr. Schneider:

Q. Is Mr. Corbett suffering from neuresthenia? A. No.

Q. What is he suffering from? A. He is suffering from the results of an injury to his brain.

Q. Neuresthenia is just plain ordinary nervousness, isn't it? A. That is all.

Q. While this is a brain injury? A. Yes, sir.

Q. His eye condition is due to this injury? A. I think that it is.

Re-cross-examination by Mr. Smith:

Q. What is the name you give to this trouble? A. It is traumatic encephalitis—in other words, inflammation of the brain subsequent to an injury to the brain.

Q. Inflammation of the brain subsequent to an injury of the brain? A. Yes, right.

Q. Can you tell me, outside of the symptoms which you have given that you saw, that there was any inflammation to the brain? A. The objective phenomena that I demonstrated all alone, subjective phenomena.

Q. What was the objective phenomena? A. Difficulty and uncertainty of situation and gait, which means muscular incoordination.

Q. And is not muscular incoordination one of the number of symptoms of neurestheniа? A. No, sir.

Q. It is not? A. No, sir.

Q. What do you mean by the Romberg test? A. The Romberg test is placing a man in an upright position with his legs together and his toes together and his eyes closed, and if it is positive there is an unsteadiness of his action, he sways in one or more directions, perhaps forward.

Q. In the unsteadiness of gait, isn't that also a symptom of neurestheniа? A. No.

Q. In other words, you don't have unsteadiness of gait in neurestheniа? A. No, not of straight neurestheniс origin.

Q. Might have headaches? A. You might have headaches.

Q. Generally those are a symtom? A. It is a common symptom. It doesn't always exist.

Q. And they may have visual disturbance? A. They might complain of visual dimness. Their eyes get dimmer, but they never complain of loss of unilateral vision in one eye.

By Mr. Schneider:

Q. What is that big Latin word you used? A. Encephalitis. It is traumatic, after injury.

Q. It is traumatic encephalitis? A. Yes, sir.

Thomas Murphy recalled in behalf of defendant.

Direct examination by Mr. Schneider:

Q. At the time of the accident you were employed by Spencer, White & Prentiss? A. Yes, sir.

Q. How long did you stay on that building after the accident? You testified yesterday that you were on that building for two years? A. Yes, sir.

Q. For whom did you work on that building besides Spencer, White & Prentiss? A. Starrett Brothers.

Q. Was that afterwards? A. After the foundation was completed.

By the Court:

Q. Had the foundation been completed at the time of this accident? A. No, sir.

By Mr. Schneider:

Q. So at the time you were still working for Spencer, White & Prentiss? A. Yes.

Q. Before this accident do you know whether different contractors used the boards of other contractors?

Mr. Smith: I object to that. My point is that they are going to show that they all used these boards. It is not simply a question of ownership in a case of this kind. It is on the subject of control.

(Question read.)

The Court: Answer that yes or no.

The Court: You do know?

Witness: Yes.

Q. Did they use boards of different contractors?

Mr. Smith: I object on the same ground.

The Court: The question may be answered.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. Did they? A. Yes, sir.

Q. This board that you took up to the office, that was shown to you by Mr. Thomas? A. Thomas gave me the board.

Q. Before this accident was Starrett Brothers using scaffolds on this building? A. Yes, they had to use scaffolds.

Q. Will you describe the construction of the scaffolds, how they look, how they are made up.

By the Court:

Q. Were they all one kind of scaffold or was there just one scaffold? A. As far as I know, scaffolds are in sections, they are not continuous, sections, different lengths.

Q. The reason for that question is that there is some testimony about scaffolds being inside the building. Do you remember that? A. Inside of the building I couldn't say.

Q. You don't know anything about it? A. No, sir.

Q. So you can describe a scaffold outside of the building? A. Yes, sir.

By Mr. Schneider:

Q. Will you describe it? A. As near as I can describe it, a scaffold sets on two inch planking, protected with a seven inch board for a guard rail.

Q. What do you mean by seven-eights, what dimension? A. Seven-eighth boards are put the same, seven-eighths to six inches.

By the Court:

Q. That was on the scaffold outside of the building? A. I am speaking outside, yes, sir.

By Mr. Schneider:

Q. And these you say were guard rails? A. That is what we call them on construction work, to protect a man from falling off the scaffold.

Q. That board that you picked up there in the cellar were not boards used as guard rails? A. They are used, yes, seven-eighth boards.

Cross-examination by Mr. Smith:

Q. You didn't see any guard rail on this scaffold this day, did you? A. I wouldn't say on that particular day.

Q. You didn't see any guard rail on this scaffold at any time? A. Yes, sir.

Q. When? A. Always. While there is a scaffold up there is bound to be a guard rail.

Q. When did you see this scaffold? A. While the building was going on.

Q. When? A. All the time I was there for the two years or so, while I was on the building.

Q. All the time, two and a half years, you were there, you saw a guard rail on the scaffold? A. Yes, when the bricklayers started to lay the bricks.

Q. Did it take them two years to lay the bricks? A. I am speaking about the foundation.

Q. You made the foundation? A. Yes, sir.

Q. The scaffold was for laying the bricks? A. Yes, sir.

Q. Did the bricks start from the foundation and go up? A. All the time, yes, sir.

Q. And you say all the time you saw the scaffold you saw a guard rail on it? A. Yes, sir.

Q. How long was the scaffold? A. The scaffolds are in sections. I couldn't exactly explain whether they are six or eight or ten inches.

Q. And you say they lay the bricks in tiers, even? A. Mostly, yes, sir.

Q. You say you saw that rail? A. Yes, sir.

Q. Was it on the outside? A. On the outside of your scaffold, the both ends.

Q. You mean both ends and on the side toward the street? A. The street side, yes, sir.

Q. How high were those boards? A. I don't imagine a scaffold goes more than three or four feet high.

Q. You mean the guard rails were three or four feet wide? A. Yes, sir, there is a long post that goes alongside. How long the scaffold is——

Q. From the floor of the scaffold, how high would these guard rails run, roughly? A. Four feet. (Illustrating.) This would be a scaffold and there would be seven-eighth inch boards nailed to protect the men from falling off.

By the Court:

Q. Did you know where this scaffold was up, what floor at the time this accident happened? A. No, sir.

PLAINTIFF RESTS.

Mr. Bishop: On behalf of the defendant, George Peterson Company, I move for a non-suit.

The Court: Is there any objection to that?

Mr. Schneider: It is not exactly an objection. Your Honor is familiar with the old

rule of putting the defendant to his proof.

The Court: I do not think that applies to a case unless there is some proof against that particular defendant. There is no proof at all against Peterson.

Mr. Schneider: I don't know whether there is anything at the present time to make a *prima facie* case, but there is enough in the proofs generally so I can appeal to your Honor's discretion to hold this defendant in so that we can get the benefit of all evidence on both sides, then your Honor may act on this motion.

The Court: I think the non-suit must be granted.

———

MICHAEL DEKENIP, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. At the time of this accident you were employed by Starrett Brothers? A. Yes, sir.

Q. What was your position? A. Time checker and material checker.

Q. At the time or shortly thereafter did you see this Mr. Kane who was on the witness-stand? A. I did.

Q. Did you have a talk with him? A. I did.

Q. Did you ask him whether or not he knew anything about this accident? A. I did.

Q. What did he say to you? A. He did not see it.

Q. Where was that? A. Down at the hod hoist on the street. He was employed as a mason's laborer, loading brick, together with four or five other men who always stood on the street loading

the hoist. After the sixth man, who was always on it on the ground floor, the hoist would go up and there would be another relieving gang upstairs. After the accident I went over to see it, we were interested, I knew a man had been struck, and coming down the street with Mr. Murphy, and I spoke to several about it and nobody seemed to know anything about it.

Q. Mr. Kane testified that he had a check and went to the office, as I understood, to get his money. How were they paid on the job. A. I checked them out.

Mr. Schneider: Mr. Kane didn't say anything about the office.

The Court: This witness is asked what their practice was and how they paid the men.

Witness: The men drew two checks on a Saturday morning, the brass check is a pay check which every man must have on the job to get the money. The armored service brings the money and I check them and either Mr. Henderson or myself accompany the men throughout the entire job whether they be on the scaffold or wherever they are, on the street, they are paid on the spot, before twelve o'clock.

By the Court:

Q. Every Saturday? A. Yes, sir.

By Mr. Smith:

Q. What checks do they show when they are paid? A. They surrender their aluminum checks to us. We go along for the purpose of identification so there would be no confusion among the

Armoured Service. They call out their number and name and the armored man checks it before the armoured man would turn over the envelope.

Q. I suppose the metal check they retain at all times, the brass check? A. That is turned in at the end of the day.

Q. Every night? A. Yes, sir, it is taken up and thrown in a box every night.

Q. But the aluminum check is only given to them on pay day? A. That is right.

Cross-examination by Mr. Schneider:

Q. Whom do you work for now? A. Starrett Brothers.

Q. How long have you been working for them? A. A year and a half.

Q. Before the accident? A. No, sir, I went in their employ sometime in July, the fifth of July, I started in New York the 27th of July, working on the Plaut store.

Q. So you were on that job two days before the accident happened? A. The third day.

Q. What day of the week did the accident happen? A. I couldn't tell you that.

Q. What job had you been on before? A. Sixty-fourth street and Lexington avenue.

Q. You made an investigation of this matter? A. Yes, sir.

Q. Did you take any statements? A. I don't remember whether I took one for Mr. Murphy or not.

Q. Did you take any statements? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. Please try to search your memory as hard as you can. A. I have tried ever since the trial went on, but I can't remember.

Q. You can't remember whether you took one or more statements? A. No, sir. I know I interviewed several men, including Mr. Thomas and Mr. Murphy.

Q. Took statements from them? A. I even spoke to Mr. Corbett.

Q. Took statements from them? A. No, sir.

Q. You interviewed Mr. Corbett? A. Yes, sir.

Q. When did you interview Mr. Corbett? A. At the time of the accident when we got up to the Spencer White & Prentiss time shanty, which was located on Cedar street, and I asked him for his name and address, got his name and address.

Q. At that time you were Starrett's man? A. Yes, sir.

Q. And you investigated this case? A. Yes, sir.

Q. Who else did you interview besides Corbett and Murphy and Kane? You said you interviewed Mr. Murphy, Mr. Corbett and Mr. Thomas, and Mr. Kane? A. Yes, sir.

Q. Did you interview anybody else?

Mr. Smith: I object to that as not cross-examination.

Objection sustained.

CHARLES F. BAKER, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. Are you a practicing physician in the City of Newark? A. Yes, sir.

Mr. Schneider: I will admit the Doctor's qualifications.

Q. You make a specialty of Roentgenology? A. Yes, sir.

Q. I show you picture L128, you have seen that before? A. Yes, sir.

Q. Will you tell me whether or not there is any evidence on that picture of any fracture of the skull, particularly I want to know whether there was little pencil checks, whether there is any indication of any fracture of the skull at those points? A. No, sir, I don't know.

Q. Will you tell us how you arrive at that conclusion? A. I see no evidence of any fracture lines, any depression, any thickening of the bones of the skull which is evidence of an old fracture or any of the signs which would indicate that there might be a fracture.

Q. When did you examine that plate last? A. I examined it one day last spring in my office. I couldn't give you the exact date. I marked my report as being taken on the 14th of January.

Q. Did you examine them to see whether or not they showed any evidence of any cracks of any kind? A. No, sir.

By the Court:

Q. L.128 is a lateral view? A. Yes, sir, and we generally mark them L for lateral and right for right. I assume this was a lateral view, meaning the left side, which was the point.

By Mr. Smith:

Q. At the point where the pencil mark is what do you call that? A. It is a normal marking that we can find in any average skull, a diploric groove, which is a groove for the blood vessel.

Q. Look at R127 and tell me where you find on that picture any evidence of any crack or fracture of the skull? A. I don't.

Q. And I call your attention particularly to points marked with a pencil check. Will you just point, where it is marked by a check, whether it is a crack, fracture or what? A. In my opinion, it is a diploric groove, such as I described on the other side.

Q. You have also seen that picture before, have you? A. Yes, sir.

Q. I show you Exhibit P-5 and ask you to look at that, plate No. 591, left view. Will you tell me on that if you find any evidence of any crack or fracture of the skull? A. I don't. It shows the same marks as in the other plate.

Q. I call your attention to little pencil marks there. Tell me whether on those points you find any evidence of fracture? A. No, sir.

Q. I show you Exhibit P-4, plate No. 590. A. Right lateral view. This plate shows the same mark that we see in the other set of plates.

Q. And that mark you say is what? A. A diloric groove.

Q. Has that anything to do with fracture? A. No, sir.

Q. Natural thing? A. Yes, sir.

Q. I show you Exhibit P-1 and ask you to examine that and see if that shows any evidence of fracture? A. It does not.

Q. I show you Exhibit P-2 and ask you to examine that and tell me whether or not that shows any evidence of fracture? A. No, sir, it doesn't.

Mr. Smith: I will offer the plates in evidence.

Cross-examination by Mr. Schneider:

Q. You didn't take those plates that you were asked to look at? A. I didn't take any of them.

Q. Were those plates you were asked to look at, Mr. Smith's plates? Do you know who took them? A. Dr. Devlin marked that off.

Q. In examining the plates they always go by the symptoms related by the patient? A. X-ray doctors don't, in order to make diagnosis, we have to see lines or depressions or something.

Q. A general physician and surgeon would know it sometimes? A. Yes, sir.

Q. Vomiting is one of the symptoms? A. Yes, it is not always present. It is always one of the symptoms.

Q. Nose bleeding is a symptom of fracture? A. Yes, sir.

Q. And continued dizziness? A. Yes, there might be if there is an injury to the brain.

Q. And headaches? A. Yes, sir.

Q. And you can have a brain injury without a fractured skull? A. Yes, sir.

Q. You can have the worst kind of a brain injury from concussion without fracture, can't you? A. You are getting in rather deep. I don't see how we can say yes or no to that question.

Q. You can have a very severe injury from concussion without fracture? A. You can have undoubtedly a tearing of the brain, the membrane supporting it, without fracture.

Q. You can have a lesion of the brain without fracture? A. Yes.

Objected.

Objection sustained.

Q. In reading X-rays, the authorities will often disagree, won't they? A. Yes, I guess we will.

Q. And you have often disagreed with other radiographers, haven't you? A. Yes, sir.

The Court: I suppose you ought to state shortly your experience in reading X-rays. Your qualifications have been admitted. State shortly your experience in reading X-rays.

A. I began the X-ray work in 1904 at the City Hospital and was continuously in charge of that branch of that work up there for twenty-three years, resigning last year when I couldn't carry it on on account of other work. During the last few years we made over twenty thousand pictures a year in that institution, and then as hospitals installed a department there I was asked to take charge of that department and I had six or eight hospitals to look after.

By the Court:

Q. What I am trying to get at is your reading of pictures? A. For the last twenty years I think I have seen close to fifty thousand plates a year—perhaps not quite, but almost.

Q. So in twenty years you have read close to one million plates? A. Yes, sir.

By Mr. Smith:

Q. Do you render a report to the physician? A. Yes, sir, I have to render a report on every plate I see.

Q. The report that you give, is that the report that they take as to the condition of the bony structure? A. Yes, practically, except my diagnosis from the plate on account of their lack of experience and the assumption that I have greater experience.

Joseph L. Diaz, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. You are a practicing physician and surgeon of this state? A. Yes, sir.

Q. Practicing how long? A. Since February, 1904.

Q. Graduate of what institution? A. Department of Physicians and Surgeons, Columbia University.

Q. Connected with any institutions? A. St. Barnabas' Hospital in Newark and the Irvington General Hospital.

Q. When did you begin doing eye work? A. As soon as I graduated and I confined myself exclusively to it since 1908.

Q. Did you examine Mr. Patrick Corbett, the plaintiff in this case? A. I did.

Q. When did you examine him? A. October 23, 1926.

Q. Will you tell us what examination and what you found? A. I examined his eyes and his nose and throat because he complained of headaches and complained of poor vision in the left eye, as the result of an injury that he had sustained. I found the ground quite normal. There was no difference between one ground and the other, and I found that he had farsightedness in one eye and a very much larger amount in the left eye than the right eye. I determined that by the use of the orthoscope to determine what glass he needed. He told me that he could not read the standard test lines with the left eye, and since there was no pathological change in the eye I drew the conclusion that we do in all such cases that the poor vision was due to the large amount of far sight he had since early infancy and since no glasses had

been worn the condition had developed, a condition which we meet in many cases that come to us where there are no glasses.

Q. What do you mean by pathological? A. I mean no sign of disease in the eye. The entire inside of the eye was a healthy normal eye, no changes in it of any description.

Q. Did you examine his right eye? A. Yes, I did.

Q. What did you find in the right eye, if anything? A. A normal, healthy eye, with a fair amount of far sight.

Q. Did you examine his nose? A. Yes, he has a chronic catarrhal condition, particularly the opening in the skull, particularly the sinuses because the nose is thickened and it is bent over first to one side and then the other.

Q. Does that cause headaches? A. It is a very common cause of headache, particularly in the forehead over the eye.

Q. Is that a common condition? A. It depends on the state of inflammation; sometimes it is a constant headache, sometimes it is an intermittent headache; it occurs at times and then disappears and returns.

Q. Did you examine his throat? A. Yes, he had a mild catarrhal inflammation of the membranes of the throat. It is a condition that always accompanies the condition that I found in the nose.

Cross-examination by Mr. Schneider:

Q. That is the only time you saw him? A. Yes, sir.

Q. Did you give him any other tests? A. Yes.

Q. You gave him the Baronic test? A. Yes, sir.

Q. Why didn't you tell us about the Baronic test? A. I was asked a specific thing.

Q. You gave him the test by swinging around in a chair? A. Yes, sir.

Q. What did that test show? A. It showed that the tracts in the brain that had to do with the organ of equilibriation on the right side were not normal.

Q. That is a standard test to ascertain whether there is a brain injury? A. No, that is a standard test to determine whether there is anything wrong with the organs of equilibration, the organs that tell us our position in the spine which affect the fibres of the brain.

Q. And that may indicate brain injury? A. Yes—that is, an injury to those fibres.

Q. There are fibres around the brain? A. Yes, sir.

Q. You would call that a brain injury? A. Oh, yes.

Q. And that is a serious thing? A. Not particularly.

Q. You mean there are brain injuries and brain injuries? A. I mean this, the loss of those fibres is not a serious thing in that we have a great many normal people in whom the fibres do not work——

Q. You have answered the question. Did you give him the Romberg test? A. No.

Q. Why not? A. I am not a neurologist.

Q. You use the Rombeg test? A. No, not in my work.

Q. You examined for dizziness, didn't you? A. I just examined to determine if there was anything wrong with his organs of equilibriation.

Q. You examined him for dizziness, didn't you? Answer that yes or no. A. I examined him because he said he was dizzy.

Q. You did examine him for dizziness? A. No, sir.

Q. He told you he was dizzy? A. Yes.

Q. Isn't the Romberg test for dizziness? A. It is a splendid test for any nervous condition, but I don't use it because I am not a neurologist.

Q. Why did you use the Baronic test? A. To find out if there was anything the matter with the labrynth which is the organ that tells us the median of space.

Q. That is neurology? A. It gets into neurology.

Q. I suppose you gave Mr. Smith a report of your examinations, didn't you? A. Yes, sir.

Q. And in that report you reported making the Baronic test?

Objected to.

Objection sustained.

Q. How much loss of vision has he in his left eye? A. According to his statement he has about 85.

Q. Assuming that this man had good vision for every day purposes before July 29, 1926, and he was then hit on the head with a board, was dazed, was semi-conscious for almost a day, vomiting, had nose bleeds, spit blood, had dizziness for a long time, had headaches, collapsed in April of the next year when he was working on light work, and assuming that his eyes before that time were normal, that he had never had any trouble with them before, would you say that the blow on the head and the resultant circumstances caused that injury to the eye? A. If you assume all those things are true it must be so. That is simply a theoretical question.

By Mr. Smith:

Q. Glasses cannot restore the vision? A. No, because he has gone too long without them.

Q. The poor vision, glasses cannot correct that condition now? A. That poor vision in that eye is due to the fact that he has a large amount of farsightedness and he did not wear glasses and the sharpness did not develop and the other eye developed at the expense of the other. It is a very common condition.

Q. This equilibriation, has that any effect on a person in the ordinary pursuits of life? A. We have a number of senses that take care of apposition and space. We have these labrynths on each side of the skull, we have the sense in the joints, what we call the treadle, and we have the tactful sense, that is, sense of feeling in the nerves and muscles and we have eyesight, and various authors bear us out that they all go to position and space. We have a large number of symptoms that prevent us from remaining erect for days, then they subside; if there is a double destruction of the labrynth, if those symptoms have disappeared, the patient is unware of the fact that the nerves or labrynths have been destroyed until they are put in the Baronic chair. It does not interfere with them in any way because the other senses take it up.

By Mr. Schneider:

Q. How long did this particular examination take, half an hour or three-quarters of an hour? A. Yes, sir.

Q. Mr. Corbett at the end of the examination was a complete wreck, he had to be assisted from the room? A. I don't recall any such thing.

Q. Will you say that he didn't do that? A. So many patients do that.

Q. You remember that he wasn't a complete wreck? A. I wouldn't call him any kind of a wreck. He wasn't the same man as when he came in, but the spinning around in the chair will make you dizzy, it will make you dizzy if your labrynths are affected, you will stagger around and you will want some help.

IRVING F. VANDERHOFF, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. You are a practicing physician in this state? A. Yes, sir.

Q. What institution are you a graduate of? A. Bellevue Medical College in 1895.

Q. Are you connected with any institutions? A. Yes, sir; St. James' Hospital since 1908 and the Presbyterian Hospital since 1912.

Q. Did you examine Mr. Corbett? A. Yes, sir.

Q. When? A. October 23, 1926, at my office.

Q. Will you tell us what examination you made, what you found? A. I took a history, made the physical examination and also examined some X-rays before and after that time.

Q. Without referring to the X-rays, will you tell us from your examination what you found? A. He had a scar on top of his head about this location (indicating) two and a quarter inches long where he had had a cut some time. I could not find any abnormal irregularity in any of the bones of the skull. I tested him for various symptoms which might arise from that injury if the

skull had been injured or if the brain had been injured and they were all negative.

Q. Tell us what tests you made? A. I tested him to see if he had any form of paralysis of the muscles. That included the muscles of the eyes and face and extremities, and I tested him for the pupil reaction, tested him for Romberg, because he said he was dizzy. Then I thought he had something wrong with his left eye and I sent him up to Dr. Dias for that. The only positive thing I found was the scar on his head.

Q. Did you make a test for what you call nervousness? A. At the time I saw the man he didn't have any tremors, he didn't talk rapidly, but he didn't have any hesitancy like nervous people and there was no trace of nervousness at the time.

Q. Did you test his reflexes? A. Yes, sir.

Q. Is that the test you used to test a man's nerves? A. Yes, sir.

Q. What is the Romberg test? A. The Romberg test is to have a man stand erect with his feet together. If it is positive he sways and if he doesn't it is negative.

Q. Was there any swaying? A. There was not.

Q. Did you examine to find out whether there was any tremor of his tongue? A. There was no tremor of the eyes, the lips or the hands. I don't know whether I tried his tongue or not.

Q. You say you sent him to Dr. Dias for his eyes? A. Yes, sir.

Q. Did you also have any X-ray made? A. I arranged for that, yes, sir.

Q. I show you two X-rays Nos. 127 and 128 and I ask you to take L 128 and tell me whether or not that shows any fracture of any kind? A. No, sir, it doesn't.

Q. I call your attention to a little pencil mark here. Will you tell me what you think that is? A. That is a normal groove for blood vessel and right here at that pencil mark there is a suture line; that is a place where two bones grow together.

Q. Is that normal? A. Yes, sir.

Q. I call your attention to plate No. 127 and ask you to examine that and tell me if you found any evidence of a fracture at all? A. This is R, which should mean right and L left. That is, they are taken from the two opposite sides of the head, and we find a similar blood vessel groove on the right side of the head.

Q. Is that where there is a pencil mark on it? A. Yes, there is a pencil mark at either end of that groove.

Q. I call your attention to Ex. P1 and ask you to examine that and tell me if you find any evidence of fracture at all on that X-ray. A. No, sir.

Q. Is that a normal sign, in your opinion? A. Yes, sir.

Q. I show you Exhibit P2 and ask you to examine that and tell me whether you find any evidence of fracture? A. No, sir, the same groove is marked here. That is a normal groove.

Q. I show you Ex. P3. A. That is not as clear in all parts. I hesitate for that reason. Down to here it is clear, but it is fainter than the other picture.

Q. I show you Ex. P4 and ask you to look at that and see if you can tell me whether or not there are any fractures of any kind shown thereon? A. No, sir.

Q. I call your attention to two little pencil marks there and ask you if there is anything there that indicates fracture of any kind? A. No, there

is a groove there, but that is the same groove as the other.

Q. I call your attention to Ex. P5 and ask you to look at that, especially directing your attention to the pencil mark, and ask you if you find there anywhere evidence of any fracture? A. No, sir. The pencil marks are a little different, a similar groove shown, and there is a suture where two bones have united.

Q. In your examination of Mr. Corbett, from the result which you ascertained from such examination, will you tell me what, in your opinion, his condition was at the time you saw him? A. At the time I saw him I thought he was well except for the eye condition. I thought he had some trouble with vision which I could not diagnose and sent him to Dr. Dias.

Cross-examination by Mr. Schneider:

Q. In your opinion at that time he didn't have any neurasthenia? A. No, sir.

Q. He had nothing at all except that eye condition? A. He had recovered at that time except for that eye condition.

Q. He was a good healthy man on October 23, 1926, wasn't he, on that day outside of the eye? A. On that day he was.

Q. Did you give him the Baronic test? A. No, sir.

Q. Why not? A. Because I thought that is a case that I send cases to Dr. Dias if I think they need a Baronic test.

Q. Did he seem to lose weight? A. Not at that time, no, sir.

Q. Did you see him in court here? A. No, sir.

Q. Will you kindly look at this man? In your opinion, is this man a healthy man now? A. I

wouldn't want to express an opinion without examining him.

Q. I mean, from his appearance? A. I couldn't tell that from hearsay without examining him.

Q. Does he look very well and healthy? A. He doesn't walk as though he were well.

Q. And how about his color? A. He looks like a man who has not been out in the air. He looks as if he had been confined indoors.

Q. How about his weight? A. I don't know.

Q. Does he look like a man who has lost weight? A. He looks like a man who had been working and then quit.

Q. He looks like a sick man to you, does he not? A. No, sir. He is a man that always works, but he looks to me like a man who has not been out in the air.

Q. In your opinion, all that he needs is air? A. I don't know that. I haven't had a chance to examine him since October 23, 1926.

Q. That is the only time you examined him? A. Yes, sir.

Q. How long did you examine him? A. Half an hour.

Q. And from your examination he is a healthy man? A. Yes, sir.

Q. You do a lot of testifying in court? A. Yes, sir.

Q. A good part of your work is testifying in court? A. I wouldn't say a good part of it was.

Q. He gave you the history of the case? A. Yes, sir.

Q. He told you that he had been hit on the head by a board? A. He said he had been hit on the head by a board which knocked him down, but didn't knock him out. He told me that his nose didn't bleed until the second day before I examined him.

Q. Did he tell you about vomiting? A. I don't remember.

Q. Did you ask him whether he was vomiting? A. I don't remember whether I did or not because vomiting is a symptom which comes from so many things.

Q. It is a definite symptom of an injury? A. It is a definite symptom of an injury immediately after.

Q. If a man has a brain injury and he vomits that is a symptom of the brain injury, isn't it? A. No, vomiting can come from a lot of things. I say it can come from brain injury.

Q. Many medical men, figuring the symptoms of brain injury, one of the outstanding and definite symptoms considered is vomiting, isn't it? A. No, sir.

Q. Is it one of the symptoms of a brain injury? A. Yes, sir, I said that before. It is not one of the definite symptoms.

Q. Is it one of the symptoms of a brain injury? A. I said that before.

Q. Why didn't you ask him if he had vomited? A. Because I was looking for definite symptoms, to have a complete history, and, as I recall, he didn't speak of vomiting. I was trying to find out what was the matter with him.

Q. Did he tell you he had dizzy spells? A. Yes, sir, he told me he was dizzy.

Q. Where is the optic nerve? A. (Indicating.) Here.

Q. Isn't there a fracture near there? A. No, sir.

Q. Where are the sinuses? A. (Indicating.) Here.

Q. There is a fracture there? A. No, sir.

Q. Is there anything abnormal whatever? A. No, sir.

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Q. And from your examination he is a healthy man? A. Yes, sir.

Q. You do a lot of testifying in court? A. Yes, sir.

Q. A good part of your work is testifying in court? A. I wouldn't say a good part of it was.

Q. He gave you the history of the case? A. Yes, sir.

Q. He told you that he had been hit on the head by a board? A. He said he had been hit on the head by a board which knocked him down, but didn't knock him out. He told me that his nose didn't bleed until the second day before I examined him.

Q. Did he tell you about vomiting? A. I don't remember.

Q. Did you ask him whether he was vomiting? A. I don't remember whether I did or not because vomiting is a symptom which comes from so many things.

Q. It is a definite symptom of an injury? A. It is a definite symptom of an injury immediately after.

Q. If a man has a brain injury and he vomits that is a symptom of the brain injury, isn't it? A. No, vomiting can come from a lot of things. I say it can come from brain injury.

Q. Many medical men, figuring the symptoms of brain injury, one of the outstanding and definite symptoms considered is vomiting, isn't it? A. No, sir.

Q. Is it one of the symptoms of a brain injury? A. Yes, sir, I said that before. It is not one of the definite symptoms.

Q. Is it one of the symptoms of a brain injury? A. I said that before.

Q. Why didn't you ask him if he had vomited? A. Because I was looking for definite symptoms, to have a complete history, and, as I recall, he didn't speak of vomiting. I was trying to find out what was the matter with him.

Q. Did he tell you he had dizzy spells? A. Yes, sir, he told me he was dizzy.

Q. Where is the optic nerve? A. (Indicating.) Here.

Q. Isn't there a fracture near there? A. No, sir.

Q. Where are the sinuses? A. (Indicating.) Here.

Q. There is a fracture there? A. No, sir.

Q. Is there anything abnormal whatever? A. No, sir.

Q. If there was anything wrong with the sinuses they would show in the X-ray? A. Not necessarily.

Q. Isn't an X-ray taken to find out if there is anything wrong with the sinuses? A. That is one way of determining. We try other ways, too.

Q. If you were treating a patient and suspected a man who had trouble with his sinuses you would take an X-ray first? A. No, we would illuminate him, we would put on a light in here.

Q. And if there was any doubt would you have an X-ray taken? A. Yes, sir.

Q. Are you an expert on eye, nose and throat? A. No, sir.

Q. Sinuses are in that field, aren't they? A. Yes, sir.

Q. And you say that you didn't find so called neurasthenia? A. No, sir.

Q. Did you give him the association test? A. No, sir.

Q. Why not? A. Don't know about it.

Q. Isn't that a definite test used for ascertaining whether a man has injuries to the central part of the brain, to the gray matter, as we call it? A. New to me, and I have been testing a long while. You are talking about coordination.

Q. Isn't that also called the association test? A. It may be.

Q. Isn't that the test that you gave him, going this way with his feet (illustrating)? A. He can do it with his feet, but you have him move them around to test them.

Q. Did you give him those tests? A. No.

Q. That is a definite test to ascertain whether a man has an injury to the central brain, isn't it? A. To the brain. There is only one brain.

Q. To the gray matter, is that it? A. Yes, sir.

Q. You gave him the Romberg test? A. Yes, sir.

Q. Did you give him the Babinsky test? A. I don't remember, but I usually do. I don't know whether I gave him that one or not.

Q. That is a standard test? A. Yes.

Q. It is a very important test to ascertain whether there is an injury to the brain? A. Later, but not then.

Q. If the toes turn up that shows injury or no injury? A. Yes.

Q. Why didn't you give him the Babinsky test? A. For this reason, I regard the Babinsky test, which comes on for a condition which comes on late in the evening. The other test there was no reason why I should go further.

Q. You didn't want to take the trouble? A. No, that is not it at all. Here is a man I did take a lot of trouble with.

Q. You gave him a pupilary test? A. Yes, sir.

Q. You gave him the Romberg test for swaying? A. Yes, sir.

Q. What other test? A. For tremors, his eye muscles.

Q. And those two tests are the tests for neurasthenia, the pupilary, the Romberg and the tests for tremors, which are all for neurasthenia? A. No, sir.

Q. What are they? A. They are tests for various things.

Q. Are they tests for affliction of the brain? A. Sometimes.

Q. But they are tests mostly for the nerves? A. They may be either, some part of the nerves some times.

Q. You use the pupilary test, the eye test and the Romberg test and the tremor test mostly to

ascertain whether there wasn't neurasthenia? A. No.

Q. Did you make them to ascertain whether there is lesion of the brain? A. Yes, sir.

Q. A more important test is the association test? A. I don't see why you say one is more important than the other.

Q. It is important? A. It might be important.

Q. And a Babinsky test is to ascertain if there is a lesion of the brain? A. No, not then. I examined him three months after. I would expect to find some other symptoms before I made that test if I found nothing wrong, and I wouldn't give him that test.

Q. You don't think with Dr. Diaz on neurasthenia? A. I don't know.

Q. He said the man had neurasthenia and you say he has not got it? A. Yes, sir.

Q. He says he needs glasses and you say he needs air. A. I don't see where we disagree on that.

The Court: I do not think that Dr. Diaz said he had neurasthenia.

William Swauger, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. At the time of this accident, to Mr. Corbett you were employed by Starrett Brothers on the building? A. I was.

Q. What was your position? A. Carpenter foreman.

Q. Do you know where the place was that Corbett was hurt? A. Not exactly. I have an idea.

Q. What did you have charge of there at the place? A. I had charge of protection work, such as building bridges, setting door bucks and carpenter work in general for Starrett.

Q. Did you have charge of obtaining lumber material for the work? A. Yes.

Q. Did you at any time have any planks for boards in your work? A. Not up to that time.

Q. Did you have charge of the erecting of these scaffolds we speak about? A. No, sir.

Q. Who did that? A. They had a foreman there, a brick layer foreman, and he had a man under him to take care of it.

Q. Do you know what kind of lumber was used? A. I do.

Q. Where were the scaffolds that Starrett was using at the time? A. They had a swinging scaffold on the outside of the building.

Q. What lumber was used in those scaffolds? A. 2 by 9 by 13 or 14.

Q. Will you explain just how these scaffolds were erected? A. There was an iron beam stuck out from the roof of the building about six or seven feet and from there there was two cables hung down from the iron bracket and they had a cable on and a pump handle on it and that is what lowered or raised the scaffolds.

Q. Were the scaffolds made on the ground? A. They were made on the ground and pumped up as the work progressed.

Q. Did they have guard rails? A. They are compelled to have guard rails.

Q. What were they composed of? A. 2 by 4s on the outside.

Q. Were there any boards nailed on those? A. I didn't see them built.

Q. Have you seen them? A. Yes, sir.

Q. Have you seen any boards nailed up there? A. No, sir, only planks 2 by 9.

Q. Was there any scaffold on the inside of the building being done by Starrett's men? A. You mean the height of the swinging scaffolds?

Q. Yes, or any other place. A. Not that I know of.

Q. As they laid bricks, did they lay them from the inside or outside? A. Outside.

Q. Was there any scaffold used for laying bricks by Starrett? A. No.

Q. Were you there every day? A. Every day.

Q. Did you build any? A. Never.

Q. Did you have charge of the building of them on the inside? A. No, that would be up to the scaffold builder.

Q. At any time do you know of Starrett Brothers laying any bricks on the wall from the inside? A. I don't.

Q. You saw the board, did you not, that struck Corbett? A. I did.

Q. Where did you see it? A. Up in front of the office on the bridge, the timekeeper's office.

Q. Who was there at the time? A. Mr. De-Kinep and another timekeeper by the name of Hurd.

Q. What kind of board was that? A. A piece of 7/8ths by 6.

Q. How long? A. Ten feet.

Q. As far as you know, did you have any board of that kind there? A. Not up to that time I didn't.

Q. Were there any such boards used on the scaffold? A. No, sir.

Q. Did you see two floor men? A. Yes, sir.

Q. What kind of work were they doing? A. Hanging forms to pour concrete on.

Q. Did he use any boards or planking in that? A. He did.

Q. Could you say whether or not the plank that you say that hit Corbett was similar to any plank that the floorman used? A. There was.

Q. What is stripping of arches? A. That is cutting wires and stripping the forms after they are concreted, that is, the forms after they have been built, and the conrete has been poured in and set up so many hours, and then they cut the wires and drop the forms down.

Q. Was any of that work being done on the walls, or was that all floor? A. That is on the floor work only.

By the Court:

Q. When boards are used for the forms for the concrete floors and they are stripped, don't they come off clean? A. No, there is liable to be some cement into it.

Q. Necessarily, does a board ever come clean, absolutely clean? A. No, that would be impossible where there is cement on the board.

Q. Cement always adheres to boards that is used in cementing floors? A. Yes, unless there is oil put on it.

By Mr. Smith:

Q. On this board that you saw there was it a clean board or did the board have evidence of having been used? A. The board I saw had three nails in it.

Q. Answer the question. A. No, it hadn't been used for concrete work.

Cross-examination by Mr. Shcneider:

Q. You are a carpenter foreman? A. Yes, sir.

Q. For Starrett? A. Yes, sir.

Q. And you were in charge of the protection work for workmen? A. Yes, sir.

Q. For the men on that building? A. In general.

Q. Did you have anything to do with the investigation made by Starrett after the accident? A. No, sir.

Q. This board that you saw there afterwards wasn't a board in use in concrete forms? A. It might have been used in the construction of concrete work.

Q. It had three nails in it? A. Yes, sir.

Q. And it was clean? A. Yes, sir.

Q. And it was 7/8ths by 6 by 10, is that right? A. That is right.

Q. Mr. Starrett's men were doing the brick work? A. Yes, sir.

Q. And there is some brick work on the inside? A. Yes, sir.

Q. Around the window sills? A. That is done on the outside.

Q. The brick work was on the outside? A. Yes, sir.

Q. And Starrett's men were doing that? A. Yes, sir.

By the Court:

Q. Were you doing the concrete flooring? A. No, it was done by Peterson.

By Mr. Schneider:

Q. You were doing the brick work inside and outside? A. Starrets were.

Q. At a job of that kind contractors use each other's boards? A. Yes, sir.

Q. And sometimes there is a conflict of using each other's boards? A. Among the men, that is all.

PETER EARLEY, sworn in behalf of defendant.

Direct examination by Mr. Smith:

Q. At the time of the accident to Mr. Corbett were you working at this building? A. Yes, sir.

Q. Who were you working for? A. Lipton Sash people.

Q. Where were you working? A. On the second floor.

Q. What were you doing there? A. Placing the sash in the window.

Q. Putting the sash in the window? A. Yes, just after putting one in.

Q. On which side of the building were you working? A. The Cedar street side.

Q. While you were working there and just before the time of Mr. Corbett's injury, did you see any board falling?

Mr. Schneider: I object. I think the time ought to be fixed more definitely.

Q. Can you tell me about the time you found out that Mr. Corbett was injured or had been injured? A. I seen that board go down, to the best of my opinion.

Q. What time was it that you say you saw the board fall? A. Half-past nine.

Q. Where were you? A. I was on the seventh floor when it went by me at the window. Where it came from I don't know. I seen it go right by the window and after that I heard that this guy had been hurt.

Q. Did you hear any noise or cry? A. I heard the ambulance come there. That is the first I knew about it—I heard about it.

Q. Do you know who was working above you? A. Yes, I worked on every floor and I was just

after coming down from the seventh floor and Peterson was stripping boards from the concrete.

Q. Did you go down after you had learned that he had been hurt? A. No.

Q. What had you been doing up on the ninth floor? A. Moving sash around, placing sash.

Q. Were you putting the sash in the windows? A. Yes, we always deliver them before we put them in.

Cross-examination by Mr. Schneider:

Q. Whom do you work for now? A. I was working for the Foundaiton Company down at Bamberger's.

Q. Are you working now? A. No.

Q. Where do you live? A. High street.

Q. What number? A. 435.

Q. How long have you lived there? A. Last Saturday night. It is the second apartment house right near here.

Q. Right near the Court House? A. Yes, sir.

Q. And you have been living there since Saturday night? A. Yes, sir.

Q. Where did you live before then? A. Down at the Commercial Hotel on Washington street.

Q. How long had you lived at the Commercial Hotel? A. Two weeks.

Q. Where did you live before that? A. 127 South Sixth street.

Q. How long have you lived there? A. Since last May.

Q. How long had you lived in Newark? A. Three years.

Q. Where did you live before that? A. Philadelphia.

Q. There was an elevator shaft on the side of the building? A. Yes, sir.

Q. Where was that located with reference to where you were standing? A. That is on the Cedar street side of the building, too.

Q. About how far from where you were standing? A. Six feet, maybe something more or less; I never measure those things up. I am just an iron worker.

Q. Does an elevator shaft go all the way down? A. Absolutely.

Q. You were standing where you could see the elevator shaft? A. I was standing between the elevator shaft and the window.

Q. And just what window? A. After placing a sash in the window.

Q. And you saw this board fall down? A. Yes, sir.

Q. And you don't know where it came from? A. It came from about the second floor, I will say that much.

Q. Can you describe that board? A. It is pretty hard for me to describe a board that drops right in front of your face. You couldn't tell either.

Q. You couldn't tell how large it was? A. It was seven feet or ten feet. It wasn't no plank. It was a board.

Q. Give us the best description you can? A. All I describe is what I am after telling you and when something goes by your face you——

Q. You didn't go downstairs after that? A. No, sir.

Q. How soon after that did the ambulance come around? A. Five or six or maybe eight minutes after.

Q. Did you see the ambulance or just hear it? A. I seen it down the street.

Q. To whom did you speak about this matter? A. Somebody came in and was inquiring about it and I said I seen it.

Q. Did Mr. DeKniep see you about it, Starrett's bookkeeper? A. He didn't speak to me about it, and he was talking about it in the office I was in and asked me if I seen it and I said yes. I didn't even know who he was.

Q. Did Mr. Corbett speak to you about it? A. Yes, sir.

Q. Didn't you say in the presence of Mr. Corbett down in Mr. Jacobs office that this board that you saw fall fell down the elevator shaft? A. I never said where it fell.

Q. Didn't you say it fell down the elevator shaft? A. I never said where it fell.

Q. Never said that at all? A. No.

Q. Did you mention the elevator shaft at all? A. Not that I can recollect.

Q. You say you didn't see it that time that this board fell down the elevator shaft? A. Not that I know of.

Q. Will you say you didn't say that or will you say you don't remember what you said? A. No, I don't remember what I said. I don't believe whether I spoke about the elevator shaft or not.

Q. You don't remember what you said how that board fell? A. No, not to him.

Q. And after you were down there and spoke to Mr. Corbett in Mr. Jacob's office, have you spoken to any other people about this accident to Mr. Corbett? A. No, not that I know of.

Q. Nobody at all since that time? A. Why should I speak anything about it.

Q. You didn't speak to a single person? A. Only the guy that got hurted.

Q. You didn't speak to anybody else about this board? A. No.

Q. How long after was it you were down in Mr. Jacobs' office? A. I couldn't tell you exactly. I was working in the Prudential Building at the time.

Q. You remember being down there? A. Yes, sir.

Q. And since that time you say you haven't spoken to a single soul about this case? A. No, sir, not one.

Q. Are you sure of that? A. Absolutely.

Q. Nobody at all? A. Nobody since I seen him.

Q. And that you are sure of? A. Yes.

Q. How did you come to court? A. I got a subpoena to come to court.

Q. Who gave you the subpoena? A. I can't exactly tell you. It was served to me this morning.

Q. Before you got on the witness-stand here today did you speak to anybody about this accident? A. No, I got this subpoena to come up here.

Q. Before you got on the witness-stand here today, after getting that subpoena, did you talk to anybody at all about this accident? A. I don't get what you mean.

Q. Did you talk to anybody at all about this accident, to this man, before you went on the witness-stand, about this accident? A. I spoke to Mike, the timekeeper.

Q. Did you talk to him about the boards? A. He said something to me about the boards, but I didn't talk to him about it.

Q. What did Mike, the timekeeper, say to you about the board? A. When I was talking about the guy getting hurt and the board falling and he said, "You didn't even know me?" And I said, "No."

Q. Where did you speak to him the first time? A. I was up having a glass of beer and I met him.

Q. Where was that? A. In Cedar street.

Q. Where? A. Opposite the job.

Q. How long after the accident was that? A. It was long after we got away ourselves.

Patrick Corbett, Recalled—Direct.

Q. How many days after the accident? A. It might be that same day or the day after. I can't recollect everything.

Q. And from that time you met him in that near-beer saloon up to the present time you hadn't met Mike? A. I seen him when this case was supposed to come up.

Q. You didn't see anybody else? A. No, sir.

Q. Except Patrick Corbett down in Mr. Jacobs' office? A. ——

DEFENDANT RESTS.

The court took a recess for one hour.

AFTER RECESS.

PATRICK CORBETT recalled in his own behalf in rebuttal.

Direct examination by Mr. Schneider:

Q. Do you remember Mr. Earley, who was on the stand here last? A. Yes, sir.

Q. Were you with him in the office of Mr. Jacobs? A. Yes, sir.

Q. Mr. Jacobs is my associate here? A. Yes, sir.

Q. Mr. Jacobs is your attorney? A. Yes, sir.

Q. Where is his office? A. 17 Academy street.

Q. In the Academy Building? A. Yes, sir.

Q. When did that occur? A. About June or July.

Q. Of this year? A. Yes, sir.

Q. Did you bring him there? A. Yes, sir.

Q. Was Mr. Earley asked to tell what he knew about this accident? A. Yes, sir.

Q. And what did he say?

Patrick Corbett, Recalled—Cross.

Peter Earley, Recalled—Cross.

Mr. Smith: I object to that. That is not the way to contradict a witness.

The Court: No.

Q. Did he say at that time that the board fell down the outside of the building? A. He said he was leaning in on the elevator shaft on the seventh or eighth floor and he wasn't working at the time, he was just leaning in this elevator shaft.

The Court: There is only one question for which the foundation was laid. You asked him only whether the board fell down the elevator shaft.

Q. Did Mr. Earley say to you that the board fell down the elevator shaft? A. Yes, sir.

Cross-examination by Mr. Smith:

Q. Mr. Earley, as I understand you, said that he did see the board falling? A. Yes, sir.

Q. But you did say that he said he saw a board falling down the elevator shaft? A. Yes, sir.

Q. And he said it was the seventh floor? A. I couldn't say whether it was the seventh or eighth.

PETER EARLEY, recalled.

Further cross-examination by Mr. Schneider:

Q. (Indicating) Is this the gentleman who subpoenaed you this morning? A. Yes, sir.

Q. Mr. Myers? A. Yes, sir.

Q. And where did he subpoena you? A. Cedar street.

Q. What place? A. 23 Cedar street.

Q. Is that a beer saloon? A. Yes.

Q. The same beer saloon where you met Mike? A. Yes, sir.

Q. Did you talk to Mr. Myers about this case when he subpoenaed you? A. He asked me who is Pete Earley and he didn't know me. I was in the corner window.

Q. And who told him you were in that place? A. He came in and asked if Pete Earley was in there.

Q. Did he say "Is Pete Earley here"? A. Yes, sir. He only gave me a subpoena. He asked me if I was Pete Earley, the ironworker in this case.

Q. Did he walk up to the Court House with you? A. Yes, sir.

Q. He didn't say a word to you on the way up to the Court House? A. No.

Q. Do you know Mr. Thomas, this gentleman here? A. No, I don't know him.

Q. Did you ever meet him at all? A. I don't know if I did or not.

Q. Didn't you meet him in the corridors of the Court House here at the time when the case came up before and there were a lot of witnesses around here? A. I couldn't say whether I did or not, but I have been up here.

Q. You recognize him as having met him? A. No, sir.

Q. And you left with him? A. I left with somebody.

Q. You can't say it was Mr. Thomas? A. Yes, sir.

Q. It might have been Mr. Thomas? A. Yes, sir.

Q. Did you not tell Mr. Thomas at that time when you walked away with him that this board fell down the elevator shaft? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. Did you tell Mr. Corbett, in Mr. Jacob's office, that you didn't know whether that board fell down that elevator shaft the same day he was hurt or not? A. They never asked me where that board fell, whether it was inside or outside. They asked me if I seen a board fall.

Q. They didn't ask you where the board fell or how it fell? A. I don't know anything about it falling. I seen a board coming down——

Q. I am asking you this. Did they ask you in the office whether or not you knew where it fell or how it fell, did they ask you that? A. They asked me if I seen the board coming down and I said yes.

Q. Did they ask you anything else? A. They asked me what floor I was on.

Q. What did you say? A. I said the seventh floor.

Q. Didn't you tell Mr. Corbett that you didn't know on what date he was hurt? A. I can't just place the date he was hurt. I don't keep track of things like that because I see them every day in the week.

Q. Didn't you tell Mr. Corbett that you didn't know whether the boards you saw fell on the same day he was hurt or not, didn't you tell him that? A. Yes, I may have told him that, but I know the day it fell they told me who it was because it was the guy that worked with him.

Cross-examination by Mr. Smith:

Q. As I understand, after you saw the board fall you saw the ambulance downstairs? A. Yes, sir.

Q. You learned Mr. Corbett got hurt? A. Yes, sir.

Q. That was the same day? A. That was the same day I saw the board had fell.

By Mr. Schneider:

Q. You say you heard someone got hurt? A. Yes, sir, it was the guy that works with him.

Q. But you found out that somebody had been hurt? A. Yes, sir.

PATRICK CORBETT, plaintiff, recalled in his own behalf in rebuttal.

Direct examination by Mr. Schneider:

Q. Did Mr. Earley say he didn't know the date you were hurt? A. Yes, sir.

Q. Did he say he didn't know what time the board fell? A. He said he didn't know what time I got hurt.

Cross-examination by Mr. Smith:

Q. As I understand, Mr. Earley said he didn't know the day you got hurt? A. Yes, sir.

JOHN THOMAS, recalled in behalf of plaintiff, in rebuttal.

Direct examination by Mr. Schneider:

Q. Mr. Thomas, were you here in the Court House corridor when this case came up? A. Yes, sir.

Q. As a witness for Starrett Brothers? A. Yes, sir.

Q. Was Earley around? A. Yes, sir.

Q. Did you discuss the case with him? A. Yes, sir.

Cross-examination by Mr. Smith:

Q. Did he tell you that the board that he saw fall fell down the elevator shaft? A. Yes, sir.

Q. Let me ask you if you weren't down to Mr. Schneider's office or Mr. Jacob's office? A. Yes, sir.

Q. How many times? A. Once last April and once this trial.

Q. Is that right? A. Yes, sir.

Q. Did you tell them any time before today that Mr. Earley told you that the board fell down the elevator shaft? A. I didn't even know that Mr. Earley was going to testify today.

Q. Did you tell anybody before today that Mr. Earley said the board fell down the elevator shaft? A. No, sir.

Q. And it is only after Mr. Earley got on the stand that you recollected it? A. Yes, sir, but we knew it.

By Mr. Schneider:

Q. You told me in the corridor about ten minutes ago after I came back from lunch? A. Yes, sir.

Q. You voluntarily told me? A. Yes, sir.

James K. Meyers, for Plaintiff—Direct.

James K. Meyers, for Plaintiff—Cross.

JAMES K. MEYERS, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Schneider:

Q. You are a private investigator? A. Yes, sir.

Q. Work on cases for different people, lawyers and so on? A. Yes, sir.

Q. You have been preparing this case for Starrett Brothers for trial? A. I didn't prepare the case. I simply served subpoenas on it.

Q. Had nothing to do with the preparation of the case? A. I had nothing to do with the preparation.

Cross-examination by Mr. Smith:

Q. You just served subpoenas for me for some of these witnesses? A. Yes.

Q. Never talked over the case and didn't know anything about the case? A. I didn't know anything about the case.

Q. Simply served subpoenas? A. Simply served subpoenas.

By Mr. Schneider:

Q. How long have you been on this case? A. I think it is three or four times I served subpoenas.

Q. You are the gentleman who subpoenaed Mr. Earley this corning? A. Yes, sir.

PLAINTIFF RESTS.

DEFENDANT RESTS.

Court's Charge.

Mr. Smith sums up in behalf of defendant.

Mr. Schneider sums up in behalf of plaintiff.

Court's Charge.

The Court charges the jury as follows:

DUNGAN, J.:

Gentlemen of the jury. The plaintiff in this case, Patrick Corbett, on the 29th day of July, 1926, was in the employ of Spencer, White & Prentiss, who were subcontractors on what is now the Kresge Building, known at that time as the Plaut Building, on Broad street, at the corner of Cedar street, in this city. He was working in the basement and had been working there for some time and was doing something with an air compressor or with the hose connected with the air compressor and was stooping over slightly when a board, which is described as being about ten feet long, six inches wide and seven-eighths of an inch thick, came through an opening above him and the end of the board struck him on top of the head, inflicting injuries for which we has brought this suit, alleging that the falling of the board was due to negligence on the part of the defendant, Starrett Brothers, or negligence of the servants, agents or employees of Starrett Brothers, for whose negligence Starrett Brothers would be liable in damages.

The allegation of negligence as contained in the complaint is this: That on the 29th day of July, 1926, while the plaintiff was lawfully inside the building and in the employ of another contractor

without any fault on his part, and solely through the negligence of the defendant, its agents, servants and employees, he was injured by reason of the negligence and carelessness of the defendant through its agents, servants and employees, in performing its duty in said building, in that it carelessly, negligently, and without any warning, dropped a wooden plank about fifteen feet long against the head and the body of the plaintiff. At this point I think I ought to state that for the plaintiff to recover in this case it must appear by the greater weight of the evidence that the injury to the plaintiff occurred in the way and manner stated in his complaint. I do not mean by that, that having alleged the board was fifteen feet long, if it was shown it was ten feet long he could not recover, nor do I mean if they say it is a plank and it was a board the plaintiff could not recover, but what I do mean is that for the plaintiff to recover it must appear that the plank or board, or whatever it was, fell because of the negligence of the defendant Starrett Brothers or its servants, agents or employees. A subcontractor is not ordinarily the servant or agent of the principal contractor, nor are the employees of the subcontractor the servants of the principal contractor. For the plaintiff to recover, as I have just told you, it must appear by a preponderance of the evidence—that is, by the greater weight of the evidence—that the plaintiff was injured as alleged in the complaint, that is, through the negligence and carelessness of the servants and employees of the defendant Starrett Brothers. The plaintiff does not know how this plank fell or where it came from; he does not pretend to tell you; he does not even know what hit him. All he knows is that something hit him and he was rendered, if not

unconscious, in such a dazed condition that he does not know anything about it. He does not know whose fault it was, but it is undisputed in this case that Starrett Brothers, the only defendant remaining in this case (because you heard the court grant a non-suit as to the other defendant Peterson, for the reason that no negligence on the part of Peterson and his servants and agents had been established by the evidence), as such general contractors, was in general charge of the building, and it is undisputed that the employees of Starrett Brothers were working in the building at the time. Mr. Kane, a witness produced on the part of the plaintiff, testifies that he was outside in the street attending a hoist which carried materials from the street to the upper floors of the building; that while standing there he saw a plank, which he described as a plank or a board, which he said came through the window of the second floor of the building. The board came down upon a bridge which was about eight feet high over the sidewalk, a portion of which had been excavated for the cellar of the building; that it struck on the outside, the street side, and then went through an opening between the platform and the building down into the basement, and he says he went down into the basement and saw men down there picking up this plaintiff. I understood him at first to say that this space between the platform and the building was about three feet, but upon cross-examination I understood him to say it was one-half a foot. That may or may not be important. I simply call it to your attention in passing. He describes this board that fell as being about nine feet long by six inches wide and about two to two and a half feet thick. Upon cross-examination he described the plank as being eight or nine inches wide and

five or six inches thick, while, admittedly, from the testimony of all the other witnesses who saw the board which struck the plaintiff, it was not more than seven-eighths of an inch thick. However, he saw this plank or board, whichever it was, going through the air, but does not say that he saw it in the cellar. I think he says he did not see it there, and he had just a momentary view of it as it was passing in front of him from this second story window, as he describes it, and while it was going from there through the hole which it passed into the basement. He testifies that from this second floor from which the board fell that he saw Starretts men, the employees of this defendant, working; he says they were taking some boards up to the second floor where they were working, and that they were taking them up on another floor for scaffolding; he says that the board which he saw them handling there were boards which were used upon an inside scaffold. If this testimony be correct, and if you decide from the testimony in the case that the board which caused the injury to the plaintiff was under the management or control of the defendant Starrett Brothers, then there is applied to that situation what the law says is *res ipso loquitur,* the Latin term which shortly defined, means the thing speaks for itself, but as defined more at length by our courts, and particularly our Courts of Errors and Appeals, this decision I am now quoting from says: "The principle is that when through any instrumentality or agency under the management or control of the defendants or his servants there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care. The occurrence in itself, in the absence of explanation by

the defendant, affords *prima facie* evidence that there was want of due care." That is what this phrase *res ipso loquitur* means, just as I have read to you. So if you find that that board was under the management and control of Starrett Brothers or their servants and employees, and that this occurrence, the falling of this board, would not have happened if the servants or employees of Starrett Brothers were in the exercise of due care, with the knowledge that people were working below them, that makes a *prima facie* case of negligence and creates the presumption of want of due care. This presumption of want of due care, however, is a rebuttable presumption, or to use the terms again that I have just read to you, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care in the absence of explanation." So if you decide in this case that this board was under the management and control of the defendant Starrett Brothers' servants and employees and that this was an occurrence which would not have happened if they had been handling the board with due care, then it is for you to say whether the other evidence in the case rebuts the presumption of want of due care which arises from that finding. Mr. Thomas, who was an employee of Spencer, White & Prentiss, testifies to being in the basement where Mr. Corbett was and to seeing this board fall through an opening between the street and the bridge overhead, and saw it strike Mr. Corbett on the head, and it also struck him on the shoulder, and he received a scratch, the scars of which he says he still carries. I have already called your attention to the testimony of Mr. Kane, who testified to seeing the board fall from the second floor.

On behalf of the defendant, Mr. William DeKenip testifies that Starrett had no seven-eighth inch boards. However, as was suggested to you in the argument, whether or not Starrett had any such boards makes no difference, if, as a matter of fact, it was Starrett's men handling this board. He also says that he never saw any scaffolding on the inside of the building. He says that he saw this board in front of the timekeeper's office and his description of it corresponds with the description given by Mr. Thomas. He says it was six inches by seven-eighth inches and about ten feet long, and he says there were no such boards used upon the only scaffold that Starrett had charge of, and that was an outside scaffold. He says there were guard rails on that scaffold, but that they were two by fours and no pieces of this size. He does say that floormen were making forms for concrete. The floor men, it appears, were the men of George Peterson, who is not now a party to this suit because of the action of the court, say that such boards were used for forms for concrete, and at that time these forms were being stripped, the concrete was being stripped, the forms being let down, the intended inference, perhaps, being that it was one of these boards that fell; but he says that this board had no concrete on it and that cement always adheres to boards used for concrete forms. He said it was a clean board, but he said it might have been used for bracing these forms. Mr. David Earley, who was working for another contractor on the building, the sash people he calls them, says that he was on the second floor of the building putting in sash and that he was on the Cedar street side and that he saw a board fall about 9:30 in the morning as it went by the window, coming from an upper floor, and he says that

on the ninth floor Peterson's men were stripping from the concrete flooring, that he had been up there and saw them do it. He did not go down, but he heard the ambulance come and then he heard it was Corbett, the plaintiff in this suit, who was hurt. Two witnesses say that they discussed this matter with Early, one the plaintiff himself, and the other Mr. Thomas, one of the plaintiff's witnesses, who say that Early told them in a conversation that this board fell down the elevator shaft which he says was near him. He says he was between the window and the elevator shaft. He denies that he said that.

When you come to the end of the case, regardless of this presumption arising from the doctrine of *res ipso loquitur* or "the thing speaks for itself" which I have defined to you, it will be for you to say whether from all the evidence in the case it appears by its greater weight—that is the preponderance of the evidence—the injury to this plaintiff occurred because of the negligent and careless handling of this board by the negligent and careless handling of this board by the agents or employees of the defendant Starrett. If it does, the plaintiff is entitled to your verdict. If it does not so appear to the greater weight of the evidence then, notwithstanding this presumption from the doctrine I have mentioned, the plaintiff is not entitled to your verdict and it should be in favor of Starrett.

Of course, if your verdict be in favor of the defendant you will not consider at all the subject of damages, but if you first decide that Starrett Brothers employees or servants were negligent, as the result of which the plaintiff received his injuries, then you will consider the damages to which he is entitled. He claims to have been very

seriously injured. I am not going to quote all the testimony for or against the seriousness of these injuries. I ought to say, however, that the burden of proving the extent of the injuries is upon the plaintiff, the same as the burden is upon the plaintiff to prove the liability of the defendant, and the plaintiff should not be awarded for any injury, or the consequences of any injury, which has not been established by the greater weight of the evidence. Therefore, for such injuries, such pain and suffering and such disability as you find to be proven, you will award him compensation if you decide he is entitled to your verdict. This matter, of course, cannot accurately be calculated, but it must be left to the good judgment of you twelve gentlemen to say what will be compensation to him for his injury, pain and suffering and disability in the past, at the present time and in the future, because this is his one day in court, and if his disability, if his pain and suffering have not yet ended, he cannot in the future come into this court and ask to have his damages assessed for such future pain and suffering and disability. It is for you to say from the evidence what that future pain, suffering and disability probably will be, and to capitalize it in dollars by your verdict. In addition to that, he is entitled to have returned to him the amount of his expenses which have been proven in this case and that item is limited to the bill of Dr. McCabe, who says that his bill is $450. In addition to that, if he is entitled to your verdict, he is entitled to be compensated for his loss of earnings not only what he has lost up to date, but if you find from the evidence he will lose earnings in the future, he is entitled to be compensated for what the future loss of earnings will probably be. He was getting $49.50 a week. That was his regular wage. He said sometimes they did extra work which brought it up to a hundred dollars a week. This accident happened on the 29th day of July, 1926. He has not yet been able to work and one of the physicians says it will probably be a year or a year and a half before he will be able to do any work, and then, only light work. To the extent to which this is due to injuries received in this accident, he is entitled to be compensated if he is entitled to your verdict. Of course, there is some dispute in the medical testimony as to whether or not his disability is due at the present time, or has for some time been due to the injuries received in this accident. That you will take into consideration in determining the amount he is entitled to both for his suffering and disability and for loss of earnings.

(The jury retires.)

Postea.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

PATRICK CORBETT, Plaintiff, *vs.* STARRETT BROTHERS, INC., a corporation of New York, Defendant.	Action at Law. POSTEA.

The above entitled cause of action was tried before the Honorable Nelson Y. Dungan, Circuit Court Judge, to whom the same had been referred, and a jury, at the Essex Circuit on December 14, 1927, and December 15, 1927. At the close of the plaintiff's case judgment of non-suit was granted in favor of the defendant, George Peterson, Inc., and against the plaintiff, Patrick Corbett. At the termination of the case, the jury, after due deliberation, returned a verdict in favor of the plaintiff, Patrick Corbett and against the defendant Starrett Brothers, Inc., a corporation of New York, in the sum of Fifteen Thousand Dollars.

NELSON Y. DUNGAN,
Circuit Court Judge.

A true copy.

EDWARD J. KELLEHER,
Acting Clerk.

On Postea.

NEW JERSEY SUPREME COURT.

PATRICK CORBETT, Plaintiff, *vs.* STARRETT BROTHERS, INC., a corporation of New York, Defendant. $15,000.00 63.84 $15,063.84	Action at Law ON POSTEA.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of fifteen thousand dollars, besides costs to be taxed nisi.

Entered December 27, 1927.

On motion of
A. MILTON JACOBS, Attorney.

A true copy.

EDWARD J. KELLEHER,
Acting Clerk.

Notice and Grounds of Appeal.

NEW JERSEY SUPREME COURT,

PATRICK CORBETT, Plaintiff, *vs.* STARRETT BROS., INC., a corp. of New York, Defendant.	NOTICE AND GROUNDS OF APPEAL.

To: A. Milton Jacobs, Esq., Attorney of Plaintiff:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in the above entitled matter to the Court of Errors and Appeals in the Last Resort in All Causes, and writes down the following ground upon which is intends to reply on the argument of the appeal:

1. Because the Court, on motion of the plaintiff and over the objection of defendant, struck out the Second Defense to the Second Count and the Second Defense to the Third Count of the defendant's answer.

Dated: January 3, 1928.

Respectfully yours,

WALTER L. GLENNEY,
Attorney of Defendant.

New Jersey Court of Errors and Appeals

PATRICK CORBETT, Plaintiff-Appellee, *vs.* STARRETT BROS., et als., Defendant-Appellant.	At Law. ON APPEAL FROM SUPREME COURT.

BRIEF FOR APPELLANT.

This case was tried in the Supreme Court (Essex Circuit) before Judge Dungan, and a jury. The case was submitted to the jury and a verdict was returned in favor of the plantiff. The case now comes up on appeal.

Facts.

Defendant, Starrett Bros., is a general contractor and was engaged in erecting for the Kresge Co., a large department store situate on the westerly side of Broad Street, and running from Cedar Street on the north to the next street south. The building was some nine (9) stories high. It was in the course of erection.

Starrett Bros. had sub-contracted a large part of the work. Among these sub-contractors was Spencer, White and Prentiss, who were engaged on the foundation work; Peterson & Co., who was the "floor man", engaged in laying the concrete floors, and various other sub-contractors—plumbers, electric work, carpenters, heating, etc.

Defendant was doing the mason and brick work.

On July 29th, 1926, plaintiff was working for Spencer, White & Prentiss, as a laborer. He was at work in the sub-way entrance which was situate along the north wall of the building (on the Cedar Street side), engaged in laying a cable.

Along the north side of the building and extending its whole length, there had been excavated a trench about three feet wide for the purpose of the sub-way above mentioned.

The sidewalk on the north side of the building had been closed off, and over it had been erected a bridge. This bridge consisted of posts placed (a) alongside of the north wall, and (b) posts placed at the curb, and (c) braces laid from post to post, and (d) planks laid along the braces, thus making a bridge or covering over the sidewalk. This bridge, or covering, came to within a foot or two feet of the north wall.

On July 29, 1926, as above mentioned, plaintiff was at work in the sub-way at a point about 50 or 60 feet west of Broad Street.

While plaintiff was at work a board fell from a second story window, struck the bridge above mentioned, and in some way went down the excavation, as above stated as running along the north wall, into the sub-way and struck plaintiff on the head.

There was evidence that on the second floor, at or near the window from which the board fell, workmen of defendant, Starrett Bros., were working.

Plaintiff brought suit against Starrett Bros. upon a charge of negligence, which negligence is stated to be that it (page 14)

> "Carelessly, negligently and without any warning, dropped a wooden plank about 15 feet long, against and upon the head and body of the plaintiff."

Defendant, Starrett Bros., denied all allegations of negligence, and in addition set up the following defense:

(page 18)

> "This answering defendant alleges that the plaintiff at the time of the alleged accident was in the general employ of a sub-contractor of the defendant, Starrett Brothers, Inc., general contractor; all of the employees of the sub-contractor, together with the employees of the general contractor, and of the defendant, George Peterson, Inc., were engaged in a common enterprise of constructing a building; that plaintiff was subject to the provisions of Chapter 95 of the Laws of 1911 and Acts Amendatory thereof and Supplemental thereto, known as An Act Prescribing the Liability of an employer to make Compensation for Injuries received by an Employee in the Course of Employment, more commonly known as the Workmen's Compensation Law of the State of New Jersey, and also subject to the provisions of Chapter 178 of the Laws of 1917 and Acts Amendatory thereof and Supplemental thereto, known as the Workmen's Compensation Insurance Act of the State of New Jersey, and never, under the terms of said Laws, elected to reserve his common-law rights, either as against said general employer of the plaintiff or either of these defendants; that the provisions of said Workmen's Compensation Laws are exclusive and plaintiff is thereby precluded from recovering against the defendant, Starrett Bros., Inc., herein."

Note: This same defense was set up as the Second Defense to the Second Count of the complaint, and the Second Defense to the Third Count of the complaint.

At the trial motion was made by plaintiff to strike out the above stated defense as follows:

(page 28)

"Mr. Schneider: In this suit the plaintiff was employed on the Kresge Building, and he was working down on the foundation, and was struck by a board which fell from one of the upper stories. The plaintiff was employed by a firm known as Spencer, White & Prentiss. We are suing Starrett Brothers and Peterson, who had a subcontract.

"The Court: He was a subcontractor under Peterson or Starrett?

"Mr. Schneider: Under Starrett. Our man was employed by Spencer, White & Prentiss who is not a party to this suit. We are suing both of them, alleging that both or one of them owned the board. The second defense to the second count and the second defense to the third count are the ones of which we complain. The plaintiff worked for a party who is not a defendant in this suit. As against him, of course, our exclusive remedy would be under the compensation act, but there have been hundreds of cases tried in these courts where an employee who has been injured while working on a building sued the third party, like in this case. There can be no double recovery, and then he can take a lien, they have to pay that back to the employer, but he is in no way barred from the act or the insurance act relating thereto, by suing these other parties. I ask that that be stricken out. It will prejudice us if counsel, even in the opening should speak about the insurance act or the compensation act, because the jury might get the impression that he is getting a double recovery, and that has nothing to do with this case."

The Court granted such motion and set forth its reason as follows:

(page 29)

"The Court: (after argument) This action is not brought against the person or corporation in whose employ the plaintiff was at the time of the accident. He was an employee of

a sub-contractor of Starrett Brothers. Starrett Brothers, in the second defense to the second count, and in the second defense to the third count, set up the employers liability act, the law of 1917, and acts amendatory thereof and supplementary thereto, which includes the 1924 act, page 224, and it might be that that defense would be a proper one under the circumstances set forth in the amendment, section 5, and as set forth in the 1924 act; but the general contractor should not be held liable under the compensation act unless the subcontractor fails to carry workmens compensation insurance, as required by the act. There is no allegation in the answer that the sub-contractor, in whose employ the plaintiff was at that time, did not carry such insurance. I think, therefore, that the second defense to the second count and the second defense to the third count should be stricken out."

Defendant's counsel prayed an exception to this ruling of the Court, and the exception was noted as ground of appeal.

Question Involved on This Appeal.

The question involved on this appeal is directed to the striking out of such defense.

ARGUMENT

POINT I.

The Court erred in striking out the defense and depriving defendant of the benefit thereof.

The Trial Court, in its remarks setting forth the reason upon which it based its decision granting the motion to strike out the defense interposed by defendant to the action, stated that the motion was granted because the pleading did not state that the sub-contractor had failed to take out insurance as required by the Workmen's Compulsory Insurance Act. It seems to us that this reason is not well founded.

We contend that such an allegation was not necessary.

Defendant was not resisting a claim *for compensation* made against it by plaintiff. It was not setting up as a defense to a claim for compensation that plaintiff had not shown that the sub-contractor had failed to carry insurance as required by the Act, and that it was only liable for compensation when plaintiff had pleaded and established such fact.

Nor was it alleging as a defense that it *was* liable for compensation to plaintiff *in this instance.*

The defense was based upon the theory that plaintiff, his employer (the sub-contractor) and defendant (the general contractor) were all brought under the terms of the Workmen's Compensation Act of New Jersey, by the terms thereof as enlarged by the Workmen's Compulsory Insurance Act of 1917, page 525, as amended by Laws

1924, page 244; that under such Acts, defendant was liable to plaintiff only as an employer and *so liable* only for the compensation provided for by said Act under the conditions and in the manner provided for by said Acts; that this liability was exclusive, and, therefore, defendant was entitled to have the suit then being tried, as to it, dismissed.

If such a defense was a valid defense, and was substantially set forth in the answer, in language sufficiently plain to enable plaintiff to "extract the pith" thereof (*Kayewski* vs. *South River,* 83 N. J. L. 151), and inform himself of the defense interposed, it was sufficient and should not have been stricken out.

All that is required under the present practice is "a plain statement of the real point involved" (*Schwarz Bros.* vs. *Evening News Pub. Co.,* 84 N. J. L. 486).

A reading of the answer shows that the defense was sufficiently set out.

It sets up (a) that plaintiff was at the time of the accident in the general employ of a sub-contractor of the defendant, a general contractor; (b) that all the employees of the sub-contractor and the general contractor were engaged in a common enterprise of constructing a building; (c) that plaintiff was subject to the provisions of the Workmen's Compensation Act of 1911, and the Workmen's Compulsory Insurance Act of 1917, and acts amendatory thereof and supplementary thereto, and (d) such acts precluded plaintiff from recovering against defendant in the present action.

It remains then to ascertain whether the defense, assuming it to have been properly pleaded, was a defense to the merits.

POINT II.

The defendant, Starrett Bros., was an employer under the terms of the Workmen's Compensation Act of New Jersey, as amplified by the terms of the Workmen's Compulsory Insurance Act, and was liable to plaintiff for the payment of compensation under the conditions provided for in said Act, and was not liable to him in damages at common law.

The purpose of the Compensation Act was to secure compensation to employees regardless of the negligence of the employer, and really to secure the payment thereof *from the industry* and as a part of the cost of conducting the same.

We take the liberty of setting forth the statement of the United States Supreme Court in the case of Cudahy Packing Co. *vs.* Paramore, 263 U. S. 418, 68 L. Ed. 366, 30 A. L. R. 532:

> "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract: that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work, as the owner contributes his capital,—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."

This principle may be also thus expressed:

> "It is based upon the proposition that the inherent risks of an employment should, in

> justice, be placed upon the shoulders of the employer, who can protect himself by an addition to the price of his product, and so cause the burden ultimately to fall upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools * * *."
>
> *Deeny* vs. *Wright & Cubb Literage*, 36 N. J. L. J. 121, 123.

The terms "employer", "business" and "industry" as used in the decisions are synonymous.

The New Jersey Workmen's Compensation Act of 1911 made the *employer* liable for compensation to his employee injured in an accident arising out of and in the course of his employment, and, so far, made the *industry* liable for such compensation. It frequently happened, however, that in construction work, the injured workman was an employee of a sub-contractor who was of no financial responsibility, and the injured employee was deprived of his compensation. It also frequently happened that in other classes of work the employer was of no financial responsibility and again the employee was deprived of his compensation.

In the several states various methods of securing the payments required by law to be made to injured employees have been devised. In New Jersey the Legislature passed an Act known as the Workmen's Compulsory Insurance Act (P. L. 1917, p. 525), the title of which is:

> "An Act concerning the compulsory insurance of compensation payments arising under section two of the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by

an employee in the course of employment, and regulating procedure for the determination of liability and compensation thereunder", approved April 4, 1911.

Section 1 of that Act makes it obligatory upon *every employer* subject to the provisions of Section 2 of the Compensation Act to secure the payments of any obligation he may incur to *any injured employee* * * * by insuring such payments by one of the methods of insurance set forth in the Act.

Other Sections of the Act (a) give the employee the right to sue upon such contract of insurance and to recover from the insurance carrier the amount due him for compensation, (b) make the insurance carrier liable even though the employer became insolvent, bankrupt or shall die, and (c) contains other provisions for the protection of the employee.

Section 5 of the Act, as amended by Laws of 1924, page 244, provides:

"5. Any employer who shall fail to provide the protection prescribed in this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for a first offense by a fine of not more than five hundred dollars, and for a subsequent offense by a fine of not more than five hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

"Any contractor placing work with a sub-contractor, shall, in the event of the sub-contractor's failing to carry workmen's compensation insurance as required by this Act, become liable for any compensation which may be due an employee or the dependent of a deceased employee of said sub-contractor. Such contractor shall then have a right of action against such sub-contractor for reimbursement."

With this section included, it is clear that the workman (employee) is, by the Compensation Act and the Compulsory Insurance Act (which must be read together as constituting one single scheme for protecting the workman in case of accident arising out of and in the course of his employment), secured and fully protected in the payment of compensation for injuries received, and the intent of the legislature that "the industry should bear the losses due to the employee's injuries" (*Dayton Power Etc. Co.* vs. *Westinghouse Electric Etc. Co.,* 287 Fed. 439, 37 A. L. R. 849) is thus demonstrated.

The foregoing establishes clearly that the *industry* or business, or in other words, the employer, is to bear the losses due to the employee's injuries, because, not only is the immediate employer, required to pay compensation and to secure the payment by proper insurance, but in case such immediate employer be a sub-contractor (as frequently arises on construction work), then the employee is made doubly secure, for should the sub-contractor fail to so secure the payment by proper insurance, the general contractor is by the terms of Section 5 of the Compulsory Insurance Act (*supra*) made liable for such payments.

Now, while it is perfectly clear that under Section 5 of the Workmen's Compulsory Insurance Act, *supra,* the general contractor is made liable for compensation payable to the employees of his sub-contractor in the event that the sub-contractor fails to carry insurance, yet the ground of such liability is not stated. Upon what theory of law is he made liable? The Workmen's Compensation Act and the Workmen's Compulsory Insurance Act govern the relation of employer and employee. In order, therefore, that the general contractor may be made liable under such acts,

he must be made so as an employer. It is apparent then that by force of the Act, the general contractor stands in the position of an employer of all men employed in work covered by the general contract, even though such men are in the immediate employ of a sub-contractor. That a general contractor should stand as an employer of all men employed in work on his contract has a basis in reason. All the men—the employees of the general contractor and employees of the sub-contractor—are engaged in one common enterprise; they are working in the business of the general contractor and in his interest. The general contractor must see that the whole work—including that to be done by each sub-contractor—is fully performed. The *entire* work is *his* work and *his* responsibility.

The "industry" is the business of the general contractor, and the result of the Compensation Act and the Compulsory Insurance Act, as we have interpreted them, is to make such industry liable and to afford security for the payment of compensation for injuries to all workmen engaged therein, even in case of injured employees of irresponsible sub-contractors, who have failed to carry insurance as required by the Act.

That the general contractor is by the Workmen's Compulsory Insurance Act made the *employer* of all men working in the "industry" (using such word in the narrow sense and meaning the project then under construction) including the men of the sub-contractors, so far as the liability for compensation goes, is clear. The title of the Act demonstrates this. The Workmen's Compulsory Insurance Act is entitled:

> "An Act concerning the compulsory insurance of compensation payments arising under Section 2 of an Act, prescribing the liability of an *employer* to make compensation for injuries received by an employee, etc."

In other words, it is an Act affecting the relation of employer and employee.

The first section requires every *employer* subject to the provisions of Section Two of the Workmen's Compensation Act to secure the payments of compensation to injured employees, and Section Five makes the general contractor liable to the employees of a sub-contractor in the event that such sub-contractor fails to carry insurance. The general contractor then comes under the definition of *employer* as used in Section Two of the Act.

POINT III.

Unless the general contractor is made liable for compensation payments provided for under the Workmen's Compensation Act as an employer, the Compulsory Insurance Act as to him would be unconstitutional.

The Workmen's Compensation Act of New Jersey regulates the relation of master and servant, or employer and employee, and this is permitted because of the right of the State to pass laws, concerning the public, health, safety and welfare of its citizens, in the legitimate exercise of the police power; this, of course, includes the right to regulate any industry which might be hazardous to its citizens. 25 R. C. L. 741; *N. Y. Cent. R. R. Co.* vs. *White,* 243 U. S. 188, 61 L. ed. 667.

But such power in the State does not permit the Legislature to pass (and enforce) laws violative of the Federal Constitution, especially of the Fourteenth Amendment thereof, which prevents

the taking of private property without due process of law.

Ives v. *South Buffalo Ry. Co.*, 201 N. Y. 271; 99 N. E. 431.

The Workmen's Compensation Act of New Jersey was held by the Courts of this State not violative of the Fourteenth Amendment of the Federal Constitution, because the Act is elective and the employer is not bound by the terms of Section Two thereof, which provides for payment of compensation by the employer to the employee irrespective of the negligence of the employer, unless he consents thereto (which consent is presumed if he fails to give the notice provided for in Section One of the Act), and if he so consents and thereby agrees to make such compensation payments to the injured employee, it is held that he is not then deprived of his property without due process of law. *Sexton* vs. *Newark Dist. Tel. Co.*, 84 N. J. L. 85; aff. 86 N. J. L. 701.

Unless, however, he does so consent, imposing such liability on him would be depriving him of his property without due process of law.

When, therefore, the Legislature attempts to make the general contractor liable for compensation payments, irrespective of the negligence of the general contractor, to the employee of a subcontractor who is injured in an accident arising out of and in the course of his employment, such legislation can only be sustained upon the theory that the general contractor is an *employer* of the injured employee.

Otherwise, such legislation would be unconstitutional as depriving the general contractor of his property without due process of law.

The foregoing is not intended as an argument to the effect that the Act is unconstitutional, but rather to sustain the contention, heretofore set up by us, that the Legislature, knowing that the constitutionality of the Act imposing liability upon the general contractor to pay compensation to an employee of a sub-contractor could only be sustained upon the theory that the general contractor was an employer, included such general contractor in its definition of the word "employer" used in the Act.

Under such an interpretation, the Act would be constitutional; under any other interpretation, it would be unconstitutional.

An interpretation which will sustain the constitutionality of the Act is to be preferred over one which would make the unconstitutionality thereof.

25 R. C. L. 1000, and numerous cases cited.

POINT IV.

Defendant, Starrett Bros., being liable to plaintiff as an employer, plaintiff's remedy was under the Workmen's Compensation Act, and not at common law.

By the terms of the Workmen's Compensation Act, the remedy of the injured employee against the employer is confined to the remedy stated in the Act. Such remedy is exclusive.

Gregutis vs. *Waclark Wire Wk.*, 86 N. J. L. 610;
McNutt vs. *Adams Express Co.*, 94 N. J. L. 490.

The provision in the Workmen's Compensation Act (Sec. 23 (f)) reserving to the employee his right of action against a third party whose negli-

gence has caused his injury, does not affect the situation under discussion.

The Legislature recognized that where a party unconnected with the industry has, by his negligent conduct, caused the injuries to the employee, such employee should not be deprived of his common law remedy against such negligent party, nor, yet, should the employee receive compensation from his employer, and also damages from such negligent party, and retain both; nor that the industry, under such circumstances, should be compelled to bear the losses due to the employee's injuries. Therefore, the Legislature inserted in the Compensation Act the provision (Sec. 23 (f)), that the right to compensation shall not deprive the injured employee of his right of action against such negligent party, and, recognizing the injustice of compelling the industry to bear the losses due to the employee's injuries under such circumstances, further provided that in case the injured employee, or his dependents, should recover a sum equivalent to a sum greater than the total compensation payments for which the employer is liable under the Statute, the employer should be released thereby from the obligation of compensation, or if the sum so recovered from the third person or corporation is less than the total compensation payments, the employer shall be liable only for the difference.

This provision (Sec. 23 (f)) uses the words "third party", and these words clearly apply to persons *not connected with the industry* in which the employee is injured and to those only. Certainly, the Legislature never intended to place *double liability* upon *the industry* or business by making it liable both in case of negligence on its part by way of a common law action and by way of compensation under the Compensation Statute.

The "third party" contemplated by the Act is,

therefore, *clearly a person not connected with the industry in which the employee was injured at the time.*

The *general contractor* made liable for compensation payments by Section 5 of the Compulsory Insurance Act *is made liable as an employer*, and not as a "third party".

POINT V.

The fact that liability is imposed upon the general contractor to make compensation payments only "in the event of the sub-contractor's failing to carry workmen's compensation insurance as required by the Act", does not affect the situation.

The intent of the Act was to *secure the payment* of compensation to the employees. The general contractor can protect himself and the injured employee only by himself insuring *all employees on the work*,—not only his immediate employees, but also the employees of all sub-contractors. Though the sub-contractor secures workmen's compensation insurance and so informs the general contractor, he may cancel the same, or it may be cancelled by the company at any time, or it may terminate by its terms, or it may for some reason not cover the injured employee, or the insurance carrier might fail, or the sub-contractor may falsely inform the general contractor. In any of such contingencies, the general contractor is liable.

Any other construction than that the *general* contractor is liable to the employees of a sub-contractor as an employer, places an undue burden upon the general contractor; a greater liability to the employee of the sub-contractor than is imposed upon him to his own employees, or than is im-

posed upon employers generally. Under the construction contended for by plaintiff if the sub-contractor does not carry compensation insurance, the general contractor is liable as an employer; if the sub-contractor carries compensation insurance, the general contractor is liable to the injured employee in a common law action grounded in negligence. He is made liable as an employer, yet is to be deprived of the immunity from other liability which the Act grants to other employers.

In the case of *White* vs. *Fuller Co.* (Mass.), 114 N. E. 829, hereafter referred to, the Court, speaking of such a contention said:

> "Such a one-sided interpretation of the Act is not to be adopted unless the language clearly requires it."

Moreover, assume that there are two sub-contractors on the same job: one secures compensation to his employees: one does not: two men, an employee of each, are injured in one accident. The general contractor is liable *as an employer to one, and as a third party to the other.* To one he is liable for compensation under the Act: to the other, he is liable for damages in an action for negligence.

It would be almost absurd to assume that the Legislature intended any such result.

The clear intent of the Legislature in enacting Section 5 of the Compulsory Insurance Act was to secure payment of compensation to the injured employee from the industry or business, first from the sub-contractor, if possible, or, in the event that such sub-contractor should be irresponsible or fail in his duty to carry insurance, then from the general contractor, or his insurance carrier. To that end, it designates the general contractor *as an employer,* and *as such* makes him liable to the employees of the sub-contractor under the Compensation Act solely.

Summary.

We are indebted for the greater part of the foregoing argument to the case of *Casey* vs. *Shane Construction Co.* (N. Y.), 221 App. Div. 660, 225 N. Y. Supp. 126.

This case, however, is not the only case so deciding.

In the case of *White* vs. *Fuller Co.* (Mass.), 114 N. E. 829, an employee of a sub-contractor was injured by the negligence of the employees of the general contractor. Compensation insurance was carried by the general contractor. The sub-contractor was not insured. The question involved was whether the injured employee's rights as against the general contractor were solely under the Compensation Act, or had he a right against the general contractor at common law.

Part 3 of Section 17 of the Workmen's Compensation Act of Massachusetts reads substantially as follows:

> "If a subscriber enters into a contract with an independent contractor to do such subscriber's work, or, if such contractor enters into a contractor with a sub-contractor to do all or any part of the work comprised in such contract with the subscriber, and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this Act to those employees, the association shall pay to such employees any compensation which would be payable to them under this Act, if the independent or sub-contractors were subscribers." * * *

The case states:

> "The object of this Section was to prevent the possibility of defeating the Act by having an irresponsible contractor to carry on part of the employer's work."

The Court held that the remedy of the employee of the sub-contractor was exclusively under the Workmen's Compensation Act.

In the case of *Bindbeutel* vs. *Willcutt & Son,* 244 Mass. 195, 138 N. E. 239 (Mass.), the Court, speaking of a situation almost identical with the case at bar, said:

> "It was not the purpose of the Act to place a greater burden upon the general contractor than upon the sub-contractor where all were insured. All the contractors,—sub-contractors, equally with the general contractor—were engaged in a common enterprise. The Statute intended that all the employees on the job, the employees of the sub-contractors, as well as those immediately in the employ of the general contractor, should be protected by the Act. With this end in view, Section 17 was enacted making the general contractor liable under the Act to the employees of the sub-contractor in case the latter did not insure his employees as provided by the statute."

In *Catalano* vs. *Watts Corp.,* 152 N. E. 46 (Mass.), the case of *Bindbeutel* vs. *Willcutt & Son, supra,* is approved.

While it is true that the statutes of New York, Massachusetts and New Jersey, are not exactly similar, yet there can be no doubt that each statute makes the general contractor liable as an employer, nor can there be any doubt that the purpose of the statute was to "prevent the possibility of defeating the Act by having an irresponsible contractor to carry on part of the work" (*White* vs. *Fuller Co., supra*).

This purpose could only be accomplished by holding the general contractor liable as an employer and thus bringing him within the terms of the Act.

It is, therefore, clear that the defense pleaded was a meritorious defense, and one which would be dispositive of the case in favor of the defendant, and depriving defendant thereof was harmful error as to it.

For the foregoing reasons, the judgment appealed from should be vacated and set aside.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

PATRICK CORBETT, *Plaintiff-Appellee,* *vs.* STARRETT BROTHERS, INC., a corporation of New York, (*et als.*), *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-APPELLEE.

Statement of Facts.

This case was tried before Judge Nelson Y. Dungan and a jury at the Essex Circuit of the Supreme Court and resulted in a verdict of Fifteen Thousand Dollars in favor of the plaintiff and against the defendant, Starrett Brothers. A non-suit was granted at the close of the plaintiff's case in favor of the defendant, George Peterson, Inc., a corporation of New Jersey.

Corbett was an employee of Spencer White & Prentiss, sub-contractor, on the foundation work of the Kresge building at Broad and Cedar streets, Newark, under the defendant, Starrett Brothers, the general contractor George Peterson, Inc., was the sub-contractor for the flooring.

The plaintiff was struck by a board which was being handled by employees of Starrett Brothers, and which fell several stories into the excavation where the plaintiff was working, striking him.

The defendant was charged with negligence in the complaint, which was denied. As a sepa-

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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

rate defense (see p. 7, of State of Case), the defendant alleged that the plaintiff was an employee of a sub-contractor, all of whose employees together with the employees of Starrett Brothers, the general contractor, were engaged in a common enterprise, that plaintiff was subject to the provisions of the Workmen's Compensation Act of our State and also to the Workmen's Compensation Insurance Act thereof, and that therefore his sole remedy was under the Compensation Act. The act upon which the appellant takes its stand is known as the Workmen's Compulsory Insurance Act (P. L. 1917, p. 525), Section 5 as amended by the laws of 1924, page 244, and is as follows:

> "Any employer who shall fail to provide the protection prescribed in this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for a first offense by a fine of not more than five hundred dollars, and for a subsequent offense by a find of not more than five hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment. Any contractor placing work with a sub-contractor, shall, in the event of the sub-contractor's failing to carry workmen's compensation insurance as required by this act, become liable for any compensation which may be due an employee or the dependents of a deceased employee of said sub-contractor. Such contractor shall then have a right of action against such sub-contractor for reimbursement. The county prosecutor of the county in which the violation occurred shall proceed at the request of the Workmen's Compensation Bureau, or the Department of Banking and Insurance against the person, partnership or corporation guilty of the violation. All fines collected under the terms of this clause shall be paid to the State Comptroller to the account of the Rehabilitation Commission for

> Physically Handicapped Persons, to be used in carrying out the purposes of the act creating the above-named commission, approved April tenth, one thousand nine hundred and nineteen."

The plaintiff filed a Reply in which he reserved the right to move to strike out this defense which had also been pleaded similarly to another count. The argument of counsel on both sides is found on pages 28 and 29. The Court granted a motion to strike out these defenses in the following language (see p. 29, l. 35 to p. 30, l. 20):

> The Court: (After argument.) "This action is not brought against the person or corporation in whose employ the plaintiff was at the time of the accident. He was an employee of a sub-contractor of Starrett Brothers. Starrett Brothers, in the second defense to the second count, and in the second defense to the third count, set up the employer liability act, the law of 1917, an act amendatory thereto, which includes the 1924 act, page 224, and it might be that that defense would be a proper one under the circumstances set forth in the amendment, section 5, and as set forth in the 1924 act; but the general contractor should not be held liable under the compensation act unless the sub-contractor fails to carry workmen's compensation insurance, as required by the act. There is no allegation in the answer that the sub-contractor, in whose employ the plaintiff was at that time, did not carry such insurance. I think, therefore, that the second defense to the second count and the second defense to the third count must be stricken out."

N. B. The page of the 1924 act is really 244 instead of 224.

Defendant's counsel did not ask for leave to amend in order to allege that the sub-contractor

did not carry compensation insurance. (It came out during part of the argument of counsel which is not reported, that the sub-contractor did in fact carry compensation insurance and that the plaintiff in fact had been receiving payments under the same.) Thereupon, defendant took an exception to the Court's rule (see p. 30, l. 21), which was noted as ground of appeal; **and this is the sole ground of appeal.** This point has never arisen in our State before.

In order to clear the atmosphere and crystallize the argument, we desire to admit some of the contentions of the appellant to which quite some space is allotted in its brief and to support which, rather numerous citations are made of cases both in New Jersey and in foreign jurisdictions.

(1) Point One of appellant's brief (see pp. 6 and 7) dwells largely upon the question as to whether the Answer was sufficient as to form. Appellee waives this entirely and agrees that the point of law be decided on the merits. The question of form was not raised in the slightest on the argument before the Trial Court.

(2) Point Two of appellant's brief (*inter alia*) lays great stress upon the point that our compensation act, as all other compensation acts, intends in a remedial spirit and for the amelioration of the situation of workmen to saddle an industry with the injuries of the workmen therein, thus adding the cost of and losses from the same to the cost of production. Our Courts and the Federal Courts are quoted to support this contention. This assertion, however, is at the present time a platitude and we feel that *the Trial Court's interpretation of the act in question carries out this theory much more effectively than appellant's,* which we shall show to be far-fetched

and specious; likewise as to appellant's reiterated argument that there was good reason for the act and its amendments.

(3) Point 4 and part of Point 5 of the appellant's brief argue at length that the Compensation Act is the sole and exclusive remedy of the plaintiff, assuming that the general contractor is to be regarded as an employer. We contend that the major premise is false, viz: that the general contractor cannot be regarded as an employer and that the conclusion is, therefore, false. The conclusion, of course, would in itself be correct, viz: if Corbett were an employee of Starrett Brothers, his sole remedy would be under the Compensation Act and would need no citations to support it. We deny the same, however, and insist that the reasoning supporting such a contention, is a veritable contortion of law on the subject and the reasoning thereunder.

(4) Point 3 attempts by innuendo to raise a constitutional question. In this case, however, anyone who runs may read that *not the slightest constitutional question is involved.* The Fourteenth Amendment of the Federal Constitution which is mentioned, prohibits the taking of property without due process of law. The plaintiff in this case sues a stranger to him under the old common law remedy for negligence. How can the defendant plead the Fourteenth Amendment without indulging in legal acrobatics?

(5) The appellant in its "Summary" (see p. 19 of appellant's brief, top) says: "We are indebted for the greater part of the foregoing argument to the case of *Casey* v. *Shane Construction Co.* (N. Y.), 221 App. Div. 660, 225 N. Y. Sup. 126. **This case has been discarded by New York.** In a case decided May 1, 1928 (not yet

reported), which will be set out verbatim, viz.: *Lena Clark, Administratrix, etc.* v. *Monarch Engineering Co., New York, takes an absolute unqualified stand in favor of the contention of the plaintiff-appellee in this case. This is a decision of the Court of last resort of New York sustaining the lower courts.*

ARGUMENT.

The Trial Court did not err in striking out the defenses setting up the Workmen's Compensation Act and the Compulsory Insurance Act as the sole and exclusive remedy of the plaintiff.

As will appear from the reasoning of the cases cited hereinafter, the Compulsory Insurance Act of New Jersey imposes a **secondary liability** on the general contractor, the **primary liability** to take out workmen's compensation insurance still resting on the sub-contractor, that is, the employer. Under the 1917 act, the employer, sub-contractor, was compelled by law to take out compensation insurance; under the 1924 act, an additional safeguard for the employee was erected and it was provided that, "**In the event of the sub-contractor's failing to carry Workmen's Compensation Insurance as required by this act,**" the general contractor should become liable for any compensation due to the employee, etc., of the sub-contractor. In fact, this provision is in the body of the section and follows that part which provides for penalties under the criminal law against an employer failing to take out compensation insurance.

It is self-evident that the sole purpose of the amendment was to provide against a situation where the injured employee, or the dependents of a deceased employee, might be deprived of

the remedial benefits of the Workmen's Compensation Act through the express or negligent failure of a sub-contracting employer to take out insurance. *It does not intend in any way to abolish the old common law action of negligence against a third party and specifically against a general contractor who is not an employer.* In fact our Compensation Act is clear on actions against third parties by injured employees. Under the original act, it was perfectly possible to have a double recovery. The employee could collect compensation and also sue the third party at law for negligence without any deduction. To remedy this situation an Amendment was passed specifically providing that the employee could pursue both remedies concurrently and that the employer could file a notice upon the alleged third party tort-feasor, whereupon the amount paid for compensation would become a lien on any sums collected from the third party by settlement or judgment.

In the instant case, the sub-contractor, on paying compensation, could file a lien with Starrett Brothers for the same.

The argument is made that an additional burden is imposed upon the employer in that he is made subject to pay compensation as well as to pay a possible judgment in the action at law. **He is not, however, compelled in any manner to pay compensation; he is simply compelled to see to it that the workman is protected by compensation insurance to be taken out by his employer. If he does see to it, there is no burden upon him at all.** And from a practical point of view, the requirement is very simple indeed, and the forms and procedure of insurance would provide for it (and in fact do provide for it) without the slightest trouble. The general contractor need

do no more than require of the sub-contractor on taking the job, to furnish him with a proper workmen's compensation policy. The argument is made that he might be misled or fooled or that the sub-contractor might cancel the insurance or juggle it in some incomprehensible manner. This argument is puerile. All that the general contractor need do is to require what might be known as a general contractor's clause in the policy, tantamount to a mortgagee clause in a fire insurance policy, the effect thereof to be that the insuring company shall not be entitled to cancel the policy without due notice to the general contractor so that he might protect his interest. He could further protect himself by having a proper clause in the agreement with the sub-contractor, prescribing penalties and remedies, which are so easy to conceive that we need not dwell upon them. Policies of insurance at the present time are most comprehensive and provide for more difficult situations than this. Therefore, where is a burden imposed upon the general contractor?

The object of this specious argument is to convince the Court that the general contractor, on account of this Amendment, must be regarded as employer of the sub-contractor's men. What an unnatural contortion of law! In the first place, *an attempt is made to impose a relationship on the parties which has never, under the wildest stretch of the imagination, been contemplated by them;* in the second place, an *established remedy* of an injured person *is swept away* where absolutely unnecessary **because the same result can be attained by considering the general contractor in this case, a guarantor, a secondary defense so to speak, and not an employer;** and in the third place, *the very remedial intent of these acts is*

perverted because the general contractor is given an incentive for laxity and carelessness in furnishing, what is most important of all, to an employee on a building job, viz: a safe place and reasonable safeguards around the same. The sub-contractor, of course, and his men, have no control over the place and the protection thereof.

This idea is supported and carried out in full by the evident intent of the Legislature in these enactments. The Workmen's Compensation Act of 1911 was intended to be a liberally remedial piece of legislation for the amelioration of injured workmen, and aimed to make their compensation for injuries certain and safe, so as to place the burden on the industry, even if it meant an increase in the cost of production; in other words, it was intended to eliminate the peril and calamity of injuries to workmen by spreading the cost of the same among the ultimate consumers and to remove from the lives of workmen such perilous catastrophies. The original act did not provide for insurance. Subsequently, the 1917 Act made insurance by employers compulsory. A possible loophole was then discovered in that general contractors could hide behind irresponsible sub-contractors, and thus shift the burden, and leave the workmen unprotected, as theretofore. The 1924 Act, therefore, was passed to fill in this gap. It created certain penalties of a criminal nature against employers neglecting to take out insurance, and furthermore compelled the general contractor to see to it that his sub-contractors were properly insured. No burden or additional liability was placed upon the general contractor thereby, as shown above. He simply became the guarantor of protection to the workmen on the entire job. And how practically, and with what facility he

could perform this function, has been shown. Likewise, no rights of the workmen were intended to be eliminated, and specifically their common law action of negligence against a third party, which had been approved by the original Workmen's Compensation Act and its amendments. In other words, the Legislature merely pointed out the method by which this particular industry or industries could be safely saddled with the taking care of losses or damages to workmen on account of injuries.

The State of New York, as well as Ohio, Wisconsin and Indiana, is behind this on all fours. In fact, some of our reasoning is taken from the first and only case on this subject in New York, which was decided by the Court of Appeals of New York on May 1, 1928, and is not yet reported. This is the case of *Lena Clark, Administratrix of the Estate of Frederick E. Clark, Deceased,* v. *Monarch Engineering Co.,* which was originally decided on motion in the Supreme Court of New York, and the opinion, from which we will quote later, was reported in 221 N. Y. Sup. 93 on March 25, 1927; it was affirmed without opinion in the Appellate Division and reported in 224 N. Y. Sup. 773; it was affirmed by the last court of resort, the Court of Appeals, on May 1, 1928, with a comprehensive opinion, with the concurrence of Chief Justice Cardozo and others; it is not mentioned whether there was any dissent. A note of this decision appeared in the Law Journal of New York City on May 2, 1928, and the opinion will be incorporated in this brief verbatim, for two reasons: firstly, because it covers the ground, and secondly, because it is not yet reported. In the interim, on November 17, 1927 (15 days after the Fourth Department of the Appellate Division affirmed *Clark* v. *Monarch Engineering Co.*), the Third

Department of the Appellate Division of New York decided the case of *Casey* v. *Shane*, reported in 225 N. Y. Sup., page 126. This case took the opposite stand, namely, that of placing the general contractor in the category of employer. *Clark* v. *Monarch Engineering Co.,* however, fairly and squarely discards this theory, and discusses *Casey* v. *Shane.* **The appellant's reasoning and argument, as stated in his summary, relies on this discarded case.**

We shall here set out verbatim the opinion of the New York Court of Appeals in *Clark* v. *Monarch Engineering Co.*

LENA CLARK, as Administratrix of the Personal Estate of FREDERICK E. CLARK, Deceased, Respondent, *v.* MONARCH ENGINEERING COMPANY, Appellant.

(Decided May 1, 1928.) New York Court of Appeals.

Appeal by defendant from an order of the Appellate Division, fourth department, affirming a judgment in favor of the plaintiff, and affirming an order denying defendant's motion for a new trial.

George P. Keating for appellant.

Karl A. McCormick for respondent.

LEHMAN, *J.* The plaintiff has recovered a judgment against the defendant for damages resulting from the death of plaintiff's husband caused by the alleged negligence of the defendant. At the time of the accident the plaintiff's husband was performing work, as an employee of a sub-contractor, in the construction of a building. The defendant was the general contractor. Upon this appeal the defendant directs its attack upon the judgment on the ground that the liability imposed upon a general contractor under

section 56 of the Workmen's Compensation Law is "exclusive and in place of any other liability whatsoever." (Workmen's Compensation Law, section 11.)

Section 10 of the Workmen's Compensation Law provides: "Liability for compensation. Every employer subject to this chapter shall * * * secure compensation to his employees and pay or provide compensation for their disability or death arising from injury arising out of and in the course of his employment * * *." Section 11 provides: "Alternative remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever * * *." By force of these provisions a two-fold liability was imposed upon an employer subject to the Workmen's Compensation Law. He must "secure compensation to his employees and pay or provide compensation for their disability or death arising out of and in the course of the employment." Such an employer who has secured compensation is not subject to any other liability.

There can be no doubt that when these sections were enacted "an employer subject to this chapter" included only a general or special "employer" as that term is generally understood and defined in our law. A contractual relation with the employee is involved. Here the workman who sustained injury resulting in his death was employed by a sub-contractor. It is not claimed that the general contractor either hired or had the right to direct him. Concededly section 10 of the Workmen's Compensation Law imposed no obligation or liability upon a general contractor in favor of the employees of a sub-contractor.

Section 56 of the Workmen's Compensation Act, enacted in 1922, did impose a liability theretofore unknown in our law upon a general contractor. That section provides: "Sub-contractors: A contractor, the subject of whose contract is, involves or includes a

hazardous employment, who sub-contracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such hazardous employment, unless the sub-contractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter." That section still leaves liability to *secure and pay or provide compensation* to an injured employee or his dependents primarily upon the sub-contractor who employed him. It places, however, a secondary liability to pay compensation upon the general contractor unless the sub-contractor has fully met his primary liability.

The defendant maintains that this new and secondary liability of the sub-contractor is exclusive and destroys any common-law right of action for negligence or wrong which might otherwise exist.

If the Legislature intended that such secondary liability should be exclusive it has not expressed that intent, as it might have done, in clear terms. We are asked to apply the provisions of section 11 of the Workmen's Compensation Law to the new liability created by section 56 of the law, though in terms section 11 applies only to "the liability prescribed by the last preceding section." Arguments in favor of such an extension of the provisions of section 11 of the Workmen's Compensation Act are not without some force. Other States have enacted workmen's compensation laws which, like our own, impose some liability on a general contractor for injuries to the employees of sub-contractors. In some jurisdictions the courts have held that the liability imposed by statute upon the general contractor is exclusive and in place of any common-law liability for wrong or negligence. (*Maryland* v. *Benjamin F. Bennett Building Co.*, not yet reported; *Biordbeutel* v. *Willcott & Sons Co.*, 244 Mass. 195.) The courts in other jurisdictions have not

always reached the same conclusion. (*Trumbull Cliffs Furnace Co.* v. *Schachosky,* 111 Ohio Stat. 791; *Cermak* v. *Milwaukee,* A. P. P. Co., 192 Wis. 44.) We do not analyze these decisions; for in each case the decision arrived at must finally depend upon the construction which the courts place upon the language of the particular statute or clause of the Constitution under consideration and the statutes and Constitutions of other States are not identical with our own.

The question before us is indeed narrower than that which counsel in this case have argued. The liability imposed by section 10 upon every "employer" is primary and absolute. The liability imposed upon a general contractor is secondary and contingent. Where the sub-contractor has secured compensation for his employees, a general contractor is under no statutory liability. Section 56 has no application in such case. Here there is neither plea nor proof by the defendant that the sub-contractor failed to secure compensation. The question before us is not whether a general contractor who is under a liability to pay statutory compensation to an "employee," because the sub-contractor primarily liable therefor has failed to secure compensation, is also subject to common-law liability for negligence or wrong. The question is whether the common-law liability no longer exists even where it does not appear that the general contractor in this particular case is under any statutory liability. We consider at this time no other question.

It is true that the language of section 56 may indicate that when claim to compensation is asserted by an employee against a general contractor, the burden of showing that the sub-contractor primarily liable had secured compensation is thrown upon the general contractor. (*Monello* v. *Klein,* 216 App. Div. 105; *Casey* v. *Shane,* 221 App. Div. 660.) We do not pass upon such question now. Where, however, the general contractor

asserts that he is relieved of a common-law liability because the statute has imposed upon him a new liability in its place and stead, he should at least plead and prove that he is in fact under the statutory liability (*Trumbull Cliffs Furnace Co.* v. *Schachlosky, supra; Cermak* v. *Milwaukee A. P. P. Co., supra*). Caution may dictate to a general contractor that he should insure himself against a contingency that by reason of the failure of the sub-contractor to secure compensation, liability against the general contractor may arise; yet until that contingency arises the general contractor is under no statutory liability to an employee of the sub-contractor. He must respond only for damages caused by his own negligence or wrong. It seems to us quite clear that the Legislature did not intend to provide exemption to the general contractor from common-law liability, at least where no statutory liability is shown to have arisen. We do not decide whether a statutory liability, when it arises, may exist contemporaneously with a common-law liability.

The judgment should be affirmed, with costs.

Cardozo, *Ch. J.* Pound, Crane, Andrews, Kellogg and O'Brien, *JJ.,* concur.

Judgment affirmed.

As the reasoning is pertinent, we also take the liberty of quoting from the Supreme Court Opinion in this same case of Clark vs. Monarch Engineering Co., supra.

> "The defendant herein argues that it must be inferred from the fact that, by reason of the foregoing, the general contractor is required to pay, under certain circumstances, compenastion to employees, the Legislature intended that such employees shall be regarded as employees of the general contractor * * *. The Court would be required to force into the law a new definition of the relation of employer and employee,

the Court would by construction be obliged to limit the rights given under Section 29 of the Workmen's Compensation Law, which provides for actions in negligence against all third parties; the general contractor would be relieved from all liability, no matter what his or its faults * * *."

"This Court is of the opinion that such Section 56 was placed in the Workmen's Compensation Law for the purpose of guarding against general contractors subletting work to sub-contractors who are irresponsible, and that the object of the Legislature in enactly such section was to provide a guaranty for the securing and payment of compensation by sub-contractors to such employees as were injured in the employ of such sub-contractors from occurrences growing out of such employment under such sub-contractors. By enacting this provision, the Legislature evidently intended for the protection of the employee of the sub-contractor that the general contractor should stand as a guarantor of the obligation of the sub-contractor to the employee. This can be done without any loss on the part of the general contractor, for in making contracts with the sub-contractor, the element of the expense of compensation insurance is always taken into consideration, and the contract between the general contractor and the sub-contractor could always provide for an allowance by the sub-contractor on the contract price of any expense to which the general contractor would be put by reason of the sub-contractor failing to secure and pay compensation to the employees of such sub-contractor. This, to this Court, seems to be a more reasonable construction of Section 56, and the intention of the Legislature in enacting the same, than the construction asked for by the defendant herein. Such a provision, enacted with such an intent, would not be unconstitutional, and, on the other hand, it would not create the relation of employee and employer between the general

contractor and the employee of the sub-contractor, where, from the very nature of the definitions of the terms 'employer' and 'employee' such relation does not exist."

The case of *Trumbull Cliffs Furnace Co.* v. *Schachovsky,* 11 Ohio St. 791, 146 N. E. 306, which is cited in *Clark* v. *Monarch,* is squarely in point. We shall not quote at large therefrom, as the reasoning is similar to that of the New York case. We wish, however, to call the Court's attention to the following excerpt:

"Inasmuch as the sub-contractor had complied with the compensation statute, the owner was not the employer of such Schachovsky at the time of the accident; it had no contractual relation with Schachovsky; it was, for the purpose of this suit, nothing more than the third person. This fact is a complete answer to the proposition of the plaintiff-in-error that it is inequitable to allow the workman to have two recoveries, one under the compensation act and one under this suit. As such third person, the owner of the premises could be sued for the negligence of his own employee, which caused the accident, since the compensation provided by the Workmen's Compensation Law is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for claims for damages for wrongful injury or death. *Newark Paving Co.* v. *Klotz,* 85 N. J. L. 432, and other cases."

Similarly, the case of *Cermak* v. *Milwaukee Air Power Pumping Co.,* 192 Wis. 44, 211 N. W. 354, which is cited in *Clark* v. *Monarch.* We take the liberty of setting forth on excerpt therefrom:

"The fact that the defendant is subject to the provisions of the Workmen's Compensation Act does not deprive the plaintiff of his right to recover of the defendant in tort. In order to make the remedy provided by the compensation act the exclusive remedy of

the plaintiff, as against the defendant, it must appear that the compensation act makes the defendant liable to pay compensation to the plaintiff. *Sheban* v. *A. M. Castle & Co.,* 185 Wis. 282, 286, 201 N. W. 379. It affirmatively appears that defendant is not liable to the plaintiff under Section 102.06 of the Statutes because it alleged that the contractor, plaintiff's employer, is subject to the act and that he has insurance, as required by subdivision (2) of Section 102.28 of the Statutes.

"The Workmen's Compensation Act deals only with the relationship of employer and employee. The defendant Pump Company was not the employer of the plaintiff. No relationship of employer and employee ever existed between plaintiff and defendant. That relationship alone is the one that brings the parties under the Compensation Act and limits liability to the compensation provided by the Act. Section 102.06 of the Statutes does not create the relationship of employer and employee, where it does not exist as a matter of fact. The purpose of this section is to insure the payment of compensation—to put the defendant Pump Company in the place of an insurance carried in case compensation insurance is not carried. The fact that the defendant Pump Company is made the insurer of compensation does not make it an employer under the statute, any more than any insurance carrier is put in the relationship of an employer of an injured employee by the fact that it has insured the payment of compensation."

Likewise the State of Indiana, in the case of *In re Waltz,* 138 N. E., p. 94. This case also specifically speaks of the creation of **"only secondary liability for compensation"** on the part of the general contractor.

The Acts of these States, namely, New York, Ohio, Wisconsin and Indiana, are very similar

to that of New Jersey on the points involved in this case. The New York act (see Chapter 615, p. 1623, of the Laws of New York, approved April 13, 1922),

> Sec. 56. "A contractor, the subject of whose contract is, involves or includes a hazardous employment, who sub-contracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured, whose injury arises out of and in the course of such hazardous employment, unless the sub-contractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter."

In WISCONSIN, the act provides (section 102.06),

> "An employer subject to the provisions of section 102.03 to 102.34 inclusive, shall be liable for compensation to an employee of a contractor or sub-contractor under him who is not subject to sections 102.03 to 102.34 inclusive, or who has not complied with the conditions of sub-section 2, of section 102.28 (relating to insurance to be carried by the sub-contractor), in any case where such employer would have been liable for compensation if such employee had been working directly for such employer."

The OHIO act reads as follows, sections 1456-61 (3), General Code,

> "Every person in the service of an independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the Industrial Commission of Ohio for his employment, or to elect to pay compensation direct to his injured, and the dependents of his killed employees as provided in section 1465-69, General Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor, unless such employees or their legal repre-

sentatives or beneficiaries elect, after injury or death to regard such independent contractor as the employer."

It is indisputable that the Acts of these States are like that of New Jersey especially in that they all create a secondary liability on the part of the general contractor which comes into being only if said general contractor does not see to it that the sub-contractor carries compensation insurance. The general contractor, therefore, becomes simply a guarantor. The reasoning of these cases, therefore, would apply to our State.

As set forth in *Clark* v. *Monarch Engineering Co.*, (*supra*), a case in Massachusetts and a very recent case in Maryland, hold that their enactments create the status of employer and employee between the general contractor and the employee of the sub-contractor. **The acts of these States are entirely different from ours, especially in that they create a primary liability on the part of the general contractor instead of a secondary liability.** *The statutes in these States specifically say that the general contractor or insurance carrier shall provide and pay direct compensation to all workmen on the common job the same as though they were employees of the general contractor.*

The statutes of Massachusetts for year 1911, 751 (3), section 17, now section 18, under G. L. of Mass., 1921, chapter 152, Workmen's Compensation, p. 1599, at p. 1604,

> Section 18, "If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insured

> would, if such work were executed by employees, immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons * * *"

The MARYLAND act (article 101 of the Annotated Code of 1924, section 62) is similar,

> "When any person as a principal contractor, undertakes to execute any work which is a part of his trade, business or occupation, which he has contracted to perform and contracts with any other person as sub-contractors for the execution by or under the sub-contractor, of the whole or any part of the work undertaken by the principal contractor, the principal contractor *shall be liable to pay* to any workman employed in the execution of the work any compensation under this article *which he would have been liable to pay if that workman had been immediately employed by him;* and where compensation is claimed from or proceedings are taken against the principal contractor, then in the application of this article, reference to the principal contractor shall be substituted for reference to the employer except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed.

The cases in Massachusetts and Maryland are in no way a guide to the questions now before this court for the reason that the statutes as we have pointed out are entirely different from our own. *However, in the States of New York, Ohio, Wisconsin and Indiana the statutes are very similar to our own, and we have, therefore, quoted from these cases at length, as we feel that it would be of assistance.*

The following excerpt from a New York case is helpful, viz: *Murray* v. *Union R. Co.,* 229 N. Y., 119,

> "Employment, like any other contract, presupposes understanding. The new relationship cannot be thrust upon the servant without knowledge or consent. He must understand that he is submitting himself to the control of a new master * * * Understanding may be inferred from circumstances, but understanding there must be. Common law rights and remedies are not lost by stumbling unaware into a new contractual relation. There can be no unwitting transfer from one service into another."

Before closing the argument, we should like to touch once more upon the constitutional question raised. It is really conceded that in this case nothing has been taken from the appellant by reason of section 5 of the amendment of 1924 of the New Jersey Compensation Act. The pleading was stricken out because it did not allege that the sub-contractor failed to carry insurance. *Therefore, for the purpose of this argument at least, it must be assumed that the sub-contractor did carry compensation insurance and that the appellee, therefore, never had a claim or could have had a claim for compensation against the appellant.* That being so, we fail to see how, under any circumstances, the Fourteenth Amendment to the Federal Constitution has in any way been violated. The appellant fails to point out any particular wherein any rights that it has have been in any way infringed. As we understand it, before any claim can be made that property is taken from one without due process of law, it must be established that some property or rights have been taken. The appellant's contention rests particularly upon what might occur in some case not now before the Court. If the appellant

means that because it was required by said section to see to it that the sub-contractor complied with the Compensation Act, that thereby it was deprived of property without due process of law, we would like to know what property or rights of the appellant were involved. It has been held that a penalty may be imposed by statute other than by fine. The imposition of a civil liability which follows a failure to comply with the statute is a proper means of enforcing the statute.

Karpelles v. *Hine,* 227 N. Y. 74;
Amberg v. *Kinley,* 214 N. Y. 531;
Koester v. *Rochester Candy Co.,* 194 N. Y. 92.

It should be remembered that the plaintiff-appellee is simply trying to enforce an old common law remedy, namely, a common law action to recover damages for injuries caused by the negligence of the defendant.

CONCLUSION.

It appearing, therefore, that reason and precedent sustain the action of the Trial Judge in striking out said defenses, it is respectfully submitted that the judgment of the Supreme Court be affirmed.

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