INDEX.

WITNESSES FOR PLAINTIFF:

Notice of Appeal.

New Jersey Supreme Court

ESSEX COUNTY.

LEO KAPPERTZ, Plaintiff-Appellant, *vs.* R. B. McEWAN & SON, a corporation, Defendant-Appellee.	Action-at-Law. Notice of Appeal.

To STEIN, McGLYNN & HANNOCH, Esqs.,
Attorneys for Defendant-Appellee:

TAKE NOTICE that the plaintiff-appellant, Leo Kappertz, appeals to the New Jersey Court of Errors and Appeals from the whole of a judgment of non-suit in this cause.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiff-Appellant.

Dated: June 1st, 1929.

Summons.

The State of New Jersey to R. B. McEwan & Son, a corporation:

YOU ARE SUMMONED to answer the annexed complaint of LEO KAPPERTZ, in an action-at-law in the NEW JERSEY SUPREME COURT. [L. S.]

And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in said suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court, at Trenton, this 18th day of April, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

WEINBERGER & WEINBERGER,
Attorneys.

Complaint.

(Filed April 28, 1927.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

LEO KAPPERTZ, Plaintiff, *vs.* R. B. MCEWAN & SON, a corporation, Defendant.	Action-at-Law. Complaint.

Summons issued April 18, 1927.

The plaintiff, a resident of the City of Morristown, in the County of Morris and State of New Jersey, says that:

FIRST COUNT.

1. On or about the 15th day of September, 1926, the defendant company, R. B. McEwan & Son, a corporation, was engaged in the paper box board business, situate in the County of Morris and State of New Jersey.

2. On or about the 15th day of September, 1926, defendant company was the owner of a factory on which certain repairs and additions were being made, pursuant to a contract or contracts entered into by and between the defendant company and a general contractor and various sub-contractors, which factory was situated in the County of Morris and State of New Jersey.

3. On or about said date, the plaintiff, Leo Kappertz, a welder by trade, was hired to perform certain welding to a pulverizer pipe connection hereinafter referred to and was, at the invitation of the said defendant company, its agents and servants, lawfully on the said premises owned and controlled by it.

4. That attached to and running through and along the side of the east wall and its addition, were certain suspended electric wires, which run along side of a certain pulverizer pipe connection, connecting a pulverizer and a boiler, which was the property of the said defendant company and all or some of which electric wires were heavily charged with electricity, but that none of them were insulated or covered for the protection of the plaintiff or other employees, whose duty it was to work in and about them.

5. That the said electric wires were the property of and owned and maintained by the defendant company.

6. Defendant company, well knowing that the said electric wires, which were uncovered and uninsulated, were heavily charged with electricity and that there was great danger of having people, who were lawfully working in and about the said place or places, come in contact with the said live wires, and well knowing that the said plaintiff and others who were lawfully there might come in such proximity to the said live wires that they would sustain injuries or be killed as a result of this dangerous situation, the said defendant company failed to cover or insulate said wires and failed to properly warn the said plaintiff to protect himself from the dangerous condition, which it, the defendant, knew existed.

7. The said defendant company by its agents and servants negligently, recklessly and carelessly failed to provide the said plaintiff with a safe place to carry on said repairs, which were made and were to be made for the said defendant company, in that it failed to advise him, the said plaintiff of the presence of said live electric wires, and failed to provide a safe place for him to work.

8. That through the negligence and carelessness of the said defendant company, its agents and servants, heretofore described, the said plaintiff, Leo Kappertz, without any fault on his part, while prosecuting his work, in attempting to repair said pipe, was shocked and burned by the current of electricity from the uninsulated and unprotected wires of the defendant company, and that as a result of said shock and burn the said plaintiff fell approximately twenty-five feet to the floor below, landing on his head with great force and violence and sustained permanent injuries, to wit, fractured skull, total loss of hearing on right side, dislocation of right shoulder, broken ribs, lacerations about the head, face, arms and body, and other serious internal and external injuries, all of which are permanent in character, and a nervous shock to his entire system, as a result of which plaintiff was confined to a hospital and for which he has and will be obliged to obtain medical aid, treatment and attention for a long time in the future.

9. Said plaintiff, as a result of said injuries was kept away from his trade, unable to perform his daily task and was obliged to expend divers sums of money in an effort to cure himself of his said injuries and will be for some time in the future.

Wherefore plaintiff says that he is injured and has sustained damage in the sum of One hundred thousand dollars on the first count.

SECOND COUNT.

1. Plaintiff repeats all of the allegations contained in paragraphs one, two and three of the first count and makes them a part of this count.

2. Defendant, with knowledge of all the foregoing facts, did wrongfully and unlawfully maintain in said factory a nuisance, of unusual danger to persons lawfully using said premises in the form of unprotected and uninsulated wires, carrying an electric current of such great power and high voltage, that the current therefrom would and did communicate to and electrically charge the body of the said plaintiff.

3. Paragraphs five, six, eight and nine of the first count are reiterated and made a part of this count.

Wherefore plaintiff says that he is injured and has sustained damage in the sum of One hundred thousand dollars on the second count.

Judgment will be asked on both counts in the sum of Two hundred thousand dollars, together with costs of suit.

WEINBERGER & WEINBERGER,
Attorneys for Plaintiff.

Answer.

(Filed May 9, 1927.)

The defendant, a corporation having its principal office in the City of Newark, County of Essex and State of New Jersey, answering the complaint of the plaintiff filed herein says that:

First Count.

1. It admits the material allegations in paragraphs 1 and 2 of the First Count.

2. It denies each and every allegation of paragraphs 3, 4, 5, 6, 7, 8 and 9 of the First Count of Complainant's Complaint.

Second Count.

1. The defendant repeats his answers to paragraphs 1, 2 and 3 of the First Count to the same effect as though the same were herein set forth in full.

2. The defendant denies each and every allegation of paragraph 2 of the Second Count.

First Separate Defense.

The plaintiff was guilty of contributory negligence in that he went upon the buildings and structures of the defendant without using proper care and precaution for his own safety, but on the contrary so negligently, carelessly and recklessly walked and climbed in and upon various pipes, planks, boards, roofs and window ledges so that he was injured solely through his own negligence and not through any negligence of the defendant.

SECOND SEPARATE DEFENSE.

The plaintiff was an employee of an independent contractor engaged by the defendant for the performance of certain work in and about its factory and works and was not upon the lands and premises of the defendant by invitation of the defendant, but was merely on such lands and premises at the sufferance of the defendant.

THIRD SEPARATE DEFENSE.

The plaintiff was warned of the dangerous condition of the structures upon which he went, but nevertheless and in spite of such warning assumed the risk of going upon the said structures.

FOURTH SEPARATE DEFENSE.

Any injury sustained by the plaintiff was sustained by him solely through his own negligence, in that in walking and climbing on high structures he did not use sufficient care and caution for his own safety, but on the contrary was so negligent, careless and reckless in the premises that he slipped and fell, sustaining the injuries complained of.

FIFTH SEPARATE DEFENSE.

Any injuries which may have been sustained by the plaintiff was sustained solely through the negligence of the plaintiff's fellow workmen in that they so negligently, carelessly and recklessly constructed the pipes and scaffolds that by reason thereof the plaintiff slipped and fell.

Answer.

SIXTH SEPARATE DEFENSE.

At the time when the alleged accident happened the walks, pipes, structures, planks, boards and scaffolds were solely under the control of an independent contractor engaged by the defendant for the performance of certain remodeling and repairs in and about the defendant's factory and at the said time the defendant had wholly ceased to exercise any control of the said works.

SEVENTH SEPARATE DEFENSE.

The plaintiff at the time of the alleged accident was an employee of an independent contractor engaged by the defendant for the performance of certain remodeling and repairing in and about the plant of the defendant and any remedy at law which the plaintiff may have is solely by virtue of the acts of the Legislature of the State of New Jersey more commonly known and designated as the Workmen's Compensation Act.

STEIN, MCGLYN & HANNOCH,
Attorneys for Defendant.

Reply.

(Filed May 20, 1927.)

The plaintiff replying to the answer filed by the defendant in the above entitled cause, says:

AS TO FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH SEPARATE DEFENSES.

The plaintiff denies each and every allegation contained in said defenses.

WEINBERGER & WEINBERGER,
Attorneys for Plaintiff.

Postea.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

LEO KAPPERTZ,
Plaintiff,

vs.

R. B. MCEWAN & SON, a corporation,
Defendant.

Action-at-Law.
Postea.

This case was tried before Judge William A. Smith, to whom it was referred for trial, with a jury at the Essex Circuit, on September 25th, 1928.

On motion of the attorney for the defendant, the court granted a non-suit in favor of the defendant and against the plaintiff.

WM. A. SMITH,
Circuit Court Judge.

On Postea.

NEW JERSEY SUPREME COURT.

R. B. McEwan & Son, a corporation,
Defendant,

ads

Leo Kappertz,
Plaintiff.

Action-at-Law.
On Postea.

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed nisi.

Entered September 26, 1928. On motion of

Stein, McGlynn, & Hannoch,
Attorneys.

Costs $51.50.

On Postea.

NEW JERSEY SUPREME COURT.

LEO KAPPERTZ, Plaintiff, *vs.* R. B. MCEWAN & SON, a corporation, Defendant.	Action-at-Law. On Postea.

Judgment of non-suit.

Judgment entered this twenty-sixth day of September, A. D. nineteen hundred and twenty-eight in favor of defendant and against the plaintiff for the sum of fifty-one dollars and fifty cents costs.

STEIN, MCGLYNN & HANNOCH,
Attorneys.

WM. S. GUMMERE,
C. J.

Costs $51.50.

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Tuesday, September 25, 1928.

LEO KAPPERTZ,

vs.

R. B. McEWAN & SON.

Action-at-Law.

Before:

Hon. WILLIAM A. SMITH, J., and a jury.

For the plaintiff appear WEINBERGER & WEINBERGER (by ROBERT J. BUNEVICH and JOSEPH J. WEINBERGER).

For the defendant appears STEIN, McGLYNN & HANNOCH (by EDWARD R. McGLYNN).

(A jury is called and sworn.)

Mr. Bunevich opens for the plaintiff.

Mr. McGlynn: May I ask my opponent to sign the interrogatories which were submitted before I open?

The Court: Yes.

Mr. McGlynn opens for the defendant.

LEO KAPPERTZ, plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Bunevich:

Q. Where do you live, Mr. Kappertz? A. Morristown.

Q. What business are you engaged in? A. Welding and radiator work.

Q. On the 15th of September, 1926, did anyone come to you and ask you to do a certain job at Whippany, New Jersey?

Mr. McGlynn: I object. We ought to have the identity of the person.

Objection sustained.

Q. Who came to see you on the 15th day of September, 1926, to hire you to do a job at Whippany? A. It was the 14th.

Q. Who hired you? A. A man by the name of Mr. Wilson.

Q. What did he ask you to do? A. He asked me to do a job at McEwan's, job of reshaping a pipe to go in the boiler.

Q. What did you tell him? A. I told him I would be over the first thing in the morning and provided they would have everything in readiness, and told him the scaffold and whatever I needed.

Q. Did you go down there the following morning? A. Yes, sir.

Q. Alone? A. Alone.

Q. When you got there, what did you do? A. Looking over the condition and situation and the pipe and the side around, how to go about and make the pipe which was not in proper shape to make the fit, by making cuts and welding these together anew.

Q. Who showed you around when you got there? A. Mr. Wilson.

Q. Anybody else? A. No, sir.

Q. Mr. Wilson showed you around? A. That's all.

Q. What sort of scaffolds did they have to erect for you to work at the pipe?

Mr. McGlynn: I object. He didn't see them do it.

Objection sustained.

Q. What kind of a scaffold did you find when you got there? A. I found a scaffold built of twelve inch planks on two-by-fours or four-by-fours, I wouldn't say what the uprights was; a scaffold of three or four stories high. The planks laid from the wall of the boiler to the outer wall where the windows are, spanning the width of the room.

Q. About how high was the scaffold? A. About thirty feet.

Q. When you got there did you immediately go up this scaffold or did you look around? A. I first had to rig up the tanks and hoses. After hooking up the hoses and tanks and torch, a man cut off the lower part of the pipe which stands on the floor. When that is cut the pipe is released hanging and supported by a chain hoist. Then I had to make a cut the same way on the top next to the boiler flange in order to set this pipe which they want to have plumb, and the flange on the boiler we then make it meet and set it straight. After welding that——

Q. Did anybody take you up on the scaffold or did you go alone? A. I went up myself.

Q. Did anybody give you instructions before you went up on the scaffold? A. Absolutely not.

Q. Did anybody show you a ladder leading up the heating plant and tell you to use that? A. Why, there was a ladder; I went up the ladder.

Q. I mean along the heating apparatus, the large boiler—did anybody tell you to use that ladder to go up to the top of the blower pipe? A. No.

Q. How was the light when you got up on top of the scaffold? A. Well, there is very large openings in the wall; that is, windows. No glass in it.

By Mr. McGlynn:

Q. No glass in it? A. No, only the sash in it. It was a new structure, a new building—and on this side (indicating) is the boiler—all new structure and brick work.

By Mr. Bunevich:

Q. Could you see clearly on top of the scaffold? A. Everything.

Q. You didn't have to use a torch? A. No, it was daylight.

Q. Was the wall white? A. Yes.

Q. Above the ledge? A. There is a reflection of the light looking through the outside. You don't see just what is over the head of the windows.

Q. Looking back from where he was putting the pipe to the wall, could you discern any objects against the wall? A. Coming to that height and to the other side of where the building sets, it is totally black and dark appearing.

Q. Can you discern the objects there? A. Not very well unless getting close to it and having a light.

Q. You say you got to the top of the scaffold and cut your flange there. What did you do after

that? A. I asked for a man to go down—another fellow was on the scaffold with me.

By the Court:

Q. Who? A. I don't know; the woodman of the mill.

By Mr. Bunevich:

Q. Whom was he employed by?

Mr. McGlynn: If he knows.
The Court: Better establish who he is.

Q. What was he doing on the scaffold? A. I don't know what he was doing. I presume he was sent along for help——

Mr. McGlynn: Just what you know.

Q. What did you see him doing there? A. He helped handing me the torch, the hoses and so on.
Q. He helped you with your work? A. Yes.
Q. Did he tell you whom he worked for?

Mr. McGlynn: I object.

By the Court:

Q. As I understand it, you found this man there and he assisted you. A. Yes.
Q. Do you know his name? A. No, I don't. Schulker, I am told——

By Mr. McGlynn:

Q. Is he here in the courtroom? A. No, I don't know the man if I saw him.

By Mr. Bunevich:

Q. Had he been helping you along with your work? A. No, I had only been there a few minutes.

Q. Nobody assigned him to help you? A. I don't know.

Mr. McGlynn: I object to that.
Objection sustained.

Q. After you made that cut and you said you found another gentleman on the scaffold, what did you ask him to do? A. I asked him down to get me bolts.

Q. What did you want bolts for? A. To hook up the flange to the boiler to hold it in position for making the cuts. He went down and I was waiting; while waiting I couldn't do nothing but look over the job which I was to do. I had not made the upper cut at that time. I am waiting for bolts to hook up the flange to the boiler. While watching the pipe I was to do—this was the outer wall—I stepped over to the outer wall—it isn't a far distance from the outer wall where the pipe goes down vertically and it is hanging on a chain hoist—I walked along that scaffold plank to the outer wall, intending to sight the position into which that pipe should be forced in its plumb or straight position which we was looking for to make.

Q. Will you describe that part of the scaffold that you stepped back on? A. It is a one plank scaffold, twelve inches wide right across.

Q. How long was it? A. I should judge twelve or fifteen feet.

Q. Where was it resting? A. In the windows where the glass is supposed to be. An iron frame and no glass.

Q. You found it there when you got there? A. Yes.

Q. Where was the scaffold resting? A. In the sash.

Q. How far did you step back on the scaffold?

The Court: He didn't say that.

By the Court:

Q. Where was the other side of the scaffold resting? A. I walked from this side for I wanted to hook it up with bolts, and I walked back to the other side to sight the pipe, by walking towards those windows. I stand myself over on top of the windows so I am walking towards the dark spot on the wall—walking over there. There is the chain hoist on which this structural part is hanging—for the purpose to sight this pipe, but by the time I got to it—there is the chain hoist (indicating)—and all of a sudden I walked to here (indicating) and there is the chain hoist and here is the big structure of pipe—I stiffened my arm and I couldn't get away (indicating).

Q. What caused your arm to stiffen? A. I got electrocuted by getting in touch with wires which I never seen for an instant. I seen bare wires then and it strikes me like that (indicating); I couldn't get away.

Q. Did sparks come out of that wire?

The Court: Don't lead the witness.

Q. On what did you put your hands? A. I don't know how I got in contact with them, but the instant I noticed it I was hanging on to it with open hand. I never had them closed, but I couldn't get away.

Q. Your hands came in contact with what? A. With bare wires.

Q. Was there any insulation on those wires? A. No, sir.

Q. They were exposed, were they? A. Exposed.

Q. Did anybody inform you that there was current in those wires? A. No, sir.

Q. Nobody ever mentioned anything to you about those wires? A. No, sir.

Q. Who owned the plant that you worked at? A. R. B. McEwan & Son.

Q. Did they hire you? A. No, sir.

Q. Did they hire you? A. No, sir.

Objected to.

Objection sustained.

The Court: You had him testify as to how he was hired.

Q. How long had you been working on this job before this accident happened? A. I had been around the place about twenty minutes or a half an hour.

Q. At the time that this accident happened was anybody present there? I mean in the immediate vicinity where you were working? A. Mr. Wilson was there.

Q. Where was he? A. Down below.

Q. I mean up on the scaffold where he could see anything going on? A. No, sir.

Mr. McGlynn: I ask that the last part of the question be stricken out as calling for a conclusion.

The Court: Strike it out.

Mr. Bunevich: I have a photograph here taken immediately after the accident.

Mr. McGlynn: I object to the use of the picture counsel shows me. It does not show a thing that explains anything. Unless counsel will have the photographer go on.

Mr. Bunevich: These photographs were taken immediately after the accident, your Honor.

The Court: But I don't know that.

Q. I show you this photograph of the scaffold in the R. B. McEwan Company plant. Does that represent the way this scaffold was erected at the time of the accident? A. Yes, sir.

Mr. Bunevich: I offer it in evidence.

Mr. McGlynn: I object to the offer. I have no objection to it being marked for identification.

The Court: Mark it for identification.

(The same is marked Ex. P-1 for identification.)

The Court: Now, I will sustain the objection on the ground that it does not appear what it shows from marks upon the face of it.

Q. I show you this photograph and ask you if it represents the actual place surrounding the scaffolds and the scaffolds at the time you were engaged there and cut the blower pipe for R. B. McEwan & Son? A. Yes, sir.

Q. It represents it as it actually was.

Mr. Bunevich: I would like to offer it at this time.

Mr. McGlynn: I object to it.

The Court: This is the same photograph and I have ruled on that already.

Q. After you testified you came in contact with the wires what happened after that, if you remember anything? A. (No answer.)

Q. Do you know where you fell after the accident happened? A. No.

Q. You didn't remain on the scaffolds. A. No.

Q. Where did you fall? A. I recall that I was clenched on to those wires I shouted, "Help" and that's all.

Q. Were you conscious after the accident?

The Court: He said that is all he remembers. He can't testify to his unconsciousness.

Q. Where did you next find yourself? A. In the hospital.

Q. What hospital? A. All Souls Hospital.

Q. Where is that hospital? A. Morristown.

Q. Do you know who removed you to the All Souls Hospital? A. The All Souls Hospital ambulance.

Q. What was the matter with you at that time?

The Court: You mean at the time he found himself in the hospital?

Q. What was the matter with you? What were you suffering? A. I couldn't move; I couldn't do a thing. I was nothing but one ache all over the body.

Q. Did you have any burns on your body? A. No.

Q. What was the condition of your hands after the accident? A. Partially paralyzed.

Q. Partially paralyzed? A. Yes.

Q. Could you move them? A. I could move them but I couldn't stretch them.

Q. How long did that condition last? A. Oh, it has lasted about a year.

Q. Anything else wrong with you at the time? A. Then I found out that I had the collarbone

was stuck out, away out from the shoulder, internal bruises or wrists broken, I don't know just how.

Q. Did you have any broken bones? A. Not what I know. A fracture of the skull—I was told the skull was fractured through the base, and I couldn't hear on one side.

Q. On what ear couldn't you hear? A. On the right side.

Q. How is that now? Is that all right? A. No, that's dead.

Q. You still find it hard to hear on the right side? A. There is no hearing there.

Q. Before the accident were you able to hear well? A. Yes, sir.

Q. You had no trouble before that with your ear? A. No.

Q. How long did you remain at the All Souls Hospital? A. Two weeks.

Q. What did you do after that? A. I was removed in an ambulance to be treated at home.

Q. What doctors treated you at the hospital? A. Dr. McMurtrie.

Q. Who treated you at home? A. Dr. McMurtrie.

Q. How long were you in Dr. McMurtrie's care? A. I am still under his care.

Q. Were any X-rays taken of your injuries? A. Yes.

Q. What doctor took them? A. Dr. Tidaback.

Q. Where is he located? A. At that time also at the All Souls Hospital.

Q. Did any other doctor treat you besides Dr. McMurtrie? A. No, not here in this country.

Q. Where else were you treated for your injuries, Mr. Kappertz? A. Last year I was over in Europe and consulted various doctors in Germany.

Q. For what condition? A. For the dizziness, headaches, unsteadiness and general nervous condition.

Q. How long were you confined to your home as a result of this particular accident? A. I think a couple of months—two or three months.

Q. After that did you resume work? A. No.

Q. Why not? A. I am not strong enough, and I can't stand it.

Q. Are you able to resume work at the present time?

The Court: You mean that work or any work?

Witness: I do work, I have been trying for a long while to physically exercise, whatever exercise is labor I try to do, but don't last.

Q. What do you mean by that, Mr. Kappertz? A. Well, I am all in. The minute I do something I am all in.

Q. Before the accident were you able to perform all the work that came to you? A. Yes, sir.

Q. Does your work necessitate your going on scaffolds? Is it necessary in your work to use scaffolds? A. Yes, sir.

Q. You use them considerably? A. I have to be able to get on a scaffold as well as laying underneath a car or any building on the back to perform my work. In arc welding, I can't have everything handy in my lap. In the line of work the skill necessitates all the functioning of the body.

Q. Before the accident happened you were in another accident, weren't you? A. Yes, sir.

Q. Where was this? A. In the Jerseyman.

Q. What do they do? A. It is a newspaper.

Q. Where are they located? A. Morristown.

Q. Where were you hurt? A. I fell——

Q. What part of your body was hurt? A. The head was injured by fracture of the skull.

Q. What doctor treated you for this injury? A. Dr. Rite.

Q. On what side of the head did you have that fracture? A. The right.

Q. Where did you have the present fracture? A. On the right side.

Q. Were you wholly cured of the first accident? A. Yes, sir.

Q. How long was that before you received the second injury? A. In 1921.

Q. The first accident was in 1921? A. June, 1921, yes.

Q. When was the second accident? A. September, 1926.

Q. You were wholly cured as a result of that first accident, Mr. Kappertz? A. Yes, sir.

Q. You didn't suffer any of the former injuries? A. No.

Q. What were you making a week at an average for the year 1926?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. At the time of the accident how much were you making a week?

Mr. McGlynn: I object. It is the same question.

(Question sustained.)

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

Exception noted as ground of appeal.

Q. What kind of work were you doing before the accident? A. General welding was my main occupation.

Q. As a contractor or as a workman? A. No, I had my own shop.

Q. Did you keep a set of books of your earnings? A. Since—yes, since 1925. I incorporated with the intention of growing bigger and since then books have been kept.

Q. Have you your books here in court? A. Yes.

Q. What were you making, according to your books, in the year 1926?

Mr. McGlynn: I object. The books would be the best evidence.

By the Court:

Q. Did you keep books before this accident? A. Yes, sir.

By Mr. Bunevich:

Q. Are your books in court? A. Yes, sir.

Q. Are these the books you kept prior to the accident in 1925? A. Yes, sir.

Q. What do your books show as having been your earnings for the year 1925?

Mr. McGlynn: Do you mean gross or net?

Q. Net earnings. A. I couldn't tell you that.

By Mr. McGlynn:

Q. You couldn't tell? A. No.

By Mr. Bunevich:

Q. By referring to these books, can't you tell? A. Here is a statement I had made by the auditors now——

Mr. McGlynn: There isn't any pending question.

Q. By referring to the books, can you recall what your earnings were for the year 1925?

Mr. McGlynn: The witness just answered that he couldn't.

Mr. Bunevich: I thought the question was incomplete on the record.

Q. Did you have these books audited recently? A. Yes, sir.

Q. By whom? A. By the accountant Robbins.

Q. What did the audit show?

Mr. McGlynn: I object.

Objection sustained.

Q. I show you a statement made by Harvey C. Robbins, auditor, of the business of the Morristown Welding & Radiator Company from June 16, 1925, to June 9, 1928. By referring to this statement, can you tell me what were your net earnings for the year 1925?

Mr. McGlynn: I object.

Objection sustained.

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

Exception noted as ground of appeal.

Mr. Bunevich: I ask that the books be marked for identification.

The Court: Show on the record what they are.

Q. What is that book? A. That is the day book.

(The same is marked Ex. P-2 for identification.)

Q. What is this book? A. That is the ledger.

(The same is marked Ex. P-3 for identification.)

Q. What is this book? A. The cash book.

(The same is marked Ex. P-4 for identification.)

Mr. Bunevich: I offer the books in evidence at this time.

Mr. McGlynn: I object.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Did you keep the books in your own handwriting? A. No.

Q. You never made any entries in the books? A. Some, yes.

Q. By referring to the books, can you tell me how much you took in a day, if I asked you for a particular day? Can you tell me how much you took in for that day? A. Yes.

The Court: That wouldn't be evidential. He might have taken in one thing on one day and another thing on another day.

Q. Can you, by referring to those books, tell us what you took in for every day during the year 1925? A. Yes.

Q. By referring to the book, can you tell us your disbursements for each day during the year 1925? A. Yes.

Q. By referring to these books, will you tell me what were your receipts for the year 1925?

The Court: I don't think his books have been properly proved. He said he made some entries in the books.

Q. Did you have supervision over those books? A. I did.

Q. Were they used in the ordinary course of business? A. Yes.

Q. Are these all the books you keep? A. Yes.

Q. Is your day book the book of original entry? A. Yes.

Mr. Bunevich: I would like to offer them.

Mr. McGlynn: I object.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Will you open those books and turn——

The Court: He is not entitled to refer to them, because he did not keep them.

Mr. Bunevich: He testified he had control over the books.

The Court: But they are not proved yet.

Q. Are you familiar with your system of book-keeping? A. Not thoroughly.

Q. Without referring to the books, did you draw a salary from the business? A. No.

Q. How were you paid? A. The profits from the business is mine.

Q. What were the profits for the year 1925?

Objected to.

Objection sustained.

Q. Did you have a drawing account? A. Yes, sir.

Q. How much was that?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. What were your doctor's bills for these injuries which you received as a result of this accident?

Mr. McGlynn: I don't want to be captious, but that is a rather broad question. I think we ought to have something more definite.

Q. How much did you pay Dr. McMurtrie for treating you? A. I would have to look it up.

The Court: You may recall him if necessary to have him identify the bills after the doctor testifies to that.

Q. How many months were you out of work altogether as a result of this accident, if you know? A. Well, I am out of engagements today.

Q. You haven't resumed work up to the present time? A. No.

Q. Do you still continue the repair shop in Morristown? A. Yes, sir.

Q. Do you employ any additional help? A. Yes, sir, I employ a man in my place.

Q. How much do you pay him?

Mr. McGlynn: I object. This business is conducted by a corporation.

Q. Are you the president of the Morristown Welding & Radiator Company? A. Yes, sir.

Leo Kappertz, for Plaintiff—Direct.

Q. Who is employed by your corporation besides yourself?

Objected to.
Objection sustained.

Q. Who comprises the corporation? A. Myself and my wife.
Q. Has the corporation engaged additional help to perform the services that you performed previously? A. Yes, sir.

Objected to.
Objection sustained and the answer stricken out.

Q. Were you ever paid for the work you did for R. B. McEwan & Son?

Objected to.
Objection sustained.
Plaintiff's counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.

Q. Were you ever paid for the work you did at the R. B. McEwan & Son plant? A. No.

Mr. Bunevich: I would like to offer the answers to the interrogatories propounded by us in evidence.
The Court: You will have to read the questions and answers because it is quite important that the jury and I hear both.
Mr. Weinberger: If your Honor please, I was at the Supreme Court in Trenton and I would like to have the court's consent now, if Mr. McGlynn has no objection, to continue.
The Court: You may have it.

Leo Kappertz, for Plaintiff—Direct.

Mr. Weinberger: These are the interrogatories propounded by the plaintiff to the defendants R. B. McEwan & Son, and their answers:

1. By whom, if anyone, was the plaintiff warned on the date of the accident or any other time, as to the dangerous condition of the structure upon which he went? Answer: The defendant refuses to answer question No. 1.

2. With what voltage of electricity is it necessary to charge the coal lorry track in order to operate the coal lorry situate in the boiler room of the R. B. McEwan & Son plant in Whippany, New Jersey? Answer: 220 volts.

3. How far from the northernmost end of the coal lorry tracks is the electric switch supplying the electricity to said wires located? Answer: About 11 to 12 feet.

4. By whom was this switch operated on September 15, 1926? Answer: The electrician of the defendant company.

5. By whom was the operator of said switch employed? Answer: The defendant company.

6. Give the names and addresses of the workmen, if any, who were present on September 15, 1926, at the scene of the accident to the plaintiff, at the time said accident occurred. Answer: These men are the defendant's witnesses to the accident and will be produced at the trial.

7. When and by whom were the coal lorry and the tracks installed in the defendant's plant? Answer: Dover Boiler Works—August, 1926.

8. For what length of time previous to September 15, 1926, was such coal lorry operated by the defendant? Answer: About two or three weeks.

9. State fully how the accident to the plaintiff in this action on September 15, 1926, happened. Answer: The method of the happening of the alleged accident on September 15, 1926, is peculiarly within the knowledge of the plaintiff."

I would like to ask Mr. McGlynn if I may—I don't see a copy in my files of the questions propounded to us in the form of interrogatories and the answers we gave, as I desire to offer these in evidence.

Mr. McGlynn: If your Honor please, before I find them, I can't see what right he has to read my questions and his answers into the record.

The Court: Do you think you have that right, Mr. Weinberger?

Mr. Weinberger: I think they are a part of the cause and may be used by either party.

The Court: That is not my understanding.

Mr. Weinberger: I think the interrogatories are the same as an examination before trial and our statute provides that an examination before trial may be used by either party in the cause.

The Court: I will overrule it.

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

Exception noted as ground of appeal.

(Mr. Weinberger proceeds with the examination of the witness.)

By Mr. Weinberger:

Q. When you went upon this scaffold to do this work, was there anybody of the McEwan Company sent with you?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Did you go there with anybody?

The Court: He has already testified to that. He said he went there and he said Mr. Wilson went there with him. I don't know whether you were here or not.

Mr. Weinberger: I was not here.

The Court: That is the reason for not allowing two counsel to examine. He said that Mr. Wilson went there with him and he found a man there to assist him and Mr. Wilson came to get him and that he was at the place and the other man who was to assist him he didn't know where he came from.

Q. Did you or did you not receive any instructions from anyone while you were on that job? A. No, sir.

Mr. McGlynn: That has all been gone over, too.

The Court: I think it has.

Q. This scaffold was erected on whose premises?

The Court: That has been testified to, Mr. Weinberger. He testified it was on the property owned by the McEwan Company.

Q. Did you pay any money for the hospital bills? A. Yes, sir.

Q. I show you a bill of the All Souls Hospital and ask you if that is a bill which you paid? A. Yes, sir.

Q. Is that for treatment as a result of this accident? A. Yes, sir.

Q. It amounts to how much? A. $111.

Mr. Weinberger: I offer it in evidence.

(The same is received in evidence and marked Ex. P-5.)

Q. I show you a check dated September 14, 1927, to Dr. A. McMurtrie. Did you pay that for medical expenses as the result of this accident? A. Yes, sir.

Mr. Weinberger: I offer in evidence the check which is for the amount of $202.

(The same is received in evidence and marked Ex. P-6.)

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

Q. What was the name of the nurse? A. I don't remember.

Q. How long did she take care of you, approximately? A. I don't know.

Q. I show you a bill to Leo Kappertz to Miss Susan O'Connor. Was she your nurse? A. Yes, sir.

Q. How much did you pay her? A. $56.

Mr. Weinberger: I offer it in evidence.

(The same is received in evidence and marked Ex. P-7.)

Mr. McGlynn: What is the date?

Mr. Weinberger: September 30, 1927.

Q. Did you pay any money for X-rays at the hospital or anywhere else? A. At the hospital.

Q. Does the hospital bill include it? A. Yes, sir.

Q. Did you pay Dr. Tidaback any extra money outside of the amount charged in your bill? A. No, sir.

Q. Is he the doctor who took the X-rays? A. Yes, sir.

Q. Is Dr. Tidaback anywhere in the courtroom? A. Yes, sir.

Q. Did you have any other expense for medicines, drugs, or anything at all? A. Yes, sir.

Q. To whom and for what? A. It has been a steady expense on me ever since the accident.

Q. For what? A. On various medicines.

Q. About how much did you spend on medicines? We are not measuring as to the penny. A. I spent at least $4,000.

Q. For what? A. For various treatments and cures and taking care.

Q. To whom did you pay these moneys and for what? A. I couldn't tell you; I don't know.

Q. For what? A. I know the money I spent.

Q. For medicines? For what? A. Last year I went to Europe.

Q. You don't include that trip to Europe, do you? A. I do; I surely do.

Q. You include the cost of the trip to Europe? A. Yes, sir.

Q. Why? A. I needed the cure; I needed ease; I needed comfort and building up.

The Court: You cannot prove that unless some foundation is laid.

Q. How much was the passage exclusive——

The Court: I will strike out the $4,000, anyway. He has to prove his damage with particularity so that he can tell whether it is attributable to this particular accident.

Q. Did you take any treatments in Europe? A. Yes, sir.

Q. What kind of treatments? A. I had a——

The Court: That is not provable unless it is shown that they were necessary due to this particular accident. Without some proof from a medical man that he was advised to go there he couldn't prove the cost of treatment there.

Mr. Weinberger: With the exception of the passage.

The Court: But you would have to prove the treatments and what he got and what it was for. He can't testify to that.

Q. How many times had you been working on this job at the McEwan place before this thing occurred? A. No more than a half hour, if that long.

Q. How were you to be paid on this job? By the hour or by the entire job, or how? A. No arrangement was made.

Cross-examination by Mr. McGlynn:

Q. You say that the business you were doing at the time of the accident was done under a corporation, is that right? A. No.

Q. Didn't you say that you ran a corporation from June, 1925? A. We incorporated, that's right, yes; we incorporated in 1925.

Q. So that the business you were doing on the day that the accident happened was being run by the Morristown Welding & Radiator Company? A. The papers were filed, but it was not working as a corporation.

Q. What did you mean when you said that "After we organized the corporation June, 1925, we kept books"? Didn't you tell us that a few minutes ago? Didn't you say that a few minutes ago in answer to a question by your lawyer that after June, 1925, when you were incorporated, you kept the books? A. Yes, that's right.

Q. Is that so or isn't it so? A. It is so.

Q. Was there any change in the way you operated your business from June, 1925, up until September, 1926, when this accident happened? A. A considerable change had been made in September, 1926.

Q. In what way? A. That I was incapacitated——

Q. I mean before the accident. From June, 1925, up until before the minute the accident, was there any change in the method of operation of your business? A. Not previous, no.

Q. Previous to June, 1925, how did you conduct your business? Did you conduct it individually or as a partnership, a corporation, or how? A. No, as an individual.

Q. For how long a time, previous to June, 1925,

had you conducted your business as an individual? A. Since the beginning of it in 1914.

Q. Since the beginning of 1914, and down to and including June, 1925, you conducted your business as an individual? A. Yes.

Q. The same kind of business? Welding? A. Yes, sir.

Q. Were you in the business during all that time from June, 1914, down to June, 1925? A. Yes, sir.

Q. Were there any interruptions at all? A. Interruption for a short period while being laid up.

Q. A short period? Was there more than one? A. No.

Q. Was there more than one? A. Only one.

Q. How long were you laid up at that time? A. I think about a few months.

Q. Will you make that a little more specific? Did you mean one month or two months or three months or four months? A. I think I was laid up about three months.

Q. Then for only three months after this accident you described to your counsel you were laid up? A. Yes.

Q. Do you recall when that accident happened that you described a little while ago? A. That happened in June, 1921.

Q. So that for the three following months you were not engaged in business? A. Yes, sir.

Q. Was your business wholly at a standstill during those three months or did someone else conduct it for you? A. No, I had somebody then to conduct it for me.

Q. And that arrangement ceased after you came back to work or were able to resume your work after three months? A. Not immediately.

Q. What arrangement was there at the end of the three months after the accident?

Mr. Weinberger: I object to all this. That is going away back to 1921. What happened then is not evidential.

Mr. McGlynn: I think it will be important. If it is not proved I will consent that it be stricken out.

The Court: I will sustain the objection.

Q. There is no question but that three months after the first accident you were back running your business? A. Yes.

Mr. Weinberger: I object to that.

The Court: I will let it stand.

Q. This accident that you say you had back in 1921, did it leave you with any permanent effects whatsoever? A. No, sir.

Q. Absolutely none? A. No.

Q. For how long a time did you suffer from any temporary effects of that accident? A. Almost two years.

Q. Did you suffer from any deafness as a result of the accident? A. Yes, sir.

Q. In which ear? A. From the right ear.

Q. The same ear you now claim to be deaf? A. Yes, sir.

Q. So that for two years after the accident you were deaf in that right ear? A. No, sir.

Q. How long were you deaf in the right ear? A. I never was deaf with it whatsoever.

Q. To what extent were you deaf as a result of the first accident? Fifty per cent. or twenty-five per cent? A. If I recall right, it was thirty per cent.

Q. For how long did it continue? A. For about a year.

Q. Not two years? A. No, sir.

Q. Did you suffer any dizziness or dizzy spells from the first accident? A. Yes, sir.

Q. How severe were those dizzy spells you suffered as a result of the first accident? Were they slight or severe? A. No, pretty severe.

Q. And for how long a time after the first accident was it you were not able to go up on a scaffold and do welding work? A. About six months.

Q. So that after those six months the results entirely disappeared? A. No, sir.

Q. When did it disappear? A. In about a year and a half.

Q. Were you able to go back on scaffolds at the end of six months? A. Yes, sir.

Q. Did you suffer any dizziness during the year and a half? A. Slightly.

Q. As a result of those dizzy spells did you ever fall off a scaffold as a result of those dizzy spells? A. No, sir.

Q. Never? A. No, sir.

Q. Did you ever fall off a chair leaning over to tie your shoe? A. Not after that period.

Q. What period? A. A short period after the accident.

Q. How short a period? A. I presume six months.

Q. You are positive of that? A. I think so.

Q. Nobody but you knows. Did you or did you not as a result of the first accident you sustained in 1921 have any dizzy spells which caused you to fall off a chair while leaning over to tie your shoe within six months after the accident? A. I don't recall the date.

Q. Do you recall the incident? A. Yes, sir.

Q. How soon after the accident was it? A. I think it was before six months.

Q. You had severe headaches as a result of that first accident, didn't you? A. Yes, sir.

Q. You also went to Europe for treatment as a result of the first accident? A. Yes, sir.

Q. While you were in Europe did you visit the same relatives that you visited the first time? A. Yes, sir.

Q. I understood you to say that this room that you were working in, or this boiler house, the boiler itself was on the inside of the room the same as this room as this wall was and the other wall on the right was all open with windows, is that right? A. Yes, sir.

Q. Large open windows? A. Yes.

Q. In which at that time no glass had yet been installed? A. Yes.

Q. And that room was very light? A. I wouldn't call it very light.

Q. You wouldn't call it very light? A. No, sir.

Q. Not with almost the entire side wall occupied by these side windows? A. No, it is not very light.

Q. Was that a bright day or a cloudy day? A. I think it was a bright day.

Q. What time of the morning was it? A. Between ten and eleven.

Q. As I recall your story on direct examination, you were facing the boiler on which one end of the scaffold was resting and on which one end of the pipe on which you were working protruded. A. Yes, sir.

Q. What was the position of your body? Were you sideways or facing or was your back to the boiler? A. I don't know which end you have reference to.

Q. Just before you started to walk over to the wall. A. Then I faced the window.

Q. Just before that. A. Then, I faced the boiler.

Q. Then did you turn around and face the wall as I am? A. Yes, sir.

Q. Looking right at it? A. Yes, sir.

Q. And the scaffold on which you were was supported by the side sash in these window frames? A. Yes, sir.

Q. What portion of the window frames was this scaffold resting on? The lower or center or top? A. On the very top sash.

The Court: Find out what it rested on on the other side.

Mr. McGlynn: It rested on the boiler, as I understood his testimony.

By the Court:

Q. Is that right? A. I think there was wooden posts put up on the boiler.

By Mr. McGlynn:

Q. But it ran from the side wall to the boiler. A. Yes, sir.

Q. A distance of twelve or fifteen feet, you said, I think? A. Yes, sir.

Q. Was this pipe above the scaffold on which you were standing or on a level with it? A. Above the scaffold.

Q. Had you made one cut in the pipe? A. Yes, sir, on the floor, on the bottom.

Q. Had you made one cut in the pipe while you were on the scaffold? A. No.

Q. You had done nothing on the scaffold except look over the position of the pipe and line it up as to how you were going to cut it? A. Yes, sir.

Q. Did you have any of your apparatus? A. Laying on the scaffold.

Q. Did you step over that as you walked over towards the window? A. I didn't have to step over it.

Q. Did you step over it as you walked over towards the window? A. No, sir.

Q. Was it back of you? A. In front of me.

Q. The scaffold was only twelve or thirteen inches wide as I remember your story. A. Yes, sir, that is right.

Q. Where was this thing lying on the scaffold? A. Towards the boiler.

Q. This other accident that you had in 1921 was almost the same kind of an accident, wasn't it? A. As far as the fracture of the skull goes.

Q. You fell down a trap door in a hole in the printing plant, twelve or thirteen feet, and hit a wheelbarrow or something? A. Yes, sir.

Q. It hit the right side of your head, didn't it? A. Yes.

Q. Was there a scaffold above the one on which you were standing? A. No.

Q. How were you to cut the top of the pipe from the scaffold on which you were standing? A. That is within reach—the scaffold was within reach. When I stand up I reach the pipe.

Q. How far above the scaffold was the pipe as you stood there on the scaffold? A. About three feet. The lower part of the pipe—the pipe is eighteen inches in diameter.

Q. When you stood up your head was above the top of the pipe? A. Yes, sir.

Q. I understood you to say you didn't see anything on this wall until just about the instant this thing happened to you? A. No instant at all before.

Q. Did you ever see what you touched? A. Yes, sir.

Q. When did you see it? A. While I was stiff.

Q. How long did you remain in that stiff position? A. I don't know.

Q. While you were in that position were you able to ascertain whether or not these things that you were touching were wires or not? A. No, sir.

Q. Could you tell then whether they were insulated or not? A. Yes, sir.

Q. Could you tell whether or not they were covered? A. Yes, sir.

Q. Just while you stood there for that instant? A. Just for an instant, yes, sir.

Q. Then what did you do? A. I shouted "help."

Q. Then what? A. I don't know. I must have fallen down.

Q. You don't know what happened? A. No, sir.

Q. Do you remember grabbing this chain that you described on a hoist? A. No, sir.

Q. You remember nothing after that at all? A. No, sir.

By the Court:

Q. Just where were those wires? You have described the scaffolds running from the side of the boiler to the sash, as I understand it. Were these wires above the sash on that wall on which the sash was? A. Yes, sir.

Q. How high above the scaffold? A. When I walked on the scaffold it is resting in the window sash—as I walked toward this wall here (indicating), the wire—I don't know how many wires there was—the wire was exactly this high (indicating).

Q. About three and a half feet? A. That's just about the way——

Q. About equal with your hips? A. Exactly the height of my stomach.

By Mr. McGlynn:

Q. Where was the pipe? A. The pipe was standing here on my left (indicating).

Q. Does that go under the wall or on the side of the wall? A. Say this is the wall and here is these wires which I went on to (indicating), and here is the pipe and here is the hoist (indicating) and I went right on to that wire.

Q. Does the pipe go down to the floor or where? A. Straight down, and the wire comes this way, which I could see and press. I could recognize on the instant I touched it it was a bare wire of which I didn't know nothing.

Q. How far did the pipes extend from the boiler? A. From the wall about two or two and a half feet.

By the Court:

Q. You mean this pipe came from the boiler and went over toward the wall where the sash was? A. Yes, sir.

Q. And it went right down? A. It is a long bend.

Q. How far was it from the wall in which the sash was? A. About two or two and a half feet.

By Mr. McGlynn:

Q. Do you recall testifying in the New Jersey Supreme Court at Morristown on June 1, 1922, in your case against the Jerseyman? A. Yes, sir.

Q. Do you recall this question and answer: "Question: Well, how would you break down? How would it affect you? Answer: It goes to work bumping in the head and I get dizzy and I would fall over." Do you recall that? A. Yes, sir.

Q. "Question: How long has the dizziness continued?"

Mr. Weinberger: I object. He hasn't laid a foundation.

The Court: He testified that his dizziness lasted six months after the previous accident. What is the date of this testimony?

Mr. McGlynn: June 1, 1922.

The Court: What was the date of the accident?

Mr. McGlynn: June, 1921.

The Court: I will allow it. He is a party to the action.

Mr. Weinberger: What difference does it make?

The Court: He said something contradictory to what he said on the witness-stand. He said he was dizzy in June, 1922. He said he was through with his business about six months after the accident.

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

Exception noted as ground of appeal.

Q. The next question is "Question: How long has this dizziness continued? Answer: Well, it is there today. Question: You still have it? How long did your headaches continue? Answer: It is the same today. Question: Have you noticed anything about your hearing? Answer: Well, the right ear on the right side I don't hear at all." Do you recall those questions and answers? A. I don't recall them, no.

Q. "Question: You cannot hear from the right side? Answer: No." Do you remember that question and answer, sir? A. I don't recall it just now, no.

Q. Another question: "Now, in what respects do you notice improvements? Answer: Well, I have worse more severe headaches. Question: Well, that is not an improvement. Answer: Well, I have had. Question: You have had it? Answer: Yes, sir, I have had more dizzy spells and more severe dizzy spells than I have now." Do you remember that question and answer about the dizzy spells? A. No, sir.

Q. "Question: Now, take into consideration your impairment in hearing, has that improved in any way? Answer: The hearing? No that don't improve a bit. That is the same." Do you recall that? A. Yes, sir, I recall more than that.

Q. Do you recall a witness in that same trial produced by you by the name of Joseph Schmulz, a witness whom you produced and who testified for you at that same trial on June 1, 1922? A. Yes.

Q. Were you in court when he testified? A. I do not recall.

Q. You do not recall that you used him as a witness in your trial? A. Yes.

Q. Did you hear him testify in answer to this question——

Mr. Weinberger: I object to that as highly improper.

The Court: I will sustain the objection. That is, if you intend to read the question into the record.

Mr. McGlynn: I asked him with regard to the dizzy spells and the falling over.

The Court: You were leading up to using this as an admission by him through what some witness testified in his favor. You can't contradict that witness upon the stand when he makes the statements, and there-

fore he isn't bound here by the statement.

Mr. McGlynn: The witness who was on the stand there was produced in his behalf. If it is untrue he is bound in his own behalf to testify that it was untrue. He has used the benefit of it and he certainly should be bound by it.

The Court: Are you going to show that he did not testify truthfully?

Mr. Weinberger: I object. That would be a novel way of getting into evidence what was said by another witness.

The Court: I will sustain the objection.

By Mr. McGlynn:

Q. Do you recall an incident in your house after the first accident when Mr. Schmulz was present and he found you on the sofa and asked you "What is the matter?" and you said, "I cannot sit up straight. The whole room goes around." As soon as you got up you crumpled to one side. Do you remember that incident? A. May I use my expression in explanation to this?

By the Court:

Q. Do you remember that incident? A. I don't remember, no; it is too long past.

By Mr. McGlynn:

Q. Do you recall this man testifying to that in your case? Just answer yes or no. A. I don't recall it now.

Q. But you are sure that any dizziness that you suffered as the result of an accident in 1921 disappeared entirely within six months?

Mr. Weinberger: He didn't say that.

A. No, sir; I didn't say that. I said a year and a half ago.

Q. Then a year and a half ago. A. That was before a year and a half ago.

Q. In other words, as soon as this case was tried your dizziness entirely disappeared? A. Yes, sir.

Mr. Weinberger: I object to that.

The Court: He has answered it.

Q. When did you first begin to go on scaffolds again after this year and a half period? A. In July, 1922.

Q. Just one month after your case was tried? A. It had nothing to do with it.

Q. And your hearing—your right ear was never totally deaf, but partially—thirty per cent.? A. That's right.

Q. And the thirty per cent. disappeared when? A. I don't remember.

Q. In July? A. I don't remember.

Q. You are sure all these injuries you have testified to are the direct cause of this accident in 1926? A. Yes, sir.

Q. None of them you have described was the result of your accident in 1921? A. No, sir.

Q. Do you recall your attorney reading to you certain questions which were propounded to you by the defendant in this case, don't you? A. I don't get that.

By the Court:

Q. The other side asked you questions to answer in writing. The papers which you just signed this morning? A. Yes, sir.

By Mr. McGlynn:

Q. Do you remember signing this paper right here this morning? A. Yes, sir.

Q. Did you read the questions and answers before signing them? A. Yes, sir.

Q. Did you give your attorneys the information which they used in making up these answers? A. I answered the questions.

Q. Did you give your attorneys the information which they used in making up these answers? A. I don't understand.

By the Court:

Q. Did you tell your attorneys what to put down in answer to those questions? A. Yes.

By Mr. McGlynn:

Q. Did you tell them anything about this $4,000? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Did you notice when your answers were read to you that the $4,000 was there? A. You talk too fast for me.

Q. You signed a paper here this morning, didn't you? A. Yes, sir.

Q. Did you know what you were signing? A. I think so.

Q. What did you think you were signing? A. I don't know—not my will, I am sure.

Q. Please don't be funny about this. I am serious.

The Court: He has answered the question. He said he gave the information to his attorneys to answer them. He said he read them over before he signed them.

Q. Do these answers say anything about $4,000 being spent for cures?

Mr. Weinberger: I object.

The Court: It doesn't show that the question was asked. You are assuming something that was in the record. I will sustain the objection to it.

Mr. McGlynn: It is cross-examination.

The Court: But I don't know what is in the interrogatories.

Mr. McGlynn: I would like to have an exception to your Honor's overruling my exception.

Exception noted as ground of appeal.

Q. Did you read the questions this morning at all?

The Court: That is already answered.

Q. This morning? A. Yes, sir.

Q. I call your specific attention to this question No. 7, "What amounts of money has the plaintiff been compelled to expend for doctors' bills, hospital bills, nurses' bills, medicine bills, X-rays, and any and all other bills or expenses incurred as a result of injuries sustained by reason of the alleged accident?" I also refer you to your answer No. 7, "Doctors' bills, $149; hospital bills, $42; nurses' bills, $68; X-rays, $40; blood examination, $10; ambulance, $7". Was that answer true when you made it? A. But that's not all.

By the Court:

Q. The question is was it true when you made it? A. Yes, sir.

Mr. Weinberger: What is the answer to No. 8?

Mr. McGlynn: I haven't asked him about No. 8.

Mr. Weinberger: I don't think that is fair. Let us have it all.

The Court: You didn't make any objection and the question is answered. You can take care of it on redirect.

By Mr. McGlynn:

Q. Is the Mr. Wilson that you mentioned here in the court room this morning? A. I wouldn't recall Mr. Wilson.

The Court: Stand up, please, Mr. Wilson.

Q. Is that the Mr. Wilson that you mentioned? A. I couldn't recall the man. I only seen him but a short while.

Re-direct examination by Mr. Weinberger:

Q. After this first accident when you had this fracture of the skull and were injured, were you insured by an insurance company? A. Yes.

Mr. McGlynn: I object.

Objection sustained.

Q. Were you examined by physicians?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q. Were you treated by any doctor in the United States or anywhere in the world after you came back from Europe after the first accident,

and you were discharged as cured, up to the time you were almost electrocuted, as you say, at the McEwan plant on September 15, 1926?

Objected to as not re-direct examination.

Objection sustained.

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

Exception noted as ground of appeal.

Q. You were asked by Mr. McGlynn whether you read these questions and answers and gave your attorneys certain information? A. Yes, sir.

Mr. Weinberger: Mr. McGlynn, may I have the questions you asked and the answers he gave?

Mr. McGlynn: No, sir.

Mr. Weinberger: I ask that the part of the testimony that counsel read be stricken out unless there is the entire contents. If he attempts to show that this man did something or said something different than he gave in the answers to the interrogatories, I am willing to have it go in.

The Court: I will deny your application.

Q. Did you tell Mr. McGlynn in the answers that you gave him that you sustained a fracture of the skull?

Mr. McGlynn: I object. What difference does it make?

Objection sustained.

Mr. Weinberger: Mr. McGlynn opened the door and started to cross-examine him on interrogatories and I have a perfect right to re-direct and ask him to point out specific things——

The Court: You are asking this witness to refer to written interrogatories and as to what their contents are. I will sustain the objection.

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

Exception noted as ground of appeal.

Mr. Weinberger: I desire to offer in evidence, if your Honor please, and I ask Mr. McGlynn to produce the interrogatories produced by him and the answers we gave him on the ground that he used them. I think I asked him before; I ask him now, having used parts of the interrogatories and attempted to get certain contents of them before the jury, I ask that Mr. McGlynn produce the questions he propounded and the answers we gave so the jury can have it all.

The Court: That particular question and the particular answer to it was read into the record.

Mr. Weinberger: I ask for the rest of it.

The Court: I will not allow you to have the rest of it.

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

Exception noted as ground of appeal.

JOHN D. TIDABACK sworn in behalf of the plaintiff.

Direct examination by Mr. Weinberger:

Q. Dr. Tidaback, you are associated with what institution? A. In what way?

Mr. McGlynn: I will admit his qualifications.

Q. Are you a medical doctor by profession? A. Yes, sir.

Q. How long have you been practicing medicine? A. Since 1913.

Q. You are a graduate of what institution? A. Albany Medical School.

Q. You specialize in what branch? A. X-rays.

Q. Did you have occasion to take X-rays of Mr. Kappertz, the plaintiff in this suit? A. So I am informed from the records.

Q. I show you an envelope with certain films in it and ask you whether or not you are the physician who took the X-rays in that envelope and whether they are of Mr. Kappertz. A. I couldn't say unless it is on the record. If the markings on the film are the same as those on the records, they are; if not, I cannot say.

Q. Will you look at them and tell us what they show?

Objected to.
Objection sustained.

Q. Did you take those X-rays? A. Well, if the record says I did——

By the Court:

Q. Do you know whether you took those X-rays, Doctor? A. No, sir.

By Mr. Weinberger:

Q. You can tell us by looking at them whether you took them and looking at the records? A. No, sir.

Q. You can't tell us whether you took these X-rays? A. I can't tell you.

Q. You haven't looked at them? A. I couldn't tell you; my name is not on them.

By the Court:

Q. How do you know? A. I beg your pardon.

Mr. Weinberger: If your Honor please, the doctor is reluctant——

The Court: That is improper. He says he doesn't know whether he took them or not.

By Mr. Weinberger:

Q. Did you take these X-rays? A. My name is not on them.

Q. Did you take these X-rays? A. I couldn't say whether I did or not except that the record says so.

Q. What do you mean by the records? A. The records you have from the hospital. I will explain that so you can understand. Dr. Vogel has charge of the X-ray Department in the All Souls Hospital and these were taken there.

The Court: As I understand it, he says he can't tell whether they were taken by him.

Mr. Weinberger: I will recall Mr. Kappertz and have him testify that Dr. Tidaback gave him the bills and charged $40 for them.

The Court: I don't know that that was proved. Even if he did give them to him and charged him $40, it would not prove that this doctor took them.

Mr. Weinberger: I will withdraw Dr. Tidaback for the moment.

WILLIAM A. MCMURTRIE, sworn on behalf of the plaintiff.

Direct examination by Mr. Weinberger:

Q. Doctor, you are a physician licensed to practice in the State of New Jersey? A. I am.

Q. Since when? A. Since 1906.

Q. You are a graduate of what college? A. Cornell.

Q. You are associated with what institution? A. All Souls Hospital.

Q. Did you have occasion to treat Mr. Kappertz in 1926? A. I did.

Q. Will you just tell the court and jury what for? A. The X-ray report said fracture of the skull and the signs showed fracture of the skull.

Q. Where was the fracture of the skull? A. On the right side.

Q. Have you any records to show when you were called into see him for the first time? A. I haven't any records of this case.

Q. Were the X-rays taken under your direction? A. I didn't see Mr. Kappertz when he was first brought into the hospital. I either saw him that night or the next day. Some X-rays had been ordered before I had seen him and I ordered some two days later.

Q. Who took them? A. I don't know. I ordered them.

Q. X-rays were taken pursuant to your order, were they not? A. Yes, sir.

Q. In order to treat the man properly did you read the X-rays? A. I didn't attempt to read them; I saw them.

Q. You saw them? A. Yes.

Q. What did they show?

Mr. McGlynn: I object.

Q. Did you look at them? A. I looked at them.

Q. Can you read an X-ray? A. Not expertly, no, sir.

Q. Can you read an X-ray? A. I don't take my judgment on X-rays.

Q. Did you look at them? A. Yes.

Q. And did you read it? A. I saw what I thought.

Q. What did it show?

Objected to.

Objection sustained.

Q. In connection with the X-rays, were there any other symptoms visible? What did you treat him for? A. For fracture of the skull and concussion of the brain.

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

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

Q. And did it show a fracture of the skull? A. The symptoms pointed to a fracture.

By the Court:

Q. With a fracture there is always a concussion? A. Yes, sir.

By Mr. Weinberger:

Q. You were satisfied as a physician and as a graduate of Cornell that there was a fracture of the skull?

The Court: I don't think that is fair.

Q. You did treat him for a fracture? A. Yes, sir.

Q. What else? A. Concussion of the brain.

Q. What else? A. And he had a dislocation of the collarbone from the shoulder blade.

Q. What else did you treat him for? A. That's all.

Q. Did he have any injuries of various parts of his body? A. I don't remember.

Q. Did you keep a record at the hospital? A. Yes, sir.

Q. Have you the records here? A. I have not.

Q. How long a period of time did you see him? A. He was in the hospital a little over two weeks.

Q. And during all that time did you have personal supervision over his case? A. Yes, sir.

Q. And after he was in the hospital for those two weeks suffering with the condition you have described was he removed to his home? A. Yes, sir.

Q. Was he treated by you at his home? A. Yes, sir.

Q. For how long a time? A. I kept him in bed at home three or four weeks.

Q. In addition to the time at the hospital? A. Yes, sir.

Q. Did his case require it? A. I thought so.

Q. Will you tell us what his general condition was at that time? A. What time?

Q. While he was at home in bed for the four weeks you have described. A. He complained of headaches and dizziness. He said when he sat up in bed he was dizzy.

Q. Did you go into a history of the case? A. What do you mean?

Q. Did you ask him what had occurred? A. I asked him how he felt.

Q. You didn't ask him that? A. I asked him how he felt.

Q. Did he at that time tell you that he had almost been electrocuted? A. I don't remember. I had heard about this wire, but I don't remember what he said about it.

Q. Did you call there every day? A. No, no.

Q. Approximately, how often did you call? A. Every two or three days.

Q. After four weeks' time, how often did you go there then? A. I don't know. He used to stop in every four or five or six days after he was up and around the house.

Q. Did he mention anything with reference to his hearing? A. He said he was deaf.

Q. Did he tell you he had pain? A. I don't recall the pain.

Q. You said he complained of pain in his head and dizziness? A. He said he had headaches.

Q. Did he specifically call attention to the ear? A. I looked at the ear, if it was bleeding at the time of the accident.

Q. That was a symptom to you that that was a fracture of the skull? A. That was always suspicious of a fracture of the skull.

Q. After you treated him for the four weeks he remained home in bed after the time at the hospital, did you advise anything that he do? A. Nothing specifically.

Q. When was the last time that you saw him? A. I don't remember.

Q. He paid you his bill, didn't he? A. Yes, sir, I think so.

Q. You were the doctor that treated this gentleman after the first accident, too? A. No, sir.

Q. Not at all? A. No, sir.

Q. He paid you a check of $202? This is your signature, isn't it, Doctor? A. I don't know.

Q. I mean this is your mark on the back of the check, "For deposit". A. It is made out to me. I have never seen the check.

Q. That is your stamp, isn't it, "For deposit"? A. Yes, sir.

Q. You have a secretary that takes care of that? A. Yes, sir.

Q. Now, with reference to the permanence of any injuries which he sustained, what have you to say? A. I don't know.

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

Q. You had occasion to examine this gentleman, Mr. Kappertz, how long before he met with this accident? A. I don't remember. I did examine him before this accident. I don't remember when it was.

Q. You examined him for an insurance company, didn't you? A. I did.

Q. At that time he took out a policy of insurance for $10,000. A. I don't know.

Q. What company was it you examined him for?

Mr. McGlynn: I object to any further questions along this line, if it please the court. The Doctor is the plaintiff's own witness. He made no attempt to go into the plaintiff's condition before the accident. It doesn't seem to me that it is any part of the plaintiff's case to show that he took out a $10,000 policy or the conditions that accompanied it.

Mr. Weinberger: My answer to that is obvious. Mr. McGlynn——

The Court: You may ask this witness anything about a previous examination he made with reference to his hearing or head. Of course, if he does not recall you may show something which might refresh his recollection.

Q. Doctor, can you recall the name of the insurance company for whom you made this examination? A. No, sir.

Mr. McGlynn: I object.

The Court: Objection sustained.

Q. Now, Doctor, looking at these policies, especially the medical examination, will you look and tell me whether your name appears on there as the physician who examined him in October, 1925?

Objected to.

The Court: I will sustain the objection to that. You may show him the paper and ask him if that is his signature, or a photostatic copy of it.

Q. Will you look at that and tell me whether your signature appears on that photostatic copy? A. Not on this one.

Q. Will you look at this one? A. Not on this one, you know, this is not the examination. I can't read the fine print with these glasses.

Q. Here is a magnifying glass. A. No, that is not my signature. Both of these have been written over.

Q. That is what it looks like to me. A. That is not my signature.

Q. Can you tell your handwriting? A. I think so.

Q. Is that your handwriting in there (indicating)? A. That is what I am looking at.

Q. All the way through? A. This is not my handwriting.

Q. How about this (indicating)? A. This isn't either.

Q. None of that? A. That is the application that is made out to the agent. They don't photograph the physical examination that they send to the patient. That is the photograph of his own statement.

Q. Did you have occasion to examine him in 1925? A. I examined him for insurance before this last accident.

Q. Did he or did he not at that time tell you that he had suffered prior to 1921 with a fractured skull?

Objected to.

Objection sustained.

Mr. Weinberger: There is a specific purpose I am doing it for.

The Court: You can't contradict the witness. This physician was not treating him at that time.

Q. Did you pass him?

Objected to.

Objection sustained.

Q. Was there anything the matter with him?

Objected to as too general.

The Court: That is too general a question. I suppose a physician might examine a man for insurance and find something the matter with him and still pass him. You have to direct your question at something specific.

Q. Did you examine him thoroughly at that time? A. I think so.

Q. And did you put him through every test that you knew that an insurance company asks of you before you pass him?

Objected to.

(Question withdrawn.)

Q. Did you examine his blood pressure? A. Yes, sir.

Q. Did you examine his heart? A. Yes, sir.
Q. Did you examine his urine? A. Yes, sir.
Q. Did you examine his entire system? A. I can't answer that question. It is too broad.
Q. You say you examined his blood pressure and his urine? A. Yes, sir.
Q. And his eyesight? A. Yes, sir.
Q. His mouth and teeth? A. Yes, sir.
Q. His hearing? A. Yes, sir.
Q. His skull? A. No, sir.

Mr. McGlynn: Inside or out?

Q. Let me ask you this: "After you made, as you testified, a thorough physical examination, did you or did you not at that time think he was a sufficient and a good risk to advise the persons for whom you were making this examination to pass him?

Objected to.
Objection sustained.

Q. Was there anything wrong — physically wrong—as far as you were able to discern, with him at that time sufficient for you to reject him from that company?

Objected to.
Objection sustained.
Plaintiff's Counsel prays an exception to this ruling of the court.
Exception noted as ground of appeal.

Q. Was there anything wrong with his hearing? A. He said not.
Q. And did you convince yourself to that effect by the examination you put him through? A. I tested his hearing with a watch and he said he heard it.

Q. Was his blood pressure all right? A. If they passed him—may I explain that?

The Court: You may testify to what you recall, Doctor.

Witness: When we examine patients for insurance they send us the application blanks and we examine for the things they specify on the blank, and that's all.

By the Court:

Q. In other words, you don't pass him? A. No, sir, we do not recommend or pass him.

By Mr. Weinberger:

Q. If you found him suffering from tuberculosis you would put it down and reject him? A. I would not reject him, no, sir.

Q. You would say, "N. G." A. They don't ask us what we think. We put down what we find.

Q. If you found a man suffering from disease you would put it down and be quick about it? A. Yes, sir.

Cross-examination waived.

JOHN D. TIDABACK resumes the stand.

Direct examination by Mr. Weinberger:

Q. Is this your handwriting? A. Yes, sir.

Q. Does that refresh your recollection as to whether you took certain X-rays of Mr. Kappertz? A. The right head.

Q. Now, will you tell us what it shows? A. The report states a stelloid fracture of the right parietal bone.

Mr. Weinberger: I offer the X-rays in evidence.

Mr. McGlynn: He has not identified them.

Witness: It will have to be identified by the numbers. That is correct.

Q. Now, will you tell us what they show? A. It is difficult, your Honor, to study a proper X-ray film in a faint light. The report states a stellate fracture of the right parietal bone. If I can show it in this light I will do so.

Q. What is the right parietal bone? Show the jury so that they can understand. A. It begins with the suture line, the occipital suture line which runs this way (indicating).

Q. To the back of the head? A. Yes, sir, and the parietal suture runs here (indicating).

Q. It is on the right side here (indicating)? A. Yes, sir.

Q. Where was the fracture on that picture? A. The dark line.

Q. The dark line on the film there? A. Yes, just above the ear. Apparently from this study that is just where it is.

Q. Above the right ear? A. Yes, sir.

By the Court:

Q. Can the jury see it if they look at it? A. I think so.

The Court: Mr. Weinberger, suppose you put in the one that shows it.

Witness: It shows best on this film (indicating), just above the right ear.

Q. The thing that looks like a pencil line? A. There is a line going down here and a line going

up here and a line going up here (indicating). It is the type we call stellate.

By Mr. Weinberger:

Q. Like a scar? A. Yes, sir, this line here, this one here and this one going down here (indicating).

Q. So it is fractured in three parts? A. Yes, sir.

The Court: It will be received in evidence.

(X-ray No. 4257, right view, is received in evidence and marked Ex. P-8.)

Q. You did not treat him at all, did you? A. No, sir.

Q. You just took the X-rays on the night of the accident in the hospital? A. Yes, sir.

Cross-examination waived.

Elvira D. Abell sworn in behalf of the plaintiff.

Direct examination by Mr. Weinberger:

Q. Mrs. Abell, you live over in Morristown? A. Yes, sir.

Q. And you specialize in the taking of X-rays? A. I did at that time; I don't now.

Q. You had occasion to take some X-rays of Mr. Kappartz in what year? A. 1921.

Q. That is when he had the first accident? A. Yes.

Q. Have you them here? A. Yes, I have.

Q. You were subpoenaed to produce them here? A. Yes, sir.

Q. You took them yourself? A. I did. These are the two that show it.

Mr. Weinberger: I offer them in evidence.

(The same are received in evidence and marked Ex. P-9.)

Q. Dr. Abell, will you refer to Ex. P-9, and show us where the fracture was in 1921? A. This is the one that shows the fracture. He had a very fine linear fracture of the temporal bone. It is right in here (indicating), the parts of the temporal bone that we call the squamous portion. It extended down into what we call the petrous portion in which the organ of hearing is located. It also apparently involved the mastoid process of the temporal bone, because the X-ray picture of the mastoid cells show them cloudy.

Q. Indicating that the fracture had something to do with the mastoid portion of the bone? A. Yes, sir.

Q. Was the parietal bone involved in that picture? A. No, sir; it was not.

Cross-examination by Mr. McGlynn:

Q. How near was this or any portion of that fracture shown on your picture to the auditory nerve? A. I couldn't say that. It involved part of the temporal bone where the organ of hearing is located. I couldn't say from the X-ray how near the auditory nerve is.

Q. Can you say how far it ran from the auditory portion of the ear? A. It evidently involved the auditory portion of the ear.

Q. There is no question about that in your mind? A. No, sir.

Re-direct examination by Mr. Weinberger:

Q. You didn't see the gentleman, did you? A. No, sir, he was brought to me for X-ray examination.

Plaintiff rests.

Defendant's counsel moves that plaintiff be non-suited on the following grounds:

1. The only proof that has been offered up to the present time with regard to the manner and the reasons or how this man Kappertz came to be on this property is from his own testimony.

2. The only single fact in the case which in any way connects up the defendant is the fact that it owned this property on which the work was being done, and the Court has a perfect right to infer that there is just as much likelihood that the work was being done by an independent contractor as that it was done by the owner himself.

3. There is no proof as to who erected the scaffolds.

4. There is no proof that these wires were erected or maintained or even operated.

5. The plaintiff himself testified that it was a new addition to the plant.

6. There is no proof of a nuisance maintained or controlled by the defendant.

(Counsel argue.)

The Court: The proof here shows that this man came upon these premises at the behest of a man by the name of Wilson. Who this man Wilson is we don't know; we don't know whom he was employed by or whom he represented.

Mr. Weinberger: Mr. Wilson is in court.

The Court: You have rested. After the court has started to announce its decision you cannot then make up your mind.

Mr. Weinberger: I didn't understand.

The Court: There is no proof as to who Mr. Wilson was or what his authority was to ask this man to come there, and under those circumstances I cannot consider him anything more than a trespasser. I cannot assume under what right he was on the premises.

Mr. Weinberger: I think the pleadings admit it. "The plaintiff was the employee of an independent contractor engaged by the defendant."

The Court: That is not an admission, it is a defense. Now, the only question here presented is that here is an electric wire some thirty feet above the ground on the side of a building. It does not seem to me that there is any duty owing by the defendant here as a trespasser.

Mr. Weinberger: It was called to my attention and Mr. McGlynn admitted that they owned the building, notwithstanding that he was working for an independent contractor.

The Court: I will grant the nonsuit.

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

Exception noted as ground of appeal.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LEO KAPPERTZ, Plaintiff-Appellant, *vs.* R. B. MCEWAN & SON, a corporation, Defendant-Appellee.	Action-at-Law. On Appeal. Grounds of Appeal.

The plaintiff-appellant hereby files the following grounds of appeal in the above-entitled cause:

1. The Court erred in granting the motion for a non-suit at the close of plaintiff's case.

2. The Court erred in refusing to permit the interrogatories propounded by the defendant in evidence after several questions were asked and others requested to be read concerning same.

3. The Court erred in finding as a matter of law that the plaintiff was a trespasser.

4. Because the Court erred in granting a non-suit in favor of the defendant, over the objection of counsel for the plaintiff-appellant, contrary to the law of the case, to which an exception was duly taken.

WEINBERGER & WEINBERGER,
Attorneys for Plaintiff.

Dated: June 4th, 1929.

New Jersey Court of Errors and Appeals

LEO KAPPERTZ, Plaintiff-Appellant, *vs.* R. B. MCEWAN & SON, a corporation, Defendant-Appellee.	Action-at-Law.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This case was brought to recover damages for injuries received by the plaintiff, Leo Kappertz, who was shocked and burnt by a current of electricity from uninsulated and unprotected wires in the plant owned by the defendant company. This accident happened on September 15th, 1926. Leo Kappertz, the plaintiff, was employed by one Mr. Wilson of the Power Specialty Company to make changes on a certain blower pipe in the plant of the defendant, the R. B. McEwan & Son Company in Morristown, N. J. Mr. Wilson's company had a contract with the R. B. McEwan & Son Company to install a pulverizer.

The plaintiff in his complaint alleged that on September 15th, 1926, the defendant company was the owner of the plant on which repairs were to be made pursuant to this contract between the defendant company and a general contractor and various subcontractors. The defendant admitted all these allegations in its answer; that the plaintiff, a welder by trade, was hired to perform cer-

tain welding to a pulverizer pipe connection, and while performing this work and while he was lawfully on the premises of the defendant company, he was burnt and shocked by a current of electricity which ran through certain suspended electric wires alongside of the pipe connection and which wires were not insulated or in any way protected; that these electric wires were the property of and owned and maintained by the defendant company; that the defendant never apprised the plaintiff of the dangerous situation and condition and that by reason of such negligence and carelessness upon the part of the defendant, the injuries mentioned were sustained; that as a result of this carelessness and negligence the plaintiff's hands became partially paralyzed for about a year, plaintiff's collar bone stuck out away from his shoulder, his wrists were broken, and he sustained a fracture of the skull, became deaf in his right ear, and sustained other internal bruises so that he has had to remain under a physician's care ever since the accident.

The case was tried on September 25th, 1928, before the Honorable William A. Smith and a jury, and on motion of the attorney of the defendant, the Court granted a nonsuit in favor of the defendant and against the plaintiff.

The proof at the trial disclosed the following evidence:

The plaintiff was engaged in the welding and radiator work business in Morristown, New Jersey (page 14, lines 9 to 12); on September 15th, 1926, a man by the name of Wilson came and hired him to do a job at R. B. McEwan & Son, which consisted in reshaping a pipe which was to go into a boiler in this plant, (page 9, lines 20 to 28); the plaintiff told Wilson that he would come over to the defendant company's plant the first thing on the following morning. He advised Wilson to

prepare certain things and also described the kind of scaffold that would be required to perform the necessary work (page 9, lines 28 to 32).

On the day in question, the plaintiff went down to the defendant company's plant, just as he had arranged with Mr. Wilson, (page 9, lines 32 and 33). *When he arrived at the plant he looked the place over, making note of the condition, the situation, the pipe and the work which he had to perform.*

> "When you got there, what did you do? A. Looking over the condition and situation and the pipe and the side around, how to go about and make the pipe which was not in proper shape to make the fit, by making cuts and welding these together anew" (Case, page 14, lines 35 to 40).

Mr. Wilson showed the plaintiff around the defendant's plant (case, page 15, lines 4 and 5); the plaintiff found a scaffold built of 12 inch planks on two-by-fours or four-by-fours, a scaffold of three or four stories high, the planks having been laid from the wall of the boiler to the outer walls where the windows were, spanning the entire width of the room; the scaffold was about thirty feet high (page 15, lines 16 to 25). Before the plaintiff went up upon the scaffold, he testified that he first had to rig up the tanks and torch, *a man cut off the lower part of the pipe which stood on the floor;* that when the cut was made, the pipe was released, hanging and supported by a chain hoist; that the plaintiff had to make a cut on the top next to the boiler flange, in order to set this pipe which had to be plumbed, and make it meet and set it straight with the flange on the boiler (case, page 15, lines 26 to 37).

The plaintiff then went up on the scaffold. Nobody had given him any warning or instructions

before he went up on the scaffold (page 15, lines 39 and 40); the plaintiff got to the top of the scaffold, and cut the flange. He then told another man who was on the scaffold with him, to go down (page 14, lines 4 and 5). The plaintiff didn't know the name of this man, but testified that *he was the woodman of the mill,* (page 17, lines 9 and 10); the plaintiff presumed that this man was sent along to help him (page 17, lines 19 and 20); *this woodman of the mill helped the plaintiff, handing him the torch, the hoses and other items that were necessary* (page 17, lines 23 to 25 and lines 30 and 31); the plaintiff didn't know this man's name but he testified that his name was Schulker (page 17, lines 32 and 33). *The plaintiff testified that he sent the woodman of the mill down to get some bolts;* that these bolts were necessary to hook up the flange to the boiler so that it could be held in a position for making the cuts; *that this man went down at the plaintiff's demand, and that the plaintiff waited for him.* That while this man was gone, the plaintiff could not do anything but look over the job that was to be done; that the upper cut had not been made yet; that while watching the pipe that he was to cut, he stepped over to the outer wall which was but a few steps away; that he walked along the scaffold plank to the outer wall, intending to sight the position into which the pipe should be forced into its plumb or straight position, which he was hired to do (page 18, lines 18 to 33).

The plaintiff testified that he walked from one side of the scaffold and walked back to the other side to sight the pipe; he was walking towards a dark spot; and that while examining the pipe, his arm stiffened and a current of electricity shot through him; that his hands came in contact with bare wires (page 19, lines 11 et seq.); that there was no insulation on the wires, (page 20, lines 4

and 5) and that the wires were exposed (page 20, line 6); the plaintiff testified that nobody had ever informed him that there was current in the wires (page 20, lines 7 to 10). *He further testified that he had been working approximately one-half hour before this accident happened.*

> "How long had you been working on this job before this accident happened? A. I had been around the place about twenty minutes or a half an hour" (Case, page 20, lines 20 to 23).

Mr. Wilson, the man who had hired the plaintiff, was waiting below at the bottom of the scaffold all the while the plaintiff was working:

> "Q. At the time that this accident happened was anybody present there? I mean in the immediate vicinity where you were working? A. Mr. Wilson was there.
> "Q. Where was he? A. Down below. (Case, page 20, lines 24 to 28.)

The plaintiff testified that he did not remember what happened to him after the accident. After this testimony had been elicited, and after the plaintiff testified as to the nature of his injuries and the expenses he had incurred and was incurring in order to heal them, the defendant's attorney made a motion for a nonsuit upon the following grounds, which appear on page 70 of the state of the case, lines 14 through 40:

> "1. The only proof that has been offered up to the present time with regard to the manner and the reasons or how this man Kappertz came to be on this property is *from his own testimony.*
>
> "2. The only single fact in the case which in any way connects up the defendant is the fact that it owned this property on which the work was being done, and the Court has a

perfect right to infer that there is just as much likelihood that the work was being done by an independent contractor as it was done by the owner himself.

"3. There is no proof as to who erected the scaffolds.

"4. There is no proof that these wires were erected or maintained or even operated.

"5. The plaintiff himself testified that it was a new addition to the plant.

"6. There is no proof of a nuisance maintained or controlled by the defendant."

None of these reasons set forth that the plaintiff was a trespasser. The nearest approach to this reason can be found in ground 1, but this ground does not specifically set forth that the motion was made to nonsuit for the reason that the plaintiff was a trespasser. It merely said that "the only proof that has been offered up to the present time with regard to the manner and the reasons or how this man Kappertz came to be on this property is from his own testimony." *We submit that such proof was sufficient to present a prima facie case for the jury.* Nevertheless, the Court, after all this testimony by the plaintiff describing the nature of his employment, his work, the mill's assistants, the scaffolds, and the length of time the plaintiff remained at the defendant's factory, and not for any reason that can be found in the defendant's motion, non-suited the plaintiff because the Court was of the opinion that the plaintiff was a trespasser. It is this ruling of the Trial Court that is the basis for this appeal.

It is this appellant's contention that an analysis of the testimony will disclose that the plaintiff was an invitee in the defendant's plant. Further, that the Court erred in resolving from the testi-

mony that the plaintiff was a trespasser, inasmuch as that the proofs warranted the submission of the question of relationship of the plaintiff and the defendant to the jury, and the Court's action in nonsuiting constituted substantial prejudicial error.

ARGUMENT.

POINT I.

Gound of appeal No. 3 (p. 72, lines 29 and 30).

The Court erred in finding as a matter of law that the plaintiff was a trespasser.

The testimony convincingly disclosed that the plaintiff was hired by a sub-contractor of the defendant company to come upon the premises and do certain work thereon. Our Courts have repeatedly held that the employee of a sub-contractor is upon the defendant's premises in such cases by an implied invitation to enter the premises.

In the case of *Riley* v. *Jersey Leather Company,* 100 N. J. Law, 300, the Court of Errors and Appeals, in an opinion delivered by Mr. Justice Trenchard, reversed the Supreme Court, and held:

> Syllabus No. 1. "Where the occupier of land engages an independent contractor to do work upon his premises, an employee of the contractor, while executing the work, is there presumably by the request of the occupier, and is an invitee and not a mere licensee."

In that case the defendant "companies contracted with a contractor for the carting of coal from the pile to the common power plant, and the

plaintiff, a young man twenty years old, was an employee of such contractor". While he was working he received injuries for which the suit was brought. At the trial, a motion for nonsuit was made and the defendants argued in support of the nonsuit, *just as they did in this case,* that the plaintiff was a mere "licensee, entitled only to protection from wanton and malicious negligence". Justice Trenchard, in his opinion, however, held:

> "*But that is not so.* As we have said, the plaintiff was the employee of the contractor who had contracted with the defendants to haul the coal in their yard from the pile to their power plant, and was injured while executing the work called for by that contract. *Now, the rule is that where, as here, the occupier of lands engages an independent contractor to do work upon his premises, an employee of the contractor, while executing the work, is there presumably by the request of the occupier, and is an invitee and not a mere licensee.* See Hardy *v.* Delaware, Lackawanna and Western Railroad Co., 57 N. J. Law 505; affirmed 58 *Id.* 205; Dettmering *v.* English, 64 *Id.* 16." (Italics ours.)

Again, in the case of *Polony* v. *James Brady's Sons' Company,* 2 Misc. 987, 126 Atl. 675 (1924) (Kalisch, Black and Campbell, JJ.), a similar situation as presents itself in this case, arose. In that case, "the plaintiff's decedent, thirty-one years of age, was in the employ of one Fitzpatrick as a carpenter, at the time he met with his death. On the morning of the accident the decedent was sent by his employer to do some carpenter work on the defendant's premises". While plaintiff's decedent was at work, he was struck and fatally injured. The Court, on page 989, held:

"We have, under the situation as presented by the evidence, the plaintiff's decedent being in a safe place for the performance of the work to be done on the defendant's premises, and where he had a lawful right to be, and, therefore, it became a duty incumbent upon the defendant to exercise reasonable care to keep and maintain the place safe, and to use reasonable care to protect the plaintiff's decedent against injury to life or limb from the use of defective machinery by it in doing its own work or through the negligence of its servants, or from an unsafe condition of the premises unknown to the plaintiff's decedent, and which could not be ascertained by him in the exercise of reasonable care on his part."

And again, the liability of the owner of premises to an employee of an independent contractor *upon the theory and relationship that the employe is an invitee,* was reiterated in the case of *Painter* v. *Hudson Trust Company,* 2 Misc. 1137, 126 Atl. 636 (1924) (Gummere, C. J., Parker and Katzenbach, JJ.). In that case, the lower Court charged the jury that the employee of the contractor who had been sent to the defendant's premises, was a licensee, but the jury returned a verdict in favor of the plaintiff. This Court, on the defendant's rule to show cause, decided, on page 1139 of the opinion:

"The trouble with the case, however, is that the charge erroneously limited the obligation of the defendant to that of a mere licensor, while, under the undisputed facts of the case, the duty imposed upon it with regard to affording protection to the plaintiff, while engaged in his work, was that imposed upon a person who invites another upon his premises to perform some act for his benefit. The defendant company had asked the telephone company to install a telephone service in the new unit; and this included, as we think, the

removal of the old service from the building that was about to be torn down. It was in compliance with this request that the plaintiff was present at the place of the accident. Being an invitee, it is quite immaterial whether the ventilator fell because of the ladder being pushed against it or for some other reason . . ." (Italics ours.)

The case of *Byram* v. *Warner-Quinlan Co.,* an opinion of the Court of Errors and Appeals of New Jersey (1928) delivered by Mr. Justice Trenchard, and reported in 6 Advance Rep. 860, 141 Atl. Rep. 809, was a case where "the testimony tended to show that the defendant contracted with the M. W. Kellogg Company to make repairs upon a steel still owned by the defendant and located on its property; that pursuant to that contract the Kellogg Company sent two of its employees, the plaintiff and a helper, to make the repairs; that the defendant had erected a scaffold to be used by the plaintiff in doing the repair work; that while he and his helper were on this scaffold, ready to begin the work, the scaffold collapsed and plaintiff fell and was injured; that the scaffolding was improperly constructed by reason of the fact that the nails used in building it were entirely too small, and that this caused the platform to collapse when the weight of the plaintiff and his helper was put upon it. *The defendant moved to nonsuit and for the direction of a verdict upon the ground * * *; that plaintiff was a mere licensee and not an invitee". The Court held that such motions for nonsuit and for direction were properly denied,* and in the opinion on page 810, the Court decided:

"It is next contended that the proofs conclusively showed that the plaintiff in going upon the scaffold was a mere licensee of the defendant, and that therefore he was not entitled to recover because of mere carelessness

> in the construction of the scaffold. But that contention is fallacious. *He was not a mere licensee. He was an invitee. An employee of one who holds a contract to perform work on premises for the owner or occupier thereof, and who enters the premises to perform that work, is there by the implied invitation of the person for whose benefit the work is to be performed.* Riley *v.* Jersey Leather Co., 100 N. J. Law, 300, 126 A. 457. (Italics ours.)

In the case of *Sommer* v. *Public Service Corporation,* 79 N. J. Law, 349 (Supreme Court), (Swayze, Trenchard and Parker, JJ.), the plaintiff's declaration averred that the plaintiff's intestate was electrocuted by a deadly current of electricity which was maintained by the defendant who was the owner of premises upon which the plaintiff's intestate had come to perform work as the employee of a contractor. A general demurrer was interposed to the declaration in that case. The Court gave judgment to the plaintiff on the demurrer and held:

> Syllabus No. 2. "An owner or occupier of lands who by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes."
>
> Syllabus No. 3. "An employe of one who holds a contract to perform work on premises for the owner and occupier thereof, who enters the premises to perform the work, is there by *implied invitation.*"

Cases in which a similar principle was involved where the *employee* was held to be an *invitee,* are as follows:

> *Shaefer* v. *Colleoni Realty Co.,* 4 Misc. 405, 133 Atl. 77 (Sup. Ct. 1926) (Parker, Minturn and Black, JJ.);
>
> *Detmerring* v. *English,* 64 N. J. Law, 16.

In line with the decision in all these cases, we respectfully submit that the plaintiff herein was impliedly invited by the defendant company to come upon its premises and make the repairs contracted for and which he was performing on the date that this accident occurred. It was therefore substantial prejudicial error for the Court to decide as a matter of law that the plaintiff was a trespasser. For this reason, we respectfully submit that the judgment of nonsuit be reversed and a "venire de novo" be awarded.

POINT II.

Grounds of appeal Nos. 1 and 4 (page 72, lines 23 and 24, and 32 to 36).

The Court erred in granting the motion for a nonsuit at the close of the plaintiff's case.

The sole question presented by this ground of appeal is whether there was evidence proper to be submitted to the jury upon the issue in the cause. If so, we respectfully submit, it was erroneous to direct a nonsuit for the defendant company. In deciding this question, such credibility and force as a jury might give, must be attributed to the evidence.

Newark Electric Light Company v. *McGilvery,* 62 N. J. Law, 451, 452.

We respectfully submit that an examination of the evidence shows that a jury question was involved and that it was for the jury to determine whether the plaintiff was a trespasser or not. The test to be applied in cases such as this has been outlined by Mr. Justice Trenchard in the case of *Gibeson* v. *Scidmore,* 99 N. J. Law, 131, in an

opinion delivered for the Court of Errors and Appeals of New Jersey.

Syllabus No. 2 of that case reads as follows:

> *"The gist of the liability consists in the fact that the injured party did not act merely on motives of his own, to which no act or sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used."* (Italics ours).

Applying this test, we submit that the question whether or not the plaintiff was an invitee was for the *jury*. The plaintiff testified that a subcontractor through one Wilson, had hired him to come to the defendant's premises the first thing on the following morning; that he outlined the kind of scaffold that he would require in performing his work; that the plaintiff did come to the defendant's premises on the following morning; that when he came there, Mr. Wilson was there and that Mr. Wilson showed him around the place and described the nature of the work that was to be done by the plaintiff. That the plaintiff prepared the necessary pipe and then carried his tools up with him as he ascended the scaffold which had been erected on the defendant's plant in order to do the work for which he had been hired. *That before he went up, a man had cut the pipe for him.* This man was in the mill at the time that the plaintiff came there. When the plaintiff came upon the scaffold, he examined the nature of the work that he had to perform there, and observed that the *woodman of the mill,* whose name he did not know

but was told it was Schulker, was on the scaffold. *The plaintiff examined the work and afterwards sent this man Schulker down to secure some bolts.* In the meanwhile, the plaintiff was unable to do any work. He therefore looked about and examined the pipe and the flange and while he was doing so, his hands came into contact with bare wires which carried a current of electricity. These wires were not insulated and were not in any wise protected. The plaintiff's testimony disclosed that he remained working in the defendant's plant for almost a half hour. *We respectfully submit that such testimony discloses acts and conduct from which an invitation can be implied.* Here, just as in the case of *Gibeson* v. *Scidmore, supra,* the circumstances tended to show that thereby the defendant led the plaintiff to believe that the scaffold was intended to be used in the manner in which he used it and that such use was not only acquiesced in, but was in accordance with the intention or design for which it was adapted and prepared and allowed to be used. *In the instant case, just as in the Gibeson case, we respectfully submit, that it was open to the jury to find an implied invitation, and, hence, the granting of a motion for nonsuit was erroneous.*

> "A motion to nonsuit admits the truth of the plaintiff's evidence and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law."
>
> *Ferro* v. *Atlantic City Electric Co.,* 103, N. J. L. 639.

The motion, therefore, admitting the truth of the plaintiff's evidence and every inference of fact legitimately drawn therefrom, it remained for the *jury* to determine whether or not, as in the *Gibeson* case, the plaintiff was an invitee or

not. *"Ad questionen facti non respondent judice."*

In 20 Corpus Juris under the topic "Electricity", paragraph 67, the following proposition of law is laid down:

> "Subject to the usual rules, *questions of fact arising on sufficient evidence are to be left to the jury,* such as the question of negligence of defendant, gross negligence or wantonness, *the relation of the parties,* the proximate cause of injury and ownership or control of wires or appliances.
>
> Citing Barker *v.* Boston Electric Light Co., 178 Mass. 503, 60 N. E. 2. And in the supplement to Corpus Juris, the case of Puchlopek *v.* Portsmouth Power Company, 136 Atl. 259."

From the circumstances proved, the jury might have inferred and found that the plaintiff was lawfully on the premises. Conceding, but not admitting that there was a question of the weight of evidence, yet, *at the time that a motion of nonsuit is made the weight of evidence is not material.* If there is *any* evidence from which the jury might have decided, and we respectfully submit that there can be no doubt but that there was, that the defendant was an invitee, the motion for nonsuit should have been denied.

It is therefore respectfully submitted that the Court committed substantial prejudicial error when it granted the motion for nonsuit, and that a "venire de novo" be awarded.

For the reason that:

1. The Court erred in finding as a matter of law that the plaintiff was a trespasser,

and for the reason that:

2. The Court erred in granting the motion for a nonsuit at the close of the plaintiff's case,

it is respectfully submitted that a *"venire de novo"* be awarded.

Respectfully submitted,

WEINBERGER & WEINBERGER,
Attorneys for Plaintiff-Appellant.

JOSEPH J. WEINBERGER,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(1073)

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

LEO KAPPERTZ, *Plaintiff-Appellant,* *vs.* R. B. MCEWAN & SON, a corporation, *Defendant-Appellee.*	*Action at Law.*

BRIEF OF DEFENDANT-APPELLEE.

Statement of Facts.

The statement of facts as given in the brief of the plaintiff-appellant may conform to the plaintiff's impression of the testimony he thought was adduced at the trial, but does not in many material respects agree with the actual testimony. The plaintiff-appellant's statement of facts recites at length that the plaintiff was employed by a sub-contractor or independent contractor of defendant and that he was an invitee on the premises. We submit that the testimony does not support either of these contentions. At the trial, the plaintiff merely testified that he was hired by a "Mr. Wilson" (State of Case, p. 14, ll. 20-27; p. 20, ll. 10-14). There was no testimony as to who this "Mr. Wilson" was, and the defendant company was not connected with the case in any way except that it was shown to be the owner of the premises upon which the accident occurred. This utter failure of the plaintiff to connect the defendant-appellee with the injuries sustained by him becomes clearly apparent upon a careful reading of the State of Case.

ARGUMENT.

But even admitting for the purposes of this argument that the plaintiff is correct in his assertions that the defendant is an invitee and *not* a trespasser, we cannot see how it can have any bearing on the merits of this appeal. We strenuously maintain that a non-suit was proper under all the facts and circumstances of the trial. There was no testimony of any negligence on the part of defendant brought out at the trial. There was nothing from which a nuisance could have been inferred. There was nothing to connect the defendant in any way with the injuries sustained by the plaintiff. The plaintiff was merely hired by a Mr. Wilson and went to work on an addition to the plant owned by the defendant, R. B. McEwan plant. The complaint contained two counts—one: said electric wires were property of and owned and maintained by defendant company and defendant, knowing that people were liable to come in contact therewith, negligently failed to insulate them and furnish plaintiff with safe place to work and failed to warn him thereof, and that this negligence caused plaintiff's injuries. The second count was on the theory that plaintiff maintained a nuisance on its premises. The testimony produced on behalf of the plaintiff did not support either one of these theories or any other conceivable theory, whereby the plaintiff could hold the defendant liable for his injuries.

It is a well-settled rule of law that if a non-suit is granted, that it will be sustained on appeal on any theory sustained by the testimony even though the particular ground was not urged by the defendant at the trial. It is also well settled that the non-suit will be sustained if properly granted, even though the Judge in his decision

bases his action on an improper ground. See the cases of *Rogers* v. *Granger,* City Treasurer (Sup. Ct. R. I. 1898), 21 R. I. 83, 41 Atl. 1010, and *Martin* v. *Royster Guano Co.* (Supt. Ct. S. C. 1905), 72 S. C. 237, 51 S. E. 680.

In the *Rogers* case there was an action by the plaintiff to recover for injuries resulting from the caving in of a sewer which plaintiff was digging for the defendant. The plaintiff was non-suited and petitioned for a new trial. The opinion of Tillinghast, *J.*, commences with the sentence:

> "The evidence in this case falls short of supporting some of the material allegations in the plaintiff's declaration."

This sentence is the keynote of the decision and is the basis for upholding a non-suit granted upon an improper ground. Judge Tillinghast goes on to say later in the course of the opinion:

> "It is true, the failure to make out the plaintiff's case in the particulars suggested was not the ground upon which the motion for non-suit was made and granted, although counsel for defendant now makes the point in his brief that no proof was offered in support of the allegations referred to. But, as it is clear that the non-suit was rightly granted, it is immaterial as to the ground upon which it was based. Whether the ground upon which the non-suit was granted, therefore, viz. that the negligence which caused the accident, if there was any negligence, was that of a fellow servant, is tenable, it is not necessary for us now to decide. As the plaintiff failed to make out his case in the particulars above referred to, the non-suit was rightly granted, and the petition for new trial must therefore be denied. Petition denied and dismissed."

Similarly, the *Martin* case was an appeal from an order of non-suit. There, an employee sued his employer for injuries which arose from the

falling of a pile of acid compound upon the plaintiff. Gary, *A. J.*, said at page 682 of 51 Southeastern Reporter:

> "One of the exceptions assigns error on the part of the circuit judge in granting the order of non-suit on grounds other than those set out in the defendant's motion. It is true, this court will not consider grounds of non-suit which were not relied upon in the circuit court. *Lewis* v. *Hinson*, 64 S. C. 571, 43 S. E. 15. But that is not the question before this court. The circuit judge did consider the said grounds, and, although he erred in partly basing the order of non-suit upon them, this does not constitute reversible error, if there was an entire failure of testimony tending to support the material allegations of the complaint."

In the present case, it can even be maintained that the Honorable Trial Court did not base his decision on the ground that plaintiff was a trespasser. He did say he considered the plaintiff a trespasser (see p. 71) but that does not mean that this was the ground for his decision. But even if it was the grounds for his decision, and plaintiff is not a trespasser, the non-suit was properly granted.

This can be readily seen from the following sections of the testimony in the State of Case:

P. 14, ll. 22-27:

> "Q Who hired you?
> A A man by the name of Mr. Wilson.
> Q What did he ask you to do?
> A He asked me to do a job at McEwan's, job of reshaping a pipe to go in the boiler."

P. 15, ll. 1-4:

> "Q Who showed you around when you got there?
> A Mr. Wilson.

Q Anybody else?
A No, sir.
Q Mr. Wilson showed you around?
A That's all."

P. 15, ll. 36-40:

"Q Did anybody take you up on the scaffold or did you go alone?
A I went up myself.
Q Did anybody give you instructions before you went up on the scaffold?
A Absolutely not."

P. 16, ll. 1-28:

"Q Did anybody show you a ladder leading up the heating plant and tell you to use that?
A Why, there was a ladder; I went up the ladder.
Q I mean along the heating apparatus, the large boiler—did anybody tell you to use that ladder to go up to the top of the blower pipe?
A No.
Q How was the light when you got up on top of the scaffold?
A Well, there is very large openings in the wall; that is, windows. No glass in it.

By Mr. McGlynn:

Q No glass in it?
A No, only the sash in it. It was a new structure, a new building—and on this side (indicating) is the boiler—all new structure and brick work.

By Mr. Bunevich:

Q Could you see clearly on top of the scaffold?
A Everything.
Q You didn't have to use a torch?
A No, it was daylight.
Q Was the wall white?
A Yes."

P. 19, ll. 26-40; p. 20, ll. 1-24:

"Q What caused your arm to stiffen?

A I got electrocuted by getting in touch with wires which I never seen for an instant. I seen bare wires then and it strikes me like that (indicating); I couldn't get away.

Q Did sparks come out of that wire?

The Court: Don't lead the witness.

Q On what did you put your hands?

A I don't know how I got in contact with them, but the instant I noticed it I was hanging on to it with open hand. I never had them closed, but I couldn't get away.

Q Your hands came in contact with what?

A With bare wires.

Q Was there any insulation on those wires?

A No, sir.

Q They were exposed, were they?

A Exposed.

Q Did anybody inform you that there was current in those wires?

A No, sir.

Q Nobody ever mentioned anything to you about those wires?

A No, sir.

Q Who owned the plant that you worked at?

A R. B. McEwan & Son.

Q Did they hire you?

A No, sir.

Q Did they hire you?

A No, sir.

Objected to.

Objection sustained.

The Court: You had him testify as to how he was hired.

Q How long had you been working on this job before this accident happened?

A I had been around the place about twenty minutes or a half an hour."

P. 22, ll. 30-31:

"Q Did you have any burns on your body?

A No."

P. 34, ll. 36-39:

"Q Did you or did you not receive any instructions from anyone while you were on that job?

A No, sir."

P. 42, ll. 10-38:

"Q I understood you to say that this room that you were working in, or this boiler house, the boiler itself was on the inside of the room the same as this room as this wall was and the other wall on the right was all open with windows, is that right?

A Yes, sir.

Q Large open windows?

A Yes.

Q In which at that time no glass had yet been installed?

A Yes.

Q And that room was very light?

A I wouldn't call it very light.

Q You wouldn't call it very light?

A No, sir.

Q Not with almost the entire side wall occupied by these side windows?

A No, it is not very light.

Q Was that a bright day or a cloudy day?

A I think it was a bright day.

Q What time of the morning was it?

A Between ten and eleven.

Q As I recall your story on direct examination, you were facing the boiler on which one end of the scaffold was resting and on which one end of the pipe on which you were working protruded?

A Yes, sir.

Q What was the position of your body? Were you sideways or facing or was your back to the boiler?

A I don't know which end you have reference to.

Q Just before you started to walk over to the wall.

A Then I faced the window."

P. 44, ll. 33-40:

"Q I understood you to say you didn't see anything on this wall until just about the instant this thing happened to you?

A No instant at all before.

Q Did you ever see what you touched?

A Yes, sir.

Q When did you see it?

A While I was stiff.

Q How long did you remain in that stiff position?

A I don't know."

P. 45, ll. 1-5:

"Q While you were in that position were you able to ascertain whether or not these things that you were touching were wires or not?

A No, sir."

The most that could have been demanded of the defendant was that it owed such duty to the plaintiff as was owed to the plaintiff in the leading case of *Schnatterer* v. *Bamberger & Co.* (1910 Er. & App.), 81 N. J. L. 558, 79 Atl. 324. However, that case set down the rule that there must be either (a) actual notice of the defect in the premises brought to the owner of the property; or (b) that the defect existed for such space of time before the occurrence of the accident as would have constituted constructive notice to the landlord. We submit that neither of these requirements are met in the testimony of the present case. A landlord is not an insurer against accidents, and its duty to invitees is satisfied when it uses reasonable care to maintain its premises in a safe condition.

The above extracts from the testimony show that the injury of the plaintiff was caused solely

by his own negligence. There is nothing to show any nuisance created or maintained by the defendant, nor any negligence or breach of duty on the part of the defendant towards the plaintiff. In view of this testimony the non-suit was clearly proper. No negligence was shown. Defendant was not connected with case and no liability was shown.

It is therefore respectfully submitted that the judgment of non-suit be affirmed.

Respectfully,

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendant-Appellee.

EDWARD R. McGLYNN,
Of Counsel.